THE CONSTITUTIONAL COURT
OF
THE REPUBLIC OF TURKEY

Annual Report

2016

Annual Report

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PREFACE

Prof. Dr. Zühtü ARSLAN
President the Constitutional Court of the Republic of Turkey

The raison d'être of constitutional courts is to protect the fundamental rights and freedoms guaranteed by it. The Turkish Constitutional Court gives decisions to secure the constitutional justice in the field of both norm review and individual application.

One has to set forth the contribution of the Constitutional Court within the framework of the duty assigned thereto to protect fundamental rights and freedoms.

In this scope the Annual Report of the Constitutional Court second of which is prepared for the year 2016 fulfills an important function in the context of accountability and transparency.

The first chapter of the report, prepared to serve such a function, provides brief information on the formation of the Plenary, Sections and Commissions.

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

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

The fourth chapter includes the Opening Speech of the 54. Anniversary of the Constitutional Court and speeches delivered in other activities.

The fifth chapter of the report includes brief summaries of the Court's leading judgments both in constitutional review cases and individual applications in 2016 with a view to revealing the case-law of the Court on various subjects.

This aims to present the paradigm of the Court on fundamental rights and freedoms and to contribute to all those showing interest to the Court's case-law, nota-

bly academicians and those practicing justice. This part constitutes the backbone of the report which is developed out of the fact that the fundamental products of the Court's judgments.

The final chapter contains a year by year comparison of the Court's performance in 2016 by providing various statistical data together with graphics.

Sincerely wishing that this second publication of the report prepared by the Constitutional Court will serve to ensure the rule of law and increase public awareness on fundamental rights and freedoms.

CHAPTER ONE

FORMATION OF THE COURT

I. FORMATION OF THE COURT

As per Article 149 of the Constitution and Article 20 of the Law No. 6216, the Constitutional Court functions in the form of the Plenary, Sections and Commissions.

The Constitutional Court is comprised of seventeen members. However, upon the approval of the constitutional amendment in the public referendum held on 16 April 2017, the number of the members taking office in the Constitutional Court has been reduced to fifteen as the military justice system was abolished.*

The Parliament elects, by secret ballot, two members from among three candidates nominated for each vacancy by the General Assembly of the Court of Accounts amongst their presidents and members and one member from among three candidates nominated by the Chairmen of Bar Associations amongst private lawyers. The President of the Republic selects three members from among three candidates nominated for each vacancy by the General Assembly of the Court of Cassation amongst its presidents and members, two members from among three candidates nominated for each vacancy by the General Assembly of the Council of State amongst its presidents and members, one member from among three candidates nominated for each vacancy by the General Assembly of the Military Court of Cassation amongst its presidents and members, one member from among three candidates nominated for each vacancy by the General Assembly of the Military Supreme Administrative Court amongst its presidents and members, three members from candidates nominated for each vacancy by the Council of Higher Education amongst lecturers who work in the fields of law, economics and political sciences of higher education institutions and who are not members of the Council itself, four members from among senior managers, private lawyers, first class judges and prosecutors and rapporteurs of the Constitutional Court who have worked as a rapporteur for at least five years

One shall hold the following qualifications to become eligible for Court membership: to have completed forty-five years of age, to be conferred the title of a professor or

*As per the provisional Article 21 § D which was incorporated into the Constitution by Article 17 of the Law no. 6771 and dated 21/1/2017, those who have been appointed as the members of the Constitutional Court from the Military Court of Cassation and the Supreme Administrative Military Court shall continue acting as the members of the Court until the termination of their offices for any reason.

assistant professor in higher education institutions (for academics), to have worked as a private lawyer effectively for at least twenty years (for lawyers), to hold a degree in higher education and to have effectively worked in the public sector for at least twenty years (for senior managers), to have a work experience of at least twenty years including the probationary period (for first class judges and prosecutors).

A president and two vice-presidents of the Court are elected for a term of four years by secret ballot from among the members by an absolute majority of the total number of members and those whose terms of office expire may be re-elected.

Although the earliest version of the Constitution did not prescribe a term of office for the members of the Court, such term of office was limited to a non-renewable period of twelve years by an amendment in Article 147 of the Constitution through Law No. 5982 on 7.5.2010. One cannot be elected for a second term. In any event, the members of the Court shall retire after completing sixty-five years of age.

According to Article 149 of the Constitution and Article 20 of Law No. 6216, The Constitutional Court functions in the form of the Plenary, Sections and Commissions.

A. FORMATION OF THE PLENARY

The Plenary shall comprise of seventeen member of the Court. The Plenary shall convene with the participation of minimum ten members and shall be chaired by the President or a Vice-President to be designated by the President.

As of 31.12.2016 the members of the Plenary are as follows.

President
Prof. Dr. Zühtü ARSLAN

Vice-President
Burhan ÜSTÜN

Vice-President
Prof. Dr. Engin YILDIRIM

Justice
Serdar ÖZGÜLDÜR

Justice
Serruh KALELİ

Justice
Osman Alifeyyaz PAKSÜT

Justice
Recep KÖMÜRCÜ

Justice
Nuri NECİPOĞLU

Justice
Hicabi DURSUN

Justice
Celal Mümtaz AKINCI

Justice
Muammer TOPAL

Justice
M. Emin KUZ

Justice
Hasan Tahsin GÖKCAN

Justice
Kadir ÖZKAYA

Justice
Rıdvan GÜLEÇ

Justice
Assoc. Prof. Dr. Recai AKYEL

Justice
Prof. Dr. Yusuf Şevki HAKYEMEZ

B. FORMATION OF THE SECTIONS

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

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

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

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

The composition of the Sections, as of 31.12.2016, is as follows:

1. FIRST SECTION

The list of the Justices who served in rotation in the meetings of the First Section in 2016 is as follows.

NO	NAME SURNAME	TITLE
1	Burhan ÜSTÜN	President
2	Serruh KALELİ	Justice
3	Nuri NECİPOĞLU	Justice
4	Hicabi DURSUN	Justice
5	Hasan Tahsin GÖKCAN	Justice
6	Kadir ÖZKAYA	Justice
7	Rıdvan GÜLEÇ	Justice
8	Yusuf Şevki HAKYEMEZ	Justice

2. SECOND SECTION

The list of the Justices who served in rotation in the meetings of the Second Section in 2016 is as follows.

NO	NAME SURNAME	TITLE
1	Engin YILDIRIM	President
2	Serdar ÖZGÜLDÜR	Justice
3	Osman Alifeyyaz PAKSÜT	Justice
4	Recep KÖMÜRCÜ	Justice
5	Celal Mümtaz AKINCI	Justice
6	Muammer TOPAL	Justice
7	M.Emin KUZ	Justice
8	Recai AKYEL	Justice

C. FORMATION OF THE COMMISSIONS

> **According to Article 32 of the Court's Rules of Procedure, there shall be three Commissions under each Section to examine the admissibility of the individual applications. Such Commissions have been assigned a number and named together with the number of the Section they are affiliated to. The President of the Section shall not take part in the Commissions and they shall be chaired by the senior member.**

As per Article 149 § 1 of the Constitution, Commissions may be established to examine the admissibility of the individual applications. Within the frame of this constitutional provision, a number of Commissions have been established in accordance with Article 20 of Law No. 6216 and Article 23 of the Court's Rules of Procedure.

According to Article 32 of the Court's Rules of Procedure, there shall be three Commissions under each Section to examine the admissibility of the individual applications. Such Commissions have been assigned a number and named together with the number of the Section they are affiliated to. The President of the Section shall not take part in the Commissions and they shall be chaired by the senior member.

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

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

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

SECOND CHAPTER

DUTIES AND POWERS OF THE COURT

II. DUTIES AND POWERS OF THE COURT

A. OVERVIEW

The duties and powers of the Court are as follows:

a) To deal with annulment cases filed on the grounds that laws, decree-laws and the Rules of Procedure of the Grand National Assembly of Turkey or certain articles or provisions thereof are against the Constitution as to the form and merits and that amendments to the Constitution contradict with the Constitution in terms of the form.

b) To conclude contested matters referred by courts to the Constitutional Court through concrete norm review pursuant to Article 152 of the Constitution.

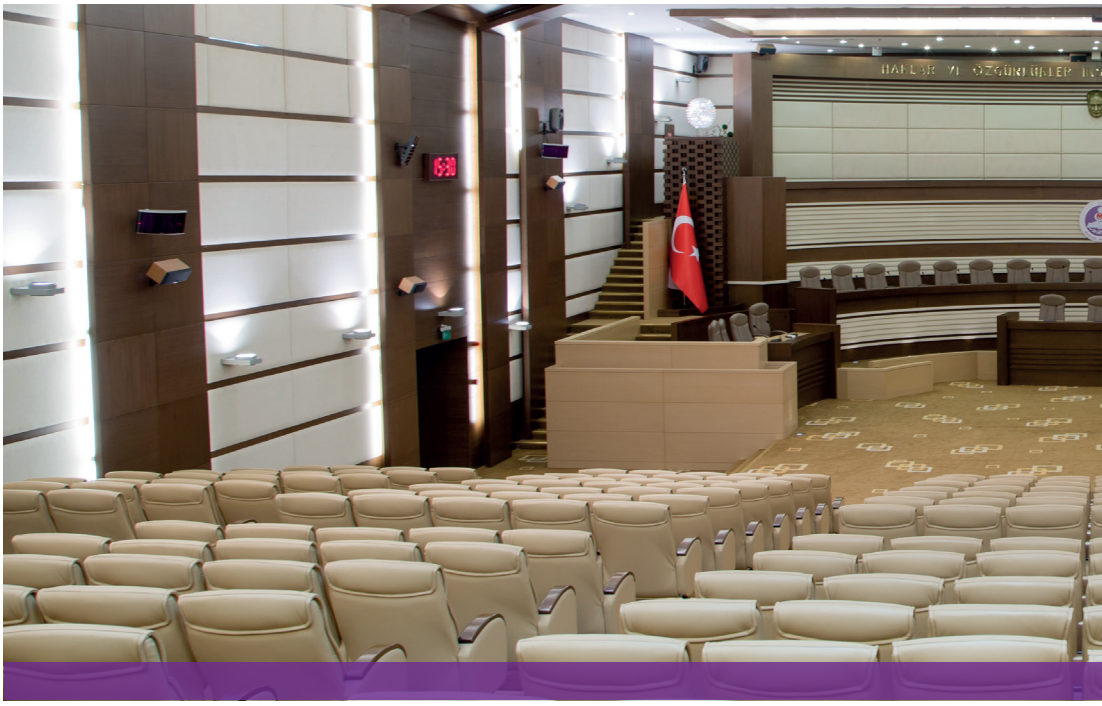
c) To conclude individual applications filed pursuant to Article 148 of the Constitution.

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

e) To conclude cases concerning dissolution and deprivation of political parties of state aid, warning applications and demands for determination of the status of dissolution.

f) To review or have reviewed lawfulness of property acquisitions by the political parties and their revenues and expenditures.

g) In case the Grand National Assembly of Turkey resolves to remove parliamentary immunity or revoke membership of the parliamentary deputies or remove the immunity of the non-deputy ministers, to conclude annulment demands of the concerned or other deputies alleging repugnance to the provisions of the Constitution, law or the Rules of Procedure of the Grand National Assembly of Turkey.



h) To elect the President and Vice-Presidents of the Constitutional Court and the President and deputy president of the Court of Jurisdictional Disputes amongst members of the Court.

i) To carry out other duties set forth in the Constitution.

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

B. DUTIES AND POWERS OF THE PLENARY

The Plenary of the Court, which consists of seventeen justices and convenes with the participation of ten members at least chaired by the President or a Vice-President to be designated by the President shall perform the duties and have powers as follows:

a)To deal with annulment and objection cases and cases which it will proceed in its capacity as the Supreme Criminal Court.

b) To conduct financial audits on political parties and conclude cases and applications related to political parties.

Hall of the Supreme Criminal Court (The Grand Hall)

c) To adopt or amend the Court's Rules of Procedure.

d) To elect the President and Vice-Presidents as well as the President and the Deputy President of the Court of Jurisdictional Disputes.

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

f) To ensure the distribution of work between the Sections.

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

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

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

j) To examine objections.

k) To carry out duties assigned to the Plenary by the Law and the Court's Rules of Procedure

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

C. DUTIES AND POWERS OF THE SECTIONS

After examination on the merits, a decision on violation or non-violation of the applicant's right is rendered by the Section. In case of a decision on violation, a judgment may be rendered on actions to be taken in order to abolish the violation and its consequences.

The Court has two Sections each presided by a vice-president and each with seven members in order to resolve individual applications. Each Section con-

Deliberation Hall of the Supreme Criminal Court

venes with four members under the chair of a vice-president. In absence of the Vice-President, the most senior member shall chair the meeting of the Section.

The duties and powers of the Sections are as follows:

a) To carry out the examination on merits of the applications declared admissible by the Commissions.

b) If deemed necessary by the chair of the Section, to carry out the joint examination both on admissibility and on merits of the applications the admissibility of which could not be decided by the Commissions.

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

If the decision to be made by one of the Sections regarding a pending application is likely to conflict with a decision previously made by the Court or if the nature of the subject matter requires it to be resolved by the Plenary, then the relevant Sec-

tion may relinquish from deciding that application. The President of the Section shall bring this matter to the attention of the President of the Court to refer the application to the Plenary.

The Sections shall render its decisions by an absolute majority of the participants.

After examination on the merits, a decision on violation or non-violation of the applicant's right is rendered by the Section. In case of a decision on violation, a judgment may be rendered on actions to be taken in order to abolish the violation and its consequences. In this case the following options are available for the Court:

a) If it is determined that the violation arouse from a court judgment, the file is forwarded to the concerned court in order to renew the judicial procedure so that the violation and its results will be cleared up. The relevant court shall carry out a retrial in such a way as to remove the violation and its consequences as explained by the Section's decision determining the violation and shall urgently make a decision based on the file if possible.

b) In case of a decision on violation, where any legal interest is not seen with renewal of judicial proceedings, it can be decided payment of a reasonable compensation in favor of the applicant.

Meeting Room of the Sections

c) In the event that the determination of the compensation amount requires a more detailed examination, the Sections may direct the applicant to general courts to bring lawsuits.

D. DUTIES AND POWERS OF THE COMMISSIONS

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

In order to carry out the admissibility examination of individual applications there are Commissions affiliated to each Section. Such Commissions shall be assigned a number and named together with the number of the Section they are affiliated to. The President of the Section shall not take part in the Commissions and the senior member shall chair the Commission.

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

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

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

CHAPTER THREE

THE COURT IN 2016

III. THE COURT IN 2016

A. CHANGES IN THE FORMATION OF THE COURT

> **"We repudiate all kinds of antidemocratic attempts against the constitutional order and we would like our glorious nation to know that we stand beside the democratic constitutional state."**

The year 2016 leaves an unforgettable mark in the Turkish and World Political history with its fight for democracy. A junta within the Turkish Armed Forces attempted a coup d'état at the night of 15 July 2016; and the winner in the sequel of the heroic struggle of the holy Turkish Nation, has been freedom and democracy.

The aim of the coup attempt of July 15 was essentially to abolish the democratic Constitutional order and fundamental rights and freedoms it has been protecting. The Constitutional Court pointed out in his statement that it made in the early hours of the coup attempt as the clashes still went on that this "attempt against the constitutional order was undemocratic" and repudiated it explicitly. The Constitutional Court, was the first state institution to announce to the national and international public with its statement that it repudiates all kinds of antidemocratic attempts against the constitutional order. The Court, for the first time in its history, announced that it stands on the side of the constitution and fundamental rights by releasing a statement with the following words:

> *"We repudiate all kinds of antidemocratic attempts against the constitutional order and we would like our glorious nation to know that we stand beside the democratic constitutional state."*

The "Fetullahist Terror Organization" (FETÖ) and/or the "Parallel State Structure" (PDY) established its cadre especially in the Turkish Armed Forces (TAF), civil administrative institutions, the judicial bodies, police force and educational institutions. To effectively fight against the FETÖ/PDY after the coup attempt of July 15 the state of emergency was declared and in this scope the Decree Law no.667 about the measures taken during the state of emergency was enacted. On 4/8/2016 it was decided unanimously by the Plenary of the Court pursuant to Article 3 of the mentioned decree law that it was no longer appropriate for the Justices Alparslan ALTAN and Erdal TERCAN, who the Plenary considered that they were related to the Parallel State Sturcture, to stay in profession and removed them from the office. After the removal of the two Justices from the office,on

After the removal of the two Justices from the office, on 25/8/2016 Assoc. Prof. Dr. Recai AKYEL, among the top executives, and Prof. Dr. Yusuf Şevki HAKYEMEZ, among three candidates suggested by the Council of Higher Education were selected as Constitutional Court Justices by the President of the Republic Mr. Recep Tayyip ERDOĞAN.

Swearing-In Ceremony of the Justices Assoc. Prof. Dr. Recai AKYEL and Prof. Dr. Yusuf Şevki HAKYEMEZ

25/8/2016 Assoc. Prof. Dr. Recai AKYEL, among the top executives, and Prof. Dr. Yusuf Şevki HAKYEMEZ, among three candidates suggested by the Council of Higher Education were selected as Constitutional Court Justices by the President of the Republic Mr. Recep Tayyip ERDOĞAN.

Prof. Dr. Yusuf Şevki HAKYEMEZ

Assoc. Prof. Dr. Recai AKYEL

B. DEVELOPMENTS IN THE COURT'S FUNCTIONS

In the decisions rendered in the year 2016, adopted an approach that broadened the field of protection and improved the standards of a range of fundamental rights and freedoms from the right to life to freedom of expression, protection of material and spiritual entity, liberty and security of person, right to a fair trial, the right to respect for private life, prohibition of discrimination to right to property.

The Court continued also in 2016 its "rights-based" approach and took new steps towards this subject. In line with this approach, the Court still endeavored to ensure constitutional and individual justice through constitutionality review and individual application and, thereby, continues to function as an institution which became the guarantor of fundamental rights and freedoms.

In the decisions rendered in the year 2016, adopted an approach that broadened the field of protection and improved the standards of a range of fundamental rights and freedoms from the right to life to freedom of expression, protection of material and spiritual entity, liberty and security of person, right to a fair trial, the right to respect for private life, prohibition of discrimination to right to property.

These decisions rendered by the Court, on one hand serve to fulfill the longtime aim in our country to raise the human rights standards and on the other give the opportunityto contribute to the universal jurisprudence and increase our countries reputation on international level.

The new practices in the field of norm review and individual application that were launched in 2015 and the positive results of which were observed were also continued in 2016.

The Filtering Department of the individual application review was established in the framework of the dual-structure that was introduced at the end of 2015, and ensured the filtering of the individual application files successfully and in line with the targets set forth.

The preparation of draft decisions by rapporteurs assigned to the Filtering Department on prima facie inadmissible applications and their immediate deciding by the commissions, allowed to conduct a more efficient review on applications that are more important regarding the implementation and interpretation of the constitution and the determination of the fundamental rights scope and limitations.

The number of rights based groups established to be more effective with individual applications have been increased in line with the growing necessityand important developments were made in the rapidly finalizing of the cases that fall in the work field by these groups.

The increase of inadmissibility decision templates used by the Filtering Department is among the most important developments in 2016.

The codes used to classify pending cases regarding the coherence of the case law and ensuring of the coordination and first implemented in 2015 were developed in the direction of needs.

The number of right based groups established to be more effective with individual applications have been increased in line with the growing necessity and important developments were made in the rapidly finalizing of the cases that fall in the work field by these groups.

The number of the language experts employed at the Court has been increased to carry out the editorial review of draft decisions.

The guidebook for inadmissibility in individual applications was updated and made available for in-house use. It is planned to publish these guidebooks and share them with the public.

Deliberation Hall

Due to the judicial and administrative proceedings after the coup attempt of July 15, more than expected (4 times than the annual average) individual applications were made to the Constitutional Court in the year 2016. Some additional measures have been taken to register, classify and finalize the applications in a reasonable time. In this framework, codes to monitor these applications were set, the decision-making structure was developed with the listing method and the working order of the administrative staff was restructured according to the new situation.

Due to the judicial and administrative proceedings after the coup attempt of July 15, more than expected (4 times than the annual average) individual applications were made to the Constitutional Court in the year 2016. Some additional measures have been taken to register, classify and finalize the applications in a reasonable time. In this framework, codes to monitor these applications were set, the decision-making structure was developed with the listing method and the working order of the administrative staff was restructured according to the new situation.

In 2016 the opportunity to check the status of the individual application made to the Constitutional Court via the e-government portal has been provided.

The work of the press unit continued by further developing the monitoring, reporting, and publishing of press releases and improving of the corporate communication with the press.

57 Press releases about Constitutional Court decisions/judgments were published in the year 2016.

Again in this period of time, the Court prepared, published and distributed many works within the scope of its publications and public relations activities. Within this scope, the Court published and distributed on domestic and international level the 51st issue of "Journal of Constitutional Court Decisions" in 6 volumes, "2015 Press Releases", "Selected Judgments on Individual Applications", "Introductory Booklet of the Constitutional Court", Turkish and English versions of "Annual Report 2015", "Constitutional Justice in Asia 'Principles of Fair Trial'" and "Symposia Proceedings of Constitutional Justice" of the years 2013, 2014 and 2015.

Also in 2016 1387 new publications were added to the Court's Library.

C. INTERNATIONAL ACTIVITIES OF THE COURT

1. OVERVIEW

The Constitutional Court of Turkey, being one of the oldest constitutional justice organs of the world, has become a center of interest of the global constitutional justice in the recent years due to its important contributions to the interpretation in the fields of human rights and constitution.

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

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

The Constitutional Court of Turkey, being one of the oldest constitutional justice organs of the world, has become a center of interest of the global constitutional justice in the recent years due to its important contributions to the interpretation in the fields of human rights and constitution.

> **In order to promote the cooperation between international constitutional justice institutions, the President of the Constitutional Court Mr. Zühtü ARSLAN organized a meeting with the representatives of the Constitutional Courts of the Balkan Region and ideas regarding the establishing of an association among Constitutional Courts of the Balkan Region were exchanged. At the meeting a consensus to establish the "Association of Balkan Constitutional Courts" was reached.**

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

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

In order to promote the cooperation between international constitutional justice institutions, the President of the Constitutional Court Mr. Zühtü ARSLAN organized a meeting with the representatives of the Constitutional Courts of the Balkan Region and ideas regarding the establishing of an association among Constitutional Courts of the Balkan Region were exchanged. At the meeting a consensus to establish the "Association of Balkan Constitutional Courts" was reached.

2. COOPERATION WITH THE INTERNATIONAL ORGANIZATIONS

The Constitutional Court of Turkey attaches utmost importance to its relations with the Council of Europe, especially with the European Court of Human Rights and the Venice Commission (The European Commission for Democracy through Law). The Court is member to the following international organizations in the field of constitutional justice:

a. World Conference on Constitutional Justice

The World Conference on Constitutional Justice unites 104 Constitutional Courts/Councils/Supreme Courts and promotes constitutional justice that fulfills the function of protecting human rights.

b. Conference of European Constitutional Courts

The Conference of European Constitutional Courts, which was established in Dubrovnik in 1972, brings together representatives of 40 European constitutional or equivalent courts conducting a constitutional review.

> **At the 3rd Congress of the Association of Asian Constitutional Courts and Equivalent Institutions in Indonesia's Bali Island it was decided to establish the Permanent Secretariat and establish and launch the Centre for Training and Human Resources Development, one of the three pillars of the Permanent Secretariat in Turkey.**

c. Association of Asian Constitutional Courts and Equivalent Institutions

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

The Turkish Constitutional Court undertook the term presidency for the period between 2012-2014. It was decided at the 2.Congress and Board of Members Meeting of the AACC in April 2014 in İstanbul, to organize the "Summer School of the AACC" that was held first in 2013 with the participation of the member states annually to be hosted by our Court.

Besides, at the 3rd Congress of the AACC in Indonesia's Bali Island it was decided to establish the Permanent Secretariat and establish and launch the Centre for Training and Human Resources Development, one of the three pillars of the Permanent Secretariat in Turkey. As from 2016, the Summer School having been unanimously decided to be held in Turkey every year has been organized within the scope of the activities of the Centre for Training and Human Resources Development after its establishing and the 4.Summer School was organized within the scope of this training centre as well.

3. COOPERATION WITH NATIONAL CONSTITUTIONAL COURTS

In the last decade, the Court signed nineteen (19) memoranda of understanding with other constitutional and/or supreme courts in order to enhance bilateral cooperation activities. In this respect, the Court hosts foreign delegations, judges, researchers and staff members of constitutional courts with the spirit of traditional Turkish hospitality and amity. Such protocols of cooperation serve as a basis for mutually beneficial exchanges that we organize with our counterpart institutions for the benefit of both parties.

The Turkish Constitutional Court signed Memorandum of Understanding with the following Constitutional Courts or Equivalent Institutions:

COUNTRY	COURT - INSTITUTION	DATE OF SIGNATURE
Indonesia	The Constitutional Court of Indonesia	24 April 2007
Macedonia	The Constitutional Court of Macedonia	26 April 2007
Azerbaijan	The Constitutional Court of Azerbaijan	10 May 2007
Chile	The Constitutional Court of Chile	07 June 2007
Korea	The Constitutional Court of the Republic of Korea	24 April 2009
Ukraine	The Constitutional Court of Ukraine	24 April 2009
Pakistan	The Federal Supreme Court of Pakistan	24 April 2009
Bosnia and Herzegovina	The Constitutional Court of Bosnia and Herzegovina	24 April 2009
Bulgaria	The Constitutional Court of Bulgaria	07 April 2011
Tajikistan	The Constitutional Court of Tajikistan	26 April 2012
Montenegro	The Constitutional Court of Montenegro	28 April 2012
Afghanistan	The Independent Commission for Overseeing the Implementation of Constitution of the Islamic Republic of Afghanistan	25 April 2013
Albania	The Constitutional Court of Albania	10 June 2013
Thailand	The Constitutional Court of the Kingdom of Thailand	29 April 2014
Kyrgyzstan	The Constitutional Chamber of the Supreme Court of the Kyrgyz Republic	28 September 2014
Romania	The Constitutional Court of Romania	17 October 2014
Algeria	The Constitutional Council of Algeria	26 February 2015
Turkish Republic of Northern Cyprus	The Supreme Court of Northern Cyprus	29 June 2015
Kosovo	Constitutional Court of Kosovo	27 April 2016

4. INTERNATIONAL RELATIONS IN 2016

> **Mr. ARSLAN, President of the Turkish Constitutional Court delivered a speech at the Congress on the coup attempt of the 15th of July in our country and the dignified stance that the Turkish Nation has taken beside democracy. The Bali Declaration was signed after the Congress and a joint statement condemning the coup attempt in our country was prepared with the initiative of the delegation of the Court. The coup attempt that happened in our country was jointly condemned by the AACC members and it was underlined in the Bali Declaration that any unconstitutional and undemocratic attempt aiming to abolish the rule of law and democracy in any country is being deplored.**

The Court maintained its mutual exchanges of visits with both the supreme courts of other countries and international judicial organs and organizations in the year 2016.

In this framework, Mr. Zühtü ARSLAN, President of the Constitutional Court of the Republic of Turkey participated with the accompanying delegation in the 3rd Congress of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) organized under the theme of "Promotion and Protection of Citizens' Constitutional Rights" and the Board of Members Meeting held between 9 – 12 August 2016 in Bali, Indonesia. Presidents and/or delegations of the Venice Com-

Participation of the Esteemed President of the Court and the accompanying delegation in the 3rd Congress themed "Protection and Improvement of the Constitutional Rights of the Citizens" and held by the AACC in the Bali Island of Indonesia

mission, the Conference of Constitutional Jurisdictions of Africa, the Constitutional Courts and Equivalent Institutions of Indonesia as the Term President of AACC, the Russian Federation, Korea, Afghanistan, Azerbaijan, the Philippines, Kazakhstan, the Kyrgyz Republic, Malaysia, Mongolia, Myanmar, Tajikistan and Thailand participated in the aforesaid Congress.

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President of the Constitutional Court of the Republic of Turkey Mr. Zühtü ARSLAN and the accompanying delegation participated in the Conference titled "Global Constitutionalism" which was organized by the Law School of the Yale University in Connecticut, the United States of America (USA) between 21-24 September 2016 and in which Presidents and Members of Constitutional Courts or Supreme Courts and academicians from many countries took part. Mr. ARSLAN expressed that the coup attempt made on the 15th of July was an attack on democracy and

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the state of law, and that accordingly the Turkish Constitutional Court has taken up a clear position against this antidemocratic attempt right from the very beginning. Having given information on the regimes concerning the state of emergency in the Turkish Law and on the judicial process carried out in Turkey in the aftermath of the 15th of July, Mr. ARSLAN also answered the participants' questions on the matter.

The Launching Conference of the Joint Project on Supporting the Individual Application to the Constitutional Court was organized at Ankara Sheraton Hotel on 1 March 2016 with the participation of the representatives and members of the Judiciary of Turkey and the Council of Europe. During the second session of the launching conference held in the afternoon, one representative from each institution the Constitutional Court of Republic of Turkey, which is the main beneficiary institution of the Project, and of the other project stakeholder institutions (the Court of Cassation, the Council of State, Ministry of Justice, High Council of Judges

Joint Project for the Promotion of the Individual Application System held in Ankara on 1 March 2016

Participation of the Esteemed President of the Court and the accompanying delegation in the round-table meeting themed "The Right to Liberty and Security of Person"

and Prosecutors, the Military Court of Cassation, the Military High Administrative Court, Union of Turkish Bar Associations, and Justice Academy) and one representative from the European Court of Human Rights delivered presentations.

The first roundtable meeting of Joint Project on Supporting the Individual Application to the Constitutional Court was held on the subject of "The Right to Liberty and Security of Person" on 4-5 June 2016 in Istanbul. The roundtable meeting was participated by the President, Vice-Presidents, Justices, Rapporteur Judges and Assistant Rapporteur Judges of the Constitutional Court, various national and international experts on constitutional law, human rights law, criminal law and criminal procedure law, jurists and experts from the Council of Europe, the European Court of Human Rights and the Constitutional Court of Spain. The case-law of the Constitutional Court on "the right to liberty and security of person" was discussed in seven sessions, in each of these sessions, the rapporteur judges of the Constitutional Court presented the case-law of the Court on the theme of the session and, later on, the jurists from the European Court of Human Rights, foreign experts and academics made comments and shared their assessments of relevant case-law judgments.

The international symposium organized on the occasion of the 54th Anniversary of the Constitutional Court, themed as "The Execution of Judgments Concerning Individual Applications and Their Effects" was held on 25-26 April 2016 at the Grand Hall of the Court with the participation of the Presidents, Justices of the Constitutional Courts from 23 countries and the representatives of the European Court of Human Rights, the Council of Europe and the Venice Commission.

Symposium held on 25-26 April 2016 within the scope of the 54th Anniversary Activities and themed ""The Execution of Judgments Concerning Individual Applications and Their Effects"

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Mr. Zühtü ARSLAN, the President of the Constitutional Court, had bilateral meetings on 26 April 2016 with the Presidents of the Constitutional Courts of Azerbaijan, Indonesia, Jordan, Pakistan and Slovenia who participated in the 54th Anniversary of the Court.

In Antalya at the same date a Memorandum of Understanding on Bilateral Cooperation was signed between the Constitutional Court of the Republic of Turkey and the Constitutional Court of Kosovo.

President of the Constitutional Court Mr. Zühtü ARSLAN, Justice Mr. Hasan Tahsin GÖKCAN and the accompanying delegation participated in the international conference titled "The Place and the Importance of the Constitutional Control Body

Participation of the Esteemed President of the Court and Justice Mr. Hasan Tahsin GÖKCAN in the conference held by the Constitutional Chamber of the Supreme Court of the Kirghiz Republic

Participation of the Esteemed President of the Court, Justice Mr. Muammer TOPAL and the accompanying delegation in the opening ceremony of the judicial year of the European Court of Human Rights held in Strasbourg

in Effective Functioning of Checks and Balances System between the Branches of State Power" organized by the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on 8-11 June 2016. President Mr. ARSLAN made a speech on "The Constitutional Control of Legislative and Executive Powers: A Cursory View of the Turkish Experience".

The Delegation consisting of the President of the Constitutional Court of the Republic of Turkey Mr. Zühtü ARSLAN, Justice of the Constitutional Court Mr. Muammer TOPAL and the accompanying delegation participated in the Opening Ceremony and international conference of the European Court of Human Rights, organized on 29 January 2016 in Strasbourg and a bilateral meeting with the President of the European Court of Human Rights Mr. Guido RAIMONDI was held.

In the scope of the activities of the Association of Asian Constitutional Courts and Equivalent Institutions the 4th Summer School on the subject "Right to Respect for Private and Family Life" was organized. Justices, rapporteur judges, assistant judg-

The 4th Summer School in Ankara within the scope of the activities of the AACC and themed "The Right to Respect for Private and Family Life"

Participation of the Vice-President Prof. Dr. Engin YILDIRIM in the international conference themed "Regional Challenges in the Implementation of the European Convention on Human Rights" held in Lithuania

es, researchers, lawyers and advisors from the Constitutional Courts or Equivalent Institutions of Afghanistan, Algeria, Indonesia, Kazakhstan, Kyrgyzstan, Kosovo, Malaysia, Mongolia, Moldova, Myanmar, Russia, Tajikistan and Turkey attended the activities of the 4th Summer School. Also, Lawyer at the European Court of Human Rights Mr. Ali BAHADIR made a presentation titled "Right to respect for private and family life within the scope of Article 8 of the ECHR. Vice President of the Turkish Constitutional Court, Mr. Burhan ÜSTÜN delivered an opening address at the Grand Hall of the Court.

Delegations send from our Court paid study visits to Latvia, Lithuania, Azerbaijan, Uzbekistan, Kyrgyzstan, Turkish Republic of Northern Cyprus, Bulgaria, Ukraine and Kosovo.

Prof. Dr. Engin YILDIRIM, Vice-President of the Turkish Constitutional Court, participated in the international conference under the theme of "Regional Challenges in Implementation of the European Convention on Human Rights" organized by the

A delegation of the Constitutional Court of the Republic of Turkey headed by Justice of the Constitutional Court Mr. Hicabi DURSUN paid a study visit to Riga, capital city of Latvia, on 25-28 May 2016 to participate in the international conference themed "Judicial Activism of Constitutional Court in a Democratic State", organized on the occasion of the 20th Anniversary of the Constitutional Court of the Republic of Latvia between 26- 27 May 2016. Mr. Hicabi DURSUN delivered a presentation titled "A General Review on Judicial Activism and Turkish Constitutional Court's Experience" at the aforementioned conference.

Participation of Justice Mr. Hicabi DURSUN and the accompanying delegation in the international conference held for the 20th Anniversary of the Constitutional Court of the Republic of Latvia

Constitutional Court of the Republic of Lithuania, the Council of Europe and European Humanities University on 8 – 9 December 2016 in Vilnius, Lithuania.

In this period representatives of various delegations from the Venice Commission, General Secretariat of the Council of Europe, Human Rights Commissioner of the Council of Europe, African Court on Human and Peoples' Rights, High Court of Justice of Mali and the Portuguese Ombudsman have visited our Court.

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Justice of the Turkish Constitutional Court Mr. Celal Mümtaz AKINCI and the accompanying delegation participated in the activities and international conference themed "The Protection of Fundamental Citizens' Rights and National Security in the Modern World. The Role of Constitutional Courts", held on 21 – 22 September 2016 in Sofia on the occasion of the 25th Anniversary of Constitutional Court of

Participation of Justice Mr. Celal Mümtaz Akıncı and the accompanying delegation in the international conference held for the 25th Anniversary of the Constitutional Court of the Republic of Bulgaria

the Republic of Bulgaria. Mr. Celal Mümtaz AKINCI made a presentation titled "The Role of the Constitutional Court in Protection of Citizens' Fundamental Rights and Freedoms" during the conference.

Justice of Turkish Constitutional Court Mr. Muammer TOPAL and the accompanying delegation participated in the international conference themed "Constitutional Control and the Processes of Democratic Transformation in Modern Society", held on 7 – 8 October 2016 on the occasion of the 20th Anniversary of the Constitutional Court of Ukraine. Mr. Muammer TOPAL made a presentation titled "The Review of Legal Mechanisms for Protection of Human Rights" during the mentioned conference.

Participation of Justice Mr. Muammer TOPAL and the accompanying delegation in the international conference held for the 20th Anniversary of the Constitutional Court of Ukraine

Participation of Justice Mr. Kadir ÖZKAYA and Secretary General Mr. Selim ERDEM in the international conference and activities held for the 7th Anniversary of the Constitutional Court of the Republic of Kosovo

Justice of the Turkish Constitutional Court Mr. Kadir ÖZKAYA and Secretary General Mr. Selim ERDEM paid a visit to Prishtine, Kosovo to participate in the international conference themed "Incidental Control as Constitutional Mechanism in Ensuring Constitutionality of Laws in Transitional Countries", held on 26 – 27 October 2016 on the occasion of the 7th Judicial Year of the Constitutional Court of the Republic of Kosovo. Mr. Kadir ÖZKAYA made a presentation titled "Constitutional Review in Turkey" during the conference.

CHAPTER FOUR

PRESIDENT'S SPEECHES

IV. PRESIDENT'S SPEECHES

A. SPEECH ON THE OCCASION OF THE 54th ANNIVERSARY OF THE TURKISH CONSTITUTIONAL COURT

> ***The raison d'être of the State is to let the people live by establishing justice. On the other hand, people may lead a peaceful life by enjoying their rights and freedoms in a secure way only in the existence of a state order. One of the most influential political theorists of the last century Hannah Arendt, on the basis of the bitter experiences of the Second World War, expresses that those who were displaced from their countries and became stateless were deprived of their most basic rights as well. In Arendt's opinion, "the right to have rights" basically means every individual enjoys the fundamental rights and freedoms in their capacity as equal members of a political or legal community.***

His Excellency Mr. President, Esteemed Guests,

I would like to welcome you to our ceremony on the occasion of the 54th Anniversary of the Constitutional Court and I greet you with all my heart and respect.

The anniversaries of institutions provide prime opportunities to evaluate the contributions of such institutions to society and democratic system. If such anniversary is celebrated by a supreme court, then this evaluation must be with respect to the contributions to a series of values including justice, the rule of law and the fundamental rights and freedoms.

As known by all, the relations between the individual and the state are based on these series of values and there have been various manifestations of such relations depending on the time and place. These values of universal essence all have a corresponding equivalent in our culture. For instance, the understanding of "let people live, so that the state lives" which is deep-rooted in the souls of this land, expresses a human-centred state philosophy. Similarly, we notice the significance of law and justice for the state order in the famous "Kutadgu Bilig" (the Wisdom which brings Happiness) which was written a thousand years ago. In this famous work of Yusūf Khāss Ḥājib, the justice is laid down as the cornerstone of the state and political order, by his expression as "The basis of the State is justice and equity."

Ceremony of the 54th Anniversary of the Constitutional Court

Such an understanding shows that the raison d'être of the State is to let the people live by establishing justice. On the other hand, people may lead a peaceful life by enjoying their rights and freedoms in a secure way only in the existence of a state order. One of the most influential political theorists of the last century Hannah Arendt, on the basis of the bitter experiences of the Second World War, expresses that those who were displaced from their countries and became stateless were deprived of their most basic rights as well. In Arendt's opinion, "the right to have rights" basically means every individual enjoys the fundamental rights and freedoms in their capacity as equal members of a political or legal community.

The importance of having a State with respect to enjoyment of fundamental rights becomes ever clear when we consider the refugee problems caused by the conflicts in our region.

His Excellency Mr. President,

It has become a common purpose of today's democratic societies to maintain the lives of people and the States on the basis of justice. The Constitutional Courts are among the institutions established to achieve such purpose. Most of today's democratic countries have a constitutional court examining the constitutionality of the laws. On the other hand, the constitutional complaint or individual application mechanism, which enables the individuals to directly access to constitutional courts with the allegations on violation of their constitutional rights, has gained widespread implementation and became a part of constitutional justice.

In order to evaluate the contribution of the Turkish Constitutional Court to justice, the rule of law and the fundamental rights and freedoms, we must take a look at the approach adopted and the judgments rendered by the Court in these two main fields of duty, namely the constitutionality review of laws and the examination of individual applications. As a matter of fact, the annual report of the Court for the year 2015, prepared as a first of its kind publication and distributed to the esteemed guests, makes such an evaluation possible by providing substantial information on the activities of our Court and its leading judgments.

In this context, in my speech I would like to dwell upon the current status of the individual application and the judgments rendered and the consequences of such judgments. However, before continuing with this issue, it would be useful to mention the principle of the rule of law which is one of the basic principles that the

> ***The constitutional democracy, which is the prevalent understanding of democracy in our age, aims to realize the rule of law and to provide effective protection of fundamental rights and freedoms regardless of which form of government is adopted by the State. As a matter of fact, in one of its judgments the Constitutional Court noted that the idea of protecting the human rights and even of not being able to raise these rights as issues for voting underlies the basis of constitutional democracy.***

The Roman jurist Ulpian formulated the basic tenets of the law and, in one sense, of justice as living honestly, doing no harm to others, and giving to each person what is due. The justice is the basis of the State and so is the law that of justice. The law is a vital need of every society like bread, water or air that we breathe. Therefore, ensuring and maintaining the rule of law is the guarantee of a country's future.

Constitutional Court takes as a reference in its norm review and examination of individual applications.

It must be noted that Turkish Constitutional Court acts on the basis of constitutional democracy as envisaged by the Constitution. The constitutional democracy, which is the prevalent understanding of democracy in our age, aims to realize the rule of law and to provide effective protection of fundamental rights and freedoms regardless of which form of government is adopted by the State. As a matter of fact, in one of its judgments the Constitutional Court noted that the idea of protecting the human rights and even of not being able to raise these rights as issues for voting underlies the basis of constitutional democracy.

It is known by all that the rule of law is the most important element of constitutional democracy. This principle, which is the most widely-relied principle in the Constitutional Court's norm review with respect to relations between the individual and the State, expresses the rule of law in general terms and its implementation in actual terms.

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The Court defines the state of law, in its various judgments, as "A state which is based on human rights, protecting and strengthening these rights and freedoms, abiding by the laws in its acts and actions, establishing a just and fair legal order in all fields of life and maintaining this in a progressive manner, ensuring the legal security, avoiding the unconstitutional behaviours and attitudes, ensuring the sovereignty of law on all state organs, deeming itself bound by the Constitution and the laws and being subject to judicial review".

The Constitutional Court interpreted in its judgments such aspects of the state

The institutional independence and impartiality of the judiciary is not per se sufficient for realizing the rule of law completely. In addition to this, the judges exercising the judicial power must be virtuous in person.

of law as legal security and independence of judiciary. The Court expressed the requirements of this principle by stating in one of its judgments "the principle of legal security requires that the legal norms be foreseeable, that the individuals have confidence in the State in all their acts and actions and that the state refrain from methods impairing such sense of confidence while making the legal regulations."

On the other hand, the definition of the regimes as democratic state of law depends on the existence of independent and impartial judiciary and judges. As a matter of fact, a chapter of Mecelle (the civil code of the Ottoman Empire in the late 19th and early 20th centuries) titled "Conduct of judges" expresses "The judge must be impartial towards the two parties". In other words, it appears that the judge must be obliged to secure the justice by observing complete impartiality towards the two parties.

The Constitutional Court defines the independence of the judiciary as "the basic and most effective guarantee of human rights and freedoms" and the aim of the judicial independence as "the administering of justice free from every form of direct or indirect influence, pressure, instruction and doubt". As the Court emphasized in one of its judgments "The independence, being a characteristics of the judiciary, is that the judge decides freely and impartially without being exposed to any external influence other than the requirement prescribed in the Constitution and free from any reservations or concerns."

On the other hand, the institutional independence and impartiality of the judiciary is not per se sufficient for realizing the rule of law completely. In addition to this, the judges exercising the judicial power must be virtuous in person.

In this context, the observations on the judge's requirement of being virtuous as expressed many centuries ago by Ibn Rushd, one of the important figures of intellectual history, still applies to today. Being a physician and a judge by profession, Ibn Rushd states, when commenting on Plato's "The Republic", that ideal state knows neither physicians nor judges; however, they are required due to unhealthy diet and lack of mutual love and friendship among the people.

In the opinion of Ibn Rushd, one of the main virtues to be observed in a judge is that his nafs (self) is free from malice, in other words he must be moral and virtuous. The physician's illness does no harm to the patient that he treats. However, a morally corrupt judge cannot be fair. As a matter fact, such a morally corrupt judge does not know the virtue and its source. On the other hand, a virtuous judge knows both his inner self and discerns the good and the evil in the others' nafs through the experience that he accumulates.

In the opinion of Ibn Rushd, one of the main virtues to be observed in a judge is that his nafs (self) is free from malice, in other words he must be moral and virtuous. The physician's illness does no harm to the patient that he treats. However, a morally corrupt judge cannot be fair. As a matter fact, such a morally corrupt judge does not know the virtue and its source. On the other hand, a virtuous judge knows both his inner self and discerns the good and the evil in the others' nafs through the experience that he accumulates.

Consequently, one cannot mention the state of law in the absence of independent and impartial justice. Undoubtedly, the state of law does not mean a "rule by judges" in the sense of a krytocracy.

His Excellency Mr. President,

As it is mentioned before, the main objective of the constitutional democracies is to ensure effective protection of fundamental rights and freedoms. With the constitutional amendments in 2010, the Constitutional Court was assigned the duty of examining individual applications which was a new and significant step towards realizing the said objective. We must present a quantitative and qualitative review of contributions by the Constitutional Court to the protection of these fundamental rights and freedoms within the scope of this new duty assigned to the Court.

The Court's annual ratio to decide the applications filed was 50 % in 2013. This ratio increased to 53 % in 2014 and to 77 % in 2015. Accordingly, the Court's capacity to keep up with the applications filed increased by 50 % in 2015. These figures show that the individual application mechanism has become manageable and sustainable. The measures taken by the Court in the last year with respect to the operation of individual application system made a significant contribution to achieving such progress.

The lengthy trial proceedings are a general and structural problem. The principles on right to a trial within a reasonable period of time have been established in details by the European Court of Human Rights ("ECtHR") and the Turkish Constitutional Court. The applications within this scope are decided in line with the said principles and, when a violation of right is identified, the Court awards a just satisfaction as a natural consequence of decision.

When we look at the statistics, total number of applications filed to the Court since the beginning of the individual application practice (23 September 2012) is 59.833. 37.536 of these applications, in other words 63 % thereof, have been decided by our Court and 22.297 applications are pending.

I am more than happy to share with you that the annual ratio of applications decided by our Court against the number of applications filed is ever increasing year by year. The Court's annual ratio to decide the applications filed was 50 % in 2013. This ratio increased to 53 % in 2014 and to 77 % in 2015. Accordingly, the Court's capacity to keep up with the applications filed increased by 50 % in 2015. These figures show that the individual application mechanism has become manageable and sustainable. The measures taken by the Court in the last year with respect to the operation of individual application system made a significant contribution to achieving such progress.

The Court has ruled for violation of rights in its 1.215 judgments. Approximately 73 % of these judgments are on the right to a fair trial, 6 % of them on the right to liberty and security of person, 4 % on the right to property, 3 % on the right to life, 3 % on freedom of expression and 11 % on the other rights and freedoms.

I would like to express that 75 % of the violations of the right to fair trial are related to right to trial within a reasonable time. Of these violations, 55 % are related to trial proceedings lasted 5 to 10 years, 19 % 10 to 15 years, and 16 % are related to proceedings length of which is over 20 years.

As a matter of fact, the lengthy trial proceedings are a general and structural problem. The principles on right to a trial within a reasonable period of time have been established in details by the European Court of Human Rights ("ECtHR") and the Turkish Constitutional Court. The applications within this scope are decided in line with the said principles and, when a violation of right is identified, the Court awards a just satisfaction as a natural consequence of decision.

> ***The number of applications filed against Turkey before the ECtHR and assigned to a judicial formation has decreased to 2.208 in 2015 while it was approximately 9.000 in 2012.***

In this context, the examination of applications related to right to trial within a reasonable time has become a well-established practice for the Constitutional Court. Further, the ECtHR does not examine this category of applications filed before a certain date and such applications are decided by awarding just satisfaction to be determined by a Commission of the Ministry of Justice established with Law No. 6384 dated 9/1/2013.

As it is known, perhaps the primary reason for such lengthy trial proceedings is the heavy workload of the judiciary. I would like to express that we welcome the positive steps taken to solve this problem. In this respect, we hope that the regional courts of appeal to become operational soon will contribute to deciding the cases within a reasonable period of time. Besides, I would like to share my opinion that it would be beneficial to adopt methods of alternative dispute resolutions, to develop the currently existing ones and to ensure their efficiency in practice.

His Excellency Mr. President,

Esteemed Guests,

I would like to touch upon three effects of the individual application, one of which is practical and the rest of which are transformative on our social life and legal system.

The practical effect of individual application is that it resulted in a considerable decrease in the number of applications filed against Turkey before the ECtHR. As it is specified in the legislative intent of the constitutional amendment adopted in 2010, one of the most important aims for introducing the individual application into Turkish legal system is to resolve the disputes on fundamental rights within our domestic law. The figures verify that we have achieved this practical goal to a considerable extent. The number of applications filed against Turkey before the ECtHR and assigned to a judicial formation has decreased to 2.208 in 2015 while it was approximately 9.000 in 2012.

As it is seen, the number of applications to the ECtHR has considerably decreased after the introduction of individual application. On the other hand, considering that

> ***The number of applications to the ECtHR has considerably decreased after the introduction of individual application.***

The first transformative effect of the individual application is that it is the engine and main instrument of the Constitutional Court's paradigm shift. This paradigm adopts an approach which prioritizes the human together with his/her fundamental rights and freedoms.

we have decided on 37.536 applications so far, only a very limited number of these applications were further brought before the ECtHR. As a matter of fact, as seen in its various decisions, the Strasbourg Court declares the applications inadmissible for non-exhaustion of domestic remedies if an application is lodged directly with the ECtHR without applying to the Constitutional Court.

The first transformative effect of the individual application is that it is the engine and main instrument of the Constitutional Court's paradigm shift. This paradigm adopts an approach which prioritizes the human together with his/her fundamental rights and freedoms. The individual application requires a "rights-based" approach by its very nature and this characteristic of the individual application also affected the constitutionality review conducted by the Court. Accordingly, the Court adopted an approach which prioritizes the rights and freedoms in carrying out the constitutionality review of the laws.

Another transformative effect of the individual application practice is that it has provided the individuals with direct access to constitutional justice after exhausting ordinary legal remedies. As it is known, the individual application paves the way for a constitutionality review which complements the norm review. The Court examines the constitutionality of a norm in abstract terms while carrying out the norm review whereas it examines the constitutionality of the acts and actions of public authorities in individual applications.

The Constitutional Court became socialized, in other words it has become an institution which contacts the society and the daily lives of the people.

As a consequence of this process, the Constitutional Court became socialized, in other words it has become an institution which contacts the society and the daily lives of the people. Although the individual application attracted public attention through the applications filed by publicly-known persons, our Court has examined the applications filed by thousands of not so much known citizens on problems which may be faced by almost anyone in daily life and determined violation of certain rights in some of these

> ***Thousands of people, having exhausted ordinary legal remedies, apply to the Constitutional Court for various reasons varying from cadastral proceedings exceeding reasonable time period to confiscation of lands without expropriation, from permanent disabilities due to medical negligence to loss of their relatives in traffic accidents.***

applications. In this context, thousands of people, having exhausted ordinary legal remedies, apply to the Constitutional Court for various reasons varying from cadastral proceedings exceeding reasonable time period to confiscation of lands without expropriation, from permanent disabilities due to medical negligence to loss of their relatives in traffic accidents.

For instance, in an application, the applicant's spouse died when the taxi she took was crashed by another vehicle. It was understood that the driving licence of the other vehicle's driver had been temporarily seized in the past due to drunk driving, that he was drunk at the time of the accident and he caused the accident by driving well above the speed limit and running red light. The criminal proceedings against those causing the accident lasted for 8 years and one month and discontinued due to statute of limitations.

The Constitutional Court emphasized that the discontinuance of the proceedings due to statute of limitations would shatter the applicant's (spouse of the victim) and the whole society's confidence in the rule of law and that it would give an impression as unlawful actions are tolerated and the State remains indifferent to such actions. The Court ruled that the victim's right to life was violated as the actions alleged to have caused his/her death went unpunished.

> ***The Court decided on many issues which occupied the public agenda for a long period of time such as headscarf, surname of a married woman, unlawful wiretapping and the press leak thereof, anonymous witness, the use of digital data as evidence in proceedings and internet journalism.***

Although most of the applications relate to these kinds of problems that we may encounter in daily life, apart from these, we see that certain problems of the society which have become chronic and politicized are brought before the Constitutional Court through individual applications. The Court decided on many issues which occupied the public agenda for a long period of time such as headscarf, surname of a married woman, unlawful wiretapping and the press leak thereof, anonymous witness, the use of digital data as evidence in proceedings and internet journalism.

Ceremony of the 54th Anniversary of the Constitutional Court

> ***In its judgment in which the Constitutional Court recalled the "liberal" understanding of secularism which allows for the religion's visibility in the individual and public sphere, acting on the reality of "the existence of different religions, faithes or disbeliefs in the society", it emphasized that the State must establish a political and legal order, where the individuals live together in peace with their faiths, by protecting the social diversity.***

In reviewing all the applications, the Constitutional Court examined the allegations of the applicants on the violation of their rights with a "rights-based" approached with no regard to the applicants' religious, political or ideological identity. A typical example of the paradigm shift and "rights-based" approach of the Constitutional Court can be tracked down in its judgment on an individual application related to headscarf.

The applicant, who is a lawyer, demanded to participate in a hearing with her headscarf like the way she wears in her daily life. The judge of the court did not permit her to participate in the hearing by referring to the judgments of the Constitutional Court and the European Court of Human Rights on the issue of headscarf. Then she filed an individual application with the Constitutional Court.

In its judgment on the said application, the Constitutional Court recalled the "liberal" understanding of secularism which allows for the religion's visibility in the individual and public sphere as expressed previously in the Court's constitutionality review on the provision of law publicly known as "4+4+4". Acting on the reality of "the existence of different religions, faiths or disbeliefs in the society", the Constitutional Court emphasized that the State must establish a political and legal order, where the individuals live together in peace with their faiths, by protecting the social diversity.

The Court ruled in the applications of the detained deputies that their right to liberty of person and right to be elected were violated as their detention exceeded reasonable time period. Similarly, the Court ruled that a retired Chief of Staff's right to effective objection against deprivation of his liberty was violated as the justifications of the judgment convicting the said retired Chief of Staff was not announced for a long period of time. The Court ruled that the applicants' right to a fair trial was violated in the cases where a large number of the Turkish Armed Forces staff were being tried and which were followed closely by the public.

The Court concluded that the prevention of the lawyer from participating in the hearing by wearing her headscarf violates freedom of religion and conscience and the prohibition of discrimination.

His Excellency Mr. President,

The Constitutional Court rendered important judgments in certain individual applications which were subject to intense public debate and discussion. In this context, the Court ruled in the applications of the detained deputies that their right to liberty of person and right to be elected were violated as their detention exceeded reasonable time period. Similarly, the Court ruled that a retired Chief of Staff's right to effective objection against deprivation of his liberty was violated as the justifications of the judgment convicting the said retired Chief of Staff was not announced for a long period of time. The Court ruled that the applicants' right to a fair trial was violated in the cases where a large number of the Turkish Armed Forces staff were being tried and which were followed closely by the public.

On the other hand, the Constitutional Court rendered very important judgements on the freedom of expression as well. The Court emphasized in these judgments that the freedom of expression is a sine qua non element of a democratic society and that this freedom is a requirement of pluralism, tolerance and broad-mindedness. The Court noted that the freedom of expression is applicable not only to opinions that are favourably received but also to opinions and thoughts regarded by others as "disturbing".

Nevertheless, the Court states in its judgments that the freedom of expression is not absolute in nature and may be restricted for the reasons prescribed in the Constitution. However, as per Article 13 of the Constitution, such restrictions shall not impair the very essence of the freedom of expression, shall not be contrary to the requirements of a democratic society and the principle of proportionality.

The freedom of expression, in democracies, allows for discussing the most bitter problems freely and defending the proposals and solutions. The prerequisite of such freedom is to abandon the terror, violence and the violent speech. As it is emphasized in the judgments of the Constitutional Court and the European Court of Human Rights, the expressions inciting terror and violence are not protected by the freedom of expression because the word is to be of no significance when the terror and violence emerges.

At this very point, I would like to touch briefly upon the relation between the freedom of expression and the terror which our country has been fighting against for many years. I participated in the conference on the freedom of expression organized by the Council of Europe in Strasbourg only three days after the terrorist attack to Ankara railroad terminal last year. In my speech at the opening of that conference, I referred to French thinker Lyotard who establishes a connection between terror and the freedom of expression, and I expressed that terrorism confines the people to a dark silence and destroys not only the individuals' right to life, but also their freedom of expression, freedom to speech and address the society which are the most distinctive characteristics of human beings.

The freedom of expression, in democracies, allows for discussing the most bitter problems freely and defending the proposals and solutions. The prerequisite of such freedom is to abandon the terror, violence and the violent speech. As it is emphasized in the judgments of the Constitutional Court and the European Court of Human Rights, the expressions inciting terror and violence are not protected by the freedom of expression because the word is to be of no significance when the terror and violence emerges.

His Excellency Mr. President,

The Constitutional Court contributes through its judgments to realizing such values as justice, rule of law and fundamental rights and freedoms which we mentioned at the beginning. We firmly believe that these judgments increase the individuals' confidence in the State and the law by satisfying their sense of justice.

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> ***Individual application can be defined as an important institution and achievement for our legal system. It has been known that the individual application system implemented in Turkey is cited among the best practices which may serve a model to other countries.***

For these reasons, individual application can be defined as an important institution and achievement for our legal system. It has been known that the individual application system implemented in Turkey is cited among the best practices which may serve a model to other countries.

It is surely beyond doubt that the principal share of this success belongs to the legislative power which introduced the individual application to our legal system, in other words it belongs to the Grand National Assembly of Turkey and to our nation as the true holder of the sovereignty. Taking this opportunity, I extend my appreciation to all persons and institutions who contributed to introduction and effective implementation of individual application mechanism. I would also like to extend my special thanks to each and every one of our Court's vice-presidents, justices, rapporteur-judges and assistant rapporteur-judges as well as the administrative staff for all their devoted efforts.

On this occasion, I would like to express my condolences to the relatives of Mr. Hasan Semih Özmert, retired President of our Court, and Mr. M. Yılmaz Aliefendioğlu and Mr. Hüseyin Karamüstantikoğlu, retired justices of our Court, who passed away last year. May Allah rest their souls in peace! I also pray for all our martyrs and all our veterans who passed away, especially for Gazi Mustafa Kemal Atatürk. May Allah rest their souls in peace!

Finally, I would like to express my thanks in advance to all Turkish and foreign speakers and participants to contribute the symposium which will start in the afternoon. I firmly believe that the presentations and discussions to take place during the symposium will make significant contributions to better understanding and implementation of the individual application.

I would like to welcome the esteemed foreign colleagues and guests and extend my thanks for their personal presence and honouring our anniversary.

His Excellency Mr. President,

Esteemed Guests,

Ending my word, I would like to express my gratitude for your participation to honour our anniversary. I extend my wishes of health and prosperity.

B. OPENING SPEECH AT THE SWEARING-IN CEREMONY OF THE JUSTICES OF THE TURKISH CONSTITUTIONAL COURT ASSOC. PROF. DR. RECAİ AKYEL AND PROF. DR. YUSUF ŞEVKİ HAKYEMEZ

His Excellency Mr. President,

Esteemed Guests,

I would like to welcome you to the swearing-in ceremony of our newly appointed justices of the Constitutional Court and I greet you with all my heart and respect.

I congratulate our justices who are about to assume office after the oath and I wish them success.

I believe that Assoc. Prof. Dr. Recai Akyel, who has worked in public administration for many years, will carry his vast experience to the field of constitutional justice and will make important contributions to our Court considering his past position as a district and province governor.

Likewise, I would like to express my belief that Prof. Dr. Yusuf Şevki Hakyemez, who is known for his studies in constitutional law and especially for his works on the Turkish Constitutional Court's approach to fundamental rights, will make significant contributions to the development of the "rights-based" case law of our Court.

Once again I want to congratulate our new justices and express my belief that the Court and this Country will greatly benefit from their service.

Also, I would like to welcome our guests from 13 countries who are among us for the "Summer School Programme" organized for the fourth time by our Court within the framework of the Association of Asian Constitutional Courts and Equivalent Institutions.

> ***As is known, in the history of countries and nations there are moments of truths and turning points. The 15th of July 2016 is such a day for this country. On July 15, we witnessed one of the most important events not only in the Turkish political history but also in the history of modern democracy.***

As is known, in the history of countries and nations there are moments of truths and turning points. The 15th of July 2016 is such a day for this country. On July 15, we witnessed one of the most important events not only in the Turkish political history but also in the history of modern democracy.

On this night we experienced opposite feelings. First a faction/junta within the Turkish Armed Forces caused us to witness despicable moments. By attempting to destroy all democratic efforts and achievements, they made us feel the shame of the possibility of turning back to the days that we recall as the dark pages of our history.

> ***But at the same night, our glorious nation erased this disgrace by showing a heroic resistance and let us enjoy dignity. The night that started dark witnessed a democratic resistance, and a history of democracy was made that we will pass onto future generations with honor. The night of 15 July once again confirmed the following words of late Alija Izzetbegovic: "History always repeats the same story: People that are ready to die win against those who aren't ready."***

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Taking this opportunity, I want to note that I owe a gratitude, on behalf of our Court and on my own behalf, first of all to our President, all other statesman, the leaders of the governing and opposition parties, the patriotic members of the Turkish Armed Forces and the National Police, the media who showed a democratic and firm stance, and above all to our brave and courageous nation that had nothing more than flags in their hands yet stood strong against the tanks at the cost of their own lives for letting us experience this dignity and honor.

During that evil night at the densest moment of the darkness, for the first time in the history of constitutional justice, the Constitutional Court made a public statement. This statement was as follows: "We repudiate all kinds of antidemocratic attempts against the constitutional order and we would like our glorious nation to know that we stand beside the democratic constitutional state." We considered this statement as a must arising from our duty to protect the constitution and fundamental rights.

The sole raison d'être of the Constitutional Court is to protect the constitution and the fundamental rights and freedoms secured within. That is why the Constitutional Court justices swear on their honor and dignity to protect the Constitution of the Republic of Turkey and the fundamental rights and freedoms. Of course, the duty to protect the constitution and rights is fulfilled within the scope of the powers granted by the Constitution.

The purpose of the coup attempt of July 15 was in essence to overthrow the democratic constitutional order and the fundamental rights and freedoms secured by it. If this attempt would have succeeded as before, the mission of the constitutional court to protect the constitutional and fundamental rights would have been rendered meaningless.

For this very reason, during that evil night at the densest moment of the darkness, for the first time in the history of constitutional justice, the Constitutional Court made a public statement. This statement was as follows: "We repudiate all kinds of antidemocratic attempts against the constitutional order and we would like our glorious nation to know that we stand beside the democratic constitutional state." We considered this statement as a must arising from our duty to protect the constitution and fundamental rights.

Taking this opportunity, I once again want to express my belief that the Constitutional Court justices will dully fulfill their duty to protect the Constitution and fundamental rights against any kind of anti-democratic and unconstitutional attack by staying loyal to their oaths.

His Excellency Mr. President,

We have to analyze the mentality and structural problems behind this coup attempt well. As it is the case with all coup and coup attempts, an understanding of "tutelage/ paternalism" lies behind July 15. This paternalism implies nothing more than delirium

The Constitutional Court pointed out in its decision taken unanimously dated 4 August 2016 the following: "The facts that the FETÖ/PDY has been organized within nearly all the public institutions and that the concrete coup attempt is conspired by this structure turned the potential (possible) danger into existent (present) danger and made it compulsory to take extraordinary measures in order to maintain the democratic constitutional order."

of a group who thinks that they hold the magic globe of truth in their hands so that they are entitled to form the society and the state and to tame them or so to say to bring them to heel. The civil-military bureaucratic tutelage that leans on different ideological buttresses at different times is based on the hypothesis that the democratic political mind is insufficient at institutional levels. On individual level, it is fed by the thought that an individual should not be left to him/herself and must be guided otherwise he/she cannot make right decisions. In any case, putting a restraint on the institutional and individual mind is at issue. Exactly for this reason the famous philosopher Kant described paternalism as "the greatest conceivable despotism".

What makes the paternalism behind July 15 worse and more dangerous is that its proprietors belong to a structure striving to capture all layers of civil and political society and acting with this purpose in mind. Therefore this exacerbates the current danger to the extent that it is not comparable with the previous ones.

Hence the Constitutional Court pointed out in its decision taken unanimously dated 4 August 2016 the following: "The facts that the FETÖ/PDY has been organized within nearly all the public institutions and that the concrete coup attempt is conspired by this structure turned the potential (possible) danger into existent (present) danger and made it compulsory to take extraordinary measures in order to maintain the democratic constitutional order."

As a matter of fact the existence of tutelage/paternalism on this land is nothing new. Since the 1913 Ottoman coup d'état (also known as Raid on the Sublime Porte-Babıali Baskını) we have witnessed classic, modern and postmodern types of tutelage. This witnessing thought us that coups and coup attempts cannot have any legitimate ground whatsoever. Any person or any institution cannot infer justifications for coups from any text and secular or religious ideology. The real guardian of the democratic constitutional regime in Turkey is the nation itself.

> ***Coups are, in a way, putting our political will and mind into a straitjacket. Military interventionism (darbecilik) attempts to encroach on the national will, and it is an incorrigible disease in the paternalistic elitism's claws silently gnawing democracy and an overall political perversion. Those who have been caught this disease should be reminded that in democracies the only way to come into power is through election. And the way to amend the Constitution or make a new one goes through convincing people and gaining the support of the nation, and consequently through the parliament. Any other roads are dead ends without any legitimacy.***

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> ***I believe that July 15 marks the day that brought an end to the ill fate of Turkey on coups and coup attempts, and it is the beginning of mental revolution that is an essential part of constitutional democracy.***

July 15 is also the turning point to hold this sick and antidemocratic mentality to account. This nation demonstrated that it will disallow coups at the cost of its life and blood, and that the sovereignty only belongs to itself. I believe that July 15 marks the day that brought an end to the ill fate of Turkey on coups and coup attempts, and it is the beginning of mental revolution that is an essential part of constitutional democracy.

Protecting the democracy, the constitution and all this values against those who try to abolish the legal system, thus the constitutional rights and freedoms, especially the right to life of individuals, is the fundamental duty of the state and is moreover its raison d'être. This is not a matter of choice but a constitutional obligation. But how and with which methods this will be achieved depends on the choices the political will is going to make within the scope of the Constitution.

Swearing-In Ceremony of the Justices of the Turkish Constitutional Court Assoc. Prof. Dr. Recai AKYEL and Prof. Dr. Yusuf Şevki HAKYEMEZ

> ***Constitutions are social contracts, but not, as in the words attributed to Abraham Lincoln, "suicide pacts". That is why no constitution can remain unresponsive to actions intending to overthrow the democratic constitutional order. In almost all modern democratic constitutions, extraordinary administration procedures or state of emergency that allow in such circumstances to further limit fundamental rights and freedoms are prescribed. This is because extraordinary situations result from the fact of "necessity".***

Yes, constitutions are social contracts, but not, as in the words attributed to Abraham Lincoln, "suicide pacts". That is why no constitution can remain unresponsive to actions intending to overthrow the democratic constitutional order. In almost all modern democratic constitutions, extraordinary administration procedures or state of emergency that allow in such circumstances to further limit fundamental rights and freedoms are prescribed. This is because extraordinary situations result from the fact of "necessity". Serious threats to the existence of the state and the nation create without doubt a state of necessity.

> ***However, the democratic conception of state of emergency rejects the complete suspension of constitutions and rendering fundamental rights and freedoms totally dysfunctional. Therefore a state of emergency is not a state of lawlessness.***

Justice is undoubtedly the core value in arranging the relation between two vital values of freedom and security Justice is the cement of the legal order and the basis state. Therefore during exceptional times where fundamental rights and freedoms become more fragile the establishment of justice is much more important.

However, the democratic conception of state of emergency rejects the complete suspension of constitutions and rendering fundamental rights and freedoms totally dysfunctional. Therefore a state of emergency is not a state of lawlessness. Indeed the state of emergency is regulated in detail in the Constitution, and the limitations of fundamental rights and freedoms during a state of emergency are clearly defined. Of course the aim is to return to normal situation as soon as possible, by eliminating the threats to fundamental rights and freedoms.

The objective of democratic constitutions is to maintain the constitutional order securing the individual's rights and freedoms. This can be achieved through securing the social order and security because it is hard to talk about freedoms when there is no security. In this sense, security is an individual right and the precondition for the protection of other rights and freedoms. As to liberty, again in the words of Alija Izetbegovic it is "what gives meaning to our lives". That is why freedom and security are not opposing but complementary values to one another. Security and freedom are equally essential for a dignified individual and social life. Just like the air we breathe, in their presence we don't appreciate them, but in their absence we cannot breathe.

Justice is undoubtedly the core value in arranging the relation between two vital values of freedom and security Justice is the cement of the legal order and the basis state. Therefore during exceptional times where fundamental rights and freedoms become more fragile the establishment of justice is much more important.

His Excellency Mr. President,

July 15 is maybe one of the most formidable crises of our political history. What is our part as a state and nation is to overcome this crisis in unity and to carry the democratic state of law to the future by reconstructing it on the basis of justice, security and freedom in a strong and powerful manner.

The unity that has been formed after July 15 has rebuilt the idea of "us" by gathering all different elements of the country under one roof.

> ***What we, especially our representatives, owe to the Martyrs and veterans of July 15 is a new constitution that totally eradicates the pro-coup mindset lying behind coups and coup attempts, that declares the will of nation as the sole source of political power, and that forming a democratic state of law with all its institutions based on human rights.***

The unity that has been formed after July 15 has rebuilt the idea of "us" by gathering all different elements of the country under one roof. This unity does not mean uniformity or that everybody has the same thought in all matters. On the contrary, it is a unity and solidarity that will surround those who do not think alike, believe alike or live alike.

With this understanding, what we, especially our representatives, owe to the Martyrs and veterans of July 15 is a new constitution that totally eradicates the pro-coup mindset lying behind coups and coup attempts, that declares the will of nation as the sole source of political power, and that forming a democratic state of law with all its institutions based on human rights. Actually the spirit of the social and political unity after July 15 has also provided the necessary climate for a new constitution.

A democratic and liberal new constitution is really important on the one hand with regard to mounting on the level of contemporary civilizations founder of our Republic Mustafa Kemal Atatürk has referred to, and on the other hand with regard to crowning the democratic acquisitions.

> ***Learned Hand said the following in his speech delivered at Central Park that became known as the "Spirit of Liberty":***
>
> ***Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.***

However, it should be noted that the constitution is not everything. Moreover, if the fire of freedom in the hearts of the people goes out, the constitution would be meaningless. During World War II Judge Learned Hand said the following in his speech delivered at Central Park that became known as the "Spirit of Liberty": "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."

> ***The coup attempt of July 15 showed that the liberty in the hearts of our people on this land has not died, and that there are millions of people ready to sacrifice their lives to carry this fire in their hearts.***

The coup attempt of July 15 showed that the liberty in the hearts of our people on this land has not died, and that there are millions of people ready to sacrifice their lives to carry this fire in their hearts. And this demonstrates that liberty and democracy are not granted or donated by someone from above but are values achieved through the struggle of the society by paying a heavy price, and they are thoroughly deserved. Now our biggest duty is to protect those values and implement them with all requirements and pass them on to future generations.

> ***It must be noted that the "free world" did not do well about the event of July 15 that will go down in the world's history of democracy. Those who come out at every opportunity as the owners and defenders of democratic values acted like in "the Silence of the Lambs" against the attempt in Turkey to destroy the democracy intentionally with deadly weapons, and the democratic resistance in the face of it.***

Finally, it must be noted that the "free world" did not do well about the event of July 15 that will go down in the world's history of democracy. Those who come out at every opportunity as the owners and defenders of democratic values acted like in "the Silence of the Lambs" against the attempt in Turkey to destroy the democracy intentionally with deadly weapons, and the democratic resistance in the face of it.

> ***On the contrary the Conference of Constitutional Jurisdictions of Africa that has 35 member countries published a message, which they also sent us, on July 16 that they denounce the coup attempt and are in solidarity with the Turkish Constitutional Court. Likewise, the statement of solidarity of the Association of Asian Constitutional Courts and Equivalent Institutions rejecting the coup is precious for us.***

On the contrary the day after the coup attempt some also published messages of solidarity. For instance, the Conference of Constitutional Jurisdictions of Africa that has 35 member countries published a message, which they also sent us, on July 16 that they denounce the coup attempt and are in solidarity with the Turkish Constitutional

Court. Likewise, the statement of solidarity of the Association of Asian Constitutional Courts and Equivalent Institutions rejecting the coup is precious for us.

Taking this opportunity I want to extend my thanks to the directors of these two international organizations that are working in the field of constitutional justice, to the presidents of the relevant constitutional courts and high courts.

At the end of my speech, I want to pray for all our martyrs and retired presidents and justices who passed away. May Allah rest their souls in peace! And I wish the veterans and retired justices a healthy and prosperous life!

His Excellency Mr. President,

Esteemed Guests,

I would like to express my gratitude for your participation in the swearing-in ceremony and I extend my wishes of pleasant and peaceful days.

C. SPEECH IN THE 3rd CONGRESS OF THE ASSOCIATION OF ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS HELD IN INDONESIA

THE 15th JULY COUP ATTEMPT AND THE STATE OF EMERGENCY: A NEW CHALLENGE FOR THE CONSTITUTIONAL DEMOCRACY IN TURKEY

Distinguished participants,

Ladies and gentlemen,

I would like to thank the Chief Justice of Indonesian Constitutional Court, Mr Hidayat, for his warm and generous hospitality.

It is pleasure to be here and speak to such distinguished colleagues.

As you know, our country has experienced a flagrant coup attempt recently. Fortunately, the perpetrators have failed and our democratic regime survives because of brave resistance of Turkish people.

There is no doubt that the recent coup attempt created a new constitutional and legal situation in Turkey. This is perhaps one of the most serious challenges that our constitutional democracy has faced so far.

What happened on 15 July 2016?

> ***What happened on 15 July 2016?***
>
> ***I would like to give you a brief information about what happened at that night by showing you a short video.***
>
> ***It was indeed a horrible day for all of us in Turkey. It was the day that lasted more than a hundred years to borrow the words of Chinghiz Aitmatov. I was at home with my family while the fighter jets (F 16s) started to bomb parliament which is only a few kilometre away from us. It was as if we, ourselves, were bombarded. My youngest son, who is only 12, kept asking me this question with a trembling voice: "Daddy are these warplanes going to bomb us?". I said "No", but I was not sure my answer was correct.***

This attempt soon was taken under control due to the continuous efforts of the political leadership including the President and the Parliament, of all political parties, the media, and significant sections of security forces from both the army and the police. Above all, it was the democratic will and resistance of the Turkish people which proved to be decisive in stopping this coup-attempt.

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I wasn't sure because the following day we found out that the perpetrators, a faction/junta within the army, launched a terrorist campaign firing at their own people and bombed the Turkish Parliament, Office of the Presidency and Police Headquarters.

This attempt soon was taken under control due to the continuous efforts of the political leadership including the President and the Parliament, of all political parties, the media, and significant sections of security forces from both the army and the police. Above all, it was the democratic will and resistance of the Turkish people which proved to be decisive in stopping this coup-attempt. The failed coup attempt is an indication of Turkish people's awareness and the consolidation of Turkish democracy.

Judicial Reactions to the Coup Attempt

The Turkish Constitutional Court made a press statement at the very beginning of the coup attempt, after a couple hours when we realized it was a coup attempt. In the statement we pointed out that we repudiate all kinds of antidemocratic attempts against the constitutional order and stand beside of democratic constitutional state. The Turkish Constitutional Court's press statement played an important role to protect constitutional order and democratic values by demoralizing the plotters and encouraging the Turkish nation.

The Constitutional Court's firm reaction to the attempted coup was followed by other high courts such as the Council of State, the Court of Cassation, and the

This group created a parallel organization in key posts of the state, especially in security, judiciary and civil bureaucracy. For a long time, the group acted more like a messianic organization than a simple Islamic faction and functioned in secrecy within state institutions. "Concealment" has been the key tactic of the members of the organisation. The members of this group are ordered to disguise their affiliation with movement.

Military Court of Cassation. On 16 July 2016 the public prosecutor ordered to arrest hundreds of thousands of people who were believed to be either the plotters of the coup or connected with the organisation behind the coup. They include 2 judges of constitutional court, 140 members of the Court of Cassation, 48 members of Council of State, and more than 3000 (three thousands) judges and prosecutors of first instance courts.

The authorities stated from the very beginning that the failed coup was planned and executed by the "Gulenist terrorist organisation" (FETÖ), which is also known as "Parallel State Structure" in Turkey. As explained in the previous indictments and court decisions, this group created a parallel organization in key posts of the state, especially in security, judiciary and civil bureaucracy. For a long time, the group acted more like a messianic organization than a simple Islamic faction and functioned in secrecy within state institutions. "Concealment" has been the key tactic of the members of the organisation. The members of this group are ordered to disguise their affiliation with movement. (Decision of Turkish Constitutional Court in its plenary sitting dated 4/8/2016, Docket no. 2016/6 (Miscellaneous file) Decision no. 2016/12, § 15).

The Reaction of Government: State of Emergency

State of Emergency is a measure regulated by almost all constitutions and international human rights law, including European Convention of Human Rights.

The Council of Ministers decided on 20 July 2016 that a nationwide state of emergency be declared for a period of ninety days in order to fight against the "FETÖ" terrorist organization in a comprehensive and effective manner which poses a grave threat to survival and security of the state through its clandestine infiltration to state institutions.

It must also be noted that, like France, Turkey resorted to the right of derogation from the obligations in the European Convention on Human Rights for a 3 month period as prescribed in Article 15 of the Convention.

> ***The coup attempt which was a kind of heinous terror attack is more extensive and disruptive compared to the terror attacks in France or in any other European state. It may be compared to 9/11 of the USA in terms of traumatic affect it created.***

I must say that the coup attempt which was a kind of heinous terror attack is more extensive and disruptive compared to the terror attacks in France or in any other European state. It may be compared to 9/11 of the USA in terms of traumatic affect it created.

During the state of emergency, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decree laws on matters required by the state of emergency. Under normal circumstances, the Constitutional Court shall examine the constitutionality of decree laws. Article 148 of the Turkish Constitution stipulates that decree law issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality.

Nevertheless, within the state of emergency period, the administrative acts and activities are subject to judicial review. The only limitation for administrative courts is that they may not render stay of execution decisions in the cases regarding decisions and acts of administration in the 90 day state of emergency period.

The right to individual application before the Constitutional Court is also available for individuals. Ultimately, they may still lodge an application to the European Court of

> ***The authorities have constantly stated that the purpose of the declaration of the State of Emergency, is not to restrict fundamental freedoms of our citizens, but to eliminate terrorist organization behind the coup attempt in a more rapid and effective way.***

Human Rights, if they are not satisfied with the decisions of the Constitutional Court, after having exhausted domestic remedies.

The authorities have constantly stated that the purpose of the declaration of the State of Emergency, is not to restrict fundamental freedoms of our citizens, but to eliminate terrorist organization behind the coup attempt in a more rapid and effective way.

The emergency decree laws seem to have two main objectives. First, they aim to demilitarise the social and political life and to ensure the full democratic and civilian control on armed forces. To this end, the army forces of land, air and navy were attached with the Ministry of Defence. Likewise, some of the military schools (colleges) were closed down.

Second objective of the decree laws is to completely eliminate the "Parallel State Structure" which was defined by the National Security Council as a terrorist organisation even before the coup attempt.

Decree Law on Measures Taken within the Scope of State of Emergency no. 667 clearly states that members of the judiciary including the Constitutional Courts (Article 3) and all state officials (Article 4) shall be dismissed from the profession or public service, if they are considered to have affiliation, membership, cohesion, or connection

While the Esteemed President of the Court was delivering his speech in the 3rd Congress themed "Protection and Improvement of the Constitutional Rights of the Citizens" and held by the AAAC in the Bali Island of Indonesia

In its decision concerning the removal of member judges from the Court, the Constitutional Court (a) explained the meaning of the coup attempt for constitutional democracy, (b) interpreted the relevant provision of the Decree Law no. 667. According to the Court, the 15 July attempted coup was the most devastating attack against democratic constitutional order, constitutional rights and liberties and national security. It was already a dark mark in the history of the Turkish democracy.

to terrorist organizations or to groups, formations or structures determined by the National Security Council to be engaged in activities against the national security of the State.

The Turkish Constitutional Court's Stance

As one of the "guardian"s of democratic constitutional order, the Turkish Constitutional Court promptly reacted and took immediate measures during and after the failed coup attempt.

The Court first initiated a disciplinary investigation about two member judges who were arrested and subsequently detained on remand within the scope of the criminal investigation. The Plenary of the Constitutional Court removed them from the office pursuant to Article 3 (1) of the Decree Law no. 667.

In addition, the Court administration removed totally thirteen (13) rapporteurs coming from the other public bodies and institutions and seconded to the Constitutional Court from office, and sent back to their institutions. It has been informed that suspension from office and detention decisions were rendered about eight (8) of these rapporteurs.

We also decided on 29 July 2016 that one (1) rapporteur, seven (7) assistant rapporteurs and fifty-six (56) staff members be suspended from office until a final evaluation is made, pursuant to Article 4 of the Decree Law no. 667.

In its decision concerning the removal of member judges from the Court, the Constitutional Court (a) explained the meaning of the coup attempt for constitutional democracy, (b) interpreted the relevant provision of the Decree Law no. 667. According to the Court, the 15 July attempted coup was the most devastating attack against democratic constitutional order, constitutional rights and liberties and national security. It was already a dark mark in the history of the Turkish democracy (§ 68).

> ***The Court has emphasised that otherwise the credibility of and respect for the judiciary would be impaired. It was decided unanimously that it is not appropriate for the members of the Constitutional Court to remain in office and that they be dismissed from their profession (§§ 99, 100).***

The Court also interpreted the parameters of Article 3 of the Decree Law no. 667 in the following terms. According to the aforementioned article, applying the measure of dismissal from profession on Constitutional Court Judges;

a. it is necessary that a Judge is considered to have "affiliation", "membership", "cohesion", or "connection" to terrorist organizations or to groups, formations or structures determined by the National Security Council to be engaged in activities against the national security of the State and,

b. that this consideration is decided by the absolute majority of the Plenary of the Constitutional Court.

To apply the measure it does not require absolutely a bond between a Constitutional Court Judge and a terror organization, terror activities and by the way the coup attempt; but it is found sufficient if there is a link to a "structure", "formation" or "groups" that are determined by the National Security Council to be engaged in activities against the national security (§ 84).

On the other hand in order to apply the measure of dismissal from profession, it is not obligatory that the link is in the form of an "affiliation" or a "membership"; a "cohesion" or "connection" is already regarded sufficient (§ 85).

In the end the article states that "certainty" for the link between the Judges and the structures, formations or groups determined by the National Security Council to be engaged in activities against the national security is not required. Nevertheless, it is found sufficient that such a link is "considered" by the Plenary of the Constitutional Court. This consideration expresses the "opinion" that is formed by the absolute majority of the Plenary. Without doubt this consideration is independent from the existence of a criminal liability (§ 86).

The necessity to rely on a certain type of evidence to form this opinion is not set forth in Article 3 of the Decree Law no. 667. It is up to the absolute majority of the Plenary of the Constitutional Court based on which aspects this opinion will be formed. What is important here is to stay away from arbitrariness while forming an opinion (§ 87).

> ***We, as the Presidents and Judges of constitutional or supreme courts, should be very well aware of the fact that if there is no democratic constitutional order, there would be no constitutional rights to be protected by these courts.***

Applying these arguments to the current case, the Court declared that taking into account of the circumstances of the concrete case, the social background information that they are related to the mentioned structure and the common opinion of the Constitutional Court Judges that was formed over time, it is considered that these two Judges have such links to the above mentioned structure that it is not appropriate for them to carry out their profession (§ 98).

The Court has emphasised that otherwise the credibility of and respect for the judiciary would be impaired. It was decided unanimously that it is not appropriate for the members of the Constitutional Court to remain in office and that they be dismissed from their profession (§§ 99, 100).

Conclusion

Turkey faced a devastating terrorist coup attempt that our country had ever faced before.

I would like to mention that there is no doubt that Turkish Constitutional Court is to ensure the fundamental freedoms and rights of individuals in the state of emergency period. Turkey is getting normalized and our Court has been exercising its vital role in the normalization period as in other times.

There is no doubt that the application of decree laws will increase the number of individual applications before the Constitutional Court. That will deteriorate the situation regarding the already heavy workload of the Court. I am sure we will sort out this problem by employing effective means.

We, as the Presidents and Judges of constitutional or supreme courts, should be very well aware of the fact that if there is no democratic constitutional order, there would be no constitutional rights to be protected by these courts.

Thank you for your attention.

THE FIFTH SECTION

LEADING JUDGMENTS OF THE CONSTITUONAL COURT IN 2016

V. LEADING JUDGMENTS OF THE CONSTITUTIONAL COURT IN 2016

A. LEADING JUDGMENTS IN THE CONSTITUTIONAL REVIEW

1. Judgment on the provision regulating the disciplinary offences committed by the security personnel (no. E.2015/85, K.2016/3)

Pursuant to Articles 38 and 128 of the Constitution, disciplinary offences committed by the public officers are required to be regulated by law.

It is envisaged in the contested provision that the acts and actions requiring disciplinary penalties in respect of the personnel of the security directorates and the degrees and amounts of the penalties shall be determined by a by-law to be formed given the significance and qualification of the profession of police officers.

In the petition lodged with the Constitutional Court, it has been maintained in brief that the contested provision envisages that the issue as to which disciplinary penalties shall be imposed on account of which acts performed by the security personnel shall be regulated by a by-law; that there is no legal guarantee introduced for the security personnel who are public officers with respect to the disciplinary actions; and that general principles with respect to the disciplinary practices are not specified. It has been therefore alleged that this provision contravenes Articles 38 and 128 of the Constitution.

The Constitutional Court has made the following assessments with respect to the contested provision, in brief:

The disciplinary offences by the public officers are required to be regulated by law pursuant to Articles 38 and 128 of the Constitution. Although types of disciplinary penalties, the competent authorities to impose disciplinary penalties and the procedure under which the penalties would become final are specified in the Law, the disciplinary offences leading to imposition of these penalties are not set out in the contested provision which sets forth that these offences shall be determined by a by-law. This provision does not encompass a legal guarantee prescribed for the security officers with respect to the disciplinary offences. In other words, the provision in dispute does not put forth the general principles and set the framework pertaining to the disciplinary offences. Nor does this provision determine, even in general terms,

the acts resulting in disciplinary penalties. Therefore, the contested provision does not, in the legal framework, enable the individuals to foresee, to a certain degree of explicitness and precision, which legal sanction or conclusion shall be imposed in respect of which concrete acts and events.

Therefore, this provision contravenes "the principle of legality" enshrined in Article 38 § 1 of the Constitution and the principle of legal regulation enshrined in Article 128 § 2 (*ibid.*).

Consequently, the Constitutional Court found the impugned provision in breach of the Constitution and accordingly annulled it. It was accordingly decided that the annulled provisions shall enter into force one year later following the promulgation of the judgment in the Official Gazette.

2. Judgment on the provision included in the Code of Civil Procedure and envisaging the request for referral of the case-file to the competent or authorized court (no. E.2015/96, K.2016/9)

> **The provision which takes the date when the decision is rendered as a basis and which does not stipulate notification and pronouncement of the decision for requesting a case-file be referred to the competent or authorized court cannot be considered to provide an explicit, practical or effective facility for accessing to the court.**

In Article 20 § 1 of the Code no. 6100 which includes the contested provision, it is set out that in case when a decision of lack of competence or jurisdiction is rendered, any of the parties is required to request the case-file be referred to the competent or authorized court by means of applying to the court rendering the decision of lack of competence or jurisdiction within two weeks following the date of this decision if it is final; if the decision becomes final without having recourse to the relevant legal remedy in due time, following the date when the decision becomes final; or if the relevant party had recourse to the relevant legal remedy and his/her request was dismissed, following the date when the dismissal decision is communicated. Otherwise, the court shall deem that the case was not filed. The contested provision consists of the expression of *"...following the date of this decision if it is final..."*included in the above-mentioned paragraph.

In the application lodged with the Constitutional Court, it has been maintained in brief that a decision of lack competence may be rendered by the court, in absentia, over the case-file without the need for holding a hearing and summoning the parties; that it is therefore impossible for the parties to be aware of the content of the decision as it has been rendered in absentia; that in respect of the final decisions which are rendered in absentia, the two-week period cannot be made use of, and thereupon, the court would deem that the case was not filed; and that running of the period granted for the parties by the Code from the time when the decision the parties are not aware of is rendered impairs the right to legal remedies. It has been accordingly alleged that this provision contravenes Article 36 of the Constitution.

The Constitutional Court has made the following assessments with respect to the contested provision, in brief:

The decisions of lack of jurisdiction or competence may be taken, at any stage of the proceedings, by the court *ex officio* or upon the objection of one of the parties. These decisions may either be rendered at the hearings in the absence of one or both of the parties or over-the case without summoning the parties to the hearing pursuant to Article 320 of the Code. As the decisions of lack jurisdiction or competence taken in this way are not required to be communicated or pronounced pursuant to the provision in dispute, the parties' opportunity to be aware of the decisions taken is extremely limited.

The parties not having the opportunity to be aware of the decision taken under such circumstances would not also have the opportunity to request referral of the case-file to the authorized or competent court. As the case, under such a circumstance, is deemed not to have been filed, the parties cannot avail themselves of the right envisaging that the case to be handled by the court to which the case has been referred would be deemed to be the continuation of the first hearing. It is therefore beyond doubt that the parties would suffer from forfeiture of rights within the meaning of the procedural law. This is because the complainant will be obliged to re-file his/her case by means of paying fee once again, and the rights acquired upon the filing of the case before the unauthorized or incompetent court such as the interruption of the period of limitation and reservation of the period of prescription, and the interim injunctions and the provisional attachments imposed by these courts would become null and void. In this respect, the decision by which the case would be deemed not to have been filed due to a decision existence of which has not been yet known by the parties imposes a restriction on the parties' right to legal remedies in a manner which would go beyond its purpose given the legal consequences it has borne.

Moreover, the provision which takes the date when the decision is rendered as a basis and which does not stipulate the notification and pronouncement of the decision for requesting a case-file be referred to the competent or authorized court cannot be considered to provide an explicit, practical or effective facility for accessing to the court. The restriction imposed by this provision on the right of access to a court goes beyond the limits specified in the Constitution with respect to the right to legal remedies and renders the enjoyment of this right difficult to a significant degree. The restriction imposed on the individuals' right of access to a court by this rule is a disproportionate restriction which is not necessary in a democratic society and is therefore in breach of the Constitution.

Consequently, the Constitutional Court found the contested rule in breach of the Constitution and accordingly annulled it.

3. Judgment on the decision amending the Law on the Supreme Administrative Court and Certain Laws (no. E.2016/135, K.2016/129)

> **It is clear that the periods for filing an annulment action specified in the Constitution and the Law no. 6216 have not started running yet by the date when the annulment action was brought. It is therefore impossible to deal with the annulment action which was brought before the proper time and to make the constitutionality review of the provisions in dispute.**

The case concerns the allegation that the Law Amending the Law on the Supreme Administrative Court and Certain Laws dated 1/7/2016 and no. 6723, as a whole, and Articles 1, 12, 17 and 22 thereof which also include the provisions envisaging termination of the membership of the Supreme Administrative Court and the Court of Cassation are in breach of Articles 2, 10, 90, 138, 139, 140, 154 and 155 the Constitution. Accordingly, it has been requested that these provisions be annulled.

In the complaint of petition, it has been maintained in brief that Article 7 of the Constitution sets out that legislative power is vested in the Parliament, and the scope of the powers vested in the Parliament is established in Article 87 thereof; that it is beyond doubt that this process would be completed upon the adoption of the Plenary Assembly; that a law issued by the legislative organ would be valid and exist in the field of law upon being balloted and adopted in the Plenary Assembly of the Parliament; and that the Law no. 6723 became valid upon being adopted on 1/7/2016

and is currently applicable in the field of law. It has been further asserted that the promulgation of or holding a referendum concerning the laws by the President of the Republic is not the condition for *"existence"* of the laws; that the laws enter into force upon being promulgated in the Official Gazette; that the period of sixty days prescribed in Article 151 of the Constitution entitled *"Time limit for annulment actions"* is the "*period of prescription"* which starts running following the promulgation of the law in the Official Gazette; that however, relying on the above-mentioned provision, it cannot be concluded that, for bringing an annulment action as to form or substance of a law, the law concerned is not required to be necessarily promulgated in the Official Gazette; that promulgation of a legislative act in the Official Gazette is a requirement of *"enforcement"*; and that satisfying the *"existence"* requirement is sufficient for bringing an annulment action with respect to the laws, which *"exist"* upon the "*adoption"* of the law by the Plenary Assembly of the Parliament, before the Constitutional Court or for raising a claim of *"nullity"* at the same time, and there is no need to await for satisfying the requirement of *"enforcement"*. It has been also noted that pursuant to Articles 7, 87 and 175 of the Constitution, it is explicit that each act amounting to an amendment to an ordinary law or the Constitution falls within the scope of the authority of the GNAT; that neither the Constitution nor our legal order include a provision prohibiting the judicial review of the laws before enforcement, and that it is therefore possible to request *"nullification of a law created on the basis of an invalid power and objective"* or *"its annulment"* without awaiting for completion of the procedure set out in Article 89 of the Constitution and for promulgation of the law by the President of the Republic (requirement of enforcement). It has been accordingly requested that the Law no. 6723 be declared, as a whole, null and void, or be found, as a whole as to form, in breach of Articles 2, 10, 90, 138, 139, 140, 154 and 155 of the Constitution, or Articles 1, 12, 17 and 22 of this Law be found in breach of the same articles of the Constitution as to their substance.

The Constitutional Court has made the following assessment with respect to the annulment action, in brief:

Article 148 of the Constitution provides for *"... Applications for annulment on the grounds of defect in form shall not be made after ten days have elapsed from the date of promulgation of the law; and it shall not be appealed by other courts to the Constitutional Court on the same ground..."* while Article 151 of the Constitution reads *"The right to apply for annulment directly to the Constitutional Court shall lapse sixty days after promulgation in the Official Gazette of the contested law, the decree-law, or the Rules of Procedure"*.

Furthermore, in Article 37 of the Law on the Establishment and Rules of Procedures of the Constitutional Court no. 6216, which is entitled *"Period for filing an annulment*

action", it is set out *"the right to directly lodge an annulment action with the claim that constitutional amendments and laws are contradictory with the Constitution regarding their form shall foreclose in ten days starting from the day on which these are promulgated in the Official Gazette; and the right to directly lodge an annulment action with the claim that decree-laws and the Rules of Procedure of the Grand National Assembly of Turkey or certain articles and provisions thereof are contradictory regarding their form and substance and the laws regarding their substance only, with the Constitution shall foreclose in sixty days starting from the promulgation of these in the Official Gazette".*

It is beyond doubt that the draft laws and bills of law shall come into existence upon the adoption of the Parliament. In the relevant articles of the Constitution and the Law no. 6216, it is envisaged that the period for filing an annulment action starts running from the date when the impugned law, decree-law or the Rules of Procedure is promulgated in the Official Gazette; and that at the end of the periods prescribed, the right to file an action shall be forfeited.

Following the examination of the file, it has been revealed that an annulment action was filed on 1/7/2016 with the request that the Law no. 6723 be, as a whole, declared null and void or the Law as a whole be annulled as to its from or Articles 1, 12, 17 and 22 of the Law be annulled as to their substance; and that on the date when the action was filed, the Law had not been promulgated in the Official Gazette yet.

It is clear that the periods for filing an annulment action specified in the Constitution and the Law no. 6216 have not started running yet by the date when the annulment action was brought. It is therefore impossible to deal with the annulment action which was brought before the proper time and to make the constitutionality review of the provisions in dispute.

Consequently, the Constitutional Court dismissed the annulment action examination of which was impossible at this stage.

4. Judgment on the legislative immunity (no. E.2016/54, K.2106/157)

> **Making the allegation of unconstitutionality, which may be reviewed within the scope of a remedy clearly prescribed in the Constitution and is subject to special conditions, the subject-matter of the parliamentarians' individual request for annulment pursuant to Article 85 of the Constitution by means of maintaining that the provision requested to be annulled is in the nature of a parliamentary resolution leads to Article 148 of the Constitution to become unreasonable and non-functional.**

The provisional Article 20 §1 which was added to the Constitution of the Republic of Turkey no. 2709 by Article 1 of the Law no. 6718 and which is requested to be annulled sets forth that, as from the date when this article was adopted in the Grand National Assembly of Turkey ("the Parliament"), with regard to the parliamentarians whose case-files concerning the lifting of their legislative immunity have been referred from the bodies authorized to conduct investigations or to grant permission for investigation or prosecution, the chief public prosecutor's offices and the courts to the Ministry of Justice, the Prime Ministry, the Presidency of the Parliament or the Presidency of the Joined Committee consisting of the members of the Constitutional and Justice Commissions; the provision of legislative immunity set out in the first sentence of Article 83 § 2 of the Constitution shall not apply to these case-files.

The second paragraph of the provision requested to be annulled provides for that, within fifteen days as from the date when this article enters into force, the case-files concerning the lifting of legislative immunity which are pending before the Presidency of the Joined Committee consisting of the members of the Constitutional and Justice Commissions, the Presidency of the Parliament, the Prime Ministry or the Ministry of Justice shall be returned to the competent authority for necessary action.

In the petitions of complaint, it has been maintained in brief that the legislative act which is subject to review pursuant to Article 85 of the Constitution does not amount to only a resolution of the parliament; all declarations of intent for lifting legislative immunity may be subject to review within the framework of the above-mentioned article; that even otherwise is acknowledged, the Law which leads to lifting of legislative immunity is in the nature of a parliamentary resolution in substantive respect; and that as the method of secret ballot which is one of the procedures pertaining to the constitutional amendment was not complied with, the Law requested to be annulled is also in the nature of a parliamentary resolution as to its form. It has been further asserted that the relevant provisions of the Constitution and the Internal Regulation which govern the procedure of lifting of legislative immunity were not complied with; that the charges against the relevant parliamentarians are not of serious nature; that the Law was adopted by acting with political motives; that the imputed acts fall within the scope of the parliamentary non-accountability, the freedom of expression, the freedom of association, the freedom to engage in political activities, the freedom of assembly and the right to hold demonstration marches; that the parliamentarians concerned were not vested with the right to defence; that as the parliamentarians who perform the same acts following the date when the Law was adopted or who have not been yet subject to investigations at this date would continue availing themselves of the legislative immunity, this Law

has led to inequality and discrimination among the parliamentarians; and that it has been thereby precluded that the requests for lifting of the immunity be discussed on individual basis and concluded separately. It has been accordingly alleged that the Law contravenes Articles 2, 10, 13, 15, 19, 25, 26, 27, 67 and 83 of the Constitution.

The Constitutional Court has made the following assessments with respect to the provisions requested to be annulled, in brief:

Article 85 of the Constitution reads as follows: "*If the legislative immunity of a parliamentarian has been lifted or if the loss of membership has been decided according to the first, third or fourth paragraphs of Article 84, the parliamentarian in question or another parliamentarian may, within seven days from the date of the decision of the Plenary, appeal to the Constitutional Court, for the decision to be annulled on the grounds that it is contrary to the Constitution, law or the Rules of Procedure. The Constitutional Court shall render the final decision on the appeal within fifteen days*".

Article 148 § 1 of the Constitution provides for *"The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decree-laws and the Rules of Procedure of the Grand National Assembly of Turkey... Constitutional amendments shall be examined and verified only with regard to their form...".* In the second paragraph, it is set out *"The verification of laws as to form shall be restricted to consideration of whether the requisite majority was obtained in the last ballot; the verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed. Verification as to form may be requested by the President of the Republic or by one-fifth of the members of the Grand National Assembly of Turkey..."*.

Having regard to Articles 83 and 84 of the Constitution which respectively set out the legislative immunity and loss of membership, there is no hesitation that the resolutions of the Parliament on the lifting of the legislative immunity and loss of membership, which are specified in Article 85 of the Constitution, are individually a parliamentary resolution with regard to their legal nature. It is acknowledged in the Constitution that out of the parliamentary resolutions taken by the Parliament which constitute the parliamentary acts other than the law, an application may be lodged with the Constitutional Court for the annulment of only the Rules of Procedure of the Parliament and the resolutions concerning the lifting of legislative immunity and loss of membership.

Although it is required for making an examination pursuant to Article 85 of the Constitution that there be a parliamentary resolution concerning the lifting of legislative immunity, the provision requested to be annulled is a Law which was adopted at the end of the legislative process starting with the "Bill of Law on Making Amendment to the Constitution of the Republic of Turkey" signed by 314 parliamentarians and submitted to the Presidency of the Parliament on 12/4/2016. The process starting upon the "Bill" is a "special" process prescribed in Article 175 of the Constitution entitled "Amendment to the Constitution, participation to elections and referenda". This process has particular procedural conditions with respect to bill, ballot, adoption and entry into force, and special legal consequences have been associated with the Assembly's will appearing at the end of this process. In this respect, it is not possible to review the adopted law amending the constitution under substantive aspect. With regard to its form, the law may be subject to review within the framework set by Article 148 of the Constitution. Pursuant to this provision, the review of laws as to form shall be restricted to issues as to whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed.

Review of the laws amending the constitution as to its form may be requested by the President of the Republic or by one-fifth of the members of the Parliament within ten days following the date when the law is promulgated in the Official Gazette. It is clear that these conditions have not been satisfied in the present requests for annulment.

A law amending the constitution may be subject to the review of the Constitutional Court only upon an annulment action brought pursuant to Article 148 § 2 of the Constitution. However, it is not possible to review this law within the framework of Article 85 of the Constitution. The breaches as to form alleged to have taken place in the course of the adoption of the law amending the constitution may only constitute the subject-matter of the annulment action which is duly brought in accordance with Article 148 of the Constitution.

Making the allegation of unconstitutionality, which may be reviewed within the scope of a remedy clearly prescribed in the Constitution and is subject to special conditions, the subject-matter of the parliamentarians' individual request for annulment pursuant to Article 85 of the Constitution by means of maintaining that the provision requested to be annulled is in the nature of a parliamentary resolution leads to Article 148 of the Constitution to become unreasonable and non-functional.

Consequently, the Constitutional Court dismissed the requests for annulment thereof.

5. Judgments on the judicial review of the state of emergency decree-laws (no. E.2016/166. K.2016/159; E.2016/167, K.2016/160)

The allegation that the state of emergency decree laws include unconstitutional provisions is not sufficient to make them subject to constitutionality review. In order for the Constitutional Court to examine such decree laws, a constitutional authority in respect thereof must be vested clearly. Having regard to the wording of Article 148 of the Constitution, the aim of constitutional-maker and the relevant legislation documents, it is clear that the state of emergency decree laws cannot, under any name, be subject to judicial review. A judicial review to be made despite the aforementioned provision, does not comply with Article 11 of the Constitution where the binding nature and superiority of the Constitution is enshrined or Article 6 of the Constitution concerning that nobody or no organ can use State authority that does not emanate from the Constitution.

The impugned rules concern certain provisions of the State of Emergency Decree-Laws nos. 668 and 669.

In the petition of complaint, it has been maintained in brief that the actions envisaged to be taken with the state of emergency decree laws ("the Decree") must be in the function of a *"measure"*; that the measure is temporary in terms of its nature; that although the ground and aim of the declared state of emergency was to efficiently and rapidly restore the public order disturbed by the coup attempt, the impugned provisions go beyond this aim by envisaging regulations for the organization of some institutions and organizations and make changes in the ordinary laws which would still remain in effect after the end of the state of emergency; that therefore the impugned provisions cannot be qualified as decree laws enacted in respect of matters necessitated by the state of emergency and are subject to judicial review. It has been accordingly argued that the mentioned provisions are in breach of the preamble part of and Articles 2, 6, 7, 8, 11, 91 and 121 of the Constitution.

The Constitutional Court has made the following assessments with respect to the impugned provisions, in brief:

As it is clearly enshrined in Article 148 of the Constitution in which the duties and powers of the Constitutional Court are regulated that the state of emergency

decree laws cannot be brought before the Constitutional Court for their alleged unconstitutionality in terms of form and substance, it is obvious that the Constitutional Court is not invested with any authorization by the Constitution for making the aforementioned regulations subject to judicial review under any name.

There is no doubt that the Constitutional Court has the discretion to qualify the nature of the rule brought before it. In this framework qualification can be made according to the material criterion based on the content of an action or according to the formal-organic criterion based on the organ performing the action and the procedures resorted. Irrespective of criterion to be taken as a basis, the qualification made must not result in going beyond the framework drawn by the Constitution; in other words in making the Decrees subject to a constitutionality review in terms of form and substance.

Taking the material criterion as a basis in its previous case-law developed on this matter, the Constitutional Court examined the state of emergency decree law in terms of time, place and subject in order to determine whether it is indeed a Decree specified in Article 121 of the Constitution. The Court has noted in its case-law specified in its judgment unanimously rendered on 10/1/1991 and numbered E.1990/25, K.1991/1 and maintained its case-law in the judgments numbered E.1991/6, K.1991/20, E.1992/30, K.1992/36 and E.2003/28, K.2003/42 that it is obligatory to examine whether the regulations made under the name of "the state of emergency decree laws" are in the nature of decree laws passed under state of emergency which are specified in the Constitution and are not made subject to the constitutionality review and to review the constitutionality of those regulations which are not regarded to be of such nature. The Court has accordingly set out the criteria of place, time and subject-matter for mentioning of a decree law passed under state of emergency. Within the scope of these criteria, the Constitutional Court does not qualify the regulations, which are not concerning the matter necessitated by the declaration of state of emergency or which would be in effect except for the place or period of time where and when state of emergency prevails, as the state of emergency decree laws and makes them subject to judicial review upon reaching the conclusion that they are decree laws passed in the course of an ordinary period.

The Constitutional Court's examination made on the basis of the criterion of place, time and subject-matter in order to establish whether the regulations made as the decree laws passed under state of emergency are indeed of this nature requires the content of the provisions specified in decree laws to be assessed. Such an assessment

would result in a constitutionality review of these provisions in terms of substance. As a matter of fact, in the judgment rendered by a majority vote in 2003, the allegation that the provision in Article 7 of the Decree no. 285 dated 10.7.1987 reformulated by the Decree no.425 *"no actions for annulment of the administrative actions related to the authorities vested in regional governors with this Decree can be filed."* does not comply with Article 125 of the Constitution has been dealt with. Although the Constitutional Court rejected, with its judgment numbered K.1991/1, the request for annulment by stating that the relevant provision was a provision of the state of emergency decree law and therefore was not subject to judicial review, the Court noted in its judgment of 2003 numbered K.2003/42 that the it was not a state of emergency Decree but an ordinary one for being contrary to Article 125 of the Constitution and made the same provision subject to judicial review. Accordingly, the Constitutional Court annulled the aforementioned provision for being in breach of Article 91 of the Constitution as there was no empowering law. This approach renders the prohibition of review in terms of form and substance set out in Article 148 of the Constitution completely unreasonable and ineffective because if the judicial review of the state of emergency decree laws was possible, the Constitutional Court would have conducted the same examination and annulled the provision finding it in breach of Article 125 of the Constitution. With this kind of an approach, it is possible to exclude every provision with the nature of a state of emergency decree law out of this scope.

The allegation that the state of emergency decree laws include unconstitutional provisions is not sufficient to make them subject to constitutionality review.In order for the Constitutional Court to examine such decree laws, a constitutional authority in respect thereof must be vested clearly. Having regard to the wording of Article 148 of the Constitution, the aim of constitutional-maker and the relevant legislation documents, it is clear that state of emergency decree laws cannot, under any name, be subject to judicial review. A judicial review to be made despite the aforementioned provision, does not comply with Article 11 of the Constitution where the binding nature and superiority of the Constitution is enshrined or Article 6 of the Constitution concerning that nobody or no organ can use State authority that does not emanate from the Constitution.

Upon the declaration of the state of emergency and after this decision was ratified by the Parliament, the Council of Ministers convened under the chairmanship of the President and enacted the decree laws nos. 668 and 669 on 25.7.2016, which would prevail throughout the country. These decree-laws were promulgated in the Official Gazettes dated 27.7.2016 and numbered 29783 (2nd Duplicate) and dated 31.7.2016

and numbered 29787 and were submitted to the approval of the Parliament on their promulgation days. Therefore, the decree laws that include the impugned provisions are decree laws passed under state of emergency by invoking Article 121 of the Constitution. It is not possible to proceed on the examination as to the merits of the impugned provisions included in the decree law that were enacted according to Article 121 of the Constitution, and to make them subject to judicial review due to the provision "*…decree laws issued during a state of emergency, martial law or in time of war cannot be brought before the Constitutional Court alleging their unconstitutionality as to form or substance…*" enshrined in the third sentence of Article 148 § 1 of the Constitution.

Consequently, the Constitutional Court decided to dismiss the request for the annulment of the impugned provisions for lack of jurisdiction.

6. Judgments on the provisions envisaging the formation of a new administrative body under the name of the Board of Trustees for the University of Health Sciences and regulating the structure of this body (no. E.2015/61, K.2016/172)

In Article 130 § 9 of the Constitution, the power to determine the bodies of the higher education institutions is vested in the legislator. The Legislator may determine the administrative bodies of the higher education institutions depending on the relevant provisions of the Constitution. There is no constitutional rule which restrains the legislator in this respect.

a- Formation of a new administrative body under the name of the Board of Trustees for the University of Health Sciences

The impugned provision concerns the formation of a new administrative body under the name of the Board of Trustees for the University of Health Sciences, as well as the other bodies specified in the Law no. 2547.

In the petition of complaint, it has been maintained in brief that envisaging an administrative body under the name of the Board of Trustees consisting of members majority of whom are determined by the central administration for the University of Health Sciences removes the academic autonomy of the University; that through

this Board, the Ministry of Health is vested with the power to control the University indirectly; and that as the Constitution allows for making special arrangements limited to the higher education institutions affiliated to the Turkish Armed Forces and the security organization, it is not possible to assign a special status to the University of Health Sciences in comparison with the other State universities. It has been accordingly argued that this provision is in breach of Articles 130 and 132 of the Constitution.

The Constitutional Court has made the following assessments with respect to the impugned provision, in brief:

In Article 130 § 9 of the Constitution, the power to determine the bodies of the higher education institutions is vested in the legislator. The Legislator may determine the administrative bodies of the higher education institutions depending on the relevant provisions of the Constitution. There is no constitutional rule which restrains the legislator in this respect. Therefore, an organization different than those of the other state universities may be envisaged in respect of the University of Health Institution. In this respect, envisaging an administrative body, with the impugned provision, under the name of the *"Board of Trustees"* for the University of Health Sciences in addition to the bodies specified in the Law no. 2547 falls within the scope of the discretionary power of the legislator for the determination of the bodies of the higher education institutions. Therefore, the provision is, under no aspect, in breach of Article 130 of the Constitution.

In Article 132 of the Constitution, it is set out that the higher education institutions affiliated to the Turkish Armed Forces and the security organization shall be subject to the provisions of their special laws. It is thereby enabled that given particular circumstances of these institutions, the higher education institutions to be established by these organizations are subject to a legal regime different than that of the other universities.

Forming of a new administrative body, by the impugned provision, under the name of the Board of Trustees for the University of Health Sciences does not mean that this university is assigned with a special status. Indeed, the University of Health Sciences is subject to the rules specified with respect to the higher education institutions in Articles 130 and 131 of the Constitution, just as the other State universities. It is also subject to the Law no. 2547 which governs the organization, functioning, duties, powers and responsibilities of the higher education institutions, except for the provisions specified in the code of establishment.

Consequently, the Constitutional Court did not find the impugned provision in breach of the Constitution and dismissed the request for annulment thereof.

b- Judgment on the Structure of the Board of Trustees

In the impugned provision, it is set forth that the Board of Trustees of the University of Health Sciences shall consist of a total of five members who are the Undersecretary of the Minister of Health, the Rector, two members to be appointed by the Minister of Health and one professor to be appointed by the Board of Higher Education ("the YÖK").

In the petition of complaint, it has been argued in brief that the fact that three members of the Board of Trustees which is envisaged as the administrative body of the University of Health Sciences shall comprise of the Undersecretary of the Ministry of Health and two persons to be appointed by the Minister of Health would lead the University to be under the control of the Minister of Health; that this situation is not compatible with the autonomous nature of the university. It has been accordingly alleged that these provisions contravene Articles 130 and 132 of the Constitution.

The Constitutional Court has made the following assessments with respect to the impugned provisions, in brief:

Academic autonomy is a condition *sine qua non* for carrying out scientific studies at the universities and means that academicians have the opportunity to provide education, training and to conduct researches and make publications only within the framework of the scientific criteria and codes of ethics without being subject to the pressure or guidance of economically and politically exposed persons and institutions and without feeling compelled to reach conclusions in line with the opinions and acknowledgements prevailing among the society. The academic autonomy of the universities requires that administrative authority be exercised freely while planning, holding and performing the educational activities, researches, publications and similar activities which are carried out at the universities and that the decisions concerning the use of university resources for the activities in question be taken freely by the administrative bodies of the university.

In Article 130 § 1 of the Constitution, universities are defined as public legal entities having academic autonomy, and it is set out that universities shall be established only by the State and by law. It is beyond doubt that the aim pursued in this provision is to prevent the political circles especially the ruling parties and different pressure groups from placing influence on the university studies and on education and training and to ensure that these studies be maintained in an environment which is free from any external influence other than the scientific requirements.

Academic autonomy, as well as the administrative and financial autonomy, constitutes parts of a whole which is *sine qua non* for the autonomy of the universities. Interference in any of these elements would lead the other elements to be adversely affected. In this respect, structuring of the administrative bodies of the universities in a manner which would allow for the interference of the central administration; in other words, the universities' being administered by persons directly appointed by the central administration, would also directly affect the academic autonomy of these institutions. This is because, with a view to providing education and training and carrying out researches and publications within the framework of scientific criteria and codes of ethics, the academicians are to have an environment which would be free from all external influences.

Academic autonomy, as well as the administrative and financial autonomy, constitutes parts of a whole which is *sine qua non* for the autonomy of the universities. Interference in any of these elements would lead the other elements to be adversely affected. In this respect, structuring of the administrative bodies of the universities in a manner which would allow for the interference of the central administration; in other words, the universities' being administered by persons directly appointed by the central administration, would also directly affect academic autonomy of these institutions. This is because, with a view to providing education and training and carrying out researches and publications within the framework of scientific criteria and codes of ethics, the academicians are to have an environment which would be free from all external influences.

Given the current powers of the Board of Trustees concerning the university administration and the fact that the Board of Trustees convenes in the presence of minimum four members and may take a decision by absolute majority, it is explicit that as the majority of the board members consists of the Undersecretary of the Ministry of Health and two members to be appointed by the Minister of Health, the central administration would be granted, through the Board of Trustees, decisive power in taking decisions concerning the university administration. Vesting power, which is in excess of the supervisory and monitoring powers over the university, in the central administration contravenes the principle of academic autonomy guaranteed in Article 130 of the Constitution.

Consequently, the Constitutional Court found the impugned provision in breach of the Constitution and accordingly annulled it.

7. Judgment on the provision regulating the positions to which the public officers who are serving as directors in certain institutions may be appointed in case of his/her being relieved of his/her duty or expiration of his/her term of office (no. E.2015/61, K.2016/172)

> **On condition of not being in breach of the constitutional provisions, an arrangement may be made by the legislator in the matters concerning the procedures in which the public officers are appointed to administrative cadres or positions or they are relieved of such duties and subsequently appointed to another cadre and concerning the scope of duration of the task.**

The impugned provision lists the cadres to which the public officers who serve as a director in the Prime Ministry, the Ministries, the affiliated and relevant institutions thereof, and the regulatory and supervisory authorities and the Savings Deposit Insurance Fund except for their presidents and members, may be appointed, regardless of the personnel law to which they are affiliated, except for the Labour Law no. 4857 and the Military Personnel Act no. 926, in case of being relieved of their duties or expiration of their term of office.

In the petition of complaint, it has been argued in brief that the personnel regime based on the principle of merit/ability has been caused to turn into a pillaging system due to this provision; that this provision makes it possible that the public officers in the administrative position, who have been relieved of their duties or whose terms of office have expired, be appointed to positions in the status lower than their current positions according to their additional indicator; and that therefore, acquired rights and legitimate expectations of these public officers are remained unprotected. It has been further maintained that the guarantee that public services must be provided in an impartial manner, in a way equal to all citizens and in accordance with the laws and public interest has been removed; and that the right to bring an action against the decision of appointment before the administrative courts has been restricted. It has been accordingly alleged that this provision contravenes Articles 2, 5, 36, 70, 125 and 128 of the Constitution.

The Constitutional Court has made the following assessments with respect to the impugned provision, in brief:

The relation with the public officers and the administration is established by the

legislative power, according to the requirements of the service, in law. On condition of being bound by the constitutional principles, the legislator may freely decide to determine the qualifications and conditions required by a task or to change the previously determined ones according to the requirements of the relevant task. In this framework, on condition of not being in breach of the constitutional provisions, an arrangement may be made by the legislator in the matters concerning the procedures in which the public officers are appointed to administrative cadres or positions or they are relieved of such duties and subsequently appointed to another cadre and concerning the scope of duration of the task.

The public officers' acquired rights are the rights which have been accrued and become final and turned into a personal claim depending on the type of employment. Turning of an objective and general legal status into a special legal status through an administrative act is not sufficient for an acquired right. Regulatory acts may be changed at any time or annulled by the judicial organ for being unconstitutional or unlawful. Prudential, expected rights in respect of a status cannot be considered to fall into scope of the acquired rights.

In the Law no. 657, there is no principle envisaging the positions to which public officers, who have been relieved of their duties or whose terms of office have expired while serving in the administrative cadre or position, would be appointed. This situation may give rise to different practices among the administrations with respect to the position to which the public officer who has been relieved of his/her duty or whose term of office has expired. This gap was eliminated by the provision in dispute. Accordingly, the cadres to which the public officers who serve as a director in the Prime Ministry, the Ministries, the affiliated and relevant institutions, and the regulatory and supervisory authorities and the Savings Deposit Insurance Fund except for their presidents and members, may be appointed, are set out in detail. Thereby, the cadres to which the public officers who have been relieved of their duties or whose terms of office have expired while serving in the administrative cadre or position, would be appointed are determined in advance. Accordingly, the ambiguity with respect to the cadres to which such persons may be appointed has been eliminated, and different practices among the public institutions have been precluded.

There is no obligation, on the part of the administration, to employ the persons who have been appointed to administrative cadres or positions in these cadres throughout their professional life. Therefore, it is not possible to mention that the persons appointed to the administrative cadres or positions have any rights which arise out of the status which these persons hold, which have been accrued or become

final and turned into a personal claim in respect of these persons or any justified expectation that this status would continue. Accordingly, the impugned provision setting out the cadres to which the public officers whose terms of office have expired or who have been relieved of their duties while serving in the administrative cadre or position is, under no aspect, in breach of the acquired right or, in general terms, of the principle of legal security.

The impugned provision does not set out that the public officers serving in the administrative cadre or position shall be deemed to have been appointed to the cadres specified in the impugned provisions but envisages the positions to which such officers would be appointed in case of being relieved of their duties through an administrative act or expiration of their terms of office. Therefore, the impugned provision cannot be directly implemented, and this provision is applied only after the administration takes an administrative action against the public officers. As the individuals may have recourse to judicial authorities in respect of the administrative acts at stake as is, in principle, in respect of all administrative acts pursuant to Article 125 of the Constitution, this provision does not, under any aspect, impair the right to legal remedies.

Consequently, the Constitutional Court did not find the impugned provision in breach of the Constitution and accordingly dismissed the request for annulment thereof.

8. Judgment on the provision setting out the offence of insulting the President of the Republic (no. E. 2016/25, 2016/186)

> **By this provision, it is aimed to prevent and punish the attacks towards the dignity of the State through the President of the Republic, who is the Head of and represents the State. In this respect, there is no contradiction with the principles of the state of law and of equality in respect of the legislator for distinguishing the offence of insulting the President of the Republic from the other offences of insult and making a special legal arrangement in respect thereof by taking into consideration the legal interest aimed to be protected with the impugned provision, the nature of offence and the outcome to take place.**

The first paragraph of the impugned provision provides for that anyone insulting the President of the Republic shall be sentenced to imprisonment for a term from one year to four years. The second paragraph thereof sets out that in cases when

this offence is committed publicly, the sentence to be imposed shall be increased by one sixth. The third paragraph envisages that the prosecution to be conducted on account of this offence shall depend on the permission of the Minister of Justice.

In the applications lodged with the Constitutional Court, it has been maintained in brief that the sentence which is envisaged for the offence of insulting the President of the Republic is severer than the sentence which is generally set forth and envisaged for the offences of insulting the public officers; that although there must be a single legal arrangement with respect to the offences of insult towards the public officers, making different arrangement is in breach of the principle of equality. It has been further asserted that the provision does not clearly set out whether the general principles with respect to the offence of insult would be applied or not; that in a state of law, it is not possible to form a type of offence specific to a position; that existence of law which provides a special safeguard for the head of the State is in breach of the European Convention on Human Rights; and that *"the right to prove"*, which is set out in the Constitution without any exceptions, is not set forth with respect to the offence of insulting the President of the Republic. It has been accordingly alleged that the impugned provision is in breach of Articles 2, 10 and 39 of the Constitution.

The Constitutional Court has made the following assessments with respect to the impugned provision, in brief:

Given the fact that the President of the Republic represents the unity of the Republic of Turkey and the Turkish Nation as the Head of the State, his powers and duties enshrined in the Constitution and the values represented by him, it is acknowledged that the offence of insulting the President of the Republic is not only committed towards his own personality but also contravenes the values and functions represented by the President. Taking into account these issues and considering that the act committed towards the personality of the President must be deemed, at the same time, to be one of the offences committed towards the State, the legislator distinguished this offence - even if committed towards the personality of the President - from the offence of insulting the public officers and formulated it as a separate offence. Accordingly, the offence of insulting the President of the Republic is not set forth in the part of the Turkish Criminal Code no. 5237 ("the TCC") entitled "Offences against Dignity" but in the third section entitled "Offences against the Symbols of State Sovereignty and the Reputation of its Organs" of the forth chapter entitled "Offences against the Nation and the State and Final Provisions". This preference of the legislator falls within

the scope of its discretionary power in determining to which types and amounts of criminal sanctions the acts defined as an offence would be subject.

By this provision, it is aimed to prevent and punish the attacks towards the dignity of the State through the President of the Republic, who is the Head of and represents the State. In this respect, there is no contradiction with the principles of the state of law and of equality in respect of the legislator for distinguishing the offence of insulting the President of the Republic from the other offences of insult and making a special legal arrangement in respect thereof by taking into consideration the legal interest aimed to be protected with the impugned provision, the nature of offence and the outcome to take place. Furthermore, it cannot be concluded that the impugned provision is ambiguous on the ground that the criminal act, the lower and upper limits of the sentence to be imposed, the circumstances when there would be an increase in the sentence, rates of the increase are clearly specified therein.

Moreover, the impugned provision is necessary for attaining the aim pursued in its arrangement, and the sentence envisaged for this offence is practicable and proportionate to attain this aim given the legal interest protected. The rate of increase to be made in the sentence, in case when the offence prescribed in the provision is committed publicly, is efficient and proportionate for the prevention of the offence. In addition, in determination of the basic sentence, the judge may take into account the factors listed in Article 61 of the TCC such as the manner in which the offence was committed, the means used to commit the offence, the time and place when and where the offence was committed, the significance and value of the subject of the offence, the gravity of damage or danger and etc., and thereby the sentence may

In principle, the freedom of expression mainly aims at guaranteeing the freedom of criticism. Therefore, severe nature of the expressions used while disclosing and disseminating thoughts must be considered natural. It is known that the acceptable limits of criticisms towards the persons exercising public power are broader than the limits of criticisms towards the other persons. However, even if towards the public officers, the criticisms must not reach the defamatory level which would impair the individuals' honour and reputation. The fact that those providing public service must be more tolerant than the other individuals does not mean that their "reputation or rights" would remain unprotected.

be individualized. Furthermore, the sentence imposed may be converted into a fine, delayed or pronouncement of the judgment may be suspended.

On the other hand, the freedom of expression is a constitutional right envisaged for everyone and constitutes one of the main elements forming the basis of a democratic society and one of the fundamental conditions necessary for the progress of the society and improvement of the individual. The freedom of expression enshrined in Article 26 of the Constitution also encompasses the expression of critical thoughts. In principle, the freedom of expression mainly aims at guaranteeing the freedom of criticism. Therefore, severe nature of the expressions used while disclosing and disseminating thoughts must be considered natural. It is known that the acceptable limits of criticisms towards the persons exercising public power are broader than the limits of criticisms towards the other persons. However, even if towards the public officers, the criticisms must not reach the defamatory level which would impair the individuals' honour and reputation. The fact that those providing public service must be more tolerant than the other individuals does not mean that their "reputation or rights" would remain unprotected. The freedom of expression does not provide the individuals with the right to defame others because the act of defamation amounts to an attack against the other individuals' reputation or dignity. Such an act is not protected by any legal order.

Although the impugned provision imposes a restriction on the freedom of expression, this restriction has been introduced with a view to protecting the others' reputation or rights and ensuring the protection of public order and falls within the scope of the measures required to be taken in a democratic society. The provision in dispute does not pose an obstacle for the individuals to disclose their thoughts and convictions on condition of not impairing the others' reputation or rights. Therefore, the restriction introduced with the impugned provision is not of a nature which precludes the proper enjoyment of the freedom of expression or which renders it dysfunctional.

Consequently, the Constitutional Court has found the impugned provision not in breach of the Constitution and decided to dismiss the requests for annulment thereof.

9. Judgment on the provision excluding incomes of the personal property from the property acquired during the union of marriage (no. E. 2016/36, K. 2016/187)

The regime of participation in acquired properties is a legal property regime which would be applicable when the spouses have not preferred one of the property regimes specified in the Law no. 4721 by means of making an agreement for property regime. Within the framework of the importance attached by the legislator to the union of marriage, the legislator has made a choice within the scope of its discretionary power with a view to preventing occurrence of a legal gap in cases when the spouses have not determined the property regime and has considered incomes of personal properties as acquired property in case of termination of the regime of participation in acquired properties which would be applicable in such a case. Furthermore, the legislator has enabled the spouses to alter the legal property regime in question by means of adopting another property regime through an agreement for property regime before and/or during their marriage and, as explicitly specified in Article 221 of the Law, to agree that incomes of personal properties would not be included in the acquired properties while the regime of acquired property is in force. Having regard to all these arrangements as a whole, it is explicit that the interference in the right to property is reasonable and acceptable.

In the impugned provision, incomes of personal properties are considered to be acquired property in the regime of participation in acquired property.

In the application lodged with the Constitutional Court, it has been maintained in brief that in the Law no. 4721, the legal property regime is envisaged to be the regime of participation in acquired property, and unless otherwise specified in an agreement, this property regime would be applied between the parties; that the personal properties are listed in limited number and in a very restricted manner in the Law; and that the provision, which envisages that incomes of the personal properties listed in a highly restricted manner would be made subject to participation claim, amounts to an interference in the right to property without a reasonable ground. It has been further asserted that private ownership is almost abandoned between the

spouses, and common understanding prevailing in the socialist countries is adopted; and that granting such a financial right to the other spouse would hinder civil marriages. It has been accordingly argued that for these reasons, the provision setting out that incomes of personal properties are also considered, without existence of a reasonable and acceptable ground, to be acquired properties contravenes Articles 2 and 35 of the Constitution.

The Constitutional Court has made the following assessments with respect to the impugned provision, in brief:

The provision was also examined under Articles 13 and 41 of the Constitution for being related thereto.

It is clear that a single property regime which would be envisaged to be the legal property regime would fail to satisfy needs of all family types as the society is comprised of individuals whose world-views, opinions as to marriage and monetary issues, expectations from marriage, needs and wishes are completely different from each other and of different types of families formed by these individuals.

Accordingly, the legislator established different property regimes such as *"separation of property"*, *"shared separation of property"* and *"community of property"* according to different expectations. Spouses may prefer one of the property regimes specified in the Law before or after getting married by means of making a property regime agreement, may revoke or alter this agreement. In this respect, it is sufficient for the spouses to make a property regime agreement in a notary office pursuant to Article 205 of the Law or to make the written agreement concluded by and between them notarized.

Unless otherwise agreed, with a view to preventing a legal gap to occur with regard to financial relations between the spouses, the legislator has adopted the "regime of participation in acquired properties" as the legal property regime in Article 202 of the Law. As per Article 218 of the Law, the regime of participation in acquired properties contains the acquired properties and personal properties of each of the spouses. In another words, all asset values in the legal property regime are either personal property or acquired property. Any third group of property does not exist in this regime. In principle, this regime is based on the principle that during the continuation of the property regime, the spouses' assets are independent and separate from each other and that the properties acquired following marriage would be shared between the spouses, as is the case with the regime of separation of properties. When the

regime of acquired property ends, all properties acquired by the spouses during the property regime are considered to be acquired property, except for those accepted as personal properties, and subject to division in half.

In the article including the impugned provision, it is specified that the acquired property is asset values which are acquired by each spouse during the continuation of this property regime by means of making payment and acquired goods are listed therein. The provision in dispute sets out that incomes of the personal properties would be accepted as the acquired properties in the regime of acquired property. In Article 220 of the Law no. 4721, personal properties are listed as the material which is for the personal use of only one of the spouses, the asset values which belong to one of the spouses at the beginning of the property regime or which are subsequently acquired by one spouse by inheritance or in any other means through acquisition free of charge, non-pecuniary damage claims and values substituting for personal properties. In pursuance of Article 685 of the Law no. 4721, an owner of a property is the owner of the yields of this property. In this sense, the yield means natural or legal outputs acquired periodically and other returns acquisition of which are deemed appropriate by virtue of custom according to the aim allocated to the property. Incomes of the personal properties which are gained by the spouses during the property regime in this way shall be accepted as acquired property and shall be accordingly subject to division in half between the spouses.

It has been revealed that the provision interferes in the right to property by means of according a right, in half, to the other spouse over the incomes of personal properties gained throughout the marriage. Although there is interference in this right due to this provision for setting out that incomes of personal properties would be divided between the spouses, this interference does not impair the very essence of the right as the owner's right to property over the incomes of his/her personal properties as it is not completely eliminated in legal terms. Therefore, what must be assessed is whether this interference is based on a legitimate aim and whether the restriction is compatible with the requirements of a democratic society and the principle of proportionality.

It is explicit that the impugned provision has been formulated for public interest with a view to protecting the family especially the women by means of allowing for joint division of incomes acquired from personal properties throughout the marriage given the other spouse's contribution in and support for the values acquired by the spouse after the marriage. It has been also observed that the provision provides for

a fair and balanced system for attaining the aim that the spouses would cover the expenses of the union of marriage, which is jointly steered by the spouses, with their labour and assets in proportion to their capacity. Therefore, it cannot be concluded that the interference in the right to property due to this provision does not pursue a legitimate aim.

On the other hand, the regime of participation in acquired properties is a legal property regime which would be applicable when the spouses have not preferred one of the property regimes specified in the Law no. 4721 by means of making an agreement for property regime. Within the framework of the importance attached by the legislator to the union of marriage, the legislator has made a choice within the scope of its discretionary power with a view to preventing occurrence of a legal gap in cases when the spouses have not determined the property regime and has considered incomes of personal properties as acquired property in case of termination of the regime of participation in acquired properties which would be applicable in such a case. Furthermore, the legislator has enabled the spouses to alter the legal property regime in question by means of adopting another property regime through an agreement for property regime before and/or during their marriage and, as explicitly specified in Article 221 of the Law, to agree that incomes of personal properties would not be included in the acquired properties while the regime of acquired property is in force. Having regard to all these arrangements as a whole, it is explicit that the interference in the right to property is reasonable and acceptable. Therefore, this provision does not, in any aspect, contradict the requirements of a democratic society and the principle of proportionality.

Consequently, the Constitutional Court has found the impugned provision not in breach of the Constitution and dismissed the request for annulment thereof.

B. LEADING JUDGMENTS RENDERED IN THE INDIVIDUAL APPLICATION PROCESS

1. JUDGMENTS ON THE MERITS

a. JUDGMENT ON THE VIOLATION OF THE PRINCIPLE OF EQUALITY (PROHIBITION OF DISCRIMINATION)

aa. Judgment on the violation of the principle of equality (prohibition of discrimination) due to rejecting the request of reinstatement due to being a member of a trade union Judgment of Remezan ORAK and Others Judgement (App. No. 2013/2229)

> **Consequently, it has been inferred that subjecting the applicants to a different treatment while making an assessment with respect to their request for reinstatement by taking into consideration the trade union of which they are members does not pursue "a legitimate aim".**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 3/2/2016, the service contracts of the applicants were suspended by the Municipality, which was the employer, for the applicants' taking part in the management of a trade union while working as a worker. The applicants requested to be re-employed upon termination of their tasks in the trade union. The Municipality decided to terminate the applicants' service contracts by means of paying their severance allowance. The applicants filed a case by maintaining that the termination of their service contract had been unfair; that their service contracts had been terminated for trade-union grounds; and that the other trade-union members in the same status with them had been re-employed. In the letter submitted by the Municipality to the Court, it is noted that there were two persons alleged to be in the same position and re-employed upon the end of their office in the management of the trade union in 2011. The court rejected the requests of the applicants. The decisions were upheld by the Court of Cassation.

The applicants stated that although they had requested to be reinstated upon the termination of their office in the trade union, their contracts had been terminated for trade-union grounds. They also maintained that the dismissal of the cases filed

by them in spite of a letter of termination by the first instance court as that there was no termination performed by the employer and the fact that their allegations concerning the re-employment of the other persons who were members of another trade union and were in the same position with them were not accepted to be a ground for a breach of equality by the inferior courts constituted a violation of their rights to a fair trial and to employment.

In brief, the Constitutional Court made the following assessments within the scope of the allegations:

Democracy will be reinforced in a social understanding in which the differences are perceived not as a threat but as a resource for enrichment. The assessment of the request for reinstatement according to the trade union of which the relevant persons are members is not acceptable in contemporary democratic societies. It is possible to accept that after having assessed the requests for reinstatement, the employer may reach a conclusion which excludes certain trade-union members for reasons other than being a member of a trade union and that such a conclusion reached may not be regarded as discrimination. However, such assessments must depend on objective criteria and concrete grounds.

While the service contracts of the applicants who had requested to be reinstated were terminated, the persons who had been members of another trade union and in the same position were reinstated. There is no explanation and assessment indicating that such choice of the employer depends on objective criteria and grounds other than the membership of different trade unions. Although the applicants' allegations of discrimination were set forth during the proceedings, the cases were concluded without this issue being dealt with.

Consequently, it has been inferred that subjecting the applicants to a different treatment while making an assessment with respect to their request for reinstatement by taking into consideration the trade union of which they are members does not pursue "a legitimate aim".

Therefore, it has been held that there was a breach of the principle of equality (the prohibition of discrimination) guaranteed in Article 10 of the Constitution.

b. JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO LIFE

ba. Judgment on the violation of the procedural aspect of the right to life due to finding of deficiencies that weaken the possibility of the detection of the reason of death and identifying those who are responsible if any.

Doğan DEMİRHAN Judgment (App. No: 2013/3908)

> **In this way, by not taking all reasonable measures to collect the evidence, it is understood that there are some deficiencies that weaken and have a profound impact on the depth and seriousness on the possibility of the detection of the reason of death and if available of the responsible persons and that the procedural aspect of the right to life was violated because of the deficiencies mentioned above and not conducting a sufficient investigation.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 6/1/2016, E.D., the son of the applicant who worked at his uncle's scrap shop and lived above it with his cousin (Y.Ç.) the son of his uncle, was found dead in the bureau part on the day of the incident due to a single gun bullet hitting his right temple area. In the investigation launched by the Chief Public Prosecutor's Office, gunshot residue was found on the hand of the suspect Y.Ç. staying at the same place with E.D.. The applicant declared to the investigating authorities that there was no reason for his son to commit suicide, the testimonies of the suspect are contradictory, despite after the incident on the hand of one of the suspects gunshot residue was found the suspect should testify again about this matter and the incident, as his son was left-handed his suicide according to the examination of corpse and the autopsy was not in line with the ordinary course of life and requested to further deepen the investigation. In the end of the investigation, a decision of non-prosecution was given on the grounds that E.D. had committed suicide.

The applicant alleges that the Chief Public Prosecutor's Office did not conduct an effective investigation and procedural aspect of the right to life guaranteed under Article 17 of the Constitution was violated.

In brief, the Constitutional Court made the following assessments within the scope of this application:

In the scope of its positive obligation the state has the duty to investigate the causes of death, determine those whoever are responsible and must bring them to book when a death occurs.

The objective of such prosecution conducted in the scope of the right to life, is to secure effective implementation of law that protects the right to life and to ensure that those who are responsible account for the death incident. This is not an obligation of results but the obligation to use correct instruments.

As the procedural investigation obligation is not an obligation of goal but of means, the criminal investigation conducted must not be completed without collecting all evidence capable of clarifying the death incident in all aspects and identifying those who are responsible; that the investigation must not include certain deficiencies which undermine the opportunities of clarifying the cause of death and identifying those who are responsible, if any; and that if there are certain deficiencies of different nature, such deficiencies must not have an impact on the in-depth nature and gravity of the investigation being conducted.

In the impugned incident, in the assessment made to see if the obligation to conduct an effective investigation was fulfilled or not, it was determined that all reasonable measures regarding to collect evidence like the allegation that the deceased was left handed and the shot that lead to his death was made not in line with the ordinary course of his life with his right hand not being investigated, the necessity to testify Y.Ç. again after he was investigated by law enforcement officers and later gunshot residue was detected after the investigation of his hand swabs was not observed, were not taken.

Due to the reasons explained above, in this way it is understood that there are some deficiencies that weaken and have a profound impact on the depth and seriousness on the possibility of the detection of the reason of death and if available of the responsible persons and that the procedural aspect of the right to life was violated because of the deficiencies mentioned above and not conducting a sufficient investigation.

bb. Judgment on the violation of the procedural aspect of the right to life regarding a proceeding concluded within over 15 years about a suicide incident

Elif MUTLU and Ferhat MUTLU Judgment (App. No: 2013/3711)

> **Having regard to the facts that the applicants had an interest in rapid and effective handling of their actions before the civil and administrative courts and did not have a substantial impact on the delay and to the limited number of the parties of the action in question and the non-complex nature of the impugned incident, the Constitutional Court has reached the conclusion that it is not possible to hold that the proceeding which could be concluded within over 15 years before the judicial and administrative procedure was reasonable; and that there was a lack of speedy examination as required in Article 17 of the Constitution.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 7/1/2016,C.M. who is the daughter of the applicant, Elif Mutlu, and the sister of the other applicant, Ferhat Mutlu, was taken under protection on account of the death of her father and poor economic conditions of her mother, Elif Mutlu, and accommodated in an institution affiliated to the Social Services, the Directorate General of the Society for Protection of Children of the Prime Ministry ("the Society for Protection of Children). C.M. started to stay in different institutions of the Society for Protection of Children as from the date she was taken under protection and committed suicide by means of jumping off a balcony of the Bolu İzzet Baysal Orphanage for Girls, where she was lastly staying, on 4/4/1997. The applicants filed an action for compensation against the Society for Protection of Children before the 24th Chamber of the Ankara Civil Court of General Jurisdiction ("the Civil Court") with the allegation that there had been service fault on the part of the administration in the death taking place. The Civil Court dismissed the action on the ground that the dispute was under the jurisdiction of the administrative procedure. The Sakarya Administrative Court decided to dismiss the action as there was no service fault on the part of the administration. Upon the appeal of the applicants, this decision was quashed by the Supreme Administrative Court. The 1st Chamber of the Sakarya Administrative Court ("the Court") complied with the quashing judgment, continued the proceedings and requested an expert to draw up a report concerning the pecuniary damage claimed by the applicant Elif

Mutlu. The expert concluded that the conditions of loss of support did not exist as the above-cited applicant was married and had three sons who could provide support for her. By its interlocutory decision of 28/9/2007, the court acknowledged that the applicant was in need of the support of her children who had died and noted that according to the additional expert report concerning the compensation for loss of support, the applicant had incurred a loss of support at the amount of 11,139.20 TRY due to the death taking place. Upon the additional expert report, the applicant Elif Mutlu stated that she had increased her claim to 11,139.20 TRY and requested to be awarded with the compensation at the above-mentioned amount plus any legal interest to be charged. The court awarded a total of 1,500.00 TRY - 1,000.00 TRY as pecuniary damage and 500.00 TRY as non-pecuniary damage - in favour of one of the applicants, Elif Mutlu, and 500.00 TRY as non-pecuniary damage in favour of the other applicant, Ferhat Mutlu. This decision was upheld after being appealed by the applicants and the defendant administration.

The applicants maintained that their next-of-kin had been led to suicide on account of the wrong attitude of the officers of the dormitory where she had been staying in 1997; that the action for compensation concerning this incident had been concluded by a court which had not been competent and impartial and within an unreasonable time; that they had been subject to loss of right on the basis of certain formal rules which had not been included in the laws; and that they had been awarded with unfair compensations in spite of the expert report. They accordingly alleged that their rights enshrined in Articles 9, 36 and 58 of the Constitution had been violated.

In brief, the Constitutional Court made the following assessments within the scope of this application:

With respect to the Allegations That the Action Had Not Been Effectively Handled within the Scope of Article 17 of the Constitution

It has been observed that the action heard before the judicial court concerning the compensation claims of the applicants was dismissed at the end of three years, without making an examination as to the merits, for being filed before the wrong authority; that there was a delay, which was partially caused by the applicants, in determination of the authority having jurisdiction over the action filed against the administration; that therefore, the action which should have been dealt with by an administrative court could only be started over three years after the date of the first action; and that there was responsibility on the part of the public authorities in conclusion of the first

instance trial before the administrative court and the judicial reviews of the decisions rendered at the end of the proceedings before the administrative court in a total of 12 years, a period which cannot be deemed to be reasonable.

In the light to these findings, it is not possible to note that the procedure both before the judicial court and the administrative court was concluded with due diligence and speed. Having regard to the facts that the applicants had an interest in rapid and effective handling of their actions before the civil and administrative courts and did not have a substantial impact on the delay and to the limited number of the parties of the action in question and the non-complex nature of the impugned incident, the Constitutional Court has reached the conclusion that it is not possible to hold that the proceeding which could be concluded within over 15 years before the judicial and administrative procedure was reasonable; and that there was a lack of speedy examination as required in Article 17 of the Constitution.

The Constitutional Court has consequently held that there was a breach of the obligation to conduct an effective investigation within the scope of the right to life guaranteed in Article 17 of the Constitution.

Alleged Violation of the Right of Access to a Court within the Scope of Article 36 of the Constitution

The applicant claimed compensation at the amount of 1,000.00 TRY due to the loss of support she was exposed to without prejudice to surplus rights. In the expert report received within the scope of the proceedings, it was considered that the applicant be awarded 11,139.20 TRY as pecuniary damage. Thereupon, becoming aware that the amount of compensation she had entitled was more than the one she had requested, the applicant informed the Court that she wished to amend the amount of compensation she requested as 11,139.20 TRY as specified in the expert report. The court dismissed the applicant's request for amendment as there was prohibition of changing and extending the allegation and defense submissions in the administrative procedure and rendered its decision by relying on the amount specified in the petition for filing an action for compensation. It is obvious that the applicant's being deprived of a certain amount of compensation as she could not make an increase in her request has constituted interference with her right of access to court. Article 16 § 4 of the Law no. 2577 constitutes the basis for this interference.

The essence of the right means the substantive core of the fundamental right and freedom at stake in case of being infringed and from this aspect provides an untouchable minimum guarantee for the individual in respect of each fundamental

In the impugned proceedings, the applicant whose right to request an amendment was restricted could only receive 1,000.00 TRY of the pecuniary damage calculated by the expert as 11,139.20 TRY. It has been accordingly concluded that the trouble that the applicant, who was deprived of a significant part of compensation she was indeed entitled and understood to have poor financial situation, was obliged to suffer was disproportionate with the legitimate aim pursued; and that therefore the interference at stake was not proportionate.

right. Within this framework, it must be accepted that restrictions which significantly hamper the enjoyment of the right, render the right unusable or remove the right in question would infringe upon the very essence of the right.

Aim of the principle of proportionality is to prevent unnecessary restriction of the fundamental rights and freedoms. Pursuant to the judgments of the Constitutional Court, the principle of proportionality includes the elements of suitability which means that the means used for restriction is suitable for attaining the aim of restriction, the necessity which means that the restricting measure is necessary for attaining the aim of restriction and proportionality which prevents the disproportionate relation between the means and the aim and ensures that the restriction does not impose a disproportionate obligation.

In the impugned proceedings, the applicant whose right to request an amendment was restricted could only receive 1,000.00 TRY of the pecuniary damage calculated by the expert as 11,139.20 TRY. It has been accordingly concluded that the trouble that the applicant, who was deprived of a significant part of compensation she was indeed entitled and understood to have poor financial situation, was obliged to suffer was disproportionate with the legitimate aim pursued; and that therefore the interference at stake was not proportionate.

The Constitutional Court has consequently held that there was a breach of the applicant's right of access to court guaranteed in Article 36 of the Constitution.

bc. Judgment on the violation of the procedural aspect of the right to life due to the rejection of the request of opening of an administrative investigation by the relatives of the deceased who committed suicide during military service

Sıddıka DÜLEK and Others Judgment (App. No: 2013/2750)

> **It has been assessed that although the recruiting of a person who must not be enlisted for military service due to his disease is considered to constitute a problem, finding no violation in the continued performance of the military service by such person and especially in his deprivation of precautions such as sick leave according to state and stage of his disorder in spite of being medically examined also in the course of the military service is incompatible with the ECtHR's judgments; and that dismissal of the request for re-trial for considering that the violation stemmed only from the deficiencies in the recruiting process does not include an examination at a level and with diligence as required in Article 17 of the Constitution.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 17/2/2016, the brother of the applicants Sıddıka DÜLEK and the others, Bayram Dülek, was found dead by being hanged in the ward toilet in the course of his military service during which the doctors issued a report indicating that he had been in tendency to commit suicide due to his psychological disorder. The applicants' request for initiation of an administrative investigation for compensation of the pecuniary and non-pecuniary damage sustained by them due to the death of Bayram Dülek was dismissed. The full remedy action brought before the Supreme Military Administrative Court ("the SMAC") was dismissed on the ground that there was no faulty liability or absolute liability attributable to the administration. In the application lodged with the European Court of Human Rights ("the ECtHR"), it was held that there had been a breach of the right to life. The applicant's request for re-trial upon the judgment of the ECtHR was also dismissed by the SMAC.

The applicants stated that due diligence was not shown to the person concerned during the military service and accordingly alleged that there had been a breach of their rights enshrined in Articles 12, 17, 40 and 125 of the Constitution.

In brief, the Constitutional Court made the following assessments within the scope of this application:

It is, in principle, for the inferior courts to assess the evidence available in a case being dealt with and to interpret the legal rules. However, in cases where there is an alleged violation of the right to life, the question as to whether an investigation has been conducted with due diligence as required by Article 17 of the Constitution and the efficiency of this investigation are to be assessed by the Constitutional Court.

In this scope, it must be examined as to whether the SMAC's decision on dismissal of the request for re-trial fulfilled the requirements set out in Article 17 of the Constitution and the ECtHR's judgments finding a violation.

Given the judgment rendered by the ECtHR concerning the impugned incident, it has been observed that that there is no evaluation indicating that the violation stemmed from not only the deficiencies in the recruiting system of the military; and that the justification given therein that "the recruiting of a person suffering from a disorder like dysthymia is sufficient for reaching the conclusion that there is deficiency in the legal arrangements" cannot be interpreted in a manner that the judgment finding a violation was rendered only on the basis of the deficiencies in the recruiting system.

It has been also observed that this justification was used in order to underline the futility of the examination as to whether the obligation to show diligence during the military service in respect of a person who had been recruited in breach of the guarantees set out in the legislation and who subsequently committed suicide had been fulfilled or not; that indeed, in the ECtHR's judgment, the recruiting of a person who had been suffering from dysthymia and whose disorder had been known to the authorities and his continuation of the performance of the military service were shown as the ground for the violation found; and that the judgment did not only emphasize the recruiting process but also the continued performance of the military service.

Having regard to all of these issues, it has been assessed that although the recruiting of a person who must not be enlisted for military service due to his disease is considered to constitute a problem, finding no violation in the continued performance of the military service by such person and especially in his deprivation of precautions such as sick leave according to state and stage of his disorder in spite of being medically examined also in the course of the military service is incompatible with the ECtHR's judgments; and that dismissal of the request for re-trial for considering that the

violation stemmed only from the deficiencies in the recruiting process does not include an examination at a level and with diligence as required in Article 17 of the Constitution.

Furthermore, the SMAC decided to dismiss the complaint that Bayram Dülek should not have been recruited without making an examination for being time-barred. Such allegation raised by the applicants were examined twice before the decision on dismissal of the request for re-trial, and at the end of both examinations, the action was decided to be dismissed on the ground that there had been no faulty liability or absolute liability on the part of the administration. However, this action was qualified as an action for compensation resulting from an act upon the ECtHR's judgment finding a violation, and this complaint was dismissed without being subject to an examination for being lodged out of time. Such an interpretation of the SMAC is an unforeseeable and a very strict interpretation, which highly makes the appropriate and sufficient redress of the violation difficult, and renders the conclusions of the ECtHR's judgment ineffective.

The Constitutional Court has consequently held that there was a breach of the right to life guaranteed in Article 17 of the Constitution under its procedural aspect.

bd. Judgment on the violation of the procedural aspect of the right to life due to denial of being involved in the investigation stage and being able to protect the legitimate interest of the deceased.

Hadra AKGÜL and Others Judgment (App. No: 2014/867)

> **One of the significant elements of an effective investigation is that the investigation and results thereof must be open to public scrutiny with a view to ensuring accountability in practice as well as in theory. In addition, in each incident, the next-of-kin of the deceased must be enabled to involve in that process to a required extent for the protection of their legitimate interests.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 24/3/2016, Renas Bulut who was the son of Hadra Akgül, one of the applicants, and the brother of the remaining applicants lost his life on 6/12/2012 at the hospital where he was taken as a result of the traffic accident taking place. The Traffic Specialization Board of the Ankara Group Presidency of the Forensic Medicine Institute delivered an opinion with its report

of 24/1/2013 that the driver colliding with the pedestrian Renas Bulut was faulty of the second degree (*"tali kusurlu"*) while genuine fault was on the part of Renas Bulut. Upon this report, a criminal case was filed against the driver colliding with Renas Bulut for the offence causing reckless killing. The applicants were informed of the death of their next-of-kin, Renas Bulut, and the criminal investigation and prosecution conducted into the accident on 14/3/2013. Thereupon, Hadra Akgül, one of the applicants, requested to become an intervening party to the criminal case heard before the 4th Chamber of the Sincan Criminal Court of General Jurisdiction with the petition dated 13/5/2013. The 4th Chamber of the Sincan Criminal Court of General Jurisdiction sentenced the driver colliding with Renas Bulut to imprisonment for a term of 1 year and 8 months as it was found established that the driver had been faulty of the second degree and decided to suspend the pronouncement of that judgment. The objection raised by the applicants to this decision was dismissed. Upon the decision on dismissal of the objection, the applicants lodged an individual application with the Constitutional Court.

The applicants maintained that their next-of-kin, Renas Bulut, had died as a result of a traffic accident; that although the deceased had carried an identity card and a mobile phone with him, the authorities had not got in contact with them, and therefore, his dead body was made to wait for about four and a half months in the Forensic Medicine Institute. They also alleged that they had been informed of the death and the investigation conducted into the accident with the instruction letter drawn up by the Chief Public Prosecutor's Office for establishing whether they would file a criminal complaint or not; that they were thereby denied involving in the investigation stage and the opportunity of being informed of the evidence requested to be collected during the investigation stage; that a decision had been rendered without making sufficient investigation and that the decision on the suspension of the pronouncement of the judgment had impaired their sense of justice. The applicants accordingly maintained that there had been a breach of the right to life.

In brief, the Constitutional Court made the following assessments within the scope of this application:

One of the significant elements of an effective investigation is that the investigation and results thereof must be open to public scrutiny with a view to ensuring accountability in practice as well as in theory. In addition, in each incident, the next-of-kin of the deceased must be enabled to involve in that process to a required extent for the protection of their legitimate interests.

The applicants were not notified of the investigation conducted by the Chief Public Prosecutor's Office. As a natural consequence thereof, they could not involve in

any action taken at the investigation stage and obtain an opportunity to raise an objection to the actions performed. Having regard to this situation, it has been concluded that the applicants were denied the opportunity to involve in the first and critical stages of the investigation and to take part in the researches which were of critical importance for the clarification of the incident to the extent that could protect their legitimate interests; and that although one of the applicants, became an intervening party to the criminal case filed against the driver upon the notification of the bill of indictment, this opportunity provided for the applicants six months after the incident was not sufficient for the protection of the legitimate interests of the applicants.

For the above-mentioned explanations, it has been concluded that there was no breach of the right to life under its procedural aspect in respect of the actions taken at the prosecution stage and the decision on the suspension of the pronouncement of the judgment rendered by the inferior courts on the basis of the information and documents included in the case file. However, it has been held that the applicants' denial of the opportunity for involving in the investigation stage, during which critical researches were conducted for the clarification of the incident, to an extent capable of protecting their legitimate interests constituted a breach of the right to life, which is guaranteed under Article 17 of the Constitution, under its procedural aspect.

be. Judgment on the violation of the procedural aspect of the right to life due to the decision rendered on the death incident in which substantial allegations were not dealt with sufficiently for the resolution of the dispute

Aysun OKUMUŞ and Aytekin OKUMUŞ Judgment (App. No: 2013/4086)

A decision was rendered by relying on the report of the Forensic Medicine Institute which did not include sufficient information concerning the applicants' allegations; that the substantial allegations were not dealt with sufficiently for the resolution of the dispute; and that the circumstances leading to the death of Alper Okumuş were not precisely revealed.

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 20/4/2016, having stated that their own child and their relatives' children had previously lost their lives in babyhood stage of their lives, the applicants had recourse to the Paediatric Emergency Department of the Dokuz Eylül University Medical Faculty Hospital (the Hospital) with

the complaint that there were contractions on the body of Alper Okumuş, who was the applicants' son born on 13/8/2003. The patient was hospitalized in the paediatric service with a pre-diagnosis that he had been suffering from a metabolic disease. He was then referred to the intensive care unit. Alper Okumuş, who had received outpatient and inpatient treatments several times due to his disease, was lastly taken to the Paediatric Emergency Department of the Hospital at around 07:00 p.m.. on 17/10/2007. The patient whose state of health was determined to be serious was referred to the Tepecik Training and Research Hospital as there was no respiratory equipment and no place to be allocated for him in the previous hospital; however, he died in the Tepecik Training and Research Hospital at 03:30 a.m.. On 13/6/2008, the applicants applied to the Rectorship of the Dokuz Eylül University and requested that the pecuniary and non-pecuniary damages sustained by them be redressed. Upon the unfavourable reply taken from the Rectorship, the applicants brought a full remedy action before the 2nd Chamber of the İzmir Administrative Court for compensation of their pecuniary and non-pecuniary damages. The applicants noted in their petition for action that their son Alper Okumuş had been subject to certain medical tests and experiments concerning epilepsy without taking their permission; that such tests might have led to their son's death; and that they had not been informed in any way during the period which was ended with the death of their son. They also maintained that there had been no respiratory equipment, and inexperienced personnel had been employed in the hospital; that the doctors in charge had not known how to use the ambu device and there had been no specialist and respiratory equipment in the hospital; and that all of these were indicators of the fact that there had been severe neglect of duty in the incident.

The defendant administration stated that the allegations asserted were not accurate; and that there was no fault attributable to the administration in the death of the applicants' son. The administrative court requested the Forensic Medicine Institute to draw up a report as to whether the treatment administered in the hospital had complied with the rules of medicine. The Forensic Medicine Institute found established that the treatment administered to the minor having died of metabolic-derived neurodegenerative disease had been in compliance with the rules of medicine. The applicants objected to the report drawn up by the Forensic Medicine Institute and additionally stated that although there had been a report received from the Hacettepe University and indicating that the diagnosis of metabolic disease was wrong, their son had died of faulty intervention by the inexperienced assistants who had insisted on administering treatment on the basis of misdiagnosis. The applicants accordingly requested that a new expert report be received. By its decision of 2/6/2011, the 2nd Chamber of the İzmir Administrative Court found the existing expert report sufficient and accordingly dismissed the action brought by the applicant. The 8th Chamber of

the Supreme Administrative Court upheld the first instance decision on 5/6/2012, and the applicants'request for rectification of the judgment was dismissed.

The applicants maintained that false treatment had been administered to their son suffering from epilepsy; that the doctor previously dealing with their son had not been informed and called; that their son had been subject to unsuccessful medical intervention due to the inexperienced assistants; that there was no specialist working in the hospital. They also alleged that the treatment had not been performed in compliance with the medical principles; and that although the action for damage and the criminal action brought against the relevant officers due to their personal faults had been pending, these actions had been dismissed without waiting for the conclusion of thereof. The applicants accordingly maintained that there had been a breach of Article 70 of the Law no. 1219 in which the patient's and the patient relatives' right to be informed is set out and of Article 6 and 8 of the European Convention on Human Rights.

In brief, the Constitutional Court made the following assessments within the scope of this application:

As well as the criminal investigation to be carried out within the scope of the right to life and the right to protect material and spiritual entity, the actions for compensation which would be brought in the civil and criminal jurisdiction and the administrative jurisdiction with a view to establishing the legal liability must satisfy the requirements of speediness and diligence to a reasonable extent. This is because the inferior courts' acting with delicacy in this respect would prevent the impairment of the significant role of the current judicial system in the prevention of similar breaches of the right to life likely to take place subsequently.

Although a sufficient assessment as to whether the Alper Okumuş, who could not avail himself of the respiratory equipment in the hospital and was therefore referred to another hospital, had been affected from this incident; whether there was any neglect in the present incident; and whether there was any delay in the patient's treatment was not made in the report of the Forensic Medicine Institute forming a basis for the decision of the 2nd Chamber of the İzmir Administrative Court, it could not be understood how the first instance court had found this report sufficient.

It has been observed that as to the applicants' allegations that the diazem treatment administered to the patient was wrong, any assessment and any plausible explanation were included neither in the decision rendered by the 2nd Chamber of the İzmir Administrative Court nor in the report drawn up by the Forensic Medicine Institute and taken as a basis for this decision.

In a similar vein, the decision rendered by the 2nd Chamber of the İzmir Administrative Court did not include any sufficient assessment as to the applicants' allegations that there had been no specialist in the hospital; that they had not been informed of the acts performed on the incident day; and that inexperienced personnel had been employed in the hospital.

When all of these issues are taken into consideration together, it has been concluded that as a result of the action brought before the administrative jurisdiction, a decision was rendered by relying on the report of the Forensic Medicine Institute which did not include sufficient information concerning the applicants'allegations; that the substantial allegations were not dealt with sufficiently for the resolution of the dispute; and that the circumstances leading to the death of Alper Okumuş were not precisely revealed.

The Constitutional Court has consequently held that there was a breach of the right to life, which is guaranteed in Article 17 of the Constitution, under its procedural aspect.

bf. Judgment on the violation of the procedural aspect of the right to life due to the undue delay in the investigation conducted for the allegations of being killed by torture.

Hıdır ÖZTÜRK and Dilif ÖZTÜRK Judgment (App. No: 2013/7832)

The facts that the allegations were started to be researched after a very long time following the date when the incident had taken place and the offenders were searched in a manner which could not be comprehended in the impugned investigation led to a situation which *per se* rendered reaching a conclusion difficult.

As explained in the part of facts, the application in question contains allegations that certain groups alleged to be affiliated to the security forces had involved in unidentified incidents on a certain date and in a specific region of our country; and that this incident is one of them. In the present incident, the investigating authorities' failure to take any step for making investigations as to the existence of such groups, as to whether they had involved in acts such as forced disappearance, torture and illegal killing, as alleged, and if so, the degree of their involvement is the most significant element undermining the effectiveness of the investigation.

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 21/4/2016, while the applicants' daughter A.Ö. was working in a factory belonging to the Private Provincial Administration operating at the Akpınar Town in Mazgirt / Tunceli, any news could not be received from her after the end of shift on 27/7/1992. The applicant, who is the father, Hıdır Öztürk, maintained before the Chief Public Prosecutor's Office that his daughter had been taken to a white car by unidentified persons while walking along the Tunceli-Elazığ highway and the persons he is suspicious of.

While the searching activities for A.Ö. were going on, a dead body of a woman determined to have been killed by means of strangling with a cloth around her neck was found within the boundaries of Elazığ province. The applicants identified that the dead body in question was belonging to their daughter A.Ö..

On 10/8/1992, the Chief Public Prosecutor's Office initiated a criminal case against N.A., E.A. and S.Ç. alleged to be in the same car with the applicant Hıdır Öztürk's daughter on the day of incident for premeditated murder of A.Ö.. At the end of the proceedings, it was ordered that the accused persons be acquitted, and that a criminal complaint be filed for the identification of the offenders of the incident. Upon this criminal complaint, the Elazığ Chief Public Prosecutor's Office issued a "permanent arrest warrant" in respect of the offenders.

It was alleged by the Chairperson of the Tunceli Branch of the Human Rights Association and a lawyer that in a news report entitled "Death Squad" published in the relevant issue of a newspaper dated 26/8/1993, a military officer declared that A.Ö. had been killed by M.Y. whose nickname was "the Green", and thereupon, a petition was submitted to the Tunceli Chief Public Prosecutor's Office. The file of investigation initiated upon this allegation was joined with the investigation conducted into the death of A.Ö..

Human Rights Inquiry Committee of the Parliament invited the applicant and heard him on 13/12/2011 pending investigation. As to the death of his daughter, the applicant maintained that in 1992, the Tunceli Provincial Gendarmerie Commander asked the applicant to visit him; that in the first interview during which he was alone, the commander asked him to bring his daughter, and when he went there together with his daughter, A.Ö., she was caused to meet with a thin and bearded person whose name was *"Mr. M....."*in a closed room on the ground floor of the command headquarters building; that her daughter was kidnapped two months after this incident; that when he subsequently went to the Elazığ State Hospital together with his family with a view to identifying a dead body belonging to a woman, a police officer in civilian clothes told his wife, Dilif Öztürk, "*this is your daughter; she was*

resembling to you". He accordingly alleged that her daughter had been tortured to death.

The applicant also maintained that he had subsequently seen the person named M.Y. on TV channels.

On 1/2/2012, the applicant filed another petition with the Tunceli Chief Public Prosecutor's Office through his lawyer with the allegation that there had been negligence in arrest of M.Y. whose nickname was "Green" and his team whom the applicant held responsible for her daughter's murder. The Elazığ Chief Public Prosecutor's Office drew up a police report concerning M.Y. and the other persons including certain law-enforcement officers, public officers and the members of the National Intelligence Organization ("the MIT") and sent the investigation file to the Malatya Chief Public Prosecutor's Office.

On 23/2/2012, the Malatya Chief Public Prosecutor's Office requested information from the Undersecretariat of the MIT concerning M.Y.'s duties under the MIT. The Undersecretariat noted in its reply letter dated 15/3/2012 that the MIT had from time to time benefited from M.Y. between September 1994 and the date of 30/11/1996.

On 25/4/2012, the applicant provided the Malatya Chief Public Prosecutor's Office through his lawyer with electronic record (DVD) concerning the video-interview submitted by a person alleged to be a military officer A.A. to a foreign agency. In this interview, A.A. noted that he had seen M.Y. in the Gendarmerie Intelligence and Anti-Terror Unit in Diyarbakır (according to his own declaration) on the dates when the applicant's daughter had been killed; that M.Y. introduced A.Ö. to him "the sister of a person named S.Ç., the person who was a member of the terrorist organization and responsible for the Tunceli region and who was an influential person within the organization"; and that he was of the opinion that A.Ö. had been killed with a view to intimidating S.Ç. and the people around him.

In his statement taken by the Malatya Chief Public Prosecutor's Office, the retired senior colonel M.S.Y. alleged to have the applicant's daughter meet with M.Y. at the commandership denied all allegations of the applicant.

On 8/6/2012, the Malatya Chief Public Prosecutor's Office took the applicant's statement once again. In his statement, the applicant mainly reiterated his previous statement before the Committee. He additionally stated that when he went to the Provincial Gendarmerie Command together with his deceased daughter A.Ö. and his other two daughters in May 1992 upon the call of the Tunceli Provincial Gendarmerie Commander, certain questions were addressed to their daughters by a bearded man in a room on the ground floor of the building, and photos of certain members of the terrorist organization were shown to them; that among these members, there

was a photo of his elder daughter A.Ö.; and that his daughters told that their sister participated in the organization after getting married and then started living abroad with his husband S.Ç.; that his daughter A.Ö. was seen while being taken to a white car by three men one of whom was a bearded person. The applicant also maintained that he had talked with the gendarmerie retired non-commissioned officer H.O., whose name was included in the report pertaining to a case known by public as "Susurluk", on the phone and H.O. told the applicant that he had knowledge concerning the murder of the applicant's daughter, A.Ö..

H.O. noted in his statement taken on 13/6/2012 that the captain Z., who was the section commander at the JITEM in Elazığ (according to his own declaration), had explained him in July 1993 that M.Y. whose nickname was "Green" had kidnapped a woman named A. in Mazgirt as that woman's brother-in-law had been the head of a terrorist organization in Tunceli region; that M.M. who was known to be confessor of the organization also accompanied him; that after kidnapping her, they had taken her to the JITEM in Diyarbakır and she was brought before A.K. who was the commander of the JITEM; and that M.M., M.Y., A.K. and A.A., who subsequently started living in Sweden, had tortured that woman for three days; however, captain Z. had not provided any information as to how the woman named A. had been killed.

H.O. also noted in the same statement that those who had been tortured in this region were killed in regions where the Gendarmerie Commands were authorized; that thereby, the duly investigation of the incident had been prevented; that the Mazgirt District Gendarmerie Station Commander and M.B., who was the commanding officer in 1994, were also aware of the incident; and that the records concerning the incident leading to the death of A.Ö. were saved in the Mazgirt District Gendarmerie Command.

Upon the instruction of the Malatya Chief Public Prosecutor's Office, the persons whose names were mentioned in the applicant's allegations noted in their statements that they had not known A.Ö., H.O. and M.Y.; and that they had not had any knowledge concerning the incident. The director of the Tunceli Private Provincial Directorate, K.K., noted in his statement dated 23/10/2012 that he could not remember who were the applicant and A.Ö.; and that the impugned evacuation of the lodgement building was of a routine procedure.

The Malatya Chief Public Prosecutor's Office did not take any further action until 13/3/2014 and once again sent the file to the Elazığ Chief Public Prosecutor's Office which issued a new arrest warrant in respect of the suspect M.Y. on 29/9/2014.

On 25/5/2005, the applicants applied to the Damage Determination Committee of the Tunceli Governorship through their lawyers, and this request was dismissed by the Committee's decision dated 10/10/2006.

The applicants brought an action for annulment of the dismissal decision in question, and the relevant court dismissed the action brought by its decision dated 3/6/2010. The decision was upheld by the judgement of the Supreme Administrative Court. The applicants'request for rectification of the judgment was also dismissed by the Supreme Administrative Court.

The applicants maintained that their daughter had been tortured and killed after being a victim of forced disappearance by the security forces and M.Y., who was serving for the MIT; that an effective criminal investigation had not been conducted into this incident; that moreover, the action for compensation brought by them had been dismissed on the ground that the incident was a terrorist act or an incident derived from terrorism. The applicants accordingly alleged that the right to life guaranteed in Article 17 of the Constitution had been violated.

In brief, the Constitutional Court made the following assessments within the scope of this application:

The criminal investigations to be carried out within the scope of the rights guaranteed in Article 17 of the Constitution must be effective and sufficient in a way which would enable the identification and punishment of those who are responsible. An investigation may be qualified as an effective and sufficient one only when the investigation authorities have taken ex officio steps and obtained all evidence capable of clarifying the incident and identifying those responsible. Therefore, an investigation into the allegations of murder and ill-treatment must be carried out in an independent, rapid and in-depth manner. In other words, the authorities must endeavour to comprehend the facts in a serious manner and must not rely on rapid and ill-founded conclusions with a view to concluding the investigation or justifying their decisions. Existence of any deficiency undermining the opportunity of establishing the cause of death or identifying those who are responsible in the investigation bears the risk of contradicting with the obligation of carrying out an effective investigation.

In the impugned investigation, the facts that investigations as to the allegations had been initiated a long time after the incident and that the offenders had been sought in a manner which could not be understood have made it difficult to reach a conclusion.

The present application includes allegations that, as explained in the above-mentioned part of the facts, certain groups alleged to be affiliated to the security forces had involved in unidentified incidents on a certain date and in a certain region of our country; and that this incident is one of them. In the present incident, the investigating authorities' failure to take a step for making investigations as to the

existence of such groups, as to whether they had involved in acts such as forced disappearance, torture and illegal killing, as alleged, and if so, the degree of their involvement is the most significant element undermining the effectiveness of the investigation.

Upon the letter of the Human Rights Inquiry Committee of the Parliament and the application subsequently lodged by the applicant, Hıdır Öztürk, through his representative, the competent authorities partially deepened the investigation. However, it has been observed also at this stage that certain steps capable of clarifying the incident and the identifying those responsible were not taken.

One of these untaken steps is the non-deepening of the investigation into the incidents place and time of which were reported by certain witnesses in a manner confirming the allegations that A.Ö. had been forcibly disappeared by official authorities. H.O. maintained that the records pertaining to the disappearance of A.Ö. had been drawn up and saved by the Mazgirt District Gendarmerie Command and by him.

In spite of the time having elapsed and the allegations that the public officers also involved in the incident, the existence of a record in this respect was not searched in an application in which it was maintained that serious human rights violations such as forced disappear and torturing someone to death had been caused although all kinds of probabilities should have been taken into account for identification of the offenders of the incident and the fact that the person providing the information in question was a public officer likely to have knowledge of such information should have been born in mind.

Along with the failure of searching for the existence of such a record, it has been observed that in the statements of the above-mentioned witness, there were certain security forces alleged to have knowledge of the impugned incident; that although identifying information pertaining to such officers were provided, any step was not taken for taking the statements of these officers during the investigation. Likewise, it has been revealed that any step was not taken for taking the statement of A.A. alleged to be an eye-witness of the incident.

Moreover, in spite of existence of clear and certain statements by some witnesses concerning the place and the date where and when A.Ö. was taken to Diyarbakır, it has been observed that the competent authorities failed to try clarifying the incident with this aspect.

As to the allegation that the applicant, Hıdır Öztürk, was asked to visit the Tunceli Provincial Gendarmerie Command together with his daughters before the incident and they firstly interviewed with the regimental commander and subsequently with M.Y., the accuracy of the defence-submission of the Commander M.S.Y. and

the applicant's allegation was not evaluated by means of identifying the personnel serving in the Command at the relevant time and likely to have knowledge thereof. Nor were the statements of the applicant's daughters who were alive taken.

As to the research of the allegations that A.Ö. was tortured to death; although it is specified in the post-mortem examination report that dead body of the deceased was photographed, the failure of making an examination for clarification of the questions as to whether the deformations on the deceased's face and body were resulted from the time having elapsed after being killed or as to whether she had been subject to a treatment as maintained in the allegations cannot be comprehended.

It has been understood that the investigating authorities failed to take all reasonable measures expected from them for obtaining evidence likely to be collected at the place and time where and when the incident took place. Nor has it been determined that they subsequently took a concrete step with a view to clarifying the cause of the incident. It has been also observed that the single step taken by these authorities for ensuring effectiveness of the investigation is to appoint a senior law enforcement officer 18 years later and to expect that the investigation be conducted in a more meticulous and comprehensive manner through this officer.

It has been seen that the investigation, as a whole, remained insufficient for the clarification of the cause of incident leading to intentional violation of the right to life and for the identification of those who were responsible. It cannot be also mentioned that the investigating authorities assessed the circumstances of the incident independently from such allegations, *ex officio* determined the investigation procedure and subsequently applied a reasonable method in this respect.

It has been therefore observed that necessary steps were not taken within the scope of the investigation on time and in an adequate manner for the clarification of the cause of death.

It has been concluded that the investigation was not conducted in a necessarily speedy and meticulous manner for the collection of all evidence capable of identifying those who were responsible and for the prevention of giving impression that illegal actions were tolerated; and that thereby the investigation was not concluded for a long time without taking any step.

The Constitutional Court has consequently held that there was a breach of the right to conduct an effective investigation within the scope of the right to life which is guaranteed in Article 17 of the Constitution.

bg. Judgment on the violation of the principle of independence of the investigating authority due to the law enforcement officers who were involved in the death incident conducted the investigation procedures

İpek DENİZ and Others Judgment (App. No: 2013/1595)

> **As it is acknowledged that the death took place as a result of use of force by the law enforcement officers, the burden to prove that the use of force leading to death was resulted from a situation that was "absolutely necessary" rests on the public authorities. However, any explanation could not be made in this respect. On the other hand, as the public authorities failed to make an explanation concerning the use of force and the grounds thereof, a separate assessment was not performed as to whether the intervention in question had an adequate legal and administrative framework or not.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 21/4/2016, the applicants were born in 1998, 1999 and 2001 and are the children of Mehmet Deniz (M.D.) who was born in 1950 and lost his life on 5/3/2008 and his wife who was born in 1963. An activity which was organized by the district branch of a political party by means of obtaining authorization from the relevant District Governorship turned into a protest in favor of a terror organization and its leader, and the demonstrators blocking the roads during the protest were dispersed by the police. Quarrels took place between the citizens whose buildings and workplaces were damaged on account of the uproars created by the demonstrators by means of removing paving stones and the groups making protests, and the quarrel was terminated through the police intervention. In the course of the incidents taking place, 14 police officers were injured, and a large number of police vehicles, two vehicles belonging to the public banks and workplaces of the citizens were damaged. The police reported the incidents taking place to the Chief Public Prosecutor's Office. Upon the instruction of the Chief Public Prosecutor's Office, 108 persons identified to get involved in the incidents were arrested until 04:30 p.m. on the incident day. Name of M.D., the next-of-kin of the applicants, was also included in this arrest warrant. After having been arrested by the law enforcement officers on the incident day, M.D. was directly taken to the Security Directorate without a forensic report drawn up in respect of him. M.D., who was held in the Security Directorate for a while (there is no record concerning the custodial

cell), was subsequently taken to a State Hospital at 06:10 p.m. by a police vehicle upon deterioration of his state of health. The doctor performing his first medical examination issued a report in which it was specified that he was exposed to a risk of death on account of blows he had received on his head. M.D. was urgently referred to the Van State Hospital and lost his life in this hospital on the same day. At the end of the post-mortem examination and autopsy carried out by the Van Chief Public Prosecutor's Office, M.D.'s definitive cause of death was determined to be "respiratory and cardiac insufficiency resulting from cerebral haemorrhage suffered due to blunt trauma to his head".

An *ex-officio* investigation was initiated into the incident on 6/3/2008 by the Chief Public Prosecutor's Office. Within the scope of the investigation, the applicant İpek Deniz, who is M.D.'s wife, maintained that her husband had been beaten and killed by the police officers while returning from a condolence visit on the day of incident; and that she would subsequently report the name of the eye-witnesses in a petition. Upon the applicant's request, M.D.'s grave was opened, and his death body was sent to the İstanbul Forensic Medicine Institute for being subject to an autopsy once again. As a result of the autopsy performed by the Morgue Specialization Board of the İstanbul Forensic Medicine Institute, the definitive cause of death of the person on whose body there were wide traumatic lesions and rib fractures was determined to be "brain tissue destruction and brain haemorrhage resulting from blunt head trauma.A large number of witnesses were heard by the Chief Public Prosecutor's Office concerning the incident. A large majority of the witnesses stated that they had not directly seen the incident. In this respect, only M.S.K., M.E.M., F.C. and S.S. stated that they had witnessed the incident. In their statements, the witnesses noted that the police officers had hit M.D. with pickaxe handles and truncheons, and one of the witnesses, S.S., identified one police officer. Statements of other police officers whose names were included in the arrest warrant by the Chief Public Prosecutor's Office were not taken. The authorities only examined the statements taken within the scope of administrative investigation conducted by the police inspectors into the incident. The investigation was completed within one year, and a criminal case was brought against the police officer in question for the offence of "causing death as a result of aggravated intentional wounding by exceeding the limit of the right to use force".

The Erciş Assize Court decided to return the bill of indictment on the ground that "any police officer taking office on 5/3/2008 was not heard as a witness". The objection raised against the decision by the Chief Public Prosecutor's Office was accepted by

the 1st Chamber of the Van Assize Court. The proceeding starting with the hearing of 16/7/2009 lasted for twelve hearings and was completed on 2/6/2011. The police officers noted in their statements that they did not know who was the police officer taking M.D. under custody. The witnesses, M.S.K., M.E.M., F.C. and S.S. whose statements had been taken during the investigation were questioned by the court. They emphasized that they could not exactly remember the details as the incident took place approximately two years ago and gave statements partially contradicting with their previous statements before the prosecutor's office. At the end of the proceedings, it was decided that the accused police officer be acquitted. The court also decided that when the decision became final, a criminal complaint would be filed before the Chief Public Prosecutor's Office for the necessary action to be taken for the identification of the police officers causing the death of M.D. and subsequently opening a criminal case against them. The appeal lodged by the applicant against this decision was dismissed by the Court of Cassation.

"A special report concerning the disproportionate use of force in the demonstrations taking place in Erciş and the death of Mehmet Deniz" was drawn up by a panel of five persons consisting of the Van Bar Association, the Van Branch of the Human Rights Association and the Van Branch of the Association of Human Rights and Solidarity for Oppressed People ("*Mazlumder*") and submitted to the Chief Public Prosecutor's Office on 14/3/2008. This report included the interviews made with the persons named S.S., İ.M., F.C., M.P., M.T., M.S.K., S.K. and H.S., the observations and findings made and reached by the panel, the issues clarification of which was found necessary and the opinions and conclusions. In the report drawn up, it was concluded that the police had used disproportionate force to disperse the demonstrators; and that it must be clarified where M.D. had been placed between the hour when he had been battered (01:30 p.m.) and the hour when he had been taken to hospital (07:30 p.m.), and the doctors examining M.D. in accompany with the police officers must be identified.

The applicants İpek Deniz and the Others maintained that their next-of-kin had lost his life due to use of force by the law-enforcement officers while being taken into custody; and that an effective investigation had not been conducted into the incident. They accordingly alleged that there had been a breach of the right to life guaranteed in Article 17 of the Constitution and requested the establishment of the violations, an effective investigation to be conducted and to be awarded pecuniary and non-pecuniary damages.

In brief, the Constitutional Court made the following assessments within the scope of this application:

Alleged Violation of the Right to Life under its Substantive Aspect

The deaths resulting from use of force by virtue of public power must be considered to fall into scope of the State's negative obligation with respect to the right to life. This obligation includes use of force resulting in or likely to result in both intentional and unintentional deaths. Within the scope of the negative obligation with respect to the right to life, the officers using force by virtue of a public power have a duty not to intentionally and unlawfully cause death of any individual.

There is uncertainty concerning the identifying information and description of the police officers who took M.D. into custody and intervened in the incident and concerning the period between the time when M.D. was taken into custody and the time he was referred to the hospital.

The public authorities did not make any explanation concerning the circumstances under which the fatal blow to the head, rib fractures and wide lesions on his body, which were specified in M.D.'s autopsy report, had occurred. The single information included within the file is the statements given by the eye-witnesses that M.D. had resisted for not being taken to the police vehicle. However, such information was not confirmed by the public authorities.

As it is acknowledged that the death took place as a result of use of force by the law enforcement officers, the burden to prove that the use of force leading to death was resulted from a situation that was "absolutely necessary" rests on the public authorities. However, any explanation could not be made in this respect. On the other hand, as the public authorities failed to make an explanation concerning the use of force and the grounds thereof, a separate assessment was not performed as to whether the intervention in question had an adequate legal and administrative framework or not.

Any official record indicating that M.D. had been taken to the Security Directorate was not kept; his name was not recorded in the log of the custodial cell; and in spite of being compulsory, his state of health at the time of his arrest was not established.

It has been observed that the security units did not share the information as to how M.D. had died; the actions performed during the period from the time of his arrest to his referral to the hospital and the identity of the law enforcement officers performing these actions with the judicial authorities.

> **When the applicants' allegations, the case before the Assize Court and information and documents within the scope of the case-file are assessed together, it has been revealed that the death occurred due to the use of force by the law enforcement officers; and that there is no ground which would justify the use of force by the law enforcement officers as per Article 17 § 4 of the Constitution.**

It could not be understood under which conditions the intervention with the life of the applicants' next-of-kin occurred due to non-existence of such information. It has been concluded that the public authorities abstained from making cooperation with the judicial authorities for the clarification of the incident.

When the applicants' allegations, the case before the Assize Court and information and documents within the scope of the case-file are assessed together, it has been revealed that the death occurred due to the use of force by the law enforcement officers; and that there is no ground which would justify the use of force by the law enforcement officers as per Article 17 § 4 of the Constitution.

The Constitutional Court consequently held that there had been a breach of the right to life guaranteed in Article 17 of the Constitution under its substantive aspect.

Alleged Violation of the Right to Life under its Procedural Aspect

The State's positive obligations with respect to the right to life have procedural aspect. This procedural obligation requires carrying out an effective investigation which would be capable of identifying those who are responsible for each unnatural death and punishing them if necessary. The primary aim of this investigation is to ensure effective implementation of the law protecting the right to life and accountability of those concerned for deaths caused by public officers or taking place under their responsibility or occurring due to the other individuals' acts.

Upon the death of M.D. in the hospital, the *ex-officio* action taken by the Chief Public Prosecutor's Office is an important step for the effectiveness of the investigation; however, all evidence is also required to be collected. For this reason, the issues which have been or could not be established by the investigating and prosecuting authorities concerning the incident leading to M.D.'s death must be primarily set forth.

The issues which could not be established at the investigation stage in spite of being important for comprehending how the incident of death occurred must be divided into two groups as the ones which were researched but could not be established and the ones which were never researched.

It has been concluded that there are certain deficiencies reducing the possibility of identifying those who were responsible for the death and undermining the stability and gravity of the investigation; that evidence and issues which are to be definitely collected and researched were ignored; and that therefore, there was a breach of the obligation to collect evidence within the context of the obligation to conduct an effective investigation.

The issues which could not be established despite of being researched were as follows: who was the police officer in civilian clothes alleged to inflict the fatal blow to M.D.'s head; failure to obtain the camera footage of the Çapa Medical Centre showing the time of M.D.'s arrest; failure to draw up entry-exit forms pertaining to the custody process and the custodial cell; and the failure to verify the allegation that certain law enforcement officers used sticks similar to pickaxe handle due to insufficient number of truncheon during the intervention with the incidents taking place.

The issues which were never researched are as follows: whether M.D. attended illegal demonstrations or not; whether he resisted the law enforcement officers while being arrested and taken into custody to the extent which would require use of absolute necessary force likely to result in death; who were the law enforcement officers who were wearing uniforms and who were with the police officer in civilian clothes alleged to inflict the fatal blow to M.D.'s head; the vehicle by which he was taken to the Security Directorate after being arrested and its driver; the camera footages showing the inside of the building, entries and exits and custodial cells of the building between 01:00 p.m. and 06:00 p.m. during which M.D. was placed in the security directorate; statements of the superiors and their officers who were in charge in the Security Directorate building on the day of the incident along with the statements of the law enforcement officers who signed the arrest warrant; who were the law enforcement officers who considered that M.D.'s state of health deteriorated and took him to the hospital; and statements of certain persons who stated in the report drawn up by the Van Bar Association, the Van Branch of the Human Rights Association and the *Mazlumder* that they had witnessed the incident.

It has been concluded that there are certain deficiencies reducing the possibility of identifying those who were responsible for the death and undermining the stability and gravity of the investigation; that evidence and issues which are to be definitely collected and researched were ignored; and that therefore, there was a breach of

As the investigation into the incident of death (collection of evidence, statement-taking, identification) was caused to be conducted through the law enforcement officers involving in the incident, it has been concluded that there was a breach of the principle of independency of the investigating authority within the context of the obligation to conduct an effective investigation.

the obligation to collect evidence within the context of the obligation to conduct an effective investigation.

The Chief Public Prosecutor's Office initiated an *ex-officio* investigation due to the death taking place as a result of the use of force by the law enforcement officers. Although the offender was unknown and the offender was probably working in the relevant Security Directorate, the tasks of collection of evidence and identification of the offender were assigned to the same Security Directorate.

As the investigation into the incident of death (collection of evidence, statement-taking, identification) was caused to be conducted through the law enforcement officers involving in the incident, it has been concluded that there was a breach of the principle of independency of the investigating authority within the context of the obligation to conduct an effective investigation.

One of the most significant grounds on which the applicants invoked their allegations that an effective investigation was not conducted in the present incident is bringing of a criminal case only against one police officer although M.D. was battered by a great number of law enforcement officers.

In the present incident, the investigation conducted was limited to the question whether a certain person had involved in the incident or not and concluded within this scope. Moreover, the decision in question did not include any assessment as to the justification of the intervention with the right to life and as to whether the intervention falls within the scope of one of the exceptional circumstances specified in Article 17 § 4 of the Constitution.

The Constitutional Court has consequently held that there was a breach of the right to life, guaranteed in Article 17 of the Constitution, under its procedural aspect for lack of an effective investigation into M.D.'s death.

bh. Judgment on the violation of the obligation to protect the right to life of the deceased who committed suicide against his own actions

Nejla ÖZER and Müslim ÖZER Judgment (App. No: 2013/3782)

> **Having previously harmed himself and started a fire at his ward, Hasan Özer once again harmed himself by means of cutting various parts of his body on 28/9/2011, 1/10/2011, 3/10/2011 and 4/10/2011. The actions taken by the authorities of the Penitentiary Institution in respect of such acts of Hasan Özer were ensuring the treatment of the injuries sustained by Hasan Özer; initiation of a disciplinary investigation into the incident and accordingly imposing a penalty on him. However, endeavouring to resolve the psychological problems is of great importance for reoccurrence of such kinds of acts. However, it has been observed in the present incident that the authorities failed to show diligence which may be reasonably expected from them for providing psychological support needed by Hasan Özer and for the prevention of such kinds of attempts.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 21/4/2016, the applicant's son Hasan Özer was detained on remand by virtue of the decision of the 1st Chamber of the Küçükçekmece Magistrate's Court with the allegation that he had committed the offence of premeditated murder and placed in the İstanbul H-Type Closed Penitentiary Institution. He was then transferred to the Metris T-Type Closed Penitentiary Institution no. 1 and subsequently to the Silivri L-Type Closed Penitentiary Institution no. 5. For setting fire his ward in the latter institution, he was punished with solitary confinement for twenty days and transferred to the Kocaeli T-Type Closed Penitentiary Institution no. 1 (hereinafter "the Penitentiary Institution") as a disciplinary action. As a result of the medical examination of Hasan Özer performed on 4/9/2010 the day when he was taken to the Penitentiary Institution, it was determined that there were many cut scars on his arms, legs and the upper part of his umbilical region. The psychologist serving in the Penitentiary Institution interviewed with Hasan Özer on 8/9/2010. Hasan Özer was punished with solitary confinement for five days due to insulting the officers of the Penitentiary Institution in the course of the search carried out in the ward no. A-11 on 18/3/2011, and he was then placed in the ward no. A-18 on account of this incident. Hasan Özer submitted a petition to the Penitentiary Institution on 11/1/2011 and requested to consult with the psychologist. He then

submitted another petition on 17/1/2011. In this petition, he wrote "This is the 9th petition submitted by me for consulting with a psychologist. Why have you not allowed me to visit the psychologist? I have psychological problems. I respectfully request you to take the necessary action". Upon these petitions, the psychologist of the penitentiary institution interviewed with Hasan Özer and reached the conclusion that he was suffering from an anger disorder. It was then decided that he must attend the "anger control program". Hasan Özer subsequently submitted another petition and reiterated his request for consulting with the psychologist. The social service specialist interviewing with Özer informed the authorities of the Penitentiary Institution that if the request made by him for change of his ward was not fulfilled, Özer could re-perform such kinds of acts. The wards of Hasan Özer, who continuously experienced problems in the wards where he was staying and harmed himself for various reasons, were changed for many times between 6/9/2011 and 5/10/2015. Hasan Özer harmed himself also on 4/10/2016, the date when he was made present during the hearing. Thereupon, his ward changed on 5/10/2011 upon his lawyer's petition just after the hearing, and he was placed in the ward no. 2. On 6/10/2011, he was found dead hanging from the showerhead with a rope made of shirt pieces in the ward where he was staying alone.

Hasan Özer's autopsy was performed in accompany with his father Müslim Özer. The applicant Müslim Özer maintained that his son who had been detained on remand for about five years was transferred to the Penitentiary Institution (where he lost his life) before over one year; that his son had previously experienced no problem but during the last twenty days, he was having problems with a person from Tunceli in the ward no. A-18 and he was beaten. Although he was informed that his son had committed suicide, the applicant noted that he requested an extensive research be conducted concerning the incident and necessary actions be taken if his son had been killed. An investigation was initiated into the death of applicant's son, and in this scope, statements of the convicts and the officers working in the Penitentiary Institution were taken. The relevant Chief Public Prosecutor's Office rendered a decision of non-prosecution in respect of the suspects. The applicant's objection against this decision was dismissed. In the special supervision report prepared by the Directorate General for Penitentiary Institutions and Detention Houses of the Ministry of Justice concerning the death of Hasan Özer, it was established that convicts and detainees were placed in some of the wards; that moreover, the young detainees and convicts were held in the same place with the adults; that those who were staying in

the wards for a long time, who had the greatest number of friends and were capable of speaking well were generally assigned as the one responsible for the ward in spite of not being set out in the legislation; and that the administration did not forbid such a practice in the wards. The special supervision report also included allegations by a significant amount of detainees and convicts who were had been heard as a witness that İ.K. staying in the ward no. C-4 had sworn at the other convicts and detainees, had applied physical force, insulted them and applied psychological pressure on them, and it was assessed that it would be appropriate to take a legal action against İ.K..

The applicants maintained that their son, Hasan Özer, had died while being under the custody of the state; that an effective and fair investigation had not been conducted into the incident; that evidence had not been sufficiently collected and assessed; that in spite of being requested for many times, printouts of the photos / camera footages required to be recorded during the autopsy had not been included in the case-file; and that any action had not been taken against the public officers notably the Administrator of the Penitentiary Institution. They also alleged that the accuracy of the statements of the persons who were questioned as a suspect had not been verified; that their son had been exposed to torture within the knowledge of the institution administration; that as specified in the autopsy report, there had been old signs of battery and physical coercion; and that although their son had declared that he had not wanted to stay in the ward no. B-14 and that he had been exposed to all kinds of maltreatment there, the administration of the Penitentiary Institution had ignored this fact. They accordingly maintained that there had been a breach of the right to life, the right to liberty and security, the right to a fair trial, the right to an effective remedy and the prohibition of torture.

In brief, the Constitutional Court made the following assessments within the scope of this application:

Alleged Failure of the Authorities to Protect Hasan Özer's Life from His Own Acts

The State has the obligation to protect the right to life of all individuals within its jurisdiction against risks likely to occur due to both public authorities' and the other individuals' acts and the individual's own acts.

The applicants' son, Hasan Özer, was punished with solitary confinement for twenty days and transferred to the Kocaeli T-Type Closed Penitentiary Institution no. 1 as a disciplinary action. It is not possible for the administration of the penitentiary

institution not to be aware of this act committed by him. It is explicit that necessary measures should have been taken by the authorities with a view to protecting the health of Hasan Özer and preventing him from harming himself or other individuals.

It has been observed that although Hasan Özer should have been placed in the part of the Penitentiary Institution allocated for the young detainees and after completing the age of twenty-one, he should have been transferred to the part allocated for adult detainees, he was not subject to any supervision and classification as from the moment he was placed in the Penitentiary Institution and accommodated in wards where both the adults and convicts were placed. It has been revealed that Hasan Özer had acted with an intensive belief that he would be released and when he was not, he showed a tendency of harming himself. It may be accordingly concluded that accommodation of such a detainee together with convicts who were not in a similar situation with him and did not share similar psychology has an influence on the psychological problems currently experienced by him.

Having previously harmed himself and started a fire at his ward, Hasan Özer once again harmed himself by means of cutting various parts of his body on 28/9/2011, 1/10/2011, 3/10/2011 and 4/10/2011. The actions taken by the authorities of the Penitentiary Institution in respect of such acts of Hasan Özer were ensuring the treatment of the injuries sustained by Hasan Özer; initiation of a disciplinary investigation into the incident and accordingly imposing a penalty on him. However, endeavouring to resolve the psychological problems is of great importance for reoccurrence of such kinds of acts. However, it has been observed in the present incident that the authorities failed to show diligence which may be reasonably expected from them for providing psychological support needed by Hasan Özer and for the prevention of such kinds of attempts.

It has been revealed that Hasan Özer's attempts to harm himself started to intensify before the day of hearing of 4/10/2011. In one of his petitions addressing to the Chief Public Prosecutor's Office, Hasan Özer stated that he had harmed himself subsequent to each hearing he attended. Given these facts, the authorities of the Penitentiary Institution should have behaved towards Hasan Özer more cautiously and ensured sufficient protection for him. However, there is no information in the application file indicating that he was provided with special care prior to and subsequent to the hearings and kept under special guard except for being placed in a temporary room.

Given all of these circumstances, it has been observed that necessary measures were not taken by the officers of the Penitentiary Institution for the prevention of Hasan Özer's death within the framework of their powers.

Given all of these circumstances, it has been observed that necessary measures were not taken by the officers of the Penitentiary Institution for the prevention of Hasan Özer's death within the framework of their powers.

The Constitutional Court has consequently held that there was a breach of the obligation to protect life as required by Article 17 of the Constitution as the life of Hasan Özer could not be protected against his own acts.

Alleged Failure to Conduct an Effective Investigation within the Scope of the Right to Life

The procedural aspect of the positive obligations which the State is to fulfil within the scope of the right to life enshrined in Article 17 of the Constitution requires carrying out an independent investigation which is capable of clarifying all aspects of the death and identifying those who are responsible. Within the framework of this procedural obligation, the State is to carry out an effective investigation capable of identifying and, if necessary, punishing those responsible for each unnatural death.

It has been comprehended that the relevant Chief Public Prosecutor's Office investigated and established, in an effective manner, the question as to whether Hasan Özer had been killed as a result of intentional act or not. However, other aspects of the death could not be clarified other than the allegation of murder, and an effective investigation capable of identifying those responsible for the incident was not conducted.

In the special supervision report prepared by the Directorate General for Penitentiary Institutions and Detention Houses of the Ministry of Justice concerning the death of Hasan Özer, it was noted that a significant amount of detainees and convicts who were had been heard as a witness that İ.K. staying in the ward no. C-4 had sworn at the other convicts and detainees, had applied physical force, insulted them and applied psychological pressure on them, and it was assessed that it would be appropriate to take a legal action against İ.K.. Hasan Özer stayed in the ward no. C-4 for a period of time and was beaten by the other convicts and detainees staying in the same ward.

It has been determined that there were many signs indicating that Hasan Özer may have performed such an act before his last attempt resulting in his death; and that given such indications, it might be expected from the authorities to take measures at more advanced level; however there was negligence on the part of the authorities in the protection of Hasan Özer's right to life. However, it has been observed that the investigation conducted into the incident, in respect of its scope and consequences, was not capable of clarifying the probabilities in question and if required, punishing those who were responsible for the incident.

Some of the convicts stated at the investigation stage that Hasan Özer's ward had been changed for several times beyond the consent of Hasan Özer and placed in problematic wards; and that he had been exposed to pressure by the administration of the Penitentiary Institution. When all of these issues are taken into account, there appear severe hesitations concerning the question as to whether Hasan Özer had been kept under pressure by the administration of the Penitentiary Institution. However, the Chief Public Prosecutor's Office heard only one public officer as a suspect, and the other officers of the Penitentiary Institution whose statements were taken as a witness were questioned only with regard to the incident of death. Nor was a sufficient investigation conducted into the probabilities likely to drive Hasan Özer to suicide. The questions as to whether there was a pressure prevailing in the ward no. C-4; if so, why such an atmosphere where pressure was prevailing was ignored by the authorities; whether it was really for exercising influence over Hasan Özer; and whether the situation reported to have taken place in the ward no. C-4 was the same in the other wards where Hasan Özer was staying were not investigated. Moreover, Hasan Özer's tendency to continuously harm himself was never questioned, and the reasons of such acts performed by him were never tried to be found out.

It has been determined that there were many signs indicating that Hasan Özer may have performed such an act before his last attempt resulting in his death; and that given such indications, it might be expected from the authorities to take measures at more advanced level; however there was negligence on the part of the authorities in the protection of Hasan Özer's right to life. However, it has been observed that the investigation conducted into the incident, in respect of its scope and consequences, was not capable of clarifying the probabilities in question and if required, punishing those who were responsible for the incident.

It has been accordingly concluded that in the investigation conducted by the Chief Public Prosecutor's Office, the incident of death could not be clarified in all aspects and those probably responsible for the incident could not be identified. Therefore, the investigation conducted into the incident could not ensure accountability in practice.

The Constitutional Court has consequently held that in the criminal investigation conducted, there was a breach of the right to life protected in Article 17 of the Constitution under its procedural aspect.

c. JUDGMENTS ON ON THE RIGHT TO PROTECT AND DEVELOP THE MATERIAL AND SPIRITUAL ENTITY

ca. Judgment on the violation of the right to protect and develop the material and spiritual entity due to dismissal of the action brought for the annulment of the favourable decision of Environmental Impact Assessment (EIA) without examination of the allegations concerning environmental activity

Mehmet KURT Judgment (App. No: 2013/2552)

> **The applicant's fundamental allegations that the environmental disturbances resulting from the operation of the plant in question adversely influenced the health and quality of life and that accordingly the environmental assessment made by the administration was inadequate are the most significant elements in establishment of the fact whether the public authorities had struck a fair balance between the applicant's interest and the public interest. However, it has been observed that the applicant's such kinds of requests and objections were not dealt with by the inferior courts. It has been revealed that the examination leading to the conclusion that an EIA report was not necessary in respect of the plant in question and the ground thereof were quietly restricted; that from this aspect, the applicant's fundamental allegations were not directly addressed; and that the applicant could not obtain the opportunity to make his allegations concerning the environmental activity in question dealt with in a duly manner before the judicial authorities.**

In the incident giving rise to the present individual application which was concluded by the Plenary of the Constitutional Court on 25/2/2016, the applicant is an owner of four-folded building located in Soğuksu Village in Kalkandere/Rize. A favourable decision of the environmental impact assessment (EIA) was rendered by the Ministry of Environment and Forestry for the Cevizlik Hydroelectric Plant planned to be constructed by A. Enerji Üretimi San. ve Tic. A.Ş. ("the Company") at the İkizdere basin in the province of Rize, and accordingly a forested land of 69.881 m^2 was allocated to the Company. At the end of the case brought before the Rize Administrative Court for the revocation of the EIA favourable decision, the act at stake was revoked on

the ground that the environmental impacts of the EIA favourable decision were at the acceptable levels except for the calculation of aqua vitae to be left for the continuation of the aquaculture. Thereupon, after the Company had undertaken to release water at the amount of 2800 l/sec, which was specified in the court's decision, to the stream, a new EIA favourable decision was taken. The action brought before the Rize Administrative Court for revocation of this decision was dismissed.

After the Directorate General of Forestry had allocated the forested land of 69.881 m^2 as a switchyard for the Cevizlik Hydroelectric Plant, the authorization was revoked as this land was not found appropriate by the Directorate General of the Turkish Electricity Transmission Company ("the TEİAŞ"). It was requested that an additional authorization be granted for the new appointed forested land of 16.638 m^2. The Cadastral and Property Department at the Directorate General of Forestry of the Ministry of Environment and Forestry granted additional authorization for the Company concerned until 27/10/2055 for establishing a switchyard on this area. A case was filed by the applicant and another person before the Rize Administrative Court for revocation of the act in question.

The case filed by the applicant for the protection of the natural environment and environmental health was dismissed by the Rize Administrative Court on the grounds that the environmental impact values were within the acceptable limits and that there was no ground which would require making another assessment different than the previously-taken EIA report. The first instance decision was quashed by specifying that the legal procedure pertaining to the site for which additional authorization had been granted was not fulfilled. Upon the request of the defendant administration for the rectification of the judgment before the Supreme Administrative Court, the previous judgment rendered by the Chamber of the Supreme Administrative Court was revoked, and the first instance decision was upheld.

Along with the administrative proceedings cited-above, in the expropriation action brought by the TEİAŞ against the applicant and another third person, it was held that the easement of the part which was indicated on the expert report and on which the switchyard and the transmission lines were built be registered in the name of the TEİAŞ; that the easement value of the immovable property be paid to the third party specified to be the owner of the immovable property while the easement value of the building be paid to the applicant who was the owner of the building.

The applicant maintained that although an EIA favourable decision was also required to be obtained for the switchyard built, upon the additional decision rendered by

the Directorate General of Forestry, within the boundaries of the Soğuksu Village in Kalkandere / Rize where many persons were residing and he had a four-storey building within the scope of the "Cevizlik Regulator and Hydroelectric Plant Project", this decision was not taken; that high-voltage transmission lines crossed just over his home within the scope of the switchyard built next to his immovable property, and it was revealed through results of scientific research that radiation emitted by these transmission lines around 600 m led to many illness including cancer. He also alleged that the noise caused by this plant while operating was far beyond the sufferable levels; and that therefore the residents could not maintain their daily lives and nor could they sleep at nights; and that he could not obtain any result from the case he had filed for non-existence of a EIA report concerning the plant in question. The applicant accordingly alleged that there had been a breach of the rights guaranteed under Articles 17 and 56 of the Constitution.

In brief, the Constitutional Court made the following assessments within the scope of this application:

In case where the interferences taking place in the context of environmental issues have a direct influence on the right to protect and develop the material and spiritual entity enshrined in Article 17 of the Constitution, it is possible to carry out an examination by means of establishing connection with legal interests falling within the scope of this article. It must be established whether the public authorities took the necessary steps to ensure the effective protection of this right and whether a fair balance was struck between the competing interests with regard to the environmental impact at stake.

It has been observed in the petition for filing a case which was submitted in the course of the proceedings by the applicant, the petition for raising an objection to the expert report and the replication that the applicant made requests and raised objections concerning the fact that the relevant plant's impacts on the health and life quality of him and the local community must be taken into consideration. It has been revealed that in spite of such objections, the court did not request a new expert examination to be conducted; and nor did it specify the ground thereof. Although the quashing judgment of the Supreme Administrative Court underlined the deficiencies concerning the proceedings and especially concerning the assessment within the scope of the expert report, it has been observed that these deficiencies were not eliminated; the judgment rendered by the Chamber were revoked and the first instance decision was upheld.

One of the most significant elements of the procedural guarantees required to be provided for the individuals who are parties to the environmental decision-taking processes is the opportunity to bring the acts and neglects of the public authorities before an independent judicial authority and to make them subject to a duly examination. Along with the opportunity for having recourse to these authorities, it must be ensured that the relevant public authorities deal with the issue with due diligence and strike a balance by means of paying regard to all relevant interests. It is accordingly requisite to ensure that the individuals effectively involve in the process, raise all kinds of objections and submit evidence and make these objections and evidence examined; and that all of their substantive allegations are discussed with justifications thereof.

In respect of the present application, the applicant's fundamental allegations that the environmental disturbances resulting from the operation of the plant in question adversely influenced the health and quality of life and that accordingly the environmental assessment made by the administration was inadequate are the most significant elements in establishment of the fact whether the public authorities had struck a fair balance between the applicant's interest and the public interest. However, it has been observed that the applicant's such kinds of requests and objections were not dealt with by the inferior courts. It has been revealed that the examination leading to the conclusion that an EIA report was not necessary in respect of the plant in question and the ground thereof were quitely restricted; that from this aspect, the applicant's fundamental allegations were not directly addressed; and that the applicant could not obtain the opportunity to make his allegations concerning the environmental activity in question dealt with in a duly manner before the judicial authorities.

In the light of these findings, it has been concluded that the public authorities failed to fulfil their positive obligations for the protection of the applicant's right to protect and develop her material and spiritual entity and ensuring effective enjoyment of this right.

The Constitutional Court has consequently held that there was a breach of the right to protect and develop material and spiritual entity which is guaranteed in Article 17 of the Constitution.

cb. Judgment on the Right to be Forgotten

N.B.B. Judgment (App. No: 2013/5653)

> **The right to be forgotten comes into question in the event that easy-accessibility of a news report for a long time on web-sites has impaired an individual's honour and dignity. The aim of this right is to ensure that a necessary delicate balance be struck between the freedoms of expression and press and the individuals' right to develop their spiritual entity due to widespread use of and the opportunities provided by internet. Hence, this means must be used in a way which would not infringe upon the very essence of the freedom of press and the individuals' freedom of receive news and ideas, taking the news archive under protection on the internet, and which would, at the same time, protect the interests of the right owner.**

In the incident giving rise to the present individual application which was concluded by the Plenary of the Constitutional Court on 3/3/2016, three news reports indicating that the applicant had been sentenced to a judicial fine for using drugs were published in the web-site archive of a national newspaper in 1998 and 1999. On 2/4/2013, the applicant sent a written warning to the relevant media outlet for banning the publication of these three news reports. As the contents of these news reports were not made unavailable within two days, the applicant applied to the 36th Chamber of the İstanbul Magistrate's Court (which was closed) on 18/4/2013 against the relevant media outlet and requested publication of the impugned contents be discontinued. On 22/4/2013, the Magistrate's Court decided to accept the applicant's request on the grounds that "the news report subject-matter of the request was not up-to-date and newsworthy anymore; that there was no public interest for its remaining on the agenda; and that it included offending and destructive information concerning the relevant person's private life".

Upon the objection, it was held by the decision dated 28/5/2013 of the 2nd Chamber of the İstanbul Criminal Court of General Jurisdiction that the above-mentioned decision of the Magistrate's Court be revoked. This decision was notified to the applicant's representative on 21/6/2013.

The applicant maintained that there had been a violation of his rights guaranteed in the Constitution on the ground that his requests for rendering the news reports,

which were related to the incident in which he had been sentenced to a judicial fine and were still on the web-sites, inaccessible were dismissed by the judicial authorities.

In brief, the Constitutional Court made the following assessments within the scope of this application:

In the present incident, a fair balance must be struck between the right to honour and reputation in which there was interference on account of the availability of the news reports on the web-sites and the freedom of expression and the freedom of press which would be interfered with when the impugned contents were made unavailable. A significant issue that must be taken into account in assessment of such balance in the present incident is the fact that not only the freedoms of expression and press but also the individuals' freedom of receiving news and ideas are in question *vis-à-vis* the right to honour and reputation and the right to be forgotten. The Constitutional Court makes its assessment as to whether a fair balance has been struck between the above-mentioned rights and freedoms on the basis of the grounds set forth by the competent judicial authorities.

The right to be forgotten comes into question in the event that easy-accessibility of a news report for a long time on web-sites has impaired an individual's honour and dignity. The aim of this right is to ensure that a necessary delicate balance be struck between the freedoms of expression and press and the individuals' right to develop their spiritual entity due to widespread use of and the opportunities provided by internet. Hence, this means must be used in a way which would not infringe upon the very essence of the freedom of press and the individuals' freedom of receive news and ideas, taking the news archive under protection on the internet, and which would, at the same time, protect the interests of the right owner.

In the present incident, the impugned news reports were published in 1998 and 1999 and they are now in the form of archive. As to the news reports which are saved in the newspaper achieve, it is obvious that archive is not only established in digital environments but also saved by the content provider. Given especially the methods by which personal data, which makes the news reports accessible on the internet, are deleted and blocked through an assessment to be made on the basis of the proportionality principle, it is possible to reach the desired conclusion without completely deleting the news report which constitute the archive of the relevant newspaper. In this respect, severe interferences in the freedom of press which would result, in terms of scientific researches, in re-writing of the incidents taking place in the past by means of completely deleting the digital news archive may be prevented.

> **"As of the application date, the news report in question is concerning an incident taking place approximately fourteen years ago and is no longer up-to-date. In terms of statistical and scientific terms, there is no ground necessitating easy-accessibility of such information on internet for the above-cited reasons. Accordingly, it is obvious that the easy-accessibility of the news reports which were concerning the applicant, who is neither a political nor a mediatic figure, and which were available on the internet impairs the applicant's reputation."**

The news reports concerning the applicant, saved in the archive available on the internet and thereby easily accessible are related to the criminal proceedings conducted in 1998 and 1999. It was not maintained that these news reports were contrary to facts. The news reports are concerning the arrest of the applicant while taking drugs and his subsequent trial. In this respect, it may not be mentioned that the subject-matter of the news reports in question is still newsworthy in social terms or is such as to cast light on the future, which are the criteria for rendering the news reports easily accessible in the archive.

As of the application date, the news report in question is concerning an incident taking place approximately fourteen years ago and is no longer up-to-date. In terms of statistical and scientific terms, there is no ground necessitating easy-accessibility of such information on internet for the above-cited reasons. Accordingly, it is obvious that the easy-accessibility of the news reports which were concerning the applicant, who is neither a political nor a mediatic figure, and which were available on the internet impairs the applicant's reputation.

Consequently, the news reports published concerning the applicant are the ones that must be assessed within the scope of the right to be forgotten. Given the facilities provided by the internet, the access to the news reports in question must be denied for protection of the applicant's honour and reputation. In this respect, it cannot be mentioned that a fair balance has been struck between the freedoms of expression and press and the individual's right to protect his spiritual entity by dismissing the applicant's request for denying access to the news reports in question.

The Constitutional Court has consequently held that there was a breach of the applicant's right to honour and reputation guaranteed in Article 17 of the Constitution.

cc. Judgment on the violation of the right to protect and develop material and spiritual entity as the provisions of the international convention, which duly entered into force, were not taken into consideration in the settlement of the dispute for ensuring certainty in the applicant's identity records

Aslan Faruk TOPRAK Judgment (App. No: 2013/2957)

> **Having regard to the application as a whole, it has been revealed that remedies which would ensure elimination of the discrepancies between the civil records for ensuring certainty in the applicant's identity which is a part of his material and spiritual entity must be formed; and that only in this manner, the applicant's right to name could be properly protected. It has been considered that the liabilities imposed on the public authorities by the Convention on Recording of Names and Surnames in the Birth Records (Convention no. 14) enables making limited corrections in a way which could eliminate the differences between the applicant's official records even if being closed.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 24/3/2016, the applicant was born in Germany in 1978 and was registered in the German birth record with the name of "Aslan". The applicant's parent applied to the Düsseldorf Consulate General for making his son registered also in the Turkish birth record. The applicant's name is "Aslan Faruk" in the Turkish birth record. The applicant, who got married with a Turkish citizen in 2005 and has been living in Germany since his birth, was deprived of his Turkish citizenship by virtue of the approval decision of 20/1/2006 taken by the Ministry of Internal Affairs. The applicant, who is currently a holder of a blue card, is only a German citizen and serves as a doctor in Germany. On 5/10/2011, the applicant's wife applied to the Düsseldorf Consulate General of the Republic of Turkey and requested the registration of their common children in the Turkish birth record. Her request was rejected on the grounds that father's name of the children was "Aslan" in the German official records while his name was "Aslan Faruk" in the Turkish birth record and that a new application must be lodged with a copy of the birth civil registry in which father's name of the children was registered as "Aslan Faruk".

The applicant brought an action for change of his name registered as "Aslan Faruk" in the closed Turkish birth record as "Aslan" by maintaining that he had been suffering

from similar problems. At the end of the proceedings, the relevant court dismissed the applicant's action brought by the applicant who had been deprived of his Turkish citizenship on the ground that any step cannot be taken on the basis of a closed record. This decision became final after being subject to the appellate review.

The applicant maintained that although there were reasonable grounds requiring the change of his name "Aslan Faruk" in the Turkish birth record which had been closed for being deprived of the Turkish citizenship, the dismissal of the action as the birth record had been closed hindered especially legal acquirements of his descendants. The applicant accordingly alleged that there had been a breach of the right to protect and develop material and spiritual entity which guarantees the individuals' right to take an action with respect to their names.

In brief, the Constitutional Court made the following assessments within the scope of this application:

The protection with respect to the name which is one of the most significant elements of the identity of the individuals entails the fulfilment of the requests for change which do not preclude functioning of public order by the public authorities. In this respect, administrative or judicial remedies by which such kinds of requests could be raised and examined must be established and the requests scope of which is found appropriate within the scope of certain national and international arrangements must be fulfilled. While making arrangements concerning the personal statuses such as change of name, this issue must not be dealt with within a narrow framework by acknowledging that these arrangements only concern the law to which the citizens of the relevant country are subject. Accordingly, it is of importance that especially the guarantees introduced by the international conventions to which relevant persons are parties be respected and that efficient, accessible and foreseeable remedies by which the requests for change of names could be fulfilled and results could be accomplished be established. It may be required that such kinds of remedies be provided for not only citizens but also for foreigners under certain and restricted circumstances.

In cases where individuals are required to take an action with respect to their own names within the scope of Article 17 of the Constitution, the arrangements must not be made in a narrow manner given the fact that the circumstances of the right-holders may be different, and the provisions set out in the relevant international conventions must be materialized at a minimum level while the legislation is made.

It is obvious that the practice in which the request of the applicant, who was deprived of the Turkish citizenship with approval, uses the name of "Aslan" in his identity card and official documents in Germany of which he is a citizen and who is called with this name by persons around him, for changing of his name "Aslan Faruk" in the Turkish birth record as "Aslan" was rejected constitutes a breach of the right to protect and develop material and spiritual entity which is enshrined in Article 17 of the Constitution.

It is undoubted that it is ordinary for the applicant, who maintains his life with the name of "Aslan", whose mother, father and wife are Turkish citizens and who is also a holder of blue card pursuant to the Law no. 5901, to wish to perform certain official acts in Turkey. It is therefore foreseeable that the applicant might experience certain difficulties due to the difference between his name in his original identity card to be submitted and his name in the closed birth register. Indeed, in the impugned incident, the applicant's descendants were not registered in the Turkish birth record due to the difference in the applicant's names.

The civil registry services provided by the State to their citizens is a legal and technical service fundamental qualifications of which are taken from the civil law arrangements and interstate private law arrangements. Performance of this service is at the same time an obligation as it always requires accurate determination of the individuals' identities which are a part of their material and spiritual entity. Performance of an action with respect to the personal status is accepted as a part of the public service in question for the states. This obligation is especially required to be fulfilled, in respect of the foreigners, by Turkey who is a member of the International Civil Status Commission.

Having regard to the application as a whole, it has been revealed that remedies which would ensure elimination of the discrepancies between the civil records for ensuring certainty in the applicant's identity which is a part of his material and spiritual entity must be formed; and that only in this manner, the applicant's right to name could be properly protected. It has been considered that the liabilities imposed on the public authorities by the Convention on Recording of Names and Surnames in the Birth Records (Convention no. 14) enables making limited corrections in a way which could eliminate the differences between the applicant's official records even if being closed.

It has been concluded that as Article 14 of the Civil Registry Services Act no. 5490 was not interpreted by taking into consideration the Convention no. 14, the

interpretation and attitude of the inferior courts in the present incident could not remedy the unjust treatment suffered by the applicant; that the provisions of the international convention which duly entered into force were not paid regard to in the resolution of the dispute; and that therefore the attitude in question failed to meet the requirement of being necessary in a democratic society and could not strike a proportional and fair balance between the public aim and the personal interest of the individual.

The Constitutional Court has consequently held that there was a breach of the right to protect and develop material and spiritual entity which is guaranteed in Article 17 of the Constitution.

cd. Judgment on the violation of the right to protect and develop the material and spiritual entity of the applicant who has the obsession of collecting garbage, on the basis of the news made about his home's being a garbage house

D.Ö. Judgment (App. no. 2014/1291)

> **In the present case, while there was no interference on the part of the public authorities, in the presence of the alleged violations of fundamental rights resulting from the relations between the private persons, it falls under the scope of the public authorities' positive obligations in this respect to create a legal framework involving sufficient and effective legal mechanisms and to strike a balance between the relevant interests within the scope of a trial procedure containing the necessary procedural guarantees.**

In the incident giving rise to the present individual application which was concluded by the Plenary of the Constitutional Court on 13/10/2016, upon a denouncement pertaining to the fact that the applicant's dwelling was like a garbage house and that it threatened the public health, the police officers entered the yard of the applicant's house, by the approval of the District Governorship dated 21/5/2003, and took out such materials as papers, plastics, glass bottles and etc. This practice was videotaped by the reporters of two news agencies. Concerning the mentioned case, the situation of the applicant and his family was broadcasted twice on a national television channel; and the 2nd Chamber of the İzmir Criminal Court of General Jurisdiction ordered that

an expert report be prepared regarding the first broadcast dated 2/5/2003, and the Bakırköy Chief Public Prosecutor's Office ordered that an expert report be prepared regarding the second broadcast dated 15/6/2003. The expert reports examined the manner in which the news was presented by the news presenter, the manner in which the video recordings were broadcasted and the police officers' intervention in the garbage house to empty it. It is seen that in the expert report concerning the second news, the expert opinions were included and it was noted that having a tendency to the obsession of collecting garbage was a sign of schizophrenic behaviour patterns, which might result from psychiatric diseases which were not treated and from solitude.

On the basis of his allegation that the broadcast dated 22/5/2003 on the television channel named T. within the H.R.T. Corporation attacked his personal right, on 20/5/2004 the applicant brought an action for non-pecuniary damages before the 4th Chamber of the İzmir Civil Court of General Jurisdiction. By a decision dated 6/6/2011, the civil court partially accepted the case. On 11/10/2012 the 4th Civil Chamber of the Court of Cassation quashed the decision of the civil court, on the ground that the case must be dismissed. The reason for quashing was as the following: *"…It has been understood that the broadcast which is the subject of the case remains within the scope of journalism by the manner it was broadcasted; it was in conformity with the principles of "right to impart information, reality, public benefit, social interest, topicality and intellectual engagement between the topic and expression"; there was no attack against the personal rights of the plaintiff; essence and manner balance was not disturbed to the detriment of the plaintiff; and in this respect, there was no element of unlawfulness. Regard being had to the facts explained by the domestic court, while the request should have been dismissed completely, the plaintiff was found to be entitled to non-pecuniary compensation on the basis of an unsubstantiated written reason, which is unlawful; therefore, the decision has been quashed."*

Upon the quashing judgment of the Court of Cassation, on 2/5/2013 the civil court dismissed the case, and the 4th Civil Chamber of the Court of Cassation upheld the relevant decision.

The applicant submitted that the police officers and news agency employees entered his house without his consent; that the video recordings were broadcasted twice by the respondent media organ in the manner of news accompanied by misinformation; that the broadcasts in question were dated 22/5/2003 and 15/6/2003; that his personal rights were damaged by the incorrect information within the content of

the mentioned news such as his collecting garbage in his house and his having psychological problems. In this respect, the applicant alleged that his rights protected by the Constitution were violated.

In brief, the Constitutional Court made the following assessments within the scope of this application:

It is clear that the video recordings and comments with respect to the applicant, which were broadcasted on the relevant television channel, constituted an interference with the applicant's right to honour and dignity. However, while it is seen that the mentioned images and comments were subject to television news, in the present application it must be assessed whether a reasonable balance was struck between the applicant's right to honour and dignity and the relevant broadcasting corporation's freedom of expression and dissemination of thought and, in this respect, its freedom of press.

In order to accept that the balance to be struck between the right to honour and dignity and the freedom of press was respected, the presence of an interest outweighing an individual's interest as regards the protection of her/his right to honour and dignity must be put forward within the scope of the criteria set by the ECtHR as well as on the basis of the concrete facts.

The applicant alleged that there was a violation of his personal rights as a result of his having been humiliated, on the grounds that by the incorrect expressions added to the relevant television news while the video recordings of his house was being broadcasted, a false impression was created to the public which indicated that together with his family he collected and stored garbage; that there was misinformation which indicated that he was undergoing psychological treatment; that the broadcast in question lacked objectivity and went beyond the limits of news; that there was misinterpretation; and that a language which created hostility in the public was used.

In the present case, while there was no interference on the part of the public authorities, in the presence of the alleged violations of fundamental rights resulting from the relations between the private persons, it falls under the scope of the public authorities' positive obligations in this respect to create a legal framework involving sufficient and effective legal mechanisms and to strike a balance between the relevant interests within the scope of a trial procedure containing the necessary procedural guarantees.

In the light of the determinations explained above, it has been understood that the news content, which has been considered to have been based on concrete facts and have been in compliance with the apparent truth, is related to a matter concerning the environment and human health, in this sense contributing to a public debate and having the value of informing the public; that given the manner in which the relevant news was broadcasted, as well as, the manner in which the person subject of the news was presented, although some exaggerative expressions were included, no expression going beyond the scope and limits of the freedom of press by affecting the personal values of the applicant was used; that the inferior courts mentioned the relevant elements and pursued a balance between the applicant's interest regarding the protection of his honour and dignity and the freedom of the press, as well as, the judicial authorities put forward the grounds for their conclusions in detail; and that in this scope, regard being had to the determinations and elements set forth in the decisions, there has been no finding which indicates that the judicial authorities exceeded their discretion.

In this scope, it must first be answered whether the broadcast in question which was on air during the newscast of a national news channel made a contribution to a debate developed on the basis of the facts, and whether its content went beyond the purpose of satisfying the curiosity of the public. In this connection, the higher the value of an article or news in terms of informing the public is, the more does a person bear the publication of the relevant article or news, as well as, the lower the value of an article or news in terms of informing the public is, the more does the individual's interest as regards the protection of her/his honour and dignity outweigh.

It has been understood that in the relevant news, a matter, reflected as garbage house cases and is frequently subject to news, which concerns the environment and in this sense the human health deeply, was broadcasted. Within this framework, it must be kept in mind that the media's function of disseminating information and opinions concerning the matters related to general interest includes also the right of the public to receive these information and opinions.

When the broadcast in question was examined on the basis of the transcription of images and the expert report, it has been understood that although the relevant broadcast included some information which might indicate value judgment about

the applicant's mother and father, it mainly relied on concrete facts.

In the light of the determinations explained above, it has been understood that the news content, which has been considered to have been based on concrete facts and have been in compliance with the apparent truth, is related to a matter concerning the environment and human health, in this sense contributing to a public debate and having the value of informing the public; that given the manner in which the relevant news was broadcasted, as well as, the manner in which the person subject of the news was presented, although some exaggerative expressions were included, no expression going beyond the scope and limits of the freedom of press by affecting the personal values of the applicant was used; that the inferior courts mentioned the relevant elements and pursued a balance between the applicant's interest regarding the protection of his honour and dignity and the freedom of the press, as well as, the judicial authorities put forward the grounds for their conclusions in detail; and that in this scope, regard being had to the determinations and elements set forth in the decisions, there has been no finding which indicates that the judicial authorities exceeded their discretion.

The Constitutional Court has consequently held that the applicant's right to protect and develop his material and spiritual entity protected in Article 17 of the Constitution has not been violated.

d. JUDGMENTS ON THE PROHIBITION OF TORTURE, ILL-TREATMENT AND TREATMENT INCOMPATIBLE WITH HUMAN DIGNITY

da. Judgment on the violation of the prohibition of treatment incompatible with human dignity in respect of the applicant suffering from a fatal illness and held in prison although his state of health was not fit for the prison conditions

Murat KARABULUT Judgment (App. No: 2013/2754)

> **A.K.'s relatives requested re-formation of the execution of the sentence imposed on A.K. by taking into consideration his state of health. It has been observed that, for receiving a final decision on such a request, A.K. and information and documents issued for the establishment of the state of health of A.K. had to shuttle between "a fully equipped state hospital" and the Forensic Medicine Institute on account of the referrals and the deficiencies and delays in the reports and request letters drawn up; and that the process initiated on 21/3/2011 could not be ended within the elapsing period of approximately seven months until the death of A.K.. The determination of which institution/institutions taking place in the process caused this delay is of no importance. The important issue is the failure of taking a decision which is very critical in respect of A.K. as bureaucratic actions were not properly and timely performed.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 18/2/2016, A.K., who was the applicant's father and 74 years old at the date when he was placed in the prison, informed during his medical examination performed on the first day he was placed in the prison that he was suffering from lung cancer. In accordance with the report drawn up by the doctor of the institution, it was considered appropriate to accommodate him in the infirmary. On the same day, A.K. requested to avail himself of personal pardon. In the report drawn up in respect of A.K. by the hospital where he was referred, he was diagnosed with the lung cancer, and it was specified that respiratory function test result was 53%. The Forensic Medicine Institute to which the applicant's father had been referred together with the above-mentioned report sent

him to the Kartal Training Research Hospital ("Kartal Hospital"), which was the health institution where the tests for diagnosis of lung cancer were performed, for receiving a report indicating his final health status and performance of all tests. On 11/8/2011, within the framework of the information obtained, the Forensic Medicine Institute also issued a report in which it was specified that A.K. was not considered to be suffering from a continuous illness, disability and his old age; and that a new report would be issued following the additional tests to be performed and the submission of the report to be prepared concerning the stage of the illness. During the period he was placed in the prison, A.K. was referred to various hospitals for a total of 14 times between 22/3/2011 and 17/10/2011 for treatment of his illness except for the referrals made for the acts performed within the scope of the personal pardon. The applicant's father, A.K., died on 19/10/2011 when he was in the prison. The report of the Kartal Hospital concerning the stage of the illness was received by the prison administration by post on 5/12/2011. The applicant filed a criminal complaint against the officers of the Forensic Medicine Institute issuing the report with the allegation that they had committed the offence of neglect of duty. Thereupon, a decision of non-prosecution was rendered. The objection to this decision was dismissed.

The applicant maintained that his father who had been in the prison as a convict requested suspension of his sentence for suffering from a lung cancer; that this request had been rejected in line with the report issued by the Forensic Medicine Institute; however, his father had died approximately two months after the issuance of this report; that he had filed a criminal complaint against the officers of the Forensic Medicine Institute issuing the report with the allegation that they had committed the offence of neglect of duty; however, a decision of non-prosecution had been rendered at the end of the investigation; and that he was experiencing grief as his father had died under severe conditions. He accordingly alleged that there had been a breach of the right to life and the prohibition of torture and claimed compensation.

In brief, the Constitutional Court made the following assessments within the scope of the application.

It has been understood that before A.K. was placed in the prison, he had been diagnosed with lung cancer; that he started to undergo chemotherapy and radiotherapy; and that the prison administration was informed of this situation on 20/3/2011 when he was placed in the prison. It is obvious that A.K.'s illness was of severe nature; and that his health deteriorated much more as time passed by. Therefore, the issue that must be resolved is to which degree A.K.'s state of health

until his death was suitable for his accommodation in the prison. In other words, the basic issue likely to be examined with respect to the present incident is whether this situation caused distress and grief much more than the level of sorrow which is a natural consequence of being deprived of liberty.

When the existing arrangements on this matter are examined, it has been observed that Article 16 § 2 of the Law no. 5275 prescribes that execution of the sentence of a convict may be suspended for health-related grounds. Moreover, Article 104 § 2 (b) of the Constitution provides the opportunity for making a request for obtaining pardon from the President of the Republic.

It is undoubted that such arrangements are, in theory, capable of ensuring the material and spiritual entities of the convicts who have been suffering from especially a very severe illness or who are not fit for being accommodated under the prison conditions for any other reason. Therefore, the issue which must be emphasized is to which degree the state of health of the convicts and detainees in the prisons is suitable for ensuring them to avail themselves of the above-cited legal opportunities and whether the acts performed with respect to the state of health of such persons have been appropriate or not.

In this scope, the issue to be dealt with by the Constitutional Court with respect to the impugned incident is to determine as to whether the acts necessary for the official establishment of the relevant person's state of health by a health institution, a legal institution authorized by subsidiary arrangements, with a view to forming a basis for the decision to be taken by the authorities with respect to the suspension of the execution of the sentence or being subject to pardon have been performed with a reasonable speed and in a diligent manner. At this stage, the proper implementation of the determined procedure may depend on the acts to be performed by the prison administration, a fully-equipped state hospital and the Forensic Medicine Institute. Deficiencies and delays in the actions to be performed might be in question in respect of all persons on behalf of whom an application has been lodged and would mean, in the present incident, leaving A.K. alone in the prison in a manner which would not enable him to protect his own dignity and which would deprive him of the support of his family while coming to the inevitable end caused by his illness progressing.

A.K.'s relatives requested re-formation of the execution of the sentence imposed on A.K. by taking into consideration his state of health. It has been observed that, for receiving a final decision on such a request, A.K. and information and documents issued for the establishment of the state of health of A.K. had to shuttle between "a

It must be accepted that A.K. was exposed to distress much more than the one which is an inevitable and natural consequence of lung cancer and of being deprived of his liberty and thereby to a treatment which was incompatible with human dignity.

fully equipped state hospital" and the Forensic Medicine Institute on account of the referrals and the deficiencies and delays in the reports and request letters drawn up; and that the process initiated on 21/3/2011 could not be ended within the elapsing period of approximately seven months until the death of A.K.. The determination of which institution/institutions taking place in the process caused this delay is of no importance. The important issue is the failure of taking a decision which is very critical in respect of A.K. as bureaucratic actions were not properly and timely performed.

It must be accepted that the facts that A.K. was examined and his disease was diagnosed by the specialized health institutions at the times when he was placed in the prison and when his request likely to be classified as a request for the suspension of the execution of his sentence was submitted to the prison administration and the Forensic Medicine Institute; that he was already established to suffer from the lung cancer which was continued to be treated and was likely to endanger his life; and that he was 74 years old increase the significance of the rapid conduction of this process much more.

Although A.K. had been suffering from a fatal disease and his state of health had become unfit for the conditions of the prison before his death, he died in the prison while being away from his family. The urgent referral of A.K. to the hospital two days before his death may be taken into consideration as an indication that health problems he had been suffering during his last days increased further. Nevertheless, it has been also observed that the applicant was not provided with the opportunity to receive inpatient treatment at the hospital where he had been referred. Within the framework, it must be accepted that A.K. was exposed to distress much more than the one which is an inevitable and natural consequence of lung cancer and of being deprived of his liberty and thereby to a treatment which was incompatible with human dignity.

The Constitutional Court has consequently held that there was a breach of the prohibition of treatment incompatible with human dignity guaranteed in Article 17 of the Constitution.

db. Judgment on the violation of the prohibition of treatment incompatible with human dignity under its procedural aspect for failure to conduct an effective investigation into the acts which may be described as a treatment incompatible with human dignity

İrfan YÜCESOY Judgment (App. No: 2013/7625)

> **Having regard to the medical report received, the documents included in the investigation file in which the applicant was a suspect and the fact that it was possible to clearly establish how the incident had taken place through the camera footage, it has been revealed that a decision of non-prosecution was rendered without making a sufficient investigation for establishing whether it would be necessary to identify and punish those who were responsible; and that the acts causing the injury of the applicant may be qualified as a treatment which is incompatible with human dignity.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 9/3/2016, the applicant was taken from the crowd towards a room located in the place where the ceremony was holding on 19/4/2013, on suspicion of assaulting the Mayor of the Kartal Municipality, A.Ö.. The manner in which he was taken to the room and his status at the relevant time were taken under record by the press members who were present at the ceremony. The attacks by the persons in the room against the applicant were tried to be prevented by a personnel who was then revealed to be a private security guard and by some other persons. The applicant was then taken from the incident scene by the police. A medical report was drawn up with respect to his health status at a hospital, and he was then taken to the police department where a minute signed by the applicant as a suspect was drawn up. Within the scope of this investigation in which the applicant was a suspect, the police officers drew up a deciphering minute pertaining to the CD of the incident scene. A criminal case was filed against the applicant by the İstanbul Anadolu Chief Public Prosecutor's Office for the "offence of actual bodily harm to a public officer due to his office".

The applicants filed a criminal complaint by maintaining that he had been attacked by stray dogs in 2012, and the stray dogs had also attacked his father on the incident day; that he had wished to get in contact with the Mayor for talking about this issue; that as he could not make himself heard through the crowd, he had wished to touch

on the Mayor's shoulder and thereupon, he had been attacked during the ceremony; and that he had been exposed to actual and verbal tort by the Guard of the Mayor, the Deputy Mayor, the 1st Deputy Chairman of the Municipal Council, the Consultant of the Municipality Mayor, the İstanbul Provincial Deputy Chairman of a political party and the other persons whose names he had not known upon the incitement of the Municipality Mayor. Within the scope of the applicant's allegations, the suspects were questioned, and a final report was requested from the forensic medicine institute. It was specified in the report drawn up that the applicant had been wounded in a manner which could be treated with simple medical intervention. The İstanbul Chief Public Prosecutor's Office issued a bill of indictment only in respect of N.Ç., who was a private security guard, on suspicion of committing the offence of actual bodily harm. On the other hand, a "decision of non-prosecution" had been rendered in respect of the other five suspects. The applicant's objection to the decision of non-prosecution was conclusively rejected.

Maintaining that while he was shouting to the Mayor in the course of the ceremony and wishing to touch on him, he was suddenly subject to a lynching attempt; that although he wanted those who took him to a room to call the police, he was not surrendered to the police during a half hour; that the persons included in the petition submitted to the Chief Public Prosecutor's Office had committed various offences; that there was a lack of effective investigation, and the offenders remained unpunished; that as the incident appeared on the national media, he was mentally depressed; that although a case was not filed against the offenders, he was subject to a criminal case; that his right to legal remedies was breached; and that statements of his family members were taken, the applicant accordingly maintained that his rights enshrined in the Constitution had been breached.

In brief, the Constitutional Court made the following assessments within the scope of this application:

Everyone's right to protect and develop his/her material and spiritual entity is guaranteed in Article 17 of the Constitution. In the first paragraph of this article, the protection of the human dignity is aimed. In its third paragraph, it is enshrined that no one may be subject to "torture" and "torment" and no one may be subject to any punishment or treatment "which is incompatible with human dignity".

There is also a procedural aspect of the positive obligations incumbent on the State within the scope of the right to life and the right to protect material and spiritual entity. The State is, within the scope of this procedural obligation, to conduct an

effective investigation which is capable of ensuring identification and, if necessary, punishment of those responsible for the incidents causing damage to the individual's material and spiritual entity and for each unnatural death. The main aim of such kind of an investigation is to guarantee effective enjoyment of the individuals' right to life and the right to protect their material and spiritual entities and, in incidents in which the public officers or institutions got involved, to ensure them to account for the deaths and the damages to the individuals' material and spiritual entity occurring under their responsibilities.

The obligation to carry out an effective investigation into the allegations of "torture", "torment" and "treatment or punishment incompatible with human dignity", which are based on concrete facts cannot be restricted to only the incidents in which the State's agents have involved. This obligation is also applicable to the acts specified to be performed by the third parties in breach of Article 17 of the Constitution. Moreover, Article 17 of the Constitution does not impose an obligation to conclude all proceedings with conviction or a certain criminal sentence or does not provide the applicants with the right to make the third parties tried or sentenced due to a criminal offence.

The investigation in which the applicant was a complainant was conducted independently from the investigation in which the applicant was a suspect. Therefore, the subject-matter of the investigation examined within the scope of the individual application is for the establishment as to whether there was a breach of the prohibition of treatment incompatible with human dignity and for the identification of those who were responsible although the applicant was neutralized just after the unlawful act alleged to be performed by him.

Taking the applicant to a room on suspicion of an offence thought to be committed against a public officer due to an unrest caused among the crowd and for ensuring security may be deemed reasonable. However, it must be investigated whether the acts performed against a person who was just waiting constituted an offence or not, and if an offence was committed, the questions who the offenders are and as to whether their acts were proportionate or not are to be examined.

As the incident was not clarified in a sufficient manner and an adequate assessment was not made with respect to the conditions of those who might be responsible, the Constitutional Court has consequently held that there was a breach of the state's obligation to conduct an effective investigation which is enshrined in Article 17 § 3 of the Constitution.

dc. Judgment on the violation of the prohibition of ill-treatment under its procedural aspect for failure to conduct an effective investigation into the allegation of being wounded by a section sergeant in the course of the military service

Sinan IŞIK Judgment (App. No: 2013/2482)

> **It must be acknowledged that the applicant was mainly under the State's supervision during the performance of the compulsory military service. In case when it is found out that a person is injured while being under the State's supervision, the obligation to make a reasonable explanation as to how the injury in question was caused is incumbent on the State. Having regard to the fact that the expert report coherent with the applicant's arguments concerning the incident was ignored, it has been revealed that due diligence was not shown in the clarification of the incident in question and in the establishment of a possible responsibility.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 13/4/2016, while the applicant was performing his compulsory military service at the Security Service Unit Command of the İstanbul Kasımpaşa Military Hospital, he was examined at the emergency service of the Hospital where he was in charge after having become ill in the course of the training. He was then referred to the Gülhane Military Medical Academy (the GATA) Haydarpaşa Training Hospital because of severe abdominal pain. The applicant was taken under operation during which it was determined that his spleen had disintegrated, and therefore his spleen was extracted. After being discharged from the hospital, he was discharged from the military for being unfit for the military service. Although the applicant noted in his first statement that he had not been exposed to any strike, when he learned that he would be discharged from the military service upon extraction of his spleen, he stated that the sergeant H. had handcuffed him to the radiator pipe and beaten him for joking with for approximately twenty days before his illness. The applicant's father filed a criminal complaint before the Public Prosecutor's Office. Thereupon, an investigation was initiated by the Military Prosecutor's Office, and statements of those who were concerned were taken, and the expert reports were received.

The applicant's father maintained that his son had been taken by the section sergeant to the basement of the hospital where he had been in charge for three times within a week and beaten by means of being handcuffed to the radiator pipe; and that his son had been threatened not to make a complaint.

The applicant noted in his statement that in the first week of February 2012, H., who previously had a firm stand towards him, imposed a penalty on him in the mess for being late and subsequently handcuffed him to the radiator with his right hand which was close to the television and beat him by saying that H. would joke with him; that H. firstly hit on his shoulders and subsequently started to hit on his stomach as he lowered his guard for being tired; and that several days after the incident, he became ill during the training and his spleen was therefore extracted. It has been observed that the suspect and the witnesses stated that the impugned act of handcuffing actually took place; but it was only a joke; that the applicant being exposed to non-severe strikes on his shoulders for 5-6 times was aware of the fact that it was only a joke and got involved in this joke; that there was no hostility between the applicant and H.; and that the applicant became ill just after the training.

The doctors examining and operating the applicant stated that any sign of strike and physical coercion were not found in the course of his examination; however, as his spleen was in normal sizes and any finding indicating that the applicant suffered from another disease was not detected, it was concluded that the applicant's illness occurred as a result of a trauma. They also noted that after the applicant had learned that he would receive a report indicating that he was unfit for military service, he maintained that he had been beaten by the section sergeant; that he did not explain how the incident had taken place; that if the illness had occurred as a result of a trauma, its symptoms would appear in a few hours and may be extended for, at the most, twelve hours; and that as it was asked, it was not possible for the illness to appear within the period of twenty days.

In the expert report caused to be drawn up by the relevant Command, it was set out that out of the spleen injuries occurring subsequent to blunt abdominal trauma, in 85% cases spleen was burst at an early stage and required medical intervention within 24-48 hours while 15% of cases gave rise to spleen laceration; and that 97% out of the delayed spleen injuries at the rate of 15% appeared within the period of the first month. It was also specified that the delayed spleen injuries occurred at a time when there was an increase in daily activities of the relevant person; and that this explanation was compatible with the present incident in which the applicant became ill in the course of the military training.

The Military Prosecutor's Office rendered a decision of non-prosecution on the grounds that there were discrepancies among different statements of the applicant concerning the dates alleged to be battered; that it was stated that the act of handcuffing had been a joke; that he had received the strikes on his shoulders; and that the impugned incident could not lead to spleen disintegration. The objection to this decision was dismissed by the Military Court.

The applicant also brought a full remedy action against the Ministry of National Defence. It was decided by virtue of the judgment of the Supreme Military Administrative Court that the case be dismissed as in the impugned incident, there was no reason which would lead to the obligation to redress on the part of the defendant administration; and that the applicant would pay the attorney's fees. The applicant's request for rectification of the judgment was rejected.

The applicant maintained that during the period when he had been performing his compulsory military service, he had been subject to violence and ill-treatment by his superiors; that on the day when his spleen had disintegrated, he had been battered by H.. Having noted that an effective investigation had not been conducted into such allegations, the applicant alleged that there had been a breach of the prohibition of ill-treatment.

In brief, the Constitutional Court made the following assessments within the scope of this application:

In the expert report included in the investigation file, it was specified that 15% of the spleen injuries resulting from trauma might have led to spleen disintegration due to intensive physical activity at a subsequent date (mainly within the first month after the incident), which was in compliance with the applicant's illness history. It has been revealed that the decision of non-prosecution rendered at the end of the investigation did not include any findings concerning the delayed spleen disintegrations and specified in the expert report.

It must be acknowledged that the applicant was mainly under the State's supervision during the performance of the compulsory military service. In case when it is found out that a person is injured while being under the State's supervision, the obligation to make a reasonable explanation as to how the injury in question was caused is incumbent on the State. Having regard to the fact that the expert report coherent with the applicant's arguments concerning the incident was ignored, it has been revealed that due diligence was not shown in the clarification of the incident in question and in the establishment of a possible responsibility.

The Constitutional Court has consequently held that there was a breach of the State's obligation to conduct an effective investigation within the scope of the prohibition of ill-treatment which is guaranteed in Article 17 of the Constitution.

dd. Judgment on the violation of the prohibition of treatment incompatible with human dignity under its procedural aspect for failure to conduct an effective investigation into the justifiable allegations of being exposed to treatment incompatible with human dignity

Z.C. Judgment (App. No: 2013/3262)

Within the scope of the individuals' right to protect and develop their material and spiritual entity, the State is liable to conduct an effective investigation capable of identifying those responsible for the incident of physical and mental assault and enabling them to be punished, if necessary.

Although, with regard to the acts considered to fall into the scope of "sexual intercourse with a minor" and alleged to be performed in a successive manner, the date of offence and thereby the starting date of the six-month period during which the complaint petition would be submitted are the date when the last sexual intercourse took place and although the applicant maintained that they had engaged in sexual intercourse for five or six times during the period they had lived together, any step was not taken during the investigation stage for determination of the date of offence, and it was accepted contrary to the ordinary flow of life that such act had been performed voluntarily only on 15-16 October, the date of wedding ceremony. It was accordingly acknowledged that such kind of subsequent acts had been also performed voluntarily and consequently held that the criminal complaint had not been filed within the prescribed period. All of these facts reflect the opinion that the investigative authorities failed to struggle for revealing the allegations of ill-treatment in a serious manner and reached ill-founded conclusions.

In the incident giving rise to the present individual application which was concluded by the Plenary of the Constitutional Court on 11/5/2016; while the applicant Z.C. was sixteen years old, she started to live together with the suspect A.L., who was twenty four years old, without an official marriage only by holding a wedding ceremony on 15-16/10/2011. On 4/6/2012, they actually ended their relationship. On 21/6/2012, the applicant filed a criminal complaint before the Kayseri Chief Public Prosecutor's Office against the suspect A.L. for the acts of aggravated sexual abuse of a child, depriving an individual of her liberty for sexual purpose, insult, threat and

intentional wounding performed by him. Thereupon, the Chief Public Prosecutor's Office initiated an investigation against A.L.

Z.C. and her father A.C. declared that A.C. started to live together and have a sexual intercourse with Z.C. through oppression, harassment and threat; that he had several times resorted to verbal and physical violence; that when the applicant's father had become aware of the incident taking place, the applicant was given shelter by her family; and that they had thereupon filed a criminal complaint against A.L.. It was stated in the assessment report as to the forensic evaluation of 6/7/2012 prepared by the social service specialist that Z.C.'s psychological state was not good and therefore it would be appropriate for her to receive treatment in a juvenile psychiatric clinic. The suspect A.L. noted in his defence submissions before the Public Prosecutor's Office that he and Z.C. held a wedding ceremony upon free will of their families; that as they were minors at the relevant time, they could not make an official marriage; that upon their marriage, they had voluntarily engaged in sexual intercourse; and that he accordingly denied the accusations against him. He also maintained that he himself had made Z.C. return her family's home for having committed adultery. He submitted their photos taken at their wedding ceremony and messages in his mobile phone as evidence indicating that Z.C. had committed adultery. It was specified in the report dated 4/7/2012 and drawn up by the Presidency of the Forensic Medicine Department of the Erciyes University that there were signs on the applicant's body matching with the violence and sexual intercourse alleged to be exposed by her; and that an examination to be made by child psychiatry would be appropriate for determination of the effects of such incidents on her mental health.

As a result of the investigation conducted, the Kayseri Chief Public Prosecutor's Office rendered a decision of non-prosecution on 26/7/2012 indicating that as specified by the victim in her own defence submissions, she had engaged in sexual intercourse of her own free will; that the offence of having sexual intercourse with a minor is subject to a criminal complaint; that although the right to raise a complaint was to be enjoyed within 6 months as per Article 73/1 of the Turkish Criminal Code ("TCC"), the victim had lodged a criminal complaint more than one year after the incident; and that there was no sufficient and plausible evidence with regard to the intangible allegations that the offences of threat and insult had been committed. The objection made to this decision was dismissed by the Boğazlıyan Assize Court with its decision of 7/3/2012. The dismissal decision was notified to the applicant on 17/4/2013.

The applicant maintained that they had held a wedding ceremony as the suspect A.L. had threatened her and her family; that thereafter she had to live together with

A.L. and she had to leave his school and the workplace where she was working due to his oppression; and that the suspect raped her for five or six times during that period and continuously insulted her. She also alleged that the investigation had not been carried out in an effective manner; that messages sent to the suspect had been sent from a mobile phone not belonging to her, however this situation had not been investigated; and that with regard to the allegation that "the complaint had not been filed within the prescribed time", the determination specified in the report drawn up by the Forensic Medicine Institute that "there had been a sexual intercourse at least 7-10 days before the medical examination" had not been taken into account. The applicant accordingly maintained that there had been a violation of the prohibition of torture and ill treatment and of the legal provisions concerning the children rights.

In brief, the Constitutional Court made the following assessments within the scope of this application:

Within the scope of the individuals' right to protect and develop their material and spiritual entity, the State is liable to conduct an effective investigation capable of identifying those responsible for the incident of physical and mental assault and enabling them to be punished, if necessary. Although, with regard to the acts considered to fall into the scope of *"sexual intercourse with a minor"* and alleged to be performed in a successive manner, the date of offence and thereby the starting date of the six-month period during which the complaint petition would be submitted are the date when the last sexual intercourse took place and although the applicant maintained that they had engaged in sexual intercourse for five or six times during the period they had lived together, any step was not taken during the investigation stage for determination of the date of offence, and it was accepted contrary to the ordinary flow of life that such act had been performed voluntarily only on 15-16 October, the date of wedding ceremony. It was accordingly acknowledged that such kind of subsequent acts had been also performed voluntarily and consequently held that the criminal complaint had not been filed within the prescribed period. All of these facts reflect the opinion that the investigative authorities failed to struggle for revealing the allegations of ill-treatment in a serious manner and reached ill-founded conclusions.

In her complaint petition and statement, the applicant alleged that the suspect had battered her on various dates. However, any assessment was not made with regard to such allegations in the decision of non-prosecution. Although the applicant asserted a defendable allegation, in conjunction with the other evidence obtained at the investigation stage, that she had been subject to a treatment degrading human

dignity, it has been concluded that an effective investigation was not conducted into such allegations.

The Constitutional Court has consequently held that there was a breach of the prohibition of treatment incompatible with human dignity, which is guaranteed in Article 17 § 3 of the Constitution, under its procedural aspect.

de. Judgment on the violation of the substantive and procedural aspects of the prohibition of ill treatment on account of the applicant's having been injured as a result of inappropriate firing of a tear gas canister

Özlem KIR Judgment (App. no. 2014/5097)

> **When the circumstances in which the incident occurred and its characteristics, type of the applicant's injury, in particular the stitches put on the applicant's face on account of the injury in question and its possible physical and psychological effects on the female applicant are considered together, it has been concluded that treatment of the law enforcement officers reached a certain level of severity and within the scope of the incident the minimum level of severity set forth in Article 17 § 3 of the Constitution was exceeded; and that there has been a violation of the prohibition of torture under its substantive aspect.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court dated 28/9/2016, on 8/9/2013 while the applicant Özlem KIR was working as a cashier and store attendant in a market located in the quarter of Tuzluçayır in the Mamak District of Ankara, the security forces intervened in the meeting and demonstration march of a crowd in a square close to the market. One of the gas canisters used during the intervention was thrown into the market. There was a chaos and panic in the market due to the gas coming from the gas canister, as well as the applicant was injured and taken to the hospital. In the provisional judicial report drawn up in respect of the applicant, the phrase of "hit by a tear gas canister" was used and it was noted that the applicant did not have risk of death, and therefore she was discharged from the hospital on the same day.

In the forensic report drawn up by the Ankara Branch of the Forensic Medicine Institution on 25/9/2013, it was noted that there was a "Y" shaped and 6 cm sized cut

over the left eyebrow of the applicant, and it was stitched; it did not put the applicant's life in danger and could be treated by a simple medical intervention. Within the scope of the investigation conducted by the Ankara Chief Public Prosecutor's Office into the incident, the applicant complained about the police officers who had fired the gas canister. The witness statements and the reports pertaining to the camera footage supported the manner in which the applicant was injured, as well. On 27/11/2013 the Chief Public Prosecutor's Office rendered a decision of non-prosecution in respect of all security forces who had intervened in the relevant demonstrations. In the decision, it was noted that there was no evidence showing that there had been an intentional act within the scope of the incident where the applicant had been injured. The applicant's objection to the relevant decision was dismissed by the 3rd Chamber of the Sincan Assize Court.

The applicant alleged that she had been injured as the law enforcement officers had fired gas canisters from their cars into the market during their intervention in the social events and one of the gas canisters had hit her face, and as a result of her being injured, nine stitches had been put around her eye area, a permanent scar had been left on her face and she had been psychologically affected, as well as no effective investigation had been conducted into the incident, which were in breach of her rights under Articles 17, 29, 36 and 40 of the Constitution. In this connection, the applicant sought pecuniary and non-pecuniary compensation.

In brief, the Constitutional Court made the following assessments within the scope of this application:

Unlike other similar applications, the applicant's complaint did not concern the natural effects of tear gas, but the manner in which it was used. In cases where a tear gas canister is not fired in an appropriate manner, it has the potential of causing serious injuries, even deaths.

In the present case it can be understood that the gas canister was not fired into the air and was not fired from the right angle. Although it could not be exactly determined at the investigation stage, it is possible that the distance of firing might have been shorter than the distance mentioned in the relevant Instruction (30-150 meters) as it was alleged that the gas canister had been fired from a car passing through the road in front of the market.

It has been concluded that even if the law enforcement officers are supposed to have targeted the demonstrators who was running towards the market where the

applicant was working, not directly inside of the market while they were firing the gas canister, they did not take the necessary measures to prevent the applicant who was not among the demonstrators and they have been found to have caused the applicant to be injured by firing a gas canister randomly during their intervention in the events.

When the circumstances in which the incident occurred and its characteristics, type of the applicant's injury, in particular the stitches put on the applicant's face on account of the injury in question and its possible physical and psychological effects on the female applicant are considered together, it has been concluded that treatment of the law enforcement officers reached a certain level of severity and within the scope of the incident the minimum level of severity set forth in Article 17 *§* 3 of the Constitution was exceeded; and that there has been a violation of the prohibition of torture under its substantive aspect.

Furthermore, it has been understood that in the decision rendered within the scope of the investigation, the incident was examined with respect to the law enforcement officers' authority to use force and arms, and no other criteria were taken into account. In the decision, the circumstances under which the law enforcement officers intervened, whether they intentionally or recklessly exceeded the limits while using force and arms during their intervention in the demonstrators, and what was accepted as the manner in which the relevant incident had occurred were not explained.

In the individual application, the applicant stated that a permanent scar had been left on her face due to the incident. In the forensic report it was noted that whether the scar on the applicant's face would be permanent or not must be evaluated as a result of the medical examinations to be carried out after at least 6 months from the date of the incident. It has been understood that this point was not taken into

> **In the relevant incident - the conditions in which it occurred have not been fully clarified – in addition to the fact that no thorough examination was carried out as to whether there were reasons for removing and reducing criminal liability, it was also not established beyond reasonable doubt as to whether the limits were exceeded in terms of the reasons that removed the criminal liability; therefore, it has been concluded that no effective investigation was conducted into the incident, and that there has been a violation of the prohibition of ill-treatment under its procedural aspect.**

consideration by the Chief Public Prosecutor's Office, and an assessment was made on the basis of an incomplete report which did not include a determination as to whether a permanent scar was left of the applicant's face or not.

In the relevant incident - the conditions in which it occurred have not been fully clarified – in addition to the fact that no thorough examination was carried out as to whether there were reasons for removing and reducing criminal liability, it was also not established beyond reasonable doubt as to whether the limits were exceeded in terms of the reasons that removed the criminal liability; therefore, it has been concluded that no effective investigation was conducted into the incident, and that there has been a violation of the prohibition of ill-treatment under its procedural aspect.

The Constitutional Court has consequently held that the prohibition of ill-treatment guaranteed in Article 17 of the Constitution had been violated under both its substantive and procedural aspects.

e. JUDGMENTS ON THE RIGHT TO LIBERTY AND SECURITY OF PERSON

ea. Judgment on the violation of the right to liberty and security of person due to unlawful detention of applicants who are journalists

Erdem GÜL and Can DÜNDAR Judgment (App. No: 2015/18567)

> **In this context, the facts of the case and the grounds of decision on detention does not sufficiently explain why it was "necessary" to implement detention measure on the applicants approximately six months after announcing that a prosecution was initiated about the news articles, which were subject matter of the accusation, and without considering that similar news were published several months ago on the incident which led to intense public discussions.**

In the incident giving rise to the present individual application which was concluded by the Plenary of the Constitutional Court on 25/2/2016, some trucks, alleged to have been weapon-laden, were stopped and searched in Hatay province on 1/1/2014 and in Adana on 19/1/2014. The incidents related to stopping and search of these trucks and the contents and destination of their freight were a matter of debate by the public for a long period of time. In this context, a newspaper named Aydınlık, in its issue on 21/1/2014, published a news article alleging that these trucks were carrying weapons and ammunition and a photograph related to such allegations.

Approximately sixteen months after such publication, Can Dündar, one of the applicants, published in daily newspaper Cumhuriyet's issue on 29/5/2015 the photographs and information related to the weapons and ammunitions alleged to have been found on the trucks. Another news article on the same incident was prepared by Erdem Gül, the other applicant, and published in the same newspaper on 12/6/2015.

After the publication of the news by Can Dündar, the Chief Public Prosecutor's Office made a press statement on 29/5/2015 and announced that a prosecution has been initiated on the charges of "providing documents regarding the security of the state, political and military espionage, unlawfully making confidential information public and making propaganda of terrorist organization". Approximately six months after such announcement, the applicants were invited by phone on 26/11/2015 to have their statements taken and they were detained on charges of "deliberate support

for organizational objectives of armed terrorist organization FETÖ/PDY (Gülenist Terror Organization/Parallel State Structure) without being a member and providing for espionage purposes the information that was confidential for the sake of the state's security or its domestic or international political interests and disclosing such information". The applicants objected to the said decision on their detention, however, such objections were dismissed. Upon the rejection of their objections, the applicants lodged an individual application to the Constitutional Court.

The applicants claimed that they were deprived of their liberty in an unlawful way, that there is no justification for their detention, that the only grounds for the decision on their detention is the news that they published and that no evidences except for the news articles were adduced against them. Accordingly, they alleged that their right to liberty and security of person and freedom of expression and the press have been violated.

Admissibility of the application

The Court held unanimously that the applicants' allegations in respect of unlawful detention and the fact that their right to freedom of expression and the press has been violated in conjunction therewith are admissible, considering that the legal remedies were exhausted by the applicants.

In this context, the Court stated that the individual application relates to the allegations as to the applicants' detention violates freedom of expression and the press and that the applicants exhausted legal remedies by objecting to the decision on their detention.

The Court recalls on this issue that, in Hidayet Karaca's application, the effects of detention measure on the freedom of expression were reviewed without waiting for the finalization of the relevant investigation and prosecution. However, the Court did not find a problem as to the lawfulness of detention in that application and the allegations on the freedom of expression were declared inadmissible as it was manifestly ill-founded. The Court also recalls that, as it is expressed in the opinion of the Ministry of Justice, the effects of detention measure on the freedom of expression and the press were reviewed by the ECthR in Nedim Şener v. Turkey and Şık v. Turkey judgments without requiring the finalization of investigation and prosecution phases and the Government's objection as to "non-exhaustion of domestic remedies" was rejected.

Allegations declared admissible

Firstly, the Constitutional Court states that its review on the merits of the allegations declared admissible is limited to the "lawfulness of detention" and "the effects of

detention measure on the freedom of expression and the press" independently of the investigation and prosecution of the applicants and possible outcomes of their trial. The Court emphasizes that this review is not on the merits of the applicants' case pending before the court of first instance and, therefore, does not include whether publishing the news articles subject to the application constitutes a crime or not.

Alleged violation of the right to liberty and security of person

The Constitutional Court's assessments on these allegations can be summarized as follows:

Under Article 19 of the Constitution, detention of an individual requires "strong indication" of having committed an offence. This is a sine qua non element for implementing a detention measure.

On the other hand, detention measure, which is a severe protection measure, may be considered reasonable only if less severe measures have been considered and found to be insufficient to safeguard the individual's and public interest. In this context, "strong indication of having committed an offence" is not sufficient on its own to implement detention measure which deprives the individual of his/her liberty. The detention measure must also be "necessary" in the circumstances of the present case. This is a requirement of "being necessary" which is one of the components of the "principal of proportionality", one of the criteria in restricting the fundamental rights and freedoms as stated under Article 13 of the Constitution.

The constitutionality review as to whether the right to liberty and security of person has been violated or not must be carried out, in the first place, with regards to existence of "strong indication of having committed an offence" which is cited among the essential conditions of detention measure in the third paragraph of Article 19 of the Constitution.

Considering that the subject of the individual application is detention measure and that there is an ongoing trial procedure of the applicants, such review shall be carried out limited to whether the concrete facts indicating the strong suspicion of crime were adduced in the grounds of the decision on detention.

The main fact grounding the decision for detention of the applicants is that two news articles on stopping and searching the trucks were published in Cumhuriyet newspaper. Although the decision for detention of the applicants reads that "the state of evidence" with regards to the charged crimes is sufficient for their detention, such decision mentions no evidences other than the said news articles. The applicants were detained on the charges of publishing the information and

photographs in the said news articles for the purposes of "deliberate support for an armed terrorist organization without being a member" and providing and disclosing such information and photographs for "political and military espionage purposes". However, the grounds of the decision on detention does not sufficiently explain which concrete facts attributable to the applicants led to strong suspicion of crime as to said news articles were published for "political and military espionage purposes". With regards to strong suspicion of crime as to "deliberate support for an armed terrorist organization without being a member", the grounds of decision on detention does not provide any concrete facts other than the opinion that "the applicants were expected to know, due to their professional occupation, the news that they published was related to a terrorist organization being prosecuted at the time".

On the other hand, the news similar to the ones subject to application were published with photos approximately sixteen months earlier in another newspaper and it is also important that the grounds of detention measure does not specify whether the publication of the similar news later by the applicants continues to pose a threat against national security or not.

It must also be examined whether the detention measure is "necessary" within the context of the principle of proportionality which is one of the criteria under Article 13 of the Constitution.

Can Dündar, one of the applicants, published on 29/5/2015 the first news subject to application. Chief Public Prosecutor's Office of Istanbul announced that a prosecution was initiated for the news and requested for banning the internet access to the contents of the said news as it was considered as being related to national security and constituting "support for an armed terrorist organization". The relevant judge issued a decision to ban internet access to the contents of the said news. Later on, the news article prepared by Erdem Gül, the other applicant, was published in the same newspaper on 12/6/2015. The applicants were invited by phone on 26/11/2015 to have their statements taken and were detained on the same day. During approximately six-months period from the first announcement of the prosecution until the date when the applicants were invited to have their statements taken, the Chief Prosecutor's Office did not take the applicants' statements and no custody or detention measure was implemented to the applicants in that time period. The questions asked while taking their statements and the grounds for their detention did not reveal which proofs –except for the news published– were found throughout the said time period regarding that the applicants committed the crimes they are charged with.

In this context, the facts of the case and the grounds of decision on detention does not sufficiently explain why it was "necessary" to implement detention measure on the applicants approximately six months after announcing that a prosecution was initiated about the news articles, which were subject matter of the accusation, and without considering that similar news were published several months ago on the incident which led to intense public discussions.

Consequently, the Constitutional Court held by majority that the applicant's right to liberty and security of person guaranteed under Article 19 of the Constitution has been violated as conditions of "strong indication" and "being necessary" required for detention measure were not duly reasoned in the relevant decision.

Allegations on the violation of the freedom of expression and the press

The Constitutional Court's assessments on these allegations can be summarized as follows:

Considering the questions addressed to the applicants by the Chief Public Prosecutor's Office and grounds of the decision on their detention, no facts are mentioned– except for publishing news in the newspaper– that may constitute a basis for the charges against them. In this context, the detention measure implemented to the applicants, irrespective of the contents of the news, constitutes an interference with the freedom of expression and press. As a matter of fact, ECtHR recognized in its judgments on *Nedim Şener v. Turkey* and Şık v. Turkey cases that detention measure constitutes an interference with the freedom of expression.

On the other hand, not every interference with the fundamental rights and freedoms leads to a violation of the relevant right or freedom on its own. In order to determine whether an interference violates the freedom of expression and the press, it must also be tested whether such interference meets the criteria of being prescribed by law, having legitimate aim, being necessary in a democratic society and being proportionate.

There is no doubt that the said interference has legal basis in the relevant articles of Code of Criminal Procedure no. 5271 and Turkish Criminal Code no.5237.

Under Articles 26/2 and 28/5 of the Constitution, freedom of expression and the press may be restricted for the purposes of "national security", "preventing crime", "punishing offenders", "withholding information duly classified as a state secret" and "preventing disclosure of state classified information". Considering the grounds in the justification of the decision on detention and the characteristics of the crimes charged against the applicants, it is seen that the aim pursued with detention of

The detention measure was implemented approximately six months after the beginning of the investigation on the said news and without considering the fact that similar news was published approximately sixteen months earlier in another newspaper. The circumstances of the case and the grounds of the decision on detention do not explain which "pressing social need" leads to such detention measure interfering with the applicants' freedom of expression and why it is necessary in a democratic society for the protection of national security.

the applicants is compatible with the aforementioned purposes of restriction cited under the Constitution.

The fact that the interference has a legal basis and a legitimate aim is not sufficient alone to justify that the interference does not lead to a violation. The facts of the case must also be reviewed with respect to "being necessary in a democratic society" and "being proportionate". The Constitutional Court shall carry out such review on the basis of detention process and the grounds of decision on detention.

Taking into account the assessments on the right to liberty and security of person and considering that the only fact adduced as basis for the crimes the applicants are charged with was the publishing of the relevant news articles, a severe measure as detention which does not meet the criteria of lawfulness cannot be considered proportionate and necessary in a democratic society.

The detention measure was implemented approximately six months after the beginning of the investigation on the said news and without considering the fact that similar news was published approximately sixteen months earlier in another newspaper. The circumstances of the case and the grounds of the decision on detention do not explain which "pressing social need" leads to such detention measure interfering with the applicants' freedom of expression and why it is necessary in a democratic society for the protection of national security.

On the other hand, taking into account the principles emphasized in the judgments of the ECtHR in *Nedim Şener v. Turkey* and Şık v. Turkey cases, it is evident that implementing a detention measure without adducing concrete facts other than the published news, and grounding the necessity of such measure might lead to a chilling effect both on the applicants and the press in general.

The Constitutional Court has consequently held by majority that the applicants' freedom of expression and the press has been violated in conjunction with their right to liberty and security of person.

eb. Judgment finding no violation of right to liberty and security of person on account of the fact that the detention of the applicant, who is a journalist, was lawful

Mehmet BARANSU Judgment (App. No: 2015/7231)

It has been observed that the conditions of the incident which is subject-matter of the recent judgment of *Erdem Gül and Can Dündar* ([Plenary Assembly], no. 2015/18567, 25/2/2016) and the conditions of the incident which is subject-matter of the present individual application are different from each other. Such differences may be summarized as follows:

While concluding that there was a violation of the applicants' rights to personal liberty and security in the judgment of *Erdem Gül and Can Dündar*, the following facts were relied on: the applicants had been detained on the basis of two news reports published by the applicants; that any concrete evidence other than these news reports was not specified in the detention decision; and that matters and that photo similar to the those specified and used in the news reports had been included in news reports published in another newspaper sixteen months ago. However, in the incident giving rise to the individual application, it has been revealed that although the İstanbul Chief Public Prosecutor's Office requested the applicant's detention for the offences of establishing an organization to commit an offence, disclosing information concerning the State's security and the State's political interests and required to be kept confidential, the Office of the Magistrate's Judge rejected the request for the applicant's detention for these offences; and that therefore, the news reports published in 2010 in the Taraf Newspaper where the applicant was serving, the content, purpose, possible effects and consequences of these news reports were not taken as a basis for the applicant's detention. It has been revealed that the allegations that confidential documents within the scope of the Egemen Operation Plan, which was required to be kept confidential with respect to the security of the State or its internal or external political interests and which was, in case of being disclosed, likely to endanger the battle preparations or battle efficiency or military operations of the State and understood to be taken away from a military office, had been obtained; that a certain part of these documents (even their copies) had been destroyed or destructed; and that certain information included in these documents had been leaked to another country served as a basis for the accusations on the basis of which the applicant was ordered to be detained. It has been observed that the plan in question had been published in the news reports in the Taraf Newspaper.

In the incident giving rise to the present individual application which was concluded by the the Second Section of the Constitutional Court on 17/5/2016, in the Taraf newspaper where the applicant was working as a reporter, the news reports entitled "The Fatih Mosque would be bombed – Name of the Coup is Sledgehammer (*Balyoz*)", "Detention of two thousand persons" and "Sledgehammer Government – These teams would bomb the mosques" were published respectively on 20/1/2010, 21/1/2010 and 22/1/2010. The persons making the news reports in question were the applicant and two other journalists working in the same newspaper with the applicant.

The applicant submitted copies of three DVDs and one CD forming a basis for the news report on 21/1/2010 and a document of 2.229 pages, nineteen CDs and ten voice records on 29/1/2010 to the İstanbul Chief Public Prosecutor's Office. The applicant informed that these documents and materials had been delivered to him by an informant.

As a result of the investigation conducted on the basis of information included in these documents and materials delivered by the applicant, the case known to the public as the "Sledgehammer Case" was initiated by the İstanbul Chief Public Prosecutor's Office. At the end of the proceedings, many accused persons were convicted. At the end of appellate review, the conviction decision rendered in respect of 237 accused persons was upheld by the 9th Criminal Chamber of the Court of Cassation. The Constitutional Court held in individual applications lodged by certain accused persons that there had been a breach of the right to a fair trial.

Upon the Constitutional Court's judgment finding a violation and the complaints raised by the accused persons tried in the case, the Chief Public Prosecutor's Office initiated an investigation into the evidence on which the decision was based and mainly consisting of digital data in 2014. On the other hand, as the expert reports received during the re-trial made upon the judgment finding a violation concluded that the digital evidence predicated in the case was not reliable, these reports were also included in the investigation file.

The applicant was taken into custody on 1/3/2015 within the scope of the above-cited investigation, and the İstanbul Chief Public Prosecutor's Office requested the applicant be detained for the offences of "establishing an organization for committing an offence", "destroying, misusing, obtaining by fraudulent, stealing the documents pertaining to the security of the State", "obtaining confidential documents concerning the security of the State", and "disclosing information concerning the security of the State and political benefit and required to be kept confidential".

The İstanbul 5th Office of the Magistrate's Judge rejected the request for the offence of "establishing an organization for committing an offence" as there was no strong suspicion of offence and for the offence of "disclosing information concerning the security of the State and political benefit and required to be kept confidential" as the period of filing a case which was specified in the Press Law had been time-barred. The applicant's detention was ordered for the offences of "obtaining confidential documents concerning the security of the State" and "destroying, misusing, obtaining by fraudulent, stealing the documents pertaining to the security of the State".

The applicant maintained that his detention had been ordered in spite of not committing the imputed offences; that the document constituting an offence and alleged to be destroyed was not an original copy but a photocopy; that he had not used copies of the documents in question for any purpose other than publishing them; that there was no risk of fleeing and no opportunity for him to tamper with evidence; that he had been detained for having obtained the documents published within the scope of the journalistic activities and subject-matter of the news reports; that although the request for his detention for publication of the documents subject-matter of the news reports had been rejected on the ground that the statutory limitation had been time-barred, his detention was ordered with the accusation of having obtained the same documents; and that provision and disclosure of the information subject-matter of the news reports was within the scope of journalistic (press) activities.

In brief, the Constitutional Court made the following assessments within the scope of this application:

Admissibility of the application

The Constitutional Court declared the applicant's allegations that the Offices of Magistrate's Judge ordering the detention on remand were in breach of the principle of legal judge and failed to provide assurance of impartial and independent court; that the documents forming a basis for the accusation were not shown to him; and that he could not effectively exercise his right to objection on the grounds that he could not examine the investigation file on which a decision of restriction was rendered and there was a vicious circle of objection mechanism which is lack of court's assurance inadmissible *for being manifestly ill-founded*.

As regards the alleged unlawfulness of the detention and the alleged violation of the freedom of expression and the freedom of the press in conjunction herewith, it was unanimously decided that the application was admissible given the fact that the available remedies had been exhausted.

In this scope, the Court noted that the subject-matter of the application was the allegation that the applicant's detention was in breach of the freedom of expression and the freedom of the press; and that the applicant had exhausted the available remedies by means of objecting to the decision ordering the applicant's detention. The Court reminds, in this respect, that in its recent judgment of *Erdem Gül and Can Dündar*, it was concluded that there was no need to await for the conclusion of the proceedings for examination of the influence of the detention of the applicants, who were journalists, due to a news report published on their freedom of expression and the press and that the applicants' allegations were examined in this respect with regard to the merits.

Allegations declared admissible

The Constitutional Court primarily noted that the examination as to the allegations declared admissible was restricted with the investigation and prosecution conducted against the applicant and with the lawfulness of detention independently from the possible results of the investigation and prosecution and with the influence of detention on the freedom of expression and the freedom of the press. The Court underlined that such an examination was not related to the merits of the investigation pending against the applicant or the case to be heard if a case was filed against the applicant and did not include the examination as to whether the offence or offences with which the applicant was charged had occurred or not.

Alleged violation of the right to liberty and security of person

In brief, the Constitutional Court has made the following assessments within the scope of this allegation:

In pursuance of Article 19 of the Constitution, detention of an individual is primarily based on the "strong indication" that he has committed an offence. This is a *sine qua non* element for the detention measure. On the other hand, detention, which is a severe protection measure, may only be deemed to be reasonable in the event that a less severe measure would not be sufficient for the protection of the individual and public interest.

The constitutional review as to whether the right to liberty and security of person has been violated must be primarily made concerning the question as to whether there was a "strong indication" for the commission of the offence, which is deemed to be one of the compulsory conditions listed in Article 19 § 3 of the Constitution for applying the detention measure. Regard being had to the facts that the subject-matter of the application was the detention measure and that there was a pending

investigation against the applicant, the Constitutional Court restricted this review with the question as to whether reasoning of the decision on detention rendered by the Office of the Magistrate's Judge and the request letter for detention had indicated the concrete facts revealing the strong criminal suspicion.

It has been inferred from the request letter for detention issued by the İstanbul Chief Public Prosecutor's Office and the reasoning of the decision on detention rendered by the İstanbul 5th Office of the Magistrate's Judge that the document forming a basis for the offence for which the applicant was decided to be detained on remand was the Egemen Operation Plan. The Egemen Operation Plan was, according to the findings of the investigating authorities, obtained from the plan room of the 1st Army Command. It has been observed that the process during which the plan was taken out of the place where it had been kept could not be clarified.

Upon the statements of one of the complainants heard in the course of the investigation in which it was stated that the CD stolen from the Plan Room of the 1st Army Command had included the Egemen Operation Plan and the annexes thereto; that the presentation concerning a land assault planned within the scope of the Egemen Operation Plan in case of a possible war had not been completely included in the documents and seminar tape recordings submitted by the applicant to the İstanbul Chief Public Prosecutor's Office; and that very private and confidential documents (information) concerning the strategy to be applied in case of a war had been included in this presentation; it has been revealed that out of the ten tape recordings submitted by the applicant and enumerated as from "1/1" to "1/10", the sixth tape was not enumerated as "6/10" according to the number sequence assigned but as "6"; and that the tape enumerated six did not include the presentation in question but a presentation made concerning an earthquake.

On the other hand, it has been observed that the Presidency of the General Staff had primarily found out that among the documents submitted by the applicant, the information included in the Egemen Operation Plan had been the one required to be kept confidential for the security of the State and State's internal and external political interests and likely to endanger the battle preparations or battle efficiency or military operations of the State in case of being disclosed; and that among the documents submitted by the applicant, there had been 118 "strictly confidential" documents within the scope of the Egemen Operation Plan, and these documents had been submitted to the İstanbul Chief Public Prosecutor's Office. It has been observed that the documents which the applicant had obtained (according to his explanations) from a retired military officer and had subsequently submitted to the

İstanbul Chief Public Prosecutor's Office, included confidential documents pertaining to State's security; and that these documents were published in the news reports in the Taraf Newspaper.

It has been accordingly concluded that there was strong indication for being suspicious of the fact that the applicant might have committed an offence.

On the other hand, it must be assessed whether the detention measure was "necessary" within the scope of the proportionality principle, which is one of the criteria set out in Article 13 of the Constitution. Taking into account the investigation pending against the applicant, the Constitutional Court conducted the constitutional review on these matters on the basis of only the detention process and the grounds for the applicant's detention.

In the decision ordering the applicant's detention and rendered by the Office of the Magistrate's Judge, the grounds for detention were specified by means of indicating that there was a risk of fleeing according to the amount of sentence likely to be imposed on the applicant for the offences subject-matter of the detention decision; and that the investigation had not been concluded yet and had been pending in a comprehensive and multi-directional level. It was also stated that the measure of conditional bail would be insufficient given the period of sanction set out in the Law for the imputed offences; and that the detention was a proportionate measure. Accordingly, it may be concluded that there was a ground for detention within the scope of the investigation conducted against the applicant. Moreover, given the investigation process, it has been revealed that there was no ground for reaching the conclusion that the detention was not necessary.

In this respect, it has been observed that the conditions of the incident which is subject-matter of the recent judgment of *Erdem Gül and Can Dündar* ([Plenary Assembly], no. 2015/18567, 25/2/2016) and the conditions of the incident which is subject-matter of the present individual application are different from each other. Such differences may be summarized as follows:

i. While concluding that there was a violation of the applicants' rights to personal liberty and security in the judgment of *Erdem Gül and Can Dündar*, the following facts were relied on: the applicants had been detained on the basis of two news reports published by the applicants; that any concrete evidence other than these news reports was not specified in the detention decision; and that matters and that photo similar to the those specified and used in the news reports had been included in news reports published in another newspaper sixteen months ago. However, in the

incident giving rise to the individual application, it has been revealed that although the İstanbul Chief Public Prosecutor's Office requested the applicant's detention for the offences of establishing an organization to commit an offence, disclosing information concerning the State's security and the State's political interests and required to be kept confidential, the Office of the Magistrate's Judge rejected the request for the applicant's detention for these offences; and that therefore, the news reports published in 2010 in the Taraf Newspaper where the applicant was serving, the content, purpose, possible effects and consequences of these news reports were not taken as a basis for the applicant's detention. It has been revealed that the allegations that confidential documents within the scope of the Egemen Operation Plan, which was required to be kept confidential with respect to the security of the State or its internal or external political interests and which was, in case of being disclosed, likely to endanger the battle preparations or battle efficiency or military operations of the State and understood to be taken away from a military office, had been obtained; that a certain part of these documents (even their copies) had been destroyed or destructed; and that certain information included in these documents had been leaked to another country served as a basis for the accusations on the basis of which the applicant was ordered to be detained. It has been observed that the plan in question had been published in the news reports in the Taraf Newspaper.

In the judgment of *Erdem Gül and Can Dündar*, it has been found out that during the period of six months starting from the date when it was announced to the public that an investigation had been initiated against the applicants to the date when the applicants were detained on remand, the investigating authorities failed to obtain any evidence other than the news reports in question. However, in the present individual application, the investigation against the applicant had been initiated upon the criminal complaint filed, following the Constitutional Court's judgment finding a violation, by persons tried within the scope of the case which was subject-matter of that judgment. In the course of the period elapsing until the applicant's detention, the investigating authorities heard the complainants' and witnesses' statements, conducted researches concerning the nature of the relevant documents and assessed the expert reports received during the re-trial initiated upon the Constitutional Court's judgment finding a violation and the criminal complaint of the court conducting the trial. It has been understood that the applicant was detained on remand at the end of the above-cited processes."

ii. In the judgment of *Erdem Gül and Can Dündar*, it has been found out that during the period of six months starting from the date when it was announced to the public that an investigation had been initiated against the applicants to the date when the applicants were detained on remand, the investigating authorities failed to obtain any evidence other than the news reports in question. However, in the present individual application, the investigation against the applicant had been initiated upon the criminal complaint filed, following the Constitutional Court's judgment finding a violation, by persons tried within the scope of the case which was subject-matter of that judgment. In the course of the period elapsing until the applicant's detention, the investigating authorities heard the complainants' and witnesses' statements, conducted researches concerning the nature of the relevant documents and assessed the expert reports received during the re-trial initiated upon the Constitutional Court's judgment finding a violation and the criminal complaint of the court conducting the trial. It has been understood that the applicant was detained on remand at the end of the above-cited processes.

Consequently, the Constitutional Court held by majority that there was no violation of the right to personal liberty and security guaranteed in Article 19 of the Constitution.

Alleged violation of the freedom of expression and freedom of the press

In brief, the Constitutional Court made the following assessments within the scope of this allegation:

> **"As the request for the applicant's detention for the offence of "disclosing information pertaining to the security of the State and its political interests and required to be kept confidential was rejected, it is out of the question that the applicant was detained on remand due to the news reports published in the Taraf Newspaper in 2010.**

As the request for the applicant's detention for the offence of "disclosing information pertaining to the security of the State and its political interests and required to be kept confidential was rejected, it is out of the question that the applicant was detained on remand due to the news reports published in the Taraf Newspaper in 2010.

It has been comprehended that the Egemen Operation Plan was not disclosed in the news reports published in the Taraf Newspaper; and that the plan in question was the basic foundation for the accusation leading to the applicant's detention. The Presidency of the General Staff informed the investigating authorities of the fact that

the "Sledgehammer" coup plan constituting the main subject-matter of the news reports, which had been prepared by the applicant and the other two journalists and published in the Taraf Newspaper, and the other plans specified to be parts of this plan had not been a document belonging to the Turkish Armed Forces.

Moreover, it may not be mentioned that the applicant was forced to disclose his news source with respect to the news published in the Taraf Newspaper and he was made subject to a sanction by the public authorities for non-disclosure of his news source.

In this respect, it has been concluded in the present incident that the applicant's detention did not amount to an interference with the applicant's freedom of expression and freedom of the press given the nature of the acts/offences for which the detention decision was rendered and the grounds for detention.

The Constitutional Court has consequently held by majority that there was no violation of the freedom of expression and the freedom of the press respectively guaranteed in Articles 26 and 28 of the Constitution.

ec. Decision finding the applications, where it was alleged that the detention orders were unlawful for the unlawful stopping and search of the MIT trucks, manifestly ill-founded

Süleyman BAĞRIYANIK and Others Decision (App. No: 2015/9756)

> **"Having regard to the context, conditions and content of the criticisms and statements by the President of the Republic and the Minister of Justice concerning these activities, which were considered by them without mentioning the names of the applicants as an act against the national security and the government, and to the way in which these activities were performed and to the public interest arising due to the topicality of the debates concerning the stopping and searching of the MIT trucks, it has been concluded that these statements and criticisms did not lead to the applicants' being declared or treated as an offender."**

In the application subject matter of the decision rendered by the the Second Section of the Constitutional Court on 16/11/2016, at the relevant times, Süleyman Bağrıyanık was the chief public prosecutor of Adana; Ahmet Karaca was the acting chief public prosecutor of Adana (authorized by repealed Article 10 of the Counter-Terrorism Act) and Aziz Takcı and Özcan Şişma were the chief public prosecutors of Adana (authorized by repealed Article 10 of the Counter-Terrorism Act).

The incident of 1/1/2014

On 1/1/2014 at 03:29 p.m., a denunciation was made to the Hatay 156 Gendarmerie Emergency Call Line, and it was reported that weapons would be supplied to a terrorist organization by trucks and automobiles travelling to Kilis through Reyhanlı-Kırıkhan-İslahiye route.

The truck and automobile specified in the denunciation was stopped by the traffic police. After the person in the truck had informed that he had been a member of the National Intelligence Organization (the MIT) and had shown his task card, the relevant units of the Security Directorate and the Gendarmerie were informed of the situation. Thereupon, the police officers left the incident scene.

The Kırıkhan Chief Public Prosecutor reported the incident to the applicant, Özcan Şişman, by phone. Thereafter, an investigation was initiated by the applicant, Aziz Takcı, for the offence of "supplying weapons to terrorist organizations", and a search warrant was accordingly issued.

The gendarmerie officers who were present in the incident scene obtained the information as a result of the negotiations they held that the persons were members of the MIT; that two vehicles belonged to the MIT; and that all materials in the truck were of the nature of the State's secret. The gendarmerie officers saw the identity cards belonging to the persons in the vehicle and issued by the MIT. Upon being informed of this situation, the applicant Özcan Şişman stated that he would arrive in the incident scene within the shortest period, and that necessary measures would continue to be taken around the truck. He also instructed the officers not to execute the search warrant before his arrival to the incident scene.

When the applicant arrived in the incident scene, he instructed the police officers who had previously arrived in the incident scene upon his instruction (afterwards) to search the truck. As the MIT personnel resisted the police officers, the truck could not be searched. Thereupon, the police officers left the incident scene in line with their superiors' instruction. Accordingly, the MIT personnel left the incident scene by the truck and automobile in question. Any search could not be conducted in the truck.

On the other hand, upon the stopping of the truck, phone conversations were held between the Minister of Justice, the Undersecretary of the Minister of Justice and the applicant, Süleyman Bağrıyanık. According to the statements of the applicant, he was informed during these conversations that this truck was under the control of the MIT; that any search could not be carried out in the truck without the permission of

the Prime Ministry as per the special provision in the Law on the National Intelligence Organization; and that the only step to be taken was to make an establishment concerning the fact that the truck was under the control of the MIT and the officers inside the vehicle were the members of the MIT.

The incident of 19/1/2014

On 19/1/2014 at 07:29 a.m., a denunciation was made to the Adana 156 Gendarmerie Emergency Call Line. It was thereby reported that three trucks loaded with explosive were travelling from Ankara to Adana; and that these trucks would arrive in Adana within one or two hours.

The applicant, Aziz Takcı, issued a search warrant by considering that there might be a link between the denunciation and the previous incident where the MIT truck had been stopped in Kırıkhan..

It was decided that the search would be carried out at the Sirkeli highway toll booths located in the Ceyhan district of Adana. Accordingly, three trucks with the loads belonging to the MIT and one accompanying automobile were stopped at the search point. It was established by the gendarmerie officers that the persons in the vehicles were the members of the MIT and the loads in the trucks belonged to the MIT. The applicant, Aziz Takcı, was informed of this situation. He reiterated his instruction concerning the search to be conducted in the trucks.

The gendarmerie officers started to carry out the search; however, the MIT officers resisted the search. Nevertheless, one of the trucks was searched while the other two trucks were started to be re-searched upon the instruction of Aziz Takcı arriving in the incident scene.

In the course of the search, the Adana Governor, the Security Director, the Provincial Gendarmerie Commander and the MIT Regional Head arrived in the incident scene. At the end of the conversations between the applicant, Aziz Takcı, and the above-mentioned authorities, the registration numbers of the MIT personnel were determined and written into the minute. Moreover, it was decided that the applicant would be provided with one copy of the letter issued by the Adana Regional Administration of the MIT and addressing to the Adana Governorship. Thereupon, the search conducted in the trucks was discontinued, and the trucks were delivered to the MIT officials.

Investigation into the incidents

The Undersecretariat of the MIT notified, in written, the Adana Chief Public Prosecutor's Office of the fact that the officers charged in both incidents and the vehicles had engaged in these activities within the scope of the activities carried out in line with the national interests of the country by virtue of the duties and powers vested in the Undersecretariat by the Law on the National Intelligence Organization. The Chief Public Prosecutor's Office rendered a decision of non-prosecution in respect of the MIT personnel taking role in these incidents on the grounds that "the activities performed by the vehicles in question were pertaining to the activities carried out within the scope of the duties of the MIT and therefore, these incidents were not unlawful and did not constitute an offence".

The Applicants' detention

The High Council of Judges and Prosecutor ("the HCJP") granted permission for investigation in respect of the applicants. The Office of Chief Inspector of the HCJP applied to the 2nd Chamber of the Tarsus Assize Court on 5/5/2015 and requested that an arrest warrant would be issued in respect of the applicants for the offences of attempting to overthrow the Government of the Republic of Turkey or to preventing it from performing its duties partially or wholly by use of coercion and violence and of obtaining and disclosing information pertaining to the security and political activities of the state. The Court accepted this request. On 8/5/2015, the court ordered the detention of the applicants, who had been questioned, for the imputed offences.

At the end of the investigation conducted against the applicants, the Second Chamber of the HCJP found it necessary to carry out a prosecution. It was also decided that the applicants would be dismissed from their office; and that they would be suspended from their office until the decision became final.

By the indictment dated 3/7/2015 of the Tarsus Chief Public Prosecutor's Office, it was requested that the applicants would be sentenced as they had committed the offences of attempting to overthrow the Government of the Republic of Turkey or to preventing it from performing its duties partially or wholly by use of coercion and violence; obtaining information pertaining to the security of the state; and disclosing information pertaining to the security and political interests of the state. The proceedings against the applicants were held before the 16th Criminal Chamber of the Court of Cassation. The proceedings were still pending by the date when the individual application was examined, and the applicants are still detained on remand.

On the other hand, the applicants were dismissed from their profession for "having connection or relation with the FETÖ/PDY (the Fetullahist Terrorist Organization / the Parallel State Structure)" by virtue of the decision dated 24/8/2016 and taken by the Plenary Assembly of the HCJP as per Article 3 of the Decree Law no. 667 on the Measures Taken under the State of Emergency declared throughout Turkey following the coup attempt at the night of 15/7/2016.

The applicants maintained that in spite of being a judge of the first degree and non-existence of the conditions of being caught red-handed, they had been detained on remand by a court, which had not been on duty, in an unlawful manner and in breach of the principle of "natural judge"; that this court had not been impartial and independent; that their detention had been ordered without the strong suspicion of crime and any ground for detention and on account of performance of their duties arising from the law and their legal opinions which were included in the decisions rendered by them by virtue of their profession and which were explained in the official documents. They also alleged that on account of the restriction imposed on the investigation file and certain practices performed, they could not effectively exercise their right to objection to the fact that they had been deprived of their liberties; that they had been denied participating in the hearing in which their detention were reviewed; and that their right to presumption of innocence had been breached on account of certain statements of the President of the Republic and the Minister of Justice.

In brief, the Constitutional Court has made the following assessments within the scope of these allegations:

Presumption of innocence

In the Constitutional Court's perspective, the presumption of innocence guarantees that a person would not be acknowledged to be guilty without the existence of a final judicial decision indicating that that person has committed the offence. Although the presumption of innocence ensures protection for a person in order not to be declared guilty by the public authorities until his guilty is found established by a court decision, it does not prevent the authorities from informing the public of a criminal investigation which is being conducted. However, as the presumption of innocence is also applicable at this stage, due attention and diligence must be paid while releasing information to the public.

In the present incident, the events taking place following the period when the MIT trucks were stopped were closely followed up by the public and remained on the

country's agenda for a long time. Various discussions and assessments were made by the political circles concerning the content of the materials included in the trucks stopped and the routes of the trucks. There were extensive political debates on the issue. Having regard to the context, conditions and content of the criticisms and statements by the President of the Republic and the Minister of Justice concerning these activities, which were considered by them without mentioning the names of the applicants as an act against the national security and the government, and to the way in which these activities were performed and to the public interest arising due to the topicality of the debates concerning the stopping and searching of the MIT trucks, it has been concluded that these statements and criticisms did not lead to the applicants' being declared or treated as an offender.

It has been therefore held that this part of the application must be declared inadmissible for being manifestly ill-founded.

Decisions on detention on remand

According to the Constitutional Court, those in respect of whom there is strong indication of guilt, may be detained on remand upon a judicial decision with a view to preventing them from fleeing and destroying or altering the evidence or under other conditions necessitating the detention like the above-mentioned ones and set out in the law. Within this framework, detention of a person primarily depends on the strong indication that he has committed the offence. It is therefore required that the charge be supported with plausible evidence likely to be deemed as strong.

> **In the present incident, when the content of the evidence such as "the suspects' statements, the witnesses' statements, a certain part of the investigation file of the Adana Chief Public Prosecutor's Office, the HTS records, the shift list, the case-file examination minutes, the examination minutes pertaining to the CDs including images, the reply letters of the Adana and Hatay Governorships", which were specified in the decision on detention and the decision on dismissal of the objection to detention rendered in respect of the applicants and which were used as a basis for the applicants' detention; the findings and assessments in the examination and investigation report drawn up in respect of the applicants; and the acts imputed on the applicants by the bill of indictment are taken into consideration together, it has been revealed that there was plausible evidence for getting suspicious that the applicants might have committed the offence.**

In the present incident, when the content of the evidence such as "the suspects' statements, the witnesses' statements, a certain part of the investigation file of the Adana Chief Public Prosecutor's Office, the HTS records, the shift list, the case-file examination minutes, the examination minutes pertaining to the CDs including images, the reply letters of the Adana and Hatay Governorships", which were specified in the decision on detention and the decision on dismissal of the objection to detention rendered in respect of the applicants and which were used as a basis for the applicants' detention; the findings and assessments in the examination and investigation report drawn up in respect of the applicants; and the acts imputed on the applicants by the bill of indictment are taken into consideration together, it has been revealed that there was plausible evidence for getting suspicious that the applicants might have committed the offence.

On the other hand, it must be also assessed whether the measure of detention is "necessary" within the scope of the principle of proportionality which is one of the criteria set out in Article 13 of the Constitution. The Constitutional Court has made the constitutionality review on these matters only on the basis of the process of detention and the grounds for their detention by having regard to the fact that proceedings are still pending in respect of the applicants.

The facts that the offences with which the applicants were charged are among the offences listed in the Code of Criminal Procedure no. 5271 ("the CCP") and that the principle of proportionality was respected given the minimum and maximum limits of the prescribed sentences were relied on as the ground for detention in the decisions ordering the applicants' detention.

As the imputed offence of attempting to overthrow the Government of the Republic of Turkey or to preventing it from performing its duties partially or wholly is among the offences listed in Article 100 § 3 of the CCP and likely to be "regarded as a ground for detention" by virtue of the Code, it has been observed that there is a ground for the applicants' detention. Moreover, the severity of the imprisonment which would be imposed on a person in case of being convicted is one of the conditions indicating the existence of suspicion of fleeing. Accordingly, it cannot be said that there is no ground for detention in the investigation conducted against the applicants. Moreover, given the process of the investigation, it has been comprehended that there is no ground for reaching the conclusion that the applicants' detention was not necessary.

> **On the other hand, the applicants are accused, by the investigating authorities, of disclosing the activities, which must be remained confidential for the security of the state and the foreign political interests due to their nature and which were performed by the MIT and were in fact of the nature of a state secret, through the search warrants and instructions issued and given by them and through the investigations conducted or caused to be conducted by them, in spite of not being the competent authority, by means of acting in an organized manner as a part of an organization conducted together with certain public officers in a planned and systematic manner and by means of abusing their powers resulting from their duties. It has been observed that the decisions on the applicants' detention were rendered not on account of the actions performed by them by virtue of their duty but with the allegation that they had intentionally used their professional position and their powers resulting from their professions with a view to leaving the State and the Government of the Republic of Turkey in a difficult situation and discrediting the State and the Government, to putting the State and the Government under legal and criminal responsibility before the international judicial bodies by means of giving an impression that it had aided the terrorist organizations. Therefore, the allegation that the applicants were detained on remand on account of a judicial activity performed by them by virtue of their duties is unfounded.**

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State and the Government, to putting the State and the Government under legal and criminal responsibility before the international judicial bodies by means of giving an impression that it had aided the terrorist organizations. Therefore, the allegation that the applicants were detained on remand on account of a judicial activity performed by them by virtue of their duties is unfounded.

It has been therefore held that this part of the application must be declared inadmissible for being manifestly ill-founded.

Other complaints

As to the applicants' allegations that they were detained on remand by a non-competent court which was established in breach of the principle of "natural judge" and which was not independent and impartial; that their right to defence was restricted within the context of the objection to their detention on the grounds that their access to the evidence pertaining to the charges was denied due to the confidentiality (restriction) decision and that they were not provided with the images of the records concerning the statements taken in the course of their questionings and made through the Audio and Video Information System; and that they were denied participating in the hearing concerning the review of their detention, it is obvious that there was no breach. It has been therefore held that these parts of the application must be declared inadmissible for being manifestly ill-founded.

ed. Decision finding the application, which was lodged by the applicants detained on remand with the allegation that they rendered unlawful decisions by means of abusing their powers as a judge, manifestly ill-founded

Metin ÖZÇELİK ve Mustafa BAŞER Decision (App. No: 2015/7908)

> **In the present incident, it has been concluded that in the press release of the İstanbul Chief Public Prosecutor's Office dated 26/4/2015, the applicants were not associated with any offence or any incriminating statement to be in breach of the presumption of innocence in respect of the applicants was not used. It has been therefore held that this part of the application be declared inadmissible for being manifestly ill-founded.**

In the application subject matter of the decision rendered by the the First Section of the Constitutional Court on 20/1/2016, at the date of incident, one of the applicants,

Metin Özçelik, was the judge of the 29th Chamber of the İstanbul Criminal Court of General Jurisdiction while the other applicant, Mustafa Başer, was the judge of 32nd Chamber of the İstanbul Criminal Court of General Jurisdiction.

Within the scope of certain investigations conducted by the İstanbul Chief Public Prosecutor's Office, the defence counsels of all suspects who were detained on remand and were security officers except for one who was a journalist submitted petitions on 20/4/2015 to the 29th Chamber of the İstanbul Criminal Court of General Jurisdiction and requested the challenge of all judges of the İstanbul Magistrate Judge's Office and release of all suspects.

The applicant, Metin Özçelik, accepted the request for challenge of all judges of the İstanbul Magistrate Judge's Office by the decision of the 29th Chamber of the İstanbul Criminal Court of General Jurisdiction dated 24/4/2015 and assigned the applicant, Mustafa Başer, to conclude the request for the release of the suspects.

The applicant, Mustafa Başer, ordered the release of all suspects by the decision of the 32nd Chamber of the İstanbul Criminal Court of General Jurisdiction dated 25/4/2015.

Within the scope of the investigation conducted against the applicants, the applicants were detained on remand for the offences of "attempting to overthrow the Government of the Republic of Turkey or preventing it from performing its duties partially or wholly and being a member of an armed terrorist organization" by the decisions of the 2nd Chamber of the Bakırköy Assize Court dated 30/4/2015 and 1/5/2015.

The applicants maintained that on account of certain explanations made and publications, there had been a breach of the presumption of innocence and their right to honour and reputation; that their rights to privacy of private life and their freedom of religion and conscience had been violated as their religious feelings and thoughts had been questioned by means of being associated with a certain religious group; and that their rights to freedom and security of person had been violated as they had been detained on remand, on account of the decisions rendered by them as a judge, by a non-competent court which was established in breach of the principle of natural judge and which was not impartial and independent, without existence of strong suspicion of crime and the ground for detention; and that their rights to freedom and security of person had been violated as they could not effectively enjoy their right to objection.

In brief, the Constitutional Court made the following assessments within the scope of this application:

With respect to presumption of innocence

According to the Constitutional Court, the presumption of innocence guarantees that a person would not be acknowledged to be guilty without the existence of a final judicial decision indicating that that person has committed the offence. Although the presumption of innocence ensures protection for a person in order not to be declared guilty by the public authorities until his guilty is found established by a court decision, it does not prevent the authorities from informing the public of a criminal investigation which is being conducted. However, as the presumption of innocence is also applicable at this stage, due attention and diligence must be paid while releasing information to the public.

In the present incident, it has been concluded that in the press release of the İstanbul Chief Public Prosecutor's Office dated 26/4/2015, the applicants were not associated with any offence or any incriminating statement to be in breach of the presumption of innocence in respect of the applicants was not used.

It has been therefore held that this part of the application be declared inadmissible for being manifestly ill-founded.

With respect to the decision on detention

According to the Constitutional Court, persons in respect of whom there is strong indication that they are guilty may be detained on remand upon a decision rendered by a judge with a view to preventing them from fleeing, destroying or tampering with evidence or in other circumstances like the above-mentioned ones and necessitating detention and prescribed by law. In this respect, detention of a person primarily depends on the strong indication that he has committed an offence. This is a *sine qua non* element sought for the measure of detention. It is therefore required that the accusation must be supported with plausible evidence likely to be deemed as strong. The nature of facts and information likely to be accepted as plausible evidence largely depends on the particular circumstances of the present incident.

In this respect, it is not necessarily required that there is sufficient evidence collected at the time of arrest and detention for accusing a person because the aim of detention is to substantiate or eliminate the suspicions forming a basis for the detention and to handle the judicial process in a much reliable manner. Accordingly, the facts forming a basis for the suspects to constitute a basis for the accusation must not be assessed at the same level with the facts to be discussed at the subsequent stages of the criminal proceedings and to be a basis for the conviction.

In the judicial review with respect to the first detention, an examination limited to the question as to whether there are plausible grounds indicating that the person has committed an offence and to the lawfulness of the deprivation of liberty in this connection is made. In this scope, existence of indications that an offence might have been committed may be sufficient at the outset of the detention. Given the grounds of the decisions on detention at this stage of the investigation and the accusation against the applicants in the present incident, it has been concluded that it must be acknowledged that there were suspicion of crime and the grounds for detention.

In the present incident, in the reasoning of the decision on detention of the applicants, CD examination report, the decisions of the 29th and 32nd Chambers of the Criminal Court of General Jurisdiction and the 10th Office of the Magistrate Judge, the letters of the registry of the court, the shift charts, the investigation documents and the witness statements were relied on with respect to the strong suspicion of crime while the ground for detention were noted as the facts that the imputed offences are among the offences listed in Article 100 § 3 of the Code of Criminal Procedure no. 5271 and "likely to be deemed as a ground for detention" by virtue of the Code; that the evidence had not been collected yet; that there was possibility that they would apply pressure on the witnesses and obfuscate the evidence; that there was risk of fleeing and the measure of judicial bail would remain insufficient.

In the judicial review with respect to the first detention, an examination limited to the question as to whether there are plausible grounds indicating that the person has committed an offence and to the lawfulness of the deprivation of liberty in this connection is made. In this scope, existence of indications that an offence might have been committed may be sufficient at the outset of the detention. Given the grounds of the decisions on detention at this stage of the investigation and the accusation against the applicants in the present incident, it has been concluded that it must be acknowledged that there were suspicion of crime and the grounds for detention.

Moreover, the applicants taking office as a judge were accused, by the investigation authorities, of acting in line with the instructions received from the organization of which they were members; of unlawfully accepting the requests made in several petitions by twenty lawyers, who were the defence counsels of the suspects (63 persons) detained on remand within the scope of seven different investigation files, for recusation of all judges sitting at the Magistrate's Judge Offices and for release

Moreover, the applicants taking office as a judge were accused, by the investigation authorities, of acting in line with the instructions received from the organization of which they were members; of unlawfully accepting the requests made in several petitions by twenty lawyers, who were the defence counsels of the suspects (63 persons) detained on remand within the scope of seven different investigation files, for recusation of all judges sitting at the Magistrate's Judge Offices and for release of their clients, without examining the investigation files in spite of not being authorized by law to do so; and of acting in unity and unanimity with the suspects as the members of the same organization. It has been observed that the applicants were ordered to be detained on remand not on account of the decisions they had rendered within the scope of judicial power vested in them as a judge but on the basis of the allegation that they had taken actions, by means of deliberately abusing their position as a judge, for release of the detainees with whom they acted in liaison.

of their clients, without examining the investigation files in spite of not being authorized by law to do so; and of acting in unity and unanimity with the suspects as the members of the same organization. It has been observed that the applicants were ordered to be detained on remand not on account of the decisions they had rendered within the scope of judicial power vested in them as a judge but on the basis of the allegation that they had taken actions, by means of deliberately abusing their position as a judge, for release of the detainees with whom they acted in liaison.

It has been therefore held that this part of the application be declared inadmissible for being manifestly ill-founded.

With respect to the effective use of the right to objection

According to the Constitutional Court, a person arrested must be informed of the basic factual and legal grounds of his arrest in a non-technical and understandable manner, and thereby that person must be provided with the opportunity to recourse to a judicial authority with a view to challenging to the lawfulness of his arrest if deemed necessary.

It has been observed in the letters requesting the applicants' detention on remand and the decisions on their detention rendered by the court that the applicants were not exposed to any accusation concerning the investigations conducted by the security

officers whose challenge of judge and requests for release had been accepted by the applicants; and that any question concerning these investigation files was not directed to them in their questionings. It has been also concluded that non-delivery of one copy of the above-mentioned investigation files to the applicants is not an obstacle for the effective enjoyment of the right to objection.

It has been therefore held that this part of the application be declared inadmissible for being manifestly ill-founded.

With respect to other complaints

It has been concluded that, with respect to the applicants' allegations that there had been a breach of their rights to honour and reputation on account of a news report published in a national newspaper, the applicants lodged the individual application without exhausting the ordinary remedies; that the allegations that there had been a breach of the private life and the freedom of religion and conscience as they had been associated with a certain religious group and their religious feelings and thoughts had been questioned could not be substantiated; that with respect to the allegation that they had been detained by a non-competent court which was established in breach of the principle of natural judge and which was not independent and impartial, it is obvious that there is no breach. Accordingly, these parts of the application have been decided to be declared inadmissible.

f. JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO RESPECT FOR FAMILY LIFE

fa. Judgment on the violation of the right to respect for family life due to no binding effect of the testator's statements in his testament

Fatma Julia EKİNCİLER Judgment (App. No: 2013/2758)

> **The State is rendered liable to take measures for protection of the family, especially the mother and the child, and it is prescribed that this liability should be performed without taking into consideration whether these children were born into a marriage or out of wedlock. The main element of the family life is the improvement of the family relationships normally and the right of the family members to maintain their relations thereby. In this respect, the obligation incumbent on the State is not restricted to refraining from an arbitrary interference with this right but primarily includes, in addition to this negative obligation, the positive obligations for ensuring effective respect for the family life. The positive obligations in question necessitate taking of measures capable of ensuring respect to the family life even in the sphere of interpersonal relations.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 17/2/2016, the applicant was born in the United States of America (the USA) on 23/9/1970. According to the civil registry extracts, F.E., a Turkish citizen, who was notified by the applicant to be her biological father, (the testator) was married with S.E. who is a Turkish citizen, and they have three common children. The testator divorced from S.E. by the decision dated 29/6/1966 of the Maine Supreme Court in the USA and subsequently got married with a foreign citizen U.B.. However, the foreign court's decision on his divorcement from S.E. was not recognized and approved, and therefore the testator still appears to be married with S.E.. Moreover, the marriage between U.B. and the testator was also terminated with divorcement.

In the content of the official testament dated 11/9/1975, the applicant stated that he had married with U.B. in the USA; and they had three common children, namely F.W.E. born in 1967, K.F.E. born in 1968 and the applicant Fatma Julia Ekinciler born on 23/9/1970; that he was still residing in America together with his wife and children; and that in case of his death, 1/4 shares of some of the immovable properties in Kayseri would belong to these persons. The action for the annulment of the testament which

was brought by S.E. and her children born into her marriage with the testator was dismissed, and the dismissal decision became final upon being subject to certain remedies.

After the testator had died in 1999, his wife S.E. and their common children obtained a certificate of inheritance in which the applicant was not included among the inheritors. In this certificate, the inheritors were S.E., the Turkish wife of the testator, and their common children.

The action brought by the applicant for cancellation of the certificate of inheritance was accepted by the decision of the relevant court dated 13/5/2010. The pourparties of all children of the testator, who were alive by the date of his death, including the applicant and his wife S.E. were re-determined. In the reasoning of the decision, it was specified that as the decision concerning the divorcement of the testator from S.E. had not been recognized before the authorities of the USA, it was not enforceable in the Turkish law; that therefore his marriage with U.B. was not valid according to the Turkish law; that accordingly, the children born as a result of this marriage including the applicant were out of wedlock. It was accordingly noted that as per Article 292 of the Law no. 743 which was in force at the date of his death, it was possible to establish the paternity relation only when the father acknowledged the child; that in this respect, the children born as a result of this marriage were acknowledged with the testament drawn up by the testator, and according to the result of the research conducted by the Directorate General of Civil Registration and Nationality in the course of the proceedings, it was observed that the children had acquired the Turkish citizenship upon establishment of paternity relation with their father and had been recorded in the civil registry.

The first instance court was quashed by the judgment of the 7th Civil Chamber of the Court of Cassation dated 17/2/2011. In the reasoning of the quashing judgment, it was specified that the heirship and the transfer of the inheritance must be determined according to the legislation which was in force at the date when the testator died; that in this scope, it was not possible for the applicant, who was born out of wedlock, to be acknowledged and it was not therefore possible for the applicant to be accepted as the testator's inheritor;

The request for rectification of the judgment was dismissed by the 7th Criminal Chamber of the Court of Cassation; however it was specified in this judgment that although Article 292 of the Law no. 743 was relied on, the judgment in question was partially annulled by the judgment of the Constitutional Court dated 28/2/1991 and no. E.1990/15, K.1991/5.It was accordingly specified that it was thereby enabled that the children born as into a relationship between a father who was married and a

mother who was not married could be acknowledged and the paternity relationship could be established; that the reasoning of the quashing judgment was not appropriate; however, given the fact that the applicant was not acknowledged by the testator or the fact that the paternity was not established between them through a court's decision, the quashing judgment was accurate in terms of the conclusions reached therein.

In the course of the proceedings held following the quashing judgment, it was decided that the request for annulment of the certificate of inheritance and for re-determination of the heirship be dismissed; and that the applicant be provided with a certificate of testament beneficiary. In the reasoning of the decision, the justifications specified in the quashing judgment of the 7th Civil Chamber of the Court of Cassation dated 17/2/2011 were completely included. The decision became final after being subject to appellate review.

It was specified in the trial period specified above that it had been observed that as a result of the examination conducted by the Directorate General of Civil Registration and Citizenship Affairs upon the request of the applicant and her siblings born into a relation between the testator and U.B., the applicant and her siblings were Turkish citizens. During these proceedings, they were recorded in the state register upon the re-issuance of their birth certificate. The action brought by the testator's wife S.E. and their common children for annulment of this act was dismissed by the decision of 10/10/2006.

The applicant applied via an individual application to the Constitutional Court after exhausting all regal remedies. The applicant alleged that the testator's declaration of acknowledgement in the testament had not been accepted; that she had been thereby deprived of her rights arising from heirship relation and she had been subject to a treatment different than that of the other children and alleged that her rights enshrined in the Constitution had been breached.

In brief, the Constitutional Court made the following assessments within the scope of this application:

The main relations in the family life are the ones between the male and female and the parents and the children. The civil marriage community is in principle secured within the scope of the family life, and the children born into marriage are *per se* deemed as a part of the marriage. In the present application, the subject-matter of the dispute is whether the legal relation which indicates the legal relationship established with the child and which amounts to the acknowledgement by the biological father before the competent authorities under the conditions set out in the relevant legislation

that the child out of wedlock is descended from him has been established in the present incident or not. In this respect, it has been observed that the close personal relationship between the applicant understood to maintain her personal relation with the testator since her birth and the testator, which is of importance for the establishment of the family life, *de facto* exists. Accordingly, the relationship between the applicant and the testator is sufficient for making an examination within the scope of the right to private life.

The problem experienced by the applicant is not related to discrimination with respect to the right of succession in respect of the children born into a marriage or born out of wedlock but to the failure of establishing a legal relationship and accordingly heirship link between the applicant and her testator as the inferior courts did not qualify the testator's declaration in the testament as an acknowledgement. In case of establishment of such a link, it is obvious that there is any discrimination with respect to the right of succession in respect of the children born into a marriage or born out of wedlock neither in the Law no. 743 upon the amendment thereto following the annulment judgment of the Constitutional Court dated 11/9/1987 and no. E.1987/1, K.1987/18 nor in the Law no. 4721 which is still in force. Therefore, the issue which must be assessed in the present application is whether the guarantees in Article 20 of the Constitution has been regarded within the meaning of the interpretation of testator's declaration in his testament by the inferior courts.

The State is rendered liable to take measures for protection of the family, especially the mother and the child, and it is prescribed that this liability should be performed without taking into consideration whether these children were born into a marriage or out of wedlock. The main element of the family life is the improvement of the family relationships normally and the right of the family members to maintain their relations thereby. In this respect, the obligation incumbent on the State is not restricted to refraining from an arbitrary interference with this right but primarily includes, in addition to this negative obligation, the positive obligations for ensuring effective respect for the family life. The positive obligations in question necessitate taking of measures capable of ensuring respect to the family life even in the sphere of interpersonal relations.

The resolution of the problem concerning the interpretation of the legislation within the scope of the assessment of the individual applications primarily falls under the jurisdiction and responsibility of the inferior courts. The role of the Constitutional Court is restricted with the establishment as to whether the interpretation of these rules is constitutional or not. The duty of the Constitutional Court is not to substitute itself for the inferior courts and to personally assess the material facts and legal norms concerning the disputes in question but to monitor whether or not the inferior courts

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It has been observed from the assessment of the impugned judicial process that in the decisions rendered by the inferior courts, it was generally specified that a child born as a result of adultery committed by married men and women cannot be acknowledged on the basis of Article 292 of the Law no. 743. In this respect, it has been revealed that the decisions included such justifications that the applicant was granted with the Turkish citizenship in 2005 and recorded in the civil registry independently and not under the testator's civil registry section; that as the testator was officially married in Turkey on the date when the applicant was born, it was not possible for the applicant to be acknowledged and accordingly accepted as the testator's inheritor in pursuance of Article 292 of the Law no. 743; that however, as it was possible for her to be appointed as the testament beneficiary, she could be provided with a certificate indicating that she was a beneficiary of the testament.

It has been revealed that the applicant was denied being included in the certificate

> **In disputes concerning the paternity and the legal consequences thereof, which bear a significant public interest for being related to public order, the public authorities have a wide margin of appreciation. Given the requirements of establishment of the individual's family bonds with the public interest specified in the use of margin of appreciation in question and of setting a fair balance by means of taking into consideration the legal interests such as right of succession and the liability incumbent on the judicial authorities to set forth a relevant and sufficient justification concerning the margin of appreciation in question, it has been concluded in respect of the present application that the interpretation which is not also compatible with the provisions of the legislation in force does not comply with the right to family life and precludes maintenance of the family life in a normal manner.**

of inheritance in the capacity of an inheritor and thereby her right of succession by means of establishing the relationship between the applicant and the testator due to the interpretation of the declaration in the testament by the inferior courts and that the conclusions of these decisions have a negative influence on the applicant's right to family life.

In respect of the present application, it is possible for a married man to acknowledge his child born out of wedlock in pursuance of both the provisions of the Law no. 743, which was in force as of 24/9/1999 when the testament became effective, and the provisions of the Law no. 4721 which is still in force. In the relevant testament, it was explicitly specified by the testator that the applicant and her two siblings were born into his relationship with U.B. Even in the case when the declaration in question is required to be interpreted by the judicial authorities, making such an interpretation by taking into consideration the date when the testament was drawn up and which corresponds to approximately forty years before the decision date does not seem effective for materialization of the guarantees with respect to the right to family life. Moreover, it is remarkable that the applicant was recorded in the civil registry after the declaration in the testament had been taken into consideration by the relevant administration and the applicant was acknowledged to gain the Turkish citizenship; and that the action brought for the annulment of the administrative act in question had been dismissed as the testator's declaration had been deemed as an acknowledgement and found sufficient for authentication of the relation between the applicant and the testator.

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The Constitutional Court has consequently held that The Constitutional Court has consequently held that there was a breach of the right to family life guaranteed in Article 20 of the Constitution.

fb. Judgment on the violation of the confidentiality of the private life and freedom of communication due to non-renewal of his contract on the basis of sending not duty-related social purposed messages via the institutional e-mail

Tevfik TÜRKMEN Judgment (App. No: 2013/9704)

> **It has been concluded that although it is taken into account that the act which was brought before the court by the applicant is not the termination of but the non-renewal of the contract, a fair balance was not ensured between the general interest likely to be attained through restriction and the loss sustained by the applicant whose fundamental rights and freedoms were restricted as the misuse of the official e-mail account for purposes other than duty-related ones and thereby the conversations and social-purpose posts via this address was accepted as a ground for the non-renewal of the applicant's contract at the end of his period of office (contract) of 9 years in respect of him whose personal record grades were very high; in respect of whom any unfavourable opinion was not delivered by his superiors; who did not have any disciplinary punishment; who was rewarded certificates of appreciation and awards and in respect of whom qualification certificate at the "excellent" level was issued. It has been accordingly concluded that the interference in the applicant's right to private life and the freedom of communication was disproportionate.**

In the incident giving rise to the present individual application which was concluded by the Plenary Assembly of the Constitutional Court on 3/3/2016, the applicant who

had been serving as a contracted non-commissioned officer as of 30/8/2003 at the Air Forces Command requested the renewal of his contract at a date close to the expiry of his contract period of 9 years. However, his contract was not renewed by the administration.

The action brought by the applicant for the annulment of the non-renewal of his contract was dismissed by the First Chamber of the Supreme Military Administrative Court ("the SMAC") on 21/5/2013. In its judgment, the SMAC noted that the administration had enjoyed its discretionary power lawfully while taking necessary actions on the grounds that the applicant had sent e-mails which had infringed confidentiality, which were not related to his duty and were sent for social purposes via his e-mail address created for internal use only; that he had used his e-mail address with a view to organizing tours and travels. The SMAC also specified that there was no explicit error in the assessment made by the administration in respect thereof. This judgment became final after the remedy for rectification of the judgment had been exhausted.

The applicant maintained that e-mails which were within the scope of his private life had been examined and recorded without a judge's decision; that his expired contract had not been renewed on the basis of e-mails which had not been supported with concrete cases and evidence, the creator of which had not been known and the content of which had not included any unlawful letter and without his defence submission being taken and accordingly alleged that there had been a breach of his rights set out in the Constitution.

In brief, the Constitutional Court made the following assessments within the scope of this application:

As the concrete reason for non-renewal of the applicant's contract was the monitoring of the institutional e-mail account and the contents thereof, the applicant's allegations were examined within the scope of the right to privacy of private life and the freedom of communication which are respectively guaranteed in Articles 20 and 22 of the Constitution.

The lawfulness and the question whether there are grounds justifying the interference must be assessed within the particular circumstances of the present incident in the examination of the interferences alleged to be made in the right to privacy of private life and the freedom of communication.

It has been understood that the monitoring of the institutional e-mail account belonging to the military personnel serving in the Air Forces Command and the contents thereof and the non-renewal of the applicant's contract had a legal basis; that the impugned interference of the military administration which is liable to ensure and protect the security of the country pursued the aim of protecting the national security within the scope of the information security and counter-intelligence activities, which is a legitimate aim within the framework of Articles 20 and 22 of the Constitution.

Being a public officer requires an individual to tolerate certain troubles and responsibilities and to be subject to restrictions to which other persons are not along with the certain privileges and advantages provided. Monitoring of phone conversations held by the public officers at their workplaces, of e-mail correspondences made via the computer provided for them and of their use of internet to a certain degree does not alone lead to the violation of the fundamental rights and freedoms. In this respect, an assessment must be made by having regard to the ordinary and reasonable requirements of the workplace and the legitimate aims. It must be taken into consideration that the margin of appreciation of the Turkish Armed Forces is much wider while employing personnel in a status for which stricter rules apply in terms of the requirements of the military discipline. Accordingly, it has been concluded that monitoring of an electronic communication system required to be used in line with the position-oriented purposes and in this scope, monitoring of the correspondences within this system and, in cases where it is established that this communication system has been misused for personal purposes, the interference in such use could be deemed to be necessary in a democratic society.

In determination as to whether the interference in the applicant's freedom of communication and the right to privacy of private life was proportionate or not, it must be required that an assessment be made given the nature of the information included in the e-mails in questions, the manner in which such information was used and the severity of the sanction imposed on the basis of the information in question.

The administration continued to employ the applicant until the duration of his contract expired after it had determined that the applicant had used the official e-mail account for reasons not related to his duty and in breach of the pre-determined rules. During that period, the applicant was not subject to a disciplinary investigation; and nor was any sanction including the termination of the contract imposed. The non-renewal of the applicant's contract has a significant impact on his economic future for being deprived of his main source of income as it has on his professional life.

It has been concluded that although it is taken into account that the act which was brought before the court by the applicant is not the termination of but the non-renewal of the contract, a fair balance was not ensured between the general interest likely to be attained through restriction and the loss sustained by the applicant whose fundamental rights and freedoms were restricted as the misuse of the official e-mail account for purposes other than duty-related ones and thereby the conversations and social-purpose posts via this address was accepted as a ground for the non-renewal of the applicant's contract at the end of his period of office (contract) of 9 years in respect of him whose personal record grades were very high; in respect of whom any unfavourable opinion was not delivered by his superiors; who did not have any disciplinary punishment; who was rewarded certificates of appreciation and awards and in respect of whom qualification certificate at the "excellent" level was issued. It has been accordingly concluded that the interference in the applicant's right to private life and the freedom of communication was disproportionate.

The Constitutional Court has consequently held that there was a breach of the right to privacy of private life and the freedom of communication which are respectively guaranteed under Articles 20 and 22 of the Constitution for the above-mentioned reasons.

fc. Judgment on the violation of the respect of the confidentiality of the private life due to the applicant's cancellation of appointment for a permanent task abroad due to sexual voice records alleged to belong to the applicants wife

Adem YÜKSEL Judgment (App. No: 2013/9045)

> **Given the procedure applied during the administrative investigation conducted, it has been revealed that the most intimate parts of private life were further disclosed through the acts performed by the administration; and that this thereby led to infringement of a far greater personal interest compared to the expected public interest.**

In the incident giving rise to the present individual application which was concluded by the Plenary Assembly of the Constitutional Court on 1/6/2016,on 11/8/2011, the applicant started to serve as a military attaché in the Tbilisi Embassy while working in the Turkish Armed Forces ("the TAF") as a staff colonel. Thereupon, the applicant's wife who was working as a civilian officer in the TAF took unpaid leave.

In September and December 2011, four tape records of sexually explicit content alleged to belong to the applicant's wife were broadcasted on the internet. The applicant was ordered to return to the country upon a written order of 16/12/2011 in which the ground thereof was not specified and was subsequently assigned under the command of the Presidency of the Turkish General Staff. On 19/12/2011, the applicant's statement was taken by the administrative investigation board. The applicant's wife, who returned from abroad three days later, rejected the allegations during the interview made with the board and did not find it necessary to submit a sample voice record at this stage.

In the report of 26/12/2011 drawn up by the Presidency of the Criminal Department of the Gendarmerie General Command upon the request of the administrative investigation board, it was stated that voice of the woman in the tape records broadcasted via internet *"most probably"* belong to the same person; and that there was no manipulation in the records. Within the same period, the administrative investigation board heard eight workmates working in the same workplace with the applicant's wife on 23/12/2011 and 26/12/2011 with a view to establishing whether the tape records broadcasted on the internet belonged to the applicant's wife or not. Moreover, out of these personnel whose statements were taken, those who did not have any knowledge concerning the impugned tape records were enabled to listen to a certain part of the records, and subsequently, their statements were taken. Given the information available in the tape records, it has been concluded that the voice in these records might belong to the applicant's wife. On 30/12/2011, the applicant's permanent appointment to abroad was cancelled upon the approval of the Chief of the General Staff on 30/12/2011due to these tape records broadcasted via internet, and the applicant was then charged in the 3rd Corps Command of the Land Forces Command (İstanbul).

Thereupon, on 9/1/2012, the applicant brought an action for the stay of execution before the 1st Chamber of the Supreme Military Administrative Court ("the SMAC") for revocation of the act of "cancelation of the appointment for a permanent task abroad". The applicant's request for the stay of execution was rejected on 6/3/2012.

In the meanwhile, the applicant filed a criminal complaint against the relevant military officers who made the tape records alleged to belong to the applicant's wife listened to the other personnel serving in the TAF; however, an authorization for investigation was not granted. This decision was served on the applicant on 7/5/2012.

During the stage of exchanging of petitions, the applicant requested from the court to be provided with a copy of the confidential documents. The court decided not to render a decision concerning the applicant's request on the ground that it was the Secretariat General's task to allow for the examination of the confidential documents in an action which was at the notification stage and noted that upon the decision of the Secretariat General, an appeal may be lodged with the Chamber.

In the meantime, an administrative investigation was initiated against the applicant's wife due to these tape records broadcasted on the internet, and the High Disciplinary Board of the Ministry of National Defence imposed a penalty of dismissal from profession on the applicant's wife. An action was brought against this decision before the 2nd Chamber of the SMAC within the prescribed period.

Thereupon, the decision on dismissal of the applicant's wife from profession and a warning letter within the scope of Article 153 of the Military Criminal Code were served on the applicant. On 13/8/2012, the applicant requested to be retired by reserving his legal rights and was retired on 27/9/2012 upon the approval of the Minister of the National Defence.

The Secretariat General of the SMAC did not find the request for the examination of the confidential documents in the action brought by the applicant appropriate. Upon the objection to the decision, the 1st Chamber of the SMAC accepted the request partially.

The applicant maintained that his representative had became aware, upon examining the confidential information, of the fact that the administrative investigation board had been established due to the tape records; and that the administrative investigation board had acted in an unduly manner, by illegal methods and on the basis of a tape record actor of which was not identified.

In the meantime, a total of eleven persons including the applicant and his wife filed criminal complaints on various dates on the ground that unsubstantial posts including aspersions and defamations against them were made available on the social networking site. It was concluded that three suspects identified within the scope of the investigation had no relation with the offences committed, and accordingly the Chief Public Prosecutor's Office rendered a decision of non-prosecution.

While the action brought by the applicant's wife was pending, she accepted to give a sample voice record. Thereupon, the Presidency of the Criminal Department of the Gendarmerie General Command specified in its report that the woman in the

tape records broadcasted via internet was *"most probably the same person"* with the applicant's wife.

At the end of the hearing held on 19/3/2013, an interlocutory decision was taken, and accordingly information was requested from the Presidency of the Second Chamber of the SMAC, which subsequently provided information in a letter concerning the action and submitted the criminal reports concerning the tape records to the court.

The 1st Chamber of the SMAC dismissed the action brought by the applicant on 18/6/2013.

The action brought by the applicant's wife due to the penalty of dismissal from profession and her request for rectification of the judgment were dismissed by the SMAC.

The applicant maintained that while he was serving as a staff officer, he had to retire at the age of 47; that the tape records broadcasted on the internet cannot be accepted as evidence; that the sole foundation of the impugned administrative act was the issues that must remain within the scope of private life; and that there had been illegal interferences with the private life and family life. He also alleged that the requests made had not been taken into account; that these tape records had been also listened to the workmates of his wife working in the same workplace with her; that this procedure was wrong and the trial was based on insufficient examination; that their requests for receiving report from the Forensic Medicine Institute had not been accepted; that he had been exposed to degrading treatments; and that there had been a breach of his rights guaranteed in the Constitution.

In brief, the Constitutional Court made the following assessments within the scope of this application:

In the period in question, various decisions were taken on the basis of the dialogues with others not belonging to the applicant himself but to his wife. Those who are appointed as military attaché are automatically assessed as to whether they have the ability to represent. While satisfying that they have such ability, their families are also taken into consideration. Therefore, it is in the administration's discretion to make the tape records alleged to belong to his wife subject-matter of the investigation even if such records are not related to the applicant himself.

It must be also established whether the applicant and his wife had any responsibility in leaking of these tape records to the internet. Many persons other than the applicant

Having regard to the grounds adduced by the court, the Constitutional Court has reached the conclusion that dismissal of this action did not only affect the professional life of the applicant, and the applicant and his family were caused to experience trouble in their social life by means of showing the reports drawn up by the Criminal Department as a ground and indirectly giving an impression that these tape records were authentic.

and his wife filed criminal complaints before the Ankara Chief Public Prosecutor's Office due to tape records broadcasted through social media accounts and requested identification and punishment of those who were responsible. Moreover, the applicant stated both before the investigation board and the non-military prosecutor's office that the tape records in question were not authentic. Therefore, given the fact that other persons including the applicant filed criminal complaints on different grounds, it was found established that any responsibility could not be attributed to the applicant in a concrete manner.

The applicant stated that he could not learn, at the first stage, the legal ground of the interference with his professional life and could become aware of this ground only after the defence petition was submitted in the course of the action brought. Given the procedure applied during the administrative investigation conducted, it has been revealed that the most intimate parts of private life were further disclosed through the acts performed by the administration; and that this thereby led to infringement of a far greater personal interest compared to the expected public interest.

Moreover, the courts' competence to examine whether an administrative act is lawful or not is not only restricted with the issue as to whether the administrative acts are based on material facts. It has been observed that the court did not assess the objections that the records in question were obtained from the internet; that the content of the criminal reports of the gendarmerie was not precise; that making the tape records listened to the workmates of the applicant's wife infringed the applicant's personal rights; and that there was no evidence other than the tape records broadcasted.

Having regard to the grounds adduced by the court, the Constitutional Court has reached the conclusion that dismissal of this action did not only affect the professional life of the applicant, and the applicant and his family were caused to experience trouble in their social life by means of showing the reports drawn up by

the Criminal Department as a ground and indirectly giving an impression that these tape records were authentic.

The Constitutional Court has consequently held that there was a breach of the right to private life, which is guaranteed in Article 20 of the Constitution, for the above-mentioned grounds.

fd. Judgment on the violation of the privacy of private life on account of a statement taken without giving information about the legal process in which the relevant statement would be used

G.G. Judgment (App. no. 2014/16701)

> **In the present incident, taking of the applicant's statement in question without referring to certain and concrete acts and without informing him for which legal action his statement would form a basis casts doubt on the statement in legal terms. Moreover, given the questions asked during the statement taking process, it has been observed that the applicant was forced to reply to allegations regarding not his professional life but his private life. In this respect, it has been revealed that the reasoning parts of the decisions taken by the administration and the judicial authorities include findings that the applicant had relations with women he met via internet or in social surroundings, that some of these women were foreigners, and that he did not live in a prudent manner in moral terms. It has been also observed that conclusions of these decisions are based on these grounds. It has been consequently revealed that the impugned disciplinary action and the behaviours discussed in the judicial process are acts which are not pertaining to the applicant's professional life but which are concerning his private life and remain within the sphere of his intimacy. Therefore, scope of the applicant's dismissal which is in dispute goes beyond the limits of professional life.**

In the incident giving rise to the present individual application which was concluded by of the Plenary Session of the Constitutional Court on 13 October 2016, while the applicant *G.G.* was serving as a commissioned officer under the command of the Air Forces Command, an investigation was launched against him on the ground that some images published on a website on 2 December 2010 constituted immoral,

disgraceful and shameful act. In this scope, on 10 December 2010 the applicant's statement was taken, and on 11 March 2011 his corps, which was intelligence, was changed as infantry. In the course of the investigation, news headed "Here are those shocking images" was published in a national newspaper dated 21/6/2012 and the relevant images were displayed in the content of the news in blurred manner.

When the documents included in the file with respect to the applicant are examined, it has been understood that on 10/12/2010 the Air Forces Command took the applicant's statement within the scope of the counter-intelligence activities. As the section including "the name of the person taking the statement" and some parts of the statement were darkened, the unit which had taken the statement could not be determined. During the statement taking process, the applicant was asked about the places where he had worked until then; the persons whom he lived with; among the women he had met on the internet or personally, the ones with whom he had had sexual intercourse; whether he had had sexual intercourse with foreign women; the identity of the woman whose images with him were displayed on the internet; the place where the images were recorded; whether those women knew his being a military officer or his duty; the reason for his having left the lodgment; and whether he had sent confidential documents through his official e-mail account without encrypting them. It has been understood that the applicant answered the mentioned questions, in particular, he explained his relations with the women with whom he had had sexual intercourse in the past; and that he signed the record of statement. Moreover, the applicant noted that classified documents regarding his private life had been obtained, and therefore, he was a victim.

As a result of the administrative investigation conducted against the applicant, on 3/8/2012 his superior officers issued a certificate for dismissing the applicant which indicated that "*It is not appropriate for him to stay in the Turkish Armed Forces ("the TAF")*", on the ground that he had had immoral acts undermining the dignity of the TAF. On 15/11/2012 the Commission established within the Air Forces Command handled the applicant's situation, and relying on the same grounds, it decided that the applicant's dismissal be submitted for the commander's approval. After the relevant decision was approved by the Chief of Air Staff and the Chief of General Staff respectively on 16/11/2012 and 24/12/2012, the applicant was dismissed by a Triple Decree dated 13/2/2013 and numbered 2013/90.

The applicant brought an action against the Ministry of National Defence before the Supreme Military Administrative Court ("the SMAC"), requesting the annulment of

his dismissal. In his petition, the applicant argued that his statements taken during a an unlawful process where questions regarding his private life and not related to his duty had been asked could not be used as evidence, and that although he had a favourable service record full of appreciations, this was not taken into account.

On 1/4/2014 the 1st Chamber of the SMAC dismissed the applicant's request for annulment. In the relevant decision it was noted that the applicant had confessed his sexual relations and that although he was a successful personnel regard being had to his previous service records and disciplinary situation, he did not carry the qualification of being a morally justified person, and that there was not unlawfulness in terms of the action taken. It was also indicated that the applicant's statements had not been taken within the scope of criminal investigation, but disciplinary proceedings, and that there was no evidence showing that his statement had been taken under duress.

The applicant lodged an individual application with the Constitutional Court. He alleged that he had been interrogated under psychological pressure by the intelligence unit unlawfully, in breach of the privacy of his private life, and that the administration took his statement in an unlawful manner and drew up an intelligence report by distorting his statements. The applicant also submitted that during the period when he had been holding office in the TAF, he had been awarded many certificates of appreciation, he had very good service records, he had reflected no aspect of his private life into his work, and that his dismissal had been disproportionate. For these reasons, the applicant alleged that there had been a violation of the privacy of his private life, within the meaning of Article 20 of the Constitution.

In brief, the Constitutional Court made the following assessments within the scope of these allegations:

The notion of private life does not refer to only the sphere of privacy but also secures the individuals' living a private social life. Certain elements of private lives of especially public officers, which are also integrated with their professional lives, may be subject to restrictions within the scope of the discretionary power of the administrative authorities. However, these persons must avail themselves of the constitutional guarantees, as in the restrictions likely to be imposed in respect of the other individuals. Furthermore, when it comes to securing the right to sexuality and the right to intimacy which remain within the scope of the privacy of private life, the discretionary power vested in the administration must be narrower.

On the other hand, in the disciplinary actions taken and in the court's decisions where these actions are subject to review of lawfulness, effects of the conducts and acts of the individuals regarding their private lives on their professional lives must be explained; their effects and risks on the functioning of the relevant institutions rendering public service must be ascertained; assessments as to such issues must be supported with sufficient and plausible grounds; and furthermore, the disciplinary actions taken must be examined in terms of proportionality by taking into consideration previous professional records and achievements of the individuals. In addition, for effective enjoyment of the rights enshrined in Article 20 of the Constitution, the decision-making processes which constitute interference must contain procedural guarantees which would ensure requisite respect for the rights and freedoms protected under this article and must be fair.

In the present incident, taking of the applicant's statement in question without referring to certain and concrete acts and without informing him for which legal action his statement would form a basis casts doubt on the statement in legal terms. Moreover, given the questions asked during the statement taking process, it has been observed that the applicant was forced to reply to allegations regarding not his professional life but his private life. In this respect, it has been revealed that the reasoning parts of the decisions taken by the administration and the judicial authorities include findings that the applicant had relations with women he met via internet or in social surroundings, that some of these women were foreigners, and that he did not live in a prudent manner in moral terms. It has been also observed that conclusions of these decisions are based on these grounds. It has been consequently revealed that the impugned disciplinary action and the behaviours discussed in the judicial process are acts which are not pertaining to the applicant's professional life but which are concerning his private life and remain within the sphere of his intimacy. Therefore, scope of the applicant's dismissal which is in dispute goes beyond the limits of professional life.

It has been observed that in spite of allegations that the applicant's statement taking process contained illegal elements as to the procedure and content thereof, the decision rendered by the SMAC failed to elaborate on the conditions under which the applicant's statement was taken and reveal why and how the applicant provided detailed information concerning his sexual life, which forms the most confidential sphere of his private life, as from the previous years.

It has been observed that in spite of allegations that the applicant's statement taking process contained illegal elements as to the procedure and content thereof, the decision rendered by the SMAC failed to elaborate on the conditions under which the applicant's statement was taken and reveal why and how the applicant provided detailed information concerning his sexual life, which forms the most confidential sphere of his private life, as from the previous years. It has been also observed that the action brought by the applicant against his dismissal from the TAF on the basis of the issues included in the applicant's statement which were of abstract nature was dismissed by the SMAC. Moreover, it has been revealed that the decision of the SMAC did not provide sufficient and convincing grounds concerning the effects of the applicant's conducts and acts remaining within the sphere of his private life on his professional life; nor did it elaborate on the effects of and risks posed by these acts on and to the functioning of the TAF. It has been further observed that any research was not carried out into the allegations that the evidence considered to form a basis for the applicant's dismissal was unlawfully obtained; and that although the administration became aware of the acts constituting a ground for his dismissal, any action was not taken in respect of the applicant for two years.

It must be acknowledged that the SMAC's decision lacked relevant and sufficient ground which would justify the interference in the applicant's right to intimacy on the grounds that the SMAC failed to reply, in a reasonable manner, to the applicant's allegations which were explicitly and concretely maintained in the course of the proceedings and considered to be able to alter the outcome of the proceedings; that effects of the issues falling into the sphere of the applicant's private life on his professional life were not explained; and that he was denied availing himself of the effective procedural guarantees by which he could request, under fair conditions, requisite respect for privacy of his private life. In addition, it has been concluded that the applicant's dismissal was not assessed in terms of proportionality by taking into consideration the applicant's previous service record and achievements; that a fair balance was not struck between the general interest aimed to be attained with the restriction in question and loss suffered by the applicant whose fundamental right and freedom was restricted; that any examination was not carried out as to whether the restriction imposed on privacy of the applicant's private life is a compulsory or exceptional measure or is the last remedy which may be resorted or the last precaution which may be taken; and that due diligence was not shown.

The Constitutional Court consequently held that there had been a breach of privacy of the applicant's private life guaranteed in Article 20 of the Constitution.

fe. Judgment finding no violation of the right to respect for family life as the public authorities fulfilled their positive obligations for the protection of matrimonial house

Melahat KARKİN Judgment (App. No: 2014/17751)

> **Regard being had to Article 194 of the Law no. 4721 and its legislative intention, it may be mentioned that the legislator has aimed, through the provisions introduced with regard to the matrimonial house, at protecting the family life and unity of family and taking necessary measures which would ensure the spouses to live together by means of taking into consideration the structure and needs of the Turkish society. It has been observed that as one of the means for fulfilling its positive obligations with regard to securing the respect for family life enshrined in Articles 20 and 41 of the Constitution, the State prefers providing a special and separate safeguard for the matrimonial house through the provisions of the Law no. 4721. Accordingly, in respect of the right to respect for family life, there might be positive obligations on the part of the public authorities for the protection of matrimonial house within the framework of particular circumstances of each concrete case.**

In the incident giving rise to the present individual application which was concluded by the Plenary Assembly of the Constitutional Court on 13/10/2016, a lien was established on the immovable property belonging to the applicant's spouse and alleged to have been used by the applicant as a matrimonial house since 2001 in favour of a bank on 25/12/2003. Upon the default in payment, the house was transferred to the bank upon the tender made by the İzmir 13th Enforcement Office on 14/5/2010.

On 20/5/2010, the applicant filed a case for release of the lien by maintaining that the house in question was of the nature of a matrimonial house; that she was residing in the house together with her children; that a lien had been established on the matrimonial house by her husband without her knowledge and consent; that the bank which was liable to act as a prudent merchant had been aware of the fact that the immovable property in question was a matrimonial house, and furthermore, an appraisal report had been drawn up by the bank experts in the course of the establishment of the lien; that Article 194 of the Turkish Civil Code dated 22/11/2001 and no. 4721 attached priority to the protection of family while making a preference between the protection of good faith and the protection of family.

By the decision of the 13th Chamber of the İzmir Family Court dated 10/11/2010, it was held that the case be accepted and the lien be released. However, this decision was quashed by the judgment of the 2nd Civil Chamber of the Court of Cassation dated 9/7/2013 on the ground that the complainant failed to prove that the defendant bank was ill-intentioned.

At the end of the proceedings held following the quashing judgment, the case brought by the applicant was dismissed by the court's decision dated 20/12/2013, which was in line with the quashing judgment. Upon the appellate review, the decision was upheld by the judgment of the 2nd Civil Chamber of the Court of Cassation dated 14/4/2014. The applicant's request for rectification of the judgment was dismissed by another judgment of the same Chamber dated 8/9/2014.

The applicant stated that the State was liable to make legal arrangements which would protect the family; that it was clearly specified in the Constitution that on the basis of which justifications the immunity of domicile could be restricted and that the immunity of domicile cannot be infringed on the basis of any justification other than the above-mentioned arrangement. She also noted that the laws attached particular importance to and a particular protection was provided for the matrimonial houses; that loss of matrimonial house generally lead to damage suffered by the wives and children; and that there was deficiencies in the protection of women and children in spite of the arrangement included in Article 41 of the Constitution. She maintained that although in the first decision of the inferior court, the bank could not be accepted to act in good faith, a dismissal decision was rendered in its last decision on the ground that there appeared hesitation concerning the applicant's good faith; and that a restriction had been imposed on the matrimonial house in spite of these findings and the explicit provision of Article 194 § 1 of the Law no. 4721. The applicant accordingly alleged that there had been a breach of her rights enshrined in the Constitution.

In brief, the Constitutional Court made the following assessments within the scope of this application.

Regard being had to Article 194 of the Law no. 4721 and its legislative intention, it may be mentioned that the legislator has aimed, through the provisions introduced with regard to the matrimonial house, at protecting the family life and unity of family and taking necessary measures which would ensure the spouses to live together by means of taking into consideration the structure and needs of the Turkish society. It has been observed that as one of the means for fulfilling its positive obligations

with regard to securing the respect for family life enshrined in Articles 20 and 41 of the Constitution, the State prefers providing a special and separate safeguard for the matrimonial house through the provisions of the Law no. 4721. Accordingly, in respect of the right to respect for family life, there might be positive obligations on the part of the public authorities for the protection of matrimonial house within the framework of particular circumstances of each concrete case.

In the present application, the provisions set out in Article 194 of the Law no. 4721 have introduced certain protective arrangements within the context of dwelling which is put in the centre of family life and which would, in case of being deprived of, endanger the sustainability of the family members' right to housing and of their family relationship. Through these legal arrangements, it was aimed to protect the family life. It has been observed that the requisite legal background has been established through these legal arrangements within the scope of the positive obligations for the effective enjoyment and protection of the right to respect for family life.

In addition, as these obligations would be completed upon the materialization of the legal arrangements in question, it is required that, especially in terms of relations of private law, the fundamental rights be taken into consideration also in the interpretation of these relations; that a trial encompassing necessary procedural guarantees be carried out; and that the judicial authorities take into consideration the values specified in the provisions of the Constitution in the interpretation of the provisions and notions of the private law.

It is primarily under the inferior courts' power and responsibility to resolve the problems concerning the interpretation of the legislation. The role of the Constitutional Court is restricted with the assessment to be made as to the impacts of the interpretation of these rules on the fundamental rights and freedoms. Therefore, the Constitutional Court monitored the procedure followed by the inferior courts and especially assessed whether the inferior courts had respected the guarantees enshrined in Articles 20 and 41 of the Constitution while interpreting and implementing the relevant provisions of the legislation.

It has been observed that the judgments rendered by the Court of Cassation specify that in cases where an annotation of matrimonial house is not attached on the title deed registry – as in the present incident -, the provisions included in the Law no. 4721 and pertaining to good faith are taken into consideration in circumstances where the matrimonial house is acquired by the third persons. On the other hand, a new approach has been adopted by the judgment of the General Assembly of Civil

Chambers of the Court of Cassation dated 15/4/2015. According to this approach, the spouse who is the owner of the matrimonial house and wishes to perform a deed in respect of the matrimonial house is required to prove that the other spouse have explicit consent for the deed. It has been accordingly observed that in the judgments rendered by the General Assembly of Civil Chambers of the Court of Cassation and the 2nd Civil Chamber of the Court of Cassation following 15/4/2015, it has been adopted that the restriction imposed by Article 194 of the Law no. 4721 on the juridical capacity of the spouses is not conditional upon the attachment or non-attachment of an annotation on the matrimonial house and the good faith of the third party who is a party to the relevant deed is of no importance.

Although it has been observed that the judicial practice has changed and a new interpretation has been adopted since the above-mentioned date, the Constitutional Court is not authorized to assess the inferior courts' appreciation concerning the interpretation of the legislation provisions. Moreover, it has been revealed that in the present incident, the final decision was rendered before the date of 15/4/2015 when the above-mentioned case-law was changed; that the dispute was dealt with and concluded as per the explanations concerning the "good faith" provisions acknowledged by the Court of Cassation along with the legislation provisions concerning the matrimonial house; that the applicant's husband obtained three loans on various dates for his commercial activity from the same bank by means of establishing lien on the matrimonial house in question; that upon default in payment, the immovable property was sold by way of compulsory enforcement; and that the applicant's case was dismissed on the ground that the defendant Bank was in good faith in respect of its acquisition pertaining to the lien and the presumption to that effect could not be rebutted. It has been noted that in the proceeding in question, the parties' right to become a party to the proceedings were respected; that their allegations, defence submissions and evidence were assessed; and that the justifications of the conclusion reached were explained in detail.

Given the reasoning of the decisions rendered by the inferior courts, it has been revealed that a balance was struck between the legal interests of the parties, and the judicial authorities explained the justifications of their conclusions in detail; and that any finding which indicates that in their decisions, with respect to the evaluations and elements included therein, the judicial authorities went beyond the limits of their discretionary powers in respect of the right to family life could not be found.

Moreover, given the reasoning of the decisions rendered by the inferior courts, it has been revealed that a balance was struck between the legal interests of the parties, and the judicial authorities explained the justifications of their conclusions in detail; and that any finding which indicates that in their decisions, with respect to the evaluations and elements included therein, the judicial authorities went beyond the limits of their discretionary powers in respect of the right to family life could not be found.

The Constitutional Court has consequently held that there was no breach of the applicant's right to family life guaranteed in Article 20 of the Constitution.

g. JUDGMENTS RENDERED IN RESPECT TO THE FREEDOM OF EXPRESSION AND DISSEMINATION OF THOUGHT

ga. Judgment on the violation of the freedom of expression due to the termination of the service contract of a worker who informed the Prime Ministry Communications Center (BİMER) about problems at his workplace

İlter NUR Judgment(App. No: 2013/6829)

A warning made by a worker to the public authorities due to illegalities at the workplace or unjust deeds caused by the employer is in principle under the guarantee of the freedom of expression.

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 14/4/2016,while the applicant was serving as a worker having service contract with a contractor firm under the Turkish Electricity Transmission Corporation ("the TEİAŞ"), he applied to the Prime Ministry Communications Center and complained of the working conditions at the workplace, the inequality between him and the other workers and ineffectiveness of the inspections carried out by the inspectors at the workplace. Upon his complaint, his service contract was terminated. In the action brought by the applicant for invalidity of the termination of his service contract and for his reinstatement, the 2nd Chamber of the Samsun Labour Court decided that the termination would be annulled and the applicant would be reinstated to his former position. Upon the appeal of the decision, the Court of Cassation found the termination of the applicant's service contract justified as the worker exercised his right to legal remedies by means of using defaming and abusing statements, quashed the first instance decision and decided to dismiss the action after assessing its merits.

The applicant maintained that although he had succeeded in his action brought before the first instance court, the first instance decision had been quashed by the Court of Cassation which subsequently dismissed the action. He therefore alleged that his rights to legal remedies and to a fair trial had been breached and requested re-trial.

In brief, the Constitutional Court made the following assessments within the scope of this application:

When the applicant's petition is assessed as a whole, it has been observed that the petition included expressions beyond an aggressive style but seeking for assistance and underlining the applicant's desperation. The applicant especially tried to express that he was subject to unjust treatment in terms of his branch of activity and that of the other workers. On the other hand, it was specified that the employer had not paid the full insurance amount and showed the working hours different than the actual ones in the official documents although the personnel worked by shifts. Also for emphasizing that his complaint was not researched seriously, the applicant told *"when an inspector pays a visit, they wine and dine the inspector and send them back. They do not take care of us. When we make a complaint, they threat us. They completely see us as an unskilled worker"*. It was not specified in the reasoning of the decision whether the defaming and abusing words were the applicant's endeavour for ensuring his complaint to be examined seriously within the whole content of the compliant petition.

The interference with the applicant's freedom of expression does not stem from the acts of the public authorities and must be examined within the scope of the State's positive obligations. It must be assessed that the interference in which the action was dismissed as certain expressions in the applicant's petition were qualified as defamation and insult falls within the scope of "the right to protect other individuals' reputation or rights" and that it is legitimate.

A warning made by a worker to the public authorities due to illegalities at the workplace or unjust deeds caused by the employer is in principle under the guarantee of the freedom of expression. When the applicant's petition is assessed as a whole, it has been observed that the petition included expressions beyond an aggressive style but seeking for assistance and underlining the applicant's desperation. The applicant especially tried to express that he was subject to unjust treatment in terms of his branch of activity and that of the other workers. On the other hand, it was specified that the employer had not paid the full insurance amount and showed the working hours different than the actual ones in the official documents although the personnel worked by shifts. Also for emphasizing that his complaint was not researched seriously, the applicant told *"when an inspector pays a visit, they wine and dine the inspector and send them back. They do not take care of us. When we make a complaint, they threat us. They completely see us as an unskilled worker"*. It was not specified in the reasoning of the decision whether the defaming and abusing words

were the applicant's endeavour for ensuring his complaint to be examined seriously within the whole content of the compliant petition. It was not also assessed whether or not such expressions were not only addressing to the employer but also for the inspectors who had not performed their tasks.

On the other hand, it has been also observed that given the fact that the petition was not publicized other than being disclosed to the public authorities and the firm, the question as to whether the complaint would lead to an unfavourable outcome in respect of the employer's reputation was not assessed. When the non-severe impacts of the complaint petition on the employer and the unfavourable impact of the sanction namely the termination of the applicant's service contract in pursuance of the provisions concerning the rightful termination on the applicant are compared, the question as to whether application of the provisions concerning the rightful termination had been necessary was not discussed in the reasoning of the decision. Therefore, it has been concluded that with regard to the termination of the service contract as per the rightful termination provisions in the reasoning of the decision, there was no relevant and sufficient justification as regards a fair balance between the applicant's freedom of expression and the employer's reputation and the employer's interest for ensuring peace in labour relations.

The Constitutional Court has consequently held that there was a breach of freedom of expression which is guaranteed in Article 26 of the Constitution.

h. JUDGMENTS RENDERED IN RESPECT OF THE RIGHT TO PROPERTY

ha. Judgment finding no violation of the right to property because of the transfer of the Bank to the TMSF to prevent the Bank from causing much more harm to the financial markets and for the protection of the rights of the depositories

Halis TOPRAK and Others Judgment (App. No: 2013/4488)

> **In the impugned incident, the less severe interference prescribed for the Bank was tried with the decision on close monitoring dated 11/12/2000, and accordingly several recommendations, instructions and suggestions were provided for the Bank on various dates for improving of the current situation. The applicants did not take the necessary measures for strengthening the financial status of the Bank in the course of the close monitoring period lasting for approximately one year; nor did they make an explanation as to how such a bank of which financial structure had deteriorated to such degree in an environment where economic crisis prevailed could continue performing its activities without causing damage to the financial markets, economy and depositors thanks to what kind of measures without being transferred to the TMSF. Although the applicants alleged that their own assets and those belonging to the Group companies would suffice for covering of the losses incurred by the Bank, they have not explained why they did not make such sales and pay the loan debts of the Group and thereby improved the Bank's financial status during the close monitoring period lasting for approximately one year in spite of the instructions and recommendations of the BDDK. It has been also revealed from the implementation of the protocol, which was signed between the applicants and the TMSF for partial collection of its losses resulting from the Group loans of the Bank, in a manner to be lasted for years that it is not possible to improve the financial status of the Bank through simple methods, such as the sale of real estate properties and subsidiaries and to indemnify the losses in a short period.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 23/3/2016, the applicants are shareholders of Toprakbank A.Ş. which was liquidated after having been seized ("the Bank"). Before their transfer to the Savings Deposit Insurance Fund ("the TMSF"),

95% of the bank shares were belonging to the applicants and the Toprak Companies Group owned by the applicants. By the decision of the Banking Regulation and Supervision Agency ("the BDDK") dated 11/12/2000, the Bank was decided to be closely monitored on the ground that their assets became frozen due to the loans supplied to the companies belonging to the Toprak Group ("the Group") and due to income-expense disequilibrium and insufficiency of capital structure. In the course of the close monitoring period, the BDDK recommended that the Bank would increase its capital; the loans supplied to the Group companies would be re-paid; cash inflow to the bank would be immediately ensured; the structure of the organization would be rendered efficient and profitable; and that Toprak Off-Shore's activities would be terminated and its accounts would be transferred to the Bank. The BDDK issued such warnings: this situation impaired the income-expense balance of the Bank; a deficit in the equity had been caused; and that the facilities supplied to the Toprak Off-Shore had exceeded the loan limits. The BDDK also suggested the Bank to find fund through a strategic partner or the sale of Group firms; to settle the Group loans through cash proceeds or to secure such loans on collateral.

The BDDK decided that the partnership rights, except for the dividend, and management and control of the Bank, which failed to comply with the warnings and recommendations, be transferred to the TMSF. The Fund Board of the TMSF decided that 45,5 million Turkish liras, the part of the Bank's loss corresponding to the paid-up capital, be taken over in return for the payment at the same amount to be made to the Bank; and that the share certificates be requested to be registered in the Bank's stock register in the name of the TMSF. The Bank's Board of Directors were replaced by the TMSF. Upon its transfer to the TMSF, the Bank was subject to an independent audit with a view to establishing its real financial status. It was accordingly revealed that the loss of the Bank size of assets of which was 1,905 million Turkish Liras was approximately 1.306 million Turkish Liras; and that the long-term loans supplied to the Group firms were approximately 678 million Turkish Liras. Pursuant to the decisions dated 26/3/2002 of the BDDK and the Fund Board of Directors, the Bank was merged with the Bayındırbank, and its banking license was revoked on 30/9/2002.

The real estate properties included among the Bank assets and its subsidiaries were sold by the TMSF, and it was especially tried to collect the Bank's losses by means of signing a protocol at the amount of 453 million USD with the applicants who were controlling shareholders of the Bank with a view to collecting the debts owed to the Bank due to the loans of the Group firms. Y.P., who was the holder of the 1.000 lot share certificates, brought an action for annulment before the 13th Chamber of the Supreme Administrative Court in 2005 and requested annulment of the transfer of the

Bank to the TMSF. The 13th Chamber of the Supreme Administrative Court decided to dismiss the case, and the appellate review was also dismissed by the Plenary Session of the Chambers for Administrative Cases. Thereafter, a request for rectification of the judgment was made. While the process of rectification of the judgment was pending, the defendant Y.P. transferred 1.000 lot share certificates of the Bank to the applicants for a total amount of 1,000 Turkish Liras by virtue of the Share Certificates Transfer and Assignment Letter. The parties were accepted to become a party to the proceedings at the stage of rectification of the judgment due to the transfer and assignment in question; however the Supreme Administrative Court decided to reject the request for rectification of the judgment.

The applicants maintained that seizure of Toprakbank A.Ş., of which they were controlling shareholders, by the BDDK had constituted interference in their properties; that as the relevant evaluation principles required to be determined by the BDDK as per the statutory provision had not been established explicitly, the Bank had been transferred to the TMSF; that if the balance of the Bank's real assets had been revealed, it could be observed that its assets covered its debts; and that the interference in their properties consequently failed to meet the criteria of lawfulness and proportionality. They also alleged that there had been tangible data indicating that this interference had been effected not for public interest but upon the imposition of the International Money Fund ("the IMF"); that according to the statistics published just after the period when the Bank had been seized, the Bank's profit had constituted 26% of the total profits of thirty three banks operating in Turkey at that time; that an interim injunction had been imposed on their assets upon the decision on seizure of the Bank, and they had been subject to a ban on leaving the country; that they had been deprived of founding a bank in future; and that therefore, the interference in their properties had been disproportionate. They further maintained that although they had tangibly proven that the Supreme Administrative Court had conducted insufficient examination in the course of the proceedings concerning the seizure of Toprakbank A.Ş., their founded allegations had not been examined, and necessary steps had not been taken in line with the allegations raised by them. The applicants accordingly alleged that there had been a breach of their rights to a fair trial and to property and the principle of equality.

In brief, the Constitutional Court made the following assessments within the scope of this application:

There is no dispute concerning the fact that the Bank was operating in the banking sector before its transfer to the TMSF. Banks have certain circle of customer and

license for establishing and operating a bank as well as its movable and immovable properties, and all of these assets must be considered to fall into scope of the "*goods and properties*" within the scope of the right to property which is under the joint protection of the Constitution and the Convention. The applicants were the shareholders of the Bank which undoubtedly involves the terms of goods and properties within the right to property.

Moreover, as it has been understood that the applicants had 1.000 lot bank shares which were a matter before the Supreme Administrative Court and they were accepted, by the judgment of the Plenary Session of the Chambers for Administrative Cases of the Supreme Administrative Court dated 1/10/2012, to be a party to the proceedings, the applicants had the right to property, which is restricted to 1.000 lot bank share certificates in the instant case. It has been therefore revealed that the applicants, in the present application, had an interest required to be protected by being limited to 1.000 lot bank share certificates. As it has been understood that the actions performed by the BDDK and the TMSF had an influence on the right to property provided by the shares owned by the applicants, who were former controlling shareholders of the Bank and that the shares completely lost their value, it is obvious that there was an interference with the applicant's right to property. Pursuant to the Constitution, this right may be restricted only by virtue of public interest and by law, and the restriction imposed must be proportional.

The Bank was merged with the Bayındırbank pursuant to the decisions and actions performed by the BDDK and the TMSF, and the banking license of the Bank was revoked as of 30/9/2002. As a result of these actions, the Bank was ceased to exist, and through the subsequent actions performed, its assets, debts and accounts receivable were settled. The applicants were deprived of their assets at the end of the above-defined process. On the other hand, the assets of the Bank were not expropriated for public interest; or nor was the Bank nationalized and caused to be turned into a State bank. The actions performed by the BDDK and the TMSF were carried out within the scope of the regulatory and monitoring duties vested in these institutions by law in order to ensure that the banking sector operates in a safe and stable manner and the loan system operates in an effective manner, as targeted by Article 167 of the Constitution and the abolished Law no. 4389 and in order to protect rights and interests of the account owners.

The applicants maintained that the interference in their properties did not meet the requirement of lawfulness. It must be primarily noted that the differences in jurisprudence in respect of similar matters among judicial authorities of the same instance due to the particular circumstances of the present incident cannot be

alone accepted to be a breach of right. Moreover, the difference in interpretation of the inferior courts or the appellate courts with respect to the parties' requests and evidence pertaining to the disputes cannot be alone regarded as a breach of right.

In the *Demirbank* case which was set as a precedent by the applicants, the Plenary Session of the Chamber for Administrative Cases of the Supreme Administrative Court held that although it had been recommended in the report drawn up by the banks sworn auditors before the transfer that the State's securities should be removed from the Bank portfolio through exchange for improvement, the act of exchange had not been performed; that following the transfer, the practice of voluntary exchange was introduced for all banks and the banks were thereby ensured to relieve; that it was specified in the report and financial structure reports of the State Supervisory Council that if the act of exchange had been performed, the Bank would not have experienced any profit or liquidity problem; that moreover, the total amount of risky loans of the Bank had not been very high compared to the total amount of loans and the quality of the current assets of the Bank had been high; and that accordingly the decision of transfer, which had been taken within the scope of Article 14 § 2 of the abolished Law no. 4389 without researching options which would ensure the liquidity balance of the Bank, had not been lawful.

In the incident subject-matter of the application, the grounds for transfer of the Bank to the TMSF were shown, in the BDDK's decision of 30/11/2001, as Articles 14 § 3 and 4 of the abolished Law no. 4389. It was specified in the study prepared by the TMSF that the basic grounds for the seizure of the Bank were the facts that the Bank's resources had been mainly supplied as a long-term loan to the Toprak Group firms (approximately 678 million Turkish Liras); that the Bank's resources in the foreign depositories (Toprakbank Offshore) had been supplied to the Group firms as a loan; and that although there had been no profit between the years of 1998 and 1999, the profit had been shown higher (approximately 25 million and 60 million Turkish liras) and profit shares were distributed to the partners.

In the letter of the Legal Affairs Department of the BDDK dated 31/12/2015, it was specified that several instructions that loans supplied to the Group firms must be secured and must be settled by means of being collected; that the capital must be increased; that the Toprak Off-Shore deposits must be closed; that fiduciary transactions must be terminated; and that profit must not be distributed had been given to the Bank on various dates following its being subject to close monitoring with the decision of 11/12/2000. There were also findings in this letter that as such instructions had not been abided by, the Bank's financial structure had been weakened in a manner which could not be improved.

It was established in the BDDK's decision of 30/11/2001 that the main reason for the seizure of the Bank had been the extensive supply of loans for the Group firms; and it was specified in the above-mentioned study performed by the TMSF that the loss incurred had been mainly resulted from the default in re-payment of the loans supplied to the Group firms. As alleged by the applicants, it has been understood that even the real estate properties belonging to the Bank had much higher values than those shown in the balance sheet, it was not revealed how the loss at the amount of 1,306 million Turkish Liras would be covered. Within this framework, it has been observed that the studies carried out by the TMSF for the settlement of the Bank's loss had continued for years, and the applicants acknowledged their debts resulting from the Group loans; and that they had signed a protocol at the amount of 453 million USD and could repay their debts in long term.

The explicit arrangements cited-above were published in the Official Gazette and on the web-sites of the relevant institutions and were accessible and comprehendible at the date of their publication. It has been accordingly concluded that legal basis of the impugned action was comprehendible and its possible results were foreseeable; and that consequently, the impugned action had a legal basis.

The applicants alleged that according to the statistics published just after the period when the Bank had been seized, the Bank's profit had been considerably high; and that the problem could have been solved with a less severe interference instead of being transferred to the TMSF. The applicants accordingly maintained that the interference in their properties had been disproportionate.

In the impugned incident, the less severe interference prescribed for the Bank was tried with the decision on close monitoring dated 11/12/2000, and accordingly several recommendations, instructions and suggestions were provided for the Bank on various dates for improving of the current situation. The applicants did not take the necessary measures for strengthening the financial status of the Bank in the course of the close monitoring period lasting for approximately one year; nor did they make an explanation as to how such a bank of which financial structure had deteriorated to such degree in an environment where economic crisis prevailed could continue performing its activities without causing damage to the financial markets, economy and depositors thanks to what kind of measures without being transferred to the TMSF. Although the applicants alleged that their own assets and those belonging to the Group companies would suffice for covering of the losses incurred by the Bank, they have not explained why they did not make such sales and pay the loan debts of the Group and thereby improved the Bank's financial status during the close monitoring period lasting for approximately one year in spite of the

In such case, when the interference with the applicants' right to property and the public interest to be ensured in the transfer of the Bank to the TMSF after the applicants had been warned to take the necessary measures and for the public interests of preventing the Bank from causing much more harm to the financial markets and for the protection of the rights of the depositories are compared, it has been concluded that the fair balance required to be paid regard was not impaired.

instructions and recommendations of the BDDK. It has been also revealed from the implementation of the protocol, which was signed between the applicants and the TMSF for partial collection of its losses resulting from the Group loans of the Bank, in a manner to be lasted for years that it is not possible to improve the financial status of the Bank through simple methods, such as the sale of real estate properties and subsidiaries and to indemnify the losses in a short period.

Moreover, after the banks are transferred to the TMSF, the obligation to cover the deposits of the depositors and the debts and losses suffered by the banks is also transferred to the TMSF. The deposits, other debts and losses of the Banks taken over are covered by specially arranged government domestic debt securities issued by the Treasury and transferred to the TMSF as the TMSF does not have sufficient resources. As a result, the TMSF becomes indebted to the Treasury. TMSF subsequently pays it debt to the Treasury by means of selling the assets of the Banks and collecting their amounts receivable. However, the existing official resources indicate that the payments made due to the banks taken over have caused cost which is fairly higher than the incomes obtained as a result of the liquidation of these banks.

In such case, when the interference with the applicants' right to property and the public interest to be ensured in the transfer of the Bank to the TMSF after the applicants had been warned to take the necessary measures and for the public interests of preventing the Bank from causing much more harm to the financial markets and for the protection of the rights of the depositories are compared, it has been concluded that the fair balance required to be paid regard was not impaired.

The Constitutional Court has consequently held that there was no breach of the applicants' right to property guaranteed in Article 35 of the Constitution.

hb. Judgment on the violation of the right to property due to the principles of predictability and comprehensibility that must be ensured at the level required by law as per the principle of legality of taxes were not fulfilled

Narsan Plastik San. Tic. Ltd. Şti. Judgment (App. No: 2013/6842)

> **Making the actions previously performed by the applicant in line with the administration's opinion subject to *ex officio* tax assessment on the basis of the provisions of legal arrangement entering into force at a subsequent date and upon the completion of the taxation period is beyond a practice which could be foreseen by the applicant in advance under the existing circumstances. Therefore, it is revealed that it is not possible to expect from the applicant to foresee that these payments would be subject to taxation.**

In the incident giving rise to the present individual application which was concluded by the First Section of the Constitutional Court on 20/04/2016, the applicant which is a limited liability company dealing in scrap plastics applied to the relevant administration concerning its sales value-added tax ("VAT") of which was paid by the applicant by means of deduction. The applicant informed the administration that it was dealing with manufacturing of granule from scrap plastics and asked whether the granules manufactured from scrap was subject to VAT exemption like plastic scrap. In its letter drawn up by the administration for the applicant, it was stated that all kinds of raw, semi-manufactured and manufactured goods having characteristics of metal, glass, plastics and paper which are in the form of ingots or turned into ingots were exempted from VAT. In line with the above-cited reply given by the administration, the applicant made its sales exempted from VAT in 2004.

Having heard that the other taxpayers were provided with an opinion different than the one submitted to him, the applicant once again asked the administration whether the plastic granule and plastic pieces were within the scope of the exemption or not. In the letter of 30/3/2005 submitted by the administration, it was informed that as the plastic pieces still retained the characteristics of scrap and wastes, they were subject to exemption; however, as the plastic granule was went through the process, it lost the characteristics of scrap and wastes and was not within the scope of the exemption. As from this date, the applicant applied VAT in the sale of granule and continued benefitting from exemption in respect of the other plastic scrap sales in line with the letter submitted by the administration.

The administration referred the issue to the Revenue Administration upon the

applicant's request for receiving opinion. The Revenue Administration specified in its letter dated 23/1/2006 that as per the General Communiqué on VAT with serial no. 97, the plastic scraps and wastes were within the scope of exemption; however, as pet bottle pieces, plastic burrs, plastic granules and similar products obtained after plastic scraps and wastes had been processed did not retain the characteristic of scrap waste and turned into finished goods, such materials were not subject to exemption. Thereupon, the Revenue Administration made the applicant's sales of plastic granule, burrs and similar products, which were made in 2004 and 2005 and exempted from VAT, subject to *ex officio* tax assessment without imposing any penalty in respect thereof.

The applicant thereupon filed a case before the Tax Court against these acts. In both cases concerning VAT of 2004 and 2005, the court accepted the cases on the grounds that "... it is obvious that value added tax could not be collected as the complainant has acted in line with the opinion submitted by the administration; and as it is not possible for the complainant, after this stage, to impose this tax on those who have purchased the products, the collection of this tax from the complainant would obviously cause an unjust decrease in its assets. Accordingly, the impugned value added tax is not found to be in compliance with the legislation".

At the appellate stage, one of these decisions concerning the year of 2004 was primarily quashed by the 9th Chamber of the Supreme Administrative Court. And subsequently at the stage of rectification of the judgment, it was upheld by the judgment dated 9/2/2010 as it was concluded that as no distinction was introduced in Article 17 of the Law no. 3065 concerning the delivery of plastics, delivery of plastics turned into granule upon being processed must be exempted from VAT. Accordingly, the judgment became final in favour of the applicant. The decision concerning the year of 2005 was quashed by the judgment of the 9th Chamber of the Supreme Administrative Court dated 20/1/2009 on the grounds that plastics turned into granule were not scrap for being turned into manufactured goods upon being processed; that it was possible for the administration to always depart from its erroneous opinion and to take a new action; and that the erroneous opinion submitted would not remove the complainant's obligation (on the basis of the same reasoning of the first quashing judgment rendered by the Chamber in the case concerning the assessment of 2004). The applicant did not submit any document indicating that it made a request for rectification of the Supreme Administrative Court's judgment. The decision rendered by the Tax Court in line with the quashing judgment was upheld at the appellate review stage and became final.

The applicant requested re-trial from the court for revocation of the impugned taxes; however, its request was also dismissed.

The applicant maintained that it had addressed a question concerning the VAT exemption status of plastic burrs and plastic scraps and wastes turned into granule, which were sold in 2004 and 2005 and had exempted these products from the VAT in accordance with the opinion received from the administration; that he had been subject to an *ex officio* tax assessment with the allegation that these sales were not exempted from VAT and VAT must be calculated on the basis of these sales. The applicant also alleged that these taxes became subject-matter of tax cases; that the Supreme Administrative Court had rendered different judgments in respect of the cases filed against the tax assessment of 2004 and against the tax assessment of 2005; that many firms had exempted their sales from VAT at the relevant time and such firms had not been subject to *ex officio* tax assessment; and that the relevant Law and the General Communiqué on VAT did not include any provision indicating that plastic burrs and plastic scraps and wastes turned into granule must be subject to VAT in 2004 and 2005. The applicant accordingly maintained that there had been a breach of the principles and rights set out in Articles 10 and 40 of the Constitution.

In brief, the Constitutional Court made the following assessments within the scope of this application:

The applicant applied to the administration and asked whether its sales were subject to VAT exemption or not as the relevant legislation was not sufficiently clear in this respect. The applicant then exempted from tax. When the applicant subsequently learned that the administration had submitted different opinions, it once again applied to the administration and requested a second opinion in this respect. Upon two replies received, the applicant exempted its sales from tax or partially made its sales subject to tax in line with the administration's opinion.

The General Communiqué no. 97, which is the basis for the *ex officio* tax assessment in respect of the applicant's sales of 2005, was promulgated in the Official Gazette dated 31/12/2005 and entered into force. There is no legal arrangement indicating that the applicant's sales are out of the scope of the tax exemption other than the provision of this Communiqué. The legal arrangements forming a basis for the actions of 2005 do not obviously set out that the applicant's sales cannot be benefitted from VAT exemption and on the contrary, list all scraps and wastes, in general terms, within the scope of exemption without making any distinction. The applicant exempted its sales from VAT as indicated in the opinions requested from the administration or made its sales by means of partially imposing VAT.

Making the actions previously performed by the applicant in line with the administration's opinion subject to *ex officio* tax assessment on the basis of the provisions of legal arrangement entering into force at a subsequent date and upon

the completion of the taxation period is beyond a practice which could be foreseen by the applicant in advance under the existing circumstances. Therefore, it is revealed that it is not possible to expect from the applicant to foresee that these payments would be subject to taxation.

For the above-mentioned reasons, it has been concluded that in the present incident, the principles of predictability and comprehensibility that must be ensured at the level required by law as per the principle of legality of taxes enshrined in Article 73 § 3 of the Constitution could not be attained in the tax assessments performed *ex officio* in subsequent years for the taxation period of 2005 on the basis of the General Communiqué no. 97 promulgated in the Official Gazette dated 31/12/2005; and that the uncertainty in the provisions of law could not be eliminated by way of subsidiary arrangements and administrative practices or judicial case-laws. In the respect, it has been observed that there is no predictable legal basis for taxation of the acts performed in 2005.

The Constitutional Court has consequently held that there was a breach of the right to property guaranteed in Article 35 of the Constitution.

hc. Judgment on the violation of the right to property due to not attaining the purpose of public interest in respect of the expropriation

Nusrat KÜLAH Judgment (App. No: 2013/6151)

> **The administration did not attain the purpose specified in the decision of public interest in respect of the immovable property expropriated. Nor did it indeed use this immovable property for another purpose seeking public interest. Moreover, the administration changed the zoning status of the immovable property which it had expropriated for being a "playfield" in the zoning plan as "the trading area" and thereby created surplus value thanks to this amended made in terms of the expropriated immovable property. However, it deprived the applicant of this surplus value and transferred a certain part of the immovable property to the private persons. Accordingly, the administration led to an income-generating transfer of property by means of transferring certain part of the immovable property, which had been duly taken over on the basis of public interest through zoning arrangements and acts of expropriation based on the Constitution and the laws, without concretely attaining the aim of public interest on which such acts were based and the applicant was deprived of his right to property in breach of the guarantees enshrined in Article 35 of the Constitution.**

In the incident giving rise to the present individual application which was concluded by the SecondvSection of the Constitutional Court on 21/4/2016, as the land to which the applicant was a beneficiary was located within the boundaries of the Cultural Park ("*Kültür Park"*), it was expropriated through reconciliation and was subsequently registered in the name of the Gaziantep Metropolitan Municipality with the registrations performed on 17/7/1998 and 27/4/1998. The Metropolitan Municipal Council amended the zoning plan of the region including the immovable property in question on 20/7/1998. The zoning status of the immovable property was sold to the third parties, as a trading area, through tender on 2/11/1998. Thereupon, a workplace was built on the land, and it was then registered in the land registry as "a two-storey, reinforced concrete market".

On 13/9/2011, the applicant filed an action for compensation against the Metropolitan Municipality and requested the collection of the price difference between the value of the immovable property, which was transferred as a result of the expropriation and sold to the third parties upon changing its status in the zoning plan, at the date when the action was brought and the expropriation price paid. On 31/5/2012, the court decided to dismiss the case. The decision which had been appealed was upheld by the Court of Cassation on 27/12/2012, and the request for rectification of the judgment was rejected.

On 25/6/2010, some of the co-owners of the immovable property of which the applicant was one of the co-owners filed an action for compensation against the Gaziantep Metropolitan Municipality and requested the return of the immovable property expropriated or redress of its value for not being used in a manner fit for its own purpose. This action was accepted by the court. The decision was appealed before the Court of Cassation which quashed the decision on 20/3/2012 on the ground that no counter-action may be brought against the acts of expropriation performed upon the reconciliation reached with the owner of the immovable property as per Article 8 of the Expropriation Law.

On 8/1/2013, the first instance court decided to persist on the previous decision. Upon the appeal of the decision of persistence (*"direnme hükmü"*), the General Assembly of Civil Chambers of the Court of Cassation found the decision of persistence, in which the first instance court held that there was no ground for application of Article 8 of the Law no. 2942 in the present incident, appropriate on 27/11/2013 and decided to refer the file to the relevant chamber of the Court of Cassation for examination of the appellate objections pertaining to Articles 22 and 23 of the same Law. On 5/11/2014, the relevant chamber decided to quash the decision.

The proceeding which is still pending upon the quashing judgment has not been concluded yet.

The applicant maintained that his right to property had been breached due to the dismissal of the action for compensation brought as the immovable property expropriated for being turned into a playfield was not used in line with the designated purpose and sold to the third parties after being registered as a trading area upon the amendment made to the zoning plan.

In brief, the Constitutional Court made the following assessments within the scope of this application:

In the incident subject-matter of the application, the purpose specified in the decision of public interest is to build a playfield in a park open to general public, and to that end, the zoning plan was arranged and the act of expropriation was performed. Upon the performance of the act of expropriation, the immovable party one of the co-owners of which was the applicant was not turned into a playfield as required by the aim of public interest. It was instead turned into a trading area within about seven months, which may be deemed to be a short period, as from the date when the act of expropriation was performed, and certain part of this property was sold to the third parties. In other words, the administration did not attain the purpose specified in the decision of public interest in respect of the immovable property expropriated. Nor did it indeed use this immovable property for another purpose seeking public interest. Moreover, the administration changed the zoning status of the immovable property which it had expropriated for being a "playfield" in the zoning plan as "the trading area" and thereby created surplus value thanks to this amended made in terms of the expropriated immovable property. However, it deprived the applicant of this surplus value and transferred a certain part of the immovable property to the private persons.

Accordingly, the administration led to an income-generating transfer of property by means of transferring certain part of the immovable property, which had been duly taken over on the basis of public interest through zoning arrangements and acts of expropriation based on the Constitution and the laws, without concretely attaining the aim of public interest on which such acts were based.

Therefore, the applicant was deprived of his right to property in breach of the guarantees enshrined in Article 35 of the Constitution as there was an interference with the right to property without a public interest on which the act of expropriation was based. It has been therefore concluded that as to the interference performed through expropriation, the interference with the applicant's right to property did not achieve a legitimate aim as the aim of public interest was not attained in a concrete manner.

The Constitutional Court has consequently held that there was a breach of the right to property which is guaranteed in Article 35 of the Constitution.

hd. Judgment on the violation of the right of property due to the deprivation of the opportunity to collect receivables of a third party in good faith

Cemtur Seyahat ve Turizm Ltd. Şti. in Liquidation Judgment (App. No: 2013/865)

> **In this process, the rights of the applicant considered to be a third party in good faith were not taken into consideration, and the applicant was deprived of the opportunity to collect its receivables. The damages incurred due to the Bank, which was under the control and custody of the State and which went bankrupt, were indirectly and partially charged to the applicant. The legal uncertainty caused to occur to the detriment of the applicant with regard to collection of its receivables**

In the incident giving rise to the present individual application which was concluded by the General Plenary of the Constitutional Court on 1/06/2016, on 8/1/2003, the applicant initiated debt enforcement proceedings without judgment before the İstanbul 7th Enforcement Office at the 6th Chamber of the Commercial Court of First Instance for the collection of his receivables which it could not collect from the debtor Ulusal Basın Gazetecilik Matbaacılık ve Yayıncılık AŞ ("the Company") for which the applicant provided personnel transportation services within the scope of a service contract. Upon the objection raised by the Company to the debt in question on 13/1/2003, the applicant filed an action for annulment of objection on 24/2/2003. While the action was pending, the Saving Deposits Insurance Fund ("the TMSF") seized the Turkiye Imar Bank on 3/7/2003. The 2nd Chamber of the Şişli Magistrate's Court ordered freezing of the rights and claims, other than the necessary expenses, of 179 companies including the debtor Company on 26/8/2003. The applicant acknowledged the receivable at the determined amount of 287,790 New Turkish Liras during the hearing dated 9/3/2004, and the Court decided to annul the defendant's objection and to collect the compensation for denial of enforcement (*"icra inkar tazminatı"*).

By its interlocutory decision dated 11/5/2004, the 8th Chamber of the İstanbul Assize Court extended the scope of the decision on interim measure rendered by the 2nd Chamber of the Şişli Magistrate's Court and gave a decision on the list of payments that they could make for enabling the companies of Uzan Group including the debtor company to continue their activities. In this decision, the personnel transportation fees were deemed to be among the payable fees.

The applicant proceeded with debt enforcement proceedings upon the decision becoming final, and movable and immovable properties of the Debtor Company were attached by virtue of the requests dated 12/5/2004 and 26/5/2004. Moreover, an order of attachment was registered by the Turkish Patent Institute on four brand marks registered in the name of the Debtor Company (star, starlife, star tek and ulusal medya) on 17/5/2004 and 15/6/2004 and by the İstanbul Governorship on 118 publications notably the Star Newspaper on 18/6/2004 and 21/6/2004. On 18/5/2004 the TMSF levied an attachment of 7,739 million New Turkish Liras in respect of the Debtor Company relying on the Law no. 6183.

The applicant also filed bankruptcy proceedings ("*iflas yoluyla takip*") against the Debtor Company on 10/6/2004, and the representative of the Debtor Company managed by the TMSF requested stay of the applicant's enforcement proceedings on 3/8/2004.

Upon the objection raised, the TMSF's representative submitted a petition of 15/2/2005 and became an intervening party to the bankruptcy case opened before the 7th Chamber of the İstanbul Commercial Court of First Instance. By the resolution of the TMSF's Fund Board dated 23/6/2005 and no. 249, it was resolved that properties, claims and assets of five companies belonging to the Star Media Group including the Debtor Company be sold by forming a financial and commercial integrity, and it was announced that this sale would be made on 15/9/2005.

By its decision dated 20/12/2005, the 7th Chamber of the İstanbul Commercial Court of First Instance dismissed the case requesting bankruptcy of the Debtor Company on the grounds that the third parties cannot request the attached properties of the companies which were seized by the TMSF and which would constitute financial integrity within two years, be taken under protection or be sold; and that bankruptcy of such companies cannot be ordered. The Court of Cassation upheld this decision.

In the period between September 2005 and March 2006, the assets of the "Uzan Group" companies which constitute a commercial and financial integrity, were sold by the TMSF through tenders made in pursuance of the abolished Law no. 4389. In this scope, the Star Newspaper's Commercial and Financial Integrity consisting of properties, claims and assets of 5 companies including the Debtor Company was sold in exchange for USD 8,000.000 through a tender made on 25/1/2006, and accordingly a total amount of USD 8,779.463.17 was collected together with interest. After deduction of taxes and social insurance receivables from the amount collected, the remaining amount was transferred to the TMSF.

The Fund Board subsequently decided to liquidate the Debtor Company having

no asset constituting a value upon the sales made on 16/11/2006. In the Debtor Company's balance sheet forming a basis for the liquidation, the applicant's receivables was recorded in the 4th place as TRY 59,517.06 while the TMSF's receivables was indicated as TRY 21 billion in the list showing the sequence of payments, which was published in the Trade Registry Gazette dated 9/5/2012.

When the applicant, which could not collect its receivables from the Debtor Company, could not receive any reply from the TMSF administration to its written warning of 20/7/2006 in which it requested payment of its receivables, it filed an action for annulment and for compensation of the receivables plus its legal interest before the 8th Chamber of the İstanbul Administrative Court against the implied dismissal decision on 17/11/2006. By its decision dated 20/2/2008, the Administrative Court dismissed the action on the ground that *"there is no legal obligation indicating that the debts of the Debtor Company are to be paid by the Fund"*. The Supreme Administrative Court subsequently dismissed the applicant's appellate request and the request for rectification of the judgment.

The applicant maintained that although it had levied attachment on the Debtor Company's properties and assets which were sold and it had taken necessary steps for enabling the payment of its receivables, it had not received any payment as a result of the public interferences; that the TMSF administration had exercised its power in an arbitrary manner which would infringe the right to property of the third parties; and that the damage incurred had been charged to the third parties instead of those causing the Bank to go bankrupt and although other certain creditors had been provided with payments, it had not received any payment. The applicant also alleged that as the Debtor Company had been liquidated, it would have no opportunity to collect its receivables and that there had been a breach of the right to property.

In brief, the Constitutional Court made the following assessments within the scope of this application:

Both the Ministry and the Department of Legal Affairs of the TMSF stated that the applicant's failure to collect its receivables does not stem from the public administration's fault. It was resulted from the fact that the Debtor Company had no more assets. The applicant's receivables which were rendered recoverable by the applicant were blocked due to the TMSF's interferences. The applicant was not involved in the liquidation process of the Debtor Company which had no ability to make payment to the applicant, and all transactions were performed by the TMSF. Under all of such circumstances, it is impossible to acknowledge that the addressee of the applicant is only the company all assets of which have been liquidated, which has run into debt and has been under control of the TMSF; that the TMSF had no

responsibility; and that the applicant's failure to obtain its receivables occurred at the end of an ordinary process of enforcement and bankruptcy proceedings.

As the applicant's right to property was interfered with as a result of the actions performed by relying on the regulations which grant priority, superiority and privilege to the TMSF's bank-related receivables, these interferences were assessed under the State's authority to control the use of property or to regulate property.

The applicant's relation with the Debtor Company is a commercial relationship based on a service contract for rendering personnel transportation service and is not related to banking activities, the use of bank resources or causing damage to the bank. In such case, the applicant's status *vis-a-vis* the damages of a seized bank which were undertaken by public may be considered as a third party in good faith.

The applicant was prevented from collecting its receivables which were due from the Debtor Company and which were rendered recoverable through the attachments levied by the applicant due to the public interferences upon the seizure of the Debtor by the TMSF. It is impossible for the applicant to foresee the interferences to be made by virtue of the Laws issued after the date when it concluded the contract with the Debtor Company and it provided service. What is foreseeable for the applicant having levied an attachment for its receivables is, at the worst, equal distribution of sales revenues as per the Laws no. 2004 and 6183 in case of an attachment proceedings based on public receivables.

All assets of the Debtor Company were sold by the TMSF without following the processes envisaged in the Laws no. 2004 and 6183 but on the basis of the Laws no. 4389 and 5411. The applicant was not included in this process in which TMSF had the powers of a creditor and of an enforcement and bankruptcy office and determined all conditions. All of the revenues obtained at the end of the sale were allocated for the other public receivables and TMSF's receivables derived from the seized bank in spite of the power given by the Law no. 5411 and ordering the payment of good- and service-related receivables pertaining to previous periods.

In this process, the rights of the applicant considered to be a third party in good faith were not taken into consideration, and the applicant was deprived of the opportunity to collect its receivables. The damages incurred due to the Bank, which was under

Given the above-cited reasons and the legal uncertainty caused to occur to the detriment of the applicant, it has been concluded that the fair balance between the applicant's right to property and the public interest was impaired to the detriment of the applicant.

the control and custody of the State and which went bankrupt, were indirectly and partially charged to the applicant.

Given the above-cited reasons and the legal uncertainty caused to occur to the detriment of the applicant, it has been concluded that the fair balance between the applicant's right to property and the public interest was impaired to the detriment of the applicant.

The Constitutional Court has consequently held that there was a breach of the right to property guaranteed under Article 35 of the Constitution.

he. Judgment finding no violation of the right to property due to the expropriation of the vehicle on the grounds of being used at illegal hunting

Fatma ÇAVUŞOĞLU and Bilal ÇAVUŞOĞLU Judgment
(App. No: 2014/5167)

> **It is not possible to make a real comparison between a vehicle monetary equivalent of which is known and a public interest to which a monetary value cannot be attributed. In this case, given the casual link among the legal subject-matter and significance of the misdemeanour, the interest protected, the applicants' behaviours and the act of misdemeanour in respect of the incident where the applicants' vehicle was confiscated for being used in an illegal hunting "by a land vehicle casting light at night", it has been concluded that the interference with the applicants' right to property did not impair the fair balance required to be struck between the legitimate aim depending on the public interest pertaining to the protection of hunting and wild life and the applicants' interests and was proportionate.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 28/09/2016, on 14/9/2013, it was reported that there had been illegal hunting at the Muslukbaşı region of the Yuva Plateau located in the Yuva Town of the Elmalı District of Antalya. The gendarmerie officers arriving in the incident scene established in the report of the same date that the applicant, Bilal Çavuşoğlu, and Ş.S. were hunting with the method of headlight hunting at night by a 2005 Mazda double cab (pick up type) truck; that these persons did not have any hunting certificate; that they were hunting out of the period during which hunting was allowed; and that during the control conducted in the truck, there were an automatic hunting rifle without a support block which belonged to

the applicant, Bilal Çavuşoğlu, and a wild rabbit which had been recently shot. The law enforcement officers seized the rifle and the wild rabbit.

In the examination report of 16/9/2013 which was drawn up by the veterinarian, it was specified that the animal found at the incident scene was a male wild rabbit which was two years old; and that this animal had been shot with a hunting rifle according to the bullet marks on its body. The Forest Administration decided to sentence the applicant to an administrative fine of 1.162 Turkish Liras on account of various violations concerning the hunting ban. By another decision of the same date, the Forest Administration decided that the vehicle and the rifle constituting the subject-matter of the misdemeanours at stake be confiscated.

The applicants applied to the Elmalı Magistrate's Court and requested the annulment of the decisions on an administrative sanction and rendered by the Forest Administration. Having made an examination as to the merits of the applications, the Elmalı Magistrate's Court dismissed the applications with its decision of 10/1/2014. The applicants objected to this decision. However, by the decision of the Elmalı Criminal Court of General Jurisdiction dated 14/2/2014, it was decided that the objections be finally dismissed on the ground that the decision rendered by the court was in compliance with the procedure and the law.

Having maintained that the applications lodged against the administrative fine imposed by the Forest Administration on account of illegal hunting and against the decisions on confiscation had been dismissed by the Magistrate's Court; that the decision on dismissal of these applications had not been appealable; and that the remedy of objection provided before the Criminal Court of General Jurisdiction of the same place had been ineffective, the applicants alleged that there had been a breach of the right to legal remedies; that as the truck registered in the name of one of the applicants, Fatma Çavuşoğlu, had been disproportionately confiscated on account of the misdemeanour although the truck had been established not to have any relation with the misdemeanour, there had been a breach of their right to property and of the principle of legality in the offence and penalty. The applicants also requested re-trial.

In brief, the Constitutional Court made the following assessments within the scope of this application:

The Constitution and the European Convention on Human Rights vest the State with the authorities to control the use of property and the right to utilize the property and to make arrangements in respect thereof. It is in principle sought that the requirements of the principles of legality, legitimate aim and proportionality must be fulfilled in the use of the authority to make arrangements or to control which provides wider discretionary power than the authority to deprive of property.

Within the framework of the hunting procedures and principles established by the Law, it is aimed to protect and develop the hunting and the wild life. It is undoubted that taking of measures for prevention of the acts and actions leading to damage of or the elimination of the hunting and the wild life resources and imposition of sanctions on those who do not act in accordance with the measures taken and the bans are for the public interest. It has been therefore concluded that the confiscation of the impugned truck for being used in the misdemeanour of "headlight hunting at night by a vehicle casting light" in spite of being banned pursued a legitimate aim.

It is required that the interference with the right to property must not impair the fair balance required to be struck between the individual's interests and general interest of the public. In assessing the proportionality of the interference, the court will take into consideration on one hand the significance of the legitimate aim requested to be attained and on the other hand the nature of the interference and the behaviours of the applicant and the public authorities and pay regard to the burden imposed on the applicant.

It must be primarily assessed whether or not the applicants were provided with the opportunity to effectively submit their objections that the confiscation was unlawful or arbitrary or unreasonable and present their defence submissions before the responsible authorities.

The applicants explicitly put forth their allegations and objections that the decision on confiscation had been executed in an arbitrary and unfair manner before the judicial authorities. Their allegations and objections were primarily examined by the Magistrate's Court and then by the Criminal Court of General Jurisdiction upon the objection, and the administrative sanction in the form of confiscation was reviewed by the judicial authorities within the framework of these allegations and objections. It has been accordingly observed that the applications were provided with the opportunity to put forth their objections and defence submissions before the responsible authorities in an effective manner.

On the other hand, it must be established that, in respect of a sanction leading to a severe conclusion such as deprivation of property, there is a casual link between the applicants' behaviours and the misdemeanour or the criminal act giving rise to the sanction of being deprived of property. The applicant, Fatma Çavuşoğlu, complained of the fact that the truck, which had belonged to her and had not been used in any act by her, was confiscated for being used in a misdemeanour by her husband who was the other applicant. It is found established by a court decision that the vehicle was used in a misdemeanour. However, there is no information or document included in the file and indicating that the applicant, Fatma Çavuşoğlu, had been aware of the

fact that this vehicle would be used in illegal hunting. However, the Magistrate's Court based its assessment on the justification that as Fatma Çavuşoğlu was the wife of Bilal Çavuşoğlu who had performed the misdemeanour, it was not possible, "according to the ordinary course of life", for her not to know for which aim this vehicle would be used, taking into consideration the time when the incident had taken place.

It is required that the interference with the right to property performed by means of seizure or confiscation is proportionate and does not impair the fair balance required to be struck between the individual's interests and the public interest. In this scope, it is not sufficient to make a mechanic comparison of value between the material decided to be seized or confiscated and the material subject-matter of the offence in making an examination as to the proportionality. The legal subject-matter and material subject-matter of the offence or the misdemeanour, its impact on the society, the benefit provided for the offender and the impact of the improper conduct of the property owner must also be assessed together. All of these matters must be dealt with in respect of each concrete incident and by paying regard to the particular circumstances of the incident.

The interest prescribed within the scope of the hunting bans and protected with the misdemeanour leading to the confiscation of the applicants' vehicle is essentially of an economic nature. In other words, it is not possible to make a real comparison between a vehicle monetary equivalent of which is known and a public interest to which a monetary value cannot be attributed. In this case, given the casual link among the legal subject-matter and significance of the misdemeanour, the interest protected, the applicants' behaviours and the act of misdemeanour in respect of the incident where the applicants' vehicle was confiscated for being used in an illegal hunting "by a land vehicle casting light at night", it has been concluded that the interference with the applicants' right to property did not impair the fair balance required to be struck between the legitimate aim depending on the public interest pertaining to the protection of hunting and wild life and the applicants' interests and was proportionate.

The Constitutional Court has consequently held that there was no breach of the right to property guaranteed in Article 35 of the Constitution.

k. JUDGMENTS ON RIGHT TO A FAIR TRIAL

ka. Decision on the inadmissibility of the dispute concerning the change of the chamber where the applicant, who is a member of the Court of Cassation is taking office, for not fall into the scope of the right to a fair trial

Ahmet KÜTÜK Judgment (App. No: 2015/19099)

> **In order for lodging an individual application for an alleged violation of the right to legal remedies under Article 36 of the Constitution and Article 6 of the European Convention on Human Rights, it must be required that the applicant is a party to a dispute concerning his civil rights and obligations or a decision has been rendered with respect to a criminal charge against the applicant.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 23/3/2016, the applicant was appointed as a member of the Court of Cassation in 2011 and assigned to the 4th Civil Chamber of the Court of Cassation by the decision of the First Presidency Board of the Court of Cassation. On 2/12/2014, the number of the Criminal Chambers of the Court of Cassation was increased from fifteen to twenty three upon the amendment made to the Law on the Court of Cassation, and upon the legal arrangements subsequently made, eight presidencies and one hundred and twenty one membership positions were created. In Provisional Article 14 added to the Law no. 2797 with Article 27 of the Law no. 6572, it is governed that members would be appointed for the memberships recently created; that selections would be made for the presidencies created; that the Board of the First Presidency would be re-determined; and that it would be re-determined, by the First Presidency Board, in which chambers the presidents, members and investigating judges of the Court of Cassation would take office by taking into consideration the workload and needs of the chambers.

The First Presidency Board of the Court of Cassation, which was re-formed, assigned the applicant to the 1st Civil Chamber of the Court of Cassation. On 10/2/2015, the applicant lodged an application with the First Presidency Board of the Court of Cassation for "re-examination" and with the Board of Presidents of the Court of Cassation for the annulment of the decision. The First Presidency Board of the Court of Cassation decided to dismiss the objection on the grounds that the assignment

was made on the basis of a statutory obligation and that an objection cannot be made to the decision. The applicant objected to the decision of the First Presidency Board of the Court of Cassation on the grounds that the objection must be examined by the Board of Presidents of the Court of Cassation; that the assignment was contrary to the practices of the Court of Cassation; and that there was not any other member taking office in the 4th Civil Chamber of the Court of Cassation for a period longer than him. The Board of Presidents of the Court of Cassation dismissed the applicant's objection with its decision dated 9/7/2015.

The applicant maintained that both decisions rendered by the First Presidency Board and the Board of Presidents of the Court of Cassation were lack of reasoning; that a public hearing had not been held; that he heard that the Board of Presidents of the Court of Cassation was not formed in the manner prescribed in the Law; that the First Presidency Board of the Court of Cassation had not been independent and impartial; that as his objection had been examined five months later, he had been denied the right of access to court; that the decision had been arbitrary; and that there had been explicit and obvious discretionary errors in the decisions.

The applicant also maintained that the impugned dispute must be assessed within the scope of the "disputes concerning the civil rights and obligations" as he had the right to object to the decision of the First Presidency Board of the Court of Cassation and the objection was a judicial remedy. He accordingly alleged that there had been a breach of the right to a fair trial.

Moreover, the applicant alleged that he had been reflected to be "a member of the parallel structure" on certain websites, media organs and social media; that the Chamber in which he had been taking office was subsequently changed; that his change of place of duty without a compulsory necessity had been perceived as an insulting event in the Court of Cassation, and therefore, his honor and reputation had been adversely affected; and that this situation had constituted a breach of his right to private life and to family life. The applicant also complained that he had been subject to discrimination due to opinions and convictions ascribed to him. He finally alleged that the chamber in which he would be assigned should have been determined by the First Presidency Board of the relevant time; and that the impugned decisions were contrary to the security of tenure of judges and the principle of legal security.

In brief, the Constitutional Court made the following assessments within the scope of this application:

The dispute concerning the right subject-matter of the application is not within the scope of the "disputes pertaining to civil rights and obligations" on the grounds that the members of the Court of Cassation are not appointed for taking office in a certain chamber; that there is no legal provision or an established jurisprudence enabling the applicant to take office in the chamber where he was previously serving; that even if the chamber where the members take office is not changed, the field of activity of a chamber of the Court of Cassation may be changed with a new division of tasks; that the change in the Chamber of the Court of Cassation is not related to the ordinary labor disputes such as salary, allowance or similar rights; that the decision does not have an adverse impact on the status of the membership of the Court of Cassation or on the work performed; and that the act in which the chamber of the relevant member was changed is not rendered subject to legal remedies on the basis of objective grounds.

Alleged Violation of the Right to a Fair Trial

In order for lodging an individual application for an alleged violation of the right to legal remedies under Article 36 of the Constitution and Article 6 of the European Convention on Human Rights, it must be required that the applicant is a party to a dispute concerning his civil rights and obligations or a decision has been rendered with respect to a criminal charge against the applicant.

As the applicant has not mentioned of any criminal and/or disciplinary investigation conducted against him or any penalty imposed on him, there is no "criminal charge" at stake in the present incident. In such case, the guarantees and principles pertaining to the right to a fair trial may be applied to the present application only when the impugned dispute falls within the scope of the "disputes concerning civil rights and obligations".

The dispute concerning the right subject-matter of the application is not within the scope of the "disputes pertaining to civil rights and obligations" on the grounds that the members of the Court of Cassation are not appointed for taking office in a certain chamber; that there is no legal provision or an established jurisprudence enabling the applicant to take office in the chamber where he was previously serving; that even if the chamber where the members take office is not changed, the field of activity of a chamber of the Court of Cassation may be changed with a new division

of tasks; that the change in the Chamber of the Court of Cassation is not related to the ordinary labour disputes such as salary, allowance or similar rights; that the decision does not have an adverse impact on the status of the membership of the Court of Cassation or on the work performed; and that the act in which the chamber of the relevant member was changed is not rendered subject to legal remedies on the basis of objective grounds.

The Constitutional Court has consequently held that this part of the application be declared inadmissible for lack of jurisdiction*ratione personae*.

Alleged violation of the right to private life

In the present incident that new chambers were established at the Court of Cassation by virtue of the Law no. 6572, and the members to take office in the Chambers of the Court of Cassation were re-appointed due to statutory necessity by having regard to the workload and needs of the chambers and recently-appointed members of the Court of Cassation. Certain Chambers of the Court of Cassation where certain members, including the applicant, in respect of whom any news reports were not published on the web, media and social media were changed; Although the applicant maintained that his chamber had been changed on account of the news and posts published in respect of him and that this changehad been an insulting situation, he failed to adduce any concrete fact or finding together with supporting evidence. Nor did the applicant mention of such allegations in his objection to the Board of Presidents of the Court of Cassation.

The Constitutional Court has consequently held that this part of the application be declared inadmissible for *being manifestly ill-founded*.

Alleged violation of the prohibition of discrimination

It is not possible to assess the allegations that the principle of equality set out in Article 10 of the Constitution and the prohibition of discrimination set out in Article 14 of the European Convention on Human Rights in an abstractmanner. They must be certainly dealt with in conjunction with the other fundamental rights and freedoms falling within the scope of the Constitution and the Convention. The applicant is to set forth with reasonable evidence that the alleged discriminatory practices in respect of persons who are in a similar position with him is based on a discriminatory ground such as race, colour, gender, religion, language and etc. without a legitimate foundation. In the present incident, the applicant could not prove with concrete evidence that he had been subject to discrimination. Nor could he demonstrate the

ground for discrimination with concrete evidence. Moreover, the applicant did not maintain such allegations in the objection made to the Board of Presidents of the Court of Cassation.

The Constitutional Court has consequently held that this part of the application be declared inadmissible for being manifestly ill-founded.

kb. Judgment finding no violation of the right to a fair trial for making no deduction, on the basis of unjust provocation, in the sentence imposed on the offender killing his wife

Hüseyin Güneş ÖZMEN Judgment (App. No. 2014/1514)

> **It does not fall within the scope of the Constitutional Court's duty to review whether the methods of producing and assessing evidence throughout a trial are appropriate. The Constitutional Court's duty is to assess whether the impugned trial is fair or not as a whole. For conducting an equitable trial in general terms, it is requisite in the light of the principles of equality of arms and adversarial proceedings that the parties be provided with appropriate facilities for asserting their allegations. The parties must also be enabled to produce and examine their evidence including the witness' testimony. In this respect, the allegations of inequality or unfairness of the evidence must also be assessed in the light of the whole proceedings.**

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 22/9/2016, the İstanbul Chief Public Prosecutor's Office issued a bill of indictment against the applicant for the offence of premeditated murder with the allegation that on 7/3/2008, he had murdered his wife living apart from him. In this respect, the 4th Chamber of the İstanbul Assize Court ("the court") heard several witnesses including the deceased's parents with a view to clarifying the problems between the applicant and the deceased as well as her family and the time when the murder had taken place.

The applicant maintained that although the deceased had been officially married with him, she had been in a forbidden relation with another man; that when he had talked with the deceased on this matter on the incident day, the deceased had said it had been her own private life, she would make life miserable for him and would not also allow him to see their joint child. He accordingly asserted that he had murdered her in anger occurring all of a sudden.

By its decision of 23/5/2012, the court sentenced the applicant to life imprisonment for premeditated murder. The court based its decision on the reports included in the case-file and the witnesses' statements concerning the manner in which the incident took place and the problems taking place between the applicant and the deceased. It is specified in this decision that there were disputes between the applicant and the deceased as well as her family including the joint child's care, which had been brought before the judicial authorities; that actions were taken in respect of the applicant; and that the applicant waited at the faculty of medicine where the deceased studied on the day of incident and murdered her following her leaving the class by means of shooting her with bullets included in two separate chargers.

Any deduction was not made in respect of the applicant on the basis of unjust provocation. In its reasoning thereof, the court noted that the applicant aimed at changing the amount of sentence to be imposed on him by maintaining in his defence that the deceased had been in a relation with another man; that there was no convincing and plausible evidence available in respect thereof; and that any of the witnesses who had been heard did not mention of such a relationship. It was also indicated that the words alleged to be uttered by the deceased were not substantiated by any means other than the applicant's abstract claims; and that given the applicant's personality and his impressions given during the hearings, the deceased's uttering such words towards the applicant did not seem convincing.

The 1st Penal Chamber of the Court of Cassation upheld the first instance decision by its judgment of 13/11/2013 following its appellate review made with a hearing in which the applicant's defence counsel was also present.

The applicant asserted that he had committed the murder under provocation; and that he had made certain requests from the court such as examination of witness, review of phone conversation records and carrying out an autopsy; however, his request had been rejected. He accordingly alleged that there had been a breach of his right to trial through legitimate means and procedures within the scope of the right to a fair trial.

In brief, the Constitutional Court made the following assessments within the scope of this application:

For a fair trial, the trial authorities are to duly examine the allegations maintained by and the evidence submitted by the parties of the trial. In this respect, it is, in principle, of the inferior courts' authority to assess the available evidence with respect to a

One of the allegations examined in respect of the applicant for the practice of unjust provocation is the words alleged to be uttered by the deceased at the time of incident. The applicant did not make a request for research of the words alleged by him to be uttered by his wife. The court assessed that it was an abstract claim and was not plausible given the particular circumstances of the present incident. The other allegation that the deceased had been in a relation with another man in the course of the divorce process was not taken as a basis for unjust provocation as the applicant had failed to submit evidence in respect thereof and the witnesses heard had not mentioned of such an issue. Consequently, it has been observed that the applicant's requests were rejected on reasonable grounds.

specific case and to decide whether the evidence produced pertains to this case or not.

It does not fall within the scope of the Constitutional Court's duty to review whether the methods of producing and assessing evidence throughout a trial are appropriate. The Constitutional Court's duty is to assess whether the impugned trial is fair or not as a whole. For conducting a fair trial in general terms, it is requisite in the light of the principles of equality of arms and adversarial proceedings that the parties be provided with appropriate facilities for asserting their allegations. The parties must also be enabled to produce and examine their evidence including the witness' testimony. In this respect, the allegations of inequality or unfairness of the evidence must also be assessed in the light of the whole proceedings.

One of the allegations examined in respect of the applicant within the scope of the practice of unjust provocation is the words alleged to be uttered by the deceased at the time of incident. The applicant did not make a request for research of the words alleged by him to be uttered by his wife. The court assessed that it was an abstract claim and was not plausible given the particular circumstances of the present incident. The other allegation that the deceased had been in a relation with another man in the course of the divorce process was not taken as a basis for unjust provocation as the applicant had failed to submit evidence in respect thereof and the witnesses heard had not mentioned of such an issue. Consequently, it has been observed that the applicant's requests were rejected on reasonable grounds.

The Constitutional Court has consequently held that there was no breach of the applicant's right to a fair trial guaranteed in Article 36 of the Constitution.

kc. Judgment on the violation of the principle of natural judge for non-functioning of the mechanisms for the elimination of legal uncertainty concerning the question as to which judicial branch is competent

Mehmet ÇELİK Judgment (App. No: 2015/889)

> **The duties of the military criminal courts are set out in Article 145 of the Constitution and Article 9 of the Law no. 353. Accordingly, the trial of the persons as a military officer falls into the jurisdiction of the military courts. When the accused person is no longer a military officer and if the imputed offence is not a military one or is related to a military offence, it is required that the trial be heard before the judicial courts, which are the natural place of jurisdiction, as the military courts would not have jurisdiction over the case.**

In the incident giving rise to the present individual application which was concluded byby the First Section of the Constitutional Court on 17/11/2016, the applicant is a military prosecutor who was retired from the Turkish Armed Forces ("the TAF") on 15/8/2014. He was subsequently dismissed from the TAF in the status of an enlisted man.

He was reported to the Yunak Chief Public Prosecutor's Office with the allegation that he had committed the offence of threat on 27/10/2007. Within the scope of the investigation conducted, the information on the applicant's duty and title was requested from the Air Forces. After being informed that he was a military prosecutor, the Prosecutor's Office requested to be provided with the applicant's photos suitable for making identification. As the relevant officers submitted a photo belonging to another person, a criminal complaint was filed against them. Thereupon, a criminal case was opened by the indictment of the Military Prosecutor's Office of the Turkish General Staff dated 4/6/2010 with the allegation that a photo of a military judge, Ö.T., who was serving as a deputy military prosecutor at the same place, was submitted instead of that of the applicant and that thereby, the accused A.Z.Ü. had committed the offence of forgery of an official document and the applicant had committed the

offence of involving in the forgery of official document by means of instigating and aiding. By its decision of 10/6/2010, the Military Court of the Turkish General Staff decided to accept the criminal case.

By the decision of the Military Court of the Turkish General Staff dated 6/6/2012, the proceedings in respect of the accused persons, the colonel A.Z.Ü., who was a judge at the Air Forces, and the applicant, be hereafter continued to be handled before the Military Court of Cassation pursuant to Article 25 and the Provisional Article 10 of the Law no. 357, and the case-file accordingly be submitted to the Presidency of the Military Court of Cassation.

By its decision of 18/1/2013, the 4th Chamber of the Military Court of Cassation dealing with the proceedings decided to acquit both accused persons by concluding that the offences with which the accused persons had been charged were not constituted in terms of their elements and that the acts specified in the bill of indictment were not related to any other offence.

The military prosecutor appealed the acquittal decision against the accused persons, maintaining that a decision on conviction must be rendered in respect of the colonel A.Z.Ü, who was a judge at the Air Forces, for the offence of protecting the offender and in respect of the applicant for the offence of instigation to protect the offender.

By the judgment of the Board of Chambers of the Military Court of Cassation dated 31/5/2013, it was decided that as the accused persons, who had acted in union for commission of the offence and had jointly performed the act, had jointly committed the offence of forgery of official documents, the acquittal decisions rendered in respect of them be quashed for having been proven to be performed.

The 4th Chamber of the Military Court of Cassation complied with the quashing judgment and continued the proceedings. At the hearing of 7/2/2014, the accused person, A.Z.Ü., requested that a decision of lack of jurisdiction be taken and that the case-file be submitted to the Presidency of the Court of Cassation. By the interlocutory judgment rendered by the Chamber at the same hearing, it was decided that the Chamber had jurisdiction over the case in question.

Upon the judgment in which his request for rendering a decision of lack of jurisdiction was dismissed, the accused person, A.Z.Ü, at the hearing of 10/2/2014, also requestedthe case-file to be submitted to the Chief Public Prosecutor's Office of the Court of Cassation for a dispute concerning the jurisdiction over the case-file. The same Chamber submitted the petition for the request and all other relevant

documents to the Chief Public Prosecutor's Office of the Court of Cassation authorized to create such a dispute. By its judgment of 18/2/2014, the Chief Public Prosecutor's Office of the Court of Cassation decided that there was no ground to create a dispute concerning the jurisdiction over the case-file on the ground that although there had been the opportunity and requirement that the request for creating such a dispute be made before the evidence is adduced, the accused person had failed to avail himself of this opportunity.

By the judgment of the 4th Chamber of the Military Court of Cassation, it was decided that the retired accused persons be individually sentenced to 2 years and 6 months' imprisonment, acknowledging that they had been committed the offence of forgery of official document which a public officer was authorized to draw up.

Maintaining that the accused person, A.Z.Ü., and the applicant be convicted respectively for the offences of protecting the offender and instigating to protect the offender, the military prosecutor appealed the decisions on conviction. The applicant also appealed the judgment by stating that the military justice did not have jurisdiction over the case and that the elements of the offence did not appear.

Upon the appeal, the judgment of the 4th Chamber of the Military Court of Cassation dated 24/3/2014 was upheld by the judgment of the Board of Chambers of the Military Court of Cassation dated 27/11/2014.

Maintaining that he left the TAF by means of being retired on 15/8/2014; that as the co-accused A.Z.Ü. had been previously dismissed from the TAF, there remained no accused person, who was a military officer, in the case-file; that pursuant to Article 145 § 2 of the Constitution amended by Article 15 of the Law no. 5982 and paragraph 2 added to Article 3 of the Code no. 5271, it was not possible for him to be tried before military courts, and in fact, the imputed offence of forgery of official documents did not constitute a military offence; and that as per the decision of the Court of Jurisdictional Disputes dated 14/1/2013, the judicial courts had jurisdiction over the case, the applicant alleged that there had been a breach of the right to a fair trial and requested the final judgment to be revoked.

In brief, the Constitutional Court made the following assessments within the scope of this application:

The duties of the military criminal courts are set out in Article 145 of the Constitution and Article 9 of the Law no. 353. Accordingly, the trial of the persons as a military officer falls into the jurisdiction of the military courts. When the accused person is no

longer a military officer and if the imputed offence is not a military one or is related to a military offence, it is required that the trial be heard before the judicial courts, which are the natural place of jurisdiction, as the military courts would not have jurisdiction over the case.

The Court of Jurisdictional Disputes established that the offence of forgery of official documents was not a "*military offence*". There is no doubt that the Board of Directors of the Military Court of Cassation was of the same opinion that the offence of forgery of official documents was not a military offence. As the phrase of "*the military scene*" was excluded from the law text pursuant to the amendment made to Article 145 of the Constitution, the fact that the offence was committed in a military scene has not an impact on the determination of the place of jurisdiction

Having noted that upon the amendments made to Article 145 of the Constitution and Article 3 of the Code no. 5271, the jurisdiction of the military justice had been restricted, which was clearly set out in the legislative intention of the amendment to Article 145 of the Constitution, the General Assembly of the Criminal Chambers of the Court of Cassation held that the trial of the applicant for his act of "*misstatement*" with which he had been charged under another case-file be held before ordinary courts.

The Constitutional Court made assessments, in its judgments concerning the constitutionality review, in line with the legislative intention of the amendment made to Article 145 of the Constitution.

In the judgment of the Board of Chambers of the Military Court of Cassation dated 27/11/2014 and indicating that even if the military judges and prosecutors have been dismissed from the TAF, their trials would continue to be held by the Military Court of Cassation, it is specified that even if the military judges and prosecutors resign or retire from their offices, the jurisdiction of the military courts would prevail as there was no provision concerning the aftermath of investigation/prosecution in the Law no. 357. In this judgment, the amendment to Article 145 of the Constitution and the legislative intent thereof were not taken into consideration, and Article 91 of the Law no. 2802 was applied by way of comparison. In other words, the limitations of the jurisdiction of the military justice was determined not on a legal basis but by way of interpretation. It is obvious that the interpretation in question is not in compatible with the previous judgments rendered by the Constitutional Court, the Court of Jurisdictional Disputes, the Military Court of Cassation and the Court of Cassation concerning the jurisdiction of the military justice by relying on the legislative intent

The Military Court of Cassation did not take action to bring the matter before the Court of Jurisdictional Disputes although the jurisprudences of the other high courts had been presented to its attention vis-à-vis the legal uncertainty as to before which courts the military judges and prosecutors would be tried. In other words, due diligence was not shown for the functioning of the mechanisms which would eliminate the legal uncertainty occurring as to which branch of judiciary would have jurisprudence in respect of the military judges and prosecutors resigning or dismissed from their office after the date of offence.

of the amendment made to Article 145 of the Constitution. Thereby, a difference has occurred among the jurisprudences of the high courts as to whether the titles of the military judges and prosecutors at the time of their resignation or retirement would be taken as a basis for the determination of the jurisdiction of the courts, which led to legal uncertainty.

The Constitutional Court is not authorized to determine which court or which branch of judiciary has jurisdiction over a dispute. The duty of the Constitutional Court within the scope of the individual application is not to review the compatibility of the proceedings with the procedural rules but to monitor whether the guarantees within the scope of the right to a fair trial have been violated in the present incident.

The Military Court of Cassation did not take action to bring the matter before the Court of Jurisdictional Disputes although the jurisprudences of the other high courts had been presented to its attention vis-à-vis the legal uncertainty as to before which courts the military judges and prosecutors would be tried. In other words, due diligence was not shown for the functioning of the mechanisms which would eliminate the legal uncertainty occurring as to which branch of judiciary would have jurisprudence in respect of the military judges and prosecutors resigning or dismissed from their office after the date of offence.

The Constitutional Court has consequently held that there was a breach of the principle of legal judge which is guaranteed in Articles 36 and 37 of the Constitution.

kd. Judgment finding no violation that non-execution of the decision on the stay of execution is not in breach of the right of access to court for not being of a nature which would preclude the execution of decision or render it difficult to an excessive degree

Hakan YILDIZ Judgment (App. No: 2014/8804)

> **The decision on the stay of execution giving rise to the application and alleged not to have been duly executed concerns the appointment of the applicant to another unit located in the same province where he would avail of the same personal benefits. The applicant did not maintain in his individual application which exclusively pertains to his appointment that there had been a breach of any other right. Nor could the Constitutional Court establish any connection between the application and the other fundamental rights. Moreover, it has been observed that failure to duly execute the decision on the stay of execution is not of a nature which would preclude the execution of the final decision to be rendered at the end of the proceedings or render it difficult to an excessive degree.**

In the incident giving rise to the present individual application which was concluded bythe Plenary of the Constitutional Court on 1/12/2016, while serving as the deputy manager in the Public Security Department of the Ankara Security Directorate, the applicant was appointed to the Foreigners' Department located in the same province as the deputy manager by virtue of the administrative act of 6/1/2014. In the action brought by the applicant with the request that the act in question be revoked and the execution of this act be stayed, the 6th Chamber of the Ankara Administrative Court found the impugned act manifestly unlawful and accordingly ordered the stay of execution of this act in its decision of 15/4/2014 on the ground that execution thereof would cause irreparable damages. Upon this decision, the Ankara Governorship re-appointed the applicant to the position in the Foreigners' Department on 12/5/2014 as the impugned position at the Public Security Department was not vacant. The decision on this act was communicated to the applicant on 26/5/2014. Thereupon, the applicant lodged an individual application on 12/6/2014. In the meantime, the administration raised an objection to the decision on the stay of execution within the prescribed period. Before the individual application was lodged, the First Board of the Ankara Regional Administrative Court had accepted the administration's objection and revoked the decision on the stay of execution by its decision dated 22/5/2014 and objection no. 2014/3075. Following the individual application, the 6th Chamber of the Ankara Administrative Court dismissed the action on substantive grounds by its

decision of 30/12/2014. The applicant's objection to this decision was dismissed by the 6th Chamber of the Ankara Regional Administrative Court by its decision of 10/6/2015. After the applicant's request for rectification of the decision had been dismissed by the decision of 11/11/2015, the first instance decision on the dismissal of the action became final.

The applicant maintained that in spite of not being subject to any criminal proceedings or administrative investigation, the department where he took office had been changed without submission of any concrete reason; that the decision on the stay of execution, which had been rendered in the action brought against the administrative act, had not been implemented by relying on Article 28 of the Law no. 2577. He accordingly asserted that the judicial decision taken was rendered ineffective; and that as the decision on the stay of execution was not duly implemented, the remedy in question was not an effective one. He accordingly alleged that his rights guaranteed in the Constitution had been violated and requested finding of the violation in question and elimination of its consequences.

In brief, the Constitutional Court made the following assessments within the scope of this application:

The practice of the stay of execution is of constitutional nature and significance. In principle, the right to a fair trial secures realization of the outcomes of judicial decisions, which are final and definite, with respect to the dispute in question. However, the decisions on the stay of execution are not of such a nature. As in the other interlocutory decisions, non-execution of the decisions on the stay of execution must be examined only within the scope of the right of access to court by having regard to the principle of becoming of the whole proceedings unfair (*"yargılamanın bütününün adil olmaktan çıkması ilkesi"*) which is one of the dominant principles of the right to a fair trial.

In this respect, the matter to be examined in the complaints of non-execution of the decision on the stay of execution, which is not of final nature in respect of the proceedings, within the scope of the right to a fair trial is to whether non-execution of this decision would, by very nature of the practice of the stay of execution, preclude the execution of the final decision likely to be rendered in future in favour of the applicant or render it difficult to an excessive degree. This matter must be examined by taking into consideration the particular circumstances of each concrete incident.

While the principle pertaining to the right to a fair trial is examined as noted above, it is possible to examine the complaint of the non-execution of interlocutory decisions, within the scope of the other fundamental rights, independently from the whole of the proceedings by taking into consideration the circumstances of the concrete case. As a matter of fact, the Constitutional Court examined the complaint of non-execution of the decision on the stay of execution raised in the application of *Yaman Akdeniz and*

Others within the scope of the freedom of expression. In a similar vein, the individual application lodged in the case of *Kristal-İş Sendikası* upon the dismissal of the request for the stay of execution was examined from the standpoint of the right to establish and join trade unions.

In the present incident, the decision on the stay of execution giving rise to the application and alleged not to have been duly executed concerns the appointment of the applicant to another unit located in the same province where he would avail of the same personal benefits. The applicant did not maintain in his individual application which exclusively pertains to his appointment that there had been a breach of any other right. Nor could the Constitutional Court establish any connection between the application and the other fundamental rights. Moreover, it has been observed that failure to duly execute the decision on the stay of execution is not of a nature which would preclude the execution of the final decision to be rendered at the end of the proceedings or render it difficult to an excessive degree.

The Constitutional Court has consequently held that there was no breach of the applicant's right of access to court and accordingly declared the present application inadmissible for being manifestly ill-founded.

ke. Judgment on the violation of the right to a fair trial in conjunction with the right to legal assistance as the statements which were taken in the absence of a lawyer and were not subsequently substantiated at the court were taken as a basis for the conviction as the decisive evidence

Yusuf KARAKUŞ and Others Judgment (App. No: 2014/12002)

> **"It has been observed that in the assessment concerning the acts within the scope of the offences imputed on the applicants, it has been observed that the applicants' and the other accused persons' statements alleged to be taken in the police custody in the absence of their defence counsels and under duress were considered as evidence. It has been revealed that the applicants conviction were ordered for the imputed offence as they were found established to have performed the acts in question on the basis of their statements which had been taken in the absence of a defence counsel and had not been subsequently confirmed before the court as well as the other evidence; that these statements taken incustody were significantly relied on as evidence for the applicants' conviction; and that the legal assistance and the other procedural guarantees provided at the subsequent stages failed to indemnify the damage caused to the applicants' right to defence at the outset of the investigation.**

In the incident giving rise to the present individual application which was concluded bythe First Section of the Constitutional Court on 8/12/2016, the İstanbul Security Directorate carried out operations against the Hezbollah terrorist organization on 17/1/2000. The organization leader was captured dead in the operation conducted by the security officers in a house. In the course of the search conducted in that house, many hard disks containing information about the organization were found. On 6/5/2000, the applicants were taken into custody within the scope of the investigation initiated upon the information obtained during the above-mentioned operation. The applicants' statements were taken in the Anti-Terror Branch of the İstanbul Security Directorate in the absence of their defence counsels. On 7/5/2000, the applicants were sent to Ankara. Hasan Kılıç, one of the applicants, denied the accusations in his statement taken in the absence of his defence counsel in the Anti-Terror Branch of the İstanbul Security Directorate. He then made detailed confessions in the course of his statement taken in the Anti-Terror Branch of the Ankara Security Directorate on 12/5/2000. He subsequently admitted the accusations against him before the State Security Court (the SSC). Similarly, the applicant, Yusuf Karakuş, gave statements incriminating himself and the other suspects in his statements takenin the Anti-Terror Branch of the İstanbul Security Directorate on 7/5/2000,in the absence of his defence counsel. He also made detailed confessions in the course of his statements taken in the Ankara Security Directorate in the absence of his defence counsel and showed certain places pertaining to the imputed offence and evidence thereof.

The applicant Mehmet Şahin explainedhis life, his joining into the Tevhid-Selam group and his activities in detail during his statement taken in the Anti-Terror Branch of the İstanbul Security Directorate, in the absence of defence counsel. He also made detailed confessions in his statements taken by the Ankara Security Directorate in the absence of his defence counsel. The applicant subsequently declared before the Public Prosecutor's Office of the Ankara SSC and the judge of the SSC that he had been associated with the Tevhid-Selam group but he had not got involved in any violent acts.

A criminal case was filed before the Ankara SSC no. 2 against the applicants for breach of the Constitution by the bill of indictment of the Chief Public Prosecutor's Office at the Ankara SSC dated 11/7/2000. During the hearings, the applicants denied the accusations against them by maintaining that their statements taken at the investigation stage and amounting to confessions had been taken under duress. The applicants were sentenced to imprisonment by virtue of the decision dated 7/1/2002 at the end of the trial held over the case-file of the Ankara SSC no. 2 no. E.2000/102. The applicants, Mehmet Şahin and Yusuf Karakuş, were sentenced for being a member of

an armed gang aiming to change the constitutional order by force of arms while the other applicant, Hasan Kılıç, was sentenced for being a head having special authority in this armed gang. This decision and the decision of 28/7/2005 which was rendered by the 11thChamber of the Ankara Assize Court (closed) continuingto handle the proceedings were quashed by the 9th Criminal Chamber of the Court of Cassation. The conviction decision of 17/1/2013, which relied on the applicants' confessions and statements incriminating each other at the investigation stage, was upheld by the judgment of the 9th Criminal Chamber of the Court of Cassation dated 31/3/2014.

The applicants maintained that their rights guaranteed in the Constitution were violated, stating that the trial had not been conducted fairly and; and that they had been convicted mainly on the basis of their statements which had been taken in the course of the police custody during which they had been denied legal assistance and which had been signed under duress and torture but the content of which had not been admitted.

In brief, the Constitutional Court made the following assessments within the scope of this application:

With respect to the offences falling into the jurisdiction of the state security courts, it is possible, in principle, for the applicants to obtain the assistance of a defence counsel while being in custody only after a certain stage. The legislation which was in force at the time when the applicants were in custody did not provide the opportunity for obtaining assistance of a lawyer during the police custody. It has been observed that the applicants were held in custody under the mentioned conditions for a period between 8 and 13 days.

It has been observed that in the assessment concerning the acts within the scope of the offences imputed on the applicants, it has been observed that the applicants' and the other accused persons' statements alleged to be taken in the police custody in the absence of their defence counsels and under duress were considered as evidence. It has been revealed that the applicants conviction were ordered for the imputed offence as they were found established to have performed the acts in question on the basis of their statements which had been taken in the absence of a defence counsel and had not been subsequently confirmed before the court as well as the other evidence; that these statements taken incustody were significantly relied on as evidence for the applicants' conviction; and that the legal assistance and the other procedural guarantees provided at the subsequent stages failed to indemnify the damage caused to the applicants' right to defence at the outset of the investigation.

Article 148 of the Law no. 5271, which subsequently entered into force (during the

Article 148 of the Law no. 5271, which subsequently entered into force (during the proceedings), is capable of ensuring the investigation to be effectiveat the prosecution stage with respect to the statements which are taken by the law-enforcement officers in the absence of a defense counsel and which are not confirmed before a judge or a court. However, this question was not discussed in the court's decision and could not be redressed at the appellate stage.

proceedings), is capable of ensuring the investigation to be effectiveat the prosecution stage with respect to the statements which are taken by the law-enforcement officers in the absence of a defence counsel and which are not confirmed before a judge or a court. However, this question was not discussed in the court's decision and could not be redressed at the appellate stage. The failure to provide the opportunity for access to legal assistance in the police custody and taking these statements at this stage as a basis for the conviction decision led to the breach of the right to a fair trial in conjunction with the right to legal assistance.

The Constitutional Court has consequently held that there was a breach of the right to a fair trial in conjunction with the right to legal assistance within the scope of the right to a fair trial guaranteed in Article 36 of the Constitution.

kf. Judgment on the violation of the right to examine a witness within the scope of the right to a fair trial for giving no opportunity for examination of the witness who was called by the prosecution and whose statement was considered to be decisive evidence

Sertaç KILIÇARSLAN Judgment (App. No: 2013/7090)

It has been concluded that the restriction imposed on the direct examination of the witness who was called by the prosecution and whose statement was considered to be the decisive evidence for the applicant's conviction for the offence of "premeditated murder by virtue of his public service he rendered" was not reasonably justified; and that sufficient procedural guarantees which would eliminate this disadvantage on the part of the defence were not provided. Therefore, it was held that this restriction was not compatible with the requirements of the right to a fair trial.

In the incident giving rise to the present individual application which was concluded by the Second Section of the Constitutional Court on 18/2/2016, the applicant Sertaç Kılıçarslan was arrested upon the information provided by his friend who was a confessor and a member of an illegal armed organization. The applicant, who was detained pending trial, denied the accusation of murdering a police officer premeditatedly in Diyarbakır and requested to be confronted with the confessor. The confessor's statement was taken at the prison where he was detained on remand. It was decided that the applicant's case-file be separated from the case in which the applicant and the confessor were co-accused.

The applicant's objections with respect to the competent court were examined and concluded by the Court of Cassation. At the end of the proceedings, the applicant was sentenced to aggravated life imprisonment two times as well as imprisonment for a term of 22 years and a judicial fine. Upon the appellate review, the first instance decision was upheld.

The applicant maintained that he had been exposed to psychological duress and battery and threatened with death while being in police custody; that he had been denied access to a doctor; and that the procedure of his detention had not been lawful. He further asserted that his rights had not been respected and his requests had not been taken into consideration throughout the proceedings; that the proceedings had lasted for a very long time; that he had been subject to unjust restrictions with respect to his civil rights; and that he had been subject to discrimination throughout the proceedings conducted against him and with respect to the standards of proof as he was a citizen of Kurdish origin. He accordingly alleged that his rights guaranteed in the Constitution had been violated.

The Constitutional Court made the following assessments with respect to the allegations within the scope of the right to examine a witness, in brief:

The applicant's defense counsel requested confrontation of the applicant with the witness, H.O., at the end of the hearing where this witness was heard. Furthermore, although it was requested at the subsequent stages of the proceedings that the witness be made present at the hearing and the applicant be provided with the opportunities to examine, identify and to be confronted with the witness, all of these requests were dismissed by the court by making reference to the fact that these requests would not bring a fresh consideration for the case and to the grounds which were not sufficiently based on a concrete basis such as the scope of the case-file, available evidence in the case-file and the stage of the proceedings. In

such circumstances, it cannot be concluded that the first instance court sufficiently justified the restriction which could not be proven to be reasonable. Furthermore, the witness, M.A.C., who was taken from the prison where he had been detained in order to be brought before the court, was heardat the hearing dated 22/8/2011. Upon his statement which was not sufficiently based on a concrete basis, the witness was not examined by anyone especially the court panel except for the applicant's defence counsel. The court's failure to check the plausibility and reliability of the statement of M.A.C., which was completely in conflict with H.O.'s statement - the decisive evidence with respect to the decision on conviction - gives the impression that the statement-taking procedure turned into a "formality". The fact that the first instance court did not find it necessary to explain, in its reasoned decision, why the statements of the witness, M.A.C., which contradicted with the witness H.O.'s statement, had not been relied on also confirms this impression.

In brief, it has been concluded that the restriction imposed on the direct examination of the witness who was called by the prosecution and whose statement was considered to be the decisive evidence for the applicant's conviction for the offence of "premeditated murder by virtue of his public service he rendered" was not reasonably justified; and that sufficient procedural guarantees which would eliminate this disadvantage on the part of the defence were not provided. Therefore, it was held that this restriction was not compatible with the requirements of the right to a fair trial.

The Constitutional Court has consequently held that there was a breach of the right to a fair trial guaranteed in Article 36 of the Constitution in conjunction with the right to examine the witnesses called by the prosecution which is one of the elements of the right to a fair trial.

2. DECISIONS OF INTERIM MEASURES

a. Decision on the dismissal of the requests for an interim measure made within the scope of the curfew declared in the district of Cizre in Şırnak

Decision of Mehmet YAVUZEL and Others (no: 2016/1652)

> **By the nature of the individual application, a request for an interim measure may be examined only in respect of the allegations raised with regard to the applicant's own personality. Therefore, general requests for the stay of execution of the curfew orders imposed by the civilian authorities were dismissed by the Constitutional Court.**

In the impugned incident dealt with in the decision rendered by the Second Section of the Constitutional Court on 29/1/2016, the applicants lodged a request for an interim measure with the European Court of Human Rights ("the ECtHR") on 23/1/2016 for the protection of their lives and physical integrity and stay of the execution of the curfew order by maintaining that they were wounded and staying in the basement of a building in the district of Cizre in Şırnak and that they were denied access to medical services.

On 26/1/2016, the ECtHR decided to adjourn the examination of the request for an interim measure. Having regard to the unpredictability and changeability of the armed conflicts taking place in the region, the ECtHR noted that the lack of information and the difficulty in ascertaining the incidents, as these issues were not subject to any examination by the national judicial authorities, prevented it from performing its duty; and that accordingly, it decided to adjourn the examination thereof. In accordance with the subsidiarity principle, the ECtHR also indicated that the national courts were in a better position to deal with such emergency cases and had the power and facilities to directly get in contact with the national and local authorities for the protection of those whose lives are under a real and immediate risk. The ECtHR accordingly encouraged the applicants to immediately make a request for an interim decision before the Constitutional Court (see *Yavuzel and others v. Turkey*, no. 5317/16, 26/1/2016).

Upon the decision rendered by the ECtHR, the lawyers lodged a request with the Constitutional Court on 26/1/2016 on the same grounds and asserted that the applicants and the other persons who were with the applicants and whose identities

could not be established were severely wounded due to the fire opened by the security forces in the Cudi neighbourhood and were in the basement of a building located at the address of "Bostancı Sokak No: 23"; and that these wounded persons were not taken to the hospital by the Governorship, and the security forces continued bombing the building where these persons were.

Considering that the information provided by the lawyers was not sufficient for rendering a proper decision on the request for an interim measure, the Constitutional Court immediately demanded information and documents from the Şırnak Governorship on the very same day in accordance with the procedure followed by the Court in similar incidents. Having received the reply of the Governorship, the Constitutional Court communicated the reply, in summary, to the lawyers and requested the lawyers to submit additional information.

The Constitutional Court informed the lawyers, on the day when the request was made, that it was not possible for the Court to give a decision on the same day as examinations would be carried out concerning the request for an interim measure; however, a decision would be rendered within the shortest time given the nature of the request.

In brief, the Constitutional Court made the following assessments within the scope of this request:

i. Request for the stay of execution of the curfew order

By the nature of the individual application, a request for an interim measure may be examined only in respect of the allegations raised with regard to the applicant's own personality. Therefore, general requests for the stay of execution of the curfew orders imposed by the civilian authorities were dismissed by the Constitutional Court.

ii- Request for the protection of the applicants' lives and physical integrity

Terrorist actions had been carried out in several provinces of Turkey as from the month of July in 2015. Within the scope of these actions, there had been close conflicts between the security forces and the members of the terrorist organization in certain provinces and districts in the South-eastern Anatolia Region. In this respect, the relevant civilian authorities declared curfews with a view to protecting lives of the civilian population.

Certain questions were directed by the Constitutional Court to the Şırnak Governorship which declared and executed curfew in Cizre and the lawyers concerning the conditions under which the applicants had got wounded. The

Governorship informed that the place notified by the applicants as the location where they had been wounded was a region where intensive conflicts took place between the security forces and the members of the terrorist organization and where the security officers shot back only to those opening fire on them. Moreover, the Governorship indicated that certain applicants alleged to be severely wounded had had an interview with the press organs.

As the application form did not include any information as to under which conditions the persons alleged to be wounded had got wounded and as to whether they had been armed, such issues were asked to the lawyers. However, in the reply sent by the lawyers to the Court, this question was left unanswered.

Mehmet Yavuzel, one of the applicants, did not report the location where he was to the medical personnel during the phone conversation and noted that the address information might be obtained from Faysal Sarıyıldız [who was a member of parliament]. However, on 28/1/2016, Faysal Sarıyıldız told during his phone conversation with the ambulance driver that he did not know the exact location of the applicants and he would give the address the next day when it would become clear.

It has been revealed from this information that it was still uncertain whether the applicants were wounded or not; if wounded, whether their states of health were severe; under which conditions they had been wounded; whether all of them were wounded and armed; and at which address the applicants were. It has been observed from the information and documents obtained within the scope the application that this uncertainty arose as the applicants were unwilling to get in contact directly with the public authorities and to provide information and were in tendency to direct the public authorities to the third parties for obtaining information.

In the applications lodged with the Constitutional Court on 27/1/2016, it was alleged that the building, where those wounded were ,was still being bombed by the security forces. In the additional information letter of 25/1/2016 submitted to the ECtHR, it was noted that upper sections of the basement, where those who were wounded were staying, were completely destroyed due to bombardment; and that those wounded remained under dust and debris in a way which would hinder their getting oxygen.

On the other hand, the Governorship submitted photos of the building and the street where the applicants were alleged to be and definitely denied the allegation that the building in question had been exposed to bomb attack. Moreover, the Governorship submitted the news report published on the Turkish web-site of BBC concerning the interview between Mehmet Tunç, one of the applicants, and a reporter of BBC and

the record of this phone conversation. It has been revealed from this news report published on 26/1/2016 that Mehmet Tunç joined a program broadcasted through TV while being on the second floor of the building and noted that his state of health was good.

It was alleged in the application form that the official authorities did not allow ambulances to take those wounded to the hospitals. The Governorship stated that it was impossible for the ambulances to go to the location where the applicants were alleged to be on account of the barricades set up, ditches dug and booby traps laid by the members of the terrorist organization. The Governorship indicated that ambulances were sent and waited in safe areas which were close to the place where the applicants were; and that those who were among the group including the applicants and whose states of health were good were several times offered to take the persons who were severely wounded to ambulances; however, this offer was rejected.

On the other hand, Mehmet Yavuzel, one of the applicants with whom the medical personnel established direct communication, informed that out of 19 wounded persons, 3 or 4 of them were severely wounded. However, Mehmet Yavuzel did not accept the offer made by the medical personnel for taking the wounded persons to a safe area and told that there was nothing he could do. He also told the medical personnel to get in contact with Faysal Sarıyıldız and İdris Baluken and not to call him any longer. Regard been had to these issues, it cannot be concluded that the public authorities denied the applicants' access to medical services in an arbitrary manner.

With regard to the allegations maintained in the application form, the lawyers failed to clearly ascertain the identities of the applicants, their addresses, circumstances in which they were, whether there was a grave and immediate risk to the applicants' lives and how such a risk would be eliminated. Nor did the Constitutional Court, as a result of the researches carried out, obtain any information and documents which would substantiate the allegations asserted in the application form.

Having regard to the applicants' unwillingness to get in contact directly with the

> **Having regard to the applicants' unwillingness to get in contact directly with the public authorities, directing the public officers to the third persons and giving different addresses in respect of their location at different dates, there arose serious suspicions on the facts that they continuously changed place and refrained from establishing communication with public authorities in order to get access to medical services.**

The Constitutional Court decided to dismiss the request for an interim measure; to invite the applicants to get in contact directly with the public authorities; to ensure that in case of elimination of uncertainty, the public authorities take necessary measures for enabling the applicants to access to medical services by means of paying regard to the right to life of the medical personnel and security forces; and to request the Governorship to inform the Constitutional Court, without any delay, of the subsequent developments in respect thereof.

public authorities, directing the public officers to the third persons and giving different addresses in respect of their location at different dates, there arose serious suspicions on the facts that they continuously changed place and refrained from establishing communication with public authorities in order to get access to medical services.

The Constitutional Court reached the conclusion that a decision on interim measure could not be taken at this stage as issues such as whether the persons in question had been wounded; if wounded, whether their states of health had been severe; under which conditions they had got wounded; whether all of them had been wounded and armed and the address at which they had been were still uncertain. In addition, the Constitutional Court would like to recall that in case of elimination of this uncertainty, the obligation to protect the right to life of individuals, regardless of whoever they are in a democratic state of law, requires the public authorities to take necessary measures by also paying regard to the medical personnel's and security officers' right to life.

It should be held that in order for ensuring the applicants to get access to medical services, there was no ground for rendering a decision on an interim measure which would force the public authorities to act in a certain manner.

For the reasons explained above, the Constitutional Court decided to dismiss the request for an interim measure; to invite the applicants to get in contact directly with the public authorities; to ensure that in case of elimination of uncertainty, the public authorities take necessary measures for enabling the applicants to access to medical services by means of paying regard to the right to life of the medical personnel and security forces; and to request the Governorship to inform the Constitutional Court, without any delay, of the subsequent developments in respect thereof.

b. Decision on acceptance of the request for an interim measure for stay of execution of the order of deportation

Decision of M.A. (App. No: 2016/220)

In the impugned incident dealt with in the decision rendered by the Second Section of the Constitutional Court on 20/1/2016, it was maintained that in case of execution of the deportation order imposed in respect of the applicant, who is a citizen of the Russian Federation, her right to life and the prohibition of torture and ill-treatment would be breached in her country due to her ethnic origin and faiths.

It has been observed that there are findings which are in support of the applicant's allegations in the reports drawn up in respect of Russia by the international human rights organizations. Regard being had to the applicant's allegations and the reports of these human rights organizations, it was concluded that the applicant's allegations were not unfounded. The Constitutional Court accordingly decided, as a measure, to stay the execution of the order for deportation of the applicant to her country.

c. Decision on acceptance of the request for an interim measure for the protection of material and spiritual entity of the children held in penitentiary institutions

Decision of Şükran İRGE (App. No: 2016/8660)

> **Continuation of the applicant's accommodation, along with her two-year old child and especially four-month old baby, in a penitentiary institution where there were inmates over its accommodation capacity and which was lack of sufficient facilities poses a serious threat to both the applicant's and her children's "material and spiritual entity". Therefore, the public authorities are required to take appropriate measures for the protection of the children's rights and best interests by also taking into consideration the applicant's personal situation. However, it is in the public authorities' discretionary power to decide which measure must be taken (improvement of the accommodation conditions, suspension of the execution of sentence or generation of the other alternatives).**

In the impugned incident dealt with in the decision rendered by the First Section of the Constitutional Court on 28/6/2016, the applicant held in the penitentiary institution together with her two children who were four months and two years

old made a request for an interim measure for the suspension of execution of her imprisonment sentence as being held under poor conditions.

Considering that the information provided by the applicant was not sufficient for rendering a proper decision on the request for an interim measure, the Constitutional Court demanded information and documents (to be submitted within a certain period of time) from the Diyarbakır Chief Public Prosecutor's Office in accordance with the procedure followed by the Court in similar incidents.

In the letter of 27/6/2016 which was submitted by the Diyarbakır Chief Public Prosecutor's Office to the Constitutional Court, it was indicated *"The penitentiary institution where the applicant is being held is heavily over-crowded due to the high number of criminal incidents taking place in the province of Diyarbakır and for being the single penitentiary institution that includes a women's ward in the province. Given the number of inmates staying in the ward where Şükran İrge was held and physical structure of the institution, this penitentiary institution is not sufficient for the development and survival of her children"*.

Within the scope of the individual applications, examinations are carried out not in respect of the question as to whether the acts and actions of the public authorities are legal but whether such act, action or omission is in breach of the fundamental rights and freedoms guaranteed in the Constitution. In this respect, the Constitutional Court's duty is not to review whether the sentence is executed in accordance with legislation but to assess whether the accommodation conditions contradict with the prohibition of torture, ill-treatment and treatment incompatible with human dignity. Therefore, the examination made by the Constitutional Court in the present incident is limited to the question as to whether the conditions under which the applicant was held in the penitentiary institution along with her four-month and two-year old children pose a serious threat to the their lives and material and spiritual entity to the extent which would require an interim decision to be taken.

Continuation of the applicant's accommodation, along with her two-year old child and especially four-month old baby, in a penitentiary institution where there were inmates over its accommodation capacity and which was lack of sufficient facilities poses a serious threat to both the applicant's and her children's "material and spiritual entity". Therefore, the public authorities are required to take appropriate measures for the protection of the children's rights and best interests by also taking into consideration the applicant's personal situation. However, it is in the public authorities' discretionary power to decide which measure must be taken (improvement of the

accommodation conditions, suspension of the execution of sentence or generation of the other alternatives).

Therefore, the Constitutional Court accepted the applicant's request for an interim measure and held that necessary measures were required to be immediately taken for the elimination of the threat to the applicant's and her children's material and spiritual entity.

d. Decision on acceptance of the request for an interim measure made by the applicant who was held in the penitentiary institution under conditions improper for his physical characteristics

Decision of Ersan NAZLIER (App. No: 2015/19917)

> **In the impugned incident dealt with in the decision rendered by the First Section of the Constitutional Court on 7/6/2016, it was maintained that the applicant who was a one-armed person was accommodated in a single room in spite of having difficulty in meeting his basic needs. The applicant requested the Court to take an interim measure for the improvement of the conditions under which his sentence was executed.**

In the impugned incident dealt with in the decision rendered by the First Section of the Constitutional Court on 7/6/2016, it was maintained that the applicant who was a one-armed person was accommodated in a single room in spite of having difficulty in meeting his basic needs on his own. The applicant requested the Court to order an interim measure for the improvement of the conditions under which his sentence was executed.

The report drawn up by the medical board of the Gazi Yaşargil Training and Research Hospital indicates that the applicant must not be accommodated "alone and in a single room".

The applicant was transferred to a more modern penitentiary institution at a subsequent date following the lodging of the individual application. However, he was continued to be accommodated in a single room.

It has been observed that although it was established in the medical board's report that the applicant was unable to meet his basic needs on his own, he was still held in a single room. This situation may pose a serious threat to "material and spiritual

The Constitutional Court accepted the applicant's request for an interim measure and held that necessary measures must be taken for the execution of his imprisonment sentence under circumstances appropriate for his state of health and physical characteristics.

entity" of the applicant who was unable to meet his basic need on his own in case of continuation of this situation.

For the elimination of the threat likely to be posed to the applicant's "material and spiritual entity", it is not sufficient to take measures such as transfer of the applicant to a penitentiary institution with better physical conditions and enabling him to periodically access to fresh air.

Accordingly, the Constitutional Court accepted the applicant's request for an interim measure and held that necessary measures must be taken for the execution of his imprisonment sentence under circumstances appropriate for his state of health and physical characteristics.

e. Decision on no ground to order an interim measure with respect to the allegations that the accommodation conditions in the penitentiary institution pose a threat to life

Decision of Mecit GÜMÜŞ (App. No: 2016/5991)

It is not the Constitutional Court's duty to review whether the acts and actions of the public authorities are legal or not. The examination to be made within the scope of the individual application is limited to the question as to whether such act, action or omission is in breach of the fundamental rights and freedoms guaranteed in the Constitution.

In the impugned incident dealt with in the decision rendered by the Second Section of the Constitutional Court on 7/4/2016, the Constitutional Court was requested to order an interim measure for the suspension of the execution of the applicant's sentence by stating that it was impossible for the applicant who was receiving treatment for being diagnosed with lung cancer to be treated under the conditions of the penitentiary institution.

It is not the Constitutional Court's duty to review whether the acts and actions of the public authorities are legal or not. The examination to be made within the scope of

the individual application is limited to the question as to whether such act, action or omission is in breach of the fundamental rights and freedoms guaranteed in the Constitution. Accordingly, the applicant's complaint of non-suspension of the execution of his imprisonment sentence, which is contrary to the legislation, was assessed in the light of the principles falling into the scope of the right to life and the prohibition of torture and ill-treatment.

Following the lodging of the individual application with the Constitutional Court, the applicant was transferred to the Metris R (Infirmary) Type Penitentiary Institution due to the poor physical conditions and insufficient facilities of the Diyarbakır D Type High Security Penitentiary Institution.

It has been observed that the applicant was accommodated in the infirmary type penitentiary institution in rooms allocated for 1-3 persons under the supervision of doctor and medical personnel throughout twenty-four hours; and that the actions for referral of the applicant to the Forensic Medicine Institute and for the suspension of the execution of his imprisonment sentence were still pending.

It has been revealed that the process of assessment as to the applicant's treatment procedure, conditions of the institution where he was held and his other requests and complaints must be concluded as soon as possible.

For the reasons explained above, the Constitutional Court found no ground to order an interim measure and decided that the Bakırköy Chief Public Prosecutor's Office be requested to accelerate the process of assessment as to the applicant's personal situation and state of health in the light of the circumstances of present incident.

C. OTHER DECISIONS

1. Decision on the dismissal of two Member Judges of the Turkish Constitutional Court, Alparslan ALTAN and Erdal TERCAN from profession (E.2016/6, K.2016/12)

> **On the night of 15 July 2016, in our country, a group organized in the Turkish Armed Forces, attempted to abolish the democratic constitutional order with the use of force and violence.**

The decision concerns an assessment as regards the legal status of two members of the Constitutional Court, Alparslan ALTAN and Erdal TERCAN, in accordance with Article 3 (1), which is entitled "Measures related to the members of the judiciary and those considered as members of this profession", of the Decree Law no. 667 on Measures Taken within the Scope of the State of Emergency.

On the night of 15 July 2016, in our country, a group organized in the Turkish Armed Forces, attempted to abolish the democratic constitutional order with the use of force and violence.

In the first statement made by the General Staff, it was indicated that 8.651 military personnel were involved in the mentioned attempt and 35 planes including fighter jets of the Turkish Armed Forces, 37 helicopters, 246 armoured vehicles including 74 tanks and approximately 4.000 light weapons were used.

With the use of planes and helicopters, bomb and armed attacks were made against many places such as the Turkish Parliament, Presidential Premises, the Ankara Security Directorate, the Police Special Operation Forces of the General Directorate of Security and the National Intelligence Agency during the attempt. An attempt to assassinate the President was made; the convoy among which the Prime Minister's vehicle existed, was shot with firearms; many senior military officials including the

> **Civilians, who went out for protesting, and the security officials , who resisted against the coup attempt, were attacked with the use of planes, helicopters, tanks, other armoured vehicles and light weapons. During these attacks, nearly 250 persons (including police officers, soldiers and civilians) lost their lives and over 2.000 persons were injured.**

Chief of Staff were taken hostage and numerous public institutions were occupied or attempted to be occupied with the use of weapons.

Civilians, who went out for protesting, and the security officials , who resisted against the coup attempt, were attacked with the use of planes, helicopters, tanks, other armoured vehicles and light weapons. During these attacks, nearly 250 persons (including police officers, soldiers and civilians) lost their lives and over 2.000 persons were injured.

The group which made the coup attempt, issued a declaration on behalf of the "Peace at Home Council" via the Turkish Radio and Television Association (TRT), which the group occupied. The declaration stated that the Turkish Armed Forces completely took over the administration of the country; the political power was elbowed out the administration of the State; the State's administration would be performed by the Peace at Home Council; it would be ensured that all individuals and institutions, which were traitors, would be tried before the courts; a martial law was proclaimed throughout the country, a curfew would be imposed until a second order and all kinds of measures would be taken until a new constitution would be prepared.

> **"The coup attempt was rejected by the constitutional bodies, including the President. Upon the call of the President, the public went out and reacted to the coup attempt. The coup attempt was resisted by the security forces complying with the orders and instructions of the legitimate State authorities. All political parties represented in the Turkish Parliament and the civil society organizations declared that they did not accept the coup attempt. Almost all of the mass media publications made broadcasts against the coup attempt. The chief public prosecutor offices launched investigations against the coup plotters across the country and ordered the security forces to arrest the coup plotters. Consequently, the coup attempt, which encountered with a comprehensive and strong resistance, was prevented.**

During the coup attempt, attacks were made against the relevant institutions and organizations for the purpose of interruption of television broadcasts and access to the internet throughout the country and the buildings of some private television channels were occupied. The coup attempt was rejected by the constitutional bodies, including the President. Upon the call of the President, the public went out and reacted to the coup attempt. The coup attempt was resisted by the security

It was specified in the oral and written statements of the competent authorities and the general ground for the Decree-Law no. 667 that the members of the FETÖ/PYD performed the coup attempt. Within the scope of investigations launched just after the coup attempt, it was echoed publicly that some suspects allegedly involved in the coup attempt, made confessions regarding that both they and the mentioned attempt had connection with the FETÖ/PYD

forces complying with the orders and instructions of the legitimate State authorities. All political parties represented in the Turkish Parliament and the civil society organizations declared that they did not accept the coup attempt. Almost all of the mass media publications made broadcasts against the coup attempt. The chief public prosecutor offices launched investigations against the coup plotters across the country and ordered the security forces to arrest the coup plotters. Consequently, the coup attempt, which encountered with a comprehensive and strong resistance, was prevented.

Following the coup attempt, numerous military personnel, police officers and judicial officials, who were regarded as the members of the Fetullahist Terrorist Organization/ Parallel State Structure (FETÖ/PDY), were taken into custody throughout the country. Besides, thousands of public officials including judicial officials were suspended.

The National Security Council made a recommendation to the Government to declare a state of emergency in accordance with Article 120 of the Constitution by the Recommendation no. 498, dated 20/7/2016. On 20/7/2016, the Council of Ministers, convened under the chairmanship of the President, decided to declare a state of emergency throughout the country for a period of ninety (90) days beginning from 21/7/ 2016, Thursday at 01.00. The said decision entered into force after it was published in the Official Gazette no. 29777, dated 21/7/2016.

The Decree-Law no. 667 on Measures Taken within the Scope of State of Emergency, which was deliberated by the Council of Ministers convened under the chairmanship of the President on 22/7/2016, entered into force following its publication in the Official Gazette no. 29779, dated 23/7/2016.

It was specified in the oral and written statements of the competent authorities and the general ground for the Decree-Law no. 667 that the members of the FETÖ/PYD performed the coup attempt. Within the scope of investigations launched just after

the coup attempt, it was echoed publicly that some suspects allegedly involved in the coup attempt, made confessions regarding that both they and the mentioned attempt had connection with the FETÖ/PYD

The Process of Criminal Investigations against the Members of the Constitutional Court

Within the scope of the investigation file no. 2016/103606 launched by the Ankara Chief Public Prosecutor's Office just after the coup attempt, the Public Prosecutor ordered to take Alparslan ALTAN and Erdal TERCAN, the members of the Constitutional Court, into custody, and to issue a search warrant for their houses, vehicles and offices, dated 16/7/2016, on the grounds that "The offense of attempt to overthrow the Government and to abolish the constitutional order by force, still continues throughout Turkey and there is possibility that the members of the Fetullah[ist] Terrorist Organization, who commit this offense, could flee abroad and abscond".

By the decision of the 2nd Office of Ankara Magistrate's Judge dated 20/7/2016 and interrogation no. 2016/595, Alparslan ALTAN, member of the Constitutional Court; and by the decision of the 5th Office of Ankara Magistrate's Judge dated 20/7/2016 and interrogation no. 2016/437, Erdal TERCAN, also a member of the Constitutional Court, were detained on remand together with some of the judicial members for the offence of "being a member of an armed terrorist organization".

In brief, the Constitutional Court made the following assessments within the scope of the circumstances:

A. Constitutional assessment of the facts which led to declaration of state of emergency

Considering the principles set forth in the preamble of the Constitution, characteristics of the State set out in Article 2, ownership of sovereignty and the way of its exercise and systematics of the Constitution as a whole; it is inferred that inseparable links have been forged among "sovereignty", "way of exercise of sovereignty", "nation's

In the event that the coup attempt becomes successful, democratic constitutional order and supremacy of the nation's will are overthrown, and a group of tyrants takes control of the sovereignty which belongs to the nation in the democratic order- and accordingly each individual forming it. In this case, democracy and rule of law are out of question. Accordingly, in such an order, there will not be any mechanism which guarantees fundamental rights and freedoms of the individuals.

In this regard, one of the most dangerous threats against a democratic society -maybe the most dangerous one- are coup attempts.

will", "democracy", "rule of law" and "human rights". As is the case with all civilized societies, the nation shall be the source of sovereignty, the sovereignty shall be exercised -directly or indirectly- through the organs authorized by the nation's will, the nation's will shall emerge in a democratic order, exercise of the sovereignty through authorized organs shall be accomplished in accordance with the principles of democracy, in particular the rule of law, and by respecting human rights.

A coup attempt amounts to an attempt of overthrowing or changing the constitutional order by force by a group which is not the source of sovereignty and which is not among the organs authorized by the nation to exercise the sovereignty. In the event that the coup attempt becomes successful, democratic constitutional order and supremacy of the nation's will are overthrown, and a group of tyrants takes control of the sovereignty which belongs to the nation in the democratic order- and accordingly each individual forming it. In this case, democracy and rule of law are out of question. Accordingly, in such an order, there will not be any mechanism which guarantees fundamental rights and freedoms of the individuals.

For the reasons explained above, it is an indisputable truth that the coup attempts to constitute clear and serious attacks against the following principles set out in the Constitution, which are indispensable as regards democratic social order: "sovereignty belongs to the nation", "sovereignty shall be exercised through authorized organs", "the exercise of sovereignty shall not be delegated by any means to any individual, group or class", "no person or organ shall exercise any state authority that does not emanate from the Constitution", "democracy", "rule of law" and "respect for human rights". In this regard, one of the most dangerous threats against a democratic society -maybe the most dangerous one- are coup attempts.

Many times, coups have been staged or coup attempts have been made in our country since the multi-party system was introduced. Our nation is the primary witness of the serious threat against the democratic constitutional order and human rights posed by the persons who take control of the nation's will and sovereignty through coup attempts.

At the night of 15 July 2016, a group which was secretly organized within the Turkish Armed Forces attempted to overthrow the constitutional order, and this attempt was

Particularly, our nation whose sovereignty was attempted to be taken control by force, the organs authorized to exercise the sovereignty on behalf of the nation (President, the Turkish Parliament, the Council of Ministers and judicial institutions), all political parties which are indispensable elements of a democratic society, non-governmental organizations, media organs and security forces who received orders and instructions from the legitimate democratic authority all together displayed resistance of sovereignty and democracy. Indeed, by its statement declared in the first hours on the night of the coup attempt while conflicts were on-going, the Constitutional Court also defined this attempt as "an anti-democratic attempt against the constitutional order" and explicitly rejected it.

prevented thanks to resolute resistance of all legitimate elements of a democratic society. Particularly, our nation whose sovereignty was attempted to be taken control by force, the organs authorized to exercise the sovereignty on behalf of the nation (President, the Turkish Parliament, the Council of Ministers and judicial institutions), all political parties which are indispensable elements of a democratic society, non-governmental organizations, media organs and security forces who received orders and instructions from the legitimate democratic authority all together displayed resistance of sovereignty and democracy. Indeed, by its statement declared in the first hours on the night of the coup attempt while conflicts were on-going, the Constitutional Court also defined this attempt as "an anti-democratic attempt against the constitutional order" and explicitly rejected it.

The coup attempt concretely revealed the seriousness of the threats against democratic constitutional order and human rights posed by those who attempted to take control of the nation's will and its sovereignty.

With regard to the assessment of seriousness of the threat against the democratic constitutional order, which was posed by the coup attempt at the night of 15 July 2016; it is not sufficient to take into account the concrete damages alone caused by the prevented attempt. The risks which might have occurred must also be assessed, if the coup attempt could not have been prevented within a short period of time and had become successful. If the nation, the owner of the sovereignty, and all elements of democratic constitutional order had not prevented the coup attempt with a resolute resistance within a short period of time, they would either have accepted the absolute supremacy of a group of tyrants and would have been subjected to their

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Striking the balance between liberty and security has become one of the most important aims of modern democracies. It is not possible to maintain democratic order and put the freedoms into practice in an insecure place.

It is inferred from all of these assessments as a whole that the coup attempt constitutes an existing and serious threat against not only the democratic constitutional order but also the "national security", which has close relations with it. The national security has been regarded as a ground for restriction of fundamental rights and freedoms in the Constitution and international documents concerning protection of human rights. Striking the balance between liberty and security has become one of the most important aims of modern democracies. It is not possible to maintain democratic order and put the freedoms into practice in an insecure place.

For the reasons explained above, it must be concluded that 15 July coup attempt, which has gone down in the democratic history of Turkey as a dark mark, is one of the most serious attacks -maybe the most serious one- against the democratic constitutional order, fundamental rights and freedoms of the individuals and the national security.

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B. The measures provided by the Decree-Law no. 667

Although the coup attempt was de facto prevented; taking measures in order to eliminate the dangers against the democratic constitutional order, fundamental

In some cases, it may not be possible for the State to eliminate the threats against democratic constitutional order, fundamental rights and freedoms and national security through ordinary administration procedures. Accordingly, it may be necessary to impose extraordinary administration procedures until these threats are eliminated. "Extraordinary administration procedures" are provided in the Constitution with a view to enabling it, and one of them is the "declaration of state of emergency" which is set out in Article 120 of the Constitution.

rights and freedoms, national security and to prevent future attempts is not only within the scope of the state's authority, it is also a duty and responsibility towards individuals and society pursuant to Article 5 of the Constitution.

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Indeed, after the coup attempt was de facto prevented; the Council of Ministers convening under the chairmanship of the President, after receiving consultation from the National Security Council, declared a state of emergency throughout the country for ninety (90) days, being effective as from 21/7/2016 at 01.00 a.m. This decision was approved by the General Board of the Turkish Parliament on the same day.

One of the opportunities provided in the Constitution for elimination of the threats against democratic constitutional order and fundamental rights and freedoms, during the state of emergency, is to grant the Council of Ministers, convening under the chairmanship of the President, the power to issue decree laws on "matters necessitated by the state of emergency" in accordance with Article 121/3 of the Constitution.

Within this scope, the Council of Ministers that came together under the chairmanship of the President issued the Decree-Law no. 667 which entered into force after being published in the Official Gazette no. 29779 of 23/7/2016.

C. *Measures prescribed in the Decree-Law no. 667 with respect to members of the judiciary and other public officials*

It was set out in Article 3 of the Decree-Law with respect to members of the judiciary and those considered as members of this profession and Article 4 of the Decree-Law with respect to all the public officials (including workers) other than members of the judiciary that a decision of dismissal from profession or public service shall be rendered in respect of all of those, who are considered to be a member of, affiliated with or have cohesion or connection with "terrorist organizations or structures, organizations or groups which are established by the National Security Council as engaging in activities against the national security of the State". It was also stipulated

Dismissal from profession or from public service prescribed in Articles 3 and 4 of the Decree-Law is an "extraordinary measure" which is non-temporal, which entails final consequences and which, unlike the sanctions imposed for ordinary or disciplinary offences, aims to terminate the existence of terrorist organizations and other structures, which are established as engaging in activities against the national security, in public institutions and organizations.

in the Articles in question that those dismissed from office shall not be employed again and that they shall not, directly or indirectly, be assigned in a public service.

Having regard to both the issue which necessitates the state of emergency, the aim of the Decree-Law no. 667 and the scope and nature of the measures set out in Articles 3 and 4 of the Decree-Law, it is understood that through the measures taken, it is sought to obtain the result of dismissing from all public institutions and organizations the entirety of those, who are considered to be a member of, affiliated with or have cohesion or connection with terrorist organizations, particularly the FETÖ/PDY, or structures, organizations or groups which are established by the National Security Council as engaging in activities against the national security of the State.

Accordingly**,** dismissal from profession or from public service prescribed in Articles 3 and 4 of the Decree-Law is an "extraordinary measure" which is non-temporal, which entails final consequences and which, unlike the sanctions imposed for ordinary or disciplinary offences, aims to terminate the existence of terrorist organizations and other structures, which are established as engaging in activities against the national security, in public institutions and organizations.

The facts that the FETÖ/PDY has been organized within nearly all the public institutions and that the concrete coup attempt stemmed from this structuring turned the danger into present danger and made it compulsory to take extraordinary measures in order to maintain the democratic constitutional order.

Dismissal from profession of members of the judiciary, who are considered as having any links with terrorist organizations, particularly the FETÖ/PDY, or structures, organization or groups engaging in activities against the national security, is of special importance for ensuring the reliability and honour of the judiciary which is one of the fundamental values of a democratic society.

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D. *Conditions for application of the measure of dismissal from profession under the Decree-Law no. 667 in respect of members of the Constitutional Court*

"Members of the Constitutional Court" are among the members of the judiciary listed in Article 3 of the Decree-Law. Pursuant to the Article in question, the measure of dismissal from profession can be applied in respect of members of the Constitutional Court if:

a. the member is considered to be a member of, affiliated with or have cohesion or connection with terrorist organizations, or structures, organizations or groups established by the National Security Council as engaging in activities against the national security of the State;

b. this consideration/assessment is decided by the absolute majority of the Plenary of the Constitutional Court.

While Article 3 of the Decree-Law generally mentions "terrorist organizations, or structures, organizations or groups determined by the National Security Council as engaging in activities against the national security of the State", it is understood that the FETÖ/PDY comes first among them when the reasoning of the Article is taken into account.

Establishing a link between members of the Constitutional Court and the terrorist organization, terrorist activities and the coup attempt was not necessarily sought for the application of the measure; it was considered sufficient to establish their link with "structures", "organizations" or "groups" established by the National Security Council as engaging in activities against the national security of the State.

On the other hand, according to this Article, the link in question does not necessarily have to be in the form of "membership of" or "affiliation with" a structure, organization or group; it is sufficient for it to be in the form of "cohesion" or "connection" in order for the measure of dismissal from profession to be applied.

Establishing "certainty" between the members and the structures, organizations or groups determined by the National Security Council as engaging in activities against the national security of the State is not sought in the Article in question. "Assessment" of such link by the Plenary of the Constitutional Court is deemed sufficient. The assessment in question means a "conviction" formed by the absolute majority of the Plenary. Undoubtedly, this conviction is solely an assessment on whether the person concerned is eligible to remain in the profession irrespective of whether there is criminal liability.

Lastly, establishing "certainty" between the members and the structures, organizations or groups determined by the National Security Council as engaging in activities against the national security of the State is not sought in the Article in question. "Assessment" of such link by the Plenary of the Constitutional Court is deemed sufficient. The assessment in question means a "conviction" formed by the absolute majority of the Plenary. Undoubtedly, this conviction is solely an assessment on whether the person concerned is eligible to remain in the profession irrespective of whether there is criminal liability.

Article 3 of the Decree-Law prescribes no requirement to rely on a certain kind of evidence in order to reach this conviction. On the basis of which elements this conviction will be formed is a matter left to the discretion of the absolute majority of the Plenary. What is important in this regard is to avoid arbitrariness while reaching a certain conviction.

Undoubtedly, while making an assessment as to whether the above-mentioned link exists, the reasons which would lead the competent boards to reach a certain conviction can vary depending on the characteristics of each case.

E. *Assessment as to whether the measure of dismissal from profession will be applied in respect of the members of the Constitutional Court Alparslan ALTAN and Erdal TERCAN*

The competent authorities considered that the plotter and implementer of the attempted coup, which started in the evening of 15 July 2016 and lasted until a certain hour of the following day, was the FETÖ/PDY which was recently categorized by the National Security Council as a "terrorist organization threatening the national security" and which has been the subject-matter of investigations and proceedings for a long time.

On 16/7/2016 the Members of the Constitutional Court Alparslan ALTAN and Erdal TERCAN were taken into custody for being "a member of the FETÖ/PDY" within the scope of the investigation launched by the Ankara Chief Public Prosecutor's Office into the offence of overthrowing the Constitutional order by using force and violence.

In the aftermath of the coup attempt, country-wide investigations were initiated and custodial measures were taken in respect of a high number of military personnel, law enforcement officers and members of the judiciary who respectively serve in the Turkish Armed Forces, law enforcement agency and judicial institutions which come first among the institutions the FETÖ/PDY attaches the most importance in terms of its organization.

On 16/7/2016 the Members of the Constitutional Court Alparslan ALTAN and Erdal TERCAN were taken into custody for being "a member of the FETÖ/PDY" within the scope of the investigation launched by the Ankara Chief Public Prosecutor's Office into the offence of overthrowing the Constitutional order by using force and violence.

Subsequent to the interrogation of the Members in question on 20/7/2016 by different Offices of Magistrate Judges in criminal matters, their detention was ordered for the offence of "being a member of an armed terrorist organization".

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During this process, it was decided that an assessment be made by the Plenary of the Constitutional Court on the legal situations of the Members Alparslan ALTAN and Erdal TERCAN under Article 3 of the Law no. 667 which regulates the measures regarding the implementation of the state of emergency which was declared subsequent to the coup attempt.

Written statements of the Members Alparslan ALTAN and Erdal TERCAN were taken in order to be taken into account in the assessment which was to be made by the Plenary of the Constitutional Court. In their statements, the Members in question

The assessment to be made under the Decree-Law no. 667 does not amount to investigating a concrete action which constitutes a criminal or disciplinary offence; rather, it amounts to a process in which a conviction will be formed as to whether the Members of the Constitutional Court have any links with a certain organization. Therefore, having regard to both the aim of the Decree-Law, the nature of the measure and the characteristics of the instant case, it was required to make an assessment in respect of the Members concerned on the basis of available information and documents.

stated that they did not have any link with the FETÖ/PDY, they requested that they be provided with the opportunity to defend themselves again after the concrete information and documents regarding the imputed offence are submitted to them and that certain witnesses whose names they provided be heard.

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The assessment to be made by the Plenary of the Constitutional Court in respect of the Members Alparslan ALTAN and Erdal TERCAN under Article 3 of the Decree-Law no. 667 concerns whether the members in question have any links with, as stated in the decisions of the National Security Council, the Parallel State Structure, which is among the structures, organizations or groups determined by the National Security Council as engaging in activities against the national security of the State, in the form

Having regard to both the above-mentioned characteristics of the instant case, information from the social circle that they are connected with the organization in question and the common conviction formed by the Members of the Constitutional Court over time, it was considered that the Members Alparslan ALTAN and Erdal TERCAN have links with the organization in question which are incompatible with their remaining in the profession under Paragraph (1) of Article 3 of the Decree-Law.

It will clearly harm the reliability and honour of the judiciary if the members, whose situations are assessed as such, continue to serve in the Constitutional Court, the main duty of which is to protect the democratic Constitutional order and fundamental rights and freedoms.

of "membership", "affiliation", "cohesion " or "connection". As it was indicated above, a "conviction" formed in respect of the Members in question by the absolute majority of the Plenary is sufficient for such assessment.

Having regard to both the above-mentioned characteristics of the instant case, information from the social circle that they are connected with the organization in question and the common conviction formed by the Members of the Constitutional Court over time, it was considered that the Members Alparslan ALTAN and Erdal TERCAN have links with the organization in question which are incompatible with their remaining in the profession under Paragraph (1) of Article 3 of the Decree-Law.

It will clearly harm the reliability and honour of the judiciary if the members, whose situations are assessed as such, continue to serve in the Constitutional Court, the main duty of which is to protect the democratic Constitutional order and fundamental rights and freedoms.

For the reasons explained above, it has been unanimously decided that it is not appropriate for the Members Alparslan ALTAN and Erdal TERCAN to remain in profession and that they be dismissed from profession.

CHAPTER SIX

STATISTICS

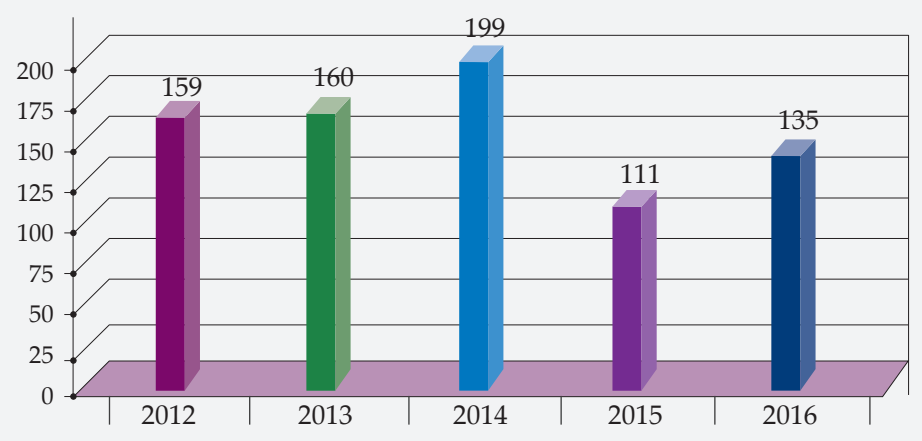
A. STATISTICS ON CONSTITUTIONAL REVIEW

In 2016, 34 cases were taken over from the previous year 2015.

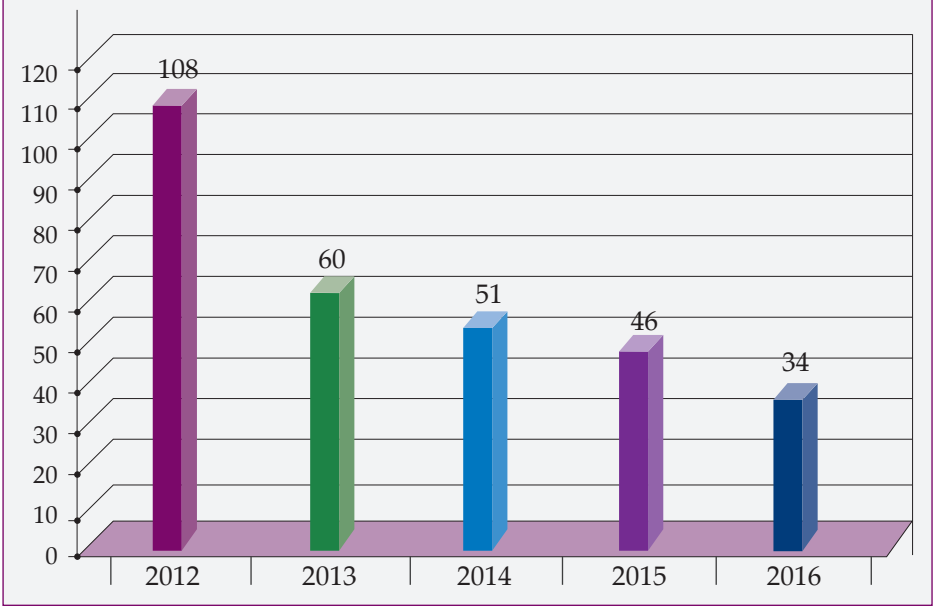
In 2016, 135 abstract&concrete review cases were received.

130 out of total 169 cases were concluded in 2016, 39 of the total were forwarded to 2017.

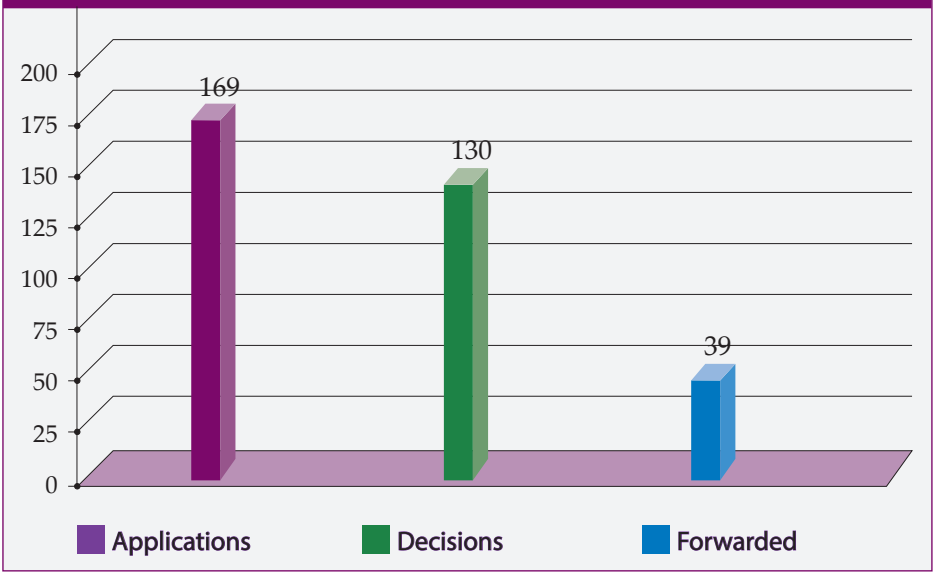
1. NUMBER OF CONSTITUTIONAL REVIEW (ABSTRACT&CONCRETE) APPLICATIONS PER YEAR



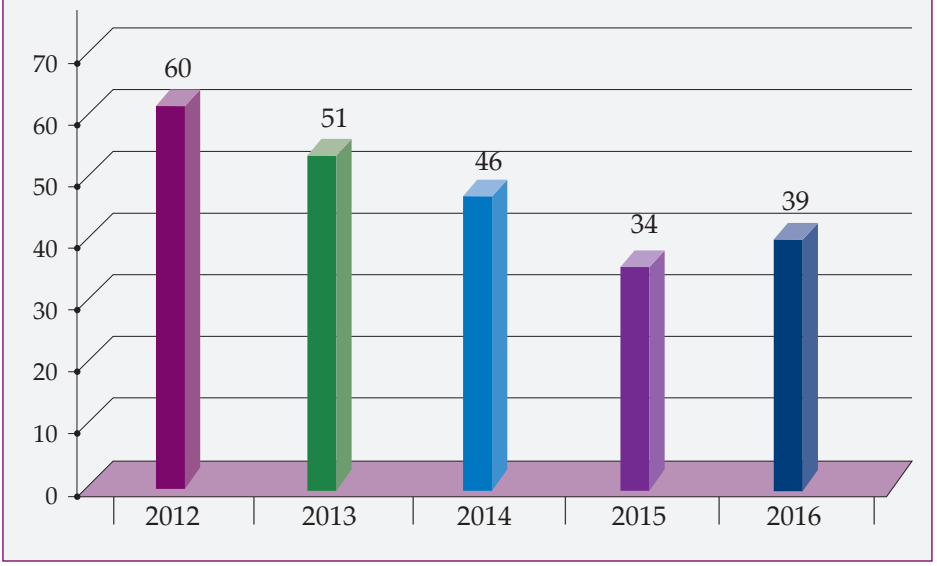
2. NUMBER OF CONSTITUTIONAL REVIEW (ABSTRACT&CONCRETE) APPLICATIONS FROM PREVIOUS YEARS



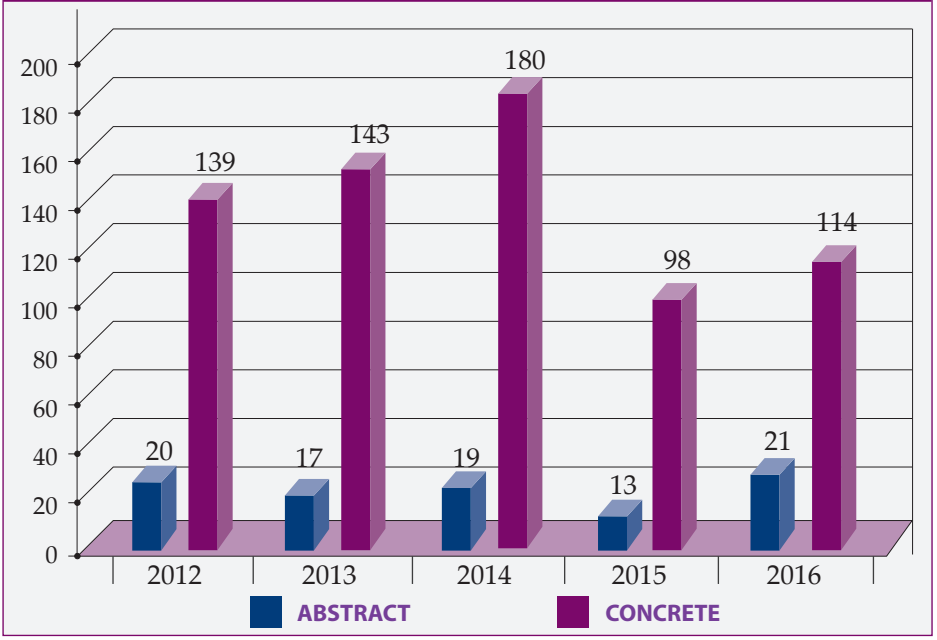
3. TOTAL NUMBER OF CONSTITUTIONAL REVIEW (ABSTRACT & CONCRETE) APPLICATIONS AND DECISIONS IN 2016



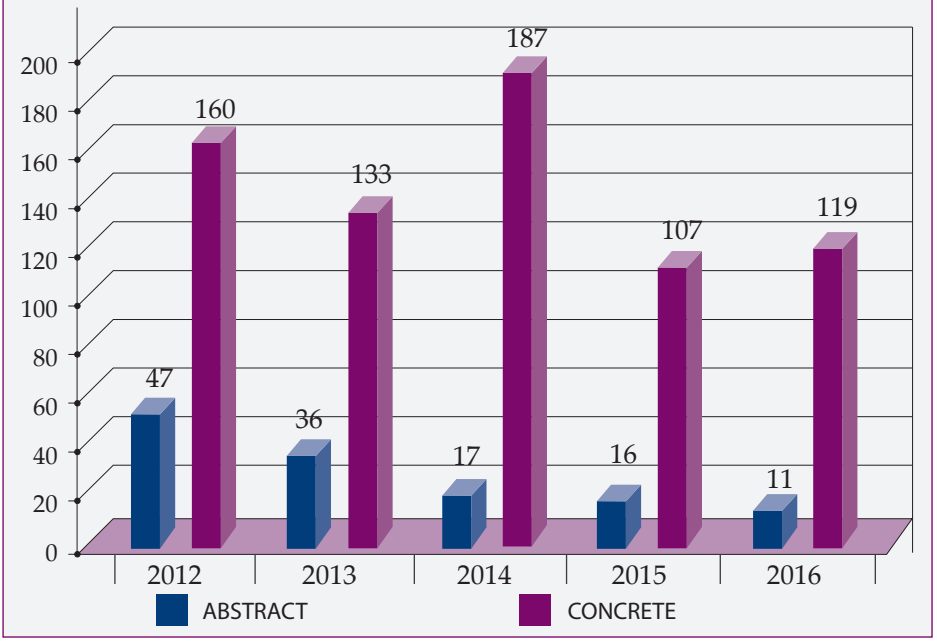
4. NUMBER OF CONSTITUTIONAL REVIEW (ABSTRACT & CONCRETE) APPLICATIONS FORWARDED TO NEXT YEAR



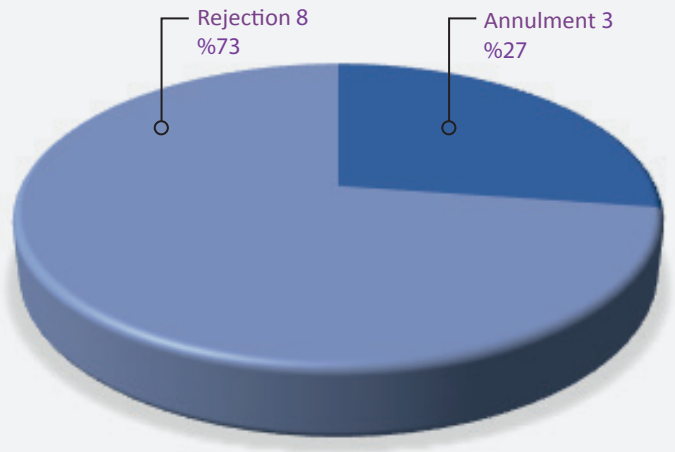
5. DISTRIBUTION OF CONSTITUTIONAL REVIEW (ABSTRACT & CONCRETE) APPLICATIONS INCOMING PER YEAR



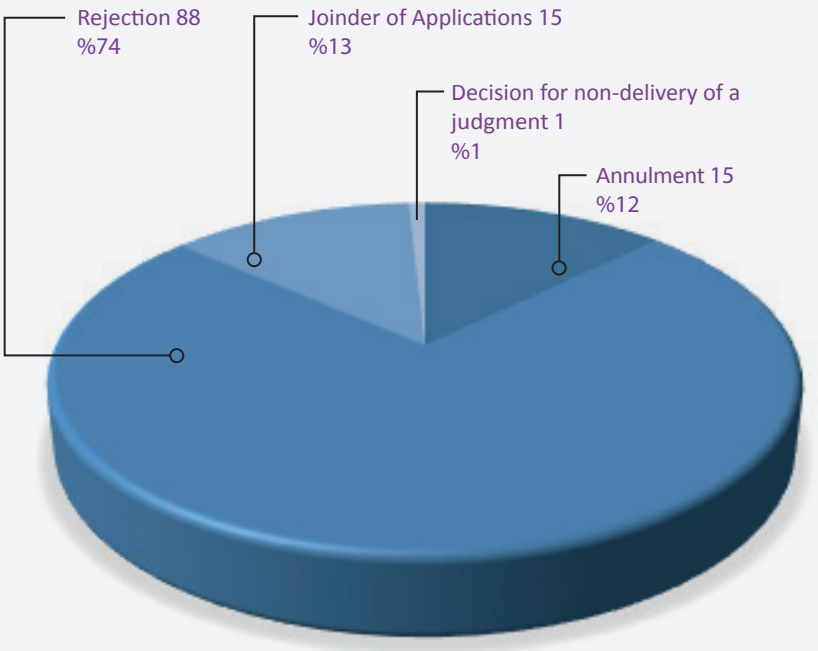
6. DISTRIBUTION OF CONSTITUTIONAL REVIEW (ABSTRACT & CONCRETE) APPLICATIONS DECIDED PER YEAR



7. DECISIONS IN ABSTRACT REVIEW CASES IN 2016



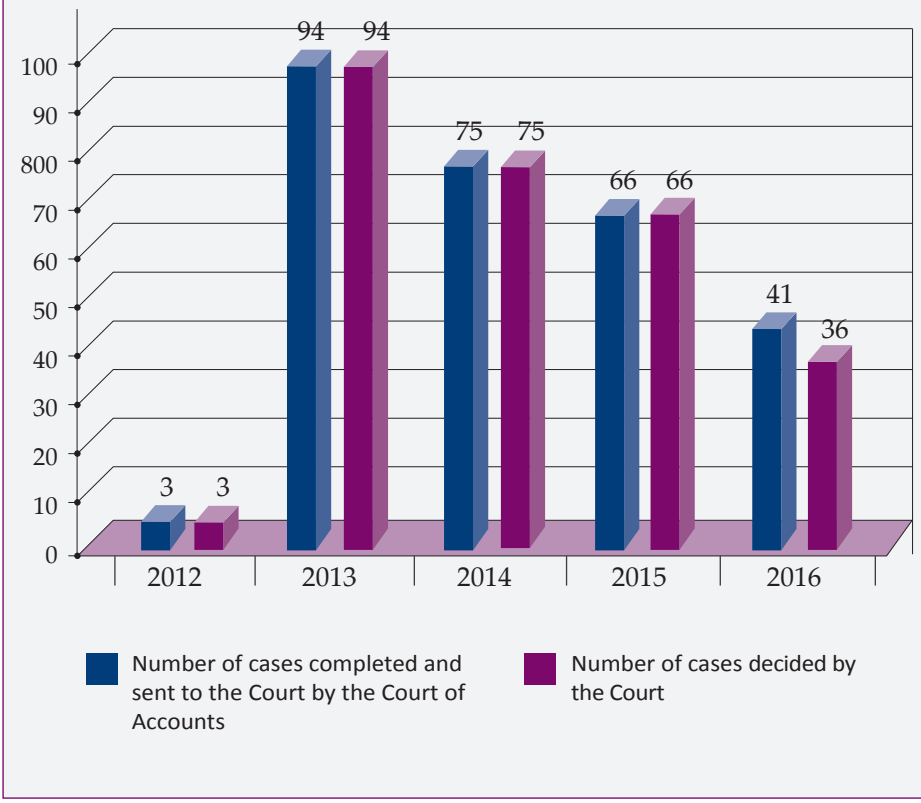
8. DECISIONS IN CONCRETE REVIEW APPLICATIONS IN 2016



B. STATISTICS ON FINANCIAL AUDIT OF POLITICAL PARTIES

In 2016, 36 out of 41 audits on financial reports completed and sent by the Court of Accounts were decided and 5 audits on financial reports that were not decided have been put on the agenda.

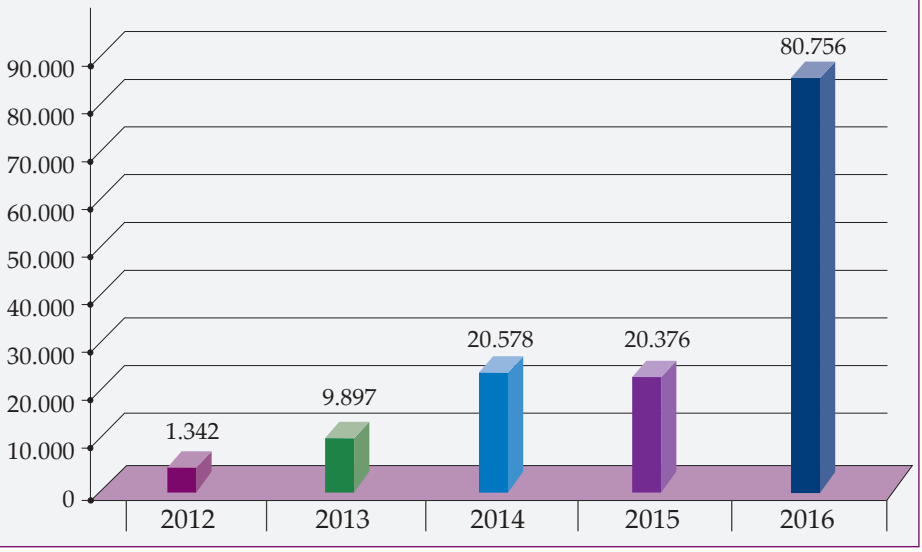
1. POLITICAL PARTY AUDITS FILED AND CONDUCTED PER YEAR



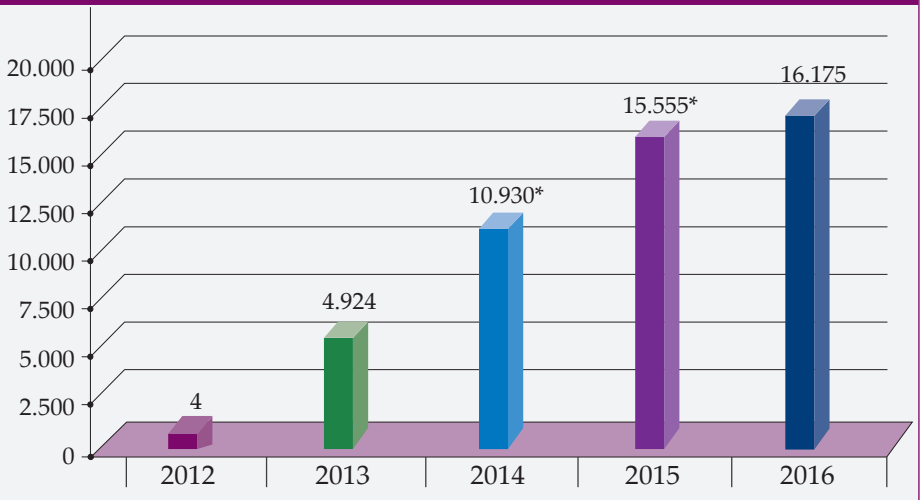
C. STATISTICS ON THE INDIVIDUAL APPLICATION REVIEW IN 2016

The Court decided on 16.175 individual applications out of 101.536 applications 80.756 of which were received in 2016 and 20.780 of which were taken over from the previous years.

1. NUMBER OF APPLICATIONS PER YEAR

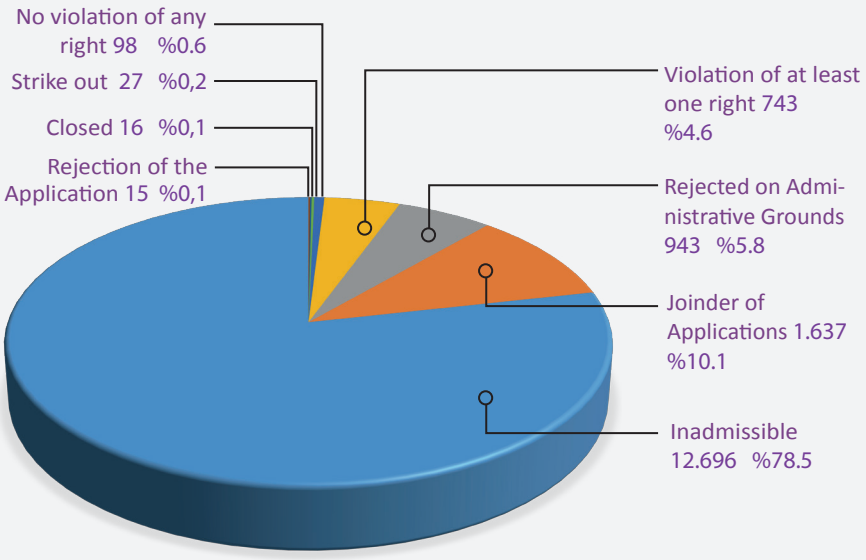


2. NUMBER OF APPLICATIONS DECIDED PER YEAR



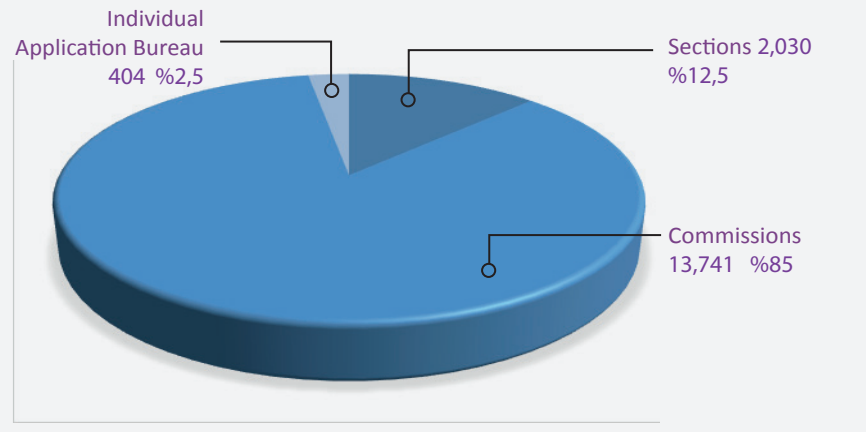
** As the cases that were reopened upon the acceptation of the objection to the administrative rejection are taken out of the decided cases, this data varies at a very low rate compared to those in 2015.*

3- DECISIONS RENDERED IN 2016

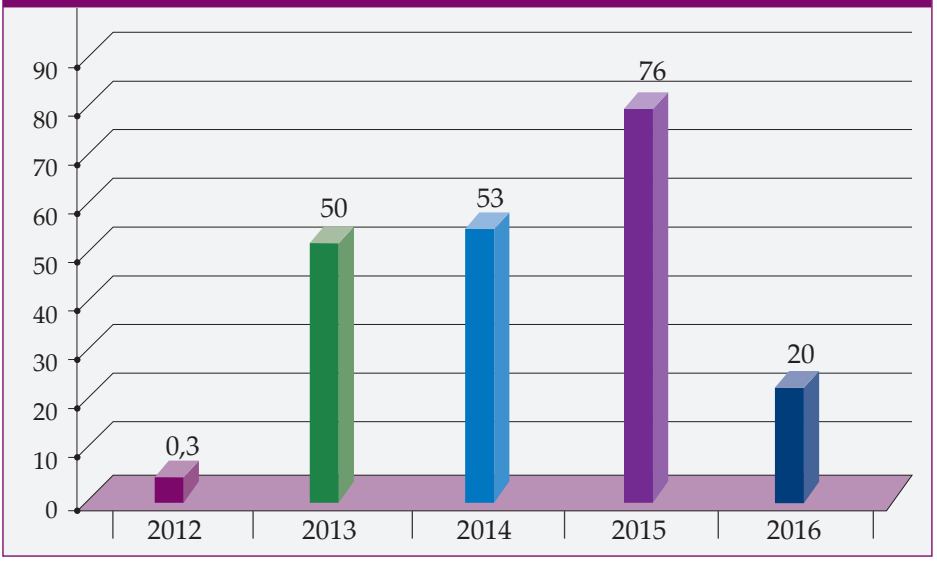


The Court declared 12.696 applications inadmissible, decided for joinder of 1.637 applications, and rejected 943 applications on administrative grounds. The Court found a violation of at least one right in 743 applications and no violation of any right in 98 applications. The Court decided to strike out 27, close 16 and reject 15 applications in 2016.

4. NUMBER OF APPLICATIONS DECIDED BY EACH UNIT OF THE COURT IN 2016

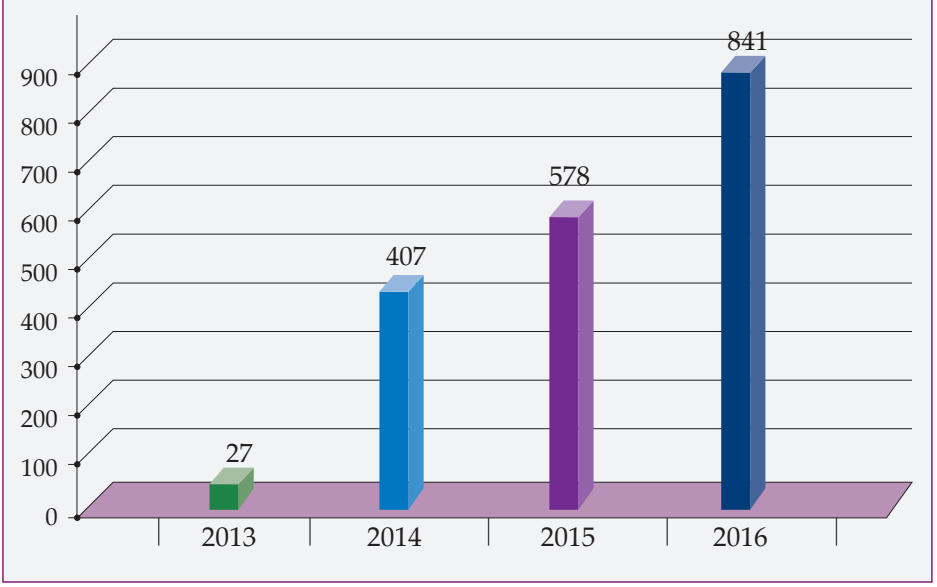


5. ANNUAL RATIO OF APPLICATIONS DECIDED AGAINST APPLICATIONS FILED

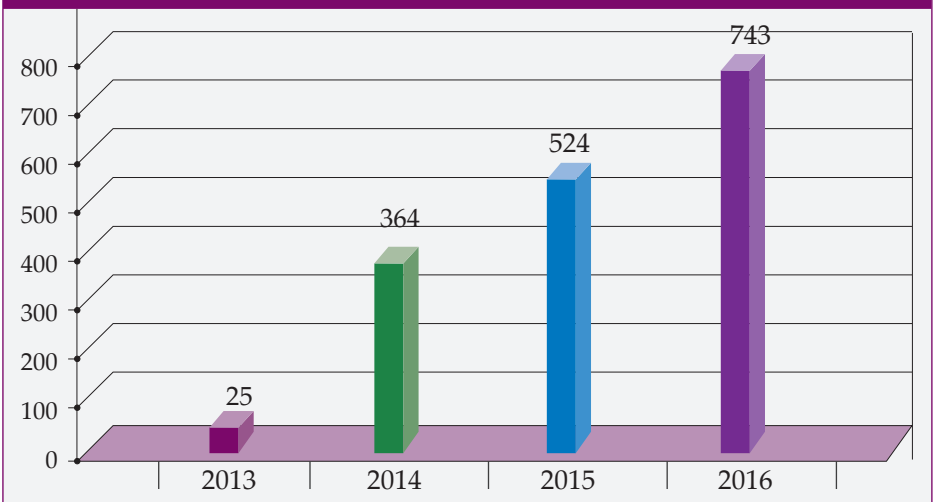


The ratio of the individual applications decided in 2016 to the number of applications received in the same year is 20%. Applications related to the measures implemented aftermath of the July 15 coup attempt have impact on this.

6. NUMBER OF APPLICATIONS EXAMINED ON MERITS PER YEAR

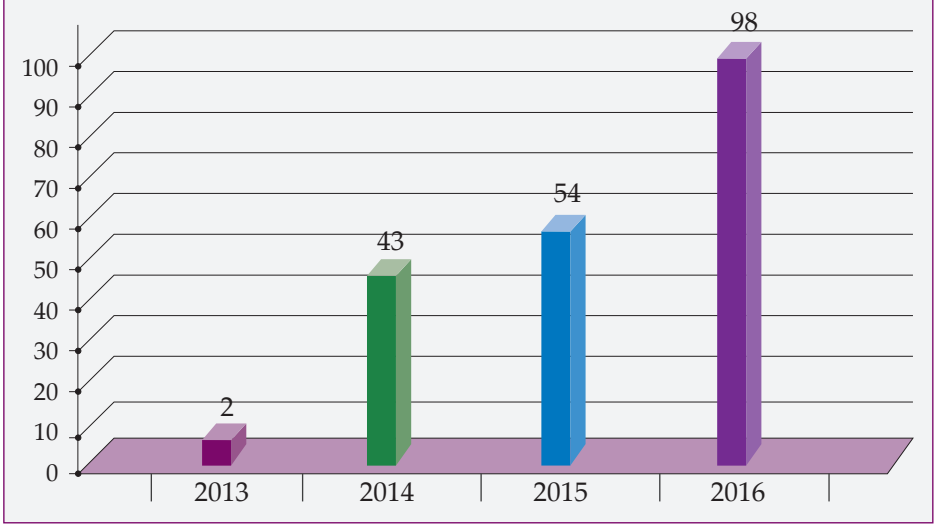


7- ANNUAL NUMBER OF APPLICATIONS DECIDED ON VIOLATION OF AT LEAST ONE RIGHT



Of 841 applications examined on the merits by the Plenary and the Sections, the Court rendered decisions on violation of at least one right in 743 applications and no violation any right in 98 applications.

8. ANNUAL NUMBER OF APPLICATIONS DECIDED ON NO VIOLATION OF A RIGHT



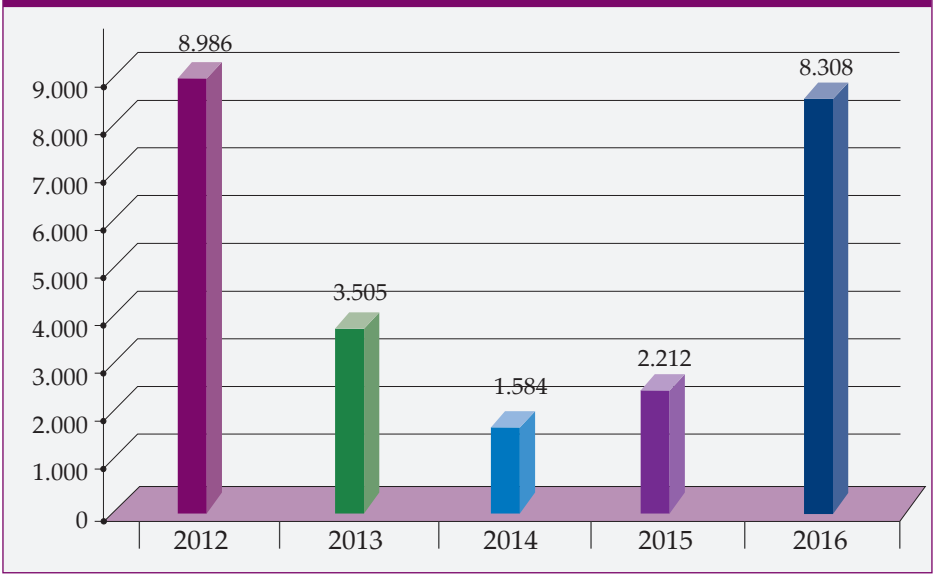
9- DIVERSITY AND INCREASE OF DECISIONS ON VIOLATION IN THE YEAR 2016

With regard to the decisions on violation, the decision on violation of the right to a fair trial stand out as the number of such decisions is 622.

YEAR	2013	2014	2015	2016	Toplam
Right to life	2	5	11	19	37
Prohibition of torture and ill-treatment	0	3	10	25	38
Right to liberty and security of person	7	35	28	18	88
Right to a fair trial	13	302	383	622	1.320
Freedom of expression	0	8	22	5	35
Right to education	0	0	0	0	0
Prohibition of discrimination	0	1	2	1	4
Freedom of religion and conscience	0	1	1	0	2
Protection of material and spiritual entity	1	1	3	9	14
Private/family life	0	2	20	44	66
Right to property	1	10	26	18	55
Right to elect and to be elected	2	4	0	0	6
Freedom of assembly and demonstration marches	0	0	2	0	2
Right to union	0	2	27	1	30
Freedom of association	0	0	1	1	2
Principles of crimes and punishments	1	4	5	1	11
Effective remedy	0	0	0	2	2
Total	**27**	**378**	**541**	**766**	**1.712**

Note: The fact that the number of violations is higher than that of applications and decisions arises from the Court's finding violations with respect to more than one right in certain individual applications.

10. ANNUAL NUMBER OF CASES FILED WITH THE ECtHR AGAINST TURKEY AND REFERRED TO A JUDICIAL FORMATION



With the introduction of the individual application into Turkish legal system after the adoption of the constitutional amendments with the referendum on 12 September 2010, it was aimed to resolve the disputes within our domestic law without requiring to apply to the European Court of Human Rights.

The change in the figures from receiving of the individual application by the Constitutional Court in 2012 to 2016 indicates that we have achieved this goal to a considerable extend. However, due to the applications made directly to the ECtHR regarding the measures implemented under the state of emergency in 2016, the statistics for this year have been realized as above.

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