# PART III: COMMENTED KEY DECISIONS

## *1. How to Read the AYM's Decisions*

The following explanations aim at making the editing process of the commented key decisions in this volume as transparent as possible. Their objective is twofold: first, the typical structure of AYM decisions is described and the selection criteria for the published parts of each decision are discussed. Second, we show to what extent these parts of the text have been edited.

While the decisions of the AYM should generally follow the same formal structure, considerable variations occur. In many cases, this can be explained by differences regarding review type, procedure, and subject matter, as well as the time of publication (i.e. the historical point in time when the Court decided the case). Some structural deviations, however, mirror inconsistencies in the writing and editing process at the Court. In the following, we try to reconstruct the reasons for those variations wherever possible and explain them in the footnotes. All translated decisions but one[682] are either abstract or concrete constitutional reviews. Therefore, Table 10 provides an overview of the basic structure of AYM decisions in these types of proceedings.[683]

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682 Decision E. 1994/09, K. 1994/28 (not published in the Official Gazette) on the Immunity of Members of Parliament (cf. Chapter III.2.5) concerns an application for annulment of a parliamentary decision regarding the Immunity of MPs. However, its formal structure is very similar to that of abstract and concrete constitutional review proceedings.

683 In other types of proceedings (cf. Chapters I.3.3-I.3.7) the structure of the ruling differs in some regards. In the party prohibition cases (cf. Chapters I.3.5 and II.4.1) for example, more room is given to the defense of the accused political party and to the oral statement of the Chief Prosecutor. Also, individual complaint decisions (introduced in 2012, cf. Chapter I.3.7), are structured differently: I. SUBJECT OF THE APPLICATION (BAŞVURUNUN KONUSU), II. PROCEDURE (BAŞVURU SÜRECİ), III. CIRCRUMSTANCES OF THE CASE (OLAY VE OLGULAR), IV. RELEVANT LAW (İLGİLİ HUKUK), V. ASSESSMENT AND LEGAL GROUNDS (İNCELEME VE GEREKÇE), VI. RULING (HÜKÜM).



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*Table 10: Structure of AYM decisions*

| | |
|---|---|
| **Application Number (Esas sayısı):** Year/Consecutive Number | |
| **Decision Number (Karar sayısı):** Year/Consecutive Number | |
| **Date of the Decision (Karar günü):** | |
| **Decision's date of publication and number in the Official Gazette (R.G. Tarih-Sayı):** | |
| **Concrete Constitutional Review Proceedings** | **Abstract Constitutional Review Proceedings** |
| SUBMITTING COURT(S)<br>İtiraz Yoluna Başvuran | APPLICANT<br>Davacı/İptal Davasını Açan |
| **PROVISION AT ISSUE**<br>İtirazın Konusu | Davanın Konusu |
| **I. THE CASE**<br>Olay | |
| **II. ARGUMENTATION OF THE SUBMITTING COURT(S)**<br>İtirazın Gerekçesi | **II. ARGUMENTATION**<br>İptal İsteminin Gerekçesi |
| **III. THE LAW**<br>Yasa Metinleri | |
| **IV. PRELIMINARY EXAMINATION**<br>İlk İnceleme | |
| **V. MERITS**<br>Esasın İncelenmesi | |
| **VI. CONCLUSION**<br>Sonuç | |
| **DISSENTING AND CONCURRING OPINIONS***<br>*Dissenting Opinions:* Muhalefet Şerhi, Karşıoy Yazısı<br>*Dissenting and Concurring Opinions:* Karşıoy ve Değişik Gerekçe, Karşıoy ve Farklı Gerekçe<br>*Concurring Opinions:* Değişik Gerekçe, Ek Gerekçe<br>*The AYM applies a great variety of different terms, here only the most important ones are mentioned. | |

Own compilation by the authors.

Most of the decisions printed in this volume start with the 'merits of the case'; this is the part where the Court presents its reasoning. Parts preceding the merits of the case (e.g. the case, the argumentation of the submitting court/applicants, and the relevant legal and constitutional provisions) are only translated, if they are necessary in order to understand the reasoning of the decision. The conclusion is also only translated if



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the ruling otherwise cannot be understood. Dissenting and concurring opinions are printed if they shed light on internal disagreement or contain additional arguments the Court did not provide before. In order to enable a better orientation within the decision, all headlines and/or numberings are mentioned even if the text of the respective paragraph has been omitted. This might be especially important if a reader wants to consult the original Turkish text.

As explained in Chapter II.3, we gave every decision included into our sample a title, indicating its respective topic. Whereas these 'headings' do not exist in the Turkish original – here, rulings are exclusively quoted by their application and decision numbers – they make it much easier to refer to respective decisions and to 'identify' them. In order to further contextualise the translated key decisions, every ruling is introduced with a short information sheet, containing all important data about a decision as well as a brief summary of its content. This box lists the application number (*esas sayısı*), the decision number (*karar sayısı*), and the date of the decision (*karar günü*), as well as the decision's date of publication and its number in the Official Gazette (*R.G. Tarih-Sayı*). In addition, the review type, the submitting court/applicant, the norms at issue, relevant constitutional and other legal provisions, and possible references to international law are indicated. As the translated decisions do not always include the conclusion and the voting, they are added together with the number of dissenting and concurring opinions (Dissenting Opinion = DO; Concurring Opinion = CO). Moreover, the justices on the bench are listed. Finally, a short summary of the case introduces the argumentation of the submitting court/applicants as well as the AYM's reasoning and ruling in the case at issue. In this summary, particularities of the respective decision are highlighted and possible references to related decisions are indicated.

The wording and the sentence structure of the translations are as close as possible to the original Turkish text. Also, typographic markers in the original, such as italics, bold print etc., are reproduced in the translated version. Only minor linguistic modifications have been made for the sake of clarity. Where paragraphs are omitted, for example, filler words (e.g. however, yet, but) at the beginning of the next (translated) paragraph have been left out, because the missing reference would lead to confusion rather than aid understanding. Sometimes – when the Court makes a very lengthy argument, when the text is difficult to translate due to argumentative weakness or a lack of structure, or when the AYM repeats an argument without giving any new information – the translated decisions summarise the respective parts. These summaries are set in italics and



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indented. Omissions are indicated with round brackets, and comments and clarifications by the translators are set in square brackets. Notes of the editors (i.e. additional information, comments and clearifications) are provided in footnotes.

In order to maintain consistency, the translated decisions follow the same style of heading, even if the Court deviates from it every now and then. The main headings are always capitalised (e.g. I. CASE). In several sub-headings the Court mixes Arabic and Roman numerals in its decisions. In the translations the roman numeral I is replaced with an Arabic one (1), since the Court continues its numeration with Arabic numbers (2, 3, 4). Moreover, and these might well be typos, in not all of the original rulings are the names of justices capitalised. Since this does not seem to be more than an insignificant anomaly, the names of justices in the translated decisions are always capitalised.

When the AYM cites the Constitution, when referring to rules of procedure, laws, case law, international law, or academic literature, the translated decisions make use of the 'official translations' of the respective document. The translations do not deviate from the official translations of the Constitutions. However, the term "laicist" is used instead of "secular", and "laicism" instead of "secularism". While these terms are often used synonymously, the Turkish text of the Constitution and the official AYM decisions use the Turkish word "laik"/"laiklik", which is better translated by the English terms "laicist"/"laicism".[684]

The Turkish language does not have gender-specific pronouns. We have decided to use 'they, their, and them' as they have long been grammatically acceptable as gender-neutral singular pronouns. Many English style guides accept singular 'they' as grammatically correct.[685] However, when the Court literally refers to constitutional text, we stick to the official translation of the 1982 Constitution, which uses gender-specific pronouns (he/she, his/her, or him/her).

684 On differences between "secularism" and "laicism" see Casanova 1994; Göztepe 2004.

685 See for example Peters 2004, p. 538.



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# 2. Decisions on State Organisation

## 2.1 Limits of Administrative Privilege in Prosecution

***Application Number:*** *1991/26* ***Decision Number:*** *1992/11*

***Date of Decision:*** *27/02/1992*

***Date of Publication and Number of the Official Gazette:*** *23/11/1992 - 21414*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Dursunbey Criminal Court of First Instance (Dursunbey Asliye Ceza Mahkemesi)*

***Provisions at Issue:*** *Provisional Law on the Trial of Civil Servants (04/02/1329)*[686]

***Relevant Constitutional Provisions:*** *Art. 9, 36, 125, 140 (1982 TA)*

***Voting:*** *Rejected unanimously* (regarding Art. 1, 2, 3, 4, 5, 7, 13, 18)
*Accepted by majority of 7:4 justices* (regarding second sentence of Article 6)

***Dissenting and Concurring Opinions:*** *3 DO*

***Justices:*** *President Yekta Güngör ÖZDEN; Vice President Güven DİNÇER; Members: Servet TÜZÜN, Mustafa ŞAHİN, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Erol CANSEL, Yavuz NAZAROĞLU, Haşim KILIÇ, Yalçın ACARGÜN*

The submitting court challenges a provision of the Provisional Law on the Trial of Civil Servants which stipulates, that civil servants can be prosecuted and tried by administrative units, claiming that this violates the rule of law principle, the principle of a separation of powers, and the principle of equality before the law. The AYM argues that since it is only an investigation, and not per se an activity that requires independent judicial authority, it is not conflicting with the Constitution. Moreover, the 1982 Constitution specifies that prosecution of civil servants shall be under the authority of administrative bodies. However, the Court rules that it is unconstitutional that decisions determining whether a case might be brought to court are final and free from constitutional review or objection through either prosecutor or prosecuted. Hence, this part of the law is annulled.

(…)

686 This date is according to the Rumi calendar (*Rumi Takvim*), which was officially used by the Ottoman Empire after Tanzimat (1839) and by its successor, the Republic of Turkey, until 1926. It equates to the date 04/02/1913 according to the Gregorian calendar. As the Provisional Law on the Trial of Civil Servants was enacted during the era of the Ottoman Empire no number is assigned to it.



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## V. MERITS

After examination of the report on the substance of the case, the judicial referral and its attachments, the law which is considered unconstitutional, the respective constitutional provisions and the explanatory memorandums of both constitutional norms and the laws requested to be annulled and other legislative acts, the following was decided:

### A. Position of the Provisional Law on the Trial of Civil Servants in Our Legal System

For more than a century, in our country civil servants have been subject to a special investigative method in the prosecution of crimes committed by exploiting the power given to them through their office. (…)

This system is based on the Provisional Law on the Trial of Civil Servants, and has been implemented in the course of all three Constitutions of 1924, 1961, and 1982. The law has met the needs of public administration, and established the relationship between public administration and judiciary concerning the trial of civil servants.

### B. Structure of the Provisional Law on the Trial of Civil Servants

The Provisional Law on the Trial of Civil Servants regulates the prosecution of crimes committed by civil servants in exploiting their offices prior to the opening of a trial before courts.

Pursuant to this law, such a process is organised in the following way: In order to initiate a criminal case before a court, administrative boards have to decide whether or not civil servants are put on trial; and they have to finalise their decision. The examination is carried out in two different stages: decisions of County Boards are examined by Province Boards, and decisions of Province Boards are examined by the Council of State ex officio or upon request. First instance decisions on senior civil servants are taken to the Council of State, and the Council of State also finalises these decisions.

The phases before initiating proceedings are coordinated by this law, and this norm is called “preliminary examination”.

The difference between the prosecution system regulated by the Provisional Law on the Trial of Civil Servants and the ordinary system



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of judicial prosecution is the following: the authorities conducting and concluding prosecution are different.
(…)

C. Opinions against the Current System

To apply special provisions to the trial of civil servants has been discussed in Turkish law circles for a long time. Those discussions and criticism in academic and judicial circles have mostly been based on constitutional provisions and principles, even though some of them were related to the question of judicial conformity. In these discussions it was claimed that civil servants and boards other than the Council of State were not independent in conducting investigations because of their role as administrative actors, and therefore their work should be subject to legal review. To confine the prosecution of criminal charges to an administrative system where the Council of State is the highest authority violates the idea of separation of powers and the idea of a constitutional system based on the principle of separate branches within the judiciary; thus, the prosecution of civil servants should not fall under the responsibility of the executive. Besides, people do not trust these investigations and decisions. And, since the investigations are conducted by public servants that do not have the tenure of a judge, such a special prosecution system violates the equality principle of the Constitution.

D. Issue of Unconstitutionality

(…)
2. (…)

The authorities responsible for investigating crimes that fall under the jurisdiction of the Provisional Law on the Trial of Civil Servants are administrative institutions. In order to examine this special prosecution system, which is very different from criminal procedural law in terms of its compliance with the Constitution, first of all its constitutional base has to be scrutinised; furthermore it is necessary to inquire how investigations under this law and decisions based on those investigations effect judicial authority.

In criminal procedural law the authority responsible for any prosecution is the public prosecutor. The system of the Provisional Law on the Trial of



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Civil Servants is based on the transfer of that competence to administrative institutions.

Neither the 1924 nor the 1961 Constitution include any provision on the trial of civil servants, but the Constitutional Court ruled on this matter under the 1961 Constitution, and concluded that the system did not violate the Constitution as a whole.

In the last paragraph of Article 129 of the 1982 Constitution, which defines powers and duties of civil servants, this matter is clarified:

"Prosecution of public servants and other public employees for alleged offences shall be subject, except in cases prescribed by law, to the responsibility of the administrative authority designated by law."

It is impossible to find any explanation as to why this provision was integrated in the 1982 Constitution, neither in preparatory documents nor in legislative texts. Nevertheless, this norm provides – above all for the Provisional Law on the Trial of Civil Servants – the constitutional basis for the special investigation and permission system for civil servants.

However, the constitutional basis of this law is not an obstacle to handle provisions in question along with other rules of the Constitution regarding the judicial power.

3. Article 9 of the Constitution precisely and inarguably states: judicial power shall be exercised only by independent courts, and courts may not share this power with other institutions.

An investigation carried out by administrative organs cannot be seen as falling into the responsibility of "judicial power". This is so because such an investigation cannot be counted as an application of judicial power, irrespective of its name. In fact, the clauses of the Provisional Law on the Trial of Civil Servants concerning the transfer of judicial power to administrative authorities and related clauses were annulled by earlier Constitutional Court decisions.

The Constitution does not include any clause defining that an investigation shall be carried out only by judges or public prosecutors. Nevertheless, to hand over the power of investigation to administrative authorities is an exceptional and unorthodox method and not the general practice.

Therefore, to conduct investigations through administrative authorities does not conflict with the regulation that "duties of judges and prosecutors shall be carried out by professional judges and public prosecutors", as specified in Article 140 of the Constitution.

4. Decisions, based on the investigation regarding the prosecution request of civil servants, which determine whether or not to continue prosecution



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At the end of investigations of crimes committed by civil servants, decisions may conclude "trial is required" or "there is no need for trial".

The fact that decisions of Province Boards concluding "there is no room for trial" are final decisions binding County Boards is of special importance since these decisions result in outcomes similar to decisions of acquittal taken by judges.

County and Province Boards and their members have none of the constitutional attributes courts and judges possess. Therefore, County and Province Boards cannot take judicial decisions. This means that constitutional principles like the "establishment by law", the "independence and impartiality of courts and judges", and "fair and open trial" cannot be implemented within the current system of trial of civil servants.

The fact that perpetrator, plaintiff or the State itself cannot object to such a decision, which means that this may have judicial effects, implies that Province Boards are exercising judicial power.

Article 6 of the law at issue which impedes appeals against Province Board decisions violates Article 9 of the Constitution, which prescribes that judicial power shall be exercised only by independent courts; and it violates Article 36 of the Constitution, which provides the right of litigation either as plaintiff or defendant; moreover it is contrary to the right to fair trial before the courts through lawful means and procedures. It also violates Article 125 of the Constitution, which prescribes that recourse to judicial review shall be available against all actions and acts of administration. Therefore, Article 6 of the law in question, which reads "an objection against a decision of a board shall be examined by a higher board", has to be annulled with respect to Province Board decisions.

İhsan PEKEL, Erol CANSEL, Yavuz NAZAROĞLU and Haşim KILIÇ did not agree with this view.

5. (…)

6. Annulment of Article 6 of the Provisional Law on the Trial of Civil Servants which impedes objections against Province Board decisions entails a definition of how to re-regulate application methods, and the determination of authorities that can act against decisions of these boards.

Since such a legal gap would adversely affect public interest, the decision for annulment must enter into force six months after publication in the Official Gazette; this is pursuant to Article 153 (3) of the Constitution, and Article 53 (4) of the Law on the Establishment and Rules of Procedure of the Constitutional Court.

(…)



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## VI. CONCLUSION

The Court concludes that,

In the preliminary examination of the reviewed Provisional Law on the Trial of Civil Servants (04/02/1329 [1913]), regarding the restrictive clause[687], the following has been decided:

A- Articles 1, 2, 3, 4, 5, 7, 13, and 18 are not unconstitutional, and the claim of unconstitutionality of these Articles has been rejected UNANIMOUSLY;

B- The second sentence of Article 6, which reads "an objection against a decision of a board shall be examined by a higher board", violates the Constitution on the grounds that it impedes objections against decisions of Province Boards, and therefore it must be annulled. The decision was taken BY MAJORITY OF VOTES, with dissenting votes from İhsan PEKEL, Erol CANSEL, Yavuz NAZAROĞLU and Haşim KILIÇ;

C- Apart from the provisions regulated under Article 6, which have been declared unconstitutional, no further provisions are decided to be unconstitutional and therefore the application is rejected UNANIMOUSLY;

D- In order to fill the legal gap resulting from annulment of Article 6, and pursuant to Article 153 of the Constitution and Article 53 of the Law on the Establishment and Rules of Procedure of the Constitutional Court, the decision for annulment, taken UNANIMOUSLY, shall enter into force six months after publication in the Official Gazette;

This decision was reached on 27/02/1992.

(…)

687 In the Turkish original, the expression "eş karaşılık" is used.



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## 2.2 Stay of Execution and Freedom to Claim Rights

***Application Number:*** *2006/33* ***Decision Number:*** *2006/36*

***Date of Decision:*** *09/03/2006*

***Date of Publication and Number of the Official Gazette:*** *10/01/2007 - 26399*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by the Thirteenth Chamber of the Council of State (Danıştay Onüçüncü Dairesi)*

***Provisions at Issue:*** *Art. 128 (2)*[688] *of the Banking Law No. 5411 (19/10/2005)*

***Relevant Constitutional Provisions:*** *Art. 2, 36, 125 (1982 TA)*

***International Treaties/References:*** *UDHR*

***Voting:*** *Accepted by majority of 6:5 justices*

***Dissenting and Concurring Opinions:*** *1 DO*

***Justices:*** *President Tülay TUĞCU, Vice President Haşim KILIÇ; Members: Sacit ADALI, Fulya KANTARCIOĞLU, Ahmet AKYALÇIN, Mehmet ERTEN, A. Necmi ÖZLER, Serdar ÖZGÜLDÜR, Şevket APALAK, Serruh KALELİ, Osman Alifeyyaz PAKSÜT*

The submitting 13th chamber of the Council of State asks for annulment of Article 128 (2) of the *Banking Law*, as it requires a hearing of stay of execution in administrative actions against the Fund Board (Fon Kurulu) and reduces the period for preparing a defence. These regulations restrict the applicants´ freedom to claim rights as well as defendants' rights. The AYM rules that Article 128 (2) of the *Banking Law* shall be annulled, as it delays courts´ decisions, therefore violating Articles 2 (Characteristics of the Republic), 36 (Freedom to claim rights), 125 (Judicial review). Further the Court rules that the execution of the (unconstitutional) Article 128 (2) of the *Banking Law* shall be suspended until the decision is published in the Official Gazette in order to prevent damage which is difficult or impossible to compensate for.

(…)

688 The Banking Law (No. 5411) stipulates under Article 128 (2): "A separate hearing shall be carried out for request of stopping enforcement in the administrative lawsuits to be filed against Fund Board decisions. In this case, the thirty-day period specified in Article 17 (5) of the Administrative Lawsuit Procedures Law No. 2577 shall not be applied. The applications for stopping enforcement shall not be concluded before hearing the defense of the Fund. The relevant parties shall present their defense within seven days following the notification of therequest for stopping enforcement thereto. Otherwise, the decision shall be made without waiting for the defense."



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## V. MERITS

After examination of the report on the substance of the case, the judicial referral and its attachments, the law which is considered unconstitutional, the respective constitutional provisions and the justifications of both constitutional provisions and the laws requested to be annulled and other legislative acts, the following was decided:

In the judicial referral it is claimed, that the provision in question violates Articles 2, 36 and 125 of the Constitution, on the grounds that Article 128 (2) of the Banking Law actually impedes stay of execution from the date of initiating proceedings, even though it does not repeal the competence of the Council of State for taking any decision regarding stay of execution. In addition, it is stated that the provision in question causes a delay in the conclusion of applicants' requests for stay of execution and it shortens the defendants' time for preparation of defense; therefore, the right to legal remedies of applicants and the defendants' right to defense are being restricted.

The provision in question prescribes the requirement of conducting a hearing for suspension of execution in administrative actions against the Fund Board, as distinct from the Administrative Jurisdiction Procedure Law. Besides, this provision reduces the period of preparing a defense from thirty days to seven days, and if the defendant does not defend themselves within this period, the decision shall be taken without hearing the defense of the defendant.

In Article 36 of the Constitution, titled "Freedom to claim rights", it is stated that "*everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. No court shall refuse to hear a case within its jurisdiction*." In the explanatory memorandum of this article it is stated, that "*in the first paragraph of the article, the right of litigation either as plaintiff or defendant, which is the initial condition of the right to claim rights, is laid down; and following that, as a corollary, it is stated that everyone has the right to a fair trial before the courts. The relevant law of jurisdictional procedures and judicial bodies shall be established fairly as the Constitution requires this*".

The right to claim rights is a basis for social peace, and besides, it provides a basis for individuals to reach justice, to enjoy their rights and recourse to legal remedies. The right to claim rights has a special position in international treaties, and it is found in Articles 6-12 of the Universal Declaration of Human Rights. The right to claim rights includes taking advantage of legal remedies for the purpose of development of human



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beings and it is an essential element of the principle of rule of law and contemporary democracy.

Pursuant to Article 142 of the Constitution the formation, duties and powers, functioning and trial procedures of the courts shall be regulated by law. The measures, which are taken by the courts before final decisions in order to enable future applicability and effectiveness of their own rulings, are among procedural provisions. The provisions about suspension of execution, like other procedural provisions, can be regulated freely by the legislative body provided that they are not contrary to the Constitution.

In Article 125 (5) of the Constitution, titled "Judicial review", it is stated that "*a justified decision regarding the stay of execution of an administrative act may be issued, should its implementation result in damages which are difficult or impossible to compensate for and, at the same time, the act would be clearly unlawful*". In the explanatory memorandum of this Article it is stated that, "*... in which cases a decision for suspension of execution would be taken is clarified. In this manner, both of two prerequisites shown in the Article must exist and the decision must be justified*". That is to say, "*implementation of an administrative act must result in damages which are difficult or impossible to compensate for*", and additionally "*the act in question must be clearly unlawful*." The Constitution does not include any other prerequisite regarding a stay of execution. However, pursuant to the provision in question, even though it is found that "*implementation of an administrative act must result in damages which are difficult or impossible to compensate for*", a decision of stay of execution cannot be taken immediately, since the statement of the defendant institution must be taken and a hearing must be conducted first. Despite the fact that the provision in question does not alter prerequisites of stay of execution, it can lead to damages which are difficult or impossible to compensate for, as it delays courts' decisions. According to Article 125 (5), which reads "*a justified decision regarding the stay of execution of an administrative act may be issued, if its implementation resulted in damages which are difficult or impossible to compensate for*", the purpose of stay of execution in administrative judicial procedure is to enable individuals to enjoy their right to claim rights more efficiently. It is obvious, that the law in question will affect that purpose adversely as it renders the prerequisite meaningless, following to which the implementation of an administrative act must result in damages which are difficult or impossible to compensate for. This will harm the right to claim rights of plaintiffs, and furthermore, since it reduces the period of preparation of a defense from thirty days to seven days, it will harm the right to claim rights of defendants.



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For the aforementioned reasons, Article 128 (2) of the Banking Law No. 5411 violates Articles 2, 36 and 125 of the Constitution and must be annulled.

## VI. THE REQUEST OF STAY OF EXECUTION

On 09/03/2006, the Court concluded BY MAJORITY OF VOTES that the execution of Article 128 (2) of the Banking Law No. 5411 of 19/10/2005 shall be SUSPENDED until the decision is published in the Official Gazette in order to prevent damage which is difficult or impossible to compensate for, which may be caused by implementation of this paragraph; with the dissenting votes of Haşim KILIÇ, Sacit ADALI, Ahmet AKYALÇIN, Serdar ÖZGÜLDÜR and Serruh KALELİ.

## VII. CONCLUSION

On 09/03/2006, the Court concluded BY MAJORITY OF VOTES that Article 128 (2) of the Banking Law No. 5411 of 19/10/2005 shall be ANNULLED, since it violates the Constitution. Haşim KILIÇ, Sacit ADALI, Ahmet AKYALÇIN, Serdar ÖZGÜLDÜR and Serruh KALELİ did not agree with this conclusion.
(…)



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## 2.3 Limitation of Executive Influence on Selection Procedures

***Application Number:*** *2005/85* ***Decision Number:*** *2009/15*

***Date of Decision:*** *29/01/2009*

***Date of Publication and Number of the Official Gazette:*** *03/04/2009 - 27189*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by the President of the Republic Mr Ahmet Necdet Sezer, and by Members of the TBMM Mr Ali Topuz (deputy chairman of the main opposition party CHP parliamentary group), Mr Mehmet Neşşar and 116 other Members of the TBMM*

***Provisions at Issue:*** *Art. 1, 2, 3 of Law No. 5397 On the Amendment of Various Laws (03/07/2005), which amend Law No. 2559 On the Duty and Competences of the Police (04/07/1934), and Law No. 2803 On the Organisation, Duties and Competences of the Gendarmerie (10/03/1983), and Law No. 2937 On State Intelligence Services and the National Intelligence Organisation (01/11/1983)*

***Relevant Constitutional Provisions:*** *Art. 2, 6, 7, 8, 11, 104, 105, 123, 128 (1982 TA)*

***Voting:*** *Unanimously accepted by 11 justices*

***Justices:*** *President Haşim KILIÇ; Vice President Osman Alifeyyaz PAKSÜT; Members: Sacit ADALI, Fulya KANTARCIOĞLU, Ahmet AKYALÇIN, Mehmet ERTEN, A. Necmi ÖZLER, Serdar ÖZGÜLDÜR, Şevket APALAK, Serruh KALELİ, Zehra Ayla PERKTAŞ*

The applicants ask for an annulment of different clauses in several laws which were amended by Articles 1, 2, 3 of Law No. 5397 *On the Amendment of Various Laws*. The amendments deal with the question of which persons are authorised to control interception activities. The applicants claim that the provisions in question violate the Constitution, because such kind of control has to be executed through a person or commission authorised by the Prime Minister. However, the eligibility criteria for this person or commission, as well as for the staff of the Presidency of Communication and Telecommunication, are not specified in the amendment law. The Court rules unanimously that the provisions in question violate the Constitution, as eligibility criteria are not specified. Regarding the President of Communication and Telecommunication, eligibility criteria are defined. Insofar, a violation of Article 128 of the Constitution (Freedom of the press) cannot be found. Nevertheless, a joint decree is necessary to provide legal validity, and hence the provision in question violates Article 8 (Executive power and function) and 104 (Duties and powers of the President of the Republic) of the Constitution.

(…)

## V. MERITS

After examination of the report on the substance of the case, the application and its attachments, the laws requested to be annulled, the respective constitutional provisions and the justifications of both constitutional pro-



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visions and the laws requested to be annulled and other legislative acts, the following was decided:

## A- General Explanation

In additional Article 7 (1) of Law No. 2559 On the Duty and Competences of the Police, it is stated that "*the police, in order to offer security, provides intelligence throughout the country so as to take preventive measures regarding the indivisible integrity of the State with its territory and its nation, the constitutional order and general security and peace; and for this purpose it collects and evaluates information, and conveys it to competent authorities or to the field of practice. It collabourates with other intelligence departments of the State*".

In Article 7 (a) of Law No. 2803 On the Organisation, Duties and Competences of the Gendarmerie, duties of the gendarmerie are listed as "*to provide, to guard and to keep security, peace and public order; to prevent, to watch and to investigate smuggling; to take measures to prevent crimes; to safeguard prisons and detention houses*".

*The Court continues: pursuant to Articles 1 and 2 of Law No. 5397, which have amended Law No. 2559 "On the Duty and Competences of the Police", and Law No. 2803 "On the Organisation, Duties and Competences of the Gendarmerie", the Police and Gendarmerie have been endowed with further competences relevant to their field of responsibility, in order to be able to better protect citizens and prevent crimes. According to that, the police and the gendarmerie can detect telecommunications, listen in on conversations, record and draw on signal information with the aim of preventing crimes regulated under Article 250 (1a, b, c) of the Criminal Procedure Law No. 5271; except for spying crimes. The measures taken should rely on a judge´s decision; or in undelayable cases on a written order from the Director General of Public Security, or the Commander or Head of the Intelligence Department of the Gendarmerie Forces.*[689]

In Article 4 of the Law of the National Intelligence Organisation and State Intelligence Services No. 2937, duties of the National Intelligence Organisation have been specified. Article 6, which was amended by Article 3 of Law No. 5397, regulates that the National Intelligence Organisation can detect and listen in on conversations of telecommunication and record

689 The original Turkish sentence is very complicated, therefore this paragraph is not literally translated. The translation focuses on the information provided in the paragraph, while partially summarising some of the complicated and/or unintelligible bits.



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and draw on signal information, about matters in its competence, in cases of serious threats against the fundamental characters of the State governed under Article 2 of the Constitution. This is allowed by law in order to provide security of the State, to reveal spying actions, to determine the acts that disclose State secrets and to prevent terrorist activities, by relying on a judge´s decision or in undelayable cases, on a written order of the Undersecretary or the deputy Undersecretary of the MİT.

In Law No. 5397, it is stated that interception within the scope of Article 135 of CMK No. 5271 and interception aiming at the prevention of crimes shall be done by the Presidency of Communication and Telecommunication within the body of the Telecommunication Institution. In addition, it is stated that copies of records shall be eradicated within ten days at the latest, after the taken measures have expired. A minute shall be taken about the eradication of the copies and these minutes shall be retained in order to be submitted when inspections are conducted. Information obtained from interception activity shall not be employed for any purpose other than those specified in the laws concerned. The principle of confidentiality shall be applied in the process of retaining this information. Beginning and ending time and date of interception and the identity of the person who performed the interception activity shall be noted in the minutes.

B- Examination of Sentences and Phrases to be Annulled

1- Examination of the phrase “Person or Commission to be authorised exclusively by the Prime Minister” in Articles 1, 2 and 3 of Law No. 5397

In the application, it is stated that, procedures and provisions on listening in on private conversations within a process of an investigation or a trial or for the purpose of prevention of crimes are regulated by amendments done by Articles 1, 2 and 3 of Law No. 5397, in the Law No. 2937 On State Intelligence Services and the National Intelligence Organisation, in the Law No. 2559 On the Duty and Competences of the Police, and in the Law No. 2803 On the Organisation, Duties and Competences of the Gendarmerie in accordance with Article 135 of the CMK No. 5271. On the other hand, it is claimed that the provision in question violates Articles 2, 6, 7, 8, 11, 123 and 128 of the Constitution, on the grounds that, in addition to inspectors of related institutions, it enables persons or



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a commission who shall be authorised exclusively by the Prime Minister to conduct such activities, which are relevant to the public order and the public security; and it does not indicate eligibility criteria and required number of relevant staff for those activities.

*In Law No. 5397, procedures and rules of interception activities by the police, the* gendarmerie and the National Intelligence Organisation are regulated; and review of these activities is governed under additional Article 7 (9) of Law No. 2559, which was amended by Article 1 of Law No. 5397, where it is stated that "…*chiefs of institutions respectively, inspectors of Directorate General of Public Security and relevant ministries and persons or a commission exclusively authorised by the Prime Minister*" and also in additional Article 5 (8) of Law No. 2803 which was amended by Article 2 of Law No. 5397, in which it is stated that "…*chiefs of institutions respectively, inspectors of General Commandership of Gendarmerie and relevant ministries and persons or a commission exclusively authorised by the Prime Minister*", and in Article 6 (8) of Law No. 2937, which was amended by Article 3 of Law No. 5397, in which it was stated that "…*chiefs of institutions respectively, inspectors of the Prime Ministry and relevant ministries and persons or a commission exclusively authorised by the Prime Minister*".

In Article 128 of the Constitution, it is stated that "*the fundamental and permanent functions required by the public services, that the State, State economic enterprises and other public corporate bodies are assigned to perform, in accordance with principles of general administration, shall be carried out by public servants and other public employees. The qualifications of public servants and other public employees, procedures governing their appointments, duties and powers, their rights and responsibilities, salaries and allowances, and other matters related to their status shall be regulated by law. The procedures and principles governing the training of senior administrators shall be specially regulated by law*."

Articles 1, 2 and 3 of Law No. 5397 prescribe that an inspection of whether telecommunication is performed in accordance with the procedures and provisions of the law is to be done by a person or a commission authorised by the Prime Minister as well.

It is evident that those activities must be performed by civil servants and other public officers since the acts concern public order and public security as well as the constitutionally guaranteed right to life and the right to protect and develop the corporeal and spiritual existence (Article 17), the right to protection of privacy (Article 20), the right to freedom of communication (Article 22), the right to freedom of expression and dissemination of thought (Article 26).



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Qualities, assignment, duties and competence, rights and obligations of all servants within the scope of Article 128 (1) must be regulated by law.

A person, or members of a commission who shall be authorised by the Prime Minister to control activities to monitor telecommunication, must be chosen from among individuals who are eligible to become public officers. Since those eligibility criteria are not mentioned in the statement of the law in question, it violates Article 128 of the Constitution.

One of the basic aspects of the State governed by the rule of law that is stipulated in Article 2 of the Constitution is to provide legal security. Legal security requires certainty and predictability of legal provisions. Provisions which do not have certain and predictable character and thus do not provide legal security, do not comply with Article 2 of the Constitution. Since the law in question includes a discretionary and uncertain competence, it violates the rule of law principle.

For the aforementioned reasons, the statement "… *a person or a commission authorised by the Prime Minister exclusively*" violates Articles 2 and 128 of the Constitution. It must be annulled.

Since this sentence has been declared unconstitutional on the grounds of Articles 2 and 128 of the Constitution, an additional examination on the grounds of Articles 6, 7, 8, and 123 of the Constitution is not necessary.

2- Examination of the second sentence of additional Article 7 (10) of Law No. 2559 amended by Article 1 of Law No. 5397

In the application it is claimed that the statement "*that the Presidency consists of a president and a technical expert, a legal expert, and an administrative expert*" violates Articles 2, 6, 7, 8, 11 and 128 of the Constitution, as it defines duty, competence and responsibility of civil servants by bylaws (yönetmelik) instead of laws.

*The Court declares that there is no necessity to take a decision on this matter, since this statement was amended by another law afterwards.*

3- Examination of the fifth sentence of additional Article 7 (10) of Law No. 2559 amended by Article 1 of Law No. 5397

The application claims that according to the statement in question the selection of the President of Telecommunication and Communication shall be done by the Prime Minister, despite the fact that the President



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of Telecommunication and Communication is a senior public official and directly subordinated to the President of the Telecommunication Institute and enjoys the same legal status as members of this institute. Following that, it is claimed that this assignment must be realised by a joint decree indeed, and eligibility criteria must be clearly indicated. Besides, it was noted that the assignment of senior public officals must be confirmed by the President of the Republic, as it is envisaged by the Constitution; and the impartiality of the President of the Republic provides an assurance for public officials against political power. In assignment acts this assurance is realised through the signature of the President of the Republic. Thus, the law under consideration violates Articles 8, 104, 105, 128 of the Constitution.

In the first sentence of additional Article 7 (10) of Law No. 2559, which was amended by Article 1 of Law No. 5397, it is stated that transactions regarding telecommunication and interception within the scope of Article 135 of Law No. 5271 shall be performed by the "*Presidency of Telecommunication and Communication*", which is directly subordinated to the President of the Telecommunication Institute. The second sentence which was amended by Law No. 5651 prescribes that this organisation shall consist of a president and chiefs of departments, and the third sentence envisages that one representative of relevant departments of the National Intelligence Organisation, the Directorate General of Public Security and the General Commandership of Gendarmerie, and the fourth prescribes that sufficient staff shall be hired for relevant duties. In the fifth sentence, it is stated that the President of Telecommunication and Communication shall be assigned by the Prime Minister upon a proposal of the President of the Telecommunication Institute, and the sixth sentence prescribes that the President of Telecommunication and Communication shall have the same personal rights as the members of the board.

In the second sentence of additional Article 1 (1) which was added to Law No. 5651 by Article 67 of Law No. 5809 of 05/11/2008, it is stated that "*the staff as the head of department, advisers, and experts must be graduates of engineering, of electronics, electricity-electronics, electronics and communication, industry, physics, mathematics, computing, telecommunication and business management, political sciences, economics and social sciences, or economics, law, management, communication from national universities, or foreign universities provided that their diplomas are nostrificated by authorised bodies. On the other hand, those who do not have an undergraduate degree from these departments or faculties may be hired, provided that they hold a master or a doctorate degree from these fields. The staff of experts shall be chosen from among those who*



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*have at least an undergraduate degree. Other staff shall be chosen from among those who graduated from high schools or their equivalent schools at least.*" Therefore, since qualities of the staff to be hired for the Presidency of Telecommunication and Communication have been defined by law, the law in question does not violate Article 128 of the Constitution.

It is stated that "*Executive power and function shall be exercised and carried out by the President of the Republic and the Council of Ministers in conformity with the Constitution and the law*" in Article 8 of the Constitution and Article 104 prescribes that "*to sign decrees*" is among the duties and competences of the President. The "*decrees*" mentioned in Article 104 include decree laws of the Council of Ministers as well as various decrees regarding the appointment of senior public officials and joint decrees. Since executive power shall be performed by the President and the Council of Ministers, both should participate in the process in order to provide legal validity.

Hence, appointments of senior public officials, who have authority and important function in the specification of public policies, managing organisations, plans and staff, and the execution of important duties, must be done by joint decrees. This is a constitutional obligation.

It is evident that the President of Telecommunication and Communication has very important duties and powers regarding public order and public security as they are the head of an institution which is authorised to detect communications pursuant to Law No. 5397, and to impede access to internet sites pursuant to Law No. 5651.

For the aforementioned reasons, the provision at issue violates Articles 8 and 104 of the Constitution.

It is not necessary to review the law in question with reference to Article 105 of the Constitution.

(…)



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## 2.4 Re-Organisation of the Statistical Institute

***Application Number:*** *2008/105* ***Decision Number:*** *2010/123*

***Date of Decision:*** *30/12/2010*

***Date of Publication and Number of the Official Gazette:*** *26/02/2011 - 27858*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Ankara First Administrative Court (Ankara Birinci İdare Mahkemesi)*

***Provisions at Issue:*** *Provisional Art. 7 of the Turkish Statistical Law No. 5429 (10/11/2005)*

***Relevant Constitutional Provisions:*** *Art. 2, 36 (1982 TA)*

***Voting:*** *Rejected by majority of 10:5 justices*

***Dissenting and Concurring Opinions:*** *3 DO*

***Justices:*** *President Haşim KILIÇ; Vice President Osman Alifeyyaz PAKSÜT; Members: Fulya KANTARCIOĞLU, Ahmet AKYALÇIN, Mehmet ERTEN, Fettah OTO, Serdar ÖZGÜLDÜR, Zehra Ayla PERKTAŞ, Recep KÖMÜRCÜ, Alparslan ALTAN, Burhan ÜSTÜN, Engin YILDIRIM, Nuri NECİPOĞLU, Hicabi DURSUN, Celal Mümtaz AKINCI*

The submitting court asks for annulment of provisional article 7 of the *Law on the Turkish Statistical Institute*. According to this provision the office of the president of the State Statistical Institute (DİE) expires with the coming into force of the new law, replacing the DİE by the newly created Turkish Statistical Institute (TÜİK). The new law stipulates in detail the criteria which the person to be appointed has to fulfil. The submitting court claims that this provision violates Article 2 (Characteristics of the Republic) and 36 (Freedom to claim rights) of the Constitution: Firstly, the principle of the rule of law requires laws to be general, objective and abstract. The acts on assignment and removal from office are of administrative character; and to issue a law for a removal from office does not comply with the rule of law. Secondly, the right to legal remedies was violated since individuals do not have any right to initiate proceedings against a law, and thus constitutional review of the act in question was impeded. The AYM rejects the claim and does neither assert a violation of the rule of law principle nor of the freedom to claim rights.

(…)

## V. MERITS

After examination the judicial referral and its attachments, the report on the substance of the case, the law which is considered unconstitutional, the respective constitutional provisions and the justifications of both constitutional provisions and the laws requested to be annulled and other legislative acts, the following was decided:



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A- Meaning and Scope of the Provision at Issue

The Law No. 52 On the Establishment, Powers and Duties of the State Statistical Institute (DİE) of 13/06/1962, and Decree Law No. 219 On the Establishment and Powers of the Presidency of the State Statistical Institute of 08/06/1984 were repealed and replaced by the Turkish Statistical Law No. 5429. The Turkish Statistical Institute (TÜİK) was founded to determine standards and basic principles on the production and organisation of formal statistics; to enable collection, evaluation, publishing and dissemination of data and information on fields that are necessary for the State; and to ensure coordination between institutions and institutes within the process of a Formal Statistical Program.

Law No. 5429 abolished administrative staff positions, which are assigned to the Presidency of the DİE, and the annex of the Decree Law No. 190 On General Public Positions and Procedures was abolished from the annexed tables of this decree law. Administrative staff positions on list No. 1 in the annex were created and they were added to the annexed Table No. 1 of the KHK No. 190 in the section on the Presidency of the Turkish Statistical Institute.

Pursuant to Article 22 of the Law, the president is the top official of the Turkish Statistical Institute and has the duties and competences to hold the presidency in accordance with law, the official statistical program, aims and policies of the Institute, the strategy plan, performance indicators and service quality standards. Conditions and procedures of assignment are ruled under Article 23. For the assignment of the president some extra criteria are prescribed in addition to those prescribed under the Civil Servants Law No. 657. In the same article it is stated, that the president shall be assigned for five years, and then may be re-assigned only once; and the president shall not be removed from office before expiration of the term of office. However, they may be discharged before the end of the term of office in the case of bad health which is stated in medical reports or in the case of losing eligibility criteria for assignment to the presidency. With Article 57 of the same law, denomination of the DİE´s president and presidency, determined in the laws 657, 2451 and 5018, has been replaced by the denominations TÜİK president and presidency.

In provisional Article 7 of the Turkish Statistical Law No. 5429 of 10/11/2005 it is stated that, once this law enters into force, the term of office of the current President of State Statistical Institute expires. One of those who fulfill the eligibility criteria regulated under this law shall be assigned as the President of Turkish Statistical Institute within one month



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for the period of five years, as of the time this law enters into force. Until the assignment of the new president, the current President of the DİE shall hold office.[690]

B- Issue of Unconstitutionality

In the judicial referral, it was stated that the provision in question violates Articles 2 and 36 of the Constitution on the grounds that the principle of the rule of law requires laws to be general, objective and abstract. The acts on assignment and removal from office are of administrative character; and to issue a law for a removal from office does not comply with the concept of a State governed by the rule of law. Therefore, the right to legal remedies was violated since individuals do not have any right to initiate proceedings against a law and thus a legal review of the act in question was impeded.

The principle of rule of law which is governed under Article 2 of the Constitution, requires the existence of a State which is based on fundamental rights and freedoms, which allows those rights to be improved and strengthened, which establishes a fair legal order and makes law sovereign over all State organs, which considers itself to be bound by the Constitution and the rule of law, and a State, whose actions and acts of administraton can be subject to legal review. The establishment of such an order depends on the essential condition that all actions and acts of legislative, executive, and judiciary power must comply with the law, and that fundamental rights and freedoms are subject to constitutional guarantee. In order to constitute a State governed by the rule of law the laws should aim at serving public interest, they should include general, objective and fair provisions and consider equity. Therefore, the legislator should exercise its authority within the limits set by the Constitution, bearing in mind criteria of justice, equity and public interest.

In Article 36 (1) of the Constitution titled "Freedom to claim rights" it is stated that "Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures", and by this statement the right to initiate proceedings before a court and as a corollary, the right to claim, to defend and to a fair trial was ensured. The right to legal remedies requires other fundamental

690 Here the Court quotes from the Turkish Statistical Law without indicating explicitly that this is a quote.



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rights and freedoms to be exercised at best and it is one of the most influential guarantees providing protection of those rights. The right to legal remedies is a prerequisite for a fair trial.

The law in question prescribes that the term of office of the President of the State Statistical Institute will end once Law No. 5429 enters into force. While the State Statistical Institute was reestablished as Turkish Statistical Institute, "conditions and procedures of assignment for the president" were changed as well, and a number of procedures and conditions were introduced that consider scientific and technical autonomy of the institute. In the explanatory memorandum of the law in question it is stated that, "*This law prescribes the reestablishment of the State Statistical Institute as Turkish Statistical Institute and some basic conditions for the assignment of the president of the Turkish Statistical Institute, like a five year term of office; (…) and it is envisaged that a President for the Turkish Statistical Institute shall be assigned within one month for a five year period, as the term of office of the President of State Statistical Institute will expire.*"

Even though the president of the State Statistical Institute used to be assigned from among those who fulfill the requirements prescribed by the Civil Servants Law No. 657 by a joint decree; for assignment of the President of Turkish Statistical Institute for a five-year term, additional conditions were prescribed in Law No. 657 and the legal status of the president was amended due to changes in the structure of the Institute.

The legislator has the authority to decide about changing or abolishing / not abolishing the characteristics of service of a public institution or to decide which public institution should exercise which public service. The legislator may make regulations on administration staff positions by defining conditions of a public service, provided that it complies with the Constitution. For the purpose of serving public interest, new administration staff positions may be created or present administration staff positions may be abolished. Furthermore, because relationships between public institutions and civil servants are regulated by abstract and general norms, the legislator may issue new laws or amend present laws regarding the status of public officials.

Therefore, to discharge the President of the DİE by establishment of the TÜİK does not lead to an infringement of the principle of the rule of law. The provision in question neither includes a statement which may impede an application for legal remedies or which may lead to a loss of a right. There is no obstacle to reassigning the President of the DİE if they might fulfill requirements or to assign them to another office, equal or superior to their former office.



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For the aforementioned reasons, the provision in question was not found contrary to Articles 2 and 36 of the Constitution. The application must be dismissed.

Osman Alifeyyaz PAKSÜT, Fulya KANTARCIOĞLU, Mehmet ERTEN, Fettah OTO and Zehra Ayla PERKTAŞ did not agree with this view.

## VI. CONCLUSION

1- (…)

2- It was decided BY MAJORITY OF VOTES, with the dissenting votes of Osman Alifeyyaz PAKSÜT, Fulya KANTARCIOĞLU, Mehmet ERTEN, Fettah OTO, Zehra Ayla PERKTAŞ, that provisional Article 7 of Law No. 5429 of 10/11/2005 is not unconstitutional, and that the application has to be rejected.

The decision was reached on 30/12/2010.

(…)

## DISSENTING OPINION

In accordance with the provision at issue the President of the DİE was dismissed; before the law was enacted he brought a suit against this decision, however the decision about his return to office was rendered unenforceable.

Pursuant to Article 2 of the Constitution, in a State governed by the rule of law and separation of powers it is unusual that a legislative organ enacts a law on a matter that is subject to an administrative act and this also infringes upon the principle that laws shall be general, abstract and objective.

As the required attributes for the President of the DİE were changed by law, the president left office; he was replaced by another public official who fulfilled the legal requirements established by the administration in accordance with the principles of administrative law; issuing a law instead violates the principle of rule of law governed under Article 2 and Article 36 of the Constitution, since it hinders the right to seek legal remedies.

I do not agree with the decision of the Court ruling that the law at issue is constitutional, for that it was not considered that this may lead to an application of the same method for hundreds of public officials too.

Vice President, Osman Alifeyyaz PAKSÜT



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DISSENTING OPINION

(…)

The Constitution that adopts the principle of separation of powers indicates limits to the powers and competences of the legislative, executive and judicial branches of government. However, the Constitution does not prescribe a solid system of separation of powers; as mentioned in the preamble, this does not imply a hierarchy between State organs but that it is based on cooperation and division of labour between these organs. Though the Constitution is based on cooperation and harmony between powers, in principle it does not allow one of those powers to act in the field of others, but clearly designates possible exceptions, as it did in the case of decree laws. Accordingly, there is no doubt that legal acts in the field of another power will lead to ultra vires and thus violate the Constitution.

To issue a law for dismissal from office despite the fact that it falls within the scope of power of the execution, constitutes an example of ultra vires and it is contrary to the principle of separation of powers.

(…)

In a State governed by the rule of law, the fact that laws are general, abstract and objective ensures that individuals can continue their duties without any change in their status, unless predetermined conditions of eligibility change. In indispensable cases of public service, it is evident that the office of a public servant may be removed in accordance with administrative procedures. It does not comply with the legal security principle of the Constitution that the legislator interferes with traditional administrative processes which should remain within the scope of the constitutional function of the administration, by excluding administrative procedures and enacting a law provision which only concerns the President of the State Statistical Institute and thus is not of general, abstract, and objective character.

In Article 36 (1) of the Constitution, it is stated that "everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures". To discharge the president by law impedes the freedom for legal remedies as it hinders the right to legal remedies.

Therefore, we do not agree with the majority since the law under consideration violates the principle of separation of powers, and Articles 2 and 36 of the Constitution.



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| Member | Member | Member |
|---|---|---|
| Fulya KANTAR-CIOĞLU | Fettah OTO | Zehra Ayla PERKTAŞ |

DISSENTING OPINION

(…)

There is no doubt that the duties of the Turkish Statistical Institute are among permanent and principal duties and they must be fulfilled in accordance with general administrative law principles, since they constitute permanent and fundamental civil services. Besides, the president of the institute is a public official; and any acts regarding assignment or discharging them are executive acts.

(…)

The law provision subject to the application violates the principle of separation of powers, for it dismisses a civil servant by a legislative act and thus infringing legal security, although there was no change in their legal status. It also violates the principle of the rule of law since it ignores the objective, general and abstract character of laws by targeting a certain individual and regulating a special, actual and temporary case. To remove them from office by a law violates the right to legal remedies since there is no right to initiate proceedings against laws directly by individuals.

Therefore, the law in question has to be annulled.

Member

Mehmet ERTEN



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## 2.5 Independence of Public Prosecutors

***Application Number:*** *1970/39* ***Decision Number:*** *1971/44*

***Date of Decision:*** *20/04/1971*

***Date of Publication and Number of the Official Gazette:*** *16/12/1971 - 14044*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by more than a sixth of the total number of members of the MM*

***Provisions at Issue:*** *Art. 1 of Law No. 1307 (26/06/1970) amending Art. 77 of Law No. 45 on the High Council of Judges (22/04/1962)*

***Relevant Constitutional Provisions:*** *Art. 2, 4 (2), 7, 8, 137, 152 (1961 TA)*

***Voting:*** *Accepted by majority of 12:3 justices (regarding Art. 77 (1) and 89)*
*Accepted by majority of 11:4 justices (regarding Art. 77 (14))*

***Dissenting and Concurring Opinions:*** *4 DO*

***Justices:*** *President Hakkı KETENOĞLU; Vice President Avni GİVDA; Members: Celalettin KURALMEN, Fazıl ULUOCAK, Muhittin TAYLAN, Şahap ARIÇ, İhsan ECEMİŞ, Recai SEÇKİN, Ahmet AKAR, Halit ZARBUN, Kani VRANA, Muhittin GÜRÜN, Lütfi ÖMERBAŞ, Şevket MÜFTÜGİL, Ahmet H. BOYACIOĞLU*

A group of deputies applies for an annulment of Article 1 of *Law 1307 amending Article 77 of the Law on the High Council of Judges (No. 45)*, claiming a violation of the Constitution on procedural and substantial grounds. The procedural complaint argues that the AYM had annulled almost identical provisions in an earlier version of the *Law on the High Council of Judges* and the *Law on Judges* in 1967 and that the repeated enactment of similar provisions violates Article 152 (Claim of unconstitutionality before other courts) of the Constitution. Substantially, the applicants mainly complain about the composition of the commission who appoints public prosecutors, violating Article 137 (Unlawful order) of the Constitution. They claim that most of its members are accountable to the Minister of Justice and thus lack constitutionally guaranteed independence. Consequently, the independence of public prosecutors as part of the judiciary is put into question. In its decision the Court rejects the procedural complaint. However, it rules the provision unconstitutional with regards to Article 137, emphasising the importance of shielding public prosecutors from the influence of political forces for the sake of the principle of judicial independence.

(…)

## IV. MERITS AND JUSTIFICATION OF THE DECISION

(…)
A- (…)

In order to conclude that the assemblies enacted a law that violates a binding decision of the Constitutional Court, the issue in question has to be identical in the law at issue and the annulled law; otherwise the



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law cannot be annulled for violating Article 152 of the Constitution. As the provisions at issue regulate the issue in a different manner compared to the annulled provisions, the claim that they violate Article 152 of the Constitution cannot be raised here.

B- *First, aim and meaning of the guarantees for public prosecutors established by the Constitution are explained in light of the decision/decisions of the Constitutional Court. Then, the contested legal norms are evaluated in relation to these guarantees.*

a) The aims and meaning of the guarantees

1- The guarantees provided to public prosecutors ensure that they can fulfil their functions according to the law and are free of any influence from political forces; in other words, that they are provided with an environment in which they can fulfil their functions solely on the basis of legal standards and their own consciences and without worrying whether or not their actions run counter to the wishes of political forces.

The main power of public prosecutors is to bring charges against someone according to the provisions of criminal procedure; in other words, they are the only officials who can bring charges, responsible for following criminal trials and fulfil their legal duties such as contributing to fair judgements by helping the judge to uncover the truth, appealing against judicial decisions if necessary, and preventing that evidence is lost and that the accused can escape (Articles 31, 66, 67, 74, 78, 79, 124, 125, 148, 153, 154, 155, 162, 163, 168, 176, 219, 226, 232, 233, 238, 239, 241, 251, 259, 289, and 310 of the Criminal Procedure Law No. 1412 of 04/04/1929). In case public prosecutors, who have the sole power to bring charges, do not make use of this power, a crime may remain unpunished. If a victim did not report an offence or if there is no identifiable victim of a crime, it is impossible to appeal against a public prosecutor's decision not to bring charges (Article 165 of the Criminal Procedure Law); hence, the case entirely depends on the public prosecutor's evaluation. All this shows that impartial criminal justice can only be delivered if, above all, public prosecutors can decide and act without having to worry about influence from political forces. The importance of a functioning criminal justice system for State and society is obvious.

2- It is also important to keep in mind that it is not impossible that a public prosecutor who finds themselves under the influence of political forces refrains from bringing charges because they are afraid of negative



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consequences for themselves. This may be the case if they feel that those in power would prefer no charges to be brought, even if this would run counter to his legal opinion and the collected evidence. The same applies in case of charges brought upon the order of the minister, they may fear negative consequences if they were to conclude after the inquiry to apply for acquittal and therefore decides to bring charges.

Such circumstances would constitute an environment where public prosecutors could no longer fulfil their function of ensuring justice.

3- The importance the constitution-maker attributed to the function of the public prosecutors with regard to the delivery of justice can be deduced from the fact that the Constitution explicitly mentions the guarantees for public prosecutors in the section on the judiciary. The observation that public prosecutors also have administrative duties does not entail that they do not need these guarantees in their non-judicial functions. It is not only impossible to divide these guarantees according to their different functions, but such a separation would also damage the security they need in the fulfilment of their judicial functions. The wording and placing of Article 137 of the Constitution shows that the constitution-maker wanted to avoid such problems by providing simple and unlimited guarantees concerning employment affairs.

4- The realisation of this constitutional guarantee, which regards the criteria for assignment and transfer, also requires laws that establish objective criteria and sufficiently spell out the main outlines in order to prevent subjective evaluations as much as possible. Even if an institution is endowed with the capacity to work neutrally, its decisions can still unsettle public officials and thereby disturb the proper fulfilment of public service.

5- Article 105 (2) of the Constitution provides that the Minister of Justice is responsible for issues pertaining to their field of authority. In view of this fact it is not legally tenable to assume that the guarantees for public prosecutors are only limited to tenure and involuntarily early retirement, and that any further guarantees are not provided for in the Constitution. Thus, the Minister of Justice can only be held responsible for actions and acts that fall within their ambit of competence. In fact, Article 105 (2) of the Constitution provides that ministers shall be responsible for the operations in their field of authority and for the actions and proceedings of their subordinates. As the above-mentioned functions of public prosecutors on principle fall outside the ambit of the minister's field of authority and considering that the public prosecutor can only fulfil their duties in an impartial way if they remain outside the influence of



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political forces, it would be wrong to consider that the guarantees for public prosecutors could be limited to tenure.

6- It does not require a restrictive interpretation of the provision on guarantees for public prosecutors, to come to the result that according to Article 114 of the Constitution it is possible to take legal action against decisions of the ministry concerning matters pertaining to the employment affairs of public prosecutors. As legal action can be taken against all administrative acts, the fact that the Constitution provides for additional guarantees for public prosecutors shows that the constitution-makers did not consider that the possibility of legal action would be guarantee enough for public prosecutors to adequately fulfil their duties. In short, the aim of the guarantee provisions is to ensure that a public official who fulfils very important functions remains outside a certain kind of influence and can fulfil their function adequately in accordance with the law; whereas the possibility of taking legal action has the aim of ensuring that injuries are remedied and redress provided. Hence, the proper functioning of the public function is directly ensured through guarantee provisions for public officials and indirectly ensured through provisions on constitutional review.

7- The fact that public prosecutors are not considered as ordinary civil servants of the Ministry of Justice can be deduced from Article 137 of the Constitution which provides for a special and broader guarantee for public prosecutors compared to the guarantee for civil servants guaranteed in Article 118.

8- It can also not be argued that the guarantees for public prosecutors put them into an independent position similar to judges; because public prosecutors can legally be ordered to bring charges and the Constitutional Court has found this provision to be constitutional (Constitutional Court Decision No. E. 1963/140 - K. 1964/62 of 22/09/1964; Anayasa Mahkemesi Kararlar Dergisi, No. 2, pp. 127-128, published in the Official Gazette No. 11925, of 10/02/1965). A public official who can be ordered to do something cannot be legally considered to be independent.

9- An important issue concerning guarantee matters is that laws should not contain provisions that could give the public the impression that certain public officials are not protected against the influence of political forces. Yet, if provisions are enacted without sufficient protective measures they could make public prosecutors look like public officials who could be forced to submit to political forces. Such a view could raise doubts among the public concerning their actions even if they are lawful and could thus undermine society's trust in the justice system. However, undermining



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trust in the justice system would result in huge societal uneasiness. This factor is an even more important element in the interpretation of provisions pertaining to guarantees.

b) Issue of unconstitutionality of the provisions at issue

aa- According to Article 77 (1; 14) amended by Law No. 1307 on the *High Council of Judges*, public prosecutors and deputy public prosecutors are appointed and transferred by a joint decree of the Minister of Justice, Prime Minister and President of the Republic following the final decision of a council called the Appointment and Transfer Commission. This commission is composed of the Undersecretary of the Ministry of Justice – who presides over the commission –, a Deputy Chief Prosecutor of the Republic, two Public Prosecutors of the Court of Cassation, the President of the Inspection Board of the Ministry, and the Director Generals of the Criminal and Employment Affairs Departments.

According to the second paragraph the commission convenes with the majority of its total number of members, and takes its decisions with a majority of the members present. In cases of standoff the vote of the president of the commission is decisive.

The possibility that decisions of the Appointment and Transfer Commission are influenced by political forces is due to the fact that this commission is composed of persons such as the Undersecretary or the President of the Review Committee who work in the ministry and are in a superior-inferior relationship with the Minister.

Even if we consider for a moment that the fact that some ministry officials are members of the commission does not violate the guarantees for public prosecutors as such, the provisions of Article 77 are still in violation with these guarantees for the following reasons: The supremacy of the ministry officials is established because the ministry officials held the majority of commission seats, and the commission can convene with the majority of its members and decide by a majority of those present. Furthermore, in cases of split votes the vote of the Undersecretary is decisive. Each of these provisions violates the principle of guarantees for public prosecutors.

The provision of amended Article 77 (6), which establishes that appointments and transfers should follow a plan based on objective rules, does not sufficiently ensure the guarantees for public prosecutors, because the commission that will implement this plan does not ensure the guarantees



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in itself. Furthermore, the principles that will be taken into consideration during the elaboration of the plan are not sufficiently clear and objective. Thus, provisions such as (according to principles that will ensure the best services) or (the districts of the jurisdiction of courts and the files and other similar personal information of the persons concerned) are not sufficiently clear and do not cover objective principles upon which decisions will be made or laws established; in fact, these terms are open to various interpretations and their boundaries are ambiguous, whereas it would have been possible to mention some example in the law that could limit these general concepts. Hence, as neither the establishment of the commission that will apply this plan nor the objective principles upon which it will be based have been made sufficiently clear in the law, it cannot be considered to be on its own capable of ensuring the guarantees.

For these reasons the provision at issue violates the guarantee provided for in Article 137 of the Constitution and has to be annulled. (…)

> bb- *As amended Article 89, regarding the conferment of temporary powers to public prosecutors, is logically subsidiary to Article 77, it is declared unconstitutional on the same grounds as Article 77.*
> cc- *All remaining paragraphs of the law at issue who are inapplicable once Article 77 is annulled have to be annulled as well.*

(…)



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## 2.6 Legal Basis of the Formation of State Security Courts

***Application Number:*** *1974/35* ***Decision Number:*** *1975/126*

***Date of Decision:*** *06/05/1975*

***Date of Publication and Number of the Official Gazette:*** *11/10/1975 -15380*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Diyarbakır State Security Court (Diyarbakır Devlet Güvenlik Mahkemesi)*

***Provisions at Issue:*** *Art. 1 and 6 of Law No. 1773 on the Establishment and Rules of Procedure of State Security Courts (26/06/1973)*

***Relevant Constitutional Provisions:*** *Art. 4, 32, 85, 92, 136 (1961 TA)*

***Voting:*** *Accepted by majority of 9:6 justices*

***Dissenting and Concurring Opinions:*** *9 DO*

***Justices:*** *President Muhittin TAYLAN; Vice President Kâni VRANA; Members: Şahap ARIÇ, İhsan ECEMİŞ, Halit ZARBUN, Ziya ÖNEL, Abdullah ÜNER, Ahmet KOÇAK, Şekip ÇOPUROĞLU, Lütfi ÖMERBAŞ, Hasan GÜRSEL, Ahmet Salih ÇEBİ, Adil ESMER, Nihat O. AKÇAKAYALIOĞLU, Ahmet H. BOYACIOĞLU*

The submitting court asks for annulment of Articles 1 and 6 of the *Law on the Establishment and Rules of Procedure of State Security Courts* on the grounds that parliamentary procedures were not followed while adopting these provisions. In substance, the complaint contests the general legitimacy of state security courts, because they are considered to be an "extraordinary judicial authority" whose establishment is prohibited. In particular, the submitting court criticises the composition of the state security courts, which are staffed with military judges, since this violates several constitutional principles: the principle of the natural judge, the unity of the judiciary and the right of personal security. The AYM rules that the provision violates Articles 85 (Bylaws, political party groups and disciplinary measures) and 92 (The debate and enactment of laws) of the Constitution, and the Rules of Procedure of the Senate of the Republic (Art. 73, 74), for Articles 1 and 6 of the law were adopted without debate in the Senate. As the provisions are annulled on procedural grounds the Court finds no reason to consider the issue from a substantive point of view.

(…)

## V. MERITS

(…)

A) Issue of unconstitutionality from a procedural point of view by the provisions of the law under consideration

Three issues arise from the consideration of the draft of Law No. 1773 and the legislative process of Articles 1 and 6. These are the preferential and urgent debates in the National Assembly and the Senate of the



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Republic; and the ballot without debate on Articles 1 and 6 in the Senate of the Republic.

1- The preferential and urgent proceedings in the National Assembly

The draft law containing the provisions at issue was adopted by the National Assembly after a preferential and urgent debate.
(…)

A proposal can be adopted after one single reading under the following conditions: The Government, sponsor of the proposal or relevant committee shall submit a motion for an urgent decision, there must be a sound reason for the motion, and the motion must be submitted in written form and with a statement of grounds when the proposal is submitted to the Legislative Assembly or before the first debate (Rules of Procedure: Articles 70, 71, 72).

> *In the following five paragraphs, the Court reviews the conditions for and the procedural aspects of the motion for a preferential and urgent debate. It considers the statement of grounds from the relevant committee, the president of the committee, and the Minister of Justice, and cites from the explanatory memorandum of Article 136 of the Constitution, which establishes the constitutional basis for the state security courts and explains that the motion was also based on it. The Court considers that the statement of grounds of the motion is well-founded and fulfils the requirements established by the Rules of Procedure. It argues further that a violation of the Rules of Procedure of the Turkish Parliament does not automatically amount to the unconstitutionality of a law because not all provisions are of the same importance. Of lesser importance are those provisions that are established by the Rules of Procedure but not by the Constitution. Otherwise, the work of the assemblies would be rendered unnecessarily difficult. The AYM concludes that it is up to the Constitutional Court to decide whether or not a violation of the Rules of Procedure constitutes a sufficient ground for the annulment of a law.*

When the Constitutional Court resolves a case it not only considers the importance and quality of the Rules of Procedure but also has to consider the limits of its own duties and competences. In cases of constitutional review where the review is limited to procedural provisions of the Constitution or where a substantive review of a law is impossible due to the form of the law, the Rules of Procedure of the Constitutional Court



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will be interpreted restrictively and the review will be carried out accordingly. In cases where the Court has the power or opportunity to conduct a substantive review, the review will not be similarly restrictive. Accordingly, as draft law No. 1773, which concerns the question of preferential and urgent debate in the National Assembly, can be subjected to a substantive review, the review with regard to the form and the question whether there was a serious flaw requiring annulment should be considered in a broad and flexible way. As stated above, all motions for a preferential and urgent debate have to be considered in the light of the motivation and the substantiation of the report of the committee, the motivation of the proposal, the constitutional amendment it is based upon as well as the statement of grounds for this amendment.

As it is seen, the provision at issue does not require annulment on procedural grounds with regard to the decision to hold a preferential and urgent debate. Furthermore, it should be mentioned that as a result of an amendment of the Rules of Procedure of the National Assembly of 01/09/1973 to abolish the principle of two readings and introducing the principle of one single reading, the question of "urgent decision making" has become obsolete.

Muhittin TAYLAN, Ahmet KOÇAK, Şekip ÇOPUROĞLU and Nihat O. AKÇAKAYALIOĞLU do not share the argumentation of the majority, but they consent with the majority that the provisions at issue must not be annulled on procedural grounds.

2- The preferential and urgent proceedings in the Senate of the Republic

The draft of Law No. 1773 containing the provisions at issue was also passed in a preferential and urgent debate; in other words, earlier than its actual position on the agenda and in only one debate. The Defence, Constitutional, and Justice Committees of the Senate all proposed a preferential and urgent debate as well as the Minister of Justice during the 77th session on 25/06/1973. Three issues pertaining to the preferential and urgent debate on Law No. 1773 in the Senate of the Republic arise.



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a) Adoption of the motion for a preferential and urgent debate without a renewed reading

*The AYM reconstructs, after the request for a preferential and urgent debate was read during the 3rd sitting some members claimed that the quorum had not been reached and required a roll call. The roll call proved the lack of quorum and the sitting was closed and was opened again 35 minutes later. After the opening of the 4th sitting another roll call was made and the quorum was reached. As the motion had been read in the previous sitting the President of the Senate submitted the motion to vote and announced that it had been accepted.*

According to Article 86 (1) of the Constitution both assemblies convene with an absolute majority of the total number of members and, unless otherwise provided in the Constitution, take decisions with an absolute majority of the attending members. Furthermore, according to Article 52 of the Rules of Procedure of the Senate of the Republic, a debate cannot start without an absolute majority of the total number of members being present. A reading cannot be considered to be valid if the motion for a preferential and urgent debate at issue was read while less than the absolute majority of the total number of members was present; under these circumstances it has to be read again in the next sitting before being submitted to a vote.

At the beginning of the 3rd sitting of the 77th session of the Plenary Assembly of the Senate of the Republic on 25/06/1973 no roll call was made nor was it claimed that the quorum had not been met. This shows that the Presidency of the Council of the Senate had no doubt with regard to the quorum and that at 20:30 an absolute majority was present at the Plenary Assembly. However, at 20:55 an absolute majority seemed no longer to be present. After the claims of some members in this direction a roll call was made, however, only showing the situation at the moment of the roll call. Yet, this does not prove that previously, particularly during the reading of the motion for a preferential and urgent debate, an absolute majority had not been present. If one considers that some members – being particularly careful – raised the issue once they were convinced that an absolute majority was no longer present, one can conclude that they would have raised the issue earlier if no absolute majority had been present when the motion was read. The fact that the members did not raise the issue then should be interpreted as proof that an absolute majority was present when the motion was read. As the contrary was not established it must be accepted that when the motion was read an absolute majority



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was present in the plenary assembly. Consequently, the vote without a further reading of the motion for a preferential and urgent debate after the opening of the 4th sitting cannot be considered to constitute a violation of the Rules of Procedure and, therefore, does not constitute a reason for annulment on procedural grounds.

Nihat O. AKÇAKAYALIOĞLU did not agree with this opinion.

b) Issue of voting on the motion without debate

According to Article 47 of the Rules of Procedure of the Senate of the Republic the motion for urgent debate is accepted or rejected after one statement for and one statement against it. However, the President did not ask whether someone would speak for and against the motion, but directly proceeded to the vote on the motion for an urgent debate on Law No. 1773 (same Journal of Minutes: page 632)[691].

It can be assumed that the members of the Senate know their rights and Article 47 of their own Rules of Procedure. Yet, following the Journal of Minutes no one claimed the right to speak nor objected to start the voting procedure. However, it cannot be assumed that the failure of the President of the Senate to remind the members of their right to speak, and to investigate whether any member wanted to exchange pro and contra arguments, constitutes a flaw that would require the annulment of the provisions at issue on procedural grounds.

(…)

3- Issue of voting on Articles 1 and 6 without debate in the Senate of the Republic

After the first debate on the whole draft of Law No. 1773, when the Plenary Assembly of the Senate of the Republic proceeded to debate every individual article, the chairman of the Justice Party group submitted a motion to debate only those articles for which there was an amendment proposal and to immediately vote on those articles for which no amend-

691 The AYM refers to the minutes already in section 2 (a) of this ruling, therefore it quotes "same Journal of Minutes" here. In the earlier reference it refers to: Jounal of Minutes of the Senate of the Republic, 12th meeting, Vol. 12, pp. 630-632.



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ment proposals were submitted. This motion was accepted and Articles 1 and 6 were adopted without debate (same Journal of Minutes, p. 689 and 691-692).

Article 92 of the Constitution requires a "debate" on draft laws. Draft laws consist of single articles. If there has not been a debate on these articles, it cannot be assumed that the requirements for a parliamentary "debate" have been fulfilled. Furthermore, the Rules of Procedure of the Senate of the Republic contain similar provisions.

Article 69 of the Rules of Procedure stipulates that draft laws can only be submitted to the plenary after having been discussed in the according committee of the Senate. This is the general rule. The deviating rule established in Article 48 of the Rules of Procedure, stipulating only one debate, can only be applied if a decision of urgency is taken. There is no doubt that under this method of discussing a draft law only once, only the second debate can be dispensed of, not the first.

The first debate is regulated by Articles 73 and 74 of the Rules of Procedure, the second debate by Article 75. According to these provisions, if during the first debate there has been a decision to proceed to the debate on the proposal as a whole and the individual articles, then a debate on all articles is required. However, a debate on the whole proposal and the articles for which an amendment has not been proposed is not possible during the second debate.

As the Plenary Assembly of the Senate of the Republic had decided to proceed with one debate only on the proposal containing the provisions at issue, the legal rules applying to the first debate had to be applied. However, the Plenary proceeded as if there were two readings of the proposal and thus the provisions at issue were not submitted to a debate because there was no amendment proposed for them. This practice constitutes an important and serious violation of Articles 73 and 74 of the Rules of Procedure of the Senate of the Republic, and, in consequence, of Articles 1 and 6 of Law No. 1773. Therefore, the law in question violates Articles 92 and 85 of the Constitution and has to be annulled.

Furthermore, it will be useful to point out that Article 136 of the Constitution provides that "... state security courts shall be established" and that "the establishment and functioning, duties and competences, rules of procedure and other relevant provisions shall be regulated by law".

It is clear that by this provision the Constitution envisages the establishment of state security courts but leaves their establishment to further legislative action. In other words, the state security courts were established by Law No. 1773 in fulfilment of the constitutional mandate. On the other



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hand, the repetition of constitutional provisions in a law does not give these ordinary law provisions a constitutional character. This explanation should invalidate the view that Articles 1 and 6 of Law No. 1773 cannot be annulled or that their annulment would be pointless.

For these reasons Articles 1 and 6 violate the Constitution on procedural grounds and must be annulled.

Şahap ARIÇ, İhsan ECEMİŞ Halit ZARBUN, Abdullah ÜNER, Hasan GÜRSEL, Ahmet Salih ÇEBİ, and Nihat O. AKÇAKAYALIOĞLU did not agree with regard to Article 1; Ahmet Salih ÇEBİ did not agree with regard to Article 6 (1, 2); and Şahap ARIÇ, İhsan ECEMİŞ, Halit ZARBUN, Abdullah ÜNER, Hasan GÜRSEL, and Nihat O. AKÇAKAYALIOĞLU did not agree with regard to the whole.

B) Issue of unconstitutionality of Law No. 1773 with regard to Article 1 and 6 of the Constitution

As the unconstitutionality of Articles 1 and 6 of Law No. 1773 has been stated on procedural grounds, there is no need to consider the issue from a substantive point of view.

(…)



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## 2.7 Appointment Procedures of Judges and Public Prosecutors

***Application Number:*** *1992/39* ***Decision Number:*** *1993/19*

***Date of Decision:*** *29/04/1993*

***Date of Publication and Number of the Official Gazette:*** *17/10/1995 - 22436*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by member of the TBMM Mr Ahmet Mesut Yılmaz (chairman of the main opposition party ANAP parliamentary group) on behalf of the ANAP parliamentary group*

***Provisions at Issue:*** *Articles 1, 3, 4, 6, 8, and 12 of Law No. 3825 (25/06/1992) amending Law No. 2802 on Judges and Public Prosecutors; Law No. 2992 amending the Statutory Decree about the Organisation and Functions of the Ministry of Justice; Law No. 2461 on the High Council of Judges and Public Prosecutors (HSYK); and the Law amending Statutory Decrees No. 190 and 270*

***Relevant Constitutional Provisions:*** *Preamble, Art. 6, 8, 9, 11, 104, 138, 139, 140, 159 (1982 TA, as of 1993)*

***Voting:*** *Rejected by majority of 8:3 justices (regarding Article 37/I b)*
*Rejected by majority of 7:4 justices (regarding Article 38)*

***Dissenting and Concurring Opinions:*** *3 DO*

***Justices:*** *President Yekta Güngör ÖZDEN; Vice President Yılmaz ALİEFENDİOĞLU; Members: Servet TÜZÜN, Mustafa ŞAHİN, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Haşim KILIÇ, Yalçın ACARGÜN, Mustafa BUMİN, Sacit ADALI*[692]

The main opposition party questions the procedure to select and appoint judges. They claim that it violates the principles of separation of powers, independence of the judiciary, and security of tenure of judges and public prosecutors. In particular, the applicant party claims that to abolish the principle of joint signature of the concerned Minister, the Prime Minister and the President of the Republic violates Article 104 (Duties and powers of the President of the Republic) of the Constitution in certain cases when concerning the appointment of judges. Thus, the new provisions compromise the independence of judges and courts and thereby harm the rule of law principle. The AYM rejects the application for annulment of Articles 1, 6, and 12 of the amended law. However, it argues that Article 3, 4 and 8 of the amended law violate the Constitution, mainly because the Undersecretary of the Ministry of Justice fulfils administrative functions of the Ministry, whereas they are also an ex officio member of the High Council of Judges and Prosecutors (HSYK). All decisions concerning the appointment of members of the judiciary to the Ministry of Justice or other administrative units have to be approved through signature by the President. It is not sufficient to only have it signed by the respective Minister and the Prime Minister.

692 Justices Ahmet Oğuz AKDOĞANLI, Samia AKBULUT and Güven DİNÇER did participate at the beginning of the proceedings, but they were not present at the decision, serving as reserve justices in this case. They replaced justices Mustafa ŞAHİN, Mustafa BUMİN and Sacit ADALI, who were present in the decision but not at the beginning of the review proceedings.



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(…)

## IV. MERITS

(…)

### A - Review of Article 1

-Meaning and scope of the provision at issue

*The Court provides a detailed recollection of the changes in the selection and appointment procedures of judges at civil, criminal and administrative courts: According to the former article 13 (2), (3), (14) of the Law on Judges and Public Prosecutors, the High Council of Judges and Prosecutors (HSYK) selected the judges which were then appointed to specific posts by lot. The appointments had to be confirmed by a joint decision of the Minister of Justice, the Prime Minister and the President of the Republic. Under the amended law, the appointment is rendered by the High Council of Judges and Prosecutors only and published in the Official Gazette.*

2- Issue of unconstitutionality

(…)

The concept of independence, which elucidates the relation between two authorities, means that one authority can fulfil its functions without any influence or interference by another authority or authorities.

Judicial independence thus means that the judiciary can freely fulfil its functions without depending on any other authority or institution and free from any orders or instructions. No suggestions or recommendations can be made nor can circulars be sent to courts in relation to their judicial functions. The possibility of exercising pressure impedes judicial independence just as much as de facto pressure. Judicial independence not only includes independence vis-à-vis the executive. Independence is also necessary vis-à-vis the legislative and socio-economic pressure groups active in society and the State. A judiciary subject to the supervision and open to the influence of the legislative, executive or other powers cannot be considered an independent "judiciary".



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An independent judiciary is the principal guarantor of fundamental rights and freedoms. For judicial independence is at the core of being a State governed by the rule of law.

> *The Court continues by arguing that the 1924 Constitution did not contain any particular provisions on judicial independence as it established the principles of unity of powers. The 1961 Constitution fundamentally changed this situation, as the AYM illustrates by citing from the explanatory memorandum of the Constitutional Committee of the National Assembly, which emphasises the importance of judicial independence. The 1982 Constitution preserved the principles established by the 1961 Constitution in relation to the judiciary.*

Generally, the term independence of courts is used synonymously with the term independence of judges, as stated in Article 9 and 138 of the Constitution. Article 9 of the Constitution states: "Judicial power shall be exercised by independent courts", whereas Article 138 of the Constitution states: "Judges shall be independent in the discharge of their duties". Thus, the Constitution stipulates that judges are the main element of the judiciary and hence their independence renders courts independent.

The independence of courts implies that the independent structure of the judiciary can use its powers and fulfil its functions independently from the legislative and executive. On the other hand, the aim of the independence of judges is to enable judges to decide according to the law and their conscience and independently of the legislative and executive. Doctrine separates the independence of judges into objective independence and individual independence, whereby individual independence/ guarantees objective independence. Although the Constitution accordingly distinguishes between "independence" and "guarantee", the independence of courts and the independence of judges are judicial institutions that complement each other and cannot exist separately.

The objective (…) independence of judges in relation to their functions is not a personal privilege but aims at ensuring the trust and belief that justice will be delivered free from any influence, pressure, manipulation and suspicion. Article 138 of the Constitution is entitled "Independence of Courts" because independence – which secures that decisions can be made freely without any hesitation and fears, impartially and solely on the basis of constitutional requirements – has to be applied integrally with regard to courts and judges.



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(…)

Security of tenure is the most important institution for ensuring the independence of judges. While the independence of judges designates the objective independence, security of tenure designates their individual independence. Security of tenure is not a privilege for judges, but an institution that ensures that judges can fulfil their functions in complete trust and impartiality. Hence, it is not for the personal benefit of the judges, but for public benefit. The aim of security of tenure for judges is not so much to increase the judges' personal authority and reputation and ensure their comfort, but to ensure that judges can decide freely and impartially and thereby give society the confidence that justice will be delivered free from any pressure and influence.

Compared to the Constitution of 1961 the Constitution of 1982 in Article 139, "Security of tenure of judges and public prosecutors", considers the judiciary as a whole and therefore provides for the security of tenure of judges and public prosecutors in one and the same article.

Furthermore, according to Article 139 (1) "Judges and public prosecutors shall not be dismissed, or retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of court or post."

Furthermore, Article 159 (6) of the Constitution states that judges and prosecutors cannot be ordered against their will to work at the Ministry of Justice for a limited or unlimited period of time.

The independence of courts and legal guaranties for judges established in Article 159 (1) of the Constitution was institutionalised by Law No. 2461 on 13/05/1983, which established the High Council of Judges and Prosecutors.

The 1961 Constitution provided for the first time an institution that would decide on all matters pertaining to employment affairs independently of the legislative and executive; thereby aiming at guaranteeing the independence of judges in the most effective manner. For entrusting all matters pertaining to the appointment and employment affairs of judges and prosecutors to an independent institution is a condition for judicial independence.

The High Council of Judges was renamed High Council of Judges and Prosecutors in the Constitution of 1982.



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The Constitutional Court in a former decision[693] ruled that Article 66 of Law No. 45, which provided for an approval of certain decisions of the High Council of Judges through the Minister Justice, Prime Minister and President of the Republic, violated Articles 132, 133, 144 of the Constitution, and thus infringes upon the intentions of the constitution-maker. These provisions stipulate that the judiciary has to be independent of any influence of the executive, and that the independence of judges shall be guaranteed and not restricted by decisions of the High Council of Judges. Furthermore, such an approval mechanism by a joint decision would abrogate the powers of the independent High Council of Judges. These powers are guaranteed by the Constitution, and they cannot be returned to the executive through a simple law regulation. This would harm the principle of security of tenure and independence of judges guaranteed by Article 139 of the Constitution. The former decision of the Constitutional Court of Turkey also emphasised that the High Council of Judges is a completely independent institution; this principle was not abrogated by the 1982 Constitution. It has to be mentioned, however, that the marginal amendments in the Constitution of 1982, concerning the independence of the judiciary and the security of tenure of judges, do not hinder further efforts to improve the independence of the judiciary.

In order to realise the principles of judicial independence and security of tenure of judges – upon which the first relies – Article 159 of the Constitution provides that the High Council of Judges shall be established and function according to the principles of the independence of courts and the security of tenure of judges (…).

As explained above, that the High Council of Judges and Prosecutors is established and functions according to the principles of the independence of courts and the security of tenure of judges means that the legal rule that it uses its powers and fulfils its duties independently of the legislative and executive enables the judges serving on the High Council of Judges and Prosecutors to decide solely on the basis of the Constitution, law and their conscience and without any influence, pressure, suspicion and manipulation.

The High Council of Judges and Prosecutors delivers its functions according to Article 159 (3) of the Constitution: The High Council of

693 In the Turkish original the Court does not indicate which decision it refers to. Actually, it refers to a former decision under the 1961 Constitution (E. 1963/50, K. 1963/111, date: 15/05/1963), which partially annulled Article 66 of Law No. 45 On the High Council of Judges under the Constitution of 1961.



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Judges and Prosecutors shall deal with the admission of judges and public prosecutors of courts of justice and of administrative courts into the profession, appointments, transfers to other posts, the delegation of temporary powers, promotion, and promotion to the first category, the allocation of posts, decisions concerning those whose continuation in the profession is found to be unsuitable, the imposition of disciplinary penalties and removal from office. It shall take final decisions on proposals by the Ministry of Justice concerning the abolition of a court or an office of judge or public prosecutor, or changes in the jurisdiction of a court. There shall be no appeal to any judicial instance against the decisions of the Council.

According to doctrine the High Council of Judges and Prosecutors is independent from the government because of its structure as a political organ and the constitution-maker conceived it as part of the "self-government of the judiciary" (…)[694], hence as its "executive organ". For these reasons, appointment decisions of the High Council of Judges and Prosecutors are not part of the general executive actions.

Moreover, these decisions based on constitutional provisions are not the same as any recommendatory and advisory decision, but directly applicable decisions with legal effects and without any need for further approval by an institution or authority.

The applicant's claim that the provision at issue, which allegedly violates Articles 8, 104, and 105 of the Constitution, also violates the requirements of the parliamentary system and settled customary practices has no constitutional foundation.

According to the parliamentary system adopted by the Constitution the decrees counter-signed by the president as the head of the executive have to be interpreted according to Article 104 of the Constitution as being restricted to the duties and competences related to the executive. The constitutional provision that "[a]ll Presidential decrees ... shall be signed by the Prime Minister, and the ministers concerned" should be understood to mean only those relating to the executive and entailing the political accountability of the Council of Ministers. If it were otherwise, it would be impossible to hold a person or institution of the executive that uses executive powers politically accountable for their actions and proceedings; such a situation would be irreconcilable with the logic of the parliamen-

694 In the Turkish original the AYM emphasises the independence of the judiciary by inserting, in English, the expression "self-goverment of the justice" (sic.). For this translation is from Turkish to English, this phrase was left out intentionally.



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tary system. Therefore, the counter-signature principle is applicable to appointments concerning the executive.

However, the competence under Article 104 of the Constitution to appoint certain members of High Courts and the High Council of Judges and Prosecutors has been conferred to the President in their role as the head of State and not as the head of the executive. There is no doubt that these powers are among those that the President can exercise alone.

It was not the aim of the parliamentary system adopted by the Constitution to establish a symbolic President without any powers. It would constitute a clear violation of Article 159 of the Constitution, which provides that the High Council of Judges and Prosecutors exercises its functions in accordance with the principles of the independence of courts and security of tenure for judges, if – in executive issues – an unaccountable President would – even if in good faith – refuse to sign a decree concerning the appointment of members of the High Council of Judges and Prosecutors and issue warnings, advice or suggestions. Moreover, as the appointment decisions of the High Council of Judges and Prosecutors are not among the general executive actions subjecting them to the approval of a joint decree would be incompatible with constitutional principles.

The new provision does not violate the principle of separation of powers "and limitation to a civilised cooperation and division of functions", stipulated in the Preamble of the Constitution. Any other regulation would have harmed this separation of powers and thus would have been in conflict with the Constitution. The changed provision does not violate Article 6 of the Constitution either.

As explained before, the requirement of an executive approval of the appointment procedure of judges infringes upon the independence of the High Council of Judges and Prosecutors and the security of tenure of judges and thus violates Article 159 of the Constitution. Consequently, the application for annulment of Article 1 of the law which amends Article 13 (4) of Law No. 2802 has to be rejected.

## B- Review of Article 3

### 1- Meaning and scope of the provision at issue

*First the Court provides an in-detail recollection of the changes in the appointment procedures of judges and public prosecutors to different administrative functions in the Ministry of Justice, among them the newly*



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*established function of ministerial chief consultancy* [bakanlık yüksek müşavirliği] *for senior judges. Under the old version of the law such appointments followed the procedure for other appointments in the judiciary, i.e. a joint decision of the Minister of Justice, the Prime Minister and the President was necessary. According to the amended law, judges and public prosecutors will be appointed to administrative posts upon proposal of the Minister of Justice and approval by the Prime Minister. The AYM decision further cites from the explanatory memorandum of the law, which argues that judges and public prosecutors appointed to the Ministry do not fulfil judicial but administrative functions and, consequently, cannot rely on the same guarantees as judges and public prosecutors in fulfilling judicial functions.*

2. Issue of unconstitutionality

*The application alleges a violation of the Preamble and Article 6, 8, 104, 140, and 159 of the Constitution, which are consecutively discussed in the following paragraphs.*

a. Review with regard to Articles 140 and 159 of the Constitution

*aa. Article 3 of the amended law stipulates that the appointment of judges and prosecutors to certain (administrative) functions can be realised without the consent of the appointee upon proposal by the Minister of Justice and approval by the Prime Minister. The applicants claim that the assent of the appointee was valid for a certain appointment only and thus to be obtained again. Based on Article 140 (7) of the Constitution, the AYM argues that judges and public prosecutors appointed to the Ministry of Justice according to Article 159 of the Constitution are bound by the provisions on judges and public prosecutors and benefit from all the rights accorded to them. Following Article 159 of the Constitution (as of 1993), guarantees provided to judges are provided to them because of their judicial functions. Therefore, any appointment to the Ministry of Justice requires their consent. Once appointed to the ministerial administration, however, the judges and public prosecutors are subject to the orders and instructions of the Minister. As this is incompatible with the concept of judicial independence, Article 140 of the Constitution has to be interpreted with regard to its aims. Recurring to the development of Article 140 of the Constitution during the constitution-making process, by referring to the explanatory memoran-*



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*dum of the Law on Judges and the Law on the Organisation and Functions of the Ministry of Justice, the Court argues that the administrative functions in the justice system are no judicial functions in the actual sense but closely related to the judicial functions and thus the consent requirement is justified.*

The principle on the independence of courts had been clearly established by the 1961 Constitution. It clearly appears from the minutes of the Constituent Assembly and the explanatory memorandum of Articles 132 of the 1961 Constitution, which contained the same provision as Article 138 of the Constitution that this principle establishes that no organ, authority, agency or person shall interfere with courts and judges in the exercise of their judicial functions.

In the explanatory memorandum of Article 132 of the Constitution it is stated that the principle "no organ, authority, agency or person may give orders or instructions to courts or judges in connection with the discharge of their judicial duties" is in fact one of the consequences of the principle of judicial independence. But the measures in this case should be connected to the "use of judicial power". When administrative affairs of courts need to be organised, the Ministry of Justice can issue circulars or take other measures.

Judges are independent in their functions and have, compared to other civil servants, a different position (status) and protection because they fulfil judicial functions. For these reasons they can only be appointed from judicial functions to administrative functions if they have assented to this.
(…)

Judges and public prosecutors who work in the administration and, by assuming administrative functions, are part of the ministrial hierarchy cannot be considered to be as independent as those exercising judicial functions. For working under orders and instructions is incompatible with the concept of independence.

> *The Court further argues that the wording of Article 140 of the Constitution is misleading and that this article has to be interpreted in accordance with its aim. Interpreted in accordance with Article 139 of the Constitution, this aim is to protect the financial and employment related rights and guarantees of judges and public prosecutors appointed to the Ministry of Justice. The aim is not to require their consent at each new appointment to the ministry. Furthermore, the Constitution does not establish a right to maintain a post or stay at a place of duty; in fact, Article 140 of the Constitution clearly provides for changes of post and place of duty. If such changes are possible without prior assent for judicial functions they must be possible for*



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*administrative functions, too. A renewed assent is therefore not required, so that the provision at issue is not unconstitutional.*

bb- *Concerning the appointment of senior judges and public prosecutors working at the Ministry of Justice to the office of chief advisor without their consent and upon proposal by the Minister and approval by the Prime Minister only (i.e. without joint decree by the Minister, the Prime Minister and the State President), a violation of Articles 8, 104, 140, and 159 of the Constitution is claimed for the same reasons as under aa.*

However, the same cannot be said of the Undersecretary of the Ministry of Justice. The Undersecretary fulfils on the one hand administrative functions of the Ministry under the orders and instructions of the Minister, while on the other hand being an ex officio member of the High Council of Judges and Prosecutors. For this reason, as the Undersecretary of the Ministry of Justice is "the most competent and most inherent part of the Ministry because they are experienced professionals with security of tenure", they have a different legal status compared to other undersecretaries.

Article 159 (1) of the Constitution, which regulates the High Council of Judges and Prosecutors, states that this organ: "shall exercise its functions in accordance with the principles of the independence of courts and security of tenure of judges". While the executive is included in the establishment of the High Council of Judges and Prosecutors, the aim was to keep it completely independent and free from any influence, pressure or manipulation during the exercise of its functions. However, the High Council of Judges and Prosecutors can only be as independent as its members are. It constitutes a violation of Article 159 (1) of the Constitution and the principle of judicial independence that the Undersecretary of the Ministry of Justice, who is expected to exercise their functions according to the principles of the independence of courts and the security of tenure of judges, will find themselves in a weaker position compared to the judges of high courts with security of tenure alongside whom they are expected to fulfil their functions. For it is clear that the independence of judges and public prosecutors will be guaranteed only to the extent that the members of the High Council of Judges and Prosecutors can exercise their functions independently.

*In the following, the Court cites from the explanatory memorandum of Article 3 of the law on the High Council of Judges and Prosecutors. The explanatory memorandum emphasises the fact that the High Council of*



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*Judges and Prosecutors is completely independent and that its members cannot be ordered or instructed on issues concerning their functions.*

Thus, it is inconceivable that the Undersecretary, who fulfils their administrative functions under the orders and instructions of the Minister of Justice, can act independently and solely on the basis of the Constitution and laws and according to their conscience when they fulfil their functions in the High Council of Judges and Prosecutors, which is the only institution authorised to act in matters pertaining to the employment affairs of judges and public prosecutors.

For this reason, Article 3 of Law No. 2802 that adds to Article 37 (1, subpara. B) of the law [on Judges and Public Prosecutors][695] subsection 7, stating that "[a]ppointments to the office of chief advisor will be made from senior judges working at the Ministry of Justice", has to be annulled as it violates Article 159 (1) of the Constitution with regard to the Undersecretary of the Ministry of Justice.

Yekta Güngör ÖZDEN and Yılmaz ALİEFENDİOĞLU did not agree with this reasoning and Mustafa ŞAHİN stated that the whole subparagraph should be annulled.

b. Review with regard to Articles 8 and 104 of the Constitution

*The main argument concerns the question of whose signatures are necessary for the appointment of a judge or prosecutor as chief advisor to a Minister. Referring to Articles 8, 104, 105 (1) and 108 of the Constitution, the Court balances the reasons for and against the necessity of a joint decision on such appointments, including not only the signatures of the Minister in question and the Prime Minister, but also the consent and signature of the President of the Republic. On the one hand, the President and the Council of Ministers do not have the power to act independently of each other. Hence, all decisions falling within the ambit of the executive have to be counter-signed by the Prime Minister and minister concerned in order to become valid. The same applies to decrees of the Councils of Ministers as well as joint decrees signed by the minister concerned, Prime Minister and President. The reason for this requirement of counter-signature by the minister concerned and the Prime Minister is the unaccountability of the President of the Republic*

695 For the sake of clarity we have added in brackets the name of the law, for the Court only very generally uses "law" for more than one law in this ruling.



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*established by the Constitution. On the other hand, the 1982 Constitution established a "strong" and "effective" position for the President. According to Article 104 of the Constitution, for example, the signature of decrees falls within the ambit of the executive functions of the President. In addition, they have the power to order any kind of inquiry, investigation and inspection necessary for the regular and efficient functioning of the administration (Article 108 of the Constitution). Consequently, Articles 104 and 108 of the Constitution complement each other, and the ordinary functioning of parliamentary systems requires that all important acts of State are signed by the head of State.*

However, it should be mentioned that as a result of the changes that the parliamentary system has undergone, the actual source of power is the elected parliament with the government formed by the majority. Nowadays the executive authority in parliamentary systems lies with the government. As a consequence, instead of having a decision of the head of State signed by the Prime Minister and the minister concerned, one should nowadays rather speak of a decision of the Prime Minister and minister concerned that is completed by the signature of the head of State. For this reason, it would run counter to the characteristics of the system if the President would go further than make remarks and give advice on decrees for which the government is responsible.

Hence, as a result of interpreting the relevant constitutional provisions in light of the basic principles of the parliamentary system – and, as despite the powers bestowed on the President, the system is in fact a parliamentary democracy and responsibility lies with the government – as long as they are not unconstitutional and unlawful the President cannot review the appropriateness of actions of the Council of Ministers and has to sign its decisions. In fact doctrine also points out that the role of the President should not go beyond remarks and advice.

As the Constitution emphasises and cares about ensuring the impartiality of the President, it is clear that it was certainly not the intention to establish a "symbolic" President without powers and who is nothing more than an executive instrument at the orders of the majority party. For this reason, the President can have a different opinion in the case of unlawful acts. For a requirement to sign unlawful decrees cannot be construed from the unaccountability of the President.

Such a view would above all violate the oath of the President as established in Article 103 of the Constitution. Furthermore, Article 11 of the Constitution, which states that "[t]he provisions of the Constitution are fundamental legal provisions binding upon legislative, executive and judi-



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cial organs, and administrative authorities and other institutions and individuals", is also binding upon the President. Most importantly, the President is obviously also part of the executive organ in the sense of Article 138 of the Constitution, which provides that "[l]egislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution". Thus, the requirement that the President should sign decrees of the Council of Ministers that violate a court decision would be incompatible with their duty to observe, implement, respect, and protect the Constitution. In fact, the President is obliged to refuse to sign them.

(…)

The fact that positions such as Undersecretary, Deputy Undersecretary, President of the Inspection Board and the other mentioned senior officials, who have advanced to the highest positions in the civil service and are thereby experienced professionals – and who are employed in order to make up for the Minister's lack of experience in their area of expertise and service, to support them in these areas and ensure that the public services remain unaffected by a change of ministers – can be appointed by the same procedure is incompatible with the system established by the Constitution.

The Constitution requires that appointment decrees – whether they concern the appointment of judges and public prosecutors who already work at the Ministry of Justice to other positions or whether they concern the appointment of judges and public prosecutors currently fulfilling judicial functions to the administrative functions mentioned in the law – have to be submitted to the approval of the President.

As according to Article 8 of the Constitution the President and the Council of Ministers jointly exercise the functions and duties of the executive, it would violate the Constitution if judges and public prosecutors were appointed to the administrative functions mentioned in the law only upon proposal by the Minister and approval by the Prime Minister and without the approval of the President.

Consequently, the terms "appointments are made upon proposal by the Minister and approval by the Prime Minister" in Article 3 of the law [on Judges and Public Prosecutors] amending the last paragraph of Article 37 (last sentence of subpara b) of Law No. 2802, are annulled for violating Articles 8 and 104 of the Constitution.

Güven DİNÇER disagrees with this reasoning; Yekta Güngör ÖZDEN argues that the annulment should only concern the Undersecretary of the Ministry of Justice; Mustafa ŞAHİN states that as to paragraph 1 (subpara-



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graph b and last phrase of subpara 2, amended by Article 3 of Law No. 3825) the annulment decision should only concern the Undersecretary.

C- Review of Article 4

1- Meaning and scope of the provision at issue

*The Court argues that Article 4 of the amended law amends Article 38 of the Law on Judges and Public Prosecutors, which regulates the appointment of judges and public prosecutors working at the ministry to judicial functions. Whereas the previous version provided that – except senior judges and public prosecutors – judges and public prosecutors working at the ministry would be appointed by the High Council of Judges and Prosecutors upon proposal by the Minister of Justice, the new provision now includes senior judges and public prosecutors in this procedure and establishes that the appointments have to be made within a month of the Minister's proposal. In the following, the Court cites from the explanatory memorandum, which argues that the aim of the provision is to ensure the effective functioning of the judicial and ministry services.*

2- Issue of unconstitutionality

(…)

a- *Article 140 of the Constitution provides that all employment related matters of judges shall be regulated with regard to the principles of the independence of courts and the security of tenure of judges. Judges and public prosecutors can achieve four levels of seniority, 3rd degree, 2nd degree, selected for 1st degree, and 1st degree (i.e. senior). Article 2 of the amended law provides that judges and public prosecutors after having been selected for 1st degree for six years and not having lost their eligibility for the Court of Cassation and Council of State will be counted as 1st degree. Article 5 of the amended law provides that 1st degree judges will benefit from the same financial rights and payments as members of the Court of Cassation and Council of State. Furthermore, membership of the Court of Cassation and Council of State has been removed from the 1st degree table. Referring to the applicant's claim that the High Council of Judges and Prosecutors is not empowered to appoint senior (1st degree) judges and public prosecutors, the Court argues that before the amendment the 1st degree status was achieved*



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*through election to the Court of Cassation or Council of State. Furthermore, the Undersecretary, Deputy Undersecretaries, President of the Inspection Board, and President of the Research, Planning and Coordination Council were also 1st degree judges. Hence Article 159 of the Constitution provides that the High Council of Judges and Prosecutors is responsible for "promotions and selection for 1st degree". However, with the amendment judges and public prosecutors selected for 1st degree and fulfilling the above-mentioned six year and eligibility criteria gain 1st degree status and can be appointed by the High Council of Judges and Prosecutors to other positions.*

It would be wrong to interpret Article 159 of the Constitution only with regard to its wording and assume that senior judges cannot be appointed to new positions. It is clear that this was not the intention of the constitution-maker. Thus, it is obvious that the new provision is not unconstitutional in this regard.

However, the situation is different with regard to the Undersecretary of the Ministry of Justice. The Undersecretary while being part of the ministry hierarchy is an ex officio member of the High Council of Judges and Prosecutors, which, according to Article 159 of the Constitution, is expected to fulfil its functions in accordance with the principles of the independence of courts and the security of tenure of judges.

There is no doubt that the Undersecretary, who – according to the Constitution – should benefit from the security of tenure of judges while they are fulfilling their duties and exercising their powers in the High Council of Judges and Prosecutors, must be free from any kind of pressure.

For this reason, the changes to Article 38 of Law No. 2802, referring to the Undesecretary, introduced by Article 4, violate Article 159 (1) of the Constitution.

Consequently, this Article of the amended law with regard to the Undersecretary has to be annulled.

Yekta Güngör ÖZDEN, Yılmaz ALİEFENDİOĞLU and Mustafa ŞAHİN did not agree with this reasoning.

b- The applicant claims one more issue of unconstitutionality. Following the amended law, first degree judges and prosecutors can be appointed to new positions at the Ministry of Justice or other administrative units within a month after the proposal by the Minister of Justice.

According to Article 6 of the Constitution "[t]he Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution". According to Article 8 of the Constitution the executive function is jointly exercised by the President and the Council of Ministers. With regard to what has been said above



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concerning Article 3 of the law and relating to the joint exercise of functions by the President and the Council of Ministers, it would violate the Constitution if the appointments of judges and public prosecutors from the ministry to judicial functions would be made only upon proposal by the Minister of Justice and without the approval of the President.

Hence, the appointment procedure to judicial functions based on the proposal of the Minister of Justice, the joint decision by the Ministry of Justice and the appointment by the High Council of Judges and Prosecutors need to be annulled.

Yekta Güngör ÖZDEN, Yılmaz ALİEFENDİOĞLU and Mustafa ŞAHİN did not agree with this reasoning.

c- As no other parts of the provision have been found unconstitutional, the annulment claim in this regard has to be rejected.

Selçuk TÜZÜN did not agree with this reasoning.

D- Review of Article 6

1- Meaning and scope of the provision at issue

(…)

2- Issue of unconstitutionality

*The Court summarises the applicant's claim that the establishment of the function of chief advisor is unnecessary as all senior officials in the Ministry of Justice are judges and work in an advisory capacity. Thus, the aim of the amendment is to eliminate senior officials. The Court unanimously rejects this claim by arguing that the law at issue provides the legal grounds for appointments to "official or public functions" as required by Article 140 of the Constitution. Furthermore, Article 140 of the Constitution provides that judges and public prosecutors can fulfil administrative functions within the judicial system.*



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E- Review of Article 8

1- Meaning and scope of the provision at issue

*Here, the Court repeats the content of Article 8 of the amended law, which amends Article 16/A of the statutory decree about the Organisation and Functions of the Ministry of Justice. According to the provision 15 senior judges or public prosecutors can be appointed to the function of chief advisor. They work at the orders and instructions of the Minister and are responsible to them. Five of the advisors can be appointed among academic staff and highly talented successful professionals with at least a university degree. The chief advisors are appointed upon proposal by the Minister and approval by the Prime Minister. Furthermore, it is possible to establish the function of advisor for external communications and appoint 15 advisors for particularly important technical issues from among members of the general administrative services. The advisors are appointed upon approval of the Minister. In contrast, the previous provision only established the function of advisor and provided for four such advisors. According to the Court, the explanatory memorandum to the amended law does not provide any particular reasons for establishing the new function.*

2- Issue of unconstitutionality

(…)

a- Review with regard to Articles 8, 104, and 105 of the Constitution

(…)

While the status of senior, i.e. 1st *degree* judges working at the ministry before the amendment included the Undersecretary of the Ministry of Justice, undersecretaries, directors general, the President of the Inspection Board, and the President of the Research, Planning and Coordination Council, the amendment added functions such as the inspectors general, deputy directors general, heads of departments of directorates general, members of the Research, Planning and Coordination Council, inspectors, and rapporteur judges working at the ministry. With the amendment the grade of senior judge has become the last promotion grade before membership of the Court of Cassation and Council of State.



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Although senior judges working in high-level positions at the Ministry of Justice and having arrived at the last stage of their career do not, as mentioned above, exercise judicial functions, they nevertheless participate in the preparation of legislation relating to the judiciary and fulfil other important functions such as those relating to the employment affairs or investigation of judges and public prosecutors. In fact, Article 98 of Law No. 2802, which provides that senior judges working at the Ministry of Justice are subject to the same legal rules as members of the Court of Cassation with regard to disciplinary measures, investigations and trials, has not been changed by the law at issue.

Thus, it is clear that senior judges at the highest stage of their career, academic staff and successful professionals will by virtue of their appointment as Chief Advisors work in an advisory capacity for the Minister and influence ministry policies and decisions.

Article 8, 104, and 105 of the Constitution require that the appointment of these civil servants to high-level positions in the ministry is approved by the Minister of Justice and the Prime Minister – who constitute the executive in parliamentary systems – as well as the impartial President of the Republic.

Further discussion of the issue is unnecessary as it has already been discussed in detail in relation to the review of the constitutionality of Article 3 of the law.

Thus, the last paragraph of Article 3, "appointment to the function of chief advisor is made upon proposal by the Minister and approval by the Prime Minister", is in conflict with Articles 8, 104 and 105 of the Constitution and therefore has to be annulled.

Yekta Güngör ÖZDEN did not agree with this reasoning.

b- Review with regard to Article 159 of the Constitution

*The Court summarises Article 3 of the amended law, providing that the Undersecretary of the Ministry of Justice is included in the group of senior judges eligible to the function of chief advisor. It states an obvious violation of Article 159 of the Constitution, for the Undersecretary, who is an ex officio member of the High Council of Judges and Prosecutors, can be appointed by the same procedures to the function of chief advisor. Therefore, the majority of the Court annuls the provision that senior judges can be appointed as chief advisors with regard to the Undersecretary.*



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Yekta Güngör ÖZDEN and Yılmaz Ali ALİEFENDİOĞLU did not agree with this reasoning; Mustafa ŞAHİN states that the whole paragraph should be annulled because it violates the constitution.

## F- Review of Article 12

### 1- Meaning and scope of the provision at issue

*The Court cites Article 12 of the amended law, which amends Article 33 of the Decree Law Concerning the Organisation and Functions of the Ministry of Justice. Article 12 of the amended law provides that non-judicial personnel will be appointed by the Minister of Justice and that the minister can delegate the appointment of personnel below the rank of advisor. It is argued that the amendments were required because of the other amendments to the law as the previous version only provided for the delegation of appointments of other civil servants without making an exception for advisors.*

### 2- Issue of unconstitutionality

(…)

However, it is also a fact that each ministry functions under the authority and responsibility of a minister, who is a political person, and that the minister represents the legal entity of the State in their area of responsibility and in this capacity the sole authorised and responsible person as well as highest hierarchical superior.

Nowadays, as it is impossible for the minister to fulfil all actions of the ministry themselves, the delegation of some powers to senior officials – while keeping the responsibility – is necessary. (…) Thus, important powers such as participation in meetings of the Council of Ministers, signature of decrees, representation of other ministries, issuing circulars, imposing disciplinary measures, application to the Court of Conflicts, and administrative tutelage cannot be delegated and have to be exercised by the minister themselves. However, other powers can be delegated according to public law principles on the delegation of powers.

It should be mentioned that the appointment of personnel other than judges and public prosecutors by the minister and the delegation of this power, if necessary, to subordinates does not violate the Constitution.



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In fact, in the previous version of Law No. 2451 the provision provided for the appointment by the minister and, if necessary, the delegation of this power in writing to subordinates.

The Constitution provides that ministries can be established and abolished as well as their functions, powers and organisation regulated by law. As the form and limits of this delegation of power is clearly set out in the law, its constitutionality is obvious. The appointment of office personnel and staff by the Minister who holds executive powers and is the highest superior of the ministry is clearly constitutional.

Thus, Article 12 of Law No. 3825, which amends Article 33 (1) of Law 2992, does not violate the Constitution; the application therefore has to be rejected.

(…)



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## 2.8 Unequal Treatment of Military and Civilian Judges

***Application Number:*** *2010/32* ***Decision Number:*** *2011/105*

***Date of Decision:*** *16/06/2011*

***Date of Publication and Number of the Official Gazette:*** *27/10/2011 - 28097*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by the Military Court of the Air Force Education and Training Command (Hava Kuvvetleri Komutanlığı Hava Eğitim Komutanlığı Askeri Mahkemesi) and the Military Court of the General Staff (Genelkurmay Başkanlığı Askeri Mahkemesi)*

***Provisions at Issue:*** *Art. 25 and 26 of Law No. 357 on Military Judges (26/10/1963)*

***Relevant Constitutional Provisions:*** *Art. 2, 10, 36, 138, 139, 140, and 145 (1982 TA)*

***International Treatises/References:*** *UDHR*

***Voting:*** *Unanimously accepted by 16 justices*

***Justices:*** *President Haşim KILIÇ; Vice President Osman Alifeyyaz PAKSÜT; Vice President Serruh KALELİ; Members: Ahmet AKYALÇIN, Mehmet ERTEN, Fettah OTO, Serdar ÖZGÜLDÜR, Zehra Ayla PERKTAŞ, Recep KÖMÜRCÜ, Alparslan ALTAN, Burhan ÜSTÜN, Engin YILDIRIM, Nuri NECİPOĞLU, Hicabi DURSUN, Celal Mümtaz AKINCI, Erdal TERCAN*

The submitting courts argue that the provisions at issue violate the Constitution for two reasons. First, in the case of a military judge committing an offence in the course of their duties they will be tried before the nearest court. This court is not a hierarchically higher court, but a court of the same level as the military court to which the judge on trial belongs. Thus, the office of military judges is not protected in the same way as the office of civilian judges who will always be tried before a hierarchically higher court. Yet, the Constitution does not differentiate between civilian and military judges. The guarantees of judicial independence and security of tenure attached to their respective offices are the same. Second, for military courts the nearest court is also always the court of appeal. Hence, the judges mutually hear each others cases and act as court of appeal for each other, in case one of them was tried for offenses committed in course of their duties. The submitting courts consider that this situation violates the principles of equality, fair trial, judicial independence, and security of tenure for judges and other constitutional provisions relating to the judiciary. The AYM decides only to review Article 25, as Article 26 will not be applied by the submitting courts in the case at issue. In its judgement the AYM rules that the provisions violate the Constitution as it results in an inequality between judges in different positions. Article 25 of the *Law on Military Judges* will be annulled one year after the publication of the decision.

(…)



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## VI. MERITS

(…)

### 1- General consideration

*The Court remarks that Law No. 353 concerning the Establishment and Rules of Procedure of Military Courts provides that the trial of military judges and prosecutors will be conducted according to special provisions. Article 25 of Law No. 357 on Military Judges does not indicate a special court for such trials; in such cases the nearest military court has jurisdiction. The military justice system, as the civilian justice system, has two levels: military and disciplinary courts and the Military Court of Cassation. The capability of a military prosecutor is limited to prosecutions before the military court of their command. The present case falls within the jurisdiction of the nearest military court, which is different from the treatment of civilian judges and prosecutors in comparable situations. The latter will be tried before different courts, according to their level of seniority. As this distinction does not exist for military judges and prosecutors, senior military judges and prosecutors could be tried by more junior judges. Only in cases of offences not committed in connection with or in the course of their duties will military judges and prosecutors be tried by a court of assize.*

### 2- Issue of unconstitutionality

(…)

According to the second paragraph of the provision at issue, Article 25 of Law No. 357 on Military Judges, which indicates that if the Ministry of Defence permits the opening of a preliminary examination against military judges and prosecutors, the brief will be sent to the prosecutor of the nearest military court; hence the competent court for offences committed in connection with or in the course of their duties is the nearest military court.

Article 2 of the Constitution states that the Turkish Republic is a "democratic, laicist and social State governed by the rule of law". Article 9 of the Constitution, titled "Judicial power", states that judicial power is exercised by independent courts on behalf of the Turkish Nation, and in Articles 36 and 37 of the Constitution, the "Freedom to claim rights" and the



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"Principle of natural judge" are counted among the rights that have to be protected.

Furthermore, the independence of courts and the legal guarantees for judges are specified in the following Articles of the Constitution: Article 138 claims the "Independence of Courts", Article 139 claims the "Security of tenure of judges and public prosecutors", Article 140 (2; 3) claims that judges shall discharge their duties in accordance with the principles of the independence of the courts and that the security of the tenure of judges and the decision to prosecute them on account of offences committed in connection with, or in the course of, their duties shall be regulated by law, Article 145 (4) states that the formation of military justice organs, their functioning, matters relating to the status of military judges, relations between military judges acting as military prosecutors, and the military command under which they serve, shall be regulated by law in accordance with the principles of the independence of courts and the security of tenure of judges.

The independence of the judiciary, which is one element of the State under the rule of law principle, constitutes the foremost and most effective protection for human rights and freedoms. Independence of courts is usually used as a synonym for the independence of judges and it is clear that one is the cause and natural result of the other. The independence of judges with regard to their duty is not a personal privilege but an instrument for guaranteeing the trust and belief that justice will be delivered free from any kind of influence, pressure, instructions or suspicion. Independence, which is a characteristic of the judiciary, is the capability of a judge to independently and freely decide without hesitation, fear or worry, only in accordance with constitutional requirements and without being subject to external influences. In a democratic society, judicial independence should not only be ensured with regard to the executive but also with regard to all institutions and organisations as well as people within the State organisation.

When the legislator regulates issues concerning judicial independence, it is just as important to establish the conditions that enable judges to decide without any influences or pressure from within or outside the judiciary as to consider the trust of society towards the judiciary. Even if judges have all the high qualities required by the office of a judge, the legislator should refrain from enacting regulations that could lead to doubts among the public concerning their impartiality. The possibility to influence judges can harm judicial independence just as much as actual influence. Judicial independence becomes possible through their being free from any kind



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of anxieties, material or psychological pressure and influence during the decision-making process. That a court is "independent and impartial" is one of the conditions for a fair trial. Independence, which is defined as being free from orders from any person or institution and from any influence from the legislator, executive or other external actors, also includes the freedom from influence from the litigants. There cannot be any doubt that the constitutionally guaranteed judicial independence and security of tenure for judges and prosecutors also includes military justice.

> *The Court repeats the content of the provision at issue, and argues that according to Article 25 (2) of Law No. 357 the military prosecutor investigating a case has to bring a charge before a court competent and responsible to handle the case. When the court does not decide that it is (factually) incompetent, it is obvious that the trial will be held at this court. The formation of the court by law means that its formation, duties and powers, trial procedures and other related issues are to be set "before the trial".*

However, regulating by law requires "certainty" and "foreseeability". The words "the nearest place" do not openly and concretely indicate an independent and impartial court. It is not clear from the law who will designate the nearest court and how any conflicts of jurisdiction will be solved. That military judges and prosecutors are not tried according to their position and duty violates the principles of a State under the rule of law, judicial independence and security of tenure for judges and the right to a fair trial.

As the constitutionally guaranteed principles of judicial independence and security of tenure for judges and prosecutors ensure the influence and reputation of the judicial power, which is a sine qua non for the State under the rule of law, the legislator must abide by these principles and act in accordance with this protection. The litigants can expect a court to conduct a fair trial and the trial judge must be able to conduct it without any manipulation. The security of tenure provided to judges and prosecutors is not a personal protection but a guarantee to ensure that they can deliver justice without being influenced, and that citizen can be sure that justice is delivered as a result of this security. A judge who does not behave objectively towards the litigants cannot be independent and impartial in their decisions. It is necessary to prevent a judge who tries judges and prosecutors who are their superiors in terms of merit, career and seniority being influenced by this. Neither litigants nor the judge should feel the slightest influence or "have any prejudice" in an independent trial. Finally, the judge who will conduct the trial in the nearest court and the judge



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or prosecutor who is being tried there could meet there while under the influence of previous roles or relations.

The provision at issue neither prevents the senior judge or prosecutor from influencing the trial judge nor does it establish any guarantees of impartiality to dispel doubts that the judge who tries a senior judge will conduct an impartial trial. While the legislator designated the competent court in relation to the competent prosecutor, it did not enact any special regulations concerning the status resulting from position and duty of the judge or prosecutor on trial.

On the other hand, the "Freedom to claim rights" in Article 36 of the Constitution does not only include the right to apply to a court but also the right to a fair trial. The independence of courts and judges is the most fundamental element of a fair trial. Article 6 (1) of the European Convention on Human Rights defines the right to a fair trial and provides that everybody has the right to be tried "by an independent and impartial tribunal established by law". It is not sufficient that the judge is impartial. At the same time, one must not be suspicious of this impartiality.

What Article 36 of the Constitution and Article 6 European Convention on Human Rights protect is, next to a materially fair judgement, the establishment of conditions enabling the delivery of a fair judgement. The hierarchical organisation of the judiciary and differences in seniority, class or grade should not under any circumstances turn into an instrument of interference in the free and unswayed decision-making process. By only using the words "the nearest military court" to designate the competent court the provision at issue neither protects the right to a fair trial of the judges and prosecutors to be tried nor of the trial judge.

Furthermore, the principle of independence of courts and judges applies without distinction to civil, penal, administrative, and military courts and judges. In fact, this has become clear through the removal of the words "the requirements of military service" from Article 145, which had weakened the independence. From the point of fair trials in independent courts all judges and prosecutors are in the same situation. Hence, military judges and prosecutors, who fulfil the same constitutional judicial function as judges and prosecutors at civilian and administrative courts, should have the same guarantees as their colleagues. While the procedures of investigation and prosecution of judges and prosecutors who committed offences in connection with or in the course of their duties are different from other civil servant because of the character of the judiciary and the public benefits expected from the fulfilment of this function, a differentiation



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between civil, administrative, and military judges and prosecutors violates Article 10 of the Constitution.

For these reasons the provision at issue violates Articles 2, 10, 36, 138, 139, 140, and 145 of the Constitution. It shall be annulled.

(…)



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## 2.9 Hierarchy of Enabling Laws and Statutory Decrees

***Application Number:*** *1989/04* ***Decision Number:*** *1989/23*

***Date of Decision:*** *16/05/1989*

***Date of Publication and Number of the Official Gazette:*** *08/10/1989 - 20306*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by member of TBMM Mr Erdal İnönü (leader of the main opposition party SHP) on behalf of the SHP parliamentary group*

***Provisions at Issue:*** *Statutory Decree No. 347 on the Amendment of an Article of the Statutory Decree on Public Economic Enterprises No. 233 (03/11/1988), and Art. 1 of Statutory Decree No. 347*

***Relevant Constitutional Provisions:*** *Art. 2, 7, 10, 12, 13, 91, 123, and 128 (1982 TA)*

***Voting:*** *Rejected by majority of 8:3 justices (regarding the substantial claims)*
*Annulment request accepted unanimously (regarding the enabling laws 3268 (12/03/1986), 3347 (09/04/1987), 3479 (12/10/1988))*

***Dissenting and Concurring Opinions:*** *2 DO*

***Justices:*** *President Mahmut C. CUHRUK; Vice President Yekta Güngör ÖZDEN; Members: Necdet DARICIOĞLU, Yılmaz ALİEFENDİOĞLU, Muammer TURAN, Mehmet ÇINARLI, Mustafa ŞAHİN, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Erol CANSEL*

The applicants argue that despite the precise provision in Article 128 (Provisions relating to public servants) of the Constitution, which prescribes that the qualifications, appointments, duties and competences, etc. of civil servants and other public officials, shall be regulated by law, these issues have been regulated by statutory decrees (Kanun Hükmünde Kararname, KHK) instead of laws for many years. The statutory decree in question amends Article 12 of the *Statutory Decree on Public Economic Enterprises* (No. 233), which deals with the qualifications of general directors to be appointed for public economic enterprises, State economic enterprises, and corporations and subsidiaries linked to them.[696] Thus, KHK No. 347 introduces new conditions for the appointment of general directors. The applicants demand the annulment of an article of the *Statutory Decree on Public Economic Enterprises*, as it includes issues that must be regulated by law, and of Article 1 of KHK No. 347, as it violates Articles 2, 7, 10, 12, 13, 91, 123, and 128 of the Constitution. The Constitutional Court of Turkey rejects the application for annulment, as far as it concerns the question whether the provision at issue is among the subjects listed in Art 91 (1) (Authorisation to issue decrees having the force of law) of the Constitution, which are excluded from regulation by decree. However, it annuls the KHK in question because the enabling law on which this decree is based does not suffice the requirements of Article 91 of the Constitution.

(…)

696 These terms characterise two different forms of public economic enterprises in Turkish Law (Kamu İktisadi Teşebbüsleri – public economic enterprises; İktisadî devlet teşekkülleriyle – public state enterprises).



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## IV. MERITS

(…)

The case in question regards, as mentioned before, annulment of an amendment to Article 12 of the KHK No. 233 of 08/06/1984 on the appointment of General Directors for Public Economic Enterprises by KHK No. 347 of 03/11/1988. Different regulations can be found within former and current forms of Article 12 under the section "The Law". The applicant claims Article 91 has been violated for the reason that the power for enacting a KHK was misused and powers of legislation and execution coalesced into one within execution of the respective decree. Besides, the applicant points out a violation of Article 128 on the grounds that in particular matters subject to this KHK may only be regulated by law, but the applicant has not accentuated whether the KHK in question is covered by the empowering laws mentioned in the preamble.

The preamble of KHK No. 347 states that this decree was enacted relying upon the power bestowed by Law No. 3268 of 12/03/1986, Law No. 3347 of 09/04/1987 and Law No. 3479 of 12/10/1988. Questions of whether those three enabling laws, which are authorised by Article 91 of the Constitution, may be relied upon; and whether KHK No. 347 falls within the scope of the enabling laws that have priority in this constitutional review.

Article 29 (1) of the Law on Establishment and Rules of Procedure of the Constitutional Court No. 2949 prescribes that the Constitutional Court is not bound by the reasoning of parties concerning a violation of the Constitution, and it can deliver a judgment with any other reasoning, provided that it remains liable to the request. Before we handle the question of whether Article 1 is unconstitutional, it is necessary to examine if the KHKis based on this enabling law. This means to solve the problem with reference to the legal source and to determine its validity. The method that will help solve this problem is to consider it as two distinct problems: whether or not the subjects regulated by this KHK can be regulated by KHK in principle; whether or not this KHK is covered by the enabling law. If requests are accepted after having dealt with the matter, to scrutinise a subsequent matter may be unnecessary. If annulment of the KHK by reason of those violations is found impossible, Article 1, which is the main cause for annulment, should be analysed in terms of merits.

A. Review of constitutionality with regard to Art. 91, 123, 128 of the Constitution of the question whether subjects governed by KHK No. 347 can be regulated by a KHK



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Article 123 (1) of the Constitution, which is titled "Integrity of the administration and public legal personality", includes provisions about administration which form a whole with regard to its "structure and functions regarding public service"; and it prescribes qualifications, appointments, functions, powers, rights, obligations, subsidies and other personal rights of civil servants and other public officials which shall be regulated by law in Article 128 (2) titled "General Principles". Article 91 of the Constitution, titled "Authorisation to issue decrees having the force of law", precisely prescribes that appointment of General Directors of Public Economic Enterprises shall be governed by laws. The second sentence of Article 91 (1) states that "However, with the exception of martial law and states of emergency, the fundamental rights, individual rights and duties included in the first and second chapters and the political rights and duties listed in the fourth chapter of the second part of the Constitution, shall not be regulated by decrees having the force of law". Due to this provision, the subjects in Articles 12-40 and 66-74 of the Constitution may only be regulated by law. In other words, only matters apart from the ones regarding articles mentioned may be regulated by KHK; in case of martial law and states of emergency KHK may be enacted about any issue.

In case the Constitution prescribes that an issue should be regulated by a law, it can be regulated by a KHK unless it is not restrained by Article 91 or it is forbidden to enact KHKs on that issue, like in Article 163. That the Constitution prescribes regulation by law in general does not render Article 91 a distinctive, unnecessary and invalid provision. Although legal structures, attributes of law making methods and KHK making methods are different, Article 91 of the Constitution clearly adopts regulation by KHK in Article 91. The way of regulation by law that is governed under Articles 12-40 and 66-74 of the Constitution has been preserved by Article 91, and it is adopted that those issues cannot be regulated by KHKs. Under these circumstances, it is impossible to declare the KHK inconvenient, considering that all articles of the Constitution, which prescribe regulations by laws, are absolute and render law enactment compulsory, and to count Article 91 valid beyond them.

It undoubtedly fits the aim of the constitution-maker to empower the Council of Ministers for enactment of KHK only in **important, compulsory and urgent cases**; and not to employ these means too frequently as this may result in delegation of legislative competences. The features of this way of regulation, which is an extraordinary method, have been indicated in the second and subsequent paragraphs of Article 91. The points of aim, content, principles, employment period of KHK and whether more



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than one statutory decree may be enacted affirm that goal. In particular the requirement of submittal of a KHK to the TBMM on the day of publication in the Official Gazette, and the requirement of hearing KHKurgently and primarily in commissions of TBMM and General Assembly, lay emphasis on the importance of the issue.

However, Articles 123 and 128 of the Constitution fall out of the scope of the second sentence in Article 91 (1), which is mentioned above. (…) Regulation by a KHK of an issue that is prescribed by the Constitution to be regulated by law is not contrary to the Constitution, unless it regards to provisions prohibited precisely by Article 91 (1). Contrary to the applicants claim, the Constitution does not include any prohibition or direct/indirect restriction that hinders enactment of KHKs. Enactment of KHKs on appointment of general directors of public economic enterprises by the Council of Ministers does not violate Articles 123, 128 and 91 of the Constitution.

For the above-mentioned reasons, a request for annulment of KHK No. 347, on the grounds that its contents cannot be regulated by KHK, should be dismissed.

Yekta Güngör ÖZDEN, Yılmaz ALİEFENDİOĞLU, Ahmet N. SEZER did not agree with this opinion.

B. Review of the question whether KHK No. 347 is within the scope of Enabling Laws No. 3268, 3347, 3479 with regard to Article 91 of the Constitution.

(…)

KHK No. 347 is by no means related to administrative, financial and social rights mentioned in Articles 1 and 2 of the Empowering Law No. 3268, nor to the Enabling Law No. 3347 that widens the scope of that law in terms of organisation, function, power and obligations of units and that consists of paragraph (A) and (B).

(…)

As can be seen, the appointment of general directors of economic public enterprises on the basis of amended Article 12 of KHK No. 233 is not included in the enabling law. An issue which is not covered by an enabling law cannot be regulated by a KHK. In this case a violation of the Constitution is obvious; therefore KHK No. 347 must be annulled.

(…)



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## 2.10 Time Limits of Enabling Laws

***Application Number:*** *1988/62* ***Decision Number:*** *1990/03*

***Date of Decision:*** *06/02/1990*

***Date of Publication and Number of the Official Gazette:*** *12/10/1990 - 20663*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by member of the TBMM Mr Erdal Inönü (leader of the main opposition party SHP) on behalf of the SHP parliamentary group*

***Provisions at Issue:*** *Art. 1, 2, 3 and 4 of the Enabling Law No. 3481 on the Reorganisation of Administrative Procedures and Acts (20/10/1988)*

***Relevant Constitutional Provisions:*** *Preamble and Art. 2, 5, 6, 7, 87, 91, and 128 (1982 TA)*

***Voting:*** *Accepted by majority of 7:4 justices*

***Dissenting and Concurring Opinions:*** *4 DO*

***Justices:*** *Vice President Yekta Güngör ÖZDEN; Members: Necdet DARICIOĞLU, Yılmaz ALİEFENDİOĞLU, Muammer TURAN, Mehmet ÇINARLI, Servet TÜZÜN, Mustafa ŞAHİN, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Erol CANSEL*

The applicant asks for the annulment of Articles 1, 2, 3, and 4 of the *Enabling Law on the Reorganisation of Administrative Procedures and Acts* on the grounds that they violate the Preamble and Articles 2, 5, 6, 7, 87, 91, and 128 of the Constitution. The Court interprets the authorisation of the Council of Ministers through the Turkish Grand National Assembly for the duration set in the provision at issue as a violation of Article 7 of the Constitution (Legislative power), because the extent to which legislative competences are delegated is too indeterminate, and therefore the enabling law at issue must be annulled.

(…)

### IV. MERITS

(…)

### A. Constitutional Examination of the Scope of Decree Competences Given to the Council of Ministers by the TBMM

#### 1- Reasons for Empowerment of the Council of Ministers

(…) The power to issue KHKis governed under Article 91 of the 1982 Constitution in a similar way as in the 1961 Constitution; with a similar reasoning but along with several changes. And thus, they are intended to



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find urgent solutions for either changing social and economic problems or strengthening executive organs.

KHK enacted under normal circumstances must rely on an enabling law. Content and components of enabling laws are defined under Article 91 of the Constitution. To issue KHK "on certain matters" has been listed as one of the functions and powers of TBMM in Article 87 of the Constitution.

2- Characteristics of the Empowerment Given to the Council of Ministers

(…)

3- Condition and Content of the Enabling Law

(…) In this case the TBMM may empower the Council of Ministers only on certain matters to issue KHK; but the scope of authorisation cannot include all matters. The obligation to indicate the subject matter of an enabling law, and whether a KHK issued relies on an enabling law are quite important aspects in terms of judicial and political review. There is no doubt that a KHK, which regulates matters that are not prescribed by an enabling law, is contrary to the Constitution.
(…)

Article 91 of the Constitution stipulates that the enabling law must explain "purpose", "scope" and "principle" of the competences delegated to the Council of Ministers. In order to make sufficiently clear to which purpose competences are delegated to the Council of Ministers, the purpose of the KHK must be defined in precise terms in the enabling law. Judicial and political review are required to definitely establish whether or not the KHK corresponds to purpose and content established by the enabling law. In case the KHK does not correspond to the purposes of the enabling law, or transgresses the delegated competences, it violates the enabling law and is hence unconstitutional.

All enabling laws must include the time period for authorisation pursuant to the Constitution. Such an obligation impedes delegation of powers of the TBMM to executive organs for a long period. However, the Constitution remains silent on how to determine the length of that period. Yet, this period should be short in order to comply with the justification of existence of KHK in Constitutional law. An authorisation of the Council



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of Ministers for a very long period may lead to the delegation of legislative power by surpassing the Constitution, which enables a conditional and temporary authorisation. Authorisation of the Council of Ministers for a long period may cause the exception to become the rule and also a transfer of legislative power; and this is contrary to Article 7 of the Constitution.

B. The Provision foreseen by Enabling Law No. 3481

1- Justification of the enabling law

Enabling Law No. 3481 represents a continuation of Law No. 2977, which was adopted earlier and the validity of which has been extended twice.

Enabling law No. 2977 entered into force on 08/02/1984, the authorisation period given to the Council of Ministers by this law was prolonged for one year by Law No. 3207 and then for another two years by Law No. 3296; it expired on 08/08/1988.

Law No. 3481, which entered into force on 25/10/1988, authorises the Council of Ministers as Law No. 2977 does, once again, for two years.

(…)

As has been seen, the goal, which is pursued in the explanatory memorandum of both laws, is to provide convenience for executive organs in a field which requires long acting and intensive work; but it does not authorise the Council of Ministers to take effective measures in a short period or to enable it to find urgent solutions.

*Section (2) repeats the content of the two enabling laws (Law No. 2977 and Law No. 3481) under consideration and examines the indicated purpose for empowerment. Section (3) lists all 30 statutory decrees based on these enabling laws.*

C. Issue of Unconstitutionality of the Enabling Law No. 3481

(…)



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1- Review of Constitutionality with regard to Article 87 and 91 of the Constitution

Although it is obligatory for the TBMM to authorise the Council of Ministers to issue a KHK only on "certain matters" pursuant to Article 87, Law No. 3481 does not indicate for what matter the authorisation is given. Even though it could be assumed that Article 1 of the law in question, which concerns the purpose, could be interpreted and concretised in combination with Article 2, which defines the scope, the unspecific and imprecise formulation of Article 2 prevents such concretisation.

> *In the succeeding paragraphs the Court discusses the following subjects: Wording of decrees; examination of administrative acts to be regulated based on decrees; technical specificities of related procedural law. After having listed the principles governed under Article 3 of the enabling law the Court declares:*

Two of the four principles mentioned are very unspecific, and the remaining two concerning the duties and competences of administrative courts do not serve the purpose of concretising the delegated competences.

In fact, Article 91 of the Constitution requires indicating purpose, scope and principles of statutory decrees in the enabling law. The titles of Articles 1, 2 and 3 of Law No. 3481 include terms of purpose, scope and principles. However, they have been written in an abstract form only in order to provide formal compatibility with the conditions of the Constitution, and do not have a concrete content. Competences are not clearly defined in terms of purpose, scope and principles. The competences seem unlimited in terms of purpose and scope. Since Law No. 3481 does not specify which topic or topics can be dealt with by administrative procedures and acts, and to which extent amendments can be introduced, it is impossible to determine whether or not the administrative procedures and acts governed by KHK could possibly limit the fundamental rights and freedoms of the individual. In other words, it is impossible to deduce whether or not the delegated competences defined in the enabling law relate to subjects explicitly excluded by Article 91 of the Constitution. Besides, it is impossible to determine whether or not the delegation of competences concerns immediate, urgent, important, and compulsory situations. According to



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the Constitution this would be the only legitimate foundation for issuing a KHK.

(…)

Necdet DARICIOĞLU, Servet TÜZÜN, and Erol CANSEL did not agree with this view.

2- Review of Constitutionality with regard to the Preamble and Article 2 of the Constitution

(…)

However, the empowerment of the Council of Ministers through Law No. 3481 to issue KHK without precisely defining the subjects, and without indicating a specific time limit implies the transfer of legislative competences of the TBMM, and thus unbalances the relation of those two organs, which leads to superiority of the executive over the legislative organ. This contradicts the principle of separation of powers, which is the basis of parliamentary democracy and the principle of the "democratic State governed by the rule of law" determined by Article 2 of the Constitution. For these reasons Article 1, 2, 3, 4 of the enabling law violate Article 6 of the Preamble of the Constitution.

Necdet DARICIOĞLU, Mehmet ÇINARLI, Servet TÜZÜN, and Erol CANSEL did not agree with this view.

3- Review of Constitutionality with regard to Article 7 of the Constitution

(…)

On the other hand, Law No. 3481 is tantamount to Law No. 2977 and its follow-up. Law No. 2977 entered into force on 08/02/1984 and the empowerment period was prolonged by Laws No. 3207 and 3296 until 08/08/1988. Article 4 of Law No. 3481, which entered into force on 25/10/1988, indicates that the empowerment period is two years.

As seen, the period of empowerment of the Council of Ministers is more than six years, if a short interruption for re-regulation of administrative procedures and transactions is ignored. This period is longer than one legislative term of the TBMM. Although other components of the law do not violate the Constitution, the authorisation of the Council of Ministers for such a long term has the character of transfer of legislative powers. For



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the above-mentioned reasons, Article 4 of the Law violates Article 7 of the Constitution and must be annulled.

Necdet DARICIOĞLU, Mehmet ÇINARLI, Servet TÜZÜN, and Erol CANSEL did not agree with this view.

(…)



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## 2.11 Judicial Emancipation in Review of Statutory Decrees

***Application Number:*** *1993/33* ***Decision Number:*** *1993/40-1*

***Date of Decision:*** *21/10/1993*

***Date of Publication and Number of the Official Gazette:*** *23/10/1993 - 21737*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by member of the TBMM Mr Mümtaz Soysal (SHP, member of the TBMM for the Ankara district) and 92 other members of the TBMM*

***Provisions at Issue:*** *Statutory Decree on the Establishment of the Türk Telekomünikasyon A.Ş.*[697] *No. 509 (20/08/1993) (Official Gazette No. 21698 of 14/09/1993)*

***Relevant Constitutional Provisions:*** *Art. 5, 10, 47, 167 (1982 TA)*

***Voting:*** *Accepted by majority of 6:5 justices*

***Dissenting and Concurring Opinions:*** *-*

***Justices:*** *President Yekta Güngör ÖZDEN; Vice President Güven DİNÇER; Members: Yılmaz ALİEFENDİOĞLU, Mustafa GÖNÜL, Oğuz AKDOĞANLI, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Haşim KILIÇ, Yalçın ACARGÜN, Mustafa BUMİN*

This decision differs in form and content from most AYM rulings. Whereas it is based on the application for abstract constitutional review of the *Statutory Decree on the Establishment of the Türk Telekomünikasyon A.Ş* for violation of Article 5 (Fundamental aims and duties of the State), 10 (Equality before the law), 47 (Nationalisation)[698] and 167 (Supervision of markets and regulation of foreign trade) of the Constitution, no constitutional review on procedural and/or substantial grounds is undertaken. Instead, the Court follows the applicants' claim that a stay of execution should be issued by almost literally repeating the reasoning of the application. It refers to the "power of judicial legislation" in order to prevent irreparable damage until the final decision of the AYM enters into force. By this means the Court for the first time explicitly awards itself with the power to issue interim measures.

(…)

697 A.Ş. is the Turkish abbreviation for anonim şirketi, incorporated company (Inc.).

698 In 1999 the phrase "and privatisation" was added (by Article 1 of Act No. 4446 (13/08/1999)). Therefore, the current Constitution defines under Article 47 the terms for nationalisation and privatisation.



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SUBJECT OF THE APPLICATION[699]

The applicants ask for annulment and stay of execution of the Statutory Decree on the Establishment of the Türk Telekomünikasyon A.Ş. No. 509 of 20/08/1993, which was published in the Official Gazette No. 21698 of 14/09/1993, since it violates Articles 5, 10, 47 and 167 of the Constitution.

REASONING OF THE APPLICATION

In the application, it is stated that, "Although the Constitution and the Law on Establishment and Rules of Procedure of the Constitutional Court remain silent, it is evident that the power of 'interim measure, preclusion, stay of execution' which is granted to all judicial bodies, can also be exercised by the Constitutional Court. In this respect, the Constitutional Court[700] must 'give a decision on the stay of execution' until the end of the proceedings, relying upon 'the power to create law', which can be exercised in the case of gaps in the law, in order to prevent irreparable damage."

CONCLUSION

After examination of the report on the application, the application and its attachments, the laws requested to be annulled, the respective constitutional provisions and the justifications of both constitutional provisions and the laws requested to be annulled and other legislative documents, the following was decided:

The Court concluded, BY MAJORITY, that the execution of the Statutory Decree on the Establishment of the Türk Telekomünikasyon A.Ş. No. 509, of 20/08/1993, must be suspended in order to prevent irreparable damage until the final decision of the Court will enter into force. Yekta Güngör ÖZDEN and Yılmaz ALİEFENDİOĞLU do not concur with the majority decision, since "it is not necessary to suspend the execution of the statutory decree in question, by considering the demand of the applicant and the circumstance that the case will be decided in the current session

699 Here the Court uses headings which differ from the usually employed headings.

700 Here the Turkish original uses the term High Court, but for the sake of consistency the translation sticks to the (intended) term Constitutional Court.



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of the Court". Oğuz AKDOĞANLI, Haşim KILIÇ and Mustafa BUMİN did not agree with the conclusion of the majority, as "the Constitutional Court does not have the power for suspending the execution of laws and statutory decrees and so in this case requirements for suspending of execution have not been fulfilled".
(…)



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## 2.12 Constitutional Basis of Privatisation Law

***Application Number:*** *1994/49* ***Decision Number:*** *1994/45-2*

***Date of Decision:*** *07/07/1994*

***Date of Publication and Number of the Official Gazette:*** *10/09/1994 - 22047*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by members of the TBMM Mr Mümtaz Soysal (SHP), Mr Nami Çağan (SHP) and 89 other members of the TBMM*

***Provisions at Issue:*** *Law No. 3987 on Regulation of Privatisation and Empowerment for Issuing Statutory Decrees for Resolving Problems about Employment As A Result of Privatisation* (05/05/1994)

***Relevant Constitutional Provisions:*** *Art. 2, 7, 87, 91, 153, 160, 165 (1982 TA)*

***Voting:*** *Accepted by a majority of 7:4 justices*

***Dissenting and Concurring Opinions:*** *1 DO, 1 CO*

***Justices:*** *President Yekta Güngör ÖZDEN; Vice President Güven DİNÇER; Members: Selçuk TÜZÜN, Ahmet N. SEZER, Samia AKBULUT, Haşim KILIÇ, Yalçın ACARGÜN, Mustafa BUMİN, Sacit ADALI, Ali HÜNER, Lütfi F. TUNCEL*

The applicants ask for annulment of the entire Law No. 3987 on the grounds that it violates Articles 87 (Duties and powers of the Grand National Assembly of Turkey), 91 (Authorisation to issue decrees having the force of law) and 153 (Decisions of the Constitutional Court) of the Constitution. They criticise that this empowerment law delegates the right to regulate privatisation to the executive by means of statutory decrees in a much too broad and unspecific manner. Besides, the applicants ask for a stay of execution of the law, as enacting statutory decrees based on it may result in defects which are difficult or impossible to compensate for. The AYM follows the applicants' argumentation and defines once more precise temporal and substantial limits for delegated legislation. Hence, the empowering law violates the Constitution and Articles 1, 2 and 3 of Law No. 3987 must be annulled. Consequently, Articles 4, 5 and 6 cannot be applied anymore. The Court also deals with the general problem of privatisation law, as privatisation is not regulated in the Constitution. It reasons that principles about privatisation can be inferred from Article 47 (Nationalisation[701]), as nationalisation can be regarded as the opposite of privatisation.

(…)

701 In 1999 the phrase "and privatisation" was added (by the Article 1 of Act No. 4446 (13/08/1999). Therefore, the current Constitution defines under Article 47 the terms for nationalisation and privatisation.



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## V. MERITS

(…)

### B. Constitutional Status of Enabling Laws and Statutory Decrees (KHK)

(…)

KHKs are only issued as compulsory and efficient measures on urgent matters, depending on enabling laws. To resort to this method too frequently can result in exclusion of the legislative organ, the essential organ of democracy, or in impeding freedoms by disqualification of the legislative organ. An approval of the legislative organ in such a case does not comply with the Constitution. Thus, in the course of debates in the Advisory Assembly, the spokesperson of the Constitution Committee explained the reason for authorising the government to issue KHKs as "…this law was made in order to empower the government to solve urgent problems, since the government does not have any other method to apply in very urgent cases…" The chairman of the Constitution Committee stated in the same breath that "…decrees are instruments which are employed when the legislative bodies cannot solve an urgent problem in a short period."

To provide continuity to the enabling laws by extending their implementation period, to extend the scope of KHKs by allowing to newly regulate via decree in almost all matters, to ignore the prerequisites of necessity and urgency; all these acts violate the principle of inalienability of the legislative function. As a result, the executive organ occupies the space of the legislative organ and becomes superior to it, thus separation of powers is breached. This violates the aforementioned principles established by the Constitution.

In Article 87 of the Constitution, "to authorise the Council of Ministers; to issue decrees having the force of law on certain matters" is mentioned among the duties and powers of the TBMM. In this case, the TBMM can authorise the Council of Ministers only in certain matters, and it is not allowed to authorise it in all matters. The meaning of the word "certain" is clear and it prescribes a limited number of circumstances.

The Constitution prohibits to regulate some subjects with KHKs. Pursuant to Article 91 (1) of the Constitution, with the exception of martial law and states of emergency, the fundamental rights, individual rights and duties included in the first and second chapters and the political rights and duties listed in the fourth chapter of the second part of the Constitution,



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shall not be regulated by decrees having the force of law". Pursuant to Article 163 of the Constitution the Council of Ministers shall not be empowered to amend the budget by a decree having the force of law.

Therefore, in enabling laws, the scope of KHKs must be clarified and the subject of authorisation must be clear.

The clarification of "purpose", "scope" and "principles" of empowerment of the Council of Ministers indicates what the Council of Ministers will have to do when it has been empowered. Purpose, scope and principles of KHKs must not be overly broad, elusive and malleable and not open to differing interpretations.

Pursuant to the Constitution, the time limit of the authorisation of the Council of Ministers must be indicated in the enabling law. This obligation prevents the TBMM from authorising the executive to issue a KHK for a very long period. The Constitution does not determine how long this period may be. However, it must be short in order to comply with the general purpose that constitutional law associates with KHKs. To authorise the Council of Ministers for a long period means a transfer of legislative power to the executive organ; thus, bypassing the Constitution which only allows a conditional and limited authority under certain circumstances. This means that an exception becomes the main rule, despite the fact that Article 7 of the Constitution does not allow this. A long period of authorisation proves that a limited and extraordinary power becomes an established one.

The TBMM can authorise the Council of Ministers in serious, urgent and necessary cases, for certain aims, subjects, scopes and principles. The authorisation must be made for concrete cases, which were specified by the TBMM, and not as a preliminary approval.

Concretising the scope, purpose, and principles of authorisation is necessary to be able to examine whether KHKs are issued within the scope of enabling laws, whether they fall within the scope of restricting provisions of Article 91 of the Constitution and whether they are issued in serious, urgent and necessary cases.

Parliaments, which are the basis of parliamentary democratic regimes, are organs that consist of representatives of the entire nation, either through the party in power or opposition parties. It is a constitutional principle that the legislative function is fulfilled by the legislative organ.

Authorisation for issuing KHKs means temporary and conditional use of enactment by the executive organ, within the limits of purpose, scope and principle of enabling laws set by the legislative organ alone.



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When one considers the principle of "Supremacy and binding force of the Constitution", stipulated in Article 11, and the fact that decisions of the Constitutional Court are binding for the legislative, executive and judicial organs, the administrative authorities as well as for persons and corporate bodies, stipulated in Article 153, the following can be concluded: the constitutionality of an enabling law depends on the compliance with the above mentioned constitutional norms in regard to their interpretation by the Constitutional Court.

## C. Constitution and Privatisation

Despite the fact that "expropriation" is determined in Article 46 of the Constitution, and "nationalisation" in Article 47, the Constitution does not prescribe any clear provision for privatisation. In the social State public services tend to grow currently, this is a challenging development; nevertheless, the constitutions of some States also give room for provisions on privatisation. However, the fact privatisation is not separately regulated in the Constitution does not mean that it is prohibited. Since there is no provision on privatisation in the Constitution, the legislator has the authority to regulate this issue provided that general principles of the Constitution are not violated. In other words, the fact that the Constitution does not prescribe any provision on this matter cannot hinder the legislator from making regulations.

Even though the Constitution does not include any special provision on privatisation, some principles about privatisation can be inferred from Article 47 which concerns nationalisation. This is so, because nationalisation is the opposite of privatisation. Therefore, it can be stated that the organ authorised for nationalisation is also authorised for privatisation. In doctrine the current/prevailing opinion holds that the organ authorised for nationalisation is also authorised for "de-nationalisation".

In Article 47 of the Constitution, it is stated that "private enterprises performing services of public nature may be nationalised in exigencies of public interest.

Nationalisation shall be carried out on the basis of real value. The methods and procedures for calculating real value shall be prescribed by law".

The Law on Procedures and Principles of Nationalisation of Private Enterprises Performing Services of Public Nature in Exigencies of Public Interest No. 3082 (20/11/1984) was enacted in accordance with Article 47 of the Constitution. In Article 3 of this law it is stated that "nation-



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alisation of private enterprises performing services of public nature in exigencies of public interest shall be prescribed by law". The decision of the Constitutional Court of 27/09/1985 (E. 1985/02, K. 1985/16), which concerns the request of annulment of Law No. 3082, includes the opinion that private enterprises which are to be nationalised shall be indicated by law, and the nationalisation restricting the fundamental rights, the right to property and the right to work and private property, would better be secured by regulation of the legislative organ. The protective provision on the right to property under Article 35 of the Constitution should be considered equally for both public property and private property. Therefore, the authorised body for the privatisation of public properties as for nationalisation of private property is the legislative organ. This is the natural consequence of the fact that the legislative organ is the guardian of public property.

Since privatisation is not prohibited by the Constitution, the legislative organ decides on privatisation of public properties by laws, when it finds this necessary, useful or appropriate; provided that it remains loyal to the constitutional principles and provisions pursuant to Article 11 of the Constitution. As in nationalisation, it is also necessary to regulate principles and procedures by laws in privatisation. The existence of a general law on privatisation does not eliminate the necessity of enacting special laws prescribing approval of the legislative organ for each public economic enterprise to be privatised. This is so, because the legislative organ has the power to change prerequisites governed under the general law for privatisation of each public economic enterprise, provided that it does not violate the Constitution.

## D. Issue of Unconstitutionality of Law No. 3987

### 1- Review with regard to Articles 35 and 91 of the Constitution

Since the protection of private properties under Article 35 of the Constitution applies to the property rights of the State and other public entities, privatisation of public economic enterprises must be carried out on the basis of real value. Since privatisation is the opposite of nationalisation, the current value of public economic enterprises must be determined, in order to make the maximum profit in privatising them. An implementation that ignores these criteria renders purchasers privileged and this violates the principle of equality. Article 4 of Law No. 3082 prescribes



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that private properties shall be nationalised on the basis of real value. Different implementations for buying and selling lead to a contradiction, which may result in a disadvantage for the State. The method of price determination prescribed by the Law on Nationalisation can be taken as an example for privatisation.

In addition: Article 5 of Law No. 3082 on Nationalisation establishes an "Assessment and Estimation Committee" for fixation and assessment issues; Article 10 determines the norms which should ensure the independency of this committee; and Article 6 foresees according to the nature of public services, which are currently served by a private firm, that the principles which should be regarded by the committee while estimating and assessing are determined. This committee chaired by the representative of the respective ministry consists of representatives of public and private sector members who should be designated to oversee a regulation. These general and fundamental provisions require a frame preventing any malpractice privileging or jeopardising the national interest.

In some types of privatisation, public property rights are restricted. But, with the purchase of public entities their status as public property ceases to apply. With this ceasing the disposition of the public entity as public property ends. Since the constitutional protection for private property applies also to public property, there is no doubt that the same procedures and principles should apply to public property. Hence, it is a necessity according to Article 35 of the Constitution that the principles of privatisation of public property must be governed by law. Nobody can state that the Constitution, which secures private property, does not secure public property. In addition to Article 35 (1), which secures private property, Article 35 (2) prescribes that the right to private property can only be restricted by law, and Article 35 (3) rules that this right cannot be enjoyed in defiance of public interest; these also apply to public property. These paragraphs also concern public property and they should be considered as assurances for public property. Public property can also be restricted for the purpose of promoting public interest and cannot be used in defiance of societal interest.

(…)



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## 2.13 Judicial Self-Restraint in Review of Statutory Decrees

***Application Number:*** *2011/60* ***Decision Number:*** *2011/147*

***Date of Decision:*** *27/10/2011*

***Date of Publication and Number of the Official Gazette:*** *15/12/2011 - 28143*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by member of the TBMM Mr Mehmet Akif Hamzaçebi (deputy chairman of the main opposition party CHP parliamentary group) and member of the TBMM Mr Muharrem İnce (deputy chairman of the CHP parliamentary group) on behalf of the CHP parliamentary group*

***Provisions at Issue:*** *Art. 1 and 2 of the Enabling Law No. 6223 Concerning Civil Servants and Organisation, Duties and Competences of Public Institutions in Order to Ensure the Regularity, Efficiency and Productivity of Public Services (06/04/2011)*

***Relevant Constitutional Provisions:*** *Art. 2, 7, 87 and 91 (1982 TA)*

***Voting:*** *Rejected by majority of 7:7 justices*[702]

***Dissenting and Concurring Opinions:*** *4 DO*

***Justices:*** *President Haşim KILIÇ; Vice President Serruh KALELİ, Vice President Alparslan ALTAN; Members: Fulya KANTARCIOĞLU, Mehmet ERTEN, Fettah OTO, Serdar ÖZGÜLDÜR, Osman Alifeyyaz PAKSÜT, Recep KÖMÜRCÜ, Burhan ÜSTÜN, Engin YILDIRIM, Nuri NECİPOĞLU, Hicabi DURSUN, Celal Mümtaz AKINCI*

The applicants ask for annulment and stay of execution of Article 1 and Article 2 of the *Enabling Law No. 6223 Concerning Civil Servants and Organisation, Duties and Competences of Public Institutions in Order to Ensure the Regularity, Efficiency and Productivity of Public Service*. They argue that the provisions at issue violate Articles 2 (Characteristics of the Republic), 7 (Legislative power), 87 (Duties and powers of the Grand National Assembly of Turkey), and 91 (Authorisation to issue decrees having the force of law) of the Constitution. The Court unanimously rejects the applicants' claim to a stay of execution. The annulment of the Enabling Law is rejected by 7:7 votes. With this decision the Constitutional Court abandons its long-standing jurisdiction concerning the conditions (i.e. immediacy, urgency, importance and compulsion) justifying the adoption of statutory decrees.

(…)

702 Art. 65 (1) of Law No. 6216 on the Constitutional Court determines: "The General Assembly and Chambers render decisions by an absolute majority of participants. In case of equal division of votes, the President will have the casting vote".



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## IV. MERITS

(…)

### B- Review with regard to Articles 2, 7, 87 and 91 of the Constitution

(…)

Another claim for violation of the Constitution is that there is no immediate, urgent, important and compulsory condition that requires the issuing of KHKs. KHKs that are allowed by the enabling law in question are *ordinary statutory decrees*. There is no regulation in the Constitution which entails an immediate, urgent, important and compulsory condition in order to issue these sorts of KHKs. Therefore, it is impossible to create new conditions not prescribed by the Constitution in constitutional review of statutory decrees and enabling laws; furthermore, to define what is "important", "urgent" and "compulsory" is not a function of the judicial body which makes a constitutional review. In addition, it is evident that these terms are relative and of a subjective character. Thus, examination of an immediate, urgent, important and compulsory condition that entails issuing a KHK and an enabling law may imply a review that falls out of the scope of the Constitution. But, the review of enabling laws must be within the scope prescribed by the Constitution. For this reason, it was found unnecessary to examine whether or not the authorisation for issuing a KHK in this case refered to a subject which is immediate, urgent, important and compulsory.



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## 2.14 Constitutional Review of Emergency Decrees I

***Application Number:*** *1990/25* ***Decision Number:*** *1991/01*

***Date of Decision:*** *10/01/1991*

***Date of Publication and Number of the Official Gazette:*** *05/03/1992 - 21162*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by member of the TBMM Mr Hasan Fehmi Güneş (deputy chairman of the main opposition party SHP parliamentary group) on behalf of the SHP parliamentary group*

***Provisions at Issue:*** *Art. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 of Statutory Decree No. 424 On the Additional Measures to be Taken During the State of Emergency Because of Widespread Acts of Violence and Serious Deterioration of Public Order (09/05/1990); Art. 1, 2, 3, 4, 5 of Statutory Decree No. 425 On Amendment of Law No. 2935 and Statutory Decree No. 285 (09/05/1990)*

***Relevant Constitutional Provisions:*** *Art. 2, 5, 6, 7, 13, 15, 23, 28, 29, 38, 91, 103, 104, 120, 121, 122 and 148 (1982 TA)*

***International Treatises/References:*** *ECHR*

***Voting:*** *Accepted by majority of 7:4 justices*

***Dissenting and Concurring Opinions:*** *1 CO/DO, 3 DO*

***Justices:*** *President Necdet DARICIOĞLU; Vice President Yekta Güngör ÖZDEN; Members: Yılmaz ALİEFENDİOĞLU, Servet TÜZÜN, Mustafa ŞAHİN, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Erol CANSEL, Yavuz NAZAROĞLU, Güven DİNÇER*

The applicants claim the unconstitutionality of statutory decrees No. 424 and 425, which specify the competences of executive authorities during state of emergency situations. They argue that both statutory decrees violate Article 121 (Rules regarding the states of emergency) and 122 (Martial law, mobilisation and state of war) of the Constitution, since the matters regulated by the decrees have to be regulated by law. Furthermore, some clauses exceed the requirements of a state of emergency as they substantially restrict basic rights and freedoms, such as the right to strike. Regarding Statutory Decree No. 424, the Court declares that no constitutional review is necessary, as the norm had been repealed in the meantime by another statutory decree (No. 430). Articles 1–3 of Statutory Decree No. 425 are ruled unconstitutional for violation of Articles 91 (Authorisation to issue decrees having the force of law), 121 and 148 (Functions and power of the Constitutional Court) of the Constitution, because the matters concerned should be regulated by law. The Court does not annul the remaining Articles 4 and 5, because it has no competence to review. In the merits, the Court develops some fundamental arguments in regard to state of emergency situations. It differentiates between state of emergency as an - unconstitutional - extra-legal order and an extraordinary legal order limited by the Constitution and the rule of law principle: In a state of emergency political bodies grant extra powers to the executive, but their action still has to work within the limits set by the constitutional order. The Court also elabourates on differences between ordinary decrees, which the court can review, and state of emergency decrees, which the Court is not able to review.

(...)



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## IV. MERITS

After examination of the report on the substance of the issue, the argumentation of the Court and its annexes, the statutory decrees requested to be annulled and the justifications of these, the answer given by the parliamentary group of the governing party, other documents and hearing oral statements, the following was decided:

### A- Constitutional Review of Emergency Regimes especially of States of Emergency

#### 1- Procedures of the state of emergency

Procedures of the state of emergency shall be invoked in cases of uprisings, turmoil, a threat of war, state of war, natural disasters, serious economic crisis, and in similar cases that seriously threaten the security of State and society. There is no doubt that these scenarios lead to an enormous threat to the existence and the security of State and society. Procedures of the state of emergency have been developed out of the fact that normal regimes are incapable of eliminating those threats within national legal orders.

However, the state of emergency does not imply arbitrariness in the regime, which in all democratic countries means to eliminate the legal system for good. The state of emergency is a regime that relies on the Constitution, that is enacted in accordance with the constitutional procedures, and that is under surveillance of legislative and judicial organs. Furthermore, the state of emergency should aim at protecting and defending the constitutional order. Despite the fact that it gives important competences to executive organs and that it restricts fundamental rights and freedoms, the state of emergency system is a "legal regime" in democracies. (...)

Thus, the constitution-maker[703] shall deliberate on these KHKs immediately and amend them if necessary. Then, these approved decrees will turn into law as other decree laws do. These laws can be reviewed by the Constitutional Court. The prohibition of constitutional review is only restricted to the period before the KHKs become law.

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703 Presumably, in this paragraph the Court erroneously writes "constitution-maker", whereas the "legislator" is meant.



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2- (...)

3- Statutory decrees which can be enacted in times of emergency

(...)

An enabling law is not required to enact a KHK in a state of emergency situation or under martial law. Articles 121 and 122 of the Constitution form the constitutional basis for this kind of KHK.

However, to declare a state of emergency is the prerequisite for enacting a state of emergency KHK. This can be done according to the conditions established under Articles 119 or 120 of the Constitution. The content of KHKs issued under the state of emergency must not extend the aims and limits of the state of emergency.

a. Content of state of emergency decrees

(...)

State of emergency KHKs can be enacted within the system established by the state of emergency. These laws can focus on "issues that are necessary because of the state of emergency". Only with these kind of state of emergency decrees measures aimed at removing reasons for the state of emergency can be taken.

(...)

According to Articles 121 (3) and 122 (2) of the Constitution the scope of this kind of decree is limited to "matters necessitated by the state of emergency or martial law".

Issues which are not related to the state of emergency cannot be governed by state of emergency KHK. These issues are restricted by the reasons and aims of the state of emergency. (...)

**Pursuant to Article 148 of the Constitution KHKs that cannot be reviewed by the Constitutional Court are those which are enacted upon "matters necessitated by the state of emergency". The Constitutional Court must first of all inquire whether or not a state of emergency KHK bears these characteristics. If this is not the case, the Court is bound to review the constitutionality of these decrees.**

b. Spatial and temporal scope of state of emergency decrees: (...) The scope of measures governed by a KHK that has been enacted pursuant to Article 121 of the Constitution must be limited to the region where a state



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of emergency is declared. The region where the state of emergency KHKs are to be implemented is the region where a state of emergency is declared.
(...)

Once a state of emergency comes to an end, a KHK issued under this state of emergency cannot remain in force. Therefore, the Law on State of Emergency cannot be amended by state of emergency KHKs.
(...)

c. Constitutional review of state of emergency decree laws

(...)

**The Constitutional Court must identify the character of a legislative or executive regulatory act that is brought before the Court for constitutional review. This is because the Constitutional Court cannot be restricted to only decide according to the title given to the regulatory act at issue.** Therefore, the Court must examine whether or not an act is indeed a "state of emergency KHK". And if this is not the case it must undertake a constitutional review. Article 148 of the Constitution impedes constitutional review of a state of emergency KHK.

Servet TÜZÜN, İhsan PEKEL, Erol CANSEL and Yavuz NAZAROĞLU did not agree with this view.

B- State of Emergency KHKs No. 424 and 425

(...)



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1- (...)

2- Statutory decree No. 425

a- (...)

b- Characteristics of KHKs and the issue of unconstitutionality of KHKs that are considered as lacking these characteristics

aa- Examination with regard to Article 1

(...)

A state of emergency law is a general law that is issued to be implemented in the whole country. Once a state of emergency is declared, this law and the measures prescribed by it are implemented automatically at any time and in any place or in the whole country. The KHKs governed under Article 121 of the Constitution can only regulate issues regarding a state of emergency. And, they can only be implemented while a state of emergency is in force and only in regions where a state of emergency is declared to be in force. However, pursuant to Article 148 of the Constitution this kind of KHK cannot be subject to constitutional review in terms of procedural and substantial examination. In case a measure taken by a KHK can enter into force in another region under state of emergency and during another time period, even though it concerns matters regarding a state of emergency, it cannot be deemed a state of emergency KHK. In other words, these laws cannot be counted as state of emergency KHKs if they remain in force despite the state of emergency in question coming to an end. KHKs which do not refer to a state of emergency fall into the scope of constitutional review.

Laws cannot be amended by state of emergency KHKs since their implementation is restricted to the regions where they are in force and to the time period of a state of emergency. (...) In Article 121 (2) of the Constitution the issues that can be subject to the state of emergency law are explicitly determined. Therefore, an amendment to the state of emergency law must definitely be made by a law. A state of emergency law and laws amending it are subject to constitutional review. Hence, regulation of these issues by state of emergency KHKs instead of laws results in avoiding constitutional review. This does not comply with the rule of law principle, which is the basis of the Constitution.



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(...)

Article 1 of the state of emergency KHK, which does not have the features of a provision of a state of emergency KHK, should be classified as an ordinary KHK. Yet, in such a case Article 91 of the Constitution is violated since this provision does not rely upon an enabling law. Despite the fact that Article 4 of the Law On the State of Emergency mentions KHKs, this article concerns state of emergency KHKs. However, KHKs enacted pursuant to Article 91 of the Constitution must rely on an enabling law that prescribes aim, scope, principles and period of validity. Article 1, which is found to be a provision of an ordinary KHK, violates Article 91 of the Constitution since it does not rely on an enabling law and must be annulled.

Servet TÜZÜN, İhsan PEKEL, Erol CANSEL and Yavuz NAZAROĞLU did not agree with this view.

(...)



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## 2.15 Constitutional Review of Emergency Decrees II

***Application Number:*** *1991/06* ***Decision Number:*** *1991/20*

***Date of Decision:*** *03/07/1991*

***Date of Publication and Number of the Official Gazette:*** *08/03/1992 - 21165*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by member of the TBMM Mr Erdal Inönü (chairman of the parliamentary group of the main opposition party SHP) on behalf of the SHP parliamentary group*

***Provisions at Issue:*** *Art. 1, 2, 3, 4, 5, 6, 7, 8, 9 of Statutory Decree No. 430 On Additional Measures to be Taken During the State of Emergency and on the Governorship of the State of Emergency of the Region (15/12/1990)*

***Relevant Constitutional Provisions:*** *Art. 2, 5, 6, 7, 10, 38, 91, 120 and 121 (1982 TA)*

***International Treatises/References:*** *ECHR*

***Voting:*** *Accepted by majority of 6:5 justices (regarding Art. 1, 5, 6 and 9)*
*Accepted 10:1 (regarding Art. 7)*
*Accepted by majority of 6:5 justices (regarding Art. 7 and 8)*

***Dissenting and Concurring Opinions:*** *3 DO*

***Justices:*** *President Yekta Güngör ÖZDEN; Vice President Güven DİNÇER; Members: Servet TÜZÜN, Mustafa ŞAHİN, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Erol CANSEL, Yavuz NAZAROĞLU, Haşim KILIÇ, Yalçın ACARGÜN*

According to Art. 148 (1, sentence 3) "decrees having the force of 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 as to form or substance". Although this provision has not been changed or amended since the adoption of the constitution, the constitutional court reinterpreted the provision, which literally situates the state of emergency outside the scope of the State under the rule of law, with two landmark decisions. In doing so, the AYM established a legally enforceable and binding scope of action for legislative and executive. In this ruling, the AYM discusses what features characterise a state of emergency decree. Such a decree must specify the particularities of a state of emergency, it must only be in force during the state of emergency, and it must be only implemented in regions where a state of emergency has been declared. Hence, an emergency decree should not exceed aim, scope, principles and period of validity of the reasons for a current state of emergency. Most importantly, the Court states that such a decree cannot amend laws but only replace them for a limited time period and in a restricted area of society or a region of the country. The Court reasons that if these criteria are not met, the decrees are ordinary decrees and not state of emergency decrees; hence these decrees, like ordinary decrees, could also be subject of constitutional review. In the norm review at issue, the AYM rules that the ban of press publications and the close-down of printing houses outside the state of emergency region exceed the limitations of the emergency measures, thus the decree has to be annulled.

(…)



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## IV. MERITS

After examination of the report on the substance of the case, the argumentation and its attachments, the statutory decrees requested to be annulled, the respective constitutional provisions and the justifications of both constitutional provisions and the laws requested to be annulled and other legislative acts, the following was decided:

### A. Constitutional Review of Emergency Regimes especially of/in a State of Emergency

#### 1- Procedures of the state of emergency

Procedures of the state of emergency shall be invoked in cases of uprisings, turmoil, a threat of war, state of war, natural disasters, serious economic crisis, and in similar cases that seriously threaten the security of State and society. There is no doubt that these scenarios lead to an enormous threat to the existence and the security of State and society. Procedures of the state of emergency have been developed out of the fact that normal regimes are incapable of eliminating those threats within national legal orders.

However, the state of emergency does not imply arbitrariness in the regime, which in all democratic countries means to eliminate the legal system for good. The state of emergency is a regime that relies on the Constitution, that is enacted in accordance with the constitutional procedures, and that is under surveillance of legislative and judicial organs. Furthermore, the state of emergency should aim at protecting and defending the constitutional order. Despite the fact that it gives important competences to executive organs and that it restricts fundamental rights and freedoms, the state of emergency system is a "legal regime" in democracies.[704]
(...)

Pursuant to the Constitution, the Council of Ministers, meeting under the chairpersonship of the President, can issue statutory decrees on issues required by the state of emergency or martial law. These statutory decrees

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704 The first two paragraphs of the merits are a word by word repetition of the according paragraphs in the first ruling on state of emergency decrees, here *4.1 Delimitation and Constitutional Review of Emergency Decrees I* (E.1990/25; K.1991/01).



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(KHK), which are enacted in accordance with Articles 121 and 122 of the Constitution, are beyond the reach of constitutional review pursuant to Article 148 (1) of the Constitution and Article 19 of Law No. 2949 on the Establishment and Rules of Procedure of the Constitutional Court. In the Constitution it is stated that only the Turkish Grand National Assembly has the competence to review martial law and state of emergency statutory decrees. (...)
(...)

2. Restriction of fundamental rights and freedoms under state of emergency regimes

(...)

3. Statutory decrees which can be issued during the state of emergency

In Article 121 (3) and Article 122 (2) of the Constitution, it is stated that during the state of emergency and during martial law, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue statutory decrees (KHK) necessitated by the state of emergency or martial law.

Therefore, an enabling act is not required in case of state of emergency and martial law. Article 121 and Article 122 form the constitutional basis of KHKs that are issued in these cases.

Yet, according to Articles 119 and 120, in order to issue a state of emergency KHK, state of emergency should be declared. State of emergency KHKs should not exeed the purpose and limits of a state of emergency.

a) Subject of state of emergency KHKs

According to Article 91 of the Constitution the limits for ordinary KHKs do not apply to martial law and state of emergency KHKs. Hence, fundamental rights, personal rights and duties, and political rights can be regulated by these kind of KHKs. Yet, in Article 121 (2, 3) of the Constitution it is stated that "The financial, material and labour obligations which are to be imposed on citizens in the event of the declaration of a state of emergency under Article 119 and the manner of how fundamental rights



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and freedoms shall be restricted or suspended in line with the principles of Article 15, how and by what means the measures necessitated by the situation shall be taken, what sorts of powers shall be conferred on public servants, what kinds of changes shall be made in the status of officials as long as they are applicable to each kinds of states of emergency separately, and the extraordinary administration procedures, shall be regulated by the Act on State of Emergency.

During the state of emergency, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decrees having the force of law on matters necessitated by the state of emergency. These decrees shall be published in the Official Gazette, and shall be submitted to the Grand National Assembly of Turkey on the same day for approval; the time limit and procedure for their approval by the Assembly shall be indicated in the Rules of Procedure."

In this respect, the Constitution requires that issues enumerated in the second paragraph of this article should be regulated under the Law of the State of Emergency. In other words, issues mentioned in the second paragraph cannot be regulated with KHKs. State of emergency KHKs can be issued "on matters required by the state of emergency" within the framework of the Law on the State of Emergency. Only by means of these kind of KHKs, measures can be taken to eliminate the reasons of declaring a state of emergency.

Taking into consideration Article 121 (2, 3) of the Constitution, state of emergency KHKs cannot have further functions. Otherwise it leads to creating a new kind of state of emergency which is not defined by the Constitution and the Law on the State of Emergency. The Constitution precisely prescribes different sorts of extraordinary regimes and that their status have to be regulated by laws. (...)

(...)

It is not possible to regulate issues, which do not require the current state of emergency regime, in a state of emergency KHK. The issues which are within the scope of the state of emergency measures are limited to the reasons and purpose of the current state of emergency. The reasons and purpose for declaring a state of emergency are that acts of violence become widespread and public order breaks down. The purpose of the state of emergency is merged with its reasons. In other words, when the claimed reasons for declaring the state of emergency are determined, its purpose becomes obvious at the same time. Thus, state of emergency KHKs "have to be limited to issues requiring a state of emergency" and ought to relate to purpose and reasons for the state of emergency.



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According to form and substance of Article 148 of the Constitution, KHKs "related to issues requiring a state of emergency" are beyond the scope of constitutional review. The Constitutional Court must first examine the character of a KHK, and if it discovers that a KHK is not issued within the frame of a state of emergency, it must conduct the review.

b) Spatial and temporal scope of state of emergency KHKs

The extraordinary administration procedures governed under Article 119, Article 120 and Article 122 of the Constitution are subject to temporal and spatial limits. Pursuant to Article 120 of the Constitution, in the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months. In this respect, measures taken through a KHK within the frame of Article 121 of the Constitution must enter into force only within the region where a state of emergency was declared. The area of application of a state of emergency KHK is a region or regions where a state of emergency was declared. Thus, when a state of emergency enters into force for a certain region of the country, the state of emergency KHKs do not have legal effects for other regions. The Constitution does not allow restriction of fundamental rights and freedoms in the regions that are not within the extent of a state of emergency. The declaration of a state of emergency for a certain region cannot be the reason for the implementation of a state of emergency for the whole country. In the regions where a state of emergency is not declared, fundamental rights and freedoms cannot be restricted by state of emergency KHKs.

The extraordinary regimes are limited to a certain temporal period. (...) The Law on State of Emergency and Martial Law can only be applied for the time span of the state of emergency or martial law in the region or regions where it has been declared. When this state is lifted, the laws in question cede to be applied in the respective region or regions. State of emergency or martial law KHKs can only be implemented in a region or regions where the state of emergency or martial law is in force and during its period of validity. It is impossible to keep a state of emergency KHK in



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force in spite of the suspension of a state of emergency regime. Therefore, ordinary laws cannot be amended by state of emergency KHKs. In case the same provisions prescribed by state of emergency KHKs are intended to be implemented outside of a region of state of emergency or in a period after the end of a state of emergency, they must be stipulated by ordinary laws. This is so, for KHKs implemented outside a state of emergency region or regions or after the suspension of a state of emergency cannot continue to be applied by pretending that they are norms containing issues "related to issues requiring a state of emergency".

The competence to issue a state of emergency KHK is limited to the duration of a state of emergency. Provisions of a state of emergency KHK cannot be implemeted before the declaration of a state of emergency, after the expiration of a state of emergency, and in regions outside of the region of the state of emergency.

Therefore, state of emergency KHKs can only enter into force in the regions where a state of emergency is declared and upon the matters required by a state of emergency. They are excluded from constitutional review pursuant to Article 148 of the Constitution. KHKs that do not fit into this scheme cannot be considered as a state of emergency KHK and they are subject to constitutional review.

c) Review of state of emergency KHKs

(...)

However, the Constitutional Court has to define the character of administrative regulations issued by legislative or executive bodies, when they are brought before the Court for constitutional review. This is because the Court cannot only rely on the name of a document to define its character. Therefore, it must elabourate on whether or not it is a real state of emergency KHK, which is excluded from constitutional review. If this is not the case, it must conduct a constitutional review. Article 148 of the Constitution precludes the constitutional review of state of emergency KHKs.

Servet TÜZÜN, İhsan PEKEL, Erol CANSEL, Yavuz NAZAROĞLU and Haşim KILIÇ did not agree with these view.



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B. Statutory Decree No. 430

1 (…)

C. Attributes of the Provisions of the Statutory Decree No. 430 and Issue of Unonstitutionality of Norms Not Considered to Have the Attributes of State of Emergency KHKs

1- Examination in terms of Article 1

a. (...) As can be seen, new provisions under KHK No. 430 are indeed found in the Law on State of Emergency No. 2935. These new provisions allow the Regional Governor of the State of Emergency to dispose of publications from outside the region of state of emergency. (...) According to paragraph (a) of the article, the Minister of Internal Affairs is given the authority of banning any publications "regardless of whether they were printed within the region of the state of emergency", and of closing the printing offices where these publications were printed. This provision does not have the character of a state of emergency KHK as it concerns issues from outside the region of the state of emergency. (...) Therefore, it cannot be excluded from constitutional review.(...) Fundamental rights and freedoms can be restricted only by law in regions where no state of emergency has been declared. Fundamental personal rights governed under the first and second sections of the second part of the Constitution and political rights and duties governed under the fourth section of the second part of the Constitution cannot be regulated by ordinary KHKs. This is a principle that creates the minimum criterion for the restriction of fundamental rights and freedoms. Therefore, neglecting this principle while restricting fundamental rights and freedoms would violate the Constitution. Hence the part of the paragraph in question that concerns the measures to be taken outside of the region of the state of emergency violates Article 7 of the Constitution.
(...)

2. Examination in terms of Article 2

The article reads as follows: "The Regional Governor of the State of Emergency can suspend labour union activities enumerated in Statutory



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Decree No. 285, such as strikes, lockouts, declaration of intention, referendum or decide on these activities to be based on permission, during the state of emergency in the provinces where a state of emergency had been declared. The Regional Governor of the State of Emergency can ban and prevent actions like demolition, plundering, and other similar actions[705], occupation, boycott, slowdown strike, restriction of freedom of labour, closure of workplaces, or can take other preventive measures when they find it necessary."

A similar provision is also found in Article 1 (c) of KHK No. 424, but in KHK No. 430 "adjacent provinces" were omitted and this provision is supposed to apply only to the provinces of the state of emergency. The article has the character of a provision of a state of emergency KHK. The application must be dismissed, since Article 2 has a character of a provision of a state of emergency KHK which can be issued within the frame of Article 121 of the Constitution and which cannot be subject to a constitutional review pursuant to Article 148 (1) in terms of a substantial and procedural violation of the Constitution.

(...)

## V. CONCLUSION

On 03/07/1991 the Court concludes that,

A- by considering the statement "... outside the region of the state of emergency..." in Article 1 (2a) of the Statutory Decree No. 430 On Additional Measures to be Taken During the State of Emergency and on the Governorship of the State of Emergency of the Region,

B- by considering the statements "...outside the region of state of emergency..." and "...adjacent provinces..." in Article 5 of the Statutory Decree No. 430 On Additional Measures to be Taken During the State of Emergency and on the Governorship of the State of Emergency of the Region,

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705 The Turkish original uses "fiili durum" which literally means "factual state". In this context it signifies that the respective Governor in case of a state of emergency is authorised to prevent actions similar to demolition or plundering. The Turkish legislator often employs these indeterminate legal terms, especially when concerning state security, to be able to subsume as many actions as possible.



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C- by considering the statement "...outside the region of state of emergency..." in Article 6 of Statutory Decree No. 430 On Additional Measures to be Taken During the State of Emergency and on the Governorship of the State of Emergency of the Region, these provisions do not have the character of a state of emergency KHK, and they must be ANNULLED since they violate the Constitution, BY MAJORITY OF VOTES and with dissenting votes of Servet TÜZÜN, İhsan PEKEL, Erol CANSEL, Yavuz NAZAROĞLU and Haşim KILIÇ;

D- Article 9 of Statutory Decree No. 430 On Additional Measures to be Taken During the State of Emergency and on the Governorship of the State of Emergency of the Region does not have the character of a provision of a state of emergency KHK, and it must be ANNULLED since it violates the Constitution, BY MAJORITY OF VOTES and with dissenting votes of Servet TÜZÜN, İhsan PEKEL, Erol CANSEL, Yavuz NAZAROĞLU and Haşim KILIÇ,

E- The application regarding paragraphs 2 (b) and 2 (c) of Article 1 and Article 2, Article 3, Article 4 of Statutory Decree No. 430 On Additional Measures to be Taken During the State of Emergency and on the Governorship of the State of Emergency of the Region must be DISMISSED, as the Constitutional Court does not have the competence to decide, on the grounds that they can be issued relying on Article 121 (3) of the Constitution and they have the character of a provision of a KHK that is excluded from constitutional review within the frame of Article 148 (1) of the Constitution; UNANIMOUSLY

F- The application regarding Article 7 of the Statutory Decree No. 430 On Additional Measures to be Taken During the State of Emergency and on the Governorship of the State of Emergency of the Region must be DISMISSED, as the Constitutional Court does not have the competence to decide, on the grounds that it can be issued relying on Article 121 (3) of the Constitution and it has the character of a provision of a KHK that is excluded from constitutional review within the frame of Article 148 (1) of the Constitution, BY MAJORITY OF VOTES, with a dissenting vote of Güven DİNÇER,

G- The application regarding Article 8 of Statutory Decree No. 430 On Additional Measures to be Taken During the State of Emergency and on the Governorship of the State of Emergency of the Region must be DISMISSED, as the Constitutional Court does not have the competence to decide, on the grounds that it can be issued relying on Article 121 (3) of the Constiution and it has the character of a provision of a KHK that is excluded from constitutional review within the frame of Article 148



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(1) of the Constitution, BY MAJORITY OF VOTES, with dissenting votes of Yekta Güngör ÖZDEN, Mustafa ŞAHİN, Selçuk TÜZÜN, Ahmet N. SEZER and Yalçın ACARGÜN.
(...)



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## 2.16 Constitutional Review of Emergency Decrees III

***Application Number:*** *2003/28* ***Decision Number:*** *2003/42*

***Date of Decision:*** *22/05/2003*

***Date of Publication and Number of the Official Gazette:*** *16/03/2004 - 25404*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by the Fifth Chamber of the Council of State (Danıştay Beşinci Dairesi)*

***Provisions at Issue:*** *Art. 7 of Statutory Decree No. 285 On the Establishment of Governorship of the State of Emergency of the Region (10/07/1987), which was amended by Statutory Decree No. 425 (09/05/1990)*

***Relevant Constitutional Provisions:*** *Art. 2, 5, 6, 7, 13, 15, 121 and 125 (1982 TA)*

***Voting:*** *Accepted by a majority of 7:4 justices*

***Dissenting and Concurring Opinions:*** *1 DO*

***Justices:*** *Vice President Haşim KILIÇ; Members: Samia AKBULUT, Yalçın ACARGÜN, Sacit ADALI, Ali HÜNER, Fulya KANTARCIOĞLU, Ertuğrul ERSOY, Tülay TUĞCU, Ahmet AKYALÇIN, Enis TUNGA, Mehmet ERTEN*

The submitting court claims that Statutory Decree No. 285 *on the Establishment of Governorship of the State of Emergency of the Region* violates the Constitution, because it excludes its content from constitutional review and all other forms of (possible) annulment. Whereas decrees issued during the term and in the region of a declared state of emergency or martial law are exempted from constitutional review according to Art. 121 (Rules regarding the states of emergency) and 122 (Martial law, mobilisation and state of war) of the Constitution, the scope of this exemption is heavily debated in constitutional and administrative law, as the AYM's decisions K. 1991/01 and K. 1991/20 show (see above). In the concrete constitutional review proceedings at issue, the AYM once more defines the limitations of this exemption. It not only confirms its earlier jurisdiction that state of emergency decrees are exempted from constitutional review only as long as their content is directly related to the issues of the state of emergency, but it even states that the Constitutional Court has the right to decide whether this is the case or not. Thus, the AYM declares that the decree at issue violates Article 91 (Authorisation to issue decrees having the force of law) of the Constitution, since it does not rely on an enabling law and must be annulled.

(…)



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## III. THE LAW

### A. Provision at Issue

The text of Article 7 of the Statutory Decree No. 285 on the Establishment of Governorship of the State of Emergency of the Region (10/07/1987), which was amended by KHK No. 425, reads as follows:

"Administrative acts regarding the exercise of powers of the Governor of the State of Emergency of the Region, which are granted by this decree, shall not be subject to any acts of annulment."

(...)

## IV. PRELIMINARY EXAMINATION

(...) First of all it is necessary to examine whether or not Statutory Decree No. 425, which has been enacted based on Article 121 (3) of the Constitution, has the character of a decree that can be subject to constitutional review pursuant to Article 148 of the Constitution.

(...)

However, in addition to being subject to different procedures and principles another prerequisite for excluding KHKs that were issued pursuant to Article 121 and Article 122 from constitutional review is to limit the content of these KHKs to the scope of the state of emergency or martial law. Therefore, a KHK cannot be identified as a state of emergency KHK without examination of its content and by only considering that it was issued through special procedures during a state of emergency or martial law; and that it was labeled as being related to the state of emergency.

**Moreover and in addition to those provisions, the power of issuing KHKs – which is granted to the Council of Ministers under the chairpersonship of the President by Article 121 and 122 of the Constitution – is also limited by various relevant constitutional provisions.** In cases where these limits are exceeded, KHKs and other provisions in question cannot be identified as KHKs concerning "extraordinary administrative procedures". Nonetheless, they can be dealt with in the context of ordinary KHKs governed under Article 91 of the Constitution.

In Article 125 (1) of the Constitution, titled "Judicial Review", it is stated that recourse to judicial review shall be available against all actions and acts of administration. In the fifth paragraph it stipulates that a substantiated decision regarding the stay of execution of an administrative act



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may be issued if its implementation results in damages that are difficult or impossible to compensate for; and if, at the same time, the act would be clearly unlawful. In the sixth paragraph it reads that the law may restrict the issuing of an order of stay of execution of an administrative act in cases of state of emergency, martial law, mobilisation and state of war, or on the grounds of national security, public order and public health. This implies that the right of judicial review can never be impeded except for those cases which are explicitly excluded from judicial review in this article, and ordering a stay of execution can only be restricted according to the enumerated cases. However, in Article 7 of KHK No. 285 on the Establishment of Governorship of the State of Emergency of the Region, which was amended by KHK No. 425, it is stated that "administrative acts regarding the exercise of the power of the Regional Governor of the State of Emergency, which are granted by this decree, shall not be subject to any acts of annulment"; and the right of litigation against those acts was impeded. Thus, this creates a competence which is not prescribed by the Constitution in the context of a state of emergency.

In this regard the provision in question must be identified as an ordinary KHK since it cannot be identified as an act regarding the state of emergency.

For the reasons mentioned above, the Court concludes that the application fulfills the procedural requirements of a preliminary examination and thus the case can be examined by the Constitutional Court. Article 7 of the Statutory Decree No. 285 on the Establishment of Governorship of the State of Emergency of the Region (10/07/1987), which was amended by Statutory Decree No. 425, is not a provision of a statutory decree covered by Article 121 (3) of the Constitution. Thus, it is not exempted from constitutional review pursuant to Article 148 (1) of the Constitution. Decided BY MAJORITY OF VOTES, with dissenting votes of Samia AKBULUT, Yalçın ACARGÜN, Ali HÜNER, Ertuğrul ERSOY and Tülay TUĞCU.

## V. MERITS

After having elabourated the judicial referral and its annexes, the report concerning the merits of the case, the provision of the KHK at issue, relevant constitutional provisions and their explanatory memorandums, and other relevant law provisions, the Court concluded as follows:

In the judicial referral it is alleged that the provision in question violates Articles 2, 5, 6, 7, 13, 15, 121 and 125 of the Constitution. However, pur-



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suant to Article 29 of the Law on Establishment and Rules of Procedure of the Constitutional Court, No. 2949, the Constitutional Court is not obliged to base its reasoning on the parties' claims regarding the violation of the Constitution by laws, statutory decrees and the Rules of Procedure of the Turkish Grand National Assembly. Provided that it abides by the complaint, the Court can decide on a violation of the Constitution following a different argumentation.

Therefore, the provision in question was examined in terms of Article 91 of the Constitution as well.

Article 91 (1) of the Constitution states that "the Grand National Assembly of Turkey may empower the Council of Ministers to issue decrees having the force of law. However, with the exception of martial law and states of emergency, the fundamental rights, individual rights and duties included in the first and second chapters and the political rights and duties listed in the fourth chapter of the second part of the Constitution, shall not be regulated by decrees having the force of law", and Article 91 (2) reads as follows: "the enabling law shall define the purpose, scope, and principles of the decree having the force of law, the operative period of the enabling law, and whether more than one decree will be issued within the same period". In this respect an ordinary KHK shall be issued relying on an enabling law.

Accordingly, Article 7 of KHK No. 285 that was amended by KHK No. 425 must be handled as an ordinary KHK; and it violates Article 91 of the Constitution since it does not rely on an enabling law. Hence it must be annulled.

Samia AKBULUT, Ali HÜNER, Ertuğrul ERSOY and Tülay TUĞCU did not agree with these view.

There is no room for a further examination of the provision at issue in terms of other constitutional provisions alleged in the judicial referral.

## VI. CONCLUSION

On 22/05/2003 the Court concludes BY MAJORITY OF VOTES that Article 7 of Statutory Decree No. 285 On the Establishment of Governorship of the State of Emergency of the Region of 10/07/1987, which was amended by Statutory Decree No. 425, violates the Constitution and must be ANNULLED; with dissenting votes of Samia AKBULUT, Ali HÜNER, Ertuğrul ERSOY and Tülay TUĞCU.



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## 2.17 Constitutionality of Anti-Terrorism Law

***Application Number:*** *1991/18* ***Decision Number:*** *1992/20*

***Date of Decision:*** *31/03/1992*

***Date of Publication and Number of the Official Gazette:*** *27/01/1993 - 21478*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by member of the TBMM Mr Hasan Fehmi Güneş (deputy chairman of the main opposition party SHP parliamentary group) on behalf of the SHP parliamentary group*

***Provisions at Issue:*** *Art. 1, 2, 5, 6, 7, 8, 10, 12, 13, 15, 16, 17, provisional Art. 4 and 9 of the Anti-Terrorism Law No. 3713 (12/04/1991)*

***Relevant Constitutional Provisions:*** *Preamble, Art. 2, 6, 9, 10, 13, 17 (3), 19, 26, 27, 35, 36, 38, 141 (1982 TA)*

***International Treaties/References:*** *ECHR*

***Voting:*** *Rejected by majority of 7:4 justices (regarding Art. 1, 2, 5, 13, 17)*

Partially accepted by varying majorities (regarding Art. 4, 6, 7, 8, 9, 10, 12, 15, 16)

***Dissenting and Concurring Opinions:*** *10 DO*

***Justices:*** *President Yekta Güngör ÖZDEN; Vice President Güven DİNÇER; Members: Servet TÜZÜN, Mustafa ŞAHİN, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Erol CANSEL, Yavuz NAZAROĞLU, Haşim KILIÇ, Yalçın ACARGÜN*

The applicant party argues that 14 articles of the *Anti-Terrorism Law* violate the Constitution: first, terms and concepts defining "terrorism" are ambiguous; second, different provisions violate among others the principle of equality and the rule of law principle. The AYM rules that Articles 1 and 2 of the Law in question do not violate the Constitution, deeming the *Anti-Terrorism Law´*s controversial definition of terrorism constitutional, as well as some other provisions of the Law. However, it strikes down important restrictions on due process rights and annuls several protections extended to Anti-Terrorism law enforcement officials and intelligence service officers with varying majorities. For example, Art. 12 of the law, which foresees that enforcement officials having interrogated terrorist suspects will be questioned in non-public hearings, is identified as unconstitutional since it violates the principle of publicity of hearings as established in Art. 141 (1982 TA). Moreover, the Court rules that the law in determining that law enforcement officials shall be tried without taking them into custody violates Art. 19 (2) (Personal liberty and security), Art. 37 (Principle of natural judge), Art. 9 and the Preamble (i.e. Judicial powers and separation of powers). The translated parts of the very long and partially opaque merits cover only the reasoning concerning Art. 1 and 2 of the incriminated law, because the broad definition of the term terrorism is of particular importance.

(…)



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## IV. MERITS[706]

(…)

Issue of Unconstitutionality

In the application it is claimed that some parts of the 14 articles of the law shall be annulled. Therefore, the constitutional review of the mentioned articles will be conducted separately, i.e. article by article.

1. Article 1 of the Law at issue

A. Meaning and Scope of the Provision at issue

The article of this law includes a definition of terror and terrorist organisations. The first paragraph of the article determines three basic characteristics that define terror:

a) The first characteristic is to initiate action with methods of "pressure", "force and violence", "threat", "to give fright", "to intimidate" or "to suppress". "Force and violence" and "threat" are conventional concepts of criminal procedure. In many provisions of Criminal Law, they either exist in parallel or individually, as elements of a crime or an aggravating element of a crime.

(…)

The concepts "force, violence, threat" are common terms in Turkish Criminal Law. On the other hand, the concepts "pressure", "to give fright, to intimidate and to suppress" are not very common. In Article 498 of the Turkish Criminal Code, "to give fright" is mentioned. However, when this article is handled together with Article 496 and 497, it is seen that this concept is used as a synonym of "threat". In the dictionary, "to intimidate" is defined as "to frighten, to suppress, to overawe". This shows that all terms in the law in question are either synonyms or homonyms. It may not be possible to find out which one covers an action in question. In the dictionary the word "pressure" is defined as "keeping someone under compulsion by restricting the rights and freedoms".

In Article 1 "violence" and "force" exist in parallel, and others exist independently. Proof of one of those is sufficient to provide evidence of an act of "terror", with other conditions shown in general provisions of the Criminal Code.

By defining "pressure", "force and violence", "threat", "to give fright", "to intimidate" and "to suppress" as methods, those terms gained new

706 In general all laws published in the Official Gazette are termed "*Kanun*", therefore the usual abbreviation for the Turkish Criminal Code is TCK (*Türk Ceza Kanunu*); in this decision the AYM used the term TCY (*Türk Ceza Yasası*).



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conceptual dimensions. For example, these new meanings are: "targeting masses", "to be conducted systematically and intensively" and "having organisational links". The concepts of giving fright, intimidating and suppressing are not motives but should be rather seen as influential methods [of terrorism].

b) The second characteristic relates to the aim of actions of "terror". The aim determined under this article may be scrutinised under five titles:

aa) To change the qualities, and the political, legal, social, laicist and economical order of the Republic governed under the Constitution:

The qualities of the republic are determined in Article 2 and in the preamble, to which Article 2 refers.

Another similar provision is Article 9 of the Law on the Establishment of State Security Courts No. 2845. It is apparent that, "the aim to change qualities of the State and to overrule the political, legal, social and laicist order" mentioned in this article is strictly related to the "fundamental economic and social rules" of Article 141 and "fundamental social and economic or political or legal order" mentioned in Article 163 of the Turkish Criminal Code, which was abolished by the law in question.

bb) To ruin the integrity of the State with its territory and people, to jeopardise the existence of the Turkish State and the Republic:

The basic provision of the Turkish Criminal Code on this matter is Article 125. Article 168 prescribes sanctions for establishing armed gangs and organisations in order to commit crimes mentioned in Article 125, and Article 171 is about alliances in these crimes. Article 172 prescribes sanctions for those who provoke people to commit such crimes in public. Articles 141 (4) and 142 (3) of the Turkish Criminal Code, which regard organisational activities and propaganda against the indivisible integrity of the state with its territory and people, have been abolished and were replaced by Article 7 and 8 of the law in question.

To jeopardise the existence of the Turkish State is defined as another aim in the provision. This aim is strictly related to the concept of an indivisible integrity of the State with its territory and people. With respect to this, the situation mentioned in the former paragraph should also be considered for this concept.

In addition, the aim to jeopardise the existence of the republic is also mentioned in the article in question. The term "republic" should be considered as the form of state. According to Articles 146, 147, 149 of the Turkish Criminal Code, activities aiming at the replacement of the Constitution or a provocation of popular uprising should be handled in this context.



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cc) To debilitate or to subvert authority of the State or to seize control over the State:

It would be possible to define activities in the scope of Articles 146, 147 and 149 as crimes against the authority of the State. Other examples that fall under this definition would be: to provide weapons to plot organisations (TCY Art. 150), to take control of a brigade, a harbor or a town without any legitimate reasons (TCY Art. 152), to call for disobedience of soldiers (TCY Art. 153), to broadcast with those aims (TCY Art. 154), to provoke people to act against laws (TCY Art. 155).

dd) To annihilate fundamental rights and freedoms:

The second section of the second part of the Turkish Criminal Code is titled "Crimes against Freedom", and it includes provisions about political freedom (TCY Art. 174), freedom of religion (TCY Art. 175), individual freedom (TCY Art. 179 - 192), immunity of domicile (TCY Art. 193 - 194), freedom of privacy (TCY Art. 195 - 200), and freedom of labour and employment.

The provision in question is also concerned with the action "to abolish" fundamental rights and freedoms. However, the Criminal Code includes a much broader title, "the crimes against freedom", and none of the relevant articles under this title mentions the term "to abolish" rights and freedoms. Moreover, crimes which do not annihilate freedoms at all have also been counted as crimes.

ee) To damage the internal and external security of the State, public order and health:

The concept of internal and external security of the State is also part of Article 9 (e) of the Law on the Establishment and Jurisdiction Procedures of State Security Courts. Crimes governed under this paragraph are recognised as terror crimes provided that other conditions prescribed by the article in question apply.

The first part of the second section of the Turkish Criminal Code, Articles 125-145, is titled "Crimes against the international personality of the State", and prescribes sanctions against: attempts to damage the unity and integrity of the State, provocation of war, collabouration with enemies, and spying.

All these actions have the character of crimes which may damage the external security of the State. The crimes that damage the internal security of the State may be exemplified as "crimes against State forces" (TCY Art. 146-162), "crimes regarding great dangers like fire, flooding, drowning" (TCY Art. 369-383) and "crimes against means of transportation and communication" (TCY Art. 384-393).



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Furthermore, “to aim to damage public order and health” is also among the conditions that qualify as terrorist activities. Crimes against public order are governed especially under the fifth part of the second section (TCY Art. 311-314). Moreover, “Crimes against the personality of the State” are largely of the character of damaging public order. The same may be said about the acts governed in the chapter titled “Crimes against public order” under Articles 516, 517 and Articles 536, 537 of the Turkish Criminal Code. These crimes cannot be confined to the examples given by the Turkish Criminal Code. The issues governed by the Law of Demonstration and Public Meetings, the Law of Collective Labour Agreements, Strike and Lock-out and the Law of Associations also mostly concern public order.

Article 394 of the Turkish Criminal Code gives a typical example of crimes against public health. It prescribes sanctions against those who jeopardise public health by lacing people’s food and water with poison, or in other ways. As the article adds “in other ways”, the act of spreading epidemic diseases must also be handled within the scope of this article.

There is no doubt that other conditions enumerated in the article also have to be considered in order to situate crimes within the scope of the Law on Anti-terrorism.

In some cases, aim and action of perpetrators may not be compatible. The aims of the above-mentioned crimes fall within the scope of the law. However, in many cases the relationship between aim and crime is not visible. For example, a member of an organisation which aims at changing the qualities of the Republic may kill or abduct a person, and a member of another organisation which aims at damaging the unity of the State may commit a crime against public health. These cases indicate that the aims of organisations and perpetrators must be elabourated on.

Article 3 of the law under review, entitled "terror crimes", and Article 4 "crimes conducted with the aim of Terror", show which crimes will be considered as such. Article 3 says that "Articles 125, 131, 146, 147, 148, 149, 156, 168, 171 and 172 of the Turkish Criminal Code are terror crimes".

Article 4 says with regard to the "implementation of this law;

a) Articles 145, 150, 151, 152, 153, 154, 155, 157, 169 and 499 (2) of the Turkish Criminal Code

b) Crimes listed under Art. 9 (b), (c), (e) of Law No. 2845 on the Establishment and Jurisdiction Procedures of State Security Courts, are to be considered as terror crimes if they are “conducted with the aim of terror” as specified in Article 1 of the law.



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c) In order to define an activity as an act of terror, the third condition is that perpetrators perform the action in affiliation with an organisation. If actions are performed without affiliation with a terror organisation, they cannot be defined as terrorist activity. However, pursuant to the last paragraph of Article 2 of the law in question, "those who commit a crime in the name of a terrorist organisation shall be counted as accused of terror, even though they are not members of a terrorist organisation". Article 1 (2) prescribes that an organisation consists of two or more people who gather for the same purpose. This was previously part of the last paragraph of Article 141 of the abolished Turkish Criminal Code.

In the last paragraph of the provision in question it is stated that "the term organisation covers any entity, armed association, band, or armed band mentioned in the Turkish Criminal Code or other special laws which include criminal provisions".

The second part of the fifth section of the second chapter of the TCY, Articles 313-315, is titled "Those who establish organisations so as to commit crimes"; and it prescribes sanctions on this matter. Articles 168, 169 and 170 of the TCY also include provisions regarding armed associations and bands.

The concept organisation has a broader meaning in the Anti-Terrorism Law.

Article 2 prescribes that a member of an organisation is guilty irrespective of committing any crime by following the purpose of the organisation.

Pursuant to Article 7, to establish, to become a member of, and to manage such organisations, to organise events for them, to propagandise for these organisations, to help members of these organisations, shall be deemed criminal acts.

B. Issue of Unconstitutionality of the Provision at Issue

a) (…)

b) It is claimed that Article 1 violates the principle of legality of crimes and punishments governed under Article 38 of the Constitution.

(…)

The criminal liability principle depends on the assumption that perpetrators commit crimes upon their will and deliberately. Therefore, laws



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should precisely indicate which actions constitute a crime, and for which crimes a perpetrator can be prosecuted.

This principle was regulated in Article 33, as well as in Article 38 of the 1961 Constitution. A ruling of the Constitutional Court under the 1961 Constitution clarified the principle of "nulla poena sine lege".

In the ruling of 10/12/1962, Application No. 1962/198 and Decision No. 1962/111, the Constitutional Court states that:

"The core of the principle of ´nulla poena sine lege´, which is governed under Article 33 of the Constitution and corresponding to this under Article 1 of the Turkish Criminal Code, is that laws shall precisely articulate which actions are to be counted as crimes, and furthermore that punishments shall be set by laws. Individuals should know which actions are prohibited and what punishments apply, and this ensures the fundamental rights and freedoms of individuals. This assurance is governed under Article 33 of the Constitution".

Before examination of the question if the provision under consideration violates this general principle, the quality of the regulation should be clarified. In Article 4 of the law subject to this case, various crimes are listed and it is stated that if these crimes are committed with the purpose to create terror, they shall be counted as terror crimes. Article 5 is regarding the matter of aggravation for crimes governed under Article 3 and 4. Article 7 prescribes sanctions for establishing and managing organisations that fall into the scope of Article 1, and of organising events for these organisations and for helping them.

In this case, Article 1 indicates components of the crime governed under Article 7. So, it is obvious that the principle of "nulla poena sine lege" applies to the provision in question. In Article 1 the concepts "pressure", "to give fright", "to suppress", and "to intimidate" are used along settled concepts such as "force and violence" and "threat". However, use of these concepts should fit the purpose in practice. The necessity of these new concepts may be debated, since they may be used as synonyms of some concepts of criminal law. However, it does not violate the principle of legality.

Since terror is defined in Article 1, other terms should be interpreted in accordance with the importance of this concept.

Using the methods of "frightening or intimidating" is not sufficient to define an act as a terrorist act. In addition, the act should aim at results indicated in Article 1. It is claimed that the results listed in Article 1 are ambiguous. However, their legal qualities are apparent. At this point, the most important one is the connection with the Turkish Criminal Code.



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Some of the relevant concepts have their sources in constitutional law. In particular the concept of "economic order", which is supposed to be ambiguous, had been found in the repealed Article 141 and Article 142 of the Turkish Criminal Code. That the concept of "public order" exists in the legal and constitutional language, and its meaning is very clear, was articulated in the decision of the Constitutional Court, Application No. 1973/12-24 of 07/06/1973 (AMKD, No. 11, p. 265-283).

The same argument can come into question for the concept of organisation, which is one of the components of the concept terror. The meaning of this concept, which can be found in the second paragraph of the article in question and in various articles of the Turkish Criminal Code with different titles, has been clarified by the help of doctrine and through practice of law.

In Article 1, terror is defined as any kind of action performed by members of an organisation using the methods described and following the purposes prescribed in law. In the application it is claimed that the notion "any kind of action" is very far reaching and ambiguous, so that intellectual activities may also be covered and that this would restrict the freedom of thought. Although "any kind of actions" is employed as a general statement, the provision in question provides restrictions for its application. An action has to be performed by using pressure, force, violence; or an action must give fright, or intimidate. Nevertheless, these restrictions are not sufficient. An action which is considered an act of terror also has to include components mentioned in Articles 4 and 7.

Actions considered under Article 3 are defined as terror crimes regardless of any other condition. However, crimes mentioned in Article 4 shall be counted as terror crimes provided that they are committed for the purpose of terror as mentioned in Article 1.

Claims concerning a violation of the Constitution by Article 1 of the law in question are relevant to expediency. The definition of terror is sufficiently clear in the article.

**Therefore, Article 1, which is subject to the case, does not violate Article 38 of the Constitution.**

Yekta Güngör ÖZDEN, Ahmet N. SEZER, Haşim KILIÇ and Yalçın ACARGÜN did not agree with the first clause of the article.

2. Article 2 of the Law at Issue



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A. Meaning and Scope of the Provision at Issue

This article, which defines terrorist criminals, regulates two distinct situations:

Terrorist criminals are members of organisations established to achieve the aims mentioned in Article 1, and who commit a crime with others or alone in order to fulfill these aims. This shows a characteristic of the terror organisation: Those who commit a crime to achieve goals mentioned in Article 1 alone or with others, and who are members of organisations which aim at the goals mentioned in Article 1, are terrorist criminals. At this juncture, a feature of the organisations arises in context of this law: In cases where two or more people gather, provided that they pursue the goals mentioned in Article 1, an organisation exists. A member of this kind of organisation shall be considered as a terrorist criminal if they commit a crime alone or together with others in accordance with these goals. However, this article may be enforced even if the crime is committed alone or with persons who are not members of terrorist organisations.

In the first paragraph of the article at issue those who commit a crime in accordance with these goals are mentioned. The concepts "to damage public health" or "to subvert public order" should be considered as methods used in order to achieve another goal rather than goals themselves.

Pursuant to the second paragraph of the article in question, those who commit crimes on behalf of terrorist organisations, even though they are not members of these organisations, shall be considered terrorist criminals; and they shall be sentenced like members of these organisations. That the crime is committed on behalf of the organisations implies that the crime is committed at the request of the organisations and the criminal act is within the knowledge of the organisations.

B. Issue of Unconstitutionality of the Provision at Issue

(…)

The claim of a violation of Article 2 depends on the assumption that Article 1 is contrary to the principle of "legality" defined in Article 1 of the Constitution. However, as mentioned above Article 1 is not contrary to the principle of legality. The claim that Article 2 violates the Constitution based on this assumption has also been found inappropriate.

When it comes to the claim that the corpus delicti is not found in cases where membership in a terrorist organisation is considered a crime: Article 7 is the provision where membership of a terrorist organisation is counted



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as a crime even though the perpetrator does not commit any other crime. This is new in criminal law. For example, the same had been found in the fifth paragraph of repealed Article 141. Article 168 (2) and Article 313 (1) of the Turkish Criminal Code also include similar statements. These regulations prevent establishing terrorist organisations and impunity for membership in these organisations.

Pursuant to the provision in question, to count someone as a terror criminal depends on the conclusion of independent courts that decide that someone committed a crime in line with the purposes of a terrorist organisation as a member, or if someone is a member of such an organisation. Such a qualification basically depends on the verdict of a court. A person may be considered as a terror criminal once it is proved that they are guilty. In terms of this, there is no regulation that violates the "presumption of innocence" in the law. Members of terrorist organisations are sentenced, since they deliberately became members of these organisations pursuant to Article 7 of the Law in question; and they are defined as terrorist criminals pursuant to Article 2 of the same Law. So, the principle of criminal liability is not violated.

**For the aforementioned reasons, Article 2 in question does not violate Article 38 of the Constitution.**

(…)



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## 2.18 Right to Life of Terror Suspects

***Application Number:*** *1996/68* ***Decision Number:*** *1999/01*

***Date of Decision:*** *06/01/1999*

***Date of Publication and Number of the Official Gazette:*** *19/01/2001 - 24292*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by members of the TBMM Mr Mümtaz Soysal (DSP), Mrs Oya Araslı (deputy chairwoman of the CHP parliamentary group) and 113 other members of the TBMM*

***Provisions at Issue:*** *Art. 1, 2, 3, 7 and 10 of Law No. 4178*[707] *(29/08/1996), amending the Anti-Terrorism Law No. 3713*[708]

***Relevant Constitutional Provisions:*** *Art. 2, 6, 7, 9, 10, 11, 13, 17, 20, 21, 87, 90, 92, 119, 120, 121, 122 and 128 (1982 TA)*

***International Treaties/References:*** *ECHR, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Council of Europe), Recommendation No. 87: Regulating the Use of Personal Data in the Police Sector (by the Committee of Ministers at the Council of Europe)*

***Voting:*** *Accepted by majority of 10:1 justices*

***Dissenting and Concurring Opinions:*** *4 DO*

***Justices:*** *President Ahmet Necdet SEZER; Members: Samia AKBULUT; Haşim KILIÇ; Yalçın ACARGÜN; Mustafa BUMİN; Sacit ADALI; Ali HÜNER; Lütfi F. TUNCEL; Fulya KANTARCIOĞLU; Mahir Can ILICAK; Rüştü SÖNMEZ*

The applicants challenge the constitutionality of Law No. 4178 covering various anti-terrorism regulations and its provisions regulating the use of weapons by the armed forces in operations against terrorist organisations. In its decision the Court states that the provisions at issue define conditions of weapon use in anti-terrorist operations too broadly, among others, authorising security officials to shoot to kill when a terror suspect does not obey a security official's "Stop!" order and attempts to use a weapon. It rules that the provision constitutes a violation of Article 17 (right to personal inviolability, corporeal and spiritual existence of the individual, i.e. *right to life*), because often situations may be solved with less harmful methods.

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707 The law under review in this case is an Omnibus Bill, amending among others Law No. 3713 on Anti-Terrorism. The original Turkish title is: *İl İdaresi Kanunu, Terörle Mücadele Kanunu, Kuvvetli Tayın Kanunu, Er Kazanından İaşe Edileceklere İlişkin Kanun, Ateşli Silahlar ve Bıçaklar ile Diğer Aletler Hakkında Kanun ve Kimlik Bildirme Kanunu*.

708 In addition to Law No. 4178, the application also refers to Laws No. 5442, 6136 and 1774. These laws have been amended in the course of the "fight against terrorism". The most extensive changes were made to Anti-Terrorism Law No. 3713, providing for numerous, massive restrictions on fundamental rights. The other laws can be understood as resulting from the changing "anti-terror policy" of that era.



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(…)

## II. THE LAW

### A- Provisions at Issue

Requested Annulment of Law No. 4178, including Articles 1, 2, 3, 7 and 10.

(…)

3 - "Article 3: Article below has been added to the Anti-Terrorism Law No. 3713:

Additional Article 2: In the course of operations against terrorist organisations, in order to deactivate offenders, the armed forces are entitled to hit a target with firearms directly and without hesitation in case it does not obey the warnings and request and/or attempts to shoot." (…)

## III. PRELIMINARY EXAMINATION

(…)

## IV. STAY OF EXECUTION

(…)

## V. MERITS

After examination of the report on the substance of the case, the application and its attachments, the laws requested to be annulled, the respective constitutional provisions and the justifications of both constitutional provisions and the laws requested to be annulled and other legislative acts, the following was decided:



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1. Issue of Unconstitutionality

(…)

3- Examination of Additional Article 2 of the Anti-Terrorism Law No. 3713 which was added by Article 3

(…)

In Additional Article 2 of the Anti-Terrorism Law No. 3713 it is stated that "In the course of operations against terrorist organisations, in order to deactivate offenders, the armed forces are entitled to hit a target with firearms directly and without hesitation in case they do not obey the warnings and request and/or attempt to shoot".

In the explanatory memorandum of the article it is stated that,

"By adding an Article to Anti-Terrorism Law No. 3713 the competence of the police to use weapons is regulated; i.e. the police are authorised to use weapons and force against terrorists when, during the operation against a terrorist organisation, terrorists do not follow the order 'lay down your arms'.

Conditional and restricted authorisation for firearm use by officers fighting against terrorist organisations under the Law of Internal Service No. 211 and the Law on the Power and Duties of the Police No. 2559 may lead to a great weakness in anti-terrorist operations.

Article 87 of Law No. 211 prescribes the opportunities of interference as (warning to stop, butt-stroking and hitting with a pistol grip, firing the gun into the air for warning, shoot at the feet, to shooting at a non-specific target). Law No. 2559 defines the conditions allowing the police to make use of their guns under Article 16.

In comparison with Article 11 of Law No. 1918 on Prohibition and Prosecution of Smuggling, Article 23 of Law No. 2935[709], and Article 4 of Law No. 1402 on Martial Law, this article [Law No. 2559, Art. 16] restricts the use of weapons very much. But when compared to Law No. 211 and Law No. 2559, the authorisation for the use of firearms is quite far-reaching."

In the explanatory memorandum of Law No. 4178 it is stated that a number of laws concerning legal and administrative issues need to be amended if a state of emergency will be restricted or gradually abolished; and it was proposed for that purpose.

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709 In the Turkish original the Court cites Law No. 2985 (The Mass Housing Law), whereas it wants to refer to Law. No. 2935 (State of Emergency Law). The translation accounts for this fact.



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Additional Article 2 frames actions of security forces in the case of terrorists not obeying warnings and requests, or attempting to shoot. This defines to what extent armed forces may make use of their weapons in the course of operations against terrorist organisations. If the situation occurs as described above, the armed forces can make use of their weapons against offenders directly and without hesitation to neutralise them.

Additional Article 2 entitles the armed forces to use their weapons as a last resort, but it does not specify other neutralisation methods when "offenders do not obey the warnings and requests" or "attempt to shoot".

In Article 17 (1) of the Constitution it is stated that "everyone has the right to life and the right to protect and improve their corporeal and spiritual existence", and in conformity with Article 2 of the European Convention on Human Rights it is stated in the last paragraph that: "Cases such as the act of killing in self-defence, occurrences of death as a result of the use of a weapon permitted by law as a necessary measure during apprehension, the execution of warrants of arrest, to prevent the escape of lawfully arrested or convicted persons, the quelling of a riot or insurrection, or carrying out the orders of authorised bodies during martial law or state of emergency, are outside of the scope of provision of paragraph 1".

The State is obliged to take all measures to protect the right to life, which is assured by this article. The power to use weapons may be granted by law only in compulsory cases. And, the use of weapons must be the last resort of the armed forces.

The paragraph only defines that if offenders attempt to use "arms", the armed forces are allowed to use "fire arms". This means, without having to take into account whether the weapon used by the offender is a fire arm, the armed forces are authorised to use their weapons even in cases which could be solved with other methods and less harmful interference.

In this respect, disobedience of the summons or to attempt to shoot mentioned in the provision in question is not such a situation that entails armed forces in all cases to shoot a target with fire arms directly and without hesitation. In some cases, it might be possible to neutralise offenders by methods less dangerous for their lives and well-being. Without considering special cases and different methods, to shoot targets with "fire arms" directly and without hesitation may jeopardise the right to life.

Therefore, it violates Article 17 of the Constitution. It must be annulled.

Lütfi F. TUNCEL did not agree with these views.

(…)



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## 2.19 Criminal Responsibility of Children in Case of Terrorist Accusations

***Application Number:*** *2011/26* ***Decision Number:*** *2012/41*

***Date of Decision:*** *15/03/2012*

***Date of Publication and Number of the Official Gazette:*** *26/06/2012 - 28335*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Third Bakırköy Juvenile Court (Bakırköy Üçüncü Çocuk Mahkemesi)*

***Provisions at Issue:*** *Art. 3, 4, 8, 9, 10 of Law No. 6008 on Amendment of the Anti-Terrorism Law and Some Other Laws (22/07/2010), amending Art. 34 of Law No. 2911 on Public Meetings and Demonstrations (06/10/1983) by adding Art. 34 (A) to this Law, Art. 5 of the Anti-Terrorism Law No. 3713 (12/04/1991), by adding the statement of "this article cannot be applied to children", amending the Criminal Procedure Law No. 5271 (05/12/2004) by adding a fourth paragraph to Art. 250 of this law, and amending Article 107 (4) of the Law on the Enforcement of the Criminal and Security Measures No. 5275 (13/12/2004) by adding the statement of "this paragraph cannot be applied to children".*

***Relevant Constitutional Provisions:*** *Art. 2, 10 (1982 TA)*

***International Treaties/References:*** *UDHR, ICCPR, ICESRC, UNCRC, Beijing Rules*

***Voting:*** *Rejected unanimously by 15 justices*

***Justices:*** *President Haşim KILIÇ; Vice President Serruh KALELİ; Vice President Alparslan ALTAN; Members: Fulya KANTARCIOĞLU, Mehmet ERTEN, Serdar ÖZGÜLDÜR, Osman Alifeyyaz PAKSÜT, Zehra Ayla PERKTAŞ, Recep KÖMÜRCÜ, Burhan ÜSTÜN, Engin YILDIRIM, Nuri NECİPOĞLU, Hicabi DURSUN, Celal Mümtaz AKINCI, Erdal TERCAN*

The submitting court claims that the provisions at issue establish an unfair situation between perpetrators who have just passed the age of 18 and those who are under the age of 18. The provisions enable terrorist organisations to employ children, who are privileged due to some regulations of Law No. 6008. According to the submitting court the fight against terrorism will be weakened as the provisions will have the result of leaving acts unpunished. The referrral further stipulates that there is no distinction between crimes of adults and children. Thus, the provisions at issue violate Articles 2 (Characteristics of the Republic) and 10 (Equality before the law) of the Constitution. The AYM rejects the referral, stating that children and juveniles and their ability to judge reasons for and results of crimes are different from adults. Therefore it is acceptable and it lies within the margin of discretion of the legislator to differentiate among juveniles and adults, even though these cases concern terror crimes.

(…)

### V. MERITS

After the examination of the judicial referral of the court and its attachments, the report on the substance of the case, the laws relevant for the case and the relevant constitutional provisions and their explanatory memorandums, and other legislative acts, the following was decided:



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A- Examination of Article 4, which amends Article 5 of Law No. 3713 (12/04/1991), i.e. the Anti-Terrorism Law, by adding the following sentence: "Provisions of this Article shall not apply to children."

In the application it is stated that the provisions subject to the application cause a great disproportionality between perpetrators who have just passed the age of 18 and those who are under the age of 18. Besides, by considering enforcement provisions, unfair situations may ensue in terms of criminal and criminal enforcement law. This gives a chance to terrorist organisations to employ children and social disorder has already increased, in many towns and cities of our country. The main actors in this social unrest are children who have been privileged by some aspects of Law No. 6008, and the fight against terrorism will be weakened as the provisions in question will render acts unpunished. In addition, there is no distinction between crimes of adults and children and the deficiency of Law No. 3713 which in practice violates law and the Constitution. The Court finally claims that the legislator must take all necessary measures against any acts which may threaten the Turkish State and the Turkish Republic, and the provision in question is contrary to Article 10 of the Constitution.

According to Article 43 of Law No. 6216 on the Establishment and Rules of Procedure of the Constitutional Court, the provisions at issue have also been examined in relation to Article 2 of the Constitution.

In Article 6 (1b) of the Turkish Criminal Code No. 5237, it is stated that a child is someone who has not yet passed the age of 18; and in Article 3 (1) of Law No. 5395, a juvenile delinquent is defined as a child who is subject to a probe or a trial as they have committed a crime or against whom a security measure has been taken.

Article 5 (1) of Law No. 3713 with the title *"Increase of punishment"* states that prison sentences or punitive fines for those who commit the crimes mentioned in Articles 3 and 4 of the same law shall be increased by half. As a result of this, maximum limits of sentences for those crimes may be exceeded, for example life imprisonment may turn into heavy life imprisonment. In the second paragraph of the same article, it is stated that, in the case of the relevant article prescribing an increase in sentence when a crime is committed within an organisation, the sentence shall be increased only pursuant to this article and the sentence shall be increased at least by two thirds of what is prescribed by law. The provision in question prescribes that Article 5 shall not be applied to children.

The principle of equality under Article 10 of the Constitution is applied to those with an equal legal status. This principle envisages not active



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equality, but legal equality. The purpose of the principle of equality is to enable equal treatment before the law for people having the same status and to prevent any discrimination and privileged status among them. By virtue of this principle, infringement of the principle of equality before the law by applying different legal rules to individuals and communities under the same circumstances is forbidden. The principle of equality before the law does not imply that everybody shall be subject to the same legal rules. Special features of circumstances of different individuals and communities may require different legal rules and implementations. If the same legal rules are applied to the same cases and different legal rules are applied to different cases, the principle of equality governed under the Constitution is not breached.

The mental capacity of juvenile delinquents—in other words mental, physical and spiritual circumstances, which enable them to judge reasons and results of crimes committed by them—is different from adults. It is also the same for the issues of taking legal actions on their own account, defending themselves and getting legal representation. Therefore, that they are being exposed to different criminal and criminal procedural legal rules is not breaching the equality principle of the Constitution. The civilised nations also set different legal rules on probation, trial and execution processes for juvenile delinquents and adult criminals. Hence, to omit the provision concerning the matter of aggravation for adults in cases where children are tried does not violate the Constitution, even though these cases are regarding terror crimes.

On the other hand, Article 2 of the Constitution specifies the State governed by the rule of law, based on human rights, which protects and strengthens these rights and freedoms, whose actions and transactions are in accordance with law, and which builds, maintains and further develops a just legal system and avoids unconstitutional situations and attitudes, actively making law the defining organisational principle in all State institutions; and this State is also bound to law and remains open to constitutional review.

In a State governed by the rule of law the sentences and security measures that substitute sentences are defined by criminal law policies; the latter are determined according to the main principles of criminal law and the respective constitutional norms, the country's social and cultural structure, ethical values, and the needs of economic life. The legislator has discretionary power to decide which acts are perceived as crimes in a society, and by which type and degree of punishment they are sanctioned,



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and which factors can be considered as aggravating or mitigating circumstances.

As mentioned in the explanatory memorandum of the law, international treaties envisage that imprisonment or imposition of a punitive fine must be the last resort and it adopts the principle of the best interests of the juvenile. Therefore, it is evident that the issue of application of the provision regarding the matters of aggravation to the juvenile delinquents falls into the scope of discretion of the legislator and the legislator has exercised this power by taking account of the best interests of the juvenile.

For the reasons mentioned above, the provision in question does not violate Article 2 and Article 10 of the Constitution. The application must be dismissed.

B- The Examination of Article 250 (4) of Law No. 5271 (04/12/2004) on Criminal Procedures, added through Article 8; and examination of Article 10 (A1) of the law under consideration

(...)

Well-civilised States agree that adult criminals and juvenile delinquents have different status in the practice of criminal law and criminal procedure law, and thus juvenile delinquents are exposed to different legal rules in the processes of probation, trial and execution. The international treaties point out that specialisation of laws, procedures and authorities for a juvenile justice system is a must. Taking account of the fact that punishing children in the same way as adults does not protect children against crimes and other risks, it rather puts children in danger. In Article 40 of the UN Convention on the Rights of the Child, which was ratified by our country, it is stated that "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law".

(…)

In consideration of the objected norms it is not anymore possible that children, who have committed terror crimes or crimes with terrorist aims, can be trialed, pursuant to Article 250 (1) of Law No. 5271, in courts of assize and that specific examination regulations apply to them. For these reasons, and pursuant to Law No. 5395, children will be trialed in special courts that respect the best interest of the child in terms of substantial and procedural law regulations, which rather aim at the reintegration of



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children into society than at maintenance of public order, and which prefer security measures for children over punishment. Thus, it does not violate the equality principle and is a constitutional regulation in the sense of Article 141 and 142 of the Constitution, because the sensibilities of children are accounted for in terms of the best interest of the child, and because special children's courts are responsible for the trial.

For the aforementioned reasons the provisions at issue do not violate Articles 10, 141 and 142 of the Constitution. The application has to be rejected.

(…)



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## 2.20 Immunity of Members of Parliament

***Application Number:*** *1994/09* ***Decision Number:*** *1994/28*

***Date of Decision:*** *21/03/1994*

***Date of Publication and Number of the Official Gazette:*** *Not published in the Official Gazette*[710]

***Review Type and Applicant:*** *Application for Annulment of a Parliamentary Decision regarding the Immunity of MPs by members of the TBMM (all DEP) Mrs Leyla Zana (Diyarbakır) and her advocates, Mr Zübeyir Aydar, Mr Naif Güneş (Siirt), Mr Remzi Kartal (Van), Mr Ali Yiğit (Mardin), Mr Selim Sadak (Şırnak), Mr Mahmut Kılınç (Adıyaman), and Mr Sedat Yurtdaş (Diyarbakır)*

***Provisions at Issue:*** *TBMM decision No. 305 on Removal of the Parliamentary Immunity of MP Leyla Zana in the 79th Session of the TBMM (03/03/1994)*

***Relevant Constitutional Provisions:*** *Art. 85 (1982 TA)*

***Other Relevant Provisions:*** *Art. 34 (Law on the Establisment and Rules of Procedure of the Constitutional Court No. 2949)*

***International Treatises/References:*** *The Situation of Kurds in Iran, Iraq and Turkey (Briefing of CSCE of May 17, 1993)*

***Voting:*** *Rejected unanimously (regarding procedural violation claims)*
*Rejected by majority of 8:3 justices (regarding merits of the case)*

***Justices:*** *President Yekta Güngör ÖZDEN; Vice President Güven DİNÇER; Members: İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Haşim KILIÇ, Yalçın ACARGÜN, Mustafa BUMİN, Sacit ADALI, Ali HÜNER, Lütfi F. TUNCEL*

The applicants claim that the TBMM decision on removal of the parliamentary immunity of MP Leyla Zana is unconstitutional on procedural and substantial grounds. In terms of procedure it is stated that the Preparatory Committee and Joint Committee made their decisions without examining relevant documents and denied the deputy's right of self-defence. Furthermore, members of the Social Democrat Populist Party (SHP) were threatened with the dissolving of the coalition by the True Path Party (DYP). Thus the deputies were deprived of the right to vote freely by their personal convictions. In terms of merits the applicants claim that the act to remove the parliamentary immunity was taken for political reasons. First, the state of evidence was by no means sufficient to remove the parliamentary immunity of the MP Leyla Zana. Second, even if the crimes were committed they are covered by indemnity and the democratic principle that any expression of thought must not be counted as crime. The AYM rejects the application dismissing all procedural and substantial claims.

710 This decision has not been published in the Official Gazette, even though the Constitution (Article 153) as well as the Law on the Establishment and Rules of Procedure of the Court (former Law No. 2929 as well as current Law No. 6216) require that all decisions are published in the Offical Gazette. For a discussion of this practice of not-publishing decisions cf. Sevinç 2005.



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(…)

## I. THE CASE

The Chief Prosecutor's Office of the Ankara State Security Court issued the Digest No. 1993/04 and asked to remove the parliamentary immunity of Leyla Zana, Diyarbakir deputy, in order to be able to initiate proceedings against her on the grounds that, in a journey to the USA, Leyla Zana and Ahmet Türk stated that political parties representing Kurds should be granted all constitutional and legal rights; and that they themselves have the same purposes as those who are involved in the armed struggle. This caused an infringement of Article 125 of the Turkish Criminal Code, which prescribes sanctions against the crime of acting in an attempt to detach a part of the territory of the State, or to demolish independence or unity of the State, or to make a part of the territory of the State entering into another State's rule.

The Joint Committee, which consists of the Constitution Committee and the Justice Committee of the Turkish Grand National Assembly, decided to remove the parliamentary immunity of Leyla Zana after having elabourated the report of the I. Preparatory Committee on 23/12/1993. This decision was adopted in the Plenary Session of the TBMM, and in response Leyla Zana and some other deputies asked for annulment of the decision of the TBMM regarding the removal of the parliamentary immunity of Leyla Zana.

## II. THE TURKISH GRAND NATIONAL ASSEMBLY´S DECISION IN QUESTION

The TBMM decision No. 305 (03/03/1994), which was published on the same day in the Official Gazette No. 21865 (1. Repetition[711]), reads as follows:

"The attached report concluded by the Joint Committee, which consists of a combination of the Constitution Committee and the Justice

711 In general, to every single issue of the Official Gazette of the Republic of Turkey a date and a number are ascribed; the numbering is sequential. In case more than one issue is published per day, the issues have the same number and they are distinguished by enumerating them as repetitions (e.g. first repetition).



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Commission, regarding the proceedings to remove the parliamentary immunity of Leyla Zana, was adopted in the 79th Session of the Plenary Assembly on 03/03/1994.

TO THE PRESIDENCY OF THE TURKISH GRAND NATIONAL ASSEMBLY

The digest, which was sent by your Presidency to our commission on 01/09/1993 and which regards the removal of parliamentary immunity of Ahmet Türk, Mardin Deputy, and Leyla Zana, Diyarbakir Deputy, was handled at the meeting of our commission on 11/11/1993, and it was sent for elaboration to the Preparatory Committee established pursuant to Article 109 of the Rules of Procedure.

At the meeting of our commission on 23/12/1993, the report of the Preparatory Committee and the file attached to the digest of the Prime Ministry were analysed.

Ahmet Türk, Mardin Deputy, and Leyla Zana, Diyarbakir Deputy, who are accused of committing the crime of acting in an attempt to detach a part of the territory from the State, were invited to the meeting of 23/12/1993 in order to hear their statements of defence pursuant to Article 111 of the Rules of Procedure of the TBMM. Only Ahmet Türk joined the meeting and his statement was heard by the commission. The investigation about Leyla Zana was concluded by examining her file without hearing her statement of defence since she did not join the committee meeting.

In the file of the Chief Prosecutor's Office of the Ankara State Security Court, Inquiry No. 1993/354, Digest No. 1993/04, it is stated that Ahmet Türk, Mardin Deputy, and Leyla Zana, Diyarbakir Deputy, organised a trip to the United States of America with political purposes. There they took part in two meetings where they declared that they have the same purposes as those who are involved in the armed struggle, that they aim at founding a Kurdish State by becoming independent of the State of the Republic of Turkey, and that they demand recognition of Kurdish identity and granting full constitutional and legal rights to the political parties representing Kurds.

As is known, Article 83 (1) of the Constitution states that deputies shall not be liable for their votes and statements during parliamentary proceedings, for the views they express before the Assembly, or, unless the Assembly decides otherwise, for repeating or revealing these views outside the Assembly´.

By the end of the examination of the case the Joint Committee concluded that the "principle of parliamentary immunity" governed under Article 83 of the Constitution exists in order to enable the deputies to



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fulfill their duties properly and it does not aim at rendering them a privileged group which is superior to the law. Besides, the Commission declared that democracy cannot be employed as an instrument to divide the country and to disrupt the State. And, as mentioned in Article 14 of the Constitution, the rights and freedoms determined in the Constitution cannot be employed as means to disrupt the unity of the State with its nation and its territory. The Committee took into account that the law shall prescribe the sanctions against those who infringe these principles.

The Joint Committee also considered other files of Mardin Deputy Ahmet Türk and Diyarbakir Deputy Leyla Zana, where they are accused of the same crimes. And it concluded that both these deputies persistently attempt to disrupt the unity of the Republic of Turkey through their speeches and other actions.

Therefore, the Joint Committee decided to remove the parliamentary immunity of Leyla Zana, Diyarbakir Deputy, so that the investigation of the Office of the Chief Prosecutor of Ankara State Security Court, Inquiry No. 1993/354, Digest No. 1993/04, could be concluded. Regarding the imputation of aiming to violate the indivisible integrity of the State, the existence of the State and the Republic, the decision of the Joint Committee is based on the opinion that democracy cannot be employed as a means to divide the country and to subvert the State.

We respectfully submit this report for the consideration of the Plenary Assembly."

## III. JOINDER OF DECISIONS

*The AYM states that for the reason that the applications of Leyla Zana and seven other deputies concerning the parliamentary decision 305 as well as all documents and information presented are identical, the applications have been merged.*



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## IV. ARGUMENTATION

Briefly, in the applications for annulment of a decision regarding the removal of parliamentary immunity it is stated:

### A- With Regard to Procedure

1. In the course of the process of removing parliamentary immunity this issue was handled in party group meetings, and various decisions were taken either explicitly or implicitly. The most striking example is the group meeting of the True Path Party of 22/02/1994, which was reported in the newspapers on 23/02/1994. Besides, the fact that a meeting of the Advisory Committee of this party took place is evidence of a group decision.

2. To call in the Board of Spokespersons of the Turkish Grand National Assembly for a meeting in order to enable that the issue of removing parliamentary immunity is to be handled in the Plenary Session urgently, and moreover to take a decision on this issue, violate the Rules of Procedure.

3. The Preparatory Committee and the Joint Committee took their decisions without analysing relevant documents and by ignoring the right of defense. The right of defense was restricted while the issue was handled in the Turkish Grand National Assembly as well. Furthermore, detaining these deputies and depriving them of personal belongings had adverse effects on statements of other deputies, who wanted to avoid having the same problems. Above all, the rights of defense of these detained deputies were interfered with. Hence, the detention in question affected all following decisions negatively and misled the decision makers.

4. Members of the TBMM were exposed to pressure. The members of the True Path Party threatened the members of the Social Democrat Populist Party with ruining the coalition. This impeded deputies from voting freely by their personal convictions.

5. Once the minutes are examined, it will be seen that the Rules of Procedure were also violated.

### B- With Regard to Merits

1. The acts, which were sanctioned by removing parliamentary immunity, consist of the expression of some ideas in accordance with the party pro-



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gram. But these ideas were also uttered in the Plenary Session. Therefore, they fall under the scope of the parliamentary immunity mentioned in Article 83 (1) of the Constitution.

2. The incriminations must be very serious to impose the sanction of removal of parliamentary immunity. However, the relevant files do not include serious indicators; only some tapes which are likely to be fake, and furthermore some newspaper articles which do not reflect the truth. In addition, releasing Selim Sadak, whose immunity was also removed within the process in question, proves that the evidence was insufficient.

3. The decisions regarding the removal of parliamentary immunity were taken for political purposes in the TBMM. The fact that this issue was discussed in the meeting of the National Security Council, and the fact that the Commander of the Turkish Armed Forces delivered his opinion, led to a political manipulation of the TBMM. Yet another piece of evidence for this claim is the threat of the DYP to ruin the coalition. Besides, files about our acts were examined urgently whereas many other files regarding various types of crimes, including infamous crimes, are handled at the end of each legislative term in general. And this is yet another piece of evidence that shows that the purpose was political.

Moreover, the acts in question were committed in 1991 and 1992 but the investigations concerned have been launched a short time ago. This is another bit of evidence for the claims. That only right-wing parties voted for the removal of parliamentary immunity proves that the purging DEP was targeted. They [the right-wing parties] strive to create an artificial agenda, since they cannot put an end to economic chaos and restore public order.

4. Even if these crimes were committed, Article 8 of Law No. 3713 would be applied instead of Article 125 of the Turkish Criminal Code. This article prescribes sanctions against crimes of thought, and such a category of crimes is contrary to the international conventions of human rights that were ratified by Turkey. Democracy requires that any expression of thought must not be counted as a crime. In view of the principle of the rule of law, the reasons of the TBMM to remove the parliamentary immunity do not have any legitimate and legal basis.

## V. EXAMINATION

The Court examined the petitions including demands for annulment, the reports, documents and other information from the Turkish Grand



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National Assembly and the Ministry of Justice, relevant issues of the Journal of the National Assembly Minutes, minutes of the meetings of the groups of political parties, relevant provisions of the Constitution, and the Rules of Procedure and some other documents, and it concluded:

A- Examination with Regard to the Claims of a Procedural Violation of the Constitution

1- The claim that Article 83 of the Constitution was violated in the process of removing the parliamentary immunity

In the application for annulment it is claimed that the process of removing the parliamentary immunity was discussed in the meetings of TBMM groups of political parties, that implicit and explicit decisions on the process were taken, and that the process was accelerated for "political purposes", violating Article 83 (5) of the Constitution.

This claim rather regards the merits of the case. Therefore, it will be better to handle it in the relevant section below.

2- The claims about the urgent discussion of the report of the Joint Committee in the plenary session

Upon request of the government, the report regarding the removal of parliamentary immunity of Leyla Zana was discussed urgently in the 79th Session of the Plenary Assembly of the TBMM on 03/03/1994.

The applicants claimed that there was no ground for an urgent discussion of the removal of parliamentary immunity. The fact that the True Path Party called the Board of Spokespersons to a meeting to enable the matter to be handled in the Plenary Session, and the act of taking a decision in the Plenary Session, violated the Constitution and the Rules of Procedure.

It can be seen from the analysis of relevant minutes of the Plenary Session of the TBMM that the TBMM groups of the Motherland Party and the True Path Party entered two motions and asked approval of the Plenary Session for urgent discussion, by stating that a consensus was not achieved in the meeting of the Board of Spokespersons on 28/02/1994.

In Article 50 (5) of the Rules of Procedure of the TBMM it is stated that in cases where the Office of the Presidency deems it necessary, a



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proposal for the order of debate for the issues addressed in Section 7 (i.a. other issues referred from other committees) may be presented to the Plenary by the Board of Spokespersons. And requests of the Government, primary committees, and of members of the Parliament who have submitted bill proposals on the subject matter can also discussed in the Board of Spokespersons.[712] In the last paragraph of Article 19 of the Rules of Procedure it is stated that "in all occasions bound in the Rules of Procedure to the decisions, proposals, or opinions of the Board of Spokespersons, if the Board of Spokespersons cannot convene the first call or provide a decision, proposal, or opinion unanimously, the Speaker or the political party groups may individually bring their request to the Plenary directly".

The matter was urgently handled in the Plenary Session of the TBMM, the files of the Joint Committee were put into the 24th place of the agenda before forty-eight hours expired, and the Plenary Session gathered to conclude these issues on 02/03/1994 upon a letter of the Prime Ministry of 28/02/1994, which asked the Plenary Session to continue on 03/03/1994 if debates could not be completed. In Article 53 of the Rules of Procedure it is stated that "a committee report, or any text sent to the Plenary, unless a decision to the contrary is taken, may not be debated before forty-eight hours have elapsed from the date of distribution. The Government or primary committee may ask the Plenary with a justification to include an item in the agenda, to prioritise one of the government bills, private members' bills, and the other matters coming from committees, and to make it the first item in this section before forty-eight hours have elapsed."[713]

For the aforementioned reasons the fact that the issue was debated urgently in the Plenary Session of the TBMM does not violate the Rules of Procedure.

3- The claim that procedural rules of examination and debate were breached in the Plenary Session and the committees

The applicants claim that it is uncertain whether or not the files regarding the removal of parliamentary immunity of Leyla Zana include evidence and justifications suitable for the examination thorugh the commissions. In this regard, the fact that Article 109 of the Rules of Procedure requires

712 This statement is to be found in Article 49 of the current version of the Rules of Procedure with some minor differences.

713 This statement is to be found in Article 52 of the current Rules of Procedure.



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in particular "examination of all content" proves that the sub-commission has to elaborate the files rigorously. However, it is stated that when considering the way of initiating the process to bring the matter before the Assembly doubts arise as to whether or not the Rules of Procedure were completely obeyed, and the same situation occurred in the course of debates in the Assembly.

The basic aspects of the decisions and operations undertaken by the TBMM are that an issue can be handled in terms of all its dimensions, that members of the parliament can express their opinions precisely, and that the decisions are definitely of the quality that they reflect the will of the parliament.

The issue of removal of parliamentary immunity has a specific significance in the Constitution and the Rules of Procedure of the TBMM. In Article 85 of the Constitution it is stated that "If the parliamentary immunity of a deputy has been lifted (...), the deputy in question or another deputy may, within seven days from the date of the decision of the Plenary, appeal to the Constitutional Court, for the decision to be annulled on the grounds that it is contrary to the Constitution, law or the Rules of Procedure."[714] Additionally, the Rules of Procedure of the TBMM prescribe that requests for removing the immunity of a deputy shall be concluded in the relevant commissions.

In Article 109 of the Rules of Procedure it is stated that the Preparatory Committee shall examine the whole content of the files, that it can hear the parliamentary member if necessary but cannot hear witnesses, and shall complete and hand in the report to the Joint Committee within one month. This report shall be elaborated and concluded within one month in the Joint Committee.

It is evident that "the whole content" implies all documents sent out to the commission. And if those documents are not sufficient to conclude the case, it can ask for further documents from relevant institutions. The duty of the commission is not to assess the evidence and not to investigate as to

714 In the official translation of the Turkish Constitution and the Rules of Procedure of the TBMM terms deriving from the root "to lift" are used to constitutionally ground acts of removing parliamentray immunity. The Turkish phrase "*parlamenter dokunulmazlığın kaldırılması*" can be literally translated as "abolition/removal of parliamentary immunity". When the AYM quotes from official documents, our translation sticks to the official translation (e.g. "lifting of parliamentary immunity"). But in the rest of the ruling we will translate this act in accordance with the terminology commonly used, i.e. with terms deriving from ther root "to remove".



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whether the crime was committed or not; but to draw a conclusion as to whether the accusation is serious or not.

The Preparatory Committee and the Joint Committee completed their reports within one month in accordance with the Constitution and the Rules of Procedure.

The procedure of debates and conclusion of the issue in the commissions and the Plenary Session of the Assembly did not cause any violation of the Constitution and the Rules of Procedure.

4- The claim that the right to defense was ignored in the activities of Committees and the Plenary Session

The applicants' claim that statements of the deputies whose parliamentary immunity is in question were not heard in all cases and that their right to defense was ignored and impeded. In addition, it is argued that the fact that these deputies were detained while relevant meetings were going on in the TBMM affected their right to defense adversely.

The right to defense is one of the fundamental rights. It is evident that a restriction which demolishes the core and meaning of this right results in depriving an individual of the right of defense. That being the case, in Article 36 it is stated "everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures."

In Article 111 of the Rules of Procedure of the TBMM it is stated "The deputy whose immunity is requested to be lifted may defend himself/herself, if he/she wishes, at the preparatory committee, the Joint Committee and the Plenary, or may assign another deputy to do so. If a deputy who is invited to defend himself/herself ignores the invitation, a decision shall be taken on the basis of the documents. The last speech is granted to the defendant in any case."[715] This means the right of defense is granted to deputies in such a position in any phase of their prosecution.

The provisions of the Constitution and the Rules of Procedure of the TBMM concerning the right of defense are in accordance with Article 6 of the European Convention of Human Rights. The right of defense has been enjoyed by deputies whose immunity is requested to be removed since the term of the 1961 Constitution. This issue was regulated under Article 142 on the Senate of the Republic in the course of the 1961 Constitution, and

715 This is to be found in Article 134 of the current Rules of Procedure.



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at present it is regulated by Article 111 of the Rules of Procedures of the National Assembly of 05/03/1973.

The Court concludes that Leyla Zana was provided with enough opportunities to defend herself during the proceedings for removing her parliamentary immunity in the commissions of the TBMM and the Plenary Session. Pursuant to Article 109 of the Rules of Procedureshe was invited by the I. Preparatory Committee to file her statement of defense, and she submitted her statement on 09/12/1993. The Committee completed the examinations of the file on 16/12/1993, at the end of the one month period envisaged by the Rules of Procedure. After the report of the Preparatory Committee with its annexes was delivered to the Joint Committee, the chairman of the Joint Committee notified the members of the commission that a report of the Joint Committee had been put on the agenda on 23/12/1993. However, Leyla Zana did not defend herself in the relevant meeting of the commission. After the report of the Preparatory Committee was declaimed in this meeting it was adopted by majority of votes.

Leyla Zana gave notification that she was not going to defend herself in the course of debate in the 79th Session of the Plenary Assembly of the TBMM on 03/03/1994 that dealt with the report of the Joint Committee on removing her parliamentary immunity. At the end of the debate Decision No. 305 was taken, pursuant to Article 53 of the Rules of Procedure through a vote by hand signal, and her parliamentary immunity was removed.

The claims regarding a violation of the Constitution and the Rules of Procedureare dismissed, since it is clear that Leyla Zana defended herself before the Preparatory Committee while she refused to defend herself in the Plenary Assembly. This can be seen in the minutes of the Preparatory Committee, the Joint Committee, and the 79th Session of the Plenary Assembly of the TBMM.

## B- Examination With Regard to the Claims in Terms of Merits

### a- The Meaning of Parliamentary Immunity and Indemnity

In all democratic countries members of the legislative organs are granted some immunity to enable them to fulfill their duties properly. However, the purpose of giving such a privileged position to the members of legislative organs does not mean to turn them into a privileged group superior to the legal order.



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Parliamentary immunity is not an aim in itself, but rather a means of reflecting the will of the nation in the parliament through deputies.

Even though the title of Article 83 of the Constitution is "parliamentary immunity", two different notions are governed under this article: as parliamentary immunity and parliamentary indemnity. In the first paragraph of this article it is stated that Members of the Assembly shall not be liable for their votes and statements during parliamentary proceedings, for the views they express before the Assembly, or, unless the Assembly decides otherwise, on the proposal of the Bureau for that sitting, for repeating or revealing these views outside the Assembly.

In the second paragraph of this article it is stated that a deputy who is alleged to have committed an offence before or after election shall not be detained, interrogated, arrested or tried unless the Assembly decides otherwise. This provision shall not apply in cases where a member is caught in flagrante delicto requiring a heavy penalty and in cases subject to Article 14 of the Constitution as long as an investigation has been initiated before the election.

Neither Article 83 of the Constitution nor the Rules of Procedure of the Assemly prescribe the conditions which may lead to removal of parliamentary immunity. However, this does not imply that the parliament has an absolute power of discretion on the matter of removing parliamentary immunity. If we consider the grounds for adopting "the immunity" and its historical evolution it is apparent that legislative organs only have limited rather than absolute power to remove parliamentary immunity. To put the notion of the immunity to the Constitution requires that legal provisions and aims that are the basis of this notion must be in accordance with the constitutional provisions and aims. There is no doubt that the aim pursued by governing the principle of parliamentary immunity under Article 83 of the Constitution is to enable members of Parliament to fulfill their duties properly, without any stress and pressure. In other words, the aim of the principle of parliamentary immunity is to prevent any investigation against deputies and in this way to prevent any hindrance to the fulfilling of their duties. Thus, the scope of the parliament´s power of discretion is limited by the aim of putting the principle of parliamentary immunity to the Constitution.

In Article 85[716] of the Constitution it is stated that "[I]f the parliamentary immunity of a deputy has been lifted or if the loss of membership has been decided, the deputy in question or another deputy may, within

716 This article (85) was amended in 1995.



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seven days from the date of the decision of the Plenary, appeal to the Constitutional Court, for the decision to be annulled on the grounds that it is contrary to the Constitution, law or the Rules of Procedure. The Constitutional Court shall make the final decision on the appeal within fifteen days." Accordingly, the Constitution prescribes a review of decisions concerning the removal of parliamentary immunity not only in terms of compliance with the Constitution but also with the Rules of Procedure of the TBMM.

In review of decisions of the TBMM on this issue the crux is the seriousness of imputation and whether or not it depends on political goals. Furthermore, these decisions must comply with the aims to put the principle of parliamentary immunity to the Constitution.

The removal of parliamentary immunity is an action that consists of stripping a deputy of the privilege of immunity, and putting them on an equal footing to an ordinary citizen. It does not mean to initiate criminal proceedings or to sentence someone. The position of a deputy whose parliamentary immunity is removed is the same as of any ordinary citizen. This deputy can benefit from all guarantees of the Constitution of the Republic of Turkey and other laws. Laws applied to all citizens shall be applied to them as well without any exception. In this context they can be detained, interrogated, arrested or tried and can be subject to all other procedures like any ordinary citizen.

b- Examination of the Facts

1- Whether the acts that led to the removing of parliamentary immunity are governed under the principle of indemnity

The goal of the principle of indemnity governed under Article 83 (1) of the Constitution is to prevent any investigation against members of the TBMM because of their speeches, expressions of thought, or their votes while fulfilling their parliamentary duties.

In the application it is claimed that actions which were subject to the proceedings of removal of parliamentary immunity were only expressions of thought in accordance with the party program, and that they were also articulated in the plenary sessions beforehand.

After having checked the minutes of the TBMM, it is apparent that Leyla Zana never gave a speech in the Plenary Session of the Assembly



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between 06/11/1991, when she became a member of parliament, and 02/03/1994, when her parliamentary immunity was removed.

Therefore, the Court dismisses the claim regarding a violation of Article 83 of the Constitution.

2- Whether the accusation was so serious that it demanded the removal of parliamentary immunity

In order to find an answer to this question the facts underlying the accusations made towards Leyla Zana must be examined.

An examination of this issue does not consist of an evaluation of evidence. Evaluation of evidence concerns the conclusion of the issue and it requires a judicial competence in order to examine whether a crime was committed. However, in this case it is only examined whether the accusation is serious or not.

According to Digest No. 1993/04 of the Chief Prosecutor's Office of Ankara State Security Court, the crime in question falls within the scope of Article 125 of the Turkish Criminal Code. This article prescribes sanctions for the crime of acting in an attempt to detach a part of the territory of the State or to demolish the independence or unity of the State, or to place a part of the territory of the State under the rule of another State.

In this digest it is stated that Leyla Zana attended a meeting titled "Status of Kurds living in Turkey, Iran and Iraq" organised by the Commission on Security and Cooperation in Europe affiliated with the U.S. Congress. There Leyla Zana said that she feels uncomfortable with the situation that she is called a Turkish citizen. Moreover, the digest states that all acts in question are linked to each other. The crime governed under Article 125 of the Turkish Criminal Code does not require that acts of the perpetrators yield a result, as it is such a type of crime that has a quality of jeopardising the existence of the State. And when all acts of the perpetrator are considered, it is clear that she committed the crime ascribed to her.

In the discussion of this case the Joint Committee included other cases in which Leyla Zana played a role, and concluded that she persistently attempts to disrupt the unity of the Republic of Turkey with her speeches and other activities. Following this the Joint Committee stated that democracy cannot be employed as a means to subvert the State and to divide the country, and it decided to remove her parliamentary immunity urgently for the purpose of enabling judicial proceedings in order to protect the



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legal personality of the Turkish Grand National Assembly, public order, and public interest. This decision was also adopted by the Plenary Session of the TBMM.

At this stage the seriousness of an accusation is a weighty matter. While evidence of the seriousness of the accusation made toward Leyla Zana was examined, the files of commissions of the TBMM and the Plenary Session were handled together.

It is seen from the content of Digest No. 1993/04 of the Chief Prosecutor's Office of the Ankara State Security Court that Leyla Zana, in a meeting in the USA, answered a question arguing that she "feels uncomfortable being called a Turkish citizen, and that in Turkish schools students undergo brainwashing as they are compelled to read ´Our National Oath´ everyday" (From the daily newspapers Cumhuriyet, Milliyet, Sabah and Zaman of 19/05/1993).

In consequence the Court concluded that the accusation that Leyla Zana's acts in question are serious enough to remove her parliamentary immunity.

### 3- Whether or not the decision to remove the parliamentary immunity was politically motivated

In its historical development process the principle of parliamentary immunity emerged so as to secure the functions of members of legislative organs against political power. Actually, this principle secures the legislative function in the person of deputies. The aim of this principle is not to privilege members of parliaments, but to protect them against investigations that could be launched for political purposes. Parliamentary immunity should not be removed to exclude some political movements or to punish political opponents.

In order to find out whether or not the decision to remove parliamentary immunity was taken for political purposes, one must assess the behavior and attitude of the majority that made the decision, speeches in committees and the Plenary Session, the type of crime which causes the removal of parliamentary immunity, evidence for and grounds of the decision, and methods used in decision-making.

In this respect the striking point is the claim that the purpose of the decision was political on the grounds that this matter was discussed in the meetings of party groups in the TBMM, and that either explicit or implicit decisions were taken on it. This was alleged among the procedural



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points in the application. However, the Court found it more appropriate to handle it in this section.

In the last paragraph of Article 83 of the Constitution it is stated that "Political party groups in the Grand National Assembly of Turkey shall not hold debates or take decisions regarding parliamentary immunity". The meaning of the expressions "shall not hold debates" and "shall not (…) take decisions" should be elabourated on. "Debate" means to speak about and discuss a topic. "To take a decision" implies to conclude on the matter. The aim of Article 83 must be revealed in order to understand the meaning of these words. The Constitution includes this provision for the purpose of impeding members of parties from discussing and delivering their opinions and from taking binding decisions on the issue of removing parliamentary immunity. This is so for the parliamentary order is at present run through political parties, and to abide by the rules taken by political parties is deemed an obligation for their members. It is supposed that political parties which cannot maintain party discipline would encounter serious problems either when they are in power or in opposition. Therefore, the Constitution prescribes that political parties are not allowed to take binding group decisions on the removal of parliamentary immunity and party discipline cannot be imposed on party members on this matter. This is so for the Constitution aims to realise that deputies vote independently and without the influence of their parties. Thus, the sensitivity of the Constitution on the matter of parliamentary immunity has been strengthened by this Article.

The minutes of group meetings of the True Path Party, the Motherland Party, and the Welfare Party reached before the Parliament took the decision in question were brought from the TBMM and they were elabourated by the Court in order to reach a reliable result.

In a letter of reply from the Welfare Party of 11/03/1994 it is stated that the minutes were not taken in the group meetings. They had three group meetings on 17/02/1994, 24/02/1994 and 01/03/1994 and the topics discussed during these meetings were assembly activities and party activities for the local elections. There was no debate and no decision was taken on the question of removal of parliamentary immunity in these meetings.

After having examined the minutes of the group meetings held after 15/02/1994 attached to the reply letter of the Motherland Party of 09/03/1994, no speech, debate or decision on parliamentary immunity cases was found.

In a letter of reply from the True Path Party on 09/03/1994 it is stated that minutes are not taken in the group meetings. However, press meet-



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ings of the president of the party were recorded and transcripts from 22/02/1994 and 02/03/1994 were attached.

It is seen that the Prime Minister in her speech on 22/02/1994 delivered her own opinions on the issues of Bosnia-Herzegovina, Cyprus, local elections, terror, economic problems and the removal of parliamentary immunity from deputies of the DEP in the group meeting of the DYP, where journalists were also present. In the group meeting of 02/03/1994 the prime minister touched on the issues of Bosnia-Herzegovina, aids to craftsmen, terror and activities of the PKK.

As can be seen, the Prime Minister expressed her own opinions on the removal of parliamentary immunity from the deputies in question as well as other matters in the group meeting of the DYP, which was open to the press. However, neither was a decision taken on this matter nor was any debate held. A speech of the Prime Minister is a single expression of thought and it is not part of a debate. As there is no group decision, this speech does not have a binding character. Consequently, the claim in question was rejected since speeches of the Prime Minister cannot be defined as a debate or a decision of a group meeting which affected the process of removing parliamentary immunity adversely.

Moreover, international conventions on which the applicants rely do not approve their claims. If one keeps in mind that these conventions protect a State structure and prohibit some actions, the claims of the applicants become invalid.

## VI. CONCLUSION

The Court DISMISSES the application regarding annulment of the TBMM decision on removing the parliamentary immunity of Leyla Zana, No. 305 (03/03/1994) which was published in the Official Gazette No. 21866 (on 03/03/1994),

A- UNANIMOUSLY, in terms of the procedural violation claims,

B- BY MAJORITY OF VOTES, in terms of claims regarding merits of the case, with dissenting votes of Yekta Güngör ÖZDEN, Haşim KILIÇ and Mustafa BUMİN on 21/03/1994.

(…)



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## 2.21 Parliamentary Procedure of Presidential Election

***Application Number:*** *2007/45* ***Decision Number:*** *2007/54*

***Date of Decision:*** *01/05/2007*

***Date of Publication and Number of the Official Gazette:*** *27/06/2007 - 26565*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by members of the TBMM Mr Deniz Baykal (leader of the main opposition party CHP), Mr Önder Sav (general secretary of the CHP) and 134 other members of the TBMM*

***Provisions at Issue:*** *Decision taken by the TBMM on 27/04/2007 regarding the appropriate quorum required to proceed with the balloting in the first round of the selection process for the 11th President of the Republic*

***Relevant Constitutional Provisions:*** *Art. 96, 102 (1982 TA)*

***Other Relevant Provisions:*** *Art. 121 (Rules of Procedure of the TBMM)*

***Voting:*** *Accepted by majority of 7:4 justices (regarding the preliminary examination)*

***Accepted*** *by majority of 9: 2 justices (regarding the merits)*

***Dissenting and Concurring Opinions:*** *4 DO, 2 CO*

***Justices:*** *President Tülay TUĞCU; Vice President Haşim KILIÇ; Members: Sacit ADALI, Fulya KANTARCIOĞLU, Ahmet AKYALÇIN, Mehmet ERTEN, A. Necmi ÖZLER, Serdar ÖZGÜLDÜR, Şevket APALAK, Serruh KALELİ, Osman Alifeyyaz PAKSÜT*

The main opposition party CHP argues that Articles 96 (Quorums and majority for decisions) and 102 (Election of the President of the Republic) of the Constitution have been violated. Article 102 foresees that the President of the Republic shall be elected by a two-thirds majority of the total number of members of the TBMM. Article 96 stipulates – if read in combination with Article 102 –, that a two-thirds majority of members of parliament has to be present during the opening of the debate concerning the election of the President of the Republic. After having boycotted the first round of voting, and thus by having preventing the quorum of a two-thirds majority, the applicant demands annulment of the first round of voting. The Court decides by majority to hear the challenge to the constitutionality of the first round of voting, interpreting the election process as a de facto amendment of the TBMM´s Rules of Procedure. In its decision the AYM rules in favour of the CHP´s argument, annulling the results of the first round of balloting by majority.

### I. STATEMENT OF GROUNDS FOR THE REQUEST OF ANNULMENT AND STAY OF EXECUTION

*The main issue of the norm control focuses on the necessary quorum of deputies present for the election of the President of the Republic and on the qualified majority of two thirds of the total number of members of the*



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*TBMM. The Court starts its deliberation by citing Article 121 of the Rules of Procedure of the Turkish Grand National Assembly and Article 102 of the Constitution, specifying the election mode of the President of the Republic. A detailed interpretation of these norms follows, the essence of which is contained in the following paragraphs:*

**1-** Article 102 (3) of the Constitution provides that the required majorities in the first two ballots are two-thirds of the total number of members, and in the third and fourth ballot the absolute majority of the total number of members. In other words, a two-thirds majority of the total number of members of the Turkish Grand National Assembly is not required in each ballot. During the third and fourth ballot mentioned in the third paragraph an absolute majority of the total number of members is sufficient to elect the President of the Republic. If the number indicated in Article 102 (1) had designated the required majority, in addition to the two-thirds majority, the absolute majority required in the third and fourth rounds would also have been indicated in this paragraph. However, only the two-thirds majority was indicated here.

**2-** If the expression "by a two-thirds majority of the total number of members" is taken out of the first paragraph, it would be possible to conduct the election with the required majorities indicated in the third paragraph. In other words, there would not be any deficiency concerning the required majorities.

**3-** In this case – that is, if there is no deficiency concerning the required majority in the case of the expression "two-thirds majority" being left out, and if the required majority in the third and fourth round is the absolute majority of the total number of members, in other words, if another required majority besides the two-thirds majority is established – the question as to what the meaning and character of the majority in the first paragraph is comes to mind.

As it is inconceivable that in a State governed by the rule of law the constitution-maker would undertake a pointless exercise, the majority spelled out separately from the third paragraph in the first paragraph of Article 102 must have a specific meaning and function. And, considering the above-mentioned remarks, this means that this majority is a quorum.

It is clear from the wording of Article 102 that this quorum is not only applicable to the first ballot of the presidential election but to all four ballots. This is because Article 102 does not contain any separate differing provision concerning the quorum for any of the ballots.

As there is the quorum specifically indicated in Article 102 of the Constitution, it is impossible to apply the quorum indicated in Article 96 of



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the Constitution. Because Article 96 of the Constitution, the only provision that regulates the quorums and required majorities, provides in its first paragraph that "[**u**]**nless otherwise stipulated in the Constitution**, the Turkish Grand National Assembly shall convene with at least, one-third of the total number of members and shall take decisions by an absolute majority of those present." As can been seen this provision does not cover cases where the Constitution has provided others quorums. **Article 102 of the Constitution establishes a special quorum.**

As our statements above show, a vote in the presidential election in which the general quorum established in Article 96 is applied and a decision taken in this sense, instead of the special quorum established in Article 102 of the Constitution, will violate Articles 96 and 102 of the Constitution.

(…)

Thus, without responding to the warning of Mr Kemal Anadol during the discussion of the procedure, the meeting, which had been opened by the President of the Turkish Grand National Assembly without roll call and upon the assumption that the ordinary quorum established in Article 96 of the Constitution had been reached, continued with the first ballot of the election of the 11th President of the Republic. Based on the decision of the plenary assembly of the TBMM the voting was conducted in a situation where it was assumed that the necessary quorum had been reached.

(…)

According to the settled case-law of the Constitutional Court legislative acts of the legislative body, which are enacted by using other procedures and under other denominations than those designated by the Constitution, fall within the constitutional review jurisdiction of the Constitutional Court. They also fall within the jurisdiction of the Constitutional Court if their effects, characteristics, and contents are comparable to the legislative acts falling within the jurisdiction of the Constitutional Court.

On many occasions the Constitutional Court decided that **decisions or practices of the Turkish Grand National Assembly** constituting an adoption or amendment of the rules of procedure with regard to their value and effect–that is to say which amend or establish a new provision of the rules of procedure–, fall within the constitutional review jurisdiction when considering them as provisions of the rules of procedure; although they were neither rules of procedure nor amendments of the rules of procedure, and although the procedures for adopting or amending the rules of procedure were not followed.



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(…)

The aforementioned decision and practice, which qualify as a de facto amendment of the rules of procedure violating Article 102 and 96 of the Constitution, cannot be separated from the voting of the presidential election as they took place simultaneously. Hence, the decision and practice which qualify as an amendment of the rules of procedure (as in the Constitutional Court's decision E. 1996/19, K. 1996/13 of 14/05/1996) and the first ballot of the presidential election should be considered as a whole and annulled.

(…)

## II. THE LAW

(…)

## III. PRELIMINARY EXAMINATION

On 01/05/2007 at the meeting concerning the preliminary examination required by Article 8 of the Rules of Procedure of the Constitutional Court it was deemed necessary to first consider the question of whether the decision of the TBMM being subject to the annulment request falls within the constitutional review jurisdiction of the Constitutional Court or not.

Article 148 (1) of the Constitution states that "*The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form";* and Article 85 provides that *"If the parliamentary immunity of a deputy has been waived or if the loss of membership has been decided according to the first, third or fourth paragraph of Article 84, the deputy in question or another deputy may, within seven days of the day of the decision of the Grand National Assembly of Turkey, 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 or Procedure of the Turkish Grand National Assembly. The Constitutional Court shall decide on the appeal within fifteen days."*

There is no doubt that decisions of the TBMM concerning the waiver of parliamentary immunity or the loss of membership mentioned in Article 85 of the Constitution and that the Rules of Procedure of the TBMM



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mentioned in Article 148 are, from the point of view of their legal characteristics, parliamentary decisions. Although other parliamentary decisions than these decisions mentioned in the Constitution cannot, as a rule, be subjected to constitutional review, when assessing whether the legislative act subject to an annulment request can be subjected to constitutional review or not, it is not sufficient, as has been made clear in many decisions of the Constitutional Court, to look at how this act is qualified and how it is named by the authority which passed it or according to which procedure this act was enacted, but, whatever its procedure or name, its legal character, effect and consequences also need to be taken into account. If as a result of the assessment the conclusion is reached that the act subject to an annulment request is an act with the same value and effect as a law, KHKs or the Rules of Procedure of the TBMM, which in accordance with Article 148 of the Constitution fall within the constitutional review jurisdiction, this act can be reviewed by the Constitutional Court. Otherwise, acts which from the point of view of their legal characteristics, effects and results are equivalent to laws, KHKs and the Rules of Procedure of the TBMM subject to constitutional review and which accordingly by establishing them by procedures and with denominations particular to the mentioned acts should acquire legal validity, could be exempted from constitutional review by incorporating them into the legal system by different procedures and under different denominations.

In such a case, TBMM decisions - which with regard to their value and effect have the character of a rule of procedure without being named adoption of a new rule or amendment of a rule of procedure and although the procedure for adopting or amending the rules of procedure was not applied - can be subjected to constitutional review. It is a requirement of being a State governed by the rule of law to subject legislative disposals, which with regard to their value and effects are not different, to the same constitutional review.

Before moving on to the vote at the 96th sitting of 27/04/2007 during which the TBMM decision at issue was taken, a discussion concerning the procedure came up after a member of parliament remarked that according to Article 102 (1) of the Constitution 367 members of parliament had to be present in order for Parliament to carry out the presidential election; otherwise it would be impossible to pass the vote for absence of a quorum. And as a result of this discussion the President of the Parliament, who was presiding at the meeting, indicated that the presence of 184 members of parliament at the plenary session was, in accordance with the provision on quorums in Article 96 of the Constitution, sufficient in order to move



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on to the agenda item concerning the presidential election and submitted to the plenary the question whether the practice he would follow on this issue was in accordance with Article 96 and 102 of the Constitution or not. The plenary assembly decided that the position advanced by the President of the Parliament was in accordance with the Constitution and the Rules of Procedure. Thus, it was established by a parliamentary decision that the quorum applicable to the presidential election was the quorum of at least one-third of the total number of TBMM members as provided for in Article 96 of the Constitution.

By providing in Article 121 (1) of the Rules of Procedure of the TBMM that *"[t]he President of the Republic shall be elected according to the provisions of Article 102 of the Constitution among candidates fulfilling the requirements laid down in Article 101 of the Constitution"*, no explicit provision concerning the quorum applicable to the presidential election was made and a reference to Article 102 of the Constitution was considered to be sufficient.

Article 102 (1) of the Constitution provides that the President of the Republic shall be elected by a two-thirds majority of the total number of members of the Turkish Grand National Assembly and by secret ballot, and that if the Turkish Grand National Assembly is not in session it shall be summoned immediately to meet.

In order to determine whether the parliamentary decision at issue has the character of a provision of the Rules of Procedure, it is necessary to first elucidate the question whether the term "two-thirds majority" also covers the quorum or not.

As regards the presidential election, Article 96 constitutes the general rule and Article 102 the special rule; thus, it is necessary to consider Article 102 of the Constitution, which regulates the presidential election, and Article 96 of the Constitution, which establishes the quorum and required majority, together.

By stating in Article 96 of the Constitution that *"[u]nless otherwise stipulated in the Constitution, the Turkish Grand National Assembly shall convene with, at least, one-third of the total number of members and shall take decisions by an absolute majority of those present; however, the quorum for decisions can, under no circumstances, be less than a quarter plus one of the total number of members."* A distinction between quorum and required majority was established for the decision-making procedures of the plenary of the TBMM, and different lower limits for both were established. Thus "unless otherwise stipulated in the Constitution" the TBMM can convene with at least one-third of the total number of members, and take decisions with at least a quarter plus one of the total number of members. Based on the current



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total number of members, the TBMM can, as a rule, convene with 184 members of parliament and take decisions with at least 139 members of parliament. However, if concerning the quorum and the required majority the Constitution contains other provisions that will be applicable instead.

Compared to the Constitution of 1961 this regulation has some differences. While Article 86 of the Constitution of 1961 – which provided for the quorums and required majorities with its provision that "an absolute majority of its plenary session shall constitute a meeting quorum for each legislative body, and unless otherwise provided in the Constitution, an absolute majority of the attending members shall constitute a quorum of decision" – envisaged the application of exceptional "other provisions in the Constitution" only for the required majority and did not establish any exceptions to the general rule concerning the quorum, the Constitution of 1982 – by putting the phrase "unless otherwise stipulated in the Constitution" in Article 96 at the beginning – indicated that there are in the Constitution, not only with regard to the required majorities but also with regard to the quorum, exceptional provisions bearing the "otherwise" attribute. In this case, when comparing it to Article 86 of the Constitution of 1961 it can be deduced that the Constitution of 1982 with regard to the quorum explicitly foresees exceptions from the general rule in Article 96.

Thus, concerning the proclamation of amnesties and pardons (Art. 87), election of the President of the Parliament (Art. 94), parliamentary investigations concerning ministers and their referral to the Supreme Criminal Court [Yüce Divan] (Art. 100), presidential election (Art. 102), impeachment of the President of the Republic for high treason (Art. 105), motion of censure and vote of confidence while in office (Art. 99 and 111) and constitutional amendments (Art. 175) the Constitution of 1982 establishes with regard to the quorums and required majorities in the TBMM special rules containing exceptions to the general rule in Article 96. With regard to the quorums and necessary majorities in the TBMM, it is certainly not the general rule in Article 96 but the special rules in the mentioned articles which are applicable in these cases.

When examining with regard to their wording and functions the mentioned articles in the Constitution that establish exceptions to the general rule, it appears that the qualified majority mentioned in these articles, except for Article 102 on the presidential election, relate to the required majority.



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Article 102 regulating the presidential election has, compared to the others, distinct features and states:

> "*The President of the Republic shall be elected by a two-thirds majority of the total number of members of the Turkish Grand National Assembly and by secret ballot. If the Turkish Grand National Assembly is not in session, it shall be summoned immediately to meet.*
> *The election of the President of the Republic shall begin thirty days before the term of office of the incumbent President of the Republic expires or ten days after the Presidency falls vacant, and shall be completed within thirty days of the beginning of the election. Candidates shall be declared to the Bureau of the Assembly within the first ten days of this period, and elections shall be completed within the remaining twenty days.*
> *If a two-thirds majority of the total number of members cannot be obtained in the first two ballots, between which there shall be at least a three-day interval, a third ballot shall be held and the candidate who receives the absolute majority of votes of the total number of members shall be elected President of the Republic. If an absolute majority of votes of the total number of members is not obtained in the third ballot, a fourth ballot will be held between the two candidates who receive the greatest number of votes in the third ballot; if the President of the Republic cannot be elected by an absolute majority of the total number of members in this ballot, new general elections for the Turkish Grand National Assembly shall be held immediately."*

Unlike the other articles of the Constitution that require qualified majorities, the first and third paragraphs of the article contain two separate quorums. By establishing the rule that the candidate who receives a two-thirds majority in the first two or the absolute majority in the third and fourth ballot would be elected, the third paragraph determined each of the required majorities to be elected in either of the four ballots separately. Accordingly, it is necessary to accept that the required majority established by the provision in the first paragraph that "The President of the Republic shall be elected by a two-thirds majority of the total number of members of the Turkish Grand National Assembly" has a different meaning compared to the third paragraph. With regard to the quorum for the presidential election in the first paragraph's provision and the required majority in the third paragraph's provision, and when considering that the two-thirds majority in the first paragraph's provision that "The President of the Republic shall be elected by a two-thirds majority of the total number of members and by secret ballot" has a different aim and function



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if compared to the required majorities in the third paragraph, the conclusion that the mentioned provision falls within the ambit of the "unless otherwise stipulated in the Constitution" provision, which constitutes the exception to the general rule concerning the quorum and required majority in Article 96, is reached.

On the other hand, although Article 94 (4) of the Constitution, which, like Article 102 (3), concerns the election of the President of the Parliament, also provides for four ballots and a required majority of two-thirds of the total number of members of the TBMM in the first two ballots and an absolute majority in the third ballot, this provision does not, as Article 102 (1), provide for a quorum. While Article 102 concerning the presidential election provides in its first paragraph for the election by a two-thirds majority of the total number of members of the Turkish Grand National Assembly and by secret ballot, Article 94 (4), after highlighting that the President of the Parliament shall be elected by secret ballot, provides that they will be elected by the established required majority. This different way of regulating shows that the provision that "the President of the Republic shall be elected by a two-thirds majority of the total number of members of the Turkish Grand National Assembly" was explicitly included in order to determine the quorum. In this context the separate determination in Article 102 of the required majorities necessary in each ballot to be elected and the separation of the first and third paragraph, by inserting the second paragraph in which the 30 days electoral calendar is provided for, reveal that Article 102 also has to be interpreted with regard to the meaning and content mentioned above.

There is no doubt that for the interpretation of a provision one has to consider as much the letter of the law as its aim in order to draw a robust conclusion. It is clear that the aim with the provision in Article 102 is to secure a compromise as wide as possible for the presidential election. Thus, the limit on the period of candidacy to 10 days of the 30 day election calendar in the second paragraph, the requirement that during the remaining 20 days, in order to elect one of the candidates during the first two of the four ballots, a two-thirds majority of the total number of members in needed, the requirement that the two candidates who received the most votes during the third ballot will be able to participate in the fourth ballot, and that new general elections for the Turkish Grand National Assembly shall be held immediately if in this ballot the President of the Republic cannot be elected from these two candidates by an absolute majority of the total number of members of the TBMM, show that the presidential election is based on compromise.



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According to Article 104 of the Constitution "The President of the Republic is the Head of State. In this capacity he/she shall represent the Republic of Turkey and the unity of the Turkish Nation." Moreover, when examining the character of the powers and duties of the President of the Republic and the other provisions in the Constitution relating to the status of the President of the Republic as a whole, it appears that for the election of the President of the Republic an approach based on the participation and will of the representatives reflecting an important majority of the nation was espoused in the Constitution. These regulations form the positive legal basis of the consensus that is to be sought for the presidential election.

To reach a compromise during the first two ballots of the presidential election is possible if the provision established by Article 102 (1), "the President of the Republic shall be elected by a two-thirds majority of the total number of members of the Turkish Grand National Assembly", also includes the quorum. Otherwise, the first and second ballot in the third paragraph would become meaningless because it would be unnecessary to reach a compromise as it will be possible to elect the President of the Republic in the third or fourth ballot with the absolute majority of votes of the total number of members. In view of the possibility that the TBMM can elect one of the candidates with an absolute majority of votes of the total number of its members during the third and fourth ballot, as foreseen in the third paragraph, a party or several parties that have an absolute majority in the parliament could be inclined to disregard the compromise that needs to be sought with a two-thirds majority in the first and second ballot. This situation is incompatible with the constitutional aim that the presidential election should be based on compromise.

The conclusion was reached that regarding the parliamentary decision at issue the quorum for the first ballot of the presidential election in Article 102 of the Constitution – to which Article 121 of the Rules of Procedure of the TBMM refers to when establishing that the President of the Republic will be elected according to the provisions in Article 102 of the Constitution among the candidates who fulfil the requirements enumerated in Article 101 of the Constitution – is the two-thirds majority of the total number of members of the TBMM. Accordingly, it is necessary to accept that the same principle was adopted in Article 121 of the Rules of Procedure.

The TBMM decision of 27/04/2007, adopted at the 96th sitting and concerning the adoption of the view of the President of the Parliament that the presence of 184 members of parliament in the plenary was sufficient



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in order to pass the agenda item concerning the presidential election, constitutes a de facto amendment of Article 121 of the Rules of Procedure; under these circumstances the constitutional review of this decision falls within the jurisdiction of the Constitutional Court.

For these reasons it was decided by a majority and against the votes of Tülay TUĞCU, Haşim KILIÇ, Sacit ADALI and Fulya KANTARCIOĞLU that the TBMM decision of 27/04/2007 at issue constitutes a de facto amendment of the Rules of Procedure and that the merits of the case will be considered.

## IV. MERITS

After having read and analysed the complaint and its annexes, the report concerning the merits, the decision which the Court is being asked to annul, the Constitutional norms upon which the complaint is founded and their explanatory memoranda, and other legislative documents, the following has been decided:

In the complaint it is alleged that Article 102 (1) of the Constitution established a special quorum applicable to the ballots of the presidential election, that the second paragraph of this article determines the electoral calendar, that Article 102 (3) determines the ballots and the required majorities for the presidential election, that the reason for why a simple majority was not considered and sufficient and qualified quorums and majorities were required, was the aim that the President of the Republic should be elected by a qualified majority of the Turkish Grand National Assembly, that the special quorum established in Article 102 (1) of the Constitution is required not only in the first ballot of the presidential election but in all four ballots, that, however, in the de facto amendment of the rules of procedure adopted by the TBMM decision at issue the required quorum for the presidential election was in accordance with Article 96 of the Constitution set at one third of the total number of members of the Turkish Grand National Assembly, and that this situation violates Article 102 of the Constitution.

Article 121 (1) of the Rules of Procedure establishes that *"The President of the Republic shall be elected according to the provisions in Article 102 of the Constitution among the candidates who fulfil the requirements enumerated in Article 101 of the Constitution"*; and Article 102 (1) of the Constitution provides that *"The President of the Republic shall be elected by a two-thirds majority of the total number of members of the Turkish Grand National*



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*Assembly and by secret ballot*". As mentioned in the preliminary examination section, the two-thirds majority foreseen for the presidential election in Article 102 (1) of the Constitution includes, with regard to the first ballot concerning the parliamentary decision at issue, the quorum as well as the required majority. Thus, it has to be accepted that, in accordance with the referral made, the same quorum was adopted in Article 121 of the Rules of Procedure. Yet, before passing to the first ballot of the election of the 11th President of the Republic at the 96th sitting of the TBMM of 27/04/2007, it was determined by a parliamentary decision that the quorum applicable to the presidential election was the quorum provided for in Article 96 of the Constitution. Hence, by amending, with regard to the first ballot, by the parliamentary decision at issue, Article 121 of the Rules of Procedure, which, as it was concluded because of the referral to Article 102 of the Constitution, provides that in the first ballot the quorum and required majority for the presidential election are the 367 members who constitute two-thirds of the total number of members of the TBMM, it was accepted that concerning the quorum, in accordance with the general rule established in Article 96 of the Constitution, the 184 votes that constitute at least one-third of the total number of members of the TBMM were sufficient.

Thus, as Article 102 (1) of the Constitution provides, as it was concluded, that the quorum and required majority during the first ballot is the two-thirds majority of the total number of members of the TBMM, thus 367 members, the TBMM decision at issue, which by applying a quorum of 184 members has the effect of a de facto amendment of the Rules of Procedure, violates Article 102 of the Constitution. It shall be annulled.

Serruh KALELİ and Osman Alifeyyaz PAKSÜT join this decision with concurring opinions.

Haşim KILIÇ and Sacit ADALI did not agree with this view.

(…)

## DISSENTING OPINION

(…)

Article 85 of the Constitution provides that "If the parliamentary immunity of a deputy has been waived or if the loss of membership has been decided according to the first, third or fourth paragraphs of Article 84, the deputy in question or another deputy may, within seven days from the



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day of the decision of the Grand National Assembly of Turkey, 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 or procedure of the Turkish Grand National Assembly. The Constitutional Court shall decide on the appeal within fifteen days."

Thus, as can be seen in this provision, the Constitution does not foresee any other "decisions" falling within the jurisdiction of the Constitutional Court except decisions on the waiver of parliamentary immunity or the loss of membership mentioned in Article 85 of the Constitution.

According to the Constitutional Court's settled case-law, when it needs to be determined whether other parliamentary acts under different names and procedures than those established by the Constitution are subject to constitutional review by the Constitutional Court, the content of the document and its value and effect as well as the procedure used also need to be assessed.

If, according to this assessment, the document at issue is equivalent to and of the same effect as acts that are, according to the Constitution, subject to constitutional review, it also has to be subject to constitutional review.

In order to determine responsibilities in this case, it would be necessary to examine if the contested and reviewed decision of parliament amounts to a de facto amendment/alteration of the rules of procedure; this is necessary to determine whether the decision at issue falls within the Court's jurisdiction.

(…)

Article 95 stipulates that "The Grand National Assembly of Turkey shall carry out its activities in accordance with the provisions of the Rules of Procedure drawn up by itself"; and Article 181 of the Rules of Procedures of the TBMM determines the special procedure for amendments of the Rules of Procedure.

Except for these cases and only if there are no provisions in the Rules of Procedure or in the Constitution and the new provision established by the parliamentary decision is adopted in order to solve an urgent question, it is possible that the creation of such decisions can with respect to their content be considered as an amendment of the Rules of Procedure. However, if there is a provision in the Rules of Procedure or the Constitution and if with a parliamentary decision this provision is disregarded, then this does not, and cannot, constitute an amendment of the Rules of Procedure but only a parliamentary decision violating the Rules of Procedure or the



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Constitution. Otherwise, it would be possible to qualify laws violating the Constitution as de facto amendments of the Constitution.

It can certainly not be wished for that parliamentary decisions that violate the Rules of Procedure or the Constitution remain unchecked. However, the Constitution does not foresee the constitutional review of violations of the Rules of Procedure and neither did it charge the Constitutional Court with such a review. Consequently, the Constitution considered it would fit the separation of powers better that the legislative body supervises itself within the internal functioning of the parliamentary regime. For this reason, it is considered impossible to review these decisions by making them fit to some names or attributes.

Upon examination of the content it appears that – as much as there is neither proposal, demand nor will in the TBMM decision subject to the annulment request to amend the rules of procedure compatible with the required procedure – there is also no constitution of a decision, thus it is impossible to accept that it is an adoption or amendment of the rules of procedure that violates the rules of procedure or the Constitution and that it could be subject to constitutional review.

For these reasons, my opinion is that the application should be rejected at the preliminary examination without considering its merits as it does not fall within the jurisdiction of the Constitutional Court. However, as my opinion was not endorsed and the merits of the case considered, my opinion concerning the merits were explained in the majority opinion.

President
Tülay TUĞCU

## DISSENTING OPINION

### 1. General assessment

After the issue concerning the election of the 11th President of the Republic passed to the Constitutional Court, the necessity was felt to elabourate the situation that the court was facing. For the only possibility for judges to share their opinions with the public are the decision or dissenting opinions.

Article 138 (1, 2) of the Constitution states: *"Judges shall be independent in the discharge of their duties; they shall give judgement in accordance with the Constitution, law, and their personal conviction conforming to the law.*



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*No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions."*

With these provisions in the Constitution it was intended to protect the personal convictions of judges by giving no organ, individual or authority the possibility to influence. Everybody, from ordinary citizens to whatever their office and rank may be, is required to contribute to the fulfilment of this responsibility envisaged by the Constitution. Despite this requirement, unfortunately, the expressions and behaviour of some people, institutions and authorities before this decision aimed at influencing the Court and cannot be approved of.

Statements, that the country would be drawn into an internal conflict if the Court did not take a decision according to their wishes, are actions that directly target the formation of the personal convictions of the judges. Article 138 of the Constitution is clear. In spite of this responsibility, statements threatening that a conflict would break out or made in the name of protecting the country are aimed at the decision to be taken. This and similar behaviour and expressions, which can cause doubts in the public conscience, are leading to irresponsibility that cannot be approved in a democratic State governed by the rule of law.

These thoughts intended for the protection of the law were written only for the historical record.

2. Consideration of the decision at issue

(…)

1- Whether the TBMM decision at issue constitutes an amendment of the Rules of Procedure

To date the Constitutional Court has examined the Rules of Procedure in two situations:

A- Firstly, when the output generated by the practice of the TBMM lead to a new norm; and

B- secondly when an existing norm was de facto amended.

De facto amended Rules of Procedure enacted by parliamentary decision must be entirely new, which means that their content was not part of the Rules of Procedure of the TBMM in force at that time. The implementa-



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tion of a new norm, which was not part of the content of the Rules of Procedure in force at that time, falls under the constitutional review competence of the Constitutional Court. The reason for this is already articulated in the majority opinion: According to this opinion, when examining the question whether or not a constitutionally objected legislative act can be subject to constitutional review, it is not sufficient to simply review the decision-making process or the denomination of the act through the legislator. The review also has to take into account the legal characteristics, effects and results generated by a legal act. Under consideration of all these aspects the following can be said: if the Court finds that the provision at issue has the value and effect of a law, KHK or Rules of Procedure of the TBMM, all of which are subject to constitutional review according to Article 148 of the Constitution, the provision can also be reviewed by the Court. Otherwise some legislative acts, which actually have the same legal characteristics, effects and results as laws, KHK and Rules of Procedure of the TBMM, could be excluded from constitutional review. For these reasons, these acts should be enacted by the same methods and denominations.

If a subject has been regulated in the Rules of Procedure, if it has been determined in detail how it will be done, it is impossible to say that it has been de facto amended. That a provision that is contrary to the existing legal rules has been enacted can only be qualified as a disposition violating the Rules of Procedure. However, the place to review a provision violating the Rules of Procedure is neither the Constitutional Court nor another judicial body. The constitution-maker foresaw the review of parliamentary decisions except those explicitly mentioned in the Constitution.

(…)

As much as it can be maintained that the decision which resulted from the aforementioned decision is in compliance with Article 121 of the Rules of Procedure of the TBMM, it can also be maintained that it is in violation of it. Both views are possible. However, the only thing impossible is to maintain the idea that it is a provision amending the Rules of Procedure. Otherwise it would be inevitable that by qualifying as an amendment of the Rules of Procedure, every situation in violation of the rules of procedure would come before the Court. To review other parliamentary decisions than those provided for in Articles 84 and 85 as well as 148, which provides for the review of the Rules of Procedure, would constitute an exercise of authority which has no constitutional foundations. The Constitutional Court has no authority to review compliance with or violation of the Assembly´s [Parliament's] Rules of Procedure.



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Whether the said decision complies or violates the Rules of Procedure, it is clear that this does not fall within the jurisdiction of the Constitutional Court. While it was necessary to render a decision of lack of jurisdiction for the mentioned reasons, there was no reason to consider the decision as a legislative disposal falling within the jurisdiction of the Court.

2- Concerning the merits of the issue

(…) The main issue with the problem discussed here is whether in addition to the required majority Article 102 also provides for a quorum or not.

Before discussing whether Article 102 of the Constitution also includes a quorum or not, it is necessary to consider the provisions of the 1961 Constitution relating to the presidential election. One event – that the President of the Republic could not be elected for almost six months, which was one of the reasons for the 1980 coup d'état – will help to enlighten the issue at hand.

(…)

As can be seen, the fact that the quorum was rather high in the case of both houses of parliament meeting together, and the fact that after the first two ballots an absolute majority was required made the presidential election extremely difficult. It continued endlessly after the first two ballots and thus it was impossible to conclude the election. The provisions in Articles 96 and 102 of our new Constitution were made with the aim of resolving this situation that caused an interruption of democratic life.

The Advisory Assembly that drafted the 1982 Constitution determined the election of the President of the Republic in Article 110 and Article 116. Then, the National Security Council merged these articles and thus produced the article currently in force. The text adopted by the Advisory Assembly reads as follows:

> *"ARTICLE 110.- The President of the Republic shall be elected by a two-thirds majority of the total number of members of the Turkish Grand National Assembly and by secret ballot. The election has to be concluded within 20 days.*
> *If THIS MAJORITY cannot be obtained in the first two ballots, between which there shall be at least a five-day interval, after five days a third ballot shall be held; in the third ballot the candidate who receives the absolute majority of votes of the total number of members of Parliament shall be elected. If an absolute majority of votes of the total number of members is*



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*not obtained in the third ballot, five days after the third ballot a fourth ballot will be held between the two candidates who received the greatest number of votes in the third ballot. If an absolute majority of the total number of members of parliament is not obtained in this final ballot, new general elections for the Turkish Grand National Assembly shall be held immediately.*

*ARTICLE 116.- The election of the President of the Republic shall begin twenty days before the term of office of the incumbent President of the Republic expires or ten days after the Presidency falls vacant, and shall be completed within fifteen days. Candidates shall be declared to the Bureau of the Assembly within the first ten days of this period.*

*If the Turkish Grand National Assembly is not in session, it shall be summoned immediately to meet.*

*The salaries and allowances of former Presidents of the Republic shall be regulated by law."*

(…)

When these two articles, which constitute Article 102 of the 1982 Constitution, were merged, the only changes made concerned the days of the election period. However, the main issue here is that the words "THIS MAJORITY" in the second paragraph of Article 110 refer to the required two-thirds decision-making majority in the first paragraph.

Article 110 (1) of the 1961 Constitution, which provides for a two-thirds majority, is equivalent to 102 (1) of the new Constitution. In other words: Article 102 (1) also refers to the REQUIRED MAJORITY. In fact, during the meetings at the Consultative Assembly Prof. Dr. Turgut TAN, member of the Constitutional Commission and the Bureau, underlined that "contrary to the special required majorities the Constitution does not provide for any SPECIAL QUORUM TO OPEN A DEBATE" (Proceedings of the Constitutional Commission of the Advisory Assembly, p. 271).

*Justice Kiliç continues arguing that Article 96 of the Constitution was meant to solve the problems of the 1961 Constitution. Accordingly, this Article explicitly separates quorum and required majority which both designate different things. Furthermore, while the Constitution provides for special required majorities in several articles (84, 87, 99, 102, 105, 111, and 175) it does not contain any special provisions on the quorum. Thus, as 'the Constitution has not stipulated otherwise', Article 96 is applicable to the presidential election, so that the quorum is one-third or 184 members. The absolute majority quorum of the 1961 Constitution was given up and replaced by a one-third quorum.*



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It is impossible to produce a "SPECIAL QUORUM FOR DEBATE" from Article 102 (1) of the Constitution. Considering the aim of facilitating parliamentary work, the historical development of the provision does also not allow this. Article 102 (1), from which the quorum constituting the foundation of the majority opinion is derived, states that "The President of the Republic shall be elected by a two-thirds majority of the total number of members of the TBMM".

As this paragraph contains the words "two-thirds", "secret ballot" and "election" to say that it was foreseen for a quorum is not inappropriate, it is to indirectly change the Constitution by interpretation. The meaning and character of the words can certainly not be used with regard to the quorum. The issue in constitutional provisions relating to procedural requirements are all clear, comprehensible and evident without any need for interpretation. Procedural rules cannot be produced by interpretation. What could prevent the constitution-makers to include special rules concerning the quorum, just as they have done with the required majorities? If such a simple procedural requirement had been wanted, it would have been clearly indicated.

Article 102 (3) establishes how the required majority provided for in the first paragraph will be realised in the four ballots foreseen in the third paragraph. If, as mentioned by the majority, to start the first ballot a two-thirds majority quorum was needed and then a two-thirds majority to elect, then this would result in the use of the quorum as a threat for compromise-building. Yet, the coercive element used by the constitution-maker to induce a compromise is the period of 30 days for the presidential election, including the period of candidacy; otherwise general elections will have to be called. The condition of the 1961 Constitution, if in the first two ballots a two-thirds majority cannot be obtained the election would go on with infinite ballots requiring an absolute majority, was changed in the 1982 Constitution to enforce the election by limiting it to two ballots at the most. To construe from Article 102 (1) that the session can only be held with at least 367 members means to allow the remaining 184 members to block the work of the TBMM before even reaching the decision-making stage. A minority of one-third of the members could thus obstruct the election, which would result in the domination of the majority by a minority. Democracy is not an unlimited majority regime; however, it is even less a regime imposed on the majority by a minority. This scenario, that the minority paralyses the majority or put differently: that the majority is left out, would result in an oddity that does not exist in any democratic country. To create new procedural rules by interpretations



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unpredictable in advance is an approach that undermines the certainty and predictability of law.

It is impossible to imagine that the constitution-maker, whose aim was to complete the presidential election period within 20 days, would have wanted a model which with a two-thirds quorum in the first ballot would obstruct the whole system. As long as the quorum (two-thirds) is not reached, it will be impossible to proceed to the 2nd, 3rd, and 4th ballot. Thus, the related provisions will remain useless and as the 4th ballot to which the immediate elections are bound will not be realised, any conclusions will be reached with de facto circumstances.

To require a two-thirds quorum at the beginning of the election is not to solve a problem that already occurred under the 1961 Constitution, but to aggravate it. This was not the intention of the constitution-makers of the 1982 Constitution. From now on, with the quorum which will be required, the presidential election will be a possible source of even greater problems. It is exactly at this point that democratic life might be the cause of unimagined consequences such as leaving its place to even more serious chaos.

For these reasons the decision does not violate Article 102 of the Constitution.

With these arguments I did not concur with the majority.

Vice President

Haşim KILIÇ

(…)



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## 2.22 Constitutional Amendments Concerning Presidential Elections

***Application Number:*** *2007/72* ***Decision Number:*** *2007/68*

***Date of Decision:*** *05/07/2007*

***Date of Publication and Number of the Official Gazette:*** *07/08/2007 - 26606*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by the President of the Republic Mr Ahmet Necdet Sezer; and by member of the TBMM Mr Deniz Baykal (leader of the main opposition party CHP), Mr Kemal Anadol (deputy chairman of the CHP parliamentary group), and 138 other members of the TBMM*

***Provisions at Issue:*** *Law No. 5678 Amending Some Provisions of the Constitution (16/06/2007)*

***Relevant Constitutional Provisions:*** *Art. 89, 148, 153, and 175 (1982 TA)*

***Other Relevant Provisions:*** *Art. 81, 93, and 94 (Rules of Procedure of the TBMM)*

***Voting:*** *Rejected by majority of 6:5 justices*

***Dissenting and Concurring Opinions:*** *4 DO, 1 CO*

***Justices:*** *Vice President Haşim KILIÇ; Members: Sacit ADALI, Fulya KANTARCIOĞLU, Ahmet AKYALÇIN, Mehmet ERTEN, Mustafa YILDIRIM, A. Necmi ÖZLER, Serdar ÖZGÜLDÜR, Şevket APALAK, Serruh KALELİ, Osman Alifeyyaz PAKSÜT*

Law No. 5678, amending several provisions of the Constitution (among other things adopting a direct popular vote for presidential elections by amending Article 101 and 102 of the Constitution and supplying a provisional Article 19, which regulated the next presidential election), was vetoed by President Sezer and returned to parliament, which then had to discuss and vote on it a second time. After the renewed adoption, the President and the leading parliamentary opposition party submitted an abstract norm control, claiming at the same time the unconstitutionality of the constitutional amendment on substantial grounds and procedural irregularities during the parliamentary adoption process. Regarding the latter, the complaint mainly focused on the required quorum of attending deputies during the second reading and the required qualified two-third majority for each round of voting during the first and second parliamentary reading as well as for the final adoption of the draft amending the constitution. The Court unanimously rejects the claim to review the provisional Article 19 on substantial grounds. It states that Article 148 (Functions and Powers of the Constitutional Court) of the Constitution clearly restricts the competence of the Court to review constitutional amendments to procedural questions. Having stated this, the Court considers the claim of procedural irregularities during the legislative adoption procedure of the constitutional amendment in question and rejects the complaint.

(…)



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## III. PRELIMINARY EXAMINATION

(…)

In his application the President alleges that it constitutes a procedural violation of Article 175 that provisional Article 19 (1) added to the Constitution by Article 6 of Law No. 5678 provides that the presidential election process will start with the publication of the law, while the entry into force of the constitutional amendments depends on whether they are submitted to a referendum or not. Hence, in the case of a referendum the presidential election might be conducted without a valid legal basis.

Article 148 of the Constitution restricts the review capacity of the Constitutional Court with regard to constitutional amendment to a consideration of whether the required majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with. As Article 148 contains an exhaustive list of grounds, there is no possibility to review other procedural issues than those listed, just as there is no basis for a substantive review.

As the grounds for annulment alleged with regard to provisional Article 19 added by Article 6 of the law at issue do not concern the required majorities for the proposal and the ballot nor the prohibition on debates under urgent procedure, they cannot be reviewed by the Constitutional Court.

For the above mentioned reasons, the application to declare unconstitutional provisional Article 19, added to Article 6 of Law No. 5678, has to be rejected.

Since the files do not seem incomplete, the Court decided with participation of Haşim KILIÇ, Sacit ADALI, Fulya KANTARCIOĞLU, Ahmet AKYALÇIN, Mehmet ERTEN, Mustafa YILDIRIM, A. Necmi ÖZLER, Serdar ÖZGÜLDÜR, Şevket APALAK, Serruh KALELİ and Osman Alifeyyaz PAKSÜT unanimously on 05/07/2007 to examine the application for formal review.

(…)



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## 2.23 Constitutionality of the New Presidential Election Law

***Application Number:*** *2012/30* ***Decision Number:*** *2012/96*

***Date of Decision:*** *15/06/2012*

***Date of Publication and Number of the Official Gazette:*** *01/01/2013 - 28515*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by members of the TBMM Ms Emine Ülker Tarhan (deputy chairwoman of the main opposition party CHP parliamentary group), Mr Mehmet Akif Hamzaçebi (deputy chairman of the CHP parliamentary group), and 115 other members of the TBMM*

***Provisions at Issue:*** *Art. 5, 11, 13, 14, 21 and provisional Art. 1 of Law No. 6271 on the Election of the President of the Republic (19/01/2012)*

***Relevant Constitutional Provisions:*** *Art. 2, 6, 10, 11, 67, 68, 78, 79, 101, 102, 106, and 175 (1982 TA)*

***Voting:*** *Rejected by majority of 15:1 justices (regarding Art. 5)*
*Rejected unanimously by 16 justices (regarding Art. 11, 13, 14, 21)*
*Rejected by majority of 12:4 justices (regarding provisional Art. 1 (1))*
*Accepted unanimously by 16 justices (regarding provisional Art. 1 (2))*

***Dissenting and Concurring Opinions:*** *1 DO, 3 DO and CO*

***Justices:*** *President Haşim KILIÇ; Vice President Serruh KALELİ; Vice President Alparslan ALTAN; Members: Fulya KANTARCIOĞLU, Mehmet ERTEN, Serdar ÖZGÜLDÜR, Osman Alifeyyaz PAKSÜT, Zehra Ayla PERKTAŞ, Recep KÖMÜRCÜ, Burhan ÜSTÜN, Engin YILDIRIM, Nuri NECİPOĞLU, Hicabi DURSUN, Celal Mümtaz AKINCI, Erdal TERCAN, Muammer TOPAL*

***Rapporteur Drafting the Decision:*** *Ali Rıza ÇOBAN*

The applicants ask for the annulment and stay of execution of several articles of the *Law on the Election of the President of the Republic* on various grounds. The main issue, dealt with under subheading (F) of the ruling, regards the content of provisional Article 1, which provides that the term of office will be seven years for the 11th President of the Republic, and that the abrogated provision prohibiting a second term continues to apply to the current and former presidents. In particular, the applicants consider that the constitutional amendment limiting the term of office to five years, which was approved by parliament before the election of the current president and ratified by referendum after the election, is applicable to the current president. Furthermore, they argue that any determination of the term of office of the current president needs to be defined by a constitutional provision and not by ordinary law; and, as none of the constitutional amendments after the amendment of 2007 contained any provision in this direction, it should be concluded that the constitution-maker intended the new term of office to also apply to the current president. The same argument applies to the continued application of the abrogated provision to the current and former presidents. The Court rules that the term of office is not unconstitutional, but that the prohibition of a second term constitutes a violation of Article 67 (Right to vote, to be elected and to engage in political activity) and Article 101 (Qualifications and impartiality of the President of the Republic) of the Constitution.

(...)



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## IV. MERITS

(…)

### F- Review of Provisional Article 1 of the Law at Issue

#### 1- Concerning the first paragraph

In the application it is claimed that the term of office of the President of the Republic constitutes a constitutional problem, and that throughout the history of the Republic the term of office was always determined in the Constitution. With Law No. 5678 on the Amendment of Certain Articles of the Constitution of the Republic of Turkey, implemented in 2007, and especially with the amendment of Article 101 of the Constitution, the term of office of the President of the Republic is determined as five years. Hence, it is impossible to regulate the term of office of the President via simple legislation. For this reason, the law [No. 5678] violates the preamble and Article, 2, 6, 11, 101, 102, and 175 of the Constitution.

Provisional Article 1 (1) of the law at issue provides that the term of office of the 11th President of the Republic will be seven years. It appears that this provision was enacted to dispel doubts concerning the term of office of the 11th President of the Republic that arose after the adoption of Law No. 5678 concerning the Amendment of Certain Articles of the Constitution of the Republic of Turkey (31/05/2007), which amended, with its fourth Article, Article 101 of the Constitution. On 31/05/2007, after the term of office of the 10th President of the Republic had ended, the Turkish Grand National Assembly adopted a proposal for a constitutional amendment that provided for the popular election of the President of the Republic and a term of office of five years. Law No. 5678 was published in the Official Gazette on 16/06/2007 with the aim of the President of the Republic to submit it to referendum. However, before the referendum was held, the 11th President of the Republic was elected by a newly constituted Turkish Grand National Assembly on 28/08/2007, after the previous Turkish Grand National Assembly had decided to hold early elections on 22/07/2007. Law No. 5678 was adopted by referendum on 21/10/2007 and came into force by the publication of the referendum results in the Official Gazette on 31/10/2007.

When the 11th President of the Republic was elected the term of office foreseen by Article 101 of the Constitution was seven years. Furthermore,



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when the President of the Republic was elected the law amending the term of office had been adopted by the Turkish Grand National Assembly but had not yet been submitted to referendum, hence its legislative process had not yet been completed and it was not yet in force. The amendment changed the term of office of the President of the Republic to five years after the 11th President of the Republic had been elected. The explanatory memorandum of the provision at issue states that the provision is introduced in order to dispel the doubts concerning the term of office of the 11th President of the Republic.

The amended Article 101 of the Constitution provides that the term of office of the President of the Republic is five years. There is no doubt that the term of office of the President of the Republic elected by popular vote is five years after this provision came into force. However, the same cannot be said for the term of office of the 11th President of the Republic, who was elected by the Turkish Grand National Assembly before the amendment came into force. In fact, the previous version of Article 101 of the Constitution foresaw that the President of the Republic is elected by the Turkish Grand National Assembly for a seven year term of office. As the 11th President of the Republic had been elected according to this provision, his term of office was also fixed with his election. As Law No. 5678, which amended the Constitution, does not contain any special provision concerning the term of office of the 11th President of the Republic, it cannot be concluded that this constitutional amendment reduced the term of office of the 11th President of the Republic. As there is no provision indicating a reduction of the term of office, the term of office of the 11th President of the Republic is seven years. Thus, the provision at issue clarifies this subject by emphasising that the term of office of the 11th President of the Republic is seven years.

Following this argument, the law at issue does not violate Article 101 of the Constitution. Thus, the application for annulment has to be rejected.

Fulya KANTARCIOĞLU, Mehmet ERTEN, Osman Alifeyyaz PAKSÜT, and Zehra Ayla PERKTAŞ did not agree with this opinion.

Articles 2, 6, 11, 102, and 175 of the Constitution are considered to be irrelevant in this case.

2- Concerning the second paragraph

In the application it is claimed that changes in Articles 101 and 102, introduced by Law No. 5678, created a new status of the presidency regarding



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election procedures, term of office and the possibility to be re-elected for a second term. This constitutionally determined status cannot be changed by simple law. The provision at issue prevents the possibility to be re-elected for former and current presidents, and thus violates their passive right to vote and the principle of equality. Hence, the provision at issue infringes upon Articles 10, 67, 101 and 175 of the Constitution.

Provisional Article 1 (2) of the law at issue provides that the Presidents of the Republic elected before the entry into force of Law No. 5678 Concerning the Amendment of Certain Articles of the Constitution of the Republic of Turkey of 31/05/2007 are subject to abrogated constitutional provisions, including the prohibition of a second term. It appears that the main aim of this provision is to prevent the candidacy of the current president and previous presidential predecessors in any future presidential election.

The amended version of Article 101 (2) of the Constitution abrogated the previous provision, which prohibited a second term, by providing that the President of the Republic can be elected for two terms at the most. The new provision allows the election for a second term if the candidate fulfils the necessary requirements. The Constitution does not foresee any exceptions concerning this right for the current and previous Presidents of the Republic. Consequently, the current and previous Presidents of the Republic can avail themselves of this right. Moreover, Article 67 of the Constitution guarantees the fundamental right to vote and the right to be elected. There is no doubt that this fundamental right also includes the right to run for the presidency and to vote in presidential elections.

The provision at issue, which retroactively reactivates the abrogated constitutional prohibition of a second term, violates the will of the constitution-maker concerning this issue. The constitutional provision that establishes the right to be elected for a second term positively affects the future right of the current president and former presidents to be elected. A constitutionally guaranteed right cannot be abrogated by an ordinary law.

For these reasons the provision at issue violates Articles 67 and 101 of the Constitution. It shall be annulled.

Fulya KANTARCIOĞLU, Mehmet ERTEN, and Zehra Ayla PERKTAŞ concurred with this opinion for other reasons.

As the provision is being annulled for violating Articles 67 and 101 of the Constitution, a separate review with regard to Articles 10 and 175 of the Constitution is not necessary.

(…)



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DISSENTING AND CONCURRING OPINION

(…)

In Article 101 (2) of the Constitution, amended by Law No. 5678 of 31/05/2007, it is regulated that the term of office of the President of the Republic shall be five years, and that a candidate can only be elected twice to this position. Nevertheless, Law No. 5678 does not include any transitional provision to regulate the term of office of the 11th President of the Republic, who is still in office, and who has been elected according to Article 101 of the Constitution by the Turkish Grand National Assembly for seven years. In conformity with public law no position acquired can principally count as an acquired right. Furthermore, to run for the election for the Presidency of the Republic is not a right but an honourable duty which requires that the adequate competences for this position are complied with. Taking into account the legal principle of immediate force and effect of laws, it must be assumed that the term of office of the 11th President of the Republic has been reduced to five years.

To assume that the objected provision determines that the term of office of the 11th President of the Republic shall be seven years has the result that the legal force and effect of the amended Article 101, which determines that the term of office shall be five years, is only retroactively valid. In other words, the will of the amending legislative power is changed by ordinary law. Even though the amending legislative power had the opportunity to regulate a seven year term of office of the 11th President of the Republic with a transitional provision, it did not make use of this option. This fact shows that the amending legislative power intended the immediate legal force and effect of the amended article. And even though the term of office of the President of the Republic is regulated in the Constitution, with the legal exceptional rule for the 11th President of the Republic the general constitutional norm was amended. If something is regulated in the Constitution, a transitional regulation of the subject also has to be determined in the Constitution. This perspective is substantiated by the fact that the transitional regulations created by law No. 5678, which restructure the status of the Presidency, are implemented in the law amending the Constitution.

Generally speaking, a transfer-regulation that is anchored in the Constitution, and which foresees an exception to the general norm, does not amount to a constitutional problem; whereas a legislatively determined exceptional rule is not conformable with the superiority and commitment of the Constitution. Without a doubt, every legal norm leading



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to the suspension of a constitutional norm amounts to an issue of unconstitutionality.

In my opinion the aforementioned reasons show that paragraph (1) of the objected provision violates Articles 2 and 101 of the Constitution and must be annulled. Therefore, I do not agree with the majority opinion.

On the other hand, the majority opinion, which neglects the unconstitutionality of paragraph (1) of the provision, is grounded in the perception that the 11th President of the Republic has been elected under the former version of Article 101 for seven years. This means that in this case the constitutional will valid at that time should be decisive. If this opinion was consistent, it would not only apply to paragraph (1) but also to paragraph (2). Nevertheless, the majority opinion did not recognise this argument for paragraph (2) but discussed the problem in relation to the right to vote and the eligibility for office. Thus, it was decided that the 11th President of the Republic should also have the right to be elected twice. This leads to a great contradiction: the question of the term of office is regulated according to the former constitutional will, whereas the question of re-election is regulated in conformity with the new constitutional will. For this reason, it is impossible to join the opinion on the annulment reasons mentioned in paragraph (2).

As already explained in the dissenting opinion in paragraph (1), in conformity with paragraph (2) and in conformity with status-law the following can be said: with the coming into force of the constitutional amendment the former President of the Republic must also have the opportunity to campaign for further re-election, and they must be subject to the new norm.

In relation to the objected to paragraph (2) I join the majority opinion with this concurring opinion.

Member
Fulya KANTARCIOĞLU

## DISSENTING AND CONCURRING OPINION

(…)

Article 101 (2), amended by Law No. 5678, has been in accordance with the principle of immediate effect of laws in force since its publication in the Official Gazette. Accordingly, the previous seven year term of office has been reduced to five years, and the inadmissibility of re-election has been abrogated. Since the constitutional amendment did not foresee a



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transitional provision for former Presidents and the 11th President of the Republic, the term of office of the latter is reduced to five years and the inadmissibility of re-election is abrogated.

PROVISIONAL ARTICLE 1 (1, 2) of Law No. 6271 on the Election of the President of the Republic is certainly a **statutory provision**, which intends to amend **Article 101 (2) of the Constitution** or impede its implementation with regard to the election of the 11th and former Presidents of the Republic.

The amendment of a constitutional norm or the transitional regulation of such a norm is only possible in accordance with the "rules for constitutional amendments" established in Article 175 of the Constitution. To amend the Constitution with ordinary law violates Article 175; neither is it legally permitted to subject the former Presidents of the Republic and the statutory law regulating their status to prior valid constitutional norms. Any opinion contrary to this would allow/permit the constitutional amendment through laws. This would violate the constitutional principles of the democratic State governed by the rule of law; the principle of the sovereignty of the people; the rule that no government body shall exercise competences which are not explicitly established in the Constitution; the rule that laws shall not be unconstitutional; and the basic rules of constitutional amendments and Article 101 (2) of the Constitution.

(…)

Member

Mehmet ERTEN

(…)

DISSENTING AND CONCURRING OPINION

(…)

According to the "principle of immediate applicability", constitutional amendments are general and binding rules that must be applied starting from the day on which they came into force. For this reason, the "deferral of applicability" of a constitutional norm is only possible through another constitutional norm. In fact, although the applicability of some provisions of Law No. 5678 of 31/05/2007, which amended the Constitution, was deferred by some provisional articles, the law did not contain any provisions postponing the applicability of the provision concerning the term of office of the President of the Republic.



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Thus, in light of the provision in Article 101 (2) of the Constitution that establishes: "[t]he president's term of office shall be five years. The President of the Republic can be elected to two terms at most (…)", the provisional Article 1 of Law No. 6271 of 19/01/2012 violates Articles 2, 6, 11, and 101 of the Constitution and must be annulled.
(…)
Member
Zehra Ayla PERKTAŞ



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# 3. Decisions on Fundamental Rights and Freedoms

## 3.1 Religious Identity in ID Cards I

***Application Number:*** *1979/09* ***Decision Number:*** *1979/44*

***Date of Decision:*** *27/11/1979*

***Date of Publication and Number of the Official Gazette:*** *13/03/1980 - 16928*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Taşköprü Civil Court of First Instance (Taşköprü Asliye Hukuk Mahkemesi)*

***Provisions at Issue:*** *Art. 5, 13, 22, 43, 46 and 47 of the Law on Civil Registration No.1587 (05/05/1972); Law on Civil Procedure No. 1086 (02/07/1927)*

***Relevant Constitutional Provisions:*** *Art. 2, 8, 12, 19 (2), 20 (2) (1961 TA)*

***Voting:*** *Rejected by majority of 8:7 justices (regarding Art. 43)*
*Rejected unanimously by 15 justices (regarding Art. 46)*

***Dissenting and Concurring Opinions:*** *2 DO*

***Justices:*** *President Şevket MÜFTÜGİL; Vice President Ahmet H. BOYACIOĞLU; Members: Ahmet ERDOĞDU, Osman TOKCAN, Rüştü ARAL, Muammer YAZAR, Adil ESMER, Nihat O. AKÇAKAYALIOĞLU, Nahit SAÇLIOĞLU, Hüseyin KARAMÜSTANTİKOĞLU, Necdet DA-RICIOĞLU, İhsan N. TANYILDIZ, Bülent OLÇAY, Yılmaz ALİEFENDİOĞLU, Yekta Güngör ÖZDEN*

The submitting court referred to the AYM asking for annulment of various articles of the Law on Civil Registration, stipulating that the civil registry includes "one's religion" and that a change of this entry can only be decided by court. The referral claims that these provisions violate Articles 2 (Characteristics of the Republic, here the principle of laicism), 12 (Equality), 19 and 20 (Freedom of thought and faith) of the Constitution of 1961. After a detailed consideration of procedural questions (not documented in the translation), the Court decides by majority to substantially review the referral, limiting the review to Articles 43 and 46 of the Law on Civil Registration. Regarding the substance, the AYM briefly refers to the constitutional principle of laicism and distinguishes between the mere *indication* of "one's religion" and the *expression* of "religious beliefs". It rejects the referral by majority with regard to Article 43 and unanimously with regard to Article 46 of the Law on Civil Registration.

(...)



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## V. MERITS

(…)

### A - Review with Regard to the Term "one's religion" as stated in Article 43 of the Law on Civil Registration

#### 1 - Because of their close relation to each other, Articles 2 and 19 of the Constitution shall be examined first

Our Constitution has established the principle of laicism as one of our Republic's characteristics and regulated the freedom of religion and conscience in Article 19. Article 19 (1) recognises everyone's right to freedom of conscience, religious belief and conviction. The second paragraph provides that "[f]orms of worship, and religious ceremonies and rites are free provided they are not in opposition to public order, or morals or to the laws enacted to uphold them", and thus establishes that the freedoms recognised in the first paragraph are not unlimited. They can be limited because the necessity to guarantee public order does not allow the freedom of religion to spill over from the individual's inner world and reach a level which causes social unrest. For this reason, there is no doubt that the aim of this limitation is to enable everyone to enjoy the same freedoms and to thereby ensure everyone's freedoms in this area.

Article 19 (3) provides that "[n]o person shall be compelled to worship, or participate in religious ceremonies and rites, or to reveal their religious faith and belief. No person shall be reproached for their religious faith and belief"; the first sentence of the fourth paragraph reads "[r]eligious education and teaching shall be subject to the individual's own will and volition, and in the case of minors, to their legally appointed guardians". Both are realisations of some of the basic principles of the concept of laicism.

The last paragraph of the Article prevents the abuse of freedom of conscience by natural and legal persons and political parties. By providing that the State's basic social, economic, political, and legal order cannot, even partially, be based on religious rules, this paragraph also specifies the meaning of the principle of laicism and also emphasises the traditional definition of this principle as the separation of religion and state affairs.

In the statement of grounds the submitting court mentions Article 19 (2) of the Constitution when arguing that the term "one's religion" in



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Article 43 of Law No. 1587 is unconstitutional. It is further specified that the unconstitutionality is based on the provision that "[n]o person shall be compelled to worship, or participate in religious ceremonies and rites, or to reveal their religious faith and belief".

However, this provision does not prevent the disclosure of one's religious beliefs and convictions. What the Constitution prohibits is coercion. Therefore, the issue has to be considered from the angle of (coercion).

Article 43 does not contain any coercive provision. During the civil registration process a situation is created in which the individual only has to disclose their religion, not the religious belief and conviction as meant by the Constitution; and this provision does not have any coercive character and intention.

For this reason, the term "one's religion" as stated in Article 43 does not violate Article 2 and 19 of the Constitution.

2 - Review with regard to Article 12 of the Constitution

Article 12 of the Constitution establishes the principle that everyone, irrespective of their language, race, sex, political opinion, philosophical views, religion or religious sect shall be equal before the law.

On the other hand, Law No. 1587 provides that every Turk shall indicate their personal status, including their religion, when applying for a new ID card or for changes in the civil registry. As this provision applies indiscriminately to every Turk, it is inconceivable that the equality principle of Article 12 has been violated.

3 - Review with regard to Article 20 of the Constitution

Our Constitution has regulated freedom of conscience and religion and freedom of thought separately in Articles 19 and 20.

There must be a reason that our Constitution has separately regulated these closely related concepts. There is no doubt that the freedom of thought of Article 20 relates to freedoms other than those regulated in Article 19.

In this respect, it is inconceivable that the provision of Article 43 that is the subject of the application violates the freedom of thought of Article 20 of the Constitution.



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Şevket MÜFTÜGİL, Ahmet H. BOYACIOĞLU, Osman TOKCAN, İhsan N. TANYILDIZ, Bülent OLÇAY, Yılmaz ALİEFENDİOĞLU, and Yekta Güngör ÖZDEN considered the provision at issue to be a violation of the Constitution and did not concur with this opinion.

B - Review of Article 46 of the Law on Civil Registration in Accordance with the Decision to Limit the Review

In view of the above-mentioned decision, as the registration of the personal status – of which religion is an element – and the amendment of any mistakes by a judicial decision are in the public interest, the provision at issue does not violate the Constitution. For this reason, the application has to be rejected.
(…)

DISSENTING OPINION

> *At first, the Justices repeat the content of Articles 4 and 5 of the Law on Civil Registration establishing the requirement for an ID card, and summarise the content of Articles 43, 48, and 52 of the law that establishes which information the civil registry contains and that giving the information is compulsory. This compulsion results in particular from Articles 48 and 52 of the law which establish a fine in cases of late declarations. The Justices also emphasise that the severity of a punishment does not change the compulsory nature of a requirement. Therefore, there can be no doubt that the law establishes a legal requirement to disclose one's religion.*

However, Article 19 (3) of the Constitution, which regulates freedom of conscience and religion, clearly establishes that no one can be compelled to disclose their religious beliefs and convictions. The meaning of this provision is that it is impossible to reconcile a legal requirement to disclose one's religious beliefs and convictions with freedom of conscience and religion.

It is also impossible to limit this freedom, which results from the principle of laicism in Article 2 of the Constitution – which establishes the characteristics of the Republic –, on the basis of Article 11. Whatever the reasons or circumstances, the requirement to disclose one's religious beliefs and convictions cannot result in anything other than a violation



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of the principle of laicism, one of the fundamental characteristics of the Republic.

For all these reasons we conclude that the term "one's religion" in Article 43 of the Law on Civil Registration violates the Constitution and cannot concur with the majority's opinion.

| President | Vice President | Member |
|---|---|---|
| Şevket MÜFTÜGİL | Ahmet H. BOYACIOĞLU | Osman TOKCAN |
| Member | Member | Member |
| İhsan N. TANYILDIZ | Bülent OLÇAY | Yılmaz ALİEFENDİOĞLU |

DISSENTING OPINION

I do not agree with the majority opinion, and even though I concur with the opinion of the other dissenting justices I want to add some own arguments.

1. Our Court, having the task to decide about the constitutionality of laws in a positive or negative way, should respect the criterion to not touch the essence of rights and liberties with caution, while protecting the rights and freedoms, ensuring their legal structure, and interpreting the limits of infringement of rights.

There is no doubt that the ATATÜRK REFORMS serve as a source for the Constitution (Preamble para. 4, Art. 4, 1, 2, 3, 9, 153); that they are a national criterion having the value of superior legal norms, and that they constitute some of the foundations of constitutional review. They cannot be ignored (…); laws that run counter to the ATATÜRK REFORMS are clearly legally invalid.

*2. Justice Özden argues that the term "one's religion" in the Law on Civil Registration violates the core, aim and meaning of the Constitution. Religion is a private issue, something between the individual and God and should only be disclosed if the person wishes so. Religion is a bond between a person and God; the bond between citizens and the State is sufficiently established by citizenship. Everybody is free to choose their religion or no religion at all. There is no public interest that the State reveals personal feelings of persons. The State should not ask or file this information and there is no constitutional basis for such a practice. Furthermore, the Constitution requires the State not to discriminate among religions and religious sects.*



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*This also means that religion has no place in any kind of official relations nor should it affect any kind of proceedings. Any kind of public disclosure should be voluntary. The compulsory nature of the provision renders it unconstitutional.*

3. (…) Laicist life is a holistic concept. It is impossible to follow the laicist principle in some laws, while not complying with it in others. Article 43 of the law on Civil Registration contradicts the principle of laicism, and hence violates Article 1, 2, and 3 of the Constitution.

4. Article 19 (3) of the Constitution prohibits forced disclosure of one's religious beliefs. The second sentence of this paragraph also includes the regulation, "No person shall be reproached for his religious faith and belief." However, Article 43 forces citizens to disclose their religious beliefs and is therefore unconstitutional. This regulation shows the State's power to sanction; this can lead to reproachment of the person and politically motivated attacks. For this reason, the norm violates Art. 19 of the Constitution.

(…)

Member

Yekta Güngör ÖZDEN



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## 3.2 Religious Identity in ID Cards II

***Application Number:*** *1995/17* ***Decision Number:*** *1995/16*

***Date of Decision:*** *21/06/1995*

***Date of Publication and Number of the Official Gazette:*** *14/10/1995 - 22433*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by the Tenth Chamber of the Council of State (Danıştay Onuncu Dairesi)*

***Provisions at Issue:*** *Application for annulment of the term "one's religion" in Art. 43 of the Law on Civil Registration No. 1587 (05/05/1972)*

***Relevant Constitutional Provisions:*** *Art. 2, 24 (1982 TA)*

***Voting:*** *Rejected by majority of 6:5 justices*

***Dissenting and Concurring Opinions:*** *4 DO*

***Justices:*** *President Yekta Güngör ÖZDEN; Vice President Güven DİNÇER; Members: İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Haşim KILIÇ, Yalçın ACARGÜN, Mustafa BUMİN, Sacit ADALI, Ali HÜNER, Lütfi F. TUNCEL*

The Council of State referred to the AYM for annulment of the term "one´s religion" in Article 43 of the Law on Civil Registration as it considered the requirement as a violation of Article 2 (Characteristics of the Republic, here the principle of laicism), and Article 24 (Freedom of religion and conscience). Without any direct reference to its earlier decision under the 1961 Constitution (E 1979/09; K 1979/44, cf. 6.1), the AYM rejects the referral for very similar reasons by majority vote. It stresses the importance of the civil registry for maintaining public order as well as the constitutional principle of laicism and distinguishes between the mere information on religion as demographic or personal status – which is compatible with the principle of laicism –, and a potential obligation to publicly disclose religious beliefs and convictions, which would be unconstitutional according to Article 24 of the Constitution.

(…)

## V. MERITS

(…)

### A. Meaning and Scope of the Provision at Issue

*All the information that has to be included in the civil register according to Article 43 is enumerated and it is argued that this information is collected "in order to determine the characteristics of persons which will be included in the civil register" and "because of a public interest in the demographic structure of the nation".*



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The nation and country, constituted by the people, are the founding elements of the State. The State must be aware of the characteristics of its citizens. This requirement, to know the individuals of the society, which constitute the State and their characteristics, is based on public order, public interest and economic, political and social requirements and imperatives.

For these reasons every country has a civil register which includes information on various issues pertaining to the personal status. Article 43 of Law No. 1587 on Civil Registration establishes which information has to be included in the civil register.

(…)

Information for which inclusion has been considered necessary, including "if there are" visible bodily changes, has to be recorded in the civil register. In fact, the explanatory memorandum to the Law on Civil Registration states with regard to Article 43 that:

"This article ensures that the civil register includes the individuals' sex, name and f, parents' names, whether they are alive or not, date and place of birth, profession, possible bodily defects, religion, whether they are literate or illiterate, marital status, and other changes to the personal status."

Furthermore, during the plenary discussions concerning Article 43 the President of the National Assembly asked:

"Does this mean that when the person is literate it will be written down and if the person is illiterate, in other words uneducated, the relevant row will be left empty?"

The reply of the spokesperson of the Provisional Committee[717]

"Yes, it will not be written down, it will be left empty"

confirms this view; there is no coercive aspect to it.

B- Issue of Unconstitutionality

(…)

1- Review with regard to Article 2 of the Constitution

(…)It is absolutely impossible to deny and neglect the fundamental characteristics of the Republic. In this context laicism has been espoused as a legal and historical fact.

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717 The Turkish term is "*Geçici Komisyon*".



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In fact, in addition to Article 2 the Preamble states "that sacred religious feelings shall absolutely not be involved in State affairs and politics as required by the principle of laicism"; Article 14 states that "[n]one of the rights and freedoms embodied in the Constitution shall be exercised with the aim of (…) creating discrimination on the basis of language, race, religion or sect"[718]; Article 24 states that "[n]o one shall be compelled (…) to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions"; and Article 68 states that "[t]he statutes and programmes (…) of political parties shall not be in conflict with (…) the principles of the democratic and laicist republic".

The last paragraph of Article 24 of the Constitution, by stating that "[n]o one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets", provides in some sense a definition of the laicism principle and emphasises the traditional definition of laicism as separation of religious and State affairs.

As can be understood from the text, what counts is not that a legal provision contains information relating to religion but the prohibition to abuse of religion.

Laicism, which is an unamendable constitutional principle of the State, is a concept of a State where the aim is to keep religion outside the political arena. Laicism does not mean hostility towards religion, irreligiousness or being against religion, but an attitude and behaviour that results from respect for freedom of belief and leaving religion to the wideness of individual freedom.

Even if citizens have different religions, the State is, without doubt, equally close to all of them. Within the laicist order a person is free to choose whatever religion they want. There cannot be any coercion.

According to the widespread but insufficient definition, laicism is the separation of religion and state affairs.

According to the Constitutional Court's settled case-law on this issue, the relevant elements of the laicism principle are listed as follows:

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718 The official translation of the 1982 Constitution uses "sect", meaning a religious sect. Article 14 has been amended in 2001. For a detailed analysis of the constitutional changes in 2001 cf. Gönenç 2004.



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a- Religion cannot have any influence and control over state affairs.

b- Without discrimination all religions have constitutional protection.

c- Where religion exceeds the individual's spiritual life and actions and behaviour have an effect on societal life, it is possible to limit the freedom of religion in order to protect public order, security and interest and prohibit the abuse and exploitation of religion.

d- The State has regulatory power in issues pertaining to religious rights and freedoms in order to protect public order and rights.

As mentioned above, there are no differences between the personal data provided for the civil register for reasons of public order and interest. Such is the form of the information on the person's religion and therefore it is in no way incompatible with the laicist State. What the Constitution prohibits is the use of religion as an element of discrimination and inequality and practices that violate the laicist order of the State.

The concept of a laicist State requires neutrality towards and equal treatment of all religions. In this sense the reference in a law to the "religious" information in the civil register is not a case of divergent treatment and inequality.

The laws do not separate between "religions with and without State approval". Within the laicist State concept all religions are admissible and respected. Based on this understanding no one can interfere with someone else's belief or lack of belief.

Another important aspect is that the State has not discriminated and only required the members of a particular religion to give information on their religion but not others – which would have violated the laicism principle. The provision applies to everybody and is therefore a general rule.

The information relating to "religion" required by Article 43 of the Law on Civil Registration and to be recorded in the civil register is only one of several personal data; and, as mentioned above, it is therefore impossible to use it for reasons or in a way that would violate the fundamental principles of the Republic or to interpret it in a manner contrary to the laicism principle. For this reason, there is no violation of Article 2 of the Constitution. Haşim KILIÇ and Sacit ADALI argue that "Article 2 of the Constitution is not relevant for the provision at issue".



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2- Review with regard to Article 24 of the Constitution

(…)

However, the provision that contains the term at issue provides what information concerning the personal status will be included in the civil register and has included "information relating to one's religion" in this. As can be understood from the text, the information to be recorded in the civil register only includes the person's religion.

The constitutional provision "[n]o one shall be compelled … to reveal religious beliefs and convictions" cannot be interpreted as a prohibition on including information on a person's religion in official registers. What the Constitution prohibits is coercion.

Coercion concerns the disclosure of religious beliefs and convictions. It is impossible to limit the concept "religious beliefs and convictions" to "information on religion", which is included in the civil register only as demographic or personal status information. The term "religious beliefs and convictions" is not a narrow concept that only designates that a person is of a certain religion or belief, but a wide concept that includes many issues pertaining to religion and belief.

Article 24 of the Constitution does not prohibit the disclosure of one's religion but forcing one to disclose their religious belief and convictions. Furthermore, the article provides that "[n]o one shall be blamed or accused because of their religious beliefs and convictions". Both provisions complement each other.

When Article 43 of the Law on Civil Registration is read in conjunction with the other provisions of the law, it becomes clear that it is wholly unrelated to the prohibitions in Article 24 of the Constitution to force anyone to disclose their religious belief and convictions and to blame or accuse anyone because of their religious beliefs and convictions. This does not amount to coercion, blaming or accusation.

On the other hand, as Article 266 of the Civil Code provides that "[a]nyone of full age is free to choose their religion", anyone wishing to change the religion indicated in the civil register may, in accordance with Article 47 of the Law on Civil Registration, submit a request to the Registration Office, with a document obtained by the relevant institution, and with the order of the highest local administrator the necessary amendment in the civil register might be done. Similarly, if anyone wishes to have the religion indicated in the civil register deleted or to have another belief which cannot be accepted as a religion indicated, that person has to file a claim, according to Article 46 of the Law on Civil Registration, with the



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appropriate court to obtain a judgement and have the required changes made by the administrative authorities.

To conclude, Article 43 cannot be considered to contain any coercive provision.

> *The Court repeats its argument that for civil registration a person only has to disclose their religion not the religious belief and convictions. This information is collected for purposes of public interest, public order and social needs. Further, the AYM refers to its earlier decision (Application Number 1979/09; Decision Number 1979/44 of 27/11/1979) in which it has also come to the conclusion that the provision at issue does not violate the Constitution.*

For these reasons the provision at issue does not violate Article 24 of the Constitution.

Yekta Güngör ÖZDEN, Selçuk TÜZÜN, Ahmet N. SEZER, Yalçın ACARGÜN and Mustafa BUMİN did not agree with this view.

(…)

## DISSENTING OPINION

(…)

> *1. Justice Özden argues that the laicism principle has not been properly understood in Turkey. It guarantees all rights and freedoms including freedom of religion. The principle was introduced with the 1921 Constitution and subsequently legally institutionalised, in particular through the inclusion in the unamendable articles. It is of utmost importance to protect this principle. He furthermore refers to previous decisions of the Constitutional Court and what he has already argued in his own concurring or dissenting opinions, including K. 1980/48 of 03/07/1980, K. 1989/12 of 07/03/1989, K. 1991/08 of 09/04/1991, and K. 1979/44 of 27/11/1979.*

2. The problem concerns the constitutional justification of the requirement to disclose one's religion for official registers. In application of law 1587 (Art. 4, Art. 47, Art. 52), parents are obliged to indicate the religion of their children; otherwise they will not be recorded in the civil register. The inclusion of religion in the civil register, and thereby on the ID card, before the coming of age and without consent, constitutes a de facto compulsory disclosure of religion in daily life; and can also entail adverse consequences when abroad.



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Article 24 (3) of the Constitution states that no one shall be compelled to reveal religious belief and convictions. Yet, the obligation to produce a copy of the civil register, especially in school or military service obligations, leads to an act of real "coercion". The fact that no one can be included in the civil register without indicating or disclosing one's religion is nothing but coercion. This fact obviously violates Article 24 (3) of the Constitution.

(…)

3. The word "religion" does not designate a particular religion but all religions to which Turkish citizens belong. To understand this regulation as only applying to a specific religion and hence to be subordinated to an unnecessary sensitivity is wrong, as it is wrong to understand this regulation as being the result of hostility towards a specific religion. Private actions and assessments shouldn't be considered, but only constitutionally legal principles. In a State under the rule of law religious rules and regulations are confined to the private realm. In legal terms action is constitutional when it conforms to Article 10, which prohibits discrimination based on religion and sect or any such grounds, and Article 2, which determines the principle of the laicist State governed by the rule of law. Article 43 of the law could be the product of habits or historical conceptions. Religion cannot be a legal measure of personal characteristics. The State should not be criticised because of religion. The State that is neutral towards religions exercises its supervisory and regulatory duties in order to preserve public order and prevent destructive activities in accordance with the laicism principle (Article 24 and 136 of the Constitution).

(…)

President
Yekta Güngör ÖZDEN

DISSENTING OPINION

(…)

The protection of freedom of religious belief is only possible with the prohibition to compel anyone to reveal their religious convictions. Requiring individuals to disclose their religion, even if only for the civil register, amounts to compelling them to disclose their religious beliefs and convictions.



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The laicist State is under obligation to prevent any possible interference and pressure on freedom of religion and belief from different parts of society. To force anyone to disclose their religion or the fact that they do not belong to any religion at all, can cause repercussions or negative impressions against them. These opinions can even lead to disorder and quarrels.

As stated in many articles of the Constitution the State has the duty to ensure the well-being and peace of society and the people. Therefore, the State should avoid any regulations which would lead to societal disorder.

Regulations violating the freedom of religion and conscience as one of the fundamental rights and freedoms would also abrogate the Republic's fundamental characteristics.

The term "one's religion" in Article 43 of the Law on Civil Registration No. 1587 requires disclosure of one's religion and thereby violates Articles 2 and 24 of the Constitution.

Member
Selçuk TÜZÜN

Member
Mustafa BUMİN

DISSENTING OPINION

*(…)*

Yet Article 24 (3) prohibits the revealing of religious beliefs and convictions. And in accordance with the character of this freedom, it cannot be restricted pursuant to Article 13. Irrelevant of the specific reasons, when a person is forced to reveal one's "religion", this freedom ceases to exist. Even in Article 15, which regulates the suspension of the exercise of fundamental rights and freedoms, it is foreseen that in times of war, mobilisation, martial law, or a state of emergency, people shall not be compelled to reveal their "religion".

*Hence, he finds a violation of Articles 24, 15, and 13 of the Constitution.*

Member
Ahmet N. SEZER
(…)



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## 3.3 Headscarf Decision I

***Application Number:*** *1989/01* ***Decision Number:*** *1989/12*

***Date of Decision:*** *07/03/1989*

***Date of Publication and Number of the Official Gazette:*** *05/07/1989 - 20216*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by the President of the Republic Mr Kenan Evren*

***Provisions at Issue:*** *Application for annulment of Law No. 3511 amending the Law on Higher Education No. 2547 (10/12/1988)*

***Relevant Constitutional Provisions:*** *Preamble, Art. 2, 10, 24, 174 (1982 TA)*

***Voting:*** *Accepted by majority of 10:1 justices*

***Dissenting and Concurring Opinions:*** *1 DO*

***Justices:*** *President Mahmut C. CUHRUK; Vice President Yekta Güngör ÖZDEN; Members: Necdet DARICIOĞLU, Muammer TURAN, Mehmet ÇINARLI, Servet TÜZÜN, Mustafa ŞAHİN, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Erol CANSEL*[719]

The president Kenan Evren applies for the annulment of *Law No. 3511 amending the Law on Higher Education No. 2547*. The Law states that "Contemporary dress and appearance are required in classrooms, labouratories, clinics, polyclinics and corridors of institutions of higher education. Hair and neck may be covered with a headscarf or türban[720] because of religious beliefs". The President claims that the provision amounts to a violation of the Constitution on procedural and substantial grounds. The procedural complaint argues that a previous law (No. 3503) already addressed the issue of dress in institutes of higher education and was sent back to the TBMM for reconsideration. Substantially the applicant mainly complains that the provisions at issue violate the goal of raising society above the level of contemporary civilisation, the principles of the nationalism of Atatürk and the principles in the Preamble and Article 2 (Characteristics of the Republic), as well as Articles 10 (Equality before the Law), 24 (Freedom of religion and conscience) and 174 (Preservation of Reform Laws). The AYM rules all the provisions at issue unconstitutional and annuls Law No. 3511 by majority.

(…)

719 Justices Yılmaz ALİEFENDİOĞLU and Mustafa GÖNÜL did participate in drafting the preliminary examination of the case, but they were not present at the decision, both served as reserve justices in this case. They replaced, in the preliminary examination, justices Servet TÜZÜN and Muammer TURAN, who were present in the decision but not during preliminary examination. The case openend in early 1989, by that time TURAN and TÜZÜN were both presiding over the Court of Jurisdictional Disputes (between 1988 and 1990).

720 As there is no equivalent English term to describe this headdress, the Turkish word "*Türban*" is applied here.



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## IV. MERITS

After examination of the report on the substance of the issue, the application and the annexes, the law which is considered unconstitutional, the concerning constitutional norms, the relating explanatory memoranda and other legislative documents, the following is decided:

The provision at issue consists of two sentences. The first sentence introduces the requirement of contemporary dress and appearance in classrooms, labouratories, clinics, polyclinics, and corridors of institutions of higher education; thus, aiming at maintaining the areas of institutions of higher education which are being used for education and teaching as well as the corridors, which are being used to reach these areas, at a contemporary appearance and level appropriate to the seriousness and dignity of science. The attitude aimed at with the contemporaneity of the dress and appearance of faculty members, without distinction between students and academic personnel, is the reflection of the order that institutions of higher education should set an example for society. The second sentence provides for an exception to the requirement of contemporary dress and appearance by allowing the covering of neck and hair for religious reasons. The terms "requirement" and "freedom", conflicting by form and content, are adjoined; and, compared to the one that women in villages, small towns, and cities usually use rather according to circumstances and traditions "because of religious beliefs", a different manner and differently called headscarf–it is indicated that this veiling will be done with a "cloth" or "türban"–is now being allowed in institutions of higher education in order to cover neck and hair "because of religious beliefs".

The issue of this constitutional review is the provision that allows for the freedom to cover neck and hair with a cloth or türban for religious reasons in institutions of higher education. That the veiling is to be done with a religious intention is clearly indicated not only by the manner of covering neck and hair but also by openly stating "because of religious beliefs". The field of application are institutions of higher education and the provision covers persons falling within this field. This law does not regulate the clothing and covering of women in Turkey in general. Women can, except for certain professional dresses and those in governmental institutions, dress as they want according to their beliefs, traditions, and customs at home, in the streets, in private workplaces, in fields, in vineyards and gardens, and summer houses. The provision concerns the clothing–of which the use of the headscarf can be considered to be a part of–in institutions of higher education which are public institutions. The central



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issue is whether a legal disposition can be enacted according to religious rules, beliefs and requirements or not. It is not important whether the content of the provision–the provision enacted because of requirements of faith–concerns the headscarf or something else. What is important is whether a provision can be made according to a religious requirement or not.

Furthermore, taking into account the mentioned essence and content of the provision at issue, the provision also needs to be reviewed with respect to the "principles, reforms and civilisationalism of Atatürk" which the Constitution has established as among the fundamental bases of the Republic of Turkey.

Without a doubt, this regulation creates in some public institutions a relationship between religion and clothing. For this reason, the review will be made with regard to the parts of the Constitution to which the application refers.

## A. Review with Regard to the Preamble of the Constitution

> *The AYM argues that according to Article 176 of the Constitution the Preamble constitutes an integral part of the constitutional text.*
> *It discusses the abolition of sultanic rule and Caliphate during the establishment of the Republic and the introduction of civilised and modern reforms that form the basis of the Republic.*

These [Reform Laws] not only established the robust and strong structure of the laicist State, but also secured today's life as a civilised society and, as an honourable and equal member of the world family of nations, ensuring the nation's future with regard to civilisation. The important and indispensable place of the principles and reforms of Atatürk, their share in our national existence, can be summarised with the historical development. The values–which they add in every respect to the nation and the country–and their effects on the future demand respect and adherence.

> *The Court argues that the most important of the principles of Atatürk is laicism and it summarises the historical and legal developments concerning the application of this principle, as well as the legal developments concerning the regulation of dress and appearance for civil servants and in public institutions.*

Although the amendment of Article 7 (h) of the Disciplinary Regulations for Students in Institutes of Higher Education (08/01/1987) - aiming at a



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contemporary dress and appearance–abrogated Decision No. 15.527 of the Council of Higher Education (10/05/1984), which allowed female students to wear headscarves, a similar provision as is now being reviewed was again added to the Disciplinary Regulations by Decision No. 88.10.29 (03/12/1988).

All regulations show the importance and particularity of the issue with respect to the laicism principle. Clothing, a societal fact primarily based on social, cultural and aesthetic reasons, is shaped by environmental conditions, individual views, culture and traditions. Thus, changes and developments of clothing are also based on these reasons. Except for these reasons legal dispositions enacted by directly establishing a link and relation with religious beliefs or religious rules concern the Reform Laws as well as the laicism principle.

> *The AYM explains that the following part will only discuss the laicism principle as the Reform Laws will be considered separately under Article 174.*

Laicism is a civilised lifestyle, which, by destroying medieval dogmatism, forms the basis of the concept of freedom and democracy, nation-state building, independence, national sovereignty, and the ideal of humanity which developed with the supremacy of reason and enlightenment of science. Modern science was born out of and developed with the downfall of the scholastic way of thinking. Even if laicism is defined in a limited sense as the separation of the affairs of State and religion, if it is defined and interpreted in various ways, in reality, the doctrine also shares the view that it is the last stage of the intellectual and organisational evolution of societies. Laicism is a societal progress based on sovereignty, democracy, freedom and knowledge accumulation. It is the modern regulator of political, social and cultural life. It is the principle that provides opportunities for individuality and free thought to individuals by holding their honour as superior, and thus, by requiring the separation of politics and conscience, it secures the freedom of conscience and religion. In societies based on religion, where religious thoughts and considerations are binding, political organisations and arrangements are of a religious character. In a laicist order religion will be saved from politicisation, will no longer be an instrument of government and will be, by keeping it at its true, respectable place, left to the individuals' conscience. Thus, science and law will be the basis of political life. The most appropriate set up for religion's sanctity is the separation of the areas of thought and belief. One of the



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bases of western democracies is the principle of conducting worldly affairs by law and religious affairs with its own rules.

> *Furthermore, the Court elabourates on the laicism principle, and it states that laws neither have to conform to religious principles nor have their source therein. The separation of religion and worldly affairs protects the freedom of religion and belief.*

The implementation of the laicism principle in Turkey differs from the implementation of laicism in some Western countries with different regimes. It is natural that the laicism principle is inspired by the conditions of each country and the particularities of each religion, and that the consistencies and inconsistencies between these conditions and particularities reverberate on the concept of laicism and thus result in different characteristics and implementation practices. Generally speaking, notwithstanding the definition as separation of state and religious affairs, the different properties of Islam and Christianity resulted in different situations and outcomes in our country and in Western countries. It cannot be expected that in a country where religion and the concept of religion are completely different the implementation of laicism should be the same as in Western countries, that laicism should have the same meaning and is assimilated to the same extent, despite having extensive relations with the West. This situation is the result of considering the differences between conditions and rules as normal. Moreover, even among Western countries, which adopted the same religion, there are differences in the understandings of laicism. Just as the concept of laicism is interpreted differently in different countries, it has been, at various times, interpreted in different ways by various sectors according to their own understanding and political preferences. Laicism, which is more than a purely philosophical and ideological concept and implemented by laws, has become a legal institution, is being influenced by the religious, social and political conditions of the country where it is being implemented and influences them in turn. In Turkey the concept of laicism has a particular importance because of its historical development, and, although it is handled differently than in the West because of its structure adopted in the Constitution, it is being kept alive as a principle which must be protected carefully. In its decisions No. 53/76 (21/10/1971), No. 19/48 (03/07/1980), No. 2/2 (25/10/1983) and No. 11/26[721](04/11/1986) the Constitutional Court, has next to its legal, social

721 Contrary to the usual way of self-citation, here the AYM refers to previous rulings by indicating only parts of the official numeration.



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and political definitions, extensively specified the national and legal value of laicism, emphasised its character as a constitutional principle in need of careful protection, and again put forth that, in terms of the elevation of the Turkish Nation, laicism serves as a justification for various restrictions provided for in the Constitution and is an idea that dominates all basic principles adopted in the Constitution.

> *The AYM argues that the judgements delivered under the 1961 Constitution are valid because Article 174 of the 1982 Constitution is the same as Article 153 of the 1961 Constitution. According to these decisions religion should not govern state affairs, freedom of belief should be constitutionally protected without distinction, limitations are justified for the protection of public order, security and benefit, its abuse can be prohibited, and the State has a right of supervision in order to protect rights and public order.*
> *The Justices furthermore argue that the modern, laicist State allows for religious organisation and does not discriminate among beliefs. Everybody can exercise their freedom of religion within the recognised limits and the legislator cannot impose any religion in a laicist society.*

The laicism principle, which accelerated modernisation and constitutes the source of the Turkish Revolution, aims at keeping society away from irrational and unscientific ideas and opinions. Thus, the State has been institutionalised and regulated by law according to scientific requirements; and laicism, which contributes to mutual respect, tolerance and understanding, has ensured national unity. Freedom of thought and belief – which bind individuals and sectors of society to each other with trust, secure nation-state building, and also strengthen national solidarity, free thought and free belief – is an important step in the national life oriented towards contemporary civilisation. Laicism, with its respect for mankind and religion, and its conception of the proper place for religion, has opened the door for reason, science, art, a contemporary manner of government and all civilised needs. If we remember Atatürk's words, it is clear that laicism is not against religion, does not denigrate it, is not hostile towards it and does certainly not reject it. The Republic and democracy are against sharia law. Generally speaking, this principle [i.e. laicism], which provides a world-view, a way of thinking and understanding, was the driving force behind the move from the "ummah" to the "nation".

Thus, rationalist and human values replaced dogmatic values and religious feelings, being confined to their owner's conscience, became untouchable. Believers of different religions and religious sects, espousing against these differences the necessity to live together, felt assured by the



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State's equal treatment of all. As a result, splitting ended, internal peace was secured and citizens with national consciousness became individuals of the Turkish Nation establishing the Republic of Turkey. The State under the rule of law, the principle of the supremacy of law, took its force from laicism, the nationality principle was completed with laicism; the Turkish Revolution became meaningful with laicism. It is also impossible to remove this principle from the Constitution. Laicism has separated religiosity and scientificness, and in particular by preventing that religion replaces science it accelerated the march of civilisation. In fact, laicism cannot be reduced to the separation of religious and state affairs. It is larger and wider, an environment of civilisation, freedom and modernity. It is Turkey's philosophy of modernisation, mode of humane living, and ideal of humanity. Religion, which is a distinctive social institution in the laicist order, cannot control State facilities and administration. The state-controlling and effective powers are not religious rules and requirements but reason and science. Religion is an act of faith between God and man, with its own realm and place within consciousness. It is inconceivable that religion, which is the organiser of a person's world of inner belief, should have a word in state affairs and substitute contemporary values and law as the source and basis of legal regulations.

Laicism, which abolished the dualism of law, derogations and inequalities, prevented religious exploitation, strengthened political and social institutions, and has also enlightened teaching and education. Laicist teaching and education is the best environment for scientific studies. Just as neutrality towards religion cannot be considered as hostility against it, laicist teaching and education cannot be considered to constitute an obstacle to freedom of belief. The conditions of obligatoriness of teaching and education do not remove freedom of belief. This freedom has also been secured constitutionally. However, religious and moral teaching and education is realised under the oversight and supervision of the State.

> *The AYM further explains that the oversight and supervisory powers of the State concerning religion cannot be considered to constitute a limitation of freedom contrary to the needs of a democratic society. Furthermore, the Court repeats arguments on laicism as founding philosophy, the separation of religious and worldly affairs and the need to base law on scientific knowledge.*

The "system of contemporary education and teaching principles" provided for in Article 130 of the Constitution cannot be an environment ignoring the laicism principle. It is inconceivable that the contributions of this arti-



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cle–which also provides that activities directed against the existence and independence of the State and against the integrity and indivisibility of the nation and the country are prohibited–to nationalism, independence and national unity should exempt laicism. Those who participate in scientific studies, which are being directed by mind and observation, should be educated without being confronted with influences other than scientific requirements. Education is ensured by being delivered only according to scientific demands and by keeping it away from dogmas and influences contrary to science.

The provision at issue, while regulating the dress of women in institutions of higher education, which are public institutions, violates the laicism principle by admitting the use of the headscarf for religious reasons, whatever its accordance with religious requirements may be, and by founding a public law provision on religious bases. In a laicist State freed of religious rules, based on reason and science and leaving religious beliefs to the conscience of the individual, the legal order cannot be achieved and maintained with religious requirements. The laicist State only takes measures to ensure and protect the freedom of religion and conscience of its citizens and guarantees the concerned rights and freedoms. Religious education is also conducted according to the laicist State concept. As in all State institutions and proceedings the laicism principle is also applied meticulously at each level of teaching and education. The Law on the Unification of the Educational System is proof of this requirement. Those who participate in the work of universities, which are obliged to conduct their work in accordance with the laicism principle, should not, regardless of their status, be formed according to religious requirements.

> *The AYM states that the unconstitutionality of the provision at issue is obvious. Referring to Article 42 (3, 4) of the Constitution it states that training and education are equally bound by the provisions of the Preamble. This includes institutions of higher education. Any visible separation according to religious beliefs would pave the way for conflict.*

The importance of laicism for Turkey, also with regard to its historical evolution, has been emphasised with Article 136 of the Constitution on the "Presidency of Religious Affairs". The content of this article–which provides that this presidency will fulfil its functions in accordance with the principles of laicism, removed from all political views and ideas, and aiming at national solidarity and integrity–in some way also determines the characteristics of the environment of institutions of higher education.



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*Furthermore, the Court defends the importance of the laicism principle in teaching and education with regard to the future of the nation and arguing that it constitutes a guarantee of democracy and a distinctive quality of the Republic, and therefore has to be carefully protected. The wearing of headscarves in institutions of higher education is irreconcilable with their laicist scientific environment.*

Laicism, as the essence of the Turkish Reform and the Republic and the foundation of national life, is a reality. Even if the words "because of religious beliefs" are not used, attempts at regulation with religious sources, which have this aim and meaning and targeted at the characteristics of the Republic, are unconstitutional. Freedoms are limited by the Constitution. Actions against the laicism principle and the provision on laicist education established in the Constitution cannot be considered to constitute a democratic right. The laicism principle, which enjoys constitutional immunity, does not violate democracy and all rights and freedoms have to be assessed on the basis of this principle.

For these reasons, the provision at issue violates the Preamble of the Constitution.

## B. Review with Regard to Article 2 of the Constitution

Article 2 of the Constitution, stipulating among other things the characteristics of the Republic, makes a reference to the values included in the Preamble, and mentions also that the Turkish Republic is a democratic, laicist and social State governed by the rule of law and loyal to the nationalism of Atatürk.

Thus;

1. Atatürk´s nationalism, which marches as appropriate for and in accordance with civilised nations on the path of development and progress and in international proceedings and relations, is that form of Turkish nationalism–the protection of the special capacities of the Turkish society and its independent identity–which covers everybody who is happy to be a Turk. As Atatürk mentioned in his speech of 05/11/1925, Turkish nationalism substituted the bond of religion and religious sect[722]. According to this

722 This could also be translated as "school of thought" but the official translation of the Constitution (e.g. Art. 10) translates the term as sect. In order to guarantee a certain degree of consistency the term will always be translated as sect.



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definition, among the elements that constitute the nation are a common language, national feeling and feelings of kindness, unity in political existence, a common fatherland, common roots, and historical and ethical closeness. (…) Religion does not form the basis of the nationalism of Atatürk; the result is unification not through religion but nationalism and national values. Laicism also includes the reciprocal behaviour of State and society. This leads to integration. The integration lies not in religion, but in the nationalism of Atatürk, in the bond of the nation and national values. Thus, by admitting a religiously justified requirement, the law at issue violates the principle of the nationalism of Atatürk.

2. The provision at issue violates the democracy principle because of the phrase "because of religious beliefs". National sovereignty is the basis of the democratic structure. The democratic order is the opposite of the sharia, which accepts religious rules as sovereign. A political system which emphasises religion cannot be democratic, only the laicist State can be democratic. Otherwise democracy would not be liberal, pluralistic, and tolerant.

3. (…)

4. The characteristics of the social State under the rule of law can, as specified in previous judgements of the Constitutional Court, be summarised as the consideration of the benefits for society, the protection of the weak, lawful laws and proceedings and acts open to constitutional review.

Law is the regulator of political power, which is represented and employed, because of sovereignty, by the State. In fact, the principal condition of validity for all proceedings and actions of the State, which is in fact a legal institution, is their lawfulness. All regulations in a State are only made in accordance with legal rules. Rules on the grounds of religion have not the quality of legal regulations. The source of religious rules is God. "The divine will" is the major source of religious rules. But the only source of law is the nation's will, not religious rules. As religion is not a value that has its source in the nation, it cannot be a legal source in an order that is based on the national will. (…) The transformation of sovereignty, which at its core is a human value, through legal structuring into state power explains the civilised structure of the State under the rule of law. Problems that affect this structure would make the State under the rule of law principle a contested issue. Laws cannot be founded on and be bound to religion. If rulings do not take their principles from life and law but from religion, then the State under the rule of law principle would be violated. As they do not espouse the freedom of conscience, laws based on



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religion would trigger the need for separate laws for each religion; such a regulation is impossible in a national State. Just as such regulations could be considered to constitute an instrument of pressure on those who do not espouse the religious rules they could be an instrument of separation for different religions. In order to develop and progress, it is necessary to accept the supremacy of reason and science, and to adjust not to stagnant religious rules but to humanity.

> *The AYM repeats the argumentation on separation of worldly and religious affairs and on the fact that law and not religion is the basis of the political order. It is argued that the provision at issue violates the State under the rule of law principle; and moreover, that sovereignty belongs to the nation and not to religion. This train of thought is concluded by stating that the Republic cannot be influenced by religious phenomena. In addition, the Court refers to the Constitution and argues that it establishes limits which also apply to the principles of democracy and human rights. This means that democracy does not provide unlimited opportunities for doing whatever one wants to do.*

For these reasons, the provision at issue has been found to violate Article 2 of the Constitution.

## C. Review with Regard to Article 10 of the Constitution

The equality concept of Article 10 of the Constitution provides for equality before the law, that is to say legal equality. This provision prevents the violation of the equality before the law principle through conferring more and wider rights and powers to some people or communities compared to other citizens in the same situation. The intended aim is to make sure that individuals in the same situation are subject to the same legal rules and to prevent discrimination among citizens based on language, race, colour, sex, political thought, philosophical convictions, religion, religious sect or similar reasons. However, different legal rules for people in different situations do not constitute a violation of the equality principle.

> *The Court states that everybody is free to disclose their belief and that the laicist State treats everybody equal. However, the provision at issue privileges the headscarf and therefore formally violates the equality principle. Allowing other religions' veilings would not nullify this violation. This is because it would create differences.*



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For these reasons, the provision at issue violates Article 10 of the Constitution.

D. Review with Regard to Article 24 of the Constitution

By allowing the use of headscarf or turban as symbol of religious beliefs in institutions of higher education, the article under review has the potential to cause cleavages among those studying or pursuing their scientific research in these institutions; in particular among young people, to emphasise difference according to social views, beliefs, religion, and religious sect may result in the destruction of the unity of the State and nation, public order and security. This would allow religion to go beyond the spiritual realm and cause behaviour which affects societal life; the constitutional barriers to the freedom of religion would be lifted.

Freedom of conscience is embedded in moral values which also include the requirements of religious life. Laicism requires the respect of everybody's freedom of conscience, religious belief and conviction. Naturally beliefs differ and in democracies this is confirmed by freedom of thought and belief; these two kinds of freedoms complement, strengthen and secure each other. Civilisation requires that people live together whatever their religious beliefs may be. It would be a violation of constitutional principles to render freedom of conscience unavailable and impracticable with some symbols. While no one can interfere with the choice of religion and religious service, the differences created with religious symbols could entail the danger that society would be deprived of these rights. As the source of every right is man, it is impossible to reconcile freedom of conscience and religion with acts that would destroy the level reached by mankind–who in previous ages worshipped and was afraid of what those who ruled did–through believing in a religion that they accepted by reflection and choose freely. It is contrary to the requirements of our time to justify clothing, headscarf and türban in institutions of higher education with religious beliefs. Everybody can dress as they want according to the requirements of our time, the day, environment, conditions and situation. Obligation and a certain manner of the use of the headscarf, which promotes religion as an anachronistic and outdated institution, conflict with freedom of conscience and religion. Respect for social and religious values and traditions is one thing, but to base the law allowing headscarves on religious beliefs is another. It is a distortion of religious freedom to bind, in institutions of higher education, faithful practices guided by society's



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morals and traditions to religious requirements. The freedom to dress in a certain way creates differences between people of the same religious belief and of different beliefs. Freedom of conscience is the right to believe whatever one wants to believe. Freedom of dress cannot be defended by mixing laicism with the freedom of conscience. Just as the issue of dress is limited by the Turkish Revolution and the Principles of Atatürk, it is also not an issue of freedom of conscience. It is a violation of the freedom of religion to introduce rules, which, like legal rules, have the character of an objective sanction, into the religious realm; a realm which does not accept coercion.

> *The AYM rules that the provision, which allows religiously justified veiling, regulates according to religious rules an area that is subject to the regulatory power of public law. This constitutes an encroachment on the State order which has been freed from religious rules, in other words, an encroachment of religion on the political sphere.*

For these reasons, the provision at issue violates Article 24 of the Constitution.

## E. Review with Regard to Article 174 of the Constitution

> *The Court develops that the Reform Laws aim at the protection of the laicism principle in Turkey, which is the supreme principle of the Constitution. The Reform Laws cannot be interpreted contrary to the laicism principle, nor can it be alleged that they violate the rights and freedoms established in the Constitution. They continue: The Reform Laws, by regulating subjects connected to laicism, have established the contemporary structure of the country and will make the country last eternally. Citing from and discussing the Law on the Prohibition of the Wearing of Certain Garments of 1934, the AYM claims that the aim of the law is to prevent any situation that could offend national unity and feelings. Thus, any law that allows for religiously justified veiling openly violates the law of 1934. Furthermore, it is impossible to reconcile democracy, which rejects any kind of pressure, with practices of religious pressure. In a laicist State the fact that the majority belongs to a certain religion does not justify provisions based on religious requirements.*
>
> *The Court defines religion as a source of respect and love which does not need any obvious indicators. Religion does not have to be against laicism; tolerance is possible and there are many historical examples for*



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*it. Furthermore, Islam denounces extremism, bigotry and coercion, requires convenience and moderation and necessitates abstention from irrational and ahistorical interpretations and assessments. Referring again to the laicist education system, which was established by the Law on the Unification of the Educational System, the AYM emphasizes that this law aims at educating unprejudiced, liberal, inquiring people who respect national values, are against bigotry, and have modern views.*

Headscarves and the particular style of dress accompanying them have no contemporary appearance and, more than being a privilege, are an instrument of differentiation. Furthermore, it will be unavoidable that the regulation is used to pretend that women who studied or are studying without wearing a headscarf, are atheist or against religion. That this anachronistic appearance is becoming more and more prevalent can also cause disadvantages for the Republic, the Reform and the laicism principle. To use democracy for actions against laicism constitutes an abuse of freedom of religion. Divisiveness and behaviour which, by being based on wrong interpretations and assessments of religion's unifying, tolerant aims, cause an alienation from religion are also irreconcilable with religious respect. The Constitution, which gives the Turkish Revolution a central place – and within this structure the laicism principle has particular importance and priority –, is aimed at the careful protection of the laicism principle against freedoms and does not allow the giving of preference to freedoms over this principle. Thus, the provision at issue, which ignores the laicism principle and the purpose, aims, and content of the Reform Laws protected in Article 174 and establishes a religiously justified regulation, also violates Article 174 of the Constitution.

For these reasons the provision at issue shall be annulled. Mehmet ÇINARLI did not agree with this opinion.

(…)

## DISSENTING OPINION

(…)

The grounds for annulment are not relative to the obligation of "having the contemporary apparel and appearance" declared in the first sentence of the additional article but to the liberty of "covering head and shoulder with headscarf or hijab due to religious beliefs" from the second sentence.

In order to decide whether or not a constitutional provision is contrary to the Preambleof the Constitution, it is necessary to consider the



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Preamble in its entirety and not only in pieces, which means to focus only on a phrase or one or two sentences. Moreover, it is precisely essential to consider the fundamental principles of the Constitution other than those in the Preamble.

(…)

Article 2 of the Constitution of the Republic of Turkey states, the Turkish State is "respecting human rights". In addition the principles established in Article 5, regarding fundamental aims and duties of the State, are counted among the fundamental aims and duties of the State: "to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social State governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence".

It is once again stated in Article 12 that "Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable." Individual rights and freedoms form the basis of all these articles. Free enjoyment of these rights is the rule and limitation the exception.

Article 13 provides why and how a restriction may be applied. In this article, the statement is as follows: "Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

This article does not provide any grounds for the prohibition of covering head and shoulders with scarf or hijab for religious reasons, nor do any of other constitutional provisions compel the legislator to enact such a prohibition. Furthermore, the provision leaves a scope of discretion to the legislator as understood from the statement "*may be restricted*". Consequently, in case such grounds are present the legislator may limit the use of fundamental rights and freedoms in accordance with "the letter and spirit of the Constitution".

(…)

"Freedom of religion and conscience" requires also to allow veiling, that is, to cover head and shoulders for religiously justified reasons. To grant a right to "veiling" to students is not contrary to the Constitution, but to despise and make students apprehensive and prevent them from taking part in exams or courses is. This is so because the Constitution indicates



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that "no one shall ... be blamed or accused because of their religious beliefs and convictions."

(…) It is not possible to connect veiling for religious beliefs with the prohibition clause of Article 14 of the Constitution, which regulates the abuse of fundamental rights and freedoms. For this reason, it is as well impossible to consider the decision of the legislator, which aims at liberation instead of prohibition, as contrary to the Constitution.

(…)

As is understood from his speeches, Atatürk himself recognised the religious justification for veiling; butin a simple way, which should not be taken to the extent that could lead to the isolation of women from life, wealth, social, economic and academic living and cooperation with men in order to earn a living.

Evaluating Atatürk's actions apparently reveals that he did not make any regulation and any prohibition concerning women's apparel. He did not even make his own wife take off her headscarf.

It would thus be wrong to argue that liberating the use of headscarf or hijab violates Atatürk's principles, reforms, and his civilisationism.

When secularism is concerned: it is pronounced in the Preamble of the Constitution that "…sacred religious feelings shall absolutely not be involved in State affairs and politics as required by the principle of secularism"; and in the last paragraph of Article 24 "No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets."

Covering neck and hair with a headscarf or hijab as a requirement of freedom of religion and conscience cannot be correlated to the separation of religious and state affairs. It is not an issue of the State, but of the individual. The State has no right to interfere in this decision unless exigencies are present. Likewise, it cannot be argued that with the provision at issue, which provides for the liberty to use a headscarf or hijab, the fundamental order of the State will be based on religious rules. Veiling or unveiling does not relate to the order of the State but a person´s appreciation and belief. Providing liberty to an individual with the mentioned decision in this case does not violate the laicism principle of the Constitution.

(…)

Considering the fact that the provision at issue only applies to female Muslim students, for they are the only ones who are required to cover their necks and hair for their religious belief, there is no contradiction to



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the principle of equality. There is not such a problem for male student whereas female students from other religious backgrounds are not seen wearing any special clothes for religious concerns. Only those Muslim students who cover their hair and necks are caused problems, only they are expelled from exams and classrooms. The legislator's decision of taking measure only for these students is therefore based on justifiable grounds, and that does not violate the principle of equality.

Furthermore, the freedom provided by law is codified for all Muslim students, not only for a minority as asserted in the application. In fact, impeding veiling to people who use them for enjoyment, not for religious beliefs, is not a question. Students using headscarf or hijab cannot be examined and discriminated on religious grounds. Everyone is free to cover or uncover their necks and hair.

On the other hand, in the text of the article at issue, the obligation to have a contemporary apparel and appearance in higher educational institutions and the liberty to cover necks and hair with headscarf or hijab for religious beliefs are mentioned with no distinction for faculty members and students. It cannot therefore be asserted that the provision of the mentioned article provides liberty to students but prohibition to faculty members, thus it is contrary to the principle of equality of the Constitution.

Besides, even if the article would make a distinction between faculty members and students; since those two groups are subject to different status, bringing in different verdicts for them would not still be contrary to the principle of equality of the Constitution.

(…)

For all reasons explained above, as I do not agree that the provision stating "it is abeyant to cover head and shoulder with headscarf or hijab due to religious beliefs" is contrary to the Constitution, I do not agree the majority verdict for the cancellation of Additional Article 16.

Member

Mehmet ÇINARLI



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## 3.4 Headscarf Decision II

***Application Number:*** *2008/16* ***Decision Number:*** *2008/116*

***Date of Decision:*** *05/06/2008*

***Date of Publication and Number of the Official Gazette:*** *22/10/2008 - 27032*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initated by members of the TBMM Mr Hakkı Süha Okay (deputy chairman of the CHP parliamentary group), Mr Kemal Anadol (deputy chairman of the CHP parliamentary group) and 110 other members of the TBMM*

***Provisions at Issue:*** *Art. 1 and 2 of Law No. 5735 (09/02/2008) amending Art. 10 (4) and 42 (adding after para. 6 a 7th paragraph) of the Constitution*

***Relevant Constitutional Provisions:*** *Preamble and Art. 1, 2, 3, 4, 6, 7, 8, 9, 24, 42, 138, 148, 153 and 174 (1982 TA)*

***International Treaties/References:*** *Leyla Şahin Case, Dahlab-Switzerland Case and Refah Partisi Case of the ECtHR*

***Voting:*** *Accepted by majority of 9:2 justices*

***Dissenting and Concurring Opinions:*** *2 DO*

***Justices:*** *President Haşim KILIÇ; Vice President Osman Alifeyyaz PAKSÜT; Members: Sacit ADALI, Fulya KANTARCIOĞLU, Ahmet AKYALÇIN, Mehmet ERTEN, A. Necmi ÖZLER, Serdar ÖZGÜLDÜR, Şevket APALAK, Serruh KALELİ, Zehra Ayla PERKTAŞ*

The CHP deputies challenge two constitutional amendments which AKP and MHP had passed in February 2008. Article 10 of the Constitution (Equality before the law) was amended to extend the principle of equality before the law to the provision of all public services; Article 42 (Right and duty of education) was amended to provide that deprivations of the right to higher education must be based in explicit provisions written in law. The changes were undertaken in order to provide an indirect constitutional basis to lift the headscarf ban by disallowing discrimination in institutions of higher education on the basis of dress. The CHP deputies claim that the amendments had the effect of changing the characteristic of "public peace and justice" in Article 2, obstructing the freedom of religion of others, violating the principle of laicism and Atatürk´s reforms and threatening pluralism and tolerance. In a first step, the AYM justifies its competence to substantially review the constitutional amendments. It argues that already the amendment propsals violated the constitution as they touched upon constitutional issues (i.e. the laicism principle stipulated in Article 2) which are unamendable according to Article 4 of the Constitution. Concerning the substance of the constitutional amendments, the Court once more develops on the principle of laicism and states that Article 1 and 2 of the proposed amendment law violate it. The AYM further declares a stay of execution of the law until the publication of the annulment decision [723] in the Official Gazette.

723 As a result of the annulment of Article 1 and 2 of Law No. 5735, Article 3, which concerns the coming into force, has also lost its applicability and is therefore annulled.



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(…)

## IV. EXAMINATION OF PROCEDURAL CONFORMITY

After having read and analysed the application and its annexes, the related report, the provisions at issue, the relevant constitutional provisions upon which the application is founded and arguments of the explanatory memoranda, and other legislative documents, the following has been ruled:

### A- Legislative process

The legislative process of Law No. 5735 Concerning the Amendment of Some Articles of the Constitution started with a written legislative proposal by Mr Recep Tayip Erdoğan, Member of Parliament for Istanbul, Mr Devlet Bahçeli, Member of Parliament for Osmaniye, and 346 other Members of Parliament. It was understood from the legislative documents that 57 further Members of Parliament joined the proposal after it had been submitted to the Presidency of the TBMM; but before it was discussed by the Constitutional Committee. Thus, the submitting majority amounts to 407 Members of Parliament.

The proposal which was accepted by the Constitutional Committee was submitted to the Parliament's plenary session on 01/02/2008.

After the plenary discussions on 06/02/2008 and 09/02/2008 the law was adopted with 411 votes. It came into force with its publication in the Official Gazette No. 26796 on 23/02/2008.

### B- Issue of Unconstitutionality

In the complaint it is alleged,

- that the contested norms have the effect of changing the characteristic "public peace and justice" as stipulated in Article 2 of the Constitution because it introduces an unlimited and unconditional freedom of dress which would lead to a religiously accentuated disintegration and polarisation between veiled and unveiled, believers and non-believers, Muslims and non-Muslims, which would threaten public order and peace,
- that—as the freedom of religion and conscience also includes the obligation to obstruct, by pressure or force, the influence of other religions



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on others—the religiously justified veiling, the freedom to wear dress exhibiting one's religion, would lead to the disintegration of society and to behaviour that puts pressure on others and harms and obstructs the freedom of religion of others, thus changing the principle of "a State respecting human rights" as the Constitutional Court had stated in its 1989 decision on the headscarf,

- that, as in the aforementioned decision, the Constitutional Court had ruled in relying on the Nationalism of Atatürk that the regulation allowing for a religiously justified covering of the head, the amendment which could lead to religiously accentuated polarisation and would provide for opportunities of disintegration instead of unification through clothes, would have the effect of changing the "loyal to the nationalism of Atatürk" characteristic stipulated in Article 2 of the Constitution,

- that—as laicism, by virtue of being defined in decisions of the Constitutional Court is a principle in need of being carefully protected, therefore making some limitations in the Constitution necessary in terms of the elevation of the Turkish nation, and is a consideration dominating all basic principles of the Constitution—the contested norm violates the principle of laicism, the preamble and Article 174 of the Constitution. With regard to court decisions it does not even contain the wording "religiously justified", it covers religiously justified dress; the contested norm also has the effect of changing the characteristic of the notion "based on the fundamental tenets set forth in the Preamble",

- that the contested norms pave the way for religious dress spreading in time to primary and secondary educational institutions, that this situation which is incompatible with the aims of Law No. 2596 is not in compliance with the loyalty to the principles and reforms of Atatürk and the "determination to reach the level of contemporary civilisation"; that the contested norms violate the principle of "strict separation of sacred religious sentiments from affairs of State and politics as required by the principle of laicism"; that they are unsuited for a person's appropriate enjoyment of the freedom of religion and conscience and development of their material and spiritual assets; that they are found to be interfering with the judiciary and thus violate the principle of separation of powers because they aim at abrogating the legal situation resulting from the Constitutional Courts' decision; and, as the legislative and executive powers have to comply with judicial and the Constitutional Courts' decisions, the contested norms violate Articles 138 and 153, that the contested norms threaten pluralism and tolerance, which are the most basic features of a contemporary civilisation, because the religiously justified veiling covered by the freedom of dress



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provides, through dress which has the character of religious symbolism, an opportunity for controlling and pressuring people with different beliefs. Thus, to allow for the possibility to abolish the freedom of others has the effect of changing the characteristic of a democratic and laicist State governed by the rule of law,

- that the first four articles of the Constitution, as well as Articles 138 and 153, limit the TBMM's prerogatives by prohibiting the transformation of the provisions contained in the first three articles through an amendment of any of the other articles; and to accept the contrary would mean "fraud against the Constitution"; that it is impossible to influence and change any of the existing articles of the Constitution or establish a new constitutional provision through a change violating the fundamental principles contained in the first three articles and that they would have to be declared null and void because of a "clear and grave abuse of powers", that, considering that the Constitutional Court also has jurisdiction to examine the "proposal majority", and considering that the norms have the effect of indirectly amending the first four articles despite the prohibition to propose their amendment, it is possible to annul the contested norms for failure to fulfil the required proposal majority.

The Court is being asked to declare the amendments null and void for the reason that they amend the unamendable provisions, or alternatively to declare that because of the "prohibition of proposal" the proposal majority requirement was not fulfilled, and consequently to annul the amendments on the grounds of Article 148 (2).

1- Examination of the request to declare null and void

Nullity means that a norm does not exist. In terms of laws, as long as the necessary conditions for the existence of a norm such as the Parliament's will, the will of the President of the Republic to publish or the publication in the Official Gazette are not present, it is impossible to speak of "existence". However, all other invalidities, as long as being held subject to review, can be the subject of constitutional review.

According to Article 175 of the Constitution, TBMM has the power to amend the Constitution and the Assembly uses this power through a written proposal supported by one third of the members and adopted by three fifths of the members.

Law No. 5735 "Concerning the Amendment of Some Articles of the Constitution", which was submitted with the support of more than one



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third of the members of TBMM and came into force after being adopted at the TBMM's plenary session on 09/02/2008, falls within the TBMM's prerogative to amend the Constitution. The contested law came into force on 23/02/2008 upon the publication by the President of the Republic in the Official Gazette.

For these reasons the request to declare the law at issue null and void is to be rejected.

2 - Examination of the annulment request

a) Possibility of proposal

Article 175 of the Constitution provides that TBMM has the power to amend the Constitution through a written proposal supported by one third of the members and adopted by three fifth of the members.

In order to determine the character and limits of the amendment prerogative it is necessary to consider in detail the legal position of the legislative organ vis-à-vis the constituent power.

To establish or amend a Constitution—which forms the basis of a State's legal architecture, establishes the constitutional organs that will use authority in the name of the nation, determines the limits of the prerogatives and relations among the organs, and determines the rights and freedoms—is a function of the primary and derived constituent power. In a country's political regime, the primary constituent power is the constitution-making will that determines the fundamental principles of the new legal order and arises based on various factors and grows out of interruptions and, because of its mode of appearance, has an extra-legal character. In participatory, negotiating and consensus-based democratic countries the primary constituent power belongs to the people.

From the moment of its coming into force the new Constitution, established by the primary constituent power not bound to previous Constitutions, becomes the source of legitimacy for all institutions and organisations. A pre-condition for the legal validity of any proceedings or actions of the organs and their sub-units—provided for by the Constitution and defined by the doctrine as legislative, executive and juridical—is that they remain within the limits of the "legal authority" established by the primary constituent power. This has been accepted without any exception with the statement "[n]o person or agency shall exercise any State authority which does not emanate from the Constitution", as set



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forth in Article 6 of the Constitution. As the constitution maker speaks of "no person or agency", it is clear that if the legislative organ, as an established institution, uses powers that falls outside the established limits, such use of power will be legally invalid.

Under the 1961 Constitution, where the unamendable provision was limited to the republican form of the State under Article 1, the Constitutional Court had ruled in its decisions E. 1970/01, K. 1970/31 (16/06/1970), E.1971/41, K. 1971/37 (13/04/1971), E. 1973/19, K. 1975/87 (15/04/1975), E. 1975/167, K. 1976/19 (23/03/1976), E. 1976/38, K. 1976/46 (12/10/1976), E. 1976/43, K. 1977/4 (27/01/1977) and finally E. 1977/82, K. 1977/117 (27/09/1977) that binding the constitutional regime to new principles that violate the supremacy of law and the requirements of a contemporary civilisation, would damage the integrity of this regime; that amendments having the effect of amending the provision of Article 1 stating that "the State of Turkey is a Republic" and complementing this with Article 2, which specifies the fundamental characteristics of the Republic, are prohibited because otherwise the new order would not function as defined in the previous Constitution; that in order to prevent such consequences contemporary Constitutions have chosen to provide for legal rules and institutions protecting them against such amendments; and accordingly, above all, proposals for constitutional amendments cannot foresee even the smallest deviation from or change of the Preamble and the principles set forth in Articles 1 and 2 of the Constitution; that in case amendments aim at all or any of the mentioned principles they cannot be proposed and the legislative assemblies cannot adopt them, and that if they are proposed and adopted they would violate the procedural conditions specified in Article 9 of the Constitution.

According to Article 175 of the Constitution, the right to amend the Constitution is conferred on the TBMM. Without doubt, this prerogative, which has its source in the Constitution, has to be used according to the procedures established by the Constitution and in compliance with the Constitution. It is clear that, when the legislative organ uses this prerogative according to the procedures established by Article 175, the prerogative needs to be a power allowed by the primary constituent power.

Article 4, which reads *"[t]he provision of Article 1 of the Constitution regarding the form of the State being a Republic, the characteristic of the Republic in in Article 2, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed"* clearly defines the subject areas in which the prerogative specified in Article 175 cannot be used and if used will be legally invalid.



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Just as a constitutional amendment that does not fulfil the proposal and voting majorities required by Article 148 will be legally invalid, an amendment proposal aimed at amending an unamendable constitutional provision falls outside the prerogatives of the legislative organ, and, as such, the legislative activity can also not be considered to have any legal validity.

Constitutional amendments have to comply with the above-mentioned fundamental choice which arises from the unity of the constitutional norms and which is concretised in the first three articles of the Constitution. Within this framework it is necessary to examine the competence norm of Article 175 together with Article 4, which defines the limits of this competence, and Article 148, which foresees the competence to define legal sanctions for the use of competences falling outside the defined limits.

For the use of the amendment prerogative of Article 175 of the Constitution to be legally valid and effective, it must not relate to the provisions, for which according to Article 4 no amendments can be proposed, it must comply with the requisite proposal and voting majorities and it must not violate the prohibition on debates under expedited procedure. That a constitutional amendment that cannot be proposed has fulfilled the proposal majority required by Article 148 (2) cannot provide the grounds for giving effectiveness to a legally invalid legislative disposal passed only because of the power of numerical majority. The validity of acts and actions of the legislative organ, which is an established power, depends on the compliance with the constitutional limits foreseen by the primary constituent power.

In light of the above-mentioned considerations the provision of Article 148, which states that the formal verification procedure for constitutional amendments is limited to matters concerning the *"proposal requirement"*, also includes verification of whether the requirement of a "valid proposal" was fulfilled or not.

The constitutional regime foreseen by our current Constitution is a constitutional regime which arises from the entirety of the constitutional norms and the first three articles, which concretise this entirety. The fundamental choice of the primary constituent power concerning the political regime appears in the first three articles of the Constitution while their concrete reverberations appear in the remaining articles. As the guarantor of the first three articles, Article 4 is also unamendable, as a matter of course. Thus, it is possible that the amendment of any article, including Article 4, can pave the way for changes of the political regime and trans-



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formations of the constitutional regime established by the primary constituent power. Therefore, the possibility that amendments to other articles of the Constitution could exceed the limits established by Article 4 for the legislative organ cannot be ignored.

Consequently—as it is impossible that any legislative proposal with amendments that provides for changes of the first three articles of the Constitution or amendments to any of the other articles of the Constitution, which directly or indirectly lead to the same result, can have any legal validity—, it does not constitute an obstacle to the [legal] invalidity of this proposal that any proposals in this direction are compatible with the Constitution from a political point of view.

For the explained reasons it should be accepted that the Constitutional Court can review the constitutionality of Articles 1 and 2 of Law No. 5735 and determine whether these articles, amending Articles 10 and 42 of the Constitution, violate the characteristics of the Republic as mentioned in Article 2 of the Constitution; and it can, in case it finds a violation, annul these provisions on the basis of a violation of the amendment prohibition as stipulated under Article 4 of the Constitution.

Haşim KILIÇ and Sacit ADALI did not agree with this view.

b) Concerning the content

The principle of a laicist Republic established in Article 2 of the Constitution envisages a Republic where the sovereignty belongs to the nation; where there is no possibility for any dogma except the nation's will to shape the political system; where legal rules are adopted on the basis of democratic national demands under the guidance of reason and science instead of religious prescriptions; where everybody, without discrimination or pre-condition and regardless of whether or not they belong to a majority or minority religion, philosophical belief or world view, has the right to freedom of religion and conscience that can only be limited within the constitutionally established limits; where the abuse and exploitation of religions or religious feelings are prohibited; and where the State in all its acts and actions treats all religions and beliefs equally and impartially.

The fifth paragraph of the Preamble provides "*that, as required by the principle of laicism, there shall be no interference whatsoever* of *sacred religious feelings in state affairs and politics*", Article 14 of the Constitution provides that "*none of the rights and freedoms embodied in the Constitution shall be*



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*exercised with the aim (...) endangering the existence of the (...) laicist order of the Turkish Republic*". Article 42 provides that "*training and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods*" and that "*the freedom of training and education does not relieve the individual from loyalty to the Constitution*". And Article 174 of the Constitution prohibits the annulment of the Reform Laws, which are aimed at safeguarding the laicist character of the Republic.

According to the last paragraph of Article 24 of the Constitution "*[n]o one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets*". Taking the country's conditions into account, the constitution-maker chose to prohibit the use of religion or religious feelings or things held sacred by religion for the purpose of political influence in order to protect the principle of laicism and left them outside the scope of the fundamental rights and freedoms.

For the assessment of the laicism principle, which holds an important place in the reforms of Atatürk, it is necessary to take the above-mentioned provisions and the results derived from the decisions of the Constitutional Court into account.

The intellectual foundation of the laicism principle, which has been clarified in detail in many decisions of the Constitutional Court, can be found in the renaissance, reformation and enlightenment eras. According to this principle, which is a common value for modern democracies, the political and legal structure is based on national choices that are the result of participatory democratic processes freed of religious dogmas and based on rationalism and scientific methods. In societies where individuals enjoy their constitutional freedoms without discrimination based on belief, religion, sect or philosophical attitudes, and where the conditions for enlightenment, a process based on rationalism, are being ensured, laicist and democratic values will be assimilated and political, social and cultural life will accordingly acquire the contemporary appearance where universal values dominate. With this function, it is clear that laicism is a common value ensuring societal and political peace. It becomes impossible to protect the societal and political peace when religions, which are social institutions resting on the individuals' free choice of conscience, begin to dominate the political structure or provide, instead of the national will, the foundations of legitimacy of legal rules. To found legal regulations



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on religious prescriptions instead of the national will—resulting from a participatory democratic process—undermines the individual's freedom and the democratic mechanism that springs from this principle. Religious dogmas that dominate the political structure will at first eliminate the freedoms. For this reason, contemporary democracies reject absolute truth claims, oppose rationalism to religious dogmas, establish the societal and intellectual foundations for explaining the world with the world's knowledge, and, by separating religious and state affairs from each other, remove religion from politicisation and from being an instrument of power.

Article 1 of the Law Concerning the Amendment of Some Articles of the Constitution , this is the article at issue, adds the words *"and in the enjoyment of any public service"* after *"in all their proceedings"* to Article 10 (4) of the Constitution; and Article 2 of the law at issue adds after Article 42 (6) a 7th paragraph: *"[n]o one can be deprived of the right to higher education due to any reason not explicitly written in the law. Limitations on the exercise of this right shall be determined by law."*

The general explanatory memorandum of Law No. 5735 "Concerning the Amendment of Some Articles of the Constitution" clarifies the aim of the provisions in the following way:

> *"The interference in institutions of higher education with the right to education of some students because of their dress has become a chronic problem. None of the other countries of the Council of Europe, of which we are a founding member, has such a problem.*
> *However, it is well known that for a long period female university students in our country have been unable to exercise their right to education because of the clothes that they use to cover their heads.*
> *The aim of educating generations 'free in mind, free in conscience and free learning' at the level of contemporary civilisation targeted by Atatürk requires that individuals enjoy their right to higher education without any discrimination for any reason in conformity with the principle of equality before the law. As a result, it has become necessary to introduce the present amendments to Article 10 and 42."*

The second paragraph of the explanatory memorandum of Article 1 of the law at issue states that the aim of the provision is "to render impossible discrimination among persons because of their language, colour, sex, political ideas, philosophical beliefs, denomination, dress, and similar reasons in the delivery of public services by universities just as any other administrative authority". And the last sentence of the explanatory memorandum of Article 2 states that the aim is solely to guarantee the equality between



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citizens who benefit from services of higher education and to end the deprivation of the right to education for those in institutions of higher education who are being deprived of this right.

When examining the general explanatory memorandum of Law No. 5735, the explanatory memoranda of Articles 1 and 2, and the explanations made in the meetings of the Constitutional Commission and the General Assembly, it becomes evident that the general aim is to admit the liberty of religiously justified veiling for those who exercise their right to higher education, which is also a public service.

Apart from the points raised in the application, the records show that during the parliamentary debates, the provisions at issue—despite their capacity to solve the problems of those students who cannot exercise their educational rights because of the headscarf prohibition implemented in universities—were criticised because the concerns of society were not dispelled and its demands of guarantee not addressed, and, because instead of seeking democratic means of reconciliation, defiance and imposition were the chosen means.

Article 1 of Law No. 5735 establishes, in addition to the obligation to comply with the principle of equality before the law in all acts, an obligation for State organs and administrative authorities to guarantee that individuals can benefit from public services in a way compliant with the principle of equality before the law; and it establishes the possibility for individuals to claim to benefit from public services, which State and administrative authorities provide, in a way compatible with the principle of equality before the law. Considering this situation with the issue of dress in mind, it becomes clear that according to this provision State organs and administrative authorities cannot bring any limitations to individuals in the exercise of their right to higher education.

Article 2 of Law No. 5735, providing that no one can be deprived of the right to higher education due to any reason *not explicitly written in the law*, forestalls the obstruction of the right to education in institutions of higher education because of religiously motivated dress. Consequently, it appears that dress is allowed without being subject to any measurement and individuals exercising their right to higher education cannot be sanctioned for wearing this dress as long as it is not explicitly prohibited by law.

Although it is an individual choice and exercise of a freedom, in classes or labouratories where students' attendance is compulsory, a religious symbol has the potential to turn into an instrument of pressure on individuals with different beliefs, political views or lifestyle choices. In case this possibility arises, to not provide any means of intervention to university



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administrations and public authorities against the pressure that the religious symbol worn creates on others and possible educational disruption by breakdown of public order can impede the equal exercise of the right to education.

With an active legislative proposal of the legislator it will be possible to understand what *"the cases explicitly written in the law"* are and the issue of when they will come into force. As there are no sanctioning mechanisms in our constitutional regime to force the legislator to enact a legal regulation it is clear that it remains within the discretion of the legislator to take legal measures to protect the freedom of others and public order. As the legislator is the main political decision-making mechanism and the great majority of the country's population belongs to a particular religion, it is clear that it will be difficult to use this discretion for the limitation of religious freedoms. It is a requirement of a State respecting human rights, the result of the democratic constitutionalism experience, that, when amending the provisions of the Constitution, the general organisation norm [temel düzen normu], the insurance of the fundamental rights and freedoms of those people who do not belong to the majority's religion, does not remain within the discretion of the legislator and that reservations and guarantee mechanisms are explicitly written in the Constitution.

The Constitution does not allow resolving societal problems by exploiting religion, religious feelings or things considered sacred instead of resolving them within the framework of the clear provisions of the Constitution and democratic peace and consensus based processes. For the exploitation of each societal problem can lead to the deepening of societal conflicts and render democratic processes dysfunctional by eliminating the possibilities for resolving the problem; and as a result, the exploitation can damage the trust in the capability of the State's power to resolve societal problems. The way the provision at issue was prepared and adopted ignores these fundamental necessities, which reflect the meaning and essence of the last paragraph of Article 24 of the Constitution. In fact, in decision E. 1989/1, K. 1989/12 (07/03/1989) the Constitutional Court found a regulation allowing the wearing of a religiously justified headscarf unconstitutional on the grounds of other persons' rights and freedoms, the instrumental use of religion and public order. The finding that religiously inspired regulations and attempts are unconstitutional is reiterated in decision E.1990/36, K.1991/08 (09/04/1991), the Refah Party decision E. 1997/01 (SPK), K. 1998/01 (16/01/1998), and the Fazilet Party decision E. 1999/02 (SPK), K.



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2001/02 (22/06/2001) of the Constitutional Court. The case law of the Council of State follows a similar line of argumentation.

The European Court of Human Rights found in the case *Leyla Şahin vs. Turkey*, in both decisions of the 4th Chamber (29/06/2004) and the Grand Chamber (10/11/2005), that State parties have a large margin of appreciation[724] when it comes to regulations regarding the use of religious symbols; that this is required by the fact that the provisions pertaining to this issue differ among countries because of their varying national traditions and that there is no common understanding in Europe concerning the requirements of "protection of the rights of others" and "public order", and that considering the conditions of Turkey the prohibition of the headscarf was a necessary measure for the "protection of the rights and freedoms of others" and the "protection of public order and safety" in a democratic society. In the case *Dahlab vs. Switzerland* (15/02/2001) the court [the ECtHR]—while rejecting the application of a teacher who was not allowed to teach in primary schools because she was wearing a headscarf—declared that the headscarf is a religious symbol difficult to reconcile with the principle of equality between genders, that allowing it would entail the wearing of other religious symbols, that it would endanger the State's impartiality in schools and that there is an important public interest behind the prohibition, and consequently that the prohibition to wear a headscarf during an educational activity is a proportional and democratic measure for the aim of protecting the rights and freedoms of others, public safety, and public order. In the *Refah Partisi Case* decisions, of the 3rd Chamber (31/07/2001) and the Grand Chamber (13/02/2003), the European Court of Human Rights found: that the freedom to wear a headscarf could be limited in case it conflicts with the necessity of protecting the rights and freedoms of others, public order, and public safety; that a behaviour not respecting the laicism principle cannot benefit from the Convention; that measures aimed at preventing that those students in universities who do not fulfil the requirements of the majority's religion or who belong to other religions are being put under pressure, are in conformity with the Convention; and that it is possible to provide for limitations regarding place and form of the display of rituals and symbols of the mentioned religion in order to assure that students belonging to

724 This term, "margin of appreciation", is a term especially employed by the ECtHR to describe the margin of discretion institutions have in decision making and law implementation.



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different faiths can live together in peace in laicist universities, and thus protect the public order and beliefs of others.

Having considered the decisions of the Constitutional Court and the European Court of Human Rights, the conclusion that the amendment to Articles 10 and 42 of the Constitution clearly violates the laicism principle has been reached because from a procedural point the amendment makes religion an instrument for politics, and from a substantive point it paves the way for the violation of the rights of others and the disruption of public order.

As this provision indirectly amends and renders dysfunctional the fundamental characteristics of the Republic stipulated under Article 2 of the Constitution, and thus violates the prohibition to amend or propose an amendment established under Article 4 of the Constitution, the proposal requirement of Article 148 (2) cannot be considered to have been fulfilled.

For the explained reasons, Articles 1 and 2 of the law at issue violate Articles 2, 4 and 148 of the Constitution and have to be annulled.

Haşim KILIÇ and Sacit ADALI did not agree with this view.

(…)

## DISSENTING OPINION

### 1- PROCEDURAL ISSUES

(…)

The only constitutional provision concerning the review of constitutional amendments is Article 148 of the Constitution. None of the other articles relating to the duties and powers of the Constitutional Court contains any provision concerning this issue. Thus, it is impossiblefor constitutional amendments to be subjected to a review which would result in a review of the merits of the issue. In fact, the Constitutional Court has stressed the impossibility of a substantial review in all its decisions under the 1982 Constitution.

The review of form, however, is limited to the assessment of whether or not the "requisite majorities for the proposal and the ballot" were obtained and whether the "prohibition on debates under urgent procedure" was complied with.

(…)

In spite of this fact, the annulment of a constitutional amendment would not be different any more than from the annulment of an ordi-



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nary law. In a democratic country the foundations for legal considerations are not conjectures or subjective assumptions but legal rules, which are the result of democratic procedures. As it is obvious that the 1982 Constitution prohibited the substantial review power of the Constitutional Court because of previous experiences and further limited the formal review power, there is—as if this development had not taken place—no legitimate basis for reintroducing it under a different name as it was done with the formal review during the 1970s. In order to comply with the dynamics of social and political life it is always possible to transform and amend the constitutional order by amending the norms constituting the integrity of the Constitution. A hierarchical relation between the constitutional norms cannot be established. Concretising the abstract characteristics stipulated under Article 2 of the Constitution is possible with the provisions in the other articles. Unity is achieved by giving a meaning to principles with these concrete provisions. In other words, the foundations of legitimacy of the fundamental choices of the political order will have to be/been updated by giving the unamendable first three articles a dynamic structure through the other provisions of the Constitution. If the unamendable provisions are not subject to a dynamic transformation, it will be unavoidable because of obstructed legal paths that extra-democratic means will be sought. As a matter of fact the majority view has rendered the unamendable articles dysfunctional by eliminating the possibility for the Constitution to solve the problems of future generations.

After the Constitutional Court had annulled constitutional amendments under the 1961 Constitution, in the 1971 constitutional amendments the constitution-maker had considered this situation as "an exercise of authority which does not emanate from the Constitution" and hence limited the constitutional review to formal aspects only. It goes without saying that once it has been determined during the review that the will in question is that of the constitution-maker, it cannot be reviewed with regard to substance because of its binding character on all constituted powers.

(…)

Amending or proposing an amendment of the first three articles has been prohibited under Article 4 of the Constitution. Although Article 11 of the Constitution provides that laws shall not be in conflict with the Constitution, there is no provision saying that constitutional amendments shall not be in conflict with the first three articles.

*Justice Kılıç argues that the power to amend the Constitution lies with the parliament and that in exercising this power it cannot discriminate against*



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*any belief, religion, sex or ethnicity. He also argues that decisions should not be based on extreme assumptions resulting from a lack of confidence in the parliament which can take decisions only by qualified majorities.*

If it is seen as likely that the large majority of the nation, constituted of individuals who are all different from one another and who have multiple demands, and its democratic representatives could unite on the support for an extra-democratic claim, this possibility would also apply to the members of other institutions exercising sovereignty rights. In constitutional democracies the power to exercise sovereignty is divided among different organs, however, the Constitution provides for the necessary limitations. The balance of powers would be broken and the establishment of a guardianship unavoidable if the substantial review of constitutional amendments would be allowed in the name of the protection of constitutional values.

It is clear that the characteristics stipulated under Article 2 of the Constitution—which provide that the Republic of Turkey is a democratic, laicist and social State governed by the rule of law; bearing in mind the concept of justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble—are related to all other articles of the Constitution. It is an unquestionable fact that based on the construction of the majority every possible constitutional amendment—based on excessive claims which, because of their relation to the mentioned characteristics, would amend and empty them and render them dysfunctional—could be subjected to a substantial review by the Constitutional Court. As a consequence, the constituent power belonging to the people is being assumed and the sovereign power, which also belongs to the people, is being ignored.

The Constitutional Court has extended its own boundaries and considerably limited the powers of the derived constituent power. Yet, when moving up the hierarchy of norms from administrative acts, to regulatory acts and to legislative acts the margin of discretion of (the will of)[725] the acting institution is widening; accordingly, the scope of constitutional review is becoming narrower. This can also be explained by the increasing democratic legitimacy they [the acting institutions] have. It is for this reason that for constitutional amendments we can expect the margin of

725 The original term "*işlem sahibi iradenin*" translates as "the will of the acting institution". In English this term does not really work, for this reason we have put this part in brackets.



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appreciation of the constituent power to be very wide and that of the reviewing institution to be very narrow; a fact that is also indicated by the regime on which the 1982 Constitution is built. By turning this relation upside down the majority view put the political mechanism under the guardianship of the judiciary and created a serious problem.
(…)
Consequently, there is no constitutional basis for this review.

## 2- ON THE GROUNDS

(This section was written after the procedural obstacles were overcome.)

> *Justice Kılıç argues that the amendment to Article 10 is nothing more than concretisation of the equality principle provided for in this article. Thus, it is impossible to conceive that previously preventing "the enjoyment of any public service" or discriminating between citizens in the provision of public services would have not violated the equality principle. Furthermore, after the 2004 constitutional amendment introducing affirmative action for women it became a constitutional requirement to consider this principle in the application of laws.*

Article 2 of the amendment added a paragraph to Article 42. Accordingly, "*[n]o one can be deprived of the right to higher education due to any reason not explicitly written in the law. Limitations on the exercising of this right shall be determined by the law.*" According to the Article 42 (1) "*[n]o one shall be deprived of the right of learning and education.*" If both provisions are considered together, it can be said that with regard to "*education*" in the first paragraph this paragraph establishes a "*general rule*" and the new paragraph with regard to "*higher education*" establishes a "*specific rule*". It appears that both provisions contain exceptions. The right to education in the first paragraph can be regulated by laws as long as this regulation does not reach to the level of deprivation. The term "*deprivation*" constitutes the "*core of the right*" for both general and higher education. The amendment also emphasises the point that relevant regulations pertaining to this right can be made by law. However, the same provision in Article 13 of the Constitution means the same thing. As the power to legislate belongs only to the legislative organ, any kind of "*limiting*" proposal, which is of a character to limit fundamental rights, also needs to be based on the will of the legislative organ. This is clearly established by Article 13 of the Constitution. The unlimited and uncontrolled norm creation by



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the judiciary using its right to interpretation clearly constitutes a power exceeding act and a violation of the separation of powers principle.

As a result, in order to implement the amendments at issue, a legal regulation is necessary. It is exactly at this point that the function of the Constitutional Court becomes evident. Instead of a substantive review of constitutional amendments that do not add any new dimensions to the old text, it would have fit the constitutional system better if the Constitutional Court had reviewed the law that is required to implement these amendments at first with regard to the characteristics stipulated under Article 2.

The majority view defined laicism as a result of the Enlightenment, which is a process based on critical reason, and—appropriately emphasising the relationship of this principle with the Renaissance based on science and art and the Reformation based on religious pluralism—adopted the fundamental parameters governing the contemporary world. However, the results it obtained on the merits fundamentally clash with the results of the contemporary world. It imposes the obligation to regulate religious symbols in universities, which exists in no modern country. However, it does not require any limitation concerning political symbols, which have the same propaganda effect. Universities are privileged spaces where propaganda, different views, and intense political, social and scientific debates are and should be pre-eminent. Universities can provide for opportunities of enlightenment, inquiry, comparison, acquiescence or disagreement, which often times are not present in social life. To impose a requirement on universities to regulate dress, which does not apply to social life, runs counter to this ordinary function of universities as well as the system of academic, scientific, ideational, collective and other intellectual freedoms provided for in the Constitution. Universities are not military barracks. Classroom discipline cannot be a justification for forcing adult students into a uniform model of behaviour, thought, and belief. The only legitimate justification for regulation in universities should be the need to provide education suitable to academic requirements.

In the reasoning of the majority it is concluded that the terms *"if not written explicitly in the law"*, added by Article 2 of Law No. 5735 to Article 42 of the Constitution, mean that if not explicitly prohibited by law dress would be allowed in higher education institutions without being subject to any suitable limits; and that no sanctions could be applied to individuals using their right to higher education because of this dress. Yet, it is forgotten that the main goal of these terms is to prevent any other organ except the legislator from attempting to limit fundamental rights. That is, Article 13 emphasises a power that belongs to the legislator. On the



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other hand, the above-mentioned assumption is being sustained and it is believed that there is no regulation concerning violations of the freedom of religion of individuals and the disruption of public order and that accordingly the hands of all State authorities are tied. Yet, Article 53 of Law No. 2547 on Higher Education can answer all these concerns without speaking of other more general laws.

On the other hand, it cannot escape one's observation that the grounds on which the majority opinion is based is not the wording of the annulled provision but the term "headscarf", which is what is stated in the explanatory memorandum. That a word in an explanatory memorandum, which itself is legally nonbinding, can create such excessive fear and concern that it could violate the Constitution's fundamental choices is inexplicable with legal science.

Moreover, as the amendments to Article 10 and 42 of the Constitution do not entail any new legal consequences compared to the old text, it is debatable to what extent they actually realise the aim mentioned in the explanatory memorandum to the law.

I did not join the majority.

President

Haşim KILIÇ

## DISSENTING OPINION

*Justice Adalı argues that the constitution-maker has limited the review power to formal issues. In its decision E. 1987/09, K. 1987/15 (16/06/1987) the Constitutional Court has stated that its review power is limited to formal issues. The review undertaken by the majority is a substantive review and not limited to a review of the procedure despite its name. However, as the Constitutional Court has no jurisdiction for such a review it has exceeded its powers.*

The consequence is that henceforth constitutional amendments, their proposal or suggestion will be impossible as the terms democracy, laicism, and sociability are wide enough and can be interpreted by the Constitutional Court to cover any kind of justification.

Thus, let alone the writing of a new Constitution, the smallest amendment will inevitably face the three unamendable articles.

The writing of a new Constitution will thus be left to the primary **constituent power** only and solely, the derived **constituent power** will not be mentioned any more.



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A Constitution which can be understood as the socio-political and socio-economic foundation of society cannot be otherwise amended. A dynamic society can be rendered happy by maintaining the State under the rule of law with a stagnant, static, and fixed document.

> *Justice Adalı further stresses that a Constitution, while protecting its fundamental principles from amendments, should be amendable in any other way in order to adapt to social developments and transformations.*

Laws and Constitutions are not engaged in pointless exercises. While Article 4 of the Constitution prohibits the amendment of the first three articles, it is an (exceptionally) stretched interpretation to allege that the amendments to Articles 10 and 42, which do not go further than stressing equality and the right to education, fall within the scope of Article 4.

On the contrary, keeping in mind the first two paragraphs of Article 14 of the Constitution it becomes apparent that the amendments to these two articles have the aim of enhancing individual rights and freedoms, that ECtHR decisions and the basic philosophy of our Constitution postulate the need not to limit but extend them as much as possible, and that, therefore, they are not unconstitutional by violating the laicism principle.

The essence of Article 2 of the Constitution is that the Republic of Turkey is a "State governed by the rule of law". By adding the characteristics "democratic, laicist, social" the content of the provision has been concretised. However, even if there were not any characteristics, this State governed by the rule of law would obviously still be democratic, laicist, and social as the term already embodies these characteristics. By spelling out the characteristic the constitution-maker emphasised the characteristics additionally. And it moreover added that the State, bearing in mind the concepts of public peace, national solidarity and justice, respects human rights, is loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble. The main emphasis, the fundamental characteristic and essential structure, is the term "State governed by the rule of law". The Constitutional Court indicated that this means that "it is a State whose actions and acts comply with the law, which respects human rights, protects and strengthens these rights and freedoms, establishes a just legal order in any area and maintains it by strengthening it, abstains from unconstitutional situations and policies, considers itself bound by legal rules, is open to constitutional review, and is conscious of the fact that there are basic legal principles and the Constitution above the legislator and by which the legislator has to abide. In a State governed by the rule of law the legislator not only has to ensure that the laws comply



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with the Constitution, but also that the Constitution complies with the basic universal principles of law. The State governed by the rule of law also contributes to stability by limiting the political power and providing the necessary legal infrastructure so that the State can sustain its activities steadily. The essence of this stability is legal security and foreseeability. In order to guarantee legal security and foreseeability norms have to be general, abstract, clear, and understandable. The State governed by the rule of law also embodies the principle that laws have to serve the public interest. Accordingly, no legal provisions which serve private interests or the interests of certain persons can be enacted".

In a State governed by the rule of law, neither majority imposition, coercion, arbitrary action against minorities, nor minority acts against the majority are possible. Crimes cannot be established according to desires, nor can punishments be imposed. That decisions and actions should be proportionate and reasonable is also part of the Court's case law. The aim is to establish **a faultless and smoothly functioning democracy** where everything is open and clear, and the sharing of powers, duties and responsibilities is fair and balanced.

There are great benefits in leaving the system, henceforth, with goodwill and mutual interaction to its own flow. A thoroughly not only formally internalised democratic laicism will pave the way not for enmity and separation, but for unity and integration, the establishment of societal peace and the spending of energy in an outward (constructive) and not inward (destructive) way; it will not be an obstacle to a beneficial renewal but the wing of growth and development, the step towards and guarantee of mutual understanding, friendship, love, respect, trust, and tolerance.

According to the principle that a danger should be existent and clear, any action by an individual constituting a crime according to the law will only be counted as such if established by a court decision. Even the accused is to be treated as not guilty. Therefore, the concept of a possible, potential, and imaginary culpable remains archaic. The violation of a concrete right to education is being ignored for an abstract and indeterminate danger, which somehow is never realised and it is unclear when it will be realised but is assumed to be realised imminently by being constantly repeated, persisted upon and kept alive. It is quite difficult to speak of the "predictability and certainty of the law", "equality", and "existence" against a background where some people are being pushed around and considered (or felt) to be second class citizens and where correspondingly privileges and arbitrariness increase (or are thought to increase). Constantly trying to detect the **intentions** and using **assumptions** and **possibilities** as excuses



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is to render a problem unsolvable. In a State governed by the rule of law, acts are not based on suspicions, speculations, or prophecies but on concrete grounds that are in compliance with the Constitution and the laws.[726]

For these reasons I believe that the claim that the amendments to Article 10 and 42 of the Constitution indirectly amend and render dysfunctional the fundamental characteristics of the Republic enumerated in Article 2 de facto amounts to a devious violation of the idea of the State governed by the rule of law and thus I do not agree with the majority opinion.

Member
Sacit ADALI

726 Justice ADALI uses several Osman terms in this paragraph, adding the modern Turkish meaning in brackets. The translation does not document these linguistic subtleties.



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## 3.5 Right to Property of Foreigners

***Application Number:*** *1986/18* ***Decision Number:*** *1986/24*

***Date of Decision:*** *09/10/1986*

***Date of Publication and Number of the Official Gazette:*** *31/01/1987 - 19358*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by 83 members of the TBMM*

***Provisions at Issue:*** *Art. 1, 2, 3 and 4 of "Law No. 3278 on adding two new paragraphs to Article 35 of the Title Deed Law No. 2644 and to Art. 87 of the Village Law No. 442 (22/04/1986)*

***Other Relevant Provisions:*** *Law No. 3029 and annulment decision of the AYM*

***Relevant Constitutional Provisions:*** *Preamble, Art. 2, 3, 7, 8, 9, 35, 138, 152,153 (1982 TA)*

***International Treaties/References:*** *UDHR, Treaty of Lausanne*

***Voting:*** *Accepted by majority of 6:5 justices*

***Dissenting and Concurring Opinions:*** *4 DO, 1 Concurring and Additional Opinion*[727]

***Justices:*** *President Orhan ONAR; Vice President Mahmut C.CUHRUK; Members: Necdet DARICIOĞLU, Yılmaz ALİEFENDİOĞLU, Yekta Güngör ÖZDEN, Muammer TURAN, Mehmet ÇINARLI, Selâhattin METİN, Servet TÜZÜN, Mustafa ŞAHİN, Adnan KÜKNER*

The applicants ask for annulment of Articles 1, 2, 3 and 4 of *Law No. 3278 on adding two new paragraphs to Article 35 of the Title Deed Law No. 2644 and to Art. 87 of the Village Law No. 442;* for violating the Preamble and several Articles of the Constitution. The provisions at issue give the Council of Ministers the right to exempt countries and their citizens from the principle of reciprocity, thereby enabling them to have real estate property in Turkey, and to determine the principles regarding the implementation and sharing of the Housing Development Fund. The Court rules that the first paragraphs of Article 1 and 2 of Law No. 3278 violate the Constitution as nobody can allow foreign public legal persons, in particular States, to purchase real estate properties in Turkey or can give the Council of Ministers the right of discretion on this matter.[728] This is so for it would infringe the "indivisible integrity of the State with its territory and nation". With regards to foreign natural persons the Court states that the Council of Ministers should not have the power to exempt foreign natural persons from the principle of reciprocity. This principle makes Turkey an equal member in the "family of world nations" and is an important principle for protecting the territory as a component of the State and a symbol of sovereignty and independence.

727 Justice Muammer TURAN uses the term "*Değişik ve ek ge-rekçe*" for his concurring opinion.

728 The annulment of Articles 1 and 2 also sets aside the implementation defined in Article 3 and 4, therefore the Court has decided unnanimously and according to Article 29 (2) of the Law on Establishment and Rules of Procedure of the Constitutional Court that Article 3 and 4 shall be annulled.



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(…)

## II. THE LAW

### A- Provision at Issue

Article 1, 2, 3 and 4 of Law No. 3278 (22/04/1986):

"ARTICLE 1: Article 35 of the Title Deed Law No. 2644 is amended by adding the following paragraphs:

Only in cases where it is found profitable for the national interests and/or the national economy, the Council of Ministers may make a decision on which countries and/or which countries' citizens shall be excluded from the reciprocity principle. Relevant procedures and principles shall be determined by the Council of Ministers.

Additionally, concerning these purchases, the Council of Ministers is authorised to determine the principles regarding the implementation and the sharing of the Housing Development Fund, which cannot exceed 25% of the purchasing price."

ARTICLE 2: Article 87 of the Village Law No. 442 is amended by adding the following paragraphs:

Only in cases where it is found profitable for national interests and/or the national economy, the Council of Ministers may make a decision on which countries and/or which countries' citizens will be ruled immune from the restrictions regulated under this article. Relevant procedures and principles shall be determined by the Council of Ministers. This article shall not be applied to agricultural lands or to lands which are supposed to be acquired as agricultural or livestock farming lands.

Additionally, concerning these purchases, the Council of Ministers is authorised to determine the principles regarding the implementation and the shares of the Housing Development Fund, which cannot be over 25% of the sale price."

ARTICLE 3: This law will come into force on the date of publication in the Official Gazette.

ARTICLE 4: This law will be implemented by the cabinet.

(...)



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## III. PRELIMINARY EXAMINATION

(…)

## IV. MERITS

(...)

### B - Issue of Unconstitutionality of Law No. 3278 with regard to Article 3 and the Preamble of the Constitution

Since the historical development of the right of foreign natural and legal persons to acquire property - from the Ottoman period through to the period of the founding of the Republic of Turkey - has been elabourated on in the decision of the Constitutional Court, E. 1984/14, K. 1985/07 (13/06/1985), which concerns the annulment of Law No. 3029, it will not be mentioned here again. Two points should be distinguished while analysing Law No. 3278 in terms of the principles enumerated in the Preamble of the Constitution and Article 3 of the Constitution.

#### 1- On the Constitutionality of the Right of Foreign States to Acquire Property in Turkey

To grant foreign States the right to own property in Turkey is the main difference between Law No. 3278 and Law No. 3029. Law No. 3278 included the statement "which States", and the proposal for removing this statement from Article 1 and Article 2 of the Law No. 3278 was rejected by the plenary assembly of the Turkish Grand National Assembly. In addition, the government issued the Decree on the Principles for Purchase of Real Estate by Foreign States and Natural Persons of these States, where it is stated that "Saudi Arabia, Kuwait, United Arab Emirates, Bahrain, Qatar, the Sultanate of Oman and natural persons who are their citizens can buy real estate in Turkey"; here it was clarified that this law also regulates the purchase of real estate by foreign States.

However, as it is adopted in the doctrine, foreign public legal persons, in particular States, cannot acquire properties in another country, since this would violate the principle of political integrity of that State and cause



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political problems. Moreover, it is underlined that even the principle of reciprocity cannot be applied in those cases, except for some exceptions.

It is not possible to say that this provision is in compliance with the constitutional principles, since the implementation of such a provision would by and by violate the political and physical integrity of the State, and since such acts lead to a loss of sovereignty of the State in these lands.

Due to the seventh paragraph of the Preamble of the Constitution, which envisages "the Turkish existence and the principle of indivisibility with its State and territory", and Article 3 (1), where it is stated that "The State of Turkey, with its territory and nation, is an indivisible entity", nobody can allow foreign States to acquire real estate properties within the territory of the Republic of Turkey or can grant a right of discretion in this matter to the Council of Ministers.

Therefore, Articles 1 and 2 of Law No. 3278 violate the seventh paragraph of the Preamble and Article 3 (1) of the Constitution.

Orhan ONAR, Mahmut C. CUHRUK and Servet TÜZÜN did not agree with this view.

2- Issue of conformity of granting the right to acquire real estate property in Turkey to foreign natural persons with the Constitution

In the application it is claimed that Articles 1 and 2 of Law No. 3278, which grants foreigners the right to have real estate property in Turkey without any reciprocity provision, are contrary to the fourth paragraph of the Preamble of the Constitution, which states that the Republic of Turkey is "an honourable member with equal rights of the family of world nations", and contrary to Article 3 (1), where it is stated that "The State of Turkey, with its territory and nation, is an indivisible entity" and also to Article 3 (3). Hence, it is necessary to accentuate the models adopted in the Law on Foreigners in general, the fundamental principles on this issue in the Constitution, and the principle of reciprocity, which is a general principle considered in bilateral and multilateral conventions in the Turkish Law on Foreigners.

As mentioned above, concerning the ruling for annulment of Law No. 3029 by the Constitutional Court (13/06/1985), even though allowing foreigners to enjoy fundamental rights and freedoms like citizens is a well-established principle, to restrict these rights for foreigners when it is necessary, as done for citizens in some cases, does not breach democratic



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principles. The Universal Declaration of Human Rights allows a State to exercise this power over foreigners within its territory.

Various models have been developed in the Law on Foreigners, motivated by the fact that very complicated political, economic, social, legal and financial problems arise when foreigners acquire real estate in a territory which is the basic component of a State. Besides, States adopted procedures and principles that they found in their best interest: Some States never grant the right to acquire real estate properties to foreigners; others grant this right to foreigners without any clause, due to the principle of reciprocity, due to the clause of pre-authorisation, due to the clause of predetermination of the real estate to be sold by the State in advance, or the clause of naturalisation or residential permission. In Turkish law, the principle of legal and de facto reciprocity has been adopted for cases were foreigners acquire real estate property.

Our Constitution, which grants the same fundamental human rights and freedoms to foreigners as it does to Turkish citizens, prescribes in Article 16 the principle that "fundamental rights and freedoms in respect to aliens may be restricted by law compatible with international law". With this principle the Constitution envisages that restrictions for fundamental rights and freedoms of foreigners shall be in compliance with international law, and that any such restriction must be governed by law. International law consists of bilateral or multilateral treaties concluded by States, based on international customs and fundamental principles of law adopted by well-civilised nations, such as good faith, pacta sunt servanda, respect for vested rights, supremacy of international law over the national laws, and supplementary resources like the doctrine and case law.

The principle of reciprocity, one of the general principles of the Turkish Law on Foreigners, is defined by the doctrine as a principle implemented by at least two States, which stands for recognition of the same rights reciprocally for other States' citizens. According to this principle, enjoying a right of a foreigner in Turkey depends on the condition that Turks also enjoy the same rights in the respective country. Reciprocity can be implemented by a treaty (law or political agreement), or law (de jure or de facto). In our law system de jure reciprocity is required so that foreigners may acquire real estate in Turkey, as it is required so that foreigners may enjoy the right of succession.

Pursuant to Article 35 of the Title Deed Law No. 2644 (22/11/1934), foreign natural persons are allowed to acquire real estate properties in Turkey within the borders of city and town municipalities, provided that they obey legal requirements and that a principle of reciprocity exists.



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The amendment by Law No. 3278 results in the fact that the Council of Ministers is authorised to lift the requirement of the reciprocity principle in favor of some countries and/or foreign natural persons. The new paragraphs of Article 35 of the Title Deed Law, amended by Article 1 of Law No. 3278, authorise the Council of Ministers to decide which countries and/or which countries' citizens shall be immunised from the reciprocity clause, and to determine the principles regarding the implementation and the shares of the Housing Development Fund, which cannot exceed 25 % of the sale price.

As a result of this amendment, foreign naturals obtained the right to own real estate properties, as many as they wish, within the borders of city and town municipalities in Turkey and provided that they would abide by the law and pay fees to the Housing Development Fund (not less than 25 % of the sale price/purchasing price.)

Article 2 of Law No. 3278, which amends Article 87 of the Village Law No. 442 that strictly forbids that foreign natural and legal persons acquire real estate properties in villages, authorises the Council of Ministers to exclude some countries "and/or" some foreign naturals from the restrictions governed under Article 87 (1), and to determine the principles regarding the implementation and the shares of the Housing Development Fund, which cannot exceed 25 % of the sale price. However, purchases of 'agricultural land or land intended for agricultural or stock farming production' are excluded from the scope of this provision. Pursuant to this provision, exempt foreign countries "and/or" foreign naturals may acquire real estate properties in rural areas without any limitation, provided that they fulfill the requirements determined by the Council of Ministers, and that they pay fees to the relevant fund. However, foreign naturals are not allowed to purchase agricultural land, and they cannot acquire land with the purpose of setting up agricultural and stock farming production.

In the explanatory memorandum of Law No. 3278 it is acknowledged that the increase of international economic relations Turkey is involved in substantiates that such a policy is in the best national interest of our country and it may be seen as a chance for the building industry. It permits some foreign natural and legal persons to acquire private property in our country, when the requests of the Council of Ministers to pay a share to the Housing Development Fund are met. Following this basic principle, Law No. 3278 grants all authority necessary to establish provisions and norms governing the acquisition of private property by foreign naturals and legal persons in our country to the Council of Ministers.



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In the case of the Council of Ministers stretching the principle of implementation due to political and economic conditions, it would be inevitable that a large part of the territory of the country would, meanwhile, be possessed by foreign countries or foreign naturals. The amendments under consideration equalise foreign naturals from some countries, which are to be determined by the Council of Ministers, - and Turkish citizens in terms of the right to acquire real estate, by lifting the principle of reciprocity. However, restrictions of fundamental rights and freedoms for foreigners are aimed at the protection of the State and enable the durability of the State's existence. In these days, in which administrative, economic, military and cultural relationships between States has greatly increased, these ideas still maintain importance. Throughout history, States have kept foreigners at a distance and deprived them of some rights or restricted their rights in the State's territories. Among those restricted rights is the right to own property. This is so for it concerns national territory.

(...)

With the statement "the absolute supremacy of the will of the nation, the fact that sovereignty is vested fully and unconditionally in the Turkish Nation, and that no individual or body empowered to exercise this sovereignty in the name of the nation shall deviate from liberal democracy as indicated in the Constitution and the legal system instituted according to its requirements" in the fifth paragraph of the Preamble, a breach of the legal order by any institution or individual is impeded. In the statement "the Republic of Turkey is an honourable member of the family of world nations with equal rights" in the fourth paragraph of the Preamble it was underlined that the nation, which constitutes the human component of the State, has the same rights as other nations.

The acquirement of real estate by foreigners cannot be considered as a mere question of property. Territory is an inalienable component of a State and a symbol of sovereignty and independence.

The principle of reciprocity is a means of balance that enables equality in international relations.

The removal of the principle of reciprocity aims at creating a modest economic solution for the housing problem, a problem that can be solved with our own resources and by rallying the economic and political support of some countries. For the aforementioned reasons, the Court concludes that the first paragraphs of Article 1 and Article 2 of Law No. 3278 violate the fundamental principle governed under the fourth paragraph of the Preamble, which evidently exists for the purpose of disabling sub-



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jective opinions of politicians on the interpretation and implementation of the Constitution, by considering the provisions of Article 2 of the Constitution.

Orhan ONAR, Mehmet ÇINARLI, Servet TÜZÜN and Mustafa ŞAHİN disagree with this view.

The claim that Articles 1 and 2 of Law No. 3278, which grants foreign naturals the right to acquire real estate in Turkey, violate Article 3 of the Constitution has been rejected.

Muammer TURAN did not agree with this view.

(…)



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## 3.6 Right of Minorities to Choose a Non-Turkish Family Name

***Application Number:*** *2009/47* ***Decision Number:*** *2011/51*

***Date of Decision:*** *17/03/2011*

***Date of Publication and Number of the Official Gazette:*** *12/07/2011 - 27992*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Midyat Civil Court of First Instance (Midyat Asliye Hukuk Mahkemesi)*

***Provisions at Issue:*** *Art. 3 of Law No. 2525 on Family Names (21/06/1934)*

***Relevant Constitutional Provisions:*** *Art. 10 (1982 TA)*

***International Treaties/References:*** *Art. 8 (ECHR) in jurisdiction of the ECtHR*

***Voting:*** *Rejected by majority of 9:8 justices*

***Dissenting and Concurring Opinions:*** *4 DO*

***Justices:*** *President Haşim KILIÇ; Vice President Osman Alifeyyaz PAKSÜT; Members: Fulya KANTARCIOĞLU, Ahmet AKYALÇIN, Mehmet ERTEN, Fettah OTO, Serdar ÖZGÜLDÜR, Serruh KALELİ, Zehra Ayla PERKTAŞ, Recep KÖMÜRCÜ, Alparslan ALTAN, Burhan ÜSTÜN, Engin YILDIRIM, Nuri NECİPOĞLU, Hicabi DURSUN, Celal Mümtaz AKINCI, Erdal TERCAN*

The submitting court asks for annulment of the statement "with the names of foreign races and nations" in Article 3 of the *Law on Family Names*. According to this provision, people are only allowed to change their family name if the new name is of Turkish origin. The order of referral argues that this provision violates Article 10 (Equality before the law) of the Constitution, as individuals who have equal status are treated differently. The Constitutional Court rejects this argument, claiming that it lies within the legislator´s discretionary power to decide about these issues in order to ensure the "unity of the nation" and to safeguard public interest.

(...)

### V. MERITS

After the examination of the judicial referral of the court and its attachments, the report on the substance of the case, the law which is considered unconstitutional and the relevant constitutional provisions and their explanatory memorandums, and other legislative acts, the following was decided:

In the application it is stated that someone who wants to change their family name to any name with Turkish origin meets no hindrance, whereas the application would be dismissed if the replacing name has no



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Turkish origin. Thus, individuals who have equal status are treated differently and the provision in question violates Article 10 of the Constitution.

The provision in question in Article 3 of Law No. 2525 stipulates that the names of foreign nations and races cannot be taken as a family name. In Article 5 of the Regulation of Family Names of 24/12/1934 it is stated that new family names shall be obtained from among Turkish words. In this way, to acquire the names of foreign races and nations as a family name was barred and only Turkish words were allowed as family names.

It is evident from the minutes of the expert committee of the Turkish Grand National Assembly, and the minutes of the plenary session, that it is the aim of this provision to enable national unity and integration of citizens.

In Article 10 of the Constitution it is stated that *"everyone is equal before the law without distinction as to language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such grounds...No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."*

The principle of equality governed under Article 10 of the Constitution can only be considered between those whose legal status is the same. This principle envisages legal equality rather than de facto equality. The purpose of the principle of equality is to enable individuals of the same status to be subject to the same legal acts, and to prevent any discrimination and privileges. By virtue of this principle, a breach of the principle of equality before the law by applying different legal rules for individuals and communities of the same status is barred. The principle of equality before the law does not imply that everyone shall be subject to the same legal rules. Different circumstances may entail different legal rules and applications for some individuals or groups. The equality principle in the Constitution would not be infringed if the same legal positions are subject to the same legal rules, and different legal positions are subject to different legal rules.

The family name, which is the most significant component of the identity of an individual, is an inalienable, non-transferable personal right that is tightly coupled with them. Since the right to have a family name is an absolute right, it can be asserted against everyone and it is distinctively protected by law. Moreover, to have a family name is an obligation imposed by law. This obligation is clarified in Article 1 of Law No. 2525 with the statement *"each Turk is obliged to have a family name other than their first name"*.



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In addition to defining personal identity, the family name also has the function of defining family and lineage of an individual, to distinguish them from members of other families, and to define origin, community or nation of the individual. Because of these functions, and for the purpose of defining the lineage, for the protection of language and lingual identity, ensuring national unity, protection of families, prevention of confusion in official documents, ensuring the order of civil registry, having a family name is regulated by law. It is evident that the legislator has a right of discretion for such interference into family names due to public interest and public order and provided that it complies with the Constitution.

The legislator has developed a unifying and integrating understanding of national and lingual identity for citizens living in the same country, with the feeling of national belonging, which prevents any discrimination against minorities in terms of rights and freedoms.

It is the legislator´s aim to perceive the unity of the nation, ensuring the continuity of fellowship of people for common suffering and common gladness, of solidarity and prevention of alienation of individuals against each other. This competence encompasses the idea of public interest and public order, and gives the legislator a discretionary power on these matters.

The European Court of Human Rights examined relevant applications within the scope of "the right to respect for private and family life" governed under Article 8 of the European Convention on Human Rights. The court declared that changing family names can be restricted for the purpose of safeguarding public interest, such as ensuring proper functioning of the civil registry, definition of personal identities, or enabling affiliation of individuals having a family name with a certain family. The court also stated that national legislators have discretionary power on these restrictions, and that they can make choices by considering historical and political characteristics of a respective State.

Furthermore, the provision in question is implemented without discriminating any foreign race or nation. Therefore, it contains no aspects violating the principle of equality of the Constitution.

For the aforementioned reasons, the provision in question does not violate Article 10 of the Constitution. The application has to be dismissed.

Haşim KILIÇ, Osman Alifeyyaz PAKSÜT, Fulya KANTARCIOĞLU, Fettah OTO, Engin YILDIRIM, Hicabi DURSUN, Celal Mümtaz AKINCI and Erdal TERCAN did not agree with this view.

(...)



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## DISSENTING OPINION

A Turkish citizen, Favlus Ay, initiated proceedings in order to change his name to Paulus Bartuma. He wanted to turn an Assyrian word – Bartuma – into his family name. In Article 3 of the Law on Family Names of 1934 it is stated that "names of foreign races and nations, tribes, ranks, official duties, and names which do not comply with the general morality or which are disgusting or ridiculous, cannot be taken as family names". The local court claims that the words "…names of foreign races and nations..." violate the principle of equality in the Constitution.

We can observe that the legislator considered that family names consisting of names of foreign races and nations could harm the national unity, and it targeted the national unity of all citizens under the roof of citizenship of the Republic of Turkey by the statement in question. This provision makes sense in the year 1934. However, today it leads to the situation that those who have different ethnic and/or religious identities feel that they are exposed to discrimination; and this situation indeed harms national unity and integration. The common will of individuals in a group to create a community of people who share the same destiny is a must for the existence of a nation. Differences in language, ethnicity or race are not an obstacle for being a nation. The word "foreign" in the statement "foreign races and nations" should not be understood as connoting those who are members of different ethnic and/or religious communities among citizens of the Turkish Republic.

The provision in question is not unitary and integrative. Instead, it leads to discrimination which violates the principle of equality governed under Article 10 of the Constitution. This does not comply with the current understanding of human rights and the requisites of a democratic societal order. To neglect the existence of differences among different ethnic and/or religious communities through a homogenising and one-dimensional approach leads to an infringement of human rights. To be different from others is deemed one of the fundamental human rights. In a democratic and free society that relies on human rights, the spirit of national solidarity and national unity can be enabled by recognising and drawing on the richness of differences instead of suppressing them. Non-discrimination against different ethnic and/or religious communities is essential in terms of constitutional unity. For constitutional rights to have a meaning, it is necessary that those who are not part of the majority enjoy the same rights that are claimed and enjoyed by the majority.



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A provision which resembles Article 3 of the Law of Family Names used to exist in Article 16 (4) of Law No. 1587 on the Civil Registry. The words "which do not comply with our customs… our national culture…" were removed from Article 16 of the Law of Family Names by an amendment of Article 5 of Law No. 4298 (15/07/2003). In this case, the legislator found it necessary to make an amendment as the provision in question did not comply with a democratic societal order relying on human rights.

In Article 10 of the Constitution it is stated that "everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds". The principle of equality is a fundamental right for those who benefit from that principle. That is to say, it leads to the right to demand equal treatment or non-discrimination. Pursuant to Article 10, a law that discriminates in terms of language, race, colour, sex, political opinion, philosophical belief, religion and sect, violates the Constitution.

In the case law of the Constitutional Court it is adopted that to apply different legal rules to some people among those who have the same status violates the equality principle. If an individual wants to change their family name with another Turkish word, they would meet no problem in terms of legal procedures. However, if they want their family name to be replaced by a word that does not have any meaning against the public order, suitable with the grammatical structure and phonetics of Turkish language, but has no Turkish origin, they meet legal hindrance. Therefore, persons that have the same legal status are treated differently; and this violates Article 10 of the Constitution.

The family name is an inseparable component of an individual's identity, as it is a legal instrument which stands for distinguishing them from other individuals. Each person is distinguished by the name and the family name and attends social life with them. Therefore, the family name is a fundamental personal right tightly coupled with the individual and it is inalienable and non-transferable. To carry on the family name without any constraint, and to have the freedom to change it only by their own will, corresponds with the right to protect and to develop physical and spiritual existence. In a democracy freedom is essential and a restriction of it is the exception. Having a family name is an absolute right that is distinctively protected by law. In principle, everyone is allowed to take a name or family name as they wish. Interference of the State is an exception. Everyone should be able to take any family name as they wish, provided that it complies with the public order, general morality and the grammatical structure of Turkish language.



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Since the right to have a family name is not within the scope of any fundamental right and freedom governed under other articles of the Constitution, there is no room for application of *lex specialis*. Article 17 (1) of the Constitution is *lex generalis*, and the family name falls within the scope of the right to develop physical and spiritual existence. Pursuant to this paragraph, "everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence". The right to protection and advancement of physical and spiritual existence of an individual constitutes the core of human dignity. This right generates the individual, guarantees the free improvement of the person, protects the values and the free advancement of these values and differentiates one individual from the others. Such a protection implies a removal of obstacles against opportunities to enjoy the rights regarding physical and spiritual existence of an individual. Development means an improvement of the current status of the rights regarding physical and spiritual existence and facilitation of obtaining the opportunities which stem from those rights. The improvement of personality includes defining themselves and thus to name themselves. The right to define themselves lies at the heart of freedom. To grant the right to define themselves to individuals contributes to an enrichment of social life since it creates autonomous and free individuals.

An interference with the family name of an individual can be defined as an infringement of human rights in itself rather than a derivation of a violation of a right that causes discrimination. To choose the family name is a fundamental personal right of an individual and it constitutes a significant component of the personality of its owner. To deprive someone of this right since they are a member of a different ethnicity is not acceptable in a democratic, political, legal and societal order.

For the aforementioned reasons, we disagree with the majority opinion as we find the provision in question violating Articles 10 and 17 of the Constitution.

| | |
|---|---|
| President | Member |
| Haşim KILIÇ | Engin YILDIRIM |

DISSENTING OPINION

(…)

The Republic of Turkey was not founded on the basis of racial identity. The meaning of Atatürk's statement "The people of Turkey that founded



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the Republic of Turkey is called the Turkish Nation" is that the notion of Turkish nation is not synonymous with the Turkish race.

The 1982 Constitution No. 2709 explicitly forbids racial discrimination, so does the 1961 Constitution. In Article 10 of the Constitution it is stated that everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

Turkey signed the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations on 13/10/1972 and deposited the ratification document on 16/09/2002. In Article 1 of the Convention racial discrimination is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

(…)

The name of an individual, and their rights and power over the name, constitute a fundamental right secured by Article 17 of the Constitution. Since Article 17 does not prescribe any restriction with regard to this matter, the restriction envisaged by the provision in question cannot be allowed. Though some restrictions would be possible on the use of the family name, considering the public order, and other general reasons for restrictions, it is evident that there is no reason regarding the public order other than determining the identity of an individual in the public space, and any legal regulation based on racial identities cannot be allowed. Apart from the requirement that the family name has to be written, read and understood in the official Turkish language and in Turkish alphabet, there is nothing else that could be of interest for public order concerning the family name.

(…)

Vice Presidentt

Osman Alifeyyaz PAKSÜT

(…)



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## 3.7 Freedom of Association of International Organisations

***Application Number:*** *1963/199* ***Decision Number:*** *1965/16*

***Date of Decision:*** *16/03/1965*

***Date of Publication and Number of the Official Gazette:*** *23/09/1965 - 12108*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by TİP parliamentary group*

***Provisions at Issue:*** *Art. 3 (2nd sentence), 10 (1), 11 of the Law No. 3512 on Associations (28/06/1938)*

***Relevant Constitutional Provisions:*** *Art. 8, 10, 11, 12, 29, 56, 68, 72 (1961 TA)*

***Voting:*** *Rejected by majority of 14:1 justices (regarding Art. 3)*
*Rejected by majority of 10:5 justices (regarding Art. 10(1))*
*Rejected by majority of 10:5 (regarding Art. 11)*

***Dissenting and Concurring Opinions:*** *5 DO*

***Justices:*** *President Lütfi AKADLI; Members: Cemalettin KÖŞEOĞLU, Asım ERKAN, Rifat GÖKSU, Şemsettin AKÇOĞLU, İbrahim SENİL, İhsan KEÇECİOĞLU, A. Şeref HOCAOĞLU, Salim BAŞOL, Celâlettin KURALMEN, Hakkı KETENOĞLU, Ahmet AKAR, Muhittin GÜRÜN, Lütfi ÖMERBAŞ, Ekrem TÜZEMEN*

The parliamentary group of the Türkiye İşçi Partisi (TİP) claims the unconstitutionality of three provisions of the *Law on Associations*. Firstly, it is argued that the age requirement of 21 years for membership in political parties violates the legal age of 18 years stipulated in Article 11 of the Constitution. Secondly, the restriction on the establishment of foreign associations' offices, which is only possible by exceptional permission from the Council of Ministers, violates the general right to form associations (Art. 29). Thirdly, the general prohibition of the engagement of associations in preparatory military training and instruction, which can only be overcome by an explicit exemption by the Council of Ministers, is criticised as violating general principles of the Constitution. The applicant even claims that this provision provides the grounds for the establishment of a totalitarian regime. The AYM rejects all three claims of the applicant, alluding to the probable threat of international associations for the country and pointing out that Article 29 (Right to publish periodicals and non-periodicals) of the Constitution authorises the legislator to limit the right to establish associations if it is necessary for maintaining public order.

(…)

### III. MERITS

1. (…)

As mentioned above, Article 29 of the Turkish Constitution No. 334 (09/07/1961) establishes that everyone has the right to form an association without prior permission. This right can only be restricted by law for



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purposes of maintaining public order or morality. The Constitution does not contain any provision – neither in this article nor anywhere else – that establishes that every individual of at least 18 years has the right to join a political party. Article 11 of the Turkish Civil Code provides that full age is attained at 18. However, neither the Turkish Civil Code nor any other law provides that everyone of full age can undertake every transaction. The legislator can consider that full age is insufficient for the enjoyment of some rights in some areas. In our case the legislator, bearing in mind the importance of political parties expressed in Article 56 of our Constitution, has considered political associations – that is political parties – as different from other associations. And it has decided to connect membership to political parties to the right to vote in parliamentary elections. The legislator has provided in Article 8 of Law No. 298 Concerning Basic Electoral Principles and Electoral Registers (26/04/1961) that "[e]very Turk who has completed 21 years can vote". In other words, 18 years, which the Turkish Civil Code has established as the age of consent, has been considered as insufficient for the right to vote. The Constitutional Court has already rejected in Decision No. E. 1963/192, K. 1963/161 (21/06/1963) an application claiming that the provision at issue violates Article 12 of the Constitution. As mentioned in this decision, the Constitution does not indicate the electoral age. In other words: just as specifying the electoral age is not a constitutional issue, specifying the required age for membership in political associations is also not a constitutional issue. Considering the above-mentioned, it turns out that the provision in Article 3 of the Law on Associations, which states that "[h]owever, membership in political associations requires the right to vote in parliamentary elections", is not unconstitutional. Therefore, the application for annulment has to be rejected.

2. (…)

The legislator has enacted the Law on Associations bearing in mind the dangerous role that many associations have played in our history. As a matter of fact the right to form associations can be limited in many respects. Thus, Article 45 (2) of the Turkish Civil Code states that if the aims of an association violate laws and morals it cannot achieve legal personality. Article 29 of the Constitution provides that the right to form associations can be limited for purposes such as protecting public order and morality. Nowadays there are countless associations all around the world. Many of



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these associations could be very harmful for our country. For instance, the establishment of associations that were formed in foreign countries with the aim of disseminating certain harmful ideologies that conflict with some of our constitutional principles could be detrimental to us, and not beneficial. Similarly, associations established with an international purpose could, instead of being beneficial, be very harmful for us. Thus, the fact that the legislator, bearing in mind these considerations, has prohibited the establishment of offices or the formation of such associations cannot constitute a violation of the Constitution. Moreover, according to Article 10 (2) of the Law on Associations "[t]he Council of Ministers can decide to permit the formation of an association or the establishment of offices in the country of an existing association, if they are considered to benefit international cooperation". This shows that the formation of associations or establishment of offices of associations that have their seat in foreign countries is not categorically prohibited. Considering the above-said, the application for annulment of Article 10 of the Law on Associations has to be rejected.

3. Concerning the applicant's request with regard to Article 11 of the Law on Associations

(…)

Article 11 of the Law on Associations has been added to the law by the Committee of Internal Affairs of the Turkish Grand National Assembly. The committee indicated that it drafted the provision to enable the authorities to take timely preventive measures in order to protect the State and nation against possible harm and dangers. The thought of establishing a totalitarian regime cannot possibly have occurred during the enactment of the second sentence. It has only been enacted in view of preparing young men and women for military service. If any association could freely engage in preparatory military training and instruction, and if anyone could freely form an association to engage in such business, then this could entail them taking action against the State and government at unforeseen moments and thereby disturb our country's peace. It is for this reason that not every association has this right. Only the Council of Ministers can authorise those associations that it considers fit to engage in some of these tasks. For instance, considering that it would contribute to national defence, the Council of Ministers could authorise a sports club to teach shooting or another association to teach flying or engage in other similar preparatory



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training. This would also not violate the equality principle. To sum up, in Article 29 the Constitution authorises the legislator to limit the right to establish associations.

The limitation created by the legislator in the issue at hand rests on the assumption that public order can thus be better maintained. Therefore, the claim that Article 11, second sentence of the Law on Associations No. 3512 violates the Constitution has to be rejected.

## IV. CONCLUSION

For the aforementioned reasons, the application is dismissed by majority of votes (16/03/1965).

1. Regarding Article 3 with a dissenting vote by Justice Şemsettin AKÇOĞLU,

2. Regarding Article 10 (1) with dissenting votes by Justices Rifat GÖKSU, Şemsettin AKÇOĞLU, İbrahim SENİL, İhsan KEÇECİOĞLU and A. Şeref HOCAOĞLU,

3. Regarding Artilce 11, 2nd sentence with dissenting votes by Justices Rifat GÖKSU, A. Şeref HOCAOĞLU, Celâlettin KURALMEN and Muhittin GÜRÜN.



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## 3.8 Freedom of Association and Assembly

***Application Number:*** *1976/27* ***Decision Number:*** *1976/51*

***Date of Decision:*** *18 and 22/11/1976*

***Date of Publication and Number of the Official Gazette:*** *16/05/1977 - 15939*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by the CHP group in the Senate of the Republic*

***Provisions at Issue:*** *Art. 3 and 4 of Law No. 1932 (19/01/1976) amending Art. 9 and 10 of Law No. 171 on Freedom of Assembly and Demonstration*

***Relevant Constitutional Provisions:*** *Art. 11, 28 (1961 TA)*

***Voting:*** *Rejected by majority of 10:5 justices (regarding the form);*
*Accepted by majority of 15:0 justices (regarding the substance of Art. 9)*
*Accepted by majority of 13:2 justices (regarding the substance of Art. 10 (2-4))*

***Dissenting and Concurring Opinions:*** *11 DO*

***Justices:*** *President Kâni VRANA; Vice President Şevket MÜFTÜGİL; Members: Halit ZARBUN, Ziya ÖNEL, Abdullah ÜNER, Ahmet KOÇAK, Şekip ÇOPUROĞLU, Fahrettin ULUÇ, Muhittin GÜRÜN, Lütfi ÖMERBAŞ, Ahmet ERDOĞDU, Hasan GÜRSEL, Ahmet Salih ÇEBİ, Nihat O. AKÇAKAYALIOĞLU, Ahmet H. BOYACIOĞLU*

The applicants claim, on procedural and substantial grounds, that the law at issue violates Articles 11 (The essence of the basic rights) and Article 28 (Right to hold meetings and demonstration marches, that is: freedom of assembly) of the Constitution.[729] Regarding procedure, it was questioned whether the National Assembly had reached the necessary quorum during the debate of the draft law. Moreover, whether the three months' period expired without a vote of the Senate after which the law would have automatically come into force. Concerning substantial claims, it is argued in the application that the discretionary powers of authorities at issue impose a de facto approval mechanism and thus violate Article 28 of the Constitution. The AYM rejects the application concerning the form. But it acknowledges the claims for annulment of the provisions at issue added by Law No. 1932, concluding that they prevent assemblies and demonstrations from reaching their democratic goals and in addition give room for subjective interpretation and arbitrariness of authorities.

(…)

729 According to the 1961 Constitution, Article 28 guarantees the "Right to congregate and march in demonstration" (in Turkish: "*Toplantı ve Gösteri Yürüyüşü Hakkı*"). The international human rights law term "freedom of assembly" covers the same activities, and for a better understanding this concept will therefore be used.



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## IV. MERITS

(…)

### A- Issue of Unconstitutionality with Regard to the Form of the Provisions at Issue

*The Court considers several procedural dimensions of the adoption process of Law Nr. 1932. It discusses the question of the necessary quorum in both chambers of Parliament, as well as the time frame of the legislative process. Due to a repeated lack of quorum in the National Assembly, adoption of the law was delayed. After it had been finally passed in the National Assembly, it was sent to the Senate where its adoption met similar difficulties. Due to a repeated lack of quorum, the Senate did not vote on the law within the stipulated three months' period. Thus, it entered into force automatically without the consent of the second chamber. Among others, the Court deals with the question of whether the four day extraordinary session of the chambers during parliamentary recess has to be counted when calculating the three months' period. Finally, the application is rejected concerning all procedural complaints by the majority of justices. However, some justices dissented on different aspects of the majority reasoning.*

### B- Issue of Unconstitutionality with Regard to the Content of the Provisions at Issue

#### 1- Concerning some constitutional principles and concepts relevant for the issue at hand

Following the general principles that concern the foundations of the State that are determined in the first nine articles, the 1961 Constitution, which provides for basic individual rights and freedoms in the broadest way, establishes the following in Article 10: "Every individual is entitled, in virtue of his existence as a human being to fundamental rights and freedoms, which cannot be usurped, transferred or relinquished. The State shall remove all political, economic and social obstacles that restrict the fundamental rights and freedoms of the individual in such a way as to be irreconcilable with the principles embodied in the rule of law, individual



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well-being and social justice. The State prepares the conditions required for the development of the individual's material and spiritual existence."

In its report the Constitutional Committee of the House of Representatives stated: "...Individual rights with their general nature appear in this draft as a democratic principle, which limits State authority.... The determination of the limits of these individual rights and freedoms, which constitute the limit of political power, the determination of the legislator's limits has not been left unconditionally to the legislator's discretion. The limit to the legislator's regulatory power of rights has been determined in principle by the Constitution itself. On the one hand, the Constitution has established a broad list of individual rights and freedoms. On the other hand, it has indicated under which circumstances, upon which considerations and to what extent they can be restricted. And finally, in any case this restriction cannot go so far as to endanger the core of the rights and freedoms." (Protocols of the House of Representatives, 34th Meeting, 30/03/1961, Vol. 25, p. 6)

As can be seen, the constitution-maker indicates the characteristics of the fundamental rights and freedoms in the first paragraph, and in the second paragraph assigns to the State the duty to remove all political, economic and social obstacles that restrict the fundamental rights and freedoms of the individual in such a way as to be irreconcilable with the principles in the rule of law, individual well-being and social justice. Thereby, it tries to guarantee these fundamental rights as required by the concept of a State governed by the rule of law.

Concerning the other constitutional provisions relevant for the issue at hand, Article 11 provides that fundamental rights and freedoms can only be limited by law and in conformity with the letters and the spirit of the Constitution for reasons mentioned in Article 11, or based on other specific grounds mentioned in other articles. However, the essence of any right or freedom cannot be infringed upon, not even by law. As can be seen, the grounds provided by this provision constitute general reasons for the limitation of fundamental rights and freedoms.

Article 28, which concerns the freedom of assembly, provides that "[a]ll individuals are entitled to congregate or march in demonstration without prior permission, insolong as they are unarmed and have no intent to assault. This right can be restricted only by law for purposes of maintaining public order." Thus, this article designates "public order" as a special ground for limitations.

*The Court cites from the explanatory memorandum to Articles 11 and 28 of the Constitution. This document states, among others, that the provision*



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*protecting the essence of a right has been inserted on purpose because the violation of freedoms is often justified by the violaters claiming that freedoms were only to be regulated. Furthermore, a law regulating the freedom of assembly shall not result in a de facto prohibition of assemblies. The Court also cites a draft provision which would have clarified this issue but was later deleted from the draft. In addition, it argues that during the constitution-making process the term "essence" was not further clarified, since essential meaning would always depend on the right in question, and that the determination of the essence of a right would be left to the Constitutional Court in each individual case.*

The Constitutional Court has determined that the essence of a right or freedom would be infringed upon if limitations upon a right or freedom make it very difficult or impossible to enjoy a right or freedom in conformity with its ends (Constitutional Court, Decision No. E. 1963/16, K. 1963/83 of 08/04/1963, Journal of Decisions, Vol. 1, p. 194).
(…)

Thus, any regulation concerning the limitation of fundamental rights and freedoms must above all comply with the letters and spirit of the Constitution. And it must not under any circumstances infringe upon the essence of fundamental rights and freedoms. In other words, the limitations imposed by law must not abolish freedoms, render it seriously difficult to enjoy rights, prevent the aims of rights and freedoms being attained and have the effect of eliminating them. Consequently, the reasons for the limitation must be stated in a concrete, open, and clear way as to prevent subjective interpretations based on the individual opinions and conceptions of the implementing agents.
(…)

2- Issue of Unconstitutionality of the terms "verbal or" in Article 9 (3) of Law No. 171 added by Law No. 1932

(…)

During the debate of Article 28 in the House of Representatives the term "assault" was discussed but not further defined. Some examples mentioned violent assaults, and it was indicated that "these kinds of assaults are regulated in criminal law … criminal law provisions can be applied to those assaulting".



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Our laws do not contain any provisions defining a verbal assault. In other words, there is no indication of a particular word that would be considered as an assault.

Concerning "general peace and order", there can be no doubt that it has the same meaning as "public order".

As indicated in a decision of the Constitutional Court, the term public order, albeit being a term difficult to define, implies anything that aims at guaranteeing societal comfort and peace and protecting the State and its institutions. In other words, it covers all provisions that constitute the foundations of societal order in every area (Constitutional Court, Decision No. E. 1963/28, K. 1964/08 of 28/01/1964, Journal of Decisions, Vol. 2, p. 47).

The limitations established by our laws, and in particular by Law No. 171, have been openly and clearly explained with reference to concrete situations. For example, the limitations established in Articles 3, 4, 7, 12 of the mentioned law, which determine the duration of assemblies and demonstrations and where they can or cannot be held, have these qualities.

According to the provision at issue, the government commissioner will estimate and determine first whether there is a "verbal assault", then whether this situation disrupts "general peace and order", and if so will render the continuation of the assembly impossible. That is to say, the Government Commissioner will decide whether there is a "verbal assault", the qualities of which have been mentioned above, and a situation disrupting "general peace and order".

According to Article 14 (3, 4) of Law No. 171, the police will remove persons who participate with arms and tools in assemblies, while the assembly or demonstration will continue and freedom of assembly will not immediately be forfeited. Additionally, the number of persons participating in an assembly or demonstration with arms has not been considered in itself to constitute a reason for dissolution. And, furthermore, it is required that the behaviour of those participating with arms or tools has to be such as to warrant a dissolution.

This means that if an assembly or a demonstration becomes an armed one, the consequences will be determined by objective legal standards, whereas if it turns into a "verbal assault", which is less serious, the consequences will be determined by the Government Commissioner's personal beliefs and discretion. It is impossible to reconcile this with the aims and general principles of Law No. 171.

As can be seen, the discretion to decide whether or not the conditions for such a limitation exist–and moreover their evaluation–has been left



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to the personal view of the Government Commissioner. This is a person who is a total stranger to the assembly and those who organised it. It is clear that such discretionary power is very likely to give way to arbitrary emotional interventions, and it is susceptible to being led to a situation where the possibility of holding an assembly is left to the mercy and consideration of the Government Commissioner.

Consequently, the authority given to the Government Commissioner to dissolve an assembly if it turns into a "verbal assault" goes beyond the constitutionally allowed limitations, prevents this right and freedom from reaching its aim, eliminates its effect and thereby infringes upon its essence. For this reason, the words "verbal or" in the provision at issue violate Articles 11 and 28 of the Constitution and shall be annulled.

3- Issue of Unconstitutionality of the second, third and fourth paragraphs of the Article added as Article 10 of Law No. 171 by Law No. 1932

a) (…)

As the Constitutional Court already decided in another case, Article 11 of the Constitution, which establishes the limits of the restrictions concerning fundamental rights and freedoms which the Constitution provides to the legislator, contains general concepts–such as "public order, national security" –that are open to subjective and broad interpretations according to individual views and opinions of the implementing authorities. This fact can lead to differing and arbitrary practices. It is impossible to reconcile the practice of transferring such general concepts directly into a law with the intentions and instructions of the constitution-maker. Hence it cannot be considered as a suitable legal arrangement. In other words, it cannot be considered to constitute a law enacted in accordance with the aims of the constitution-maker (Constitutional Court, Decision No. E. 1973/41, K. 1974/13 of 25/04/1974, Journal of Decisions, Vol. 12, p. 152).

In order to conform to the letter and spirit of the Constitution a limitation must be enacted, above all, according to democratic legal rules. Consequently, as mentioned above, the reasons for the limitation have to be clearly and concretely indicated so as to leave no room for personal views and discretion.

Yet, the provision at issue establishes a practice that resembles a system of administrative authorisation for any kind of assembly or demonstration. And it opens the possibility of subjecting the holding of assemblies and



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demonstrations to the will of the administrative authority and not to those who wish to assemble. Furthermore, it makes it possible to prevent or render it difficult to hold an assembly or demonstration after the period of postponement. Thus, as the assembly cannot be held in time, the result of the provision is to prevent the assembly or demonstration from reaching their aim and to eliminate their effects.

For these reasons, the provision at issue cannot be considered to comply with Articles 11 and 28 of the Constitution. In other words, the provision at issue establishes a limitation that exceeds the aims provided for by the Constitution and infringes upon the essence of a right.

b) (…)

According to the provision at issue, the Governor can use the power to postpone an assembly or demonstration before they begin and according to his/her judgement. (Since the use of this power, after the beginning of the assembly or demonstration, would constitute a dissolving of the assembly or demonstration, not a deferment.) Thus, the power conferred by the law and its use are based on assumptions. However, the Governor has above all the duty to take all necessary preventive security measures and ensure that the assemblies and demonstrations can be securely held in such situations. As it is possible to deploy riot police and military forces if necessary, it will not be a problem anymore to ensure the security of such assemblies and demonstrations. Even if there is a possibility that events disrupting public peace and order occur, or when such events have occurred.

When considering the provisions of Law No. 171, one can see that the law provides for the necessary precautions to ensure public peace and order before and during assemblies and demonstrations; under certain circumstances they can even be dissolved. For example, Articles 3, 4, 8, 11, 12, 13, and 14 contain such provisions. Furthermore, there are sufficient provisions providing for precautionary measures and sanctions to prevent and punish the abuse of this right.

(…)

As can be seen, the provision at issue renders practices based on personal views and discretion possible; it can result in the obstruction of the use of these fundamental rights and freedoms; and–for the reasons mentioned in relation to the other provisions and which apply also in this case–it furthermore infringes upon the core of the freedom of assembly.



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c) *In this part the Court discusses the power of the Ministry of the Interior to postpone an assembly or demonstration if they are planned for the same day in several provinces and if the ministry considers that the support requested by the governors cannot be provided. The Court states that the law provides ample opportunities to deploy security forces and that it should therefore not be a problem to ensure the security of assemblies and demonstrations.*

According to the provision at issue, the Ministry of the Interior can use its power to defer assemblies and demonstrations in case it considers that it cannot provide the requested support. As in the case of the previous provisions the decision of deferment will, again, be based on presumptions.

On the other hand, the law provides the Ministry with discretion to decide which requests for support from the Governors will not be accepted and which assemblies will therefore be postponed. In other words, it is not clear on which considerations and standards the postponement decision will be based and how the affected province will be determined. This can also result in arbitrary decisions.

*Then the AYM states that the provision does not contain sufficient precautions to prevent arbitrariness and that the concerns pertaining to the character and possible results of the provisions considered above also apply to this provision. Thus, this restriction also infringes upon the essence of a right.*
*Moreover, the Court summarises the above-mentioned conclusions that the provisions at issue a) open the possibility of subjecting the holding of an assembly or demonstration to the will of the administrative authorities; b) prevent the assemblies and demonstrations from reaching their aim as they cannot be held in time; c) provide opportunities for subjective interpretations based on personal views and opinions and arbitrariness and do not constitute a law in compliance with the constitution-maker's intentions. Therefore, they violate Articles 11 and 28 of the Constitution and have to be annulled.*

Halit ZARBUN and Abdullah ÜNER did not agree with this view.

## V. CONCLUSION

1- For the reason that hearing a verbal statement is considered unnecessary, the application for annulment has been rejected BY MAJORITY OF VOTES, with dissenting votes of Halit Zarbun, Fahrettin Uluç and Nihat O. Akçakayalıoğlu.

2- It was decided that the examination of the law at issue in the annulment case should be continued chronologically regarding the procedures



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of drafting the law BY MAJORITY OF VOTES, with dissenting votes of Ahmet Koçak, Şekip Çopuroğlu and Ahmet H. Boyacıoğlu (as it is their opinion that priority should be given to the reasons of annulment written in the application)

3- It was decided that the results of the open ballot conducted for other proposals in the 89th session held on 17/06/1975 does not provide any reasons for annulment with regard to quorum for Law No. 1932 of 19/01/1976 for which the negotiations over all had been continued BY MAJORITY OF VOTES, with dissenting votes of Ziya Önel, Sekip Çopuroğlu, Muhittin Gürün and Hasan Gürsel,

4- Since the draft of the law at issue has become law directly in the form as decided by the National Assembly without being discussed in the Senate of the Republic, it has been found unnecessary to elabourate on the structure of the commission established for the draft, UNANIMOUSLY;

5- The four days of 15., 16., 17. and 18/07/1975, when the legislative assemblies were holding extraordinary meetings, should be counted as falling within the three months period stated in Article 92 (10) of the Constitution; this was decided BY MAJORITY OF VOTES, with dissenting votes from Ahmet Salih Çebi and Ahmet H. Boyacıoğlu (according to those, only the first day of the four-days-term of extraordinary meeting should be counted as falling within in the three months period)

6- It was decided BY MAJORITY OF VOTES, with dissenting votes of Kani Vrana, Sekip Çopuroğlu, Lûtfi Ömerbaş and Ahmet H. Boyacıoğlu, that the non- establishment of the Executive Board of the Senate of the Republic did not result in an expiry of the three months period;

7- It was decided BY MAJORITY OF VOTES, with dissenting votes of Kani Vrana, Şekip Çopuroğlu, Nihat O. Akçakayalıoğlu and Ahmet H. Boyacıoğlu, that the three months period written in Article 92 (10) of the Constitution was completed starting from the day the draft was sent to the Senate of the Republic until the day it becomes law on 19/01/1976,

By these decisions, all annulment claims concerning the form have been rejected.

Regarding annulment claims concerning the content:

1-The phrase "verbally or" stated in Article 9 (3) of Law No. 1932 (19/01/1976) of Law No. 171 on Freedom of Assembly and Demonstrations (10/02/1963) is found to be contrary to the Constitution and decided to be annulled UNANIMOUSLY;

2- The provisions of the aforementioned Law Article 10 (2, 3, 4) amended with the Law No. 1932 are found to violate the Constitution and



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are decided to be annulled BY MAJORITY OF VOTES, with dissenting votes of Halit Zarbun and Abdullah Üner;

3- Having decided on the annulment of provisions in Article 10 (2, 3, 4), according to Article 28 of Law No. 44 from 22/04/1962, the annulment of the fifth paragraph of the aforementioned annulled article and paragraph (g) added to Article 13 of the same Law are decided to be annulled BY MAJORITY OF VOTES, with dissenting votes of Halit Zarbun, Abdullah Üner and Nihat O. Akçakayalıoğlu,

4- There is no need to decide on the date at which the decision of the Court should come into force according to the amended Article 152 (2) of the Constitution; decided BY MAJORITY OF VOTES, with dissenting votes of Halit Zarbun and Abdullah Üner on 18 and 22/11/1976.

(…)



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## 3.9 Duties of a Demonstration's Organisation Committee

***Application Number:*** *2004/90* ***Decision Number:*** *2008/78*

***Date of Decision:*** *11/03/2008*

***Date of Publication and Number of the Official Gazette:*** *05/07/2008 - 26927*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Ürgüp Criminal Court of First Instance (Ürgüp Asliye Ceza Mahkemesi)*

***Provisions at Issue:*** *Article 11 (2nd sentence) and Article 28 (3) of Law No. 2911 on Assemblies and Demonstrations (06/10/1983)*

***Relevant Constitutional Provisions:*** *Art. 2, 5, 13, 26, 34, 38 (1982 TA)*

***International Treatises/References:*** *UDHR*

***Voting:*** *Rejected by majority of 8:3 justices*

***Dissenting and Concurring Opinions:*** *3 DO, 1 CO*

***Justices:*** *President Haşim KILIÇ; Vice President Osman Alifeyyaz PAKSÜT; Members: Sacit ADALI, Fulya KANTARCIOĞLU, Ahmet AKYALÇIN, Mehmet ERTEN, A. Necmi ÖZLER, Serdar ÖZGÜLDÜR, Şevket APALAK, Serruh KALELİ, Zehra Ayla PERKTAŞ*

The submitting court states that the obligation to have all members of an organisation committee present at every assembly or demonstration severely limits Article 26 (Freedom of expression and dissemination of thought) and Article 34 (Right to hold meetings and demonstration marches) of the Constitution. In case a committee member fails to be present, the remaining members can only choose to cancel the demonstration or continue which means to risk facing criminal charges. The AYM rejects the application, arguing that the duty of the committee to be present is a consequence of its power and part of its responsibilities. Here the Court expresses the opinion that the provision at issue generally aims at ensuring peaceful and orderly assemblies without violating essential constitutional rights.

(…)

### V. MERITS

(…)

#### A- Review of Article 11 (2nd sentence)

(…)

Article 11 (2nd sentence) of the Law on Assemblies and Demonstrations provides that the organising committee is required to be present at the assembly with at least seven members including the president.

(…)



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With regard to Article 11 of the Law on Assemblies and Demonstrations the explanatory memorandum states that "*the provision has established the requirement for the organising committee to be present at the assembly*". And with regard to Article 9 of the Law on Assemblies and Demonstrations it states that "*the provision requires an organising committee with at least seven members in order to ensure an orderly assembly and enable, in case of incidents, the authorities to identify the responsible persons*".

Article 12 of the Law on Assemblies and Demonstrations, which is entitled "*Duties and Responsibilities of the Organising Committee*", provides: that the organising committee is responsible for ensuring peace and order at an assembly and that it does not exceed the aims stated in the written application; that the committee takes the necessary measures for this and, if necessary, requests the support of the security forces; that in case it cannot fulfil its duties despite the precautionary measures, the president of the committee can request the Government Commissioner to dissolve the assembly; and that the responsibility of the organising committee will only expire after the complete dissolving of the demonstration.

Article 11 of the Law No. 2911 regulates assemblies and demonstrations with more than seven people. Less than seven people obviously have the right to express their ideas collectively. A legal rule that has been established to ensure orderly assemblies with more than seven people cannot be construed as violating the freedom of assembly protected in Article 34 of the Constitution.

On the other hand, there can be no doubt that the duty of the organising committee to be present at the assembly with at least seven people including the president is a consequence of the duties, powers and responsibilities provided to the organising committee by the law to fulfil its functions. Thus, it is clear that this provision, which aims at ensuring peaceful and orderly assemblies, establishes a limitation aiming for the protection of public order without infringing upon the essence of the right.

For this reason, the provision does not violate Articles 13 and 34 of the Constitution. The application has to be rejected.

Osman Alifeyyaz PAKSÜT, Fulya KANTARCIOĞLU and Serruh KALELİ did not agree with this view.

Articles 2, 5, and 26 of the Constitution have not been found to be relevant.



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B- Review of Article 28 (3)

1) Issue of Restriction

*Here the AYM states that courts can only submit applications for review of provisions that are directly applicable to a case at hand. Thus, the AYM unanimously decides to restrict its review to Article 11 of the Law on Assemblies and Demonstrations, although the provision at issue also refers to Article 12 of the Law on Assemblies and Demonstrations.*

2) Issue of Unconstitutionality

(…)

Article 38 of the Constitution provides that "*[c]riminal responsibility shall be personal*".

The provision at issue uses the terms "*as regards the members of the organising committee who did not fulfil their duties*" to designate to whom this provision applies.

On the other hand, even though Article 11 of the Law on Assemblies and Demonstrations, to which the provision at issue refers, confers duties to the organising committee, as the organising committee has no coercive powers to ensure the presence of its members, the criminal responsibility, which the failure to fulfil the duty established by Article 11 of the Law on Assemblies and Demonstrations entails, is not a collective but an individual responsibility. Hence, it is only applicable to those who fail to be present at an assembly.

For these reasons the terms "*11 and...*" do not violate Article 38 of the Constitution. The application has to be rejected.

A. Necmi ÖZLER and Şevket APALAK have shared the decision and added a concurring opinion.

Osman Alifeyyaz PAKSÜT, Fulya KANTARCIOĞLU and Serruh KALELİ did not agree with this view.

Articles 2, 5, 26 and 34 of the Constitution have not been found to be relevant.



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## 3.10 Crime of Stirring Up Social Unrest

***Application Number:*** *1963/193* ***Decision Number:*** *1964/09*

***Date of Decision:*** *29/01/1964*

***Date of Publication and Number of the Official Gazette:*** *11/06/1964 - 11725*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by TİP parliamentary group*

***Provisions at Issue:*** *Art. 143 and 312 of the Turkish Criminal Code No. 765 (01/03/1926)*

***Relevant Constitutional Provisions:*** *Art. 11, 19, 20, 21, 29 (1961 TA)*

***Voting:*** *Rejected unanimously (regarding Art. 312),*
*Rejected by majority of 8:7 justices (regarding Art. 143)*

***Dissenting and Concurring Opinions:*** *5 DO*

***Justices:*** *President Sûnuhi ARSAN; Members: Rifat GÖKSU, İsmail Hakkı ÜLKMEN, Şemsettin AKÇOĞLU, İbrahim SENİL, İhsan KEÇECİOĞLU, A. Şeref HOCAOĞLU, Salim BAŞOL, Celâlettin KURALMEN, Hakkı KETENOĞLU, Fazıl ULUOCAK, Avni GİVDA, Muhittin GÜRÜN, Lütfi ÖMERBAŞ, Ekrem TÜZEMEN*

The parliamentary group of the Türkiye İşçi Partisi claims that the crime "to prompt some social classes to hate and hostility in a way that threatens public security", listed in Article 312 of the Turkish Criminal Code, can cause arbitrary treatments and or impediments of scientific research, as the elements of a crime are not clearly indicated. Therefore, the applicants ask to annul Article 143 and 312 of the Turkish Criminal Code. Since only the aforementioned crime is explicitly mentioned in the application, the justices decide by majority to neglect other crimes listed in the articles. The AYM rejects the application for constitutional review of Art. 143 by majority; the application for Art. 312 is dismissed unanimously and underlines that the provisions in question do not violate fundamental rights but aim at ensuring public order and security.

(...)



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MERITS

1- Because the question of constitutionality of Art. 143 of the Turkish Criminal Code No. 765 (01/03/1926) has been decided in decision E. 1963/128, K. 1964/08 (28/01/1964), and since the Court has no reason to deviate from this view, with the dissenting votes of the President Sünuhi ARSAN, and members Rifat GÖKSU, İsmail Hakkı ÜLKMEN, Şemsettin AKÇOĞLU, İbrahim SENİL, İhsan KEÇECİOĞLU and A. Şeref HOCAOĞLU it has been decided by majority that the application for constitutional review of this article has to be rejected.

2- Regarding the application in light of Article 312 of the Turkish Criminal Code No. 765 (01/03/1926):

Article 312 (1) of the Turkish Criminal Code No. 765 prescribes sanctions for three different crimes. These are:

a) To praise an action that is counted as a crime by law,

b) To prompt the people to disobey the law.

c) To prompt hate and hostility among some social classes in a way that threatens public security.

The applicant Türkiye İşçi Partisi states that in the article in question elements of a crime are not clearly indicated, that this form of regulation can cause arbitrary treatment or impediment of scientific research, and that therefore this article must be annulled by the Court. However, the applicant mentions only the crime (to prompt hate and hostility among some social classes in a way that threatens public security)[730] and claims that the regulation of this crime violates the Constitution. The applicant does not have any claims concerning other crimes governed under the same article.

Having considered this situation, the majority of the panel of justices decided to handle only the crime (to prompt hate and hostility among

730 Here the AYM uses brackets instead of quotation marks.



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some social classes in a way that threatens public security). Some members of the Court, Şemsettin AKÇOĞLU, A. Şeref HOCAOĞLU, Celâlettin KURALMEN and Muhittin GÜRÜN, did not agree with the majority opinion as they think that the Court should handle the article in its entirety, since an annulment of the whole article is requested in the application.

As mentioned above, Article 312 (1) of the Turkish Criminal Code No. 765 (01/03/1926) prescribes sanctions for the crime to prompt some social classes to hate and hostility in a way that threatens public security[731].

The Constitution of the Turkish Republic No. 334 (09/07/1961) does not include any provision that impedes counting such an act as a crime. The constitutional articles on which the applicant relies do not affirm the claims of the applicant. Contrary to the applicant's claim that in the article in question elements of a crime are not clearly indicated, that this form of regulation can cause arbitrary treatment or impediment of scientific research and that this article (to prompt some social classes to hate and hostility in a way that threatens public security…) should therefore be declared unconstitutional, the elements of a crime are clearly defined in Article 312 (1) of the Turkish Criminal Code No. 765. The claim that this article infringes fundamental rights secured by the Constitution is ill-founded. To allow the prompting of hate and hostility among some social classes in a way that threatens public security means to give consent to chaos and turmoil among citizens, and this can never be accepted. The constitution-makers do not aim at prompting some social classes to hate and hostility in a way that threatens public security; but they aim at preventing a subversion of order and security. Furthermore, statements of the preamble of the Constitution, which is a part of the Constitution pursuant to Article 156, confirm this opinion.

For these reasons, it is evident that none of the articles of the Constitution can allow the prompting of hate and hostility among some social classes in a way that threatens public security[732]. Hence, the provision in Article 312 (1) of the Turkish Criminal Code No. 765, which prescribes sanctions for any act (to prompt hate and hostility among some social classes in a way that threatens public security), does not violate the Constitution and the application must be dismissed.

(...)

731 Here we find yet another quote, but the AYM uses neither brackets nor quotation marks to indicate this.

732 Here, again, neither brackets nor quotation marks are used.



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## 3.11 Press and Broadcasting Privilege

***Application Number:*** *1999/39* ***Decision Number:*** *2000/23*

***Date of Decision:*** *19/09/2000*

***Date of Publication and Number of the Official Gazette:*** *12/10/2000 - 24198*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by member of the TBMM Mr Mehmet Recai Kutan (leader and group chairman of the main opposition party FP) on behalf of FP parliamentary group*

***Provisions at Issue:*** *Statement "… by the press or by broadcasting means…" in Art. 1 of Law No. 4454 on the Suspension of Sentences for the Crimes Committed by the Press (03/09/1999)*

***Relevant Constitutional Provisions:*** *Art. 10 (1982 TA)*

***Voting:*** *Accepted by majority of 6:5 justices*

***Dissenting and Concurring Opinions:*** *2 DO*

***Justices:*** *President Mustafa BUMİN; Vice President Haşim KILIÇ; Members: Yalçın ACARGÜN, Sacit ADALI, Ali HÜNER, Fulya KANTARCIOĞLU, Mahir Can ILICAK, Rüştü SÖNMEZ, Ertugrul ERSOY, Tülay TUĞCU, Ahmet AKYALÇIN, (Mustafa YAKUPOĞLU)*[733]

Referring to Article 10 (Equality before the law) of the Constitution, the Fazilet Partisi asks to annul the statement "… by the press or by broadcasting means…" in Article 1 of the *Law on the Suspension of Sentences for the Crimes Committed by the Press*. It argues that perpetrators, who committed crimes through press means and who were sentenced to imprisonment for not more than 12 years, enjoy the privilege of postponement, while scientists or researchers who quote from the news or broadcasting subject to a crime in a seminar that has less public reach have been excluded from the scope of postponement. The AYM rules that the statement has to be annulled, as it prescribes different sentences for those who commit similar types of crimes without having a valid reason such as national security, public interest or public order.

(…)

## II. THE LAW

### 1- Provision at Issue

Article 1 of Law No. 4454 (28/08/1999):

"**ARTICLE 1**- The execution of sentences shall be postponed for those who were convicted of press or broadcasting crimes, which were punished

733 Justice Mustafa YAKUPOĞLU was present at the beginning of the case. He retired on 14/07/2000 and was not present when the case was decided on 19/09/2000.



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with a maximum sentence of 12 years and with imprisonment, until the date 23/04/1999; including crimes committed by the chief editor.

The above paragraph shall be applied also to those who are serving a sentence at the moment.

If those mentioned in the first paragraph were not probed yet, or probed but not indicted yet, or trialed but not sentenced yet, or the sentence was not finalised; an indictment or a finalising decision of the sentence shall be postponed."

(…)

## III. PRELIMINARY EXAMINATION

(…)

## IV. STAY OF EXECUTION

(…)

## V. MERITS

(…)

### A. Meaning and Scope

(…)

In the explanatory memorandum of Law No. 4454 it is stated that:

"The freedom of expression and dissemination of thought, which is secured by constitutions of civilised countries, is a basic component of a democratic society. One of the means of enjoying this right is TV and radio broadcasting. To enable these means to function properly is essential in civilised societies: The final aim is to render the press and human thought free, by removing obstacles to the freedom of press and by safeguarding it. Therefore, issuing provisions regarding a postponement of execution of sentences and trials concerning crimes committed by press or TV and radio broadcasting as chief editors has vital importance in terms of enabling and maintaining social peace."



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So, in this text it is underlined that persons who commit crimes through TV or radio broadcasting or by press publications are targeted by this new regulation in particular; and this in the context of the freedom of the press, which is indeed a natural result of the freedom of expression and of thought.

The feature of crimes committed by the press is that the press is used as a means to realise crimes. "Publishing" is the essential component of this criminal act. Some other general crimes may also be committed through the press, and our penal system considers that to commit a crime through the press amounts to a matter of aggravation.

B. Issue of Unconstitutionality

In the application it is stated that the postponement of sentences below twelve years of imprisonment, for those who committed crimes by press or TV-radio broadcasting, renders perpetrators committing these crimes privileged. However, scientists or researchers who quote from the news, an article or a radio-TV program that was classed as a crime – in a seminar, symposium or in a meeting with a small audience – have been excluded from the scope of postponement. Despite the fact that committing a crime through the press or other means of communication results, pursuant to the Turkish Criminal Code and international treaties, in the imposition of heavier sentences, those who commit crimes through the press benefit from a postponement in particular. Perpetrators of minor crimes are excluded from the scope of the law. Therefore, it is claimed that the provision in question violates the principle of equality governed under Article 10 of the Constitution, and it must be annulled.

(…)

The "principle of equality before the law" can only be put into question among those whose legal statuses are similar. By this principle it is rather legal equality than de facto equality that is prescribed. The purpose of the principle of equality is to enable persons of the same status to be subject to the same proceedings and to prevent any discrimination and privilege. By this principle, infringement of the principle of equality before the law is eliminated through an application of different legal rules to some individuals and communities. The principle of equality before the law does not imply that everyone shall be subject to the same legal rules. To make someone subject to different legal rules for the reasons envisaged by Article 13 of the Constitution does not violate the principle of equality.



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Special conditions in their situations and positions may require different legal rules and implementations for some individuals and communities. The principle of equality would not be violated if the same legal rules are applied to the same legal positions, and if different legal rules are applied to different positions.

Since the establishment of a fair legal order that depends on equality is one of the basic functions of the rule of law, it is evident that the principle of the rule of law cannot be realised without enabling legal equality.

(…)

Provided that it acts loyal to the fundamental principles of the Constitution and the criminal law, there is no doubt that the legislator can issue regulations for "postponement" of sentences for some crimes. Similarly, it can determine which acts are to be considered as crimes and the type and severity of sentences, and the reasons for mitigation and matters of aggravation. But in case such a regulation is issued, it must apply to everyone equally due to the principle of equality. Issuing different regulations must be based on valid grounds, such as national security, public interest or public order.

By the provision in question, postponement of sentences has been made possible for crimes committed by the press or broadcasting means. However, similar types of crimes that require less punishment and that are not committed by press or broadcasting means have been excluded from the scope of the regulation in question. There is obviously no good reason for this regulation which prescribes different sentences for those who commit similar types of crimes.

Moreover, a State which is based on the rule of law cannot confine itself to consider fair measures in determining only crimes and punishments. It must also take the same measures in elimination or amendment of them or in the remedying of punishments. To take a heavier form of a crime into the scope of a postponement regulation while excluding a lighter form is not a fair solution.

Therefore, the provision violates Article 2 and 10 of the Constitution. It must be annulled.

Mustafa BUMİN, Yalçın ACARGÜN, Ali HÜNER, Mahir Can I-LICAK and Ertuğrul ERSOY did not agree with this view.



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## VI. THE ISSUE OF DATE OF ENTERING INTO FORCE OF THE RULING FOR ANNULMENT

In Article 153 (3) of the Constitution it is stated that "Laws, decrees having the force of law, or the Rules of Procedure of the Grand National Assembly of Turkey or provisions thereof, shall cease to have effect from the date of publication in the Official Gazette of the annulment decision. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That duration shall not be more than one year from the date of publication of the decision in the Official Gazette." This statement is also repeated in Article 53 (4) of the Law on the Establishment and Rules of Procedure of the Constitutional Court. In the fifth paragraph of the same article, it is stated that the Constitutional Court shall apply the paragraph above in the event that a legal gap arising from the annulment decision is found to be a threat to the public order or the public interest.

The Court concludes that the decision of annulment is going to enter into force one year after publication in the Official Gazette, in order to give time to the parliament to issue the required new regulations, since the legal gap stemming from the annulled part of Article 1 (1) of the Law No. 4454 will affect the public order and public interest adversely.
(…)



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## 3.12 Death Sentence

***Application Number:*** *1972/13* ***Decision Number:*** *1972/18*

***Date of Decision:*** *06/04/1972*

***Date of Publication and Number of the Official Gazette:*** *24/07/1972 - 14255*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by CHP*

***Provisions at Issue:*** *Law No. 1576 Regarding the Enforcement of Execution of Deniz Gezmiş, Yusuf Aslan and Hüseyin İnan (17/03/1972)*

***Relevant Constitutional Provisions:*** *Art. 64, 85, 147, 149, 150 (1961 TA)*

***Other Relevant Provisions:*** *Rules of Procedure of Both Legislative Organs*

***Voting:*** *Accepted by majority of 10:5 justices*

***Dissenting and Concurring Opinions:*** *6 DO*

***Justices:*** *President Muhittin TAYLAN; Vice President Avni GİVDA; Members: Fazıl ULUOCAK, Sait KOÇAK, Şahap ARIÇ, İhsan ECEMİŞ, Recai SEÇKİN, Ahmet AKAR, Halit ZARBUN, Ziya ÖNEL, Kâni VRANA, Muhittin GÜRÜN, Lütfi ÖMERBAŞ, Şevket MÜFTÜGİL, Ahmet H. BOYACIOĞLU*

The CHP asks for the annulment of Law No. 1576 *Regarding Enforcement of Execution of Deniz Gezmiş, Yusuf Aslan and Hüseyin İnan* (17/03/1972). They hold that it violates Article 147 (Function and Powers of the Constitutional Court), the amended Article 149 (Right of Litigation on Annulment Suits) and Article 150 (Term of litigation on Annulment Suits) of the Constitution, as well as the Rules of Procedure of the National Assembly. Furthermore, the CHP asks for stay of execution of Law No. 1576. After a meticulous discussion of several procedural problems, the AYM rules the provisions at issue unconstitutional and annuls Law No. 1576 by majority for violation of Article 85 (Rules of Procedure, political party groups and disciplinary measures) of the Constitution. Hence, stipulating that both legislative bodies have to act in accordance with the provisions stated in the Rules of Procedure. As the National Assembly did not respect these legal rules when it passed the law in question after only one reading (instead of two), declaring it to be urgent only after the reading had started, Law No. 1576 is declared unconstitutional on procedural grounds. All other arguments of the applicants are rejected by the AYM with a majority of votes. However, the tone of the ruling as well as the five long and substantial dissenting opinions by a total of 10 justices (in varying coalitions) show that the matter in question is highly controversial – and that political arguments are "hidden" behind a facade of procedural judicial argumentation.

(…)



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## III. PRELIMINARY EXAMINATION AND ARRANGEMENT OF THE AGENDA

### A- Preliminary Examination

a) Pursuant to Article 15 of the Rules of Procedure of the Constitutional Court, in the presence of Muhittin TAYLAN, Avni GİVDA, Fazıl ULUOCAK, Sait KOÇAK, Şahap ARIÇ, İhsan ECEMİŞ, Recai SEÇKİN, Ahmet AKAR, Halit ZARBUN, Ziya ÖNEL, Kâni VRANA, Muhittin GÜRÜN, Lütfi ÖMERBAŞ, Şevket MÜFTÜGİL and Ahmet H. BOYACIOĞLU on 27/03/1972 the first examination of the problems below has been carried out by the panel which reached the decision at the bottom of the ruling:

#### 1- Issue of agenda

Even though a call had been made for preliminary examination at 10:00 on Monday 27/03/1972, this did not meet the requirement of Article 33 (2) of the Rules of Procedure of the Constitutional Court which stipulates that there must be a period of ten days between the day when the agenda is sent out and the day of the hearing. Therefore, at the beginning of the hearing, the Court deliberated on the issue as to whether or not a further decision of the Court to shorten the ten-day period and deal with the matter on that day is necessary.

Article 33 (2) of the Rules of Procedure has a general character. The issue of preliminary examination is governed under Article 26 (4) of Law No. 44 (22/04/1962). According to this article, the Constitutional Court, within ten days of registration, shall examine whether a petition is in line with the requirements of Article 26 (2, 3). In other words, the Court verifies whether the applicant explained which laws or rules of procedure of legislative assemblies violate which constitutional provisions on what grounds, and whether they fulfilled the requirement to provide a certified copy of the authorising decision to the Secretary General. This shall prove the applicant's authorisation to initiate proceedings. This step is the major part of the preliminary examination defined under Article 15 of the Rules of Procedure of the Constitutional Court. As the law prescribes that an examination must be carried out within ten days of registration, Article 33 (2) of the Rules of Procedure, which does not comply with this provision, cannot be implemented. Muhittin GÜRÜN did not agree with this view.



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2- Whether the examination of the case lies within the jurisdiction of the Constitutional Court

Pursuant to amended Article 147 (1) and the last paragraph of amended Article 64, the Constitutional Court has the competence to review the constitutionality of laws, statutory decrees and Rules of Procedure of the Turkish Grand National Assembly and of constitutional amendments. In case of constitutional amendments, the Court is only allowed to review the conformity of the amendment with formal provisions prescribed in the Constitution. Here, the constitution-maker used the word "law" in its broad meaning, without making a distinction between the law in real terms and the law in a formal sense. On the other hand, the Constitution excludes some laws from constitutional review, such as "international treaties duly put into effect" which are counted as laws in the Constitution (last paragraph of Article 65), laws and decrees mentioned in Article 153, and laws enacted between 27/05/1960 and 06/01/1961 (fourth paragraph of amended Article).

There is no doubt that a law regarding the enforcement of a death sentence is hardly a law in the formal sense. At this point the key question is whether the enforcement of a death sentence should rely on a law or on a decision of the Turkish Grand National Assembly.

The amended Article 64 of the Constitution states the general duties and powers of the Turkish Grand National Assembly as follows (first paragraph):

To enact, amend and repeal laws;

to debate and adopt the bills on the budget and final accounts bills;

to decide to issue currency, to proclaim amnesty and pardon and to decide on the execution of death penalties given by the courts.

Article 64 (1) differentiates between the right "to pass resolutions in regard to minting currency, proclaiming pardons and amnesties, and to the carrying out of definitive death sentences" and the right "to enact laws" or to "debate and adopt bills".[734] This should be interpreted as a feature of wording because of a concern for avoiding repetition and because

734 The Turkish Constitution distinguishes between "*kanun koymak*", which literally means "to enact a law" and "*karar vermek*", which can be translated as "to take a decision", "to pass a resolution" or "to deliver a judgment". The following argumentation of the AYM deals with the material differences (or similarities) between these two types of legal acts.



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any disposal of legislation shall be a result of a decision (Article 86 (1) of the Constitution).

If enforcement of a death sentence relies on a resolution, not a law, such a decision could only be taken in a joint meeting of the Turkish Grand National Assembly. In fact, the Constitution prescribes in which cases the National Assembly and the Senate of the Republic shall have a joint meeting by a precise legal rule in Article 63 (2). The election of the President (Article 95), the impeachment of the President for high treason (Article 99), a parliamentary investigation and referral to the Supreme Court (Article 90), the declaration of a state of war and the authorisation to deploy armed forces or to allow foreign armed forces to be stationed in Turkey (Article 66), the approval of proclamation of martial law (amended Article 124), the approval of a decision to seize control of the administration of universities by the Council of Ministers (amended Article 120); all these have been regulated in this way and the detailed procedure regarding the first five issues is stipulated in the second, third and fourth sections of the Rules of Procedure of the Turkish Grand National Assembly. A similar provision on the enforcement of death sentences does not exist in the Rules of Procedure of the Turkish Grand National Assembly since there is no corresponding legal rule in the Constitution. Incidentally, it is appropriate to mention that in the report of the Constitutional Commission regarding the draft of the Constitution it is stated that "the enforcement of death sentences which relies on parliamentary decisions under the old constitutional regime will rely on laws under the new regime".

On the other hand, the right "to proclaim pardons and amnesties" – which is mentioned next to the right "to carry out definitive death sentences" among the listed competences of the Turkish Grand National Assembly which are linked with the expression "to pass resolutions" –, has so far been regulated by laws. The Constitutional Court considers them within the scope of the term of "law" governed under Article 147 and reviews their constitutionality. (…)

In summary, Law No. 1576 falls into the scope of the term "Law" in amended Article 147 of the Constitution. It is not one of the laws that are excluded from constitutional review by the Constitution. Therefore, the Constitutional Court is competent to hear the case.

Şahap ARlÇ and Halit ZARBUN did not agree with this opinion.



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3- Issue of conformity of the case with the conditions for preliminary examination

(…)

4- Issue of stay of execution of the law at issue

The applicant requested in their application letter to suspend the execution proceedings, in other words to close the implementation of the law. In general, concerning this topic the following can be said:

The Constitution defines the functions and competences of the Constitutional Court (in amended Article 19, Article 57, Article 81, amended Article 147 and amended Article 152). (Article 148) prescribes that establishment and the Rules of Procedure of the Court shall be regulated by law, and the mode of operation shall be regulated by Rules of Procedure to be formulated by the Court itself.

A competence with serious consequences, such as suspending the execution of a law, should be bestowed on the Constitutional Court only by the Constitution. If the matter is treated as an issue of procedure, then, the competence has to be deduced from Law No. 44 that regulates the establishment and Rules of Procedure of the Court. It is evident that the Constitutional Court has been bestowed such a competence neither by the Constitution nor by Law No. 44. Furthermore, by the amendment introduced by Law No. 1488 a suspension order can only be implemented on the day when a substantiated decision is published in the Official Gazette. In the former version of Article 152 it was prescribed that provisions of laws and rules of procedures of legislative organs that were annulled for unconstitutionality shall cease to have effect on the date of the ruling. Thus, it becomes even more obvious that the constitution-maker has meticulously defined when a suspended law ceases to have effect.

On the other hand, the amended Article 151 of the Constitution prescribes an obligation for the local courts, in cases of concrete constitutional review, to adjourn a case until a ruling of the Constitutional Court is delivered. This is because the provisions at issue affect the subjective rights of those concerned[735]. In other words, there exists an obligation of the local courts not to execute the law, i.e. a sort of competence of stay of exe-

735 With the phrase "subjective rights of those concerned" the AYM refers to applicant rights, or the rights of persons affected by a provision at issue.



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cution. But the fact that such an adjournment is not prescribed in abstract constitutional review procedure, i.e. by making a distinction between concrete and subjective laws, indicates that the constitution-maker did not consider for the Constitutional Court the competence of taking a decision for a "stay of execution of a law at issue". There is no possibility for the Constitutional Court to bestow upon itself such a competence, which is not foreseen in the law, by way of interpretation and comparison – no matter what law is at issue.

Although at the end of the hearings, a majority emerged to dismiss the request for a stay of execution, different reasons were given for this. The following justifications for the dismissal were given:

aa) Fazıl ULUOCAK, Şahap ARIÇ and Halit ZARBUN: "In the Constitution and Law No. 44 no competence has been bestowed on the Constitutional Court for the stay of execution".

bb) İhsan ECEMİŞ: "The Constitution and Law No. 44 have not entitled the Constitutional Court to take a decision on the stay of execution of laws. Though an application was submitted for annulment of the law at issue, to decide on the suspension of the law, which means to halt its execution, is only within the power of authorities that are assigned for implementation of law."

cc) Muhittin TAYLAN, Sait KOÇAK, Ziya ÖNEL, Lütfi ÖMERBAŞ and Ahmet H. BOYACIOĞLU: "The Constitution has not authorised the Constitutional Court to order the stay of execution of laws and also the Law on the Establishment and Rules of Procedure of the Constitutional Court does not regulate such a competence."

"On the other hand, the competence of constitutional review of laws is assigned to the Constitutional Court by constitutional provisions, and Article 149 indicates the authorities that have the power to directly bring action for annulment. There is no doubt that this right should be exercised in the name of the public."

"Taking a decision on the enforcement of definitive death sentences, meaning the enactment of a law in the formal sense of the word, by the Constitutional Court, is a legislative act which has effects only on individuals. Bringing an action against such a law by authorities listed in Article 149 of the Constitution by reason of violation of the Constitution and taking a decision for substantial examination of the case leads to some legal consequences. Hence, the goal of Article 151 of the Constitution which regulates pleas for violation of the Constitution renders the constitutional review effective by adjourning the case until the ruling of the Constitutional Court is rendered."



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"The Law on enforcement of definitive death sentences has been brought before the Constitutional Court, and the Court decided to undertake a substantive examination. Since the law concerns the right to life, which is respected as the most important right among the personal rights, the proper authorities dealing with the execution of the penalty ought to act just as prescribed under Article 151 of the Constitution.[736]

"The request for stay of execution of the law in question should be dismissed for the given reasons and because the Constitutional Court lacks the competence of review."

Under these circumstances the request for stay of execution should be dismissed and the applicant should be notified of the conclusion.

Avni GİVDA, Recai SEÇKİN, Ahmet AKAR, Kâni VRANA, Muhittin GÜRÜN and Şevket MÜFTÜGİL defended the opinion that the execution of the law in question should be suspended because of the special character of the matter.

5- The issue of getting the documents

Due to the urgency of the case it is recommended to authorise the presidency [of the Constitutional Court] to provide the Court with the documents necessary for substantive review.

b) At the end of the examination, for the reasons mentioned above, the Court ruled that:

1- The Court convenes at 10:00 on 27/03/1972 and there is no room to take a decision to hear the case today pursuant to Article 26 (4) of Law No. 44; with the dissenting vote of Muhittin GÜRÜN, who claims that Article 33 of the Rules of Procedure should be taken into account along with that provision of the law;

2- The Constitutional Court is competent to hear the case, and the substantive review should begin since all requirements of the preliminary examination are fulfilled; ruled by a majority of votes with dissenting votes

736 Pursuant to Article 151, the parliament – like lower courts – has to wait for a decision of the Constitutional Court and issue a stay of execution of the law reviewed by the AYM.



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by Şahap ARlÇ and Halit ZARBUN, who claim that the Constitutional Court lacks the required competence;

3- The request for stay of execution should be dismissed, ruled by majority of votes with dissenting votes by Avni GİVDA, Recai SEÇKİN, Ahmet AKAR, Kâni VRANA, Muhittin GÜRÜN and Şevket MÜFTÜGİL, who defend the opinion that the law in question must be suspended because of the special character of the issue.

A[737]- To authorise the presidency to provide the Court with the documents necessary for substantive review was decided unanimously.

5- On 27/03/1972 it was decided unanimously that the part of the decisions which regards the stay of execution of the law should be send to the headquarters of the applying political party.

B- Arrangement of Agenda

a) Because of the particularity of the concrete case, the Court came together on 31/03/1972 to discuss the matter of agenda. Muhittin TAYLAN, Avni GİVDA, Fazıl ULUOCAK, Sait KOÇAK, Şahap ARIÇ, İhsan ECEMİŞ, Recai SEÇKİN, Ahmet AKAR, Halit ZARBUN, Ziya ÖNEL, Kâni VRANA, Muhittin GÜRÜN, Lütfi ÖMERBAŞ, Şevket MÜFTÜGİL and Ahmet H. BOYACIOĞLU participated in the meeting.

Pursuant to Article 33 (2), an agenda must be sent out to the members at least ten days before the meeting. However, in urgent cases, this period may be shortened. Law No. 1576 concerns the enforcement of death sentences for three individuals. The Court is not able to decide on a stay of execution since the Constitution and Law No. 44 have not entitled the Court to do so. This situation calls for a maximum shortening of the period prescribed in the Rules of Procedure and thus for concluding the case as soon as possible.

Avni GİVDA, Ahmet AKAR, Ziya ÖNEL, Muhittin GÜRÜN and Şevket MÜFTÜGİL did not agree with this.

It is appropriate to examine the case at 10:00 on 06/04/1972, making use of the possibility provided by the Rules of Procedure to implement the shortest required time span between the distributing of the agenda and the day of the hearing in accordance with the Rules of Procedure.

It is appropriate to hear the case at 10:00 on 06/04/1972, since it has been decided to implement the shortest time span possible between the distribution of the agenda and the hearing indicated in the Rules of Procedure.

Avni GİVDA, Ahmet AKAR, Halit ZARBUN, Muhittin GÜRÜN and Şevket MÜFTÜGİL did not agree with this.

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737 The “A” instead of a “4” has to be interpreted as an inadvertency of the Court.



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Since it had been decided to put the case on the agenda of 06/04/1972, and in order to be able to carry out the thorough examination of the issue, it was articulated before and during the session that the presidency should postpone the original agenda items of 04/04 and 06/04/1972.

b) Therefore, it was decided that;

1- The period indicated in the Rules of Procedure shall be shortened; decided by majority of votes; dissenting votes by Avni GİVDA, Ahmet AKAR, Ziya ÖNEL, Muhittin GÜRÜN and Şevket MÜFTÜGİL;

The case will be heard at 10:00 on 06/04/1972; decided by majority of votes; dissenting votes by Avni GİVDA, Ahmet AKAR, Halit ZARBUN; Muhittin GÜRÜN and Şevket MÜFTÜGİL.

2- Regarding the issues on the original agenda of 04/04 and 06/04/1972, the Presidency will fix another date; decided unanimously, on 31/03/1972.

## IV. MERITS

(…)

### A- Issue of Re-arrangement of the Agenda

(…)

### B- Issue of Unconstitutionality of Law No. 1576

#### 1- The problem caused by the way of sending the file regarding the enforcement of the death sentence

It is apparent that the death sentence for Deniz Gezmiş, Yusuf Aslan and Hüseyin İnan, imposed by decision No. 1971/13-23 (09/10/1971) of the Ankara Martial Law Command's First Military Court and based on Article 146 (1) of the Turkish Criminal Code, has been approved by decision No. 1971/457-1972/1 (10/01/1972) of the 2. Chamber Military Court of Appeals. A request for revision of the decision was refused by the Public Prosecution Office of the Military Court of Appeals and the sentence was



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finalised. The following step was the preliminary transaction required in the case of enforcement: pursuant to Article 244 (3) of Law No. 353 on the Establishment and Trial Procedure of Military Courts, the Ankara Martial Command sent the copies of the case file and other related documents to the Prime Ministry in order to receive the decision of enforcement from the Turkish Grand National Assembly. The Prime Ministry delivered them to the Presidency of the Turkish Grand National Assembly in compliance with Article 64 of the Constitution. Thus, the issue was not dealt with by the Ministry of Justice. The applicant claimed that this situation rendered Law No. 1576 contrary to the Constitution since formal requirements were not fulfilled.

Neither the Constitution, nor the Rules of Procedure of the Legislative Assemblies include any provisions determining the procedure according to which the enforcement of determined death sentences will be brought before the Turkish Grand National Assembly. Since the Martial Command, pursuant to Article 6 of the Martial Law No. 1402, is accountable to the Prime Minister and the Ministry of Justice has no competence regarding a punishment determined by the approval of the Military Court of Appeals, there is no reason for the claim that the delivery of the file from the Martial Command to the Prime Ministry and then to the Presidency of the Turkish Grand National Assembly is not appropriate.

Under these circumstances it is evident that the delivery of the file regarding the demand of enforcement of the determined death sentence from the Prime Ministry to the Turkish Grand National Assembly does not entail the annulment of the Law No. 1578, which is subject to the action, for formal reasons.

2- The problem deriving from the position of the Presidency Council of the National Assembly during the readings

In the course of reading the proposal for Law No. 1576 during the Plenary of the National Assembly, it became apparent that the Presidency Council consists of three members of the Justice Party, of whom one is deputy president and two are clerks. The applicant claims that this is a significant procedural and formal defect contradicting the spirit of Article 84 of the Constitution.

While this issue was heard, it was discussed whether the method of composing the Presidency Council of the National Assembly should be scrutinised. It was found appropriate to not scrutinise the law by a majority of



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votes, with the dissenting vote of Muhittin GÜRÜN, on the ground that the applicant did not claim that the Presidency Council of the National Assembly had not been established in proportion to the representatives of political parties in the assembly but only asserted this claim before the Council of three persons that managed the readings on that day. Next, the Court decided to continue examination of other matters.

Article 84 (1) of the Constitution prescribes the principle that defines the establishment of the Presidency Councils, which is compatible with the specification of their names, functions and the number of officials given in the Legislative Assemblies' Rules of Procedures (Article 3 of the Rules of Procedure of the Senate of Republic; Article 5 of the Rules of Procedure implemented in the National Assembly). Pursuant to this principle, the Presidency Councils of the Assemblies shall be established in the way political party groups in the assembly are represented in the council according to their strength. When the Presidency Council of an Assembly is established pursuant to these principles, and when a president and a deputy president are appointed to preside over a session and at least two clerks that will take office are respectively chosen from among the officials of the Council pursuant to the aforementioned Rules of Procedure, individuals from the same party may come together on various occasions and for various reasons. The idea that Article 84 (1) of the Constitution must absolutely be applied in these narrow-cadre councils may lead to serious breakdowns in practice and even to the impossibility of implementation. Such an idea also does not comply with the aim of this principle. Furthermore, there is neither information nor claim about any biased action of the Presidency Council in question; nor about any efforts to prevent the participation of Council members from other parties whose turn have come; nor about any intention behind the specific formation of the Presidency Council that chaired the session for the proposal of Law No. 1576.

In this case, the composition of the National Assembly Presidency Council from members of the same party does not necessarily lead to annulment of the law with respect to a lack of formal requirements.



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3- The problem deriving from the priority and urgency decisions which were taken in plenary sessions of the National Assembly and the Senate of the Republic

It is seen that priority and urgency decisions were taken when debating the proposal on "The Law Regarding the Enforcement of Execution of Deniz Gezmiş, Yusuf Aslan and Hüseyin İnan", No. 1576 (17/03/1972), in plenary sessions of the National Assembly and the Senate of the Republic. The applicant claims that these decisions violate Rules of Procedures of the Legislative Assemblies.

According to the contents of the application the legal situation is as follows:

Even though the proposal of Law No. 1576 was brought in under paragraph 30 of the part titled "V. Issues to be heard twice – B. Issues, first reading of which is to be done", of the agenda of 10/03/1972. After the priority decision due to the unsubstantiated proposal of the president of the Justice Commission was taken and it was accepted that single articles and the whole proposal were dealt with in the same reading, the decision for urgency was taken, having voted on the unsubstantiated demand in Report No. 03/744-34 (07/03/1972). Consequently, the proposal was debated only once and before all other matters.

In the Plenary of the Senate of the Republic, the proposal was debated under the first paragraph of the item of the agenda of 16/03/1972 titled "V. Items to be heard twice – B. Items, first reading of which is to be done". After the decision of priority had been accepted upon an unsubstantiated proposal and after it had been decided that the articles were to be discussed separately after the reading of the proposal as a whole, the decision for urgency was taken, by having voted on the substantiated request apart from the unsubstantiated proposal in the report of the Constitution and Justice Commission. Thus, the proposal was heard only once and before all other matters in the Plenary of the Senate of Republic as well.

Pursuant to Article 85 (1) of the Constitution, the Turkish Grand National Assembly and each legislative assembly should operate in accordance with the provisions stated in the Rules of Procedure. The Constitutional Court's settled opinion on the provisions of rules of procedure of the legislative assemblies regarding the form may be summarised as follows: "Attributing the same level of importance to all provisions of the rules of procedure that concern the form is not appropriate. Among these are the ones which may be influential over the validity of decisions taken by the legislative assembly, as well as the ones which may be counted



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as insignificant details. It is appropriate to acknowledge that a violation of the former may cause annulment, whereas infringement of the latter does not entail annulment. It is compulsory to make such a formal distinction between provisions, which are only prescribed under the Rules of Procedure but not under the Constitution. This is so because overdependence on formal provisions under rules of procedure needlessly hinders the operation of legislative assemblies. The problem of transactions that contravene provisions of rules of procedure to be deemed a cause of annulment shall be solved by the Constitutional Court due to importance and attribution of the Rules of Procedure provision in question."[738]

„It is prescribed as a rule for both meetings and works of the National Assembly to hear proposals for laws twice. Since its own Rules of Procedure have not yet been made, this is stipulated in the Rules of Procedure of the Turkish Grand National Assembly (Rules of Procedure of 01/11/1956: Articles 99, 78)[739], which were in force before 27/10/1957, and in the provisions in force relying on provisional Article 3 of the Constitution, and also in the Rules of Procedure of the Senate of Republic (Articles 69, 44). While deciding on the agenda it was also determined in which order the items were to be discussed. There it was made clear which proposals should be dealt with in only one reading. It was moreover clarified that the modus operandi to hear proposals only once which should be heard twice constituted a deviation from the rule; this was pointed out as among the listed exceptional provisions which enable the parliaments departing from the order of the agenda. "

The Rules of Procedure of the Legislative Assemblies attribute much importance to the question of confining a proposal to only one reading and prescribe strict provisions for it. These provisions may be summarised as follows: While a proposal is presented to the legislative organ or before its first reading, Government, proposer or a related commission should demand that a decision for urgency is taken. There must be a drastic reason for this to be accepted by the legislative organ. A decision for urgency should be requested in written form and with justification (Rules of Procedure, Articles 70, 71, 72 and Rules of Procedure of the Senate of the Republic, Article 46, 47, 48).

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738 The citation referred to in this part of the ruling can be found in the following decisions of the AYM: E. 1971/41, K. 1971/67 (15/01/1972), and E. 1971/37, K. 1971/66 (04/04/1972).

739 Under the 1961 Constitution, the Senate of the Republic never enacted Rules of Procedure for itself. Therefore, the former rule of the house remained in force.



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There are also strict conditions for when one can deviate from the order of the agenda, in other words, to hear a proposal before other items on the agenda. The Government or a committee should ask for a preponed reading; this request must be submitted in written form including a justification (Rules of Procedure, Article 74 – Rules of Procedure of the Senate of the Republic, Article 45).

It should be normal and common practice to attribute great attention to the provisions of the Rules of Procedure. The importance and significance of State organisation law for public life is evident. Thus, the Rules of Procedure of the Legislative Assemblies are the very documents where compulsory rules and conditions have to be fixed in order to enable such an important legislative document to attain its goal in the best way, and to keep its spiritual values and effects high. To discuss an issue only once although the rules and conditions require two readings – in other words: deviating from the basic rule – certainly needs a strong and plausible justification. A substantiated justification of a request for urgent reading is of particular importance in a country where judicial control by constitutional review of laws exists. Thus, the Constitutional Court can analyse the reasoning for leaving the basic rule aside during the reading of a law proposal.

Provisions of the Rules of Procedure, defining the timeframe to request an urgency decision, are important and predominant provisions which concern procedure. With regard to the related provisions of the Rules of Procedure, it is clear that the provision determines also the point in time for taking a decision of urgency. This point in time ends with the first reading of a proposal. In the following stages such a request and taking of a decision due to that request is not possible. This is due to the characteristics of the case. This occurs as a matter of course since a proposal which is subject to an urgency decision may only be heard once and a second reading will not be possible. All members of the Legislative Assembly must know this case before the debate begins and should be able to adopt an attitude in accordance with it. Especially in a situation like the concrete case at issue, to take a decision of urgency after the opening of the first reading, after deciding to deal with the articles of the proposal, blocks the way for a second reading suddenly and some of the members of the legislative assembly face a fait accompli.

Departing from and changing the order of agendas of legislative assemblies is also a significant fact. The same arguments for the obligation of substantiating the requests, as mentioned above in the context of urgency requests, are also valid for provisions of the Rules of Procedure entailing



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requests to change the priority order of agendas; there is no need to repeat these arguments.

The consequences of the above exemplified are the following: the Rules of Procedure of the Legislative Assemblies specify that requests for priority and urgency shall be substantiated; decisions for urgency shall be taken before the first reading of proposals; and as a natural result of that requirement, such a proposal should be decided upon before beginning the first reading. These are all important and essential formal provisions which may impact the validity of a law. Any action that contravenes these provisions causes the annulment of the law in terms of lack of formal requirements.

As mentioned before, there was no opportunity to vote for proposals which were not compatible with the Rules of Procedure. However, the decision for priority and urgency was taken upon unsubstantiated requests to debate the proposal of Law No. 1576. And the request for urgency was decided upon after the reading of the whole proposal was closed. The same situation occurred in the Senate of the Republic – although there the request for urgency was substantiated. Consequently, Articles 70, 71 and 74 of the Rules of Procedure implemented by the National Assembly and Articles 45 and 46 of the Rules of Procedure of the Senate of the Republic were violated when the decision of urgency and priority for the proposal was taken. Departing from the basic rule, and debating the proposal only once deprived the proposal of a legal basis, since such an action rendered the decision of urgency and the decision for priority null and void. Besides, it also violated Article 99 of the Rules of Procedure implemented in the National Assembly and the basic rule established in Article 69 of the Rules of Procedure of the Senate of the Republic. Hence, this legal situation entails the annulment of Law No. 1576 in terms of violation of formal requirements.

In addition, when examining the aforementioned content of the Rules of Procedures in question, it seems obvious that they cannot be neglected and treated as insignificant detail provisions. If the violation of essential procedural preconditions regarding the validity of laws is not supposed to affect the validity of the laws, this would result in leaving the task to deal with the question of whether rules of procedure should be applied or not to the discretion of the legislative assemblies. This would cause the breakdown of the imperative norm in Article 85 (1) of the Constitution. Such a case cannot be justified from the point of view of the law.



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Fazıl ULUOCAK, Şahap ARIÇ, Halit ZARBUN, Lütfi ÖMERBAŞ and Ahmet H. BOYACIOĞLU did not agree that Law No. 1576 should be annulled due to lack of formal requirements.

### C- Other Claims of Violation

As it is seen from the argumentation of the decision summarised above under part I, the applicants also present other claims of violation. But, since it has already been concluded that taking priority and urgency decisions in plenary sessions of the National Assembly and the Senate of the Republic leads to a violation of the Rules of Procedure of the legislative organs – which caused the incompatibility of Law No. 1576 with Article 85 of the Constitution and, consequently, is reason for annulment of the law – there is no room to examine other claims of violation.

### Ç- Issue of Publishing the Part Concerning the Annulment

Pursuant to the amended Article 152 (2) of the Constitution, laws annulled by the Constitutional Court may only cease to have effect from the date of publication in the Official Gazette.

Because it may take time to write out and publish this decision, and considering the specific issue at hand in this case – in other words: taking note of the fact that Law No. 1570, the law in question, concerns the enforcement of a determined death sentence of three individuals – the part containing the justification of the annulment has to be published immediately in the Official Gazette pursuant to the amended Article 152 of the Constitution.

## V. CONCLUSION

On 06/04/1972 it was decided,

1. unanimously, that the delivery of the file concerning the enforcement of the death sentence to the Turkish Grand National Assembly by the Prime Ministry does not entail annulment of Law No. 1576 (17/03/1972) in terms of lack of formal requirements;

2. unanimously, that the formation of the Presidency Council of the National Assembly including individuals from the same during one read-



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ing does not entail annulment of the law in terms of lack of formal requirements;

3. by majority of votes, with dissenting votes of Fazıl ULUOCAK, Şahap ARIÇ, Halit ZARBUN, Lütfi ÖMERBAŞ and Ahmet H. BOYACIOĞLU, that the violation of the Rules of Procedure of the legislative bodies – by voting requests for urgency after taking a decision for dealing with the articles of the proposed law in both assemblies without any substantiation of the priority and urgency decisions in the National Assembly and of the proposal for priority decisions in the Senate of the Republic – result in a violation of Article 85 of the Constitution. Therefore, the law has to be annulled for violating the formal requirements and thus Law No. 1576 is annulled;

4. unanimously, that there is no room to examine other claims because the annulment was already decided upon;

5. unanimously, that given the particularity of the case, the part of the decision justifying the annulment shall be published immediately in the Official Gazette pursuant to the amended Article 152 of the Constitution, and the whole decision will be published later.

(…)

DISSENTING OPINION

I- Issue of Stay of Execution of the Law at Issue: The Constitution does not authorise the Constitutional Court to suspend execution when deciding the annulment of a law. Furthermore, due to the amendment of Article 152 of the Constitution by Law No. 1488 (20/09/1971), even rulings of annulment cannot repeal provisions in question for the date when the ruling is rendered, as the enforcement of the annulment is up to the publication of the substantiated decision in the Official Gazette. By no means is there any provision regarding this question in Law No. 44 on the Establishment and Rules of Procedure of the Constitutional Court (22/04/1962).

This legal situation may be explained by the abstract and public character of abstract constitutional review and by the fact that laws do not affect specific subjective rights directly, perceptibly and irretrievably. Laws on "the decisions of the Turkish Grand National Assembly on the enforcement of death penalties imposed by courts and made definitive" are possibly the only exception here. It may be supposed that during the constitution-making process this special and exceptional case was not



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emphasised, or even if it was discussed it was found unnecessary to prescribe a special measure for a rare case – as shown there is only one case of submission for unconstitutionality of a law on a finalised death sentence in the ten-year-history of the Constitutional Court –; and left this to the discretion of the Constitutional Court. On the other hand, in case claims are well-founded according to Article 151 of the Constitution, which prescribes "bringing claims for violation of the Constitution before local courts" as a way of constitutional review of laws, stay of execution may be adopted up to the decision of the Constitutional Court, since the provisions in question may affect some specific subjective rights directly. Thus, there are guidelines for the Constitutional Court in the case of constitutional review of a law affecting specific subjective rights – like in the case at issue – concerning actions of annulment.

While examining case No. 1972/13 concerning the claims for stay of execution, the Constitutional Court must find a possibility of constitutional review, and therefore it must examine whether or not there is any provision in the Constitution that may prevent the stay of execution of a law. The law in question is about the enforcement of the death sentence for three individuals. It is evident that once the law has been implemented and the three persons have been sentenced, there is no room for constitutional review any more. This is tantamount to the Constitutional Court omitting its duty of constitutional review. However, there is no provision in the Constitution that may prevent suspension of the law in question until a decision of the Constitutional Court, and the aforementioned Article 151 provides an example and a method of how to proceed in the case of a law that is contrary to the Constitution. What is to be done at this point is to declare the stay of execution of the law in question and thus to proceed according to the competence of the Constitutional Court, and to implement the requirements of constitutional review in such a way that it comes to an effective conclusion. Therefore, we are against the decision to reject the claim of stay of execution taken during the first preliminary execution meeting on 27/03/1972.

II- Issue of Shortening the Time Periods Regarding Agendas Stipulated in the Rules of Procedure of the Constitutional Court

1- According to Article 16 of the Rules of Procedure of the Constitutional Court, a copy of substantive reports shall be sent out to the members ten days before distribution of the agenda. In Article 133 it is stated that agendas shall be distributed at least ten days before the day of the meeting. Due to these provisions, the substance of a case cannot be discussed earlier than twenty days after the distribution of the report. This



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period has been adopted, because it was considered the shortest possible period, enabling the Court members to sufficiently examine the matter they have to decide upon.

There is no provision in the Rules of Procedure prescribing that the time span of a minimum of 10 days, between the distribution of the agenda and the report regarding the application, has to be limited. This is normal, since such important, heavy and serious assignments as the constitutional review of laws and the Rules of Procedure of the Legislative Assemblies cannot be fitted into a shorter examination period. When it comes to the ten day rule, Article 33 of the Rules of Procedure of the Constitutional Court allows this period to be restricted in urgent cases.

Aside from the fact that there is no urgency required, in the case in question the importance and particularity of the matter requires respecting at least the shortest regular timespan prescribed in the Rules of Procedure. There is no room to explain this importance and particularity in detail. It is the first time that a law concerning the enforcement of a death sentence has come before the Constitutional Court for constitutional review. Thus, no principles defined by similar decisions are available according to which the current case can be decided. Many former decisions of the Constitutional Court regarding claims for violation of Rules of Procedures of the Legislative Assemblies should be reviewed and revised. The case will at least solve the matter of the life and death of three persons. Thus, a profound, detailed examination and careful re-thinking is necessary. On the other hand, though claims for the violation of the Rules of Procedure of the legislative assemblies were concentrated in priority and urgency decisions taken in the course of the meetings, attempts to shorten the time periods stipulated in the Rules of Procedure of the Constitutional Court and to discuss this possibility is not necessary.[740] To shorten these periods may lead to misunderstandings in public opinion. Besides, it should not be overlooked that the Rules of Procedure of the Constitutional Court stress that the members of the Court must decide upon sufficient analysis and discussion. Consequently, it is forbidden to declare the end of a debate during a meeting (Article 17 (6)), and if one of the members of the Court

740 The meaning of this sentence in the Turkish original is not clear: "*Öte yandan dâvada Yasama Meclislerinin görüşmeler sırasında aldığı öncelik ve ivedilik kararlarında içtüzüklere aykırılık bulunduğu iddialarına ağırlık verilmişken Anayasa Mahkemesinin incelemenin daha ilk evresinde kendi İçtüzüklerindeki süreleri kısıtlamaya girişmesi ve bunu tartışma konusu yapması yerinde bir davranış olmasa gerektir.*"



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puts forward that they were unable to examine the matter sufficiently, it prescribes that the decision should be referred to a later date (Article 17 (8)). Regarding the fact that some members have claimed tremendous difficulty in conducting a sufficient examination of the case by the envisaged day, it is evident that dealing with the agenda problem of the Court as if it was just a question of quantity, contravenes the purpose of the two previously mentioned articles.

Arguing that the matter has to be handled urgently because the law in question concerns the enforcement of a death sentence does not seem appropriate and consistent. This is because the Constitutional Court had separated the relationship of Law No. 1576 (17/03/1972) with its effects on subjective rights beforehand, by dismissing the request for a stay of execution. Seen from this angle, whether or not the decision is taken one week earlier or later does not affect the execution of the law.

As shown above, in the case in question it is absolutely necessary to respect at least the usual time span indicated in the Rules of Procedure of the Constitutional Court. However, in the meeting of 31/03/1972, which was only held in order to deal with the issue of shortening time periods, a decision "to shorten the period regarding agendas in the Rules of Procedure and to hold the case on 06/04/1972 at 10:00" was taken without considering the substantive report that was sent out on 30/03/1972 at the end of the workday, and without respecting the ten-day-period-rule by giving only three and a half workdays to the members of the Court. We object to this ruling for the above mentioned reasons.

2- Despite the attempt on 06/04/1972 to correct the incorrect decision on the agenda by arguing for its rescheduling by taking into account Article 16 of the Rules of Procedure, the majority did not follow this attempt. We also do not agree for the reasons explained in Part II-1 of the dissenting opinion, which states that there is no room to alter the agenda; therefore, the arguments will not be repeated here.

(…)

Vice President, Avni GİVDA

Member, Ahmet AKAR

## DISSENTING OPINION

In the Turkish Constitution one finds no provision that mentions the matter of priority in the case of a decision for urgency being taken, except for Articles 92 and 155. The Constitution states in provisional Article 3



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that "Provisions of the Rules of Procedure of the Turkish Grand National Assembly, which was in force before 27/10/1957, shall be implemented before the Rules of Procedure of the Turkish Grand National Assembly, the National Assembly and the Senate of the Republic established in accordance with this Constitution are adopted". In addition, Article 85 (1) states that the Turkish Grand National Assembly and its Assemblies will operate according to self-established Rules of Procedure.

According to Article 85 of the Constitution, it does not violate the Constitution if Legislative Assemblies do not abide to the Rules of Procedure or implement them wrongly. Hence, the Constitutional Court dealt with this question in different decisions, for example in Decision No. 1965/59 – Application No. 1964/38 (16/11/1965) in the following way: (Provisions of Rules of Procedure are formal legal rules in general. Here, the law making process has to be recollected in order to decide what amounts to a violation of which provisions of the Rules of Procedure and thus constitutes a ground for annulment. Some violations could affect the validity of decisions taken by Legislative Assemblies. It falls to the discretion of our Court to evaluate which actions violate the Rules of Procedure in a way that constitutes a reason for annulment, taking into consideration the importance and quality of the provision of the Rules of Procedure in question.)

In the case in question it must be scrutinised as to whether there is any incorrect implementation, when taking decisions dealing with the priority and urgency issues of Law No. 1576 in the National Assembly and the Senate of the Republic, which requires the annulment of a law.

Article 155 of the Constitution does not establish any rule that a decision for urgency cannot be taken except for constitutional amendments. On the other hand, in the Rules of Procedure of both the National Assembly and the Senate of the Republic provisions it can be found that proposals for urgency and priority may be brought forward and in this respect the General Assemblies are competent to decide; this holds as well for the Rules of Procedure, which prescribe the laws which could be decided after one reading. In Article 74 of the Rules of Procedure of the National Assembly, and in Article 45 of the Rules of Procedure of the Senate of the Republic, it is stated that a proposal may be discussed before other matters upon a written and substantiated request by the Government […].[741] As seen from the literal meaning of these provisions, a request for

741 Here the Court has left out the following part of the sentence: "(..) the deputy/deputies who proposed a law or the responsible commission of parliament."



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priority must be in written form and must be substantiated. But there was no substantiation in either the decision of the Justice Committee of the National Assembly, the proposal that was presented to the Presidency of the National Assembly or in the priority proposal which was presented to the Senate of the Republic by decision of the Constitution and Justice Committee of the Senate of the Republic.

Article 70 (2) of the Rules of Procedure of the National Assembly states that "a decision for urgency cannot be taken in order to deal with a proposal or a memorandum only once, and unless a drastic reason acknowledged by the Assembly exists"; and Article 46 (2) of the Rules of Procedure of the Senate of the Republic states that "a decision for urgency cannot be taken in order to discuss a draft or proposal only once, and unless a drastic reason acknowledged by the Senate of the Republic exists." By considering these provisions, it can be stated that the National Assembly and the Senate of the Republic are entitled to determine if a drastic reason exists and accordingly to make a decision. The fact that no drastic reason has been indicated in Article 71 of the Rules of Procedure of the National Assembly and Article 47 of the Rules of Procedure of the Senate cannot be deemed a valid condition for commission decisions or proposals. The National Assembly and the Senate of the Republic cannot be bound by those reasons, because it is an unacceptable opinion that the reasons given in the General Assembly decisions (e.g. the special condition of the country, especially martial law and its recurrent prolongation which was objected to by the Turkish Grand National Assembly), like those prescribed by the provisions of the Rules of Procedure, do not amount to a drastic reason such as public interest.

Although it is prescribed by the Rules of Procedure of both Assemblies at what moment proposals for a decision of urgency should be made, the question has not been resolved, until when these proposals should be voted on.[742] From this point of view, voting for urgency requests when articles are handled should not be deemed a direct violation of provisions in the Rules of Procedure. Hence, even the applicant does not mention a violation of the Constitution and the Rules of Procedure.

To briefly summarise: we are against the annulment of Law No. 1576, because of the violation of Article 85 of the Constitution, on the grounds that the lack of substantiation of the proposals for decisions of priority

742 The construction and the wording of this sentence is hardly intelligible in the Turkish text; our translation therefore tries to reconstruct the supposed meaning while staying as close as possible to the Turkish original.



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and urgency does not give a reason for annulment; since the will shaped in the National Assembly and the Senate has not been damaged through this decision; that decisions for urgency cannot be counted as evidence and presumption that these matters were not discussed sufficiently in the Legislative Assemblies; that acts contravening the Rules of Procedure cannot be handled as causes for annulment only for this reason.

Members: Fazıl ULUOCAK, Şahap ARIÇ, Halit ZARBUN, Lütfi ÖMERBAŞ, Ahmet H. BOYACIOĞLU

DISSENTING OPINION

Dissenting opinion on the problem of whether the case falls within the jurisdiction of the Constitutional Court.

Article 147 of the Constitution and Article 20 of Law No. 44 on the Establishment and Rules of Procedure of the Constitutional Court, which was arranged in accordance with the former, does not authorise the Constitutional Court to review directives of the TBMM that have the characteristics of a decision.

For reasons that I explain below, the competence of the TBMM concerning the enforcement of death sentences has the characteristics of a decision and not of law. Therefore, dealing with this case goes beyond the competence of the Constitutional Court, since:

Article 64 of the Constitution lists the functions and competences of the TBMM, including the following: law-making, amending and abolishing laws and making decisions on issuing money, amnesty and pardons, enforcement of death sentences.

The principle adopted in this Article of the Constitution signifies that the TBMM can only exercise its authority on the enforcement of death sentences in the form of a decision. This principle was adopted for the reason that to take decisions on this topic was left to the discretion of the TBMM, and it is not suitable to be decided by issuing a law.

The problem of the enforcement of a death sentence by either a decision or a law is not an abstract question but results in very serious legal consequences. Although our Constitution, in principle, does not stipulate constitutional reviewing of decisions, in Article 147 it stipulates such a review for laws. However, in various articles, such as Articles 65 and 81, the Constitution indicates explicitly the provisions of laws that are not intended to be reviewed as well as decisions of the TBMM that are intended to be reviewed. The problem with these regulations and principles is the following: Unless the competence of the TBMM, which must be exercised in accordance with these constitutional principles, is not explicitly stipulated, generally no review is possible. Adopting a decision as a



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law by a constitutional provision and putting it to constitutional review results in handing the decision-making power to the Constitutional Court, although according to Article 64 (1) of the Constitution it falls within the competence of the TBMM. Hence, our Constitution does not allow this.

Article 64 (1) of the Constitution states that this power will be exercised by issuing a parliamentary decision, but it is claimed that this competence should be used by enacting law with the following argumentation: In Article 63 (2) the principle that assemblies convene in situations indicated in the Constitution has been adopted. Although Article 64 (1) states that taking a decision for enforcement of death sentences lies within the competence of the TBMM, both chambers of the Assembly cannot operate together for the reason that Article 64 does not prescribe any provision for the assemblies to operate together. Therefore, it is stated that it is compulsory to abide with the procedure of law-making in order to enable the assemblies to operate together and thereby to enable constitutional review. This opinion can be found in the explanatory memorandum of the Constitutional Commission and in the justification of this Article. Despite the fact that Article 64 (1) of the Constitution does not prescribe that the chambers of the TBMM convene together, an exigency, caused by such a situation, does not lead to changing the competence of decision-making to that of law-making. Thus, it is not eligible for constitutional review.

Because of the aforementioned principles of the Constitution, a provision stating that the chambers of the Assembly should convene together in order to take such a decision should have been added to Article 64. The lack of such a provision is a defect; besides it is impossible to suppose that the legislator implied a law, not a decision, and intended it to be put to constitutional review. As the Constitution defines that laws may be subject to constitutional review but decisions may not, and enumerates all exceptions one by one, it cannot be supposed that a law can be issued in a matter that has to be dealt with in form of a decision. If the constitution-maker had such an intention, according to constitution making methods, they would have created the competence to issue laws on all issues within the scope of Article 64 (1), or would have reflected their intention by stating that decisions on the enforcement of a death sentence may be subject to constitutional review like they did in Article 81.

The competence to enforce a death sentence had to be exercised in the form of a decision under the former Constitution, the Assembly then exercised its competence accordingly.

The evaluation of the TBMM's competence to enforce death sentences in the light of the rule of law principle of the Constitution: According to



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the rule of law principle, the opinion that acts of the TBMM, including the one on enforcement of death sentences, cannot be immunised from constitutional review, is not compatible with the Constitution. This is because the provision that the enforcement of death sentences has to be rendered in the form of a decision as well as its immunity from constitutional review are also constitutional principles, like the rule of law principle. In the Constitution, all principles have been arranged in a way that they are compatible with each other. The supremacy of the Constitution implies that all these principles have to be implemented.

The opinion that the competence to enforce death sentences may be exercised by laws in substantive means not by formal means: Our Constitution does not prescribe law making in terms of substantive and formal laws. This opinion, which can be found in the explanatory memorandum of the Constitutional Commission, should not be taken as a basis for an interpretation that may override principles of the Constitution. Such an opinion also contravenes the aim of law-making. There is no justification for allowing a directive, which is claimed to be a formal law, to be subject to constitutional review as if it was a substantive law. On the other hand, considering its characteristics, it is not suitable to exercise the competence to enforce death sentences in the form of a (formal) law. If one tries to define it as a law, it will prove not to be compatible with (formal) laws in some regards and we may face procedural and substantive problems. Moreover, we may identify many gaps in the Constitution. However, these are not real constitutional gaps; abstractness stems from the adoption of power in the form of law, whereas the Constitution defines it as a decision. Since the Constitution bestowed this power by issuing decisions and did not prescribe that it might be used by issuing laws, it did not find it necessary to suggest solutions for the problems that may occur when it is held in the form of law. For instance, if the competence to pass decisions is turned into the competence of passing a law, the route to constitutional review is opened. On the other hand, for that reason and since the Constitutional Court does not have the competence to suspend the implementation of law before it has ruled on its constitutionality, the Constitutional Court's decision to annul a law will not be effective in the case of the enforcement of death sentences. All these inconsistencies result from the fact that the characteristics of the case in question do not correspond to the characteristics of laws.

For the aforementioned reasons, legislative acts do not lose their attribute as a decision only, because the Legislative Assemblies applied law making procedures and because the Constitution labels them as laws.



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A parliamentary act could only change its character from decision to law if this can be deduced from a constitutional provision. It is not possible to execute a competence by issuing a law if the Constitution does not stipulate such a provision. Article 64 stipulates that legislative bodies shall exercise the competence of enforcing death sentences in the form of a decision. In consequence, no law making competence on this issue has been bestowed.

In our Constitution it is not clearly defined on which topics the TBMM has the competence to pass a law. But it has no competence to pass laws on topics which the Constitution defines beyond the domain of law-making, or on topics which the Constitution defines to be only dealt with in decisions. Considering the principle that no person or institution may exercise any competences not enumerated in the Constitution, as stipulated in the last sentence of the last paragraph of Article 4 of the Constitution, legislative assemblies cannot execute a competence not bestowed on them by the Constitution. Thus, executing such a competence is null and void. Following this, the competence to enforce death sentences can be executed in the form of decisions and any act in the form of law has no legal effect. If, for instance, a draft law is declared to come into force before the reading in parliament but after completing other proceedings, it can never become a law and is null and void. Likewise, pursuant to Article 9 the constitutional provision stipulating that the form of government is a Republic cannot be amended or even be proposed to be amended. Considering this principle, any attempt to change the form of government cannot be found legally valid. It is null and void. Because Article 9 states that legislative bodies cannot exercise such a power and this constitutional provision cannot be amended, it will always be in force. (…)

To sum up, as a consequence of the constitutional principles mentioned above, the act of the Legislative Assembly has the character of a decision and it may not be subject to constitutional review. The Constitutional Court is not competent to hear this case on the grounds that Article 147 of the Constitution and Article 20 of the Law No. 44 on the Establishment and Rules of Procedure of the Constitutional Court do not grant the Constitutional Court the competence of reviewing acts that are to be characterised as a TBMM decision. On these grounds I do not share the decision taken by the Constitutional Court that it has the competence to review the case as has been done at the stage of preliminary examination.
Member, Şahap ARIÇ[743]

743 Justice ARIÇ also participated in the previous dissenting opinion.



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I agree with the dissenting opinion of Mr. Şahap Arıç.
Member, Halit ZARBUN[744]

DISSENTING OPINION

(…)

(…) our new Constitution stipulates that the enforcement of a death sentence must be confirmed by enacting a law, therefore taking a decision does not fulfill the requirements. Hence the explanatory memorandum of Article 64 of the Constitution reads that "the legislative body shall execute other competences mentioned in the article by passing laws. As a matter of fact, the draft has been regulated under the title 'How both legislative organs shall use their common competences (Enacting Laws)'. From this point of view, to take one example, the enforcement of death sentences which was based on a decision of the Assembly shall be based on law in a new regime." This confirms the explanation given above. Moreover, the spokesman of the Commission stated during the second meeting of the Assembly of Representatives that: "the reason for using the expression 'taking a
decision' is that the term 'law' which is used in the headline of Article 64 does not have the meaning of substantive law. In fact, amnesties, pardons and the enforcement of finalised death sentences should be based on laws. The changes implemented in our law at present are as such: Previously, the enforcement of death sentences was based on a decision. Now, since there are two assemblies, enforcement should be based on a law. Likewise, the process to grant personal amnesty[745] should be based on the same procedure. That is to say, all actions and competences mentioned in Article 64 should be executed according to the procedures of passing a law in both assemblies. I find it important to mention this once again to prevent further misunderstandings." With this speech, he clarified the issue. Under these circumstances, since Article 12 (3) of the Turkish Criminal Code regarding death sentences should be interpreted in the light of Article 64 of the Constitution, the confirmation mentioned there must be made

744 Justice ZARBUN also participated in the second dissenting opinion.

745 In the case of a personal amnesty (*özel af*), a sentence is reduced or annulled on behalf of an individual on a case-by-case-basis. A general amnesty, on the contrary, would abolish the statutory constituents of a crime and all its legal consequences.



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by a law. In this regard, it is in line with the Constitution to pass a law according to formal procedure.

Although there is no definition or explanation of the legal characteristics of decisions to enforce finalised death sentences taken by the Turkish Grand National Assembly either in our Constitution or in other laws, these decisions are characterised as a (condition for enforcement) or (a complementary condition for enforcement) in doctrine.

In Article 26 of the former Constitution, mitigation and amendment of punishments were also listed among the tasks and competences of the Turkish Grand National Assembly, but in the new Constitution there was no necessity to mention mitigation and amendment in particular since the Turkish Grand National Assembly has the competence of granting a pardon, and this is noted in the explanatory memorandum of this article.

The main reason why the verdict of a death sentence has to be confirmed before its enforcement is to enable the TBMM to execute the right of pardon when required and to investigate the possibility of mitigation or amendment and thus to provide extra protection of the right to life which is irreparable in the case of violation. Hence, taking into consideration that the enforcement of finalised court rulings is indispensable pursuant to Article 7 and Article 132 (2) of the Constitution, such a distinctive condition regarding death sentences cannot be interpreted in any other way.

On the other hand, since decisions to enforce death sentences are taken by the Grand Turkish National Assembly following the procedure of passing laws, as has been done in the case in question, and the Constitutional Court decided to deal with the substance of the case, the possibility to enact the death sentences is nullified for the moment. Therefore, in this case the condition for enforcement prescribed in Article 64 of the Constitution and Article 12 (3) of the Turkish Criminal Code is realised on a dubious basis. The Law, which includes the decision for enforcement taken by the Turkish Grand National Assembly, may be annulled, or the request for annulment may be dismissed. If the complaint is rejected, no problem would emerge. But if the law was annulled, there would be no room for enforcement of the death sentence because the requirements for enforcement are nullified. It is impossible to enforce a death sentence unless a new decision is taken. On the assumption that the punishment was enforced before the decision of annulment, an irreparable result may arise, because the new decision of the legislative body cannot be predicted. Such a result does not comply with the spirit of our Constitution and the



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principles of individual rights as well as human rights in general and the supremacy of law.

(…)

A stay of execution of a law enforcing a finalised death sentence because of constitutional review proceedings is a normal and even compulsory consequence of the right to life, which is one of the fundamental rights in the constitution of a democratic State under the rule of law.

In our Constitution there is no provision prescribing that the Constitutional Court may rule a stay of execution of a law upon a request for constitutional review. Therefore, there is no doubt that the Court does not have the competence and authority to decide on a stay of execution regarding substantive laws prescribing objective and general rules. But in the case of formal laws, the Constitutional Court may decide on a stay of execution of a law in some distinct cases.

Without touching upon doctrinal debates which have not yet gained a dimension and which have not been made clear, it can be stated that the Constitutional Court is competent to suspend the execution of formal laws. That is the case if there is the threat that [the execution of these laws] may result in irreparable individual damage; and it is carried out under the conditions for a stay of execution in judicial procedures as stipulated in Article 151 of the Constitution; and that it relies on the constitutional principles of the democratic State and the rule of law in the Constitution and the fundamental law principles which were recognised by the Court. Furthermore, there is no impeditive and prohibitory provision on this issue within the Constitution.

Besides, it should be acknowledged that the Constitution which bestows on the Constitutional Court a very wide competence, such as the annulment of a law that is contrary to the Constitution, implicitly bestows it the more limited competence to order a stay of execution for a period of time in certain and distinct cases. This is because limited is always included in wide, unless the contrary is explicitly stated.

It is among the duties of the Constitutional Court to pass judgement on this problem which has been resolved through the spirit of our Constitution and not by the wording of case law. Although unity and clearness of case law is a fundamental judicial principle, jurisprudence should respond to the requirements of societal and individual life and thus it should not prevent contemporary developments. Therefore, if laws have gaps, the highest principles of law should be applied in case law; and this should be guided by personal convictions.



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The gap in our new constitutional system has been filled by case law and the function of constitutional review of the Constitutional Court should not be impeded. In cases mentioned above, suspension of execution for a while is a procedural matter. Neither the Constitution, nor the Law on the Establishment and Rules of Procedure of the Constitutional Court delivered a regulation that covers all matters regarding procedures to be implemented at constitutional review. The reason for opting for such a path is that, as mentioned in justification of Law No. 44, procedural problems which are faced by the Constitutional Court can be easily solved by case law thanks to general and fundamental principles (Journal of Minutes of TBMM, Volume 4, Number 54, page: 2).

On the other hand, this opinion and justification were repeated in Article 6 of a report of 15/04/1962, No. 1/37-5 drawn up by a joint commission that consists of Constitution and Justice Commissions of Senate of Republic and Budget Commission: "Our Constitution confined itself to setting single principles in terms of procedure to be applied by the Constitutional Court and to leaving other rules to the law. For this reason, it was found necessary in the text of the draft to give ample room to procedural provisions, and aspects not regulated by case law were left to [future] jurisprudence." (Journal of Minutes of Senate of Republic, Volume 3, Number 51, page: 2).

That is to say, the Constitutional Court must take note of procedural provisions either in the Constitution or in the Law No. 44 since they are related to public order. In the case of elusiveness of legal rules, procedural matters should be solved by case law. Say, the Constitutional Court is under obligation to solve all procedural matters and come to a decisive conclusion.

"Pursuant to Article 136 of the Constitution, criminal and enforcement procedure provisions may be fixed in general or procedural laws or other laws provided that they do not violate the soul of the Constitution and its imperative or prohibitory or restrictive provisions. In the face of the aforementioned legal cause, pursuant to provisions about suspension of enforcement in criminal and criminal procedure laws and other laws; there is a possibility of suspension until the publication of the ruling of the Constitutional Court in the Official Gazette. But that possibility may not prevent the decision of the Constitutional Court. This is so because the Constitutional Court's competence and task of constitutional review would be impeded if the enforcement was not suspended. Constitutional provisions must have superiority, relying on Article 8 of the Constitution which states that "laws shall not be in conflict with the Constitution. The



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provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, as well as administrative authorities and individuals." Thus, the competence and task of constitutional review that stem from Constitutional rules cannot be impeded.

Moreover, the Constitutional Court also performs a judicial function in the annulment cases. Thus, like any other court, it has the competence to take the necessary measures within its functions and competences. Consequently, a ruling for stay of execution is a must if enforcement of a formal code provision, prior to the final decision on the request for annulment, leads to an irreparable result. This is because the law requires that the situation be preserved.

(…)

Indeed, when the Constitutional Court rules for stay of execution, other authorities cannot take a contrary decision. This is because the duty and competence of the Constitutional Court have been attributed in order to render Constitutional provisions superior. Therefore, these binding provisions should have priority.

For these reasons, we do not agree with the third paragraph regarding dismissal of suspension of execution of decision for preliminary examination.

Members: Recai SEÇKİN, Kani VRANA, Şevket MÜFTÜGİL

DISSENTING OPINION

1- Issue of the agenda for preliminary examination

The first agenda of examination concerning this case was sent out on 25/03/1972 along with the preliminary report about the issue in question, and Monday 27/03/1972 at 10:00 was fixed as the date of the first meeting, which was held on the indicated day.

Hence, there was only one workday between the day of sending out the agenda and the day of the first meeting.

Article 33, first part of section seven (Agenda Setting) of the Rules of Procedure of the Constitutional Court (Joint Provisions), reads as follows:

(Article 33: Determining meeting days and setting the agenda is a duty of the Presidency. When required, the Court may also decide to add some issues to the agenda.



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The agenda shall be sent out to permanent and substitute members at least ten days before the meeting. In urgent cases this period may be shortened by the court……..)

(…)

Due to these facts and Article 33 of the Rules of Procedure, this is seen as an urgent case which necessitates a reduction in the ten-day period.

Therefore, our Court has to decide to shorten the time span by determining the period in Article 26 of the Law No. 44.

Besides, the applicant has also asked for a stay of execution. In this regard, that this request was favorably decided by conducting the preliminary examination under the conditions of urgency, constitutes a plausible application of the (urgent case) provisions as stipulated in the Rules of Procedure.

For that reason, I do not agree with the opinion that the provision of the Rules of Procedure in question does not apply here because Article 33 of the Rules of Procedure does not comply with Article 26 of Law No. 44.

Therefore, I oppose this part of the decision in question.

2- Issue of the arrangement of the agenda regarding substantial examination

(…)

Regardless of the identity of the perpetrators and the nature of the crimes committed, the law will be annulled and death sentences cannot be enforced in the case of there being a violation of the Constitution, as claimed. In such an important case effecting individual life, in which not even the smallest mistake which occurs can be corrected, there is no room to recur to (urgency).

Instead, it would be much better to continue the ongoing examination up until the final date stipulated by law and regulations, and it is in no sense correct to consider the application of provisions that allow for a shortening of the time span. I therefore oppose the decisions on shortening periods for substantial examination.



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3- Issue of the time span for distributing the agenda of the substantial examination report

The last sentence of Article 16 (1) of the Rules of Procedure of the Constitutional Court stipulates that a copy of the substantial examination report that is prepared by rapporteurs shall be sent out to court members at least ten days before the distribution of the agenda.

This norm does not stipulate any competence of any authority to shorten that period.

As mentioned above, the substantiated examination report was sent out on 31/03/1972 and despite the fact that the ten-day period prescribed under Article 16 should never be shortened, the period was shortened by applying Article 33 of the Rules of Procedure in order to enable members to study the reports properly. However, it should never have been possible to make a substantiated examination earlier than ten days after 31/03/1972, that is, before 11/04/1972.

Consequently, it violates the Rules of Procedure that the case was examined in substance on 06/04/1972.

4- Issue of taking a decision on stay of execution

Article 148 of the Constitution prescribes the judicial procedures to be applied by the Constitutional Court.

This Article stipulates that the Rules of Procedure of the Constitutional Court shall be regulated by law except for the provision that states (The Constitutional Court shall conduct its business on the basis of written records, except in cases in which it acts as a High Court. However, when it is deemed to ne necessary, it may call the interested parties to present oral explanations.)

In Article 34 of the Law on the Establishment and Rules of Procedures of the Constitutional Court No. 44 of 22/04/1962 it is stated that the Court shall operate according to existing laws while it acts as High Court. Article 32 stipulates that the Court shall operate according to Criminal Procedure Law while hearing a case regarding the dissolution of a political party. Procedures concerning actions for annulment with regard to constitutional review and concrete constitutional review proceedings are regulated separately.

Apart from these norms there is neither a precise reference nor a prohibitory provision for the Constitutional Court with regard to making use



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of procedures and measures on the ground of general principles by other courts, i.e.to decide on the stay of execution.

Under these circumstances, the solution of the problem depends on how one evaluates the competences of the Constitutional Court and interprets the purpose behind the establishment of the Constitutional Court pursued by the Constitution.

(…)

Since the law, subject to this case, concerns the enforcement of the death sentence for three people, the law must be annulled, if its unconstitutionality were declared after its implementation. In the case at issue, these three people who could not be brought back to life would have been deprived of the protection of the Constitution by the act of the Constitutional Court. Besides, the Constitutional Court ruling which is final and binding according to the Constitution would be reduced to a document which has lost its use.

Therefore, a stay of execution of Law No. 1576 should be announced, in compliance with the request of the applicant, until the final decision of the court is rendered.

I oppose the reasoning in the respective part of the decision.

Member, Muhittin GÜRÜN



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## 3.13 Amnesty for Certain Groups of Political Prisoners

***Application Number:*** *1974/19* ***Decision Number:*** *1974/31*

***Date of Decision:*** *02/07/1974*

***Date of Publication and Number of the Official Gazette:*** *12/07/1974 - 14943*

***Review Type and Applicant:*** *Abstract Constitutional Review Proceedings initiated by more than a sixth of the total number of members of the MM*

***Provisions at Issue:*** *Art. 5 (A) of Law No. 1803 on Amnesty for Some Crimes Due to 50th Anniversary of the Republic (18/05/1974)*

***Relevant Constitutional Provisions:*** *Art. 8, 12, 92 (5) and amended Art. 147, 149, 150 (1961 TA)*

***Voting:*** *Accepted by majority of 9:6 justices (regarding Art. 5 (A)),*
*Accepted by majority of 11:4 justices (add. reasoning regarding Art. 5 (A))*
*Substantial review rejected unanimously by 15 justices*
*Rejected to decide of date of coming into force by majority of 9:6 justices*

***Dissenting and Concurring Opinions:*** *9 DO*

***Justices:*** *President Muhittin TAYLAN; Vice President Avni GİVDA; Members: Şahap ARIÇ, İhsan ECEMİŞ, Ahmet AKAR, Halit ZARBUN, Abdullah ÜNER, Kâni VRANA, Sait KOÇAK, Muhittin GÜRÜN, Lütfi ÖMERBAŞ, Ahmet Salih ÇEBİ, Şevket MÜFTÜGİL, Nihat O. AKÇAKAYALIOĞLU, Ahmet H. BOYACIOĞLU*

The members of the MM applied for the annulment of Article 5 (A) of the *Law on Amnesty for some Crimes Due to 50th Anniversary of the Republic* (15/05/1974). The group claimed that the mentioned paragraph conflicts with Article 8 (Supremacy and binding force of the Constitution) of the Constitution and violates the principle of equality guaranteed by Article 12 of the Constitution by granting amnesty only to some groups of prisoners and not to others. The applicants also argued on procedural grounds: they postulated that the paragraph in question was not correctly voted on by the National General Assembly, which contradicts Article 92 (5) of the Constitution. Whereas the AYM ruled the paragraph at issue unconstitutional on procedural grounds and annulled Law No. 1803 by majority, it did not discuss the case in substance. Instead, the decision (and the dissenting and concurring opinions) raised two additional procedural problems. On the one hand, the AYM's right to review the *Law on Amnesty* is put into question because it seems unclear whether this decision is a formal law in character and form. On the other hand, it is argued about the date at which the AYM's annulment decision should enter into force.

(…)

## IV. MERITS

(…)



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C) Question of Unconstitutionality of the Provisions at Issue

1- Issue of unconstitutionality of the provision with regard to procedural requirements

This case also involves the claim that Law No. 1803 (15/05/1974) violates the Constitution because of an infringement upon formal requirements. Two problems are determinable which could constitute a violation of the Constitution in terms of procedural requirements, regarding the adoption procedure of the law in question after a draft was prepared by the Joint Committee, since the draft of the Senate of the Republic regarding enactment of Article 5 (A) of Law No. 1803 (15/05/1974) had not been adopted by the National Assembly. Both problems will be discussed below separately:

a) Issue of voting on the provisions of the law separately

The draft for Law No. 1803 was proposed by the National Assembly with 24 articles, including articles which regulate the date of enforcement and the enforcing authority. The Senate of the Republic accepted Articles 6 and 7 without any change, removed Articles 8 and 21, added Article 20 as a new one and changed the draft to 23 articles by making amendments in terms of the number or content of articles. Since the Senate of the Republic did accept Articles 6 and 7, these articles are no longer disputed, and, following a longstanding practice shall be counted as finalised without changes. Consequently, the Senate of the Republic is in the situation of having adopted the draft of the National Assembly with amendments (51st session on 27/04/1974), and the National Assembly did not accept the changes. Thus, a Joint Committee, consisting of eight members of the National Assembly and the Senate of the Republic, was installed during the 71st session of the National Assembly on 07/05/1974 (Journal of Minutes of the National Assembly, 4th term, Volume 3, Meeting I, 71st session on 07/05/1974, pages 368-440; and the document attached to this Minutes, numbered 25 e I supplement S). After this decision, Article 92 (5) of the Constitution is now applicable.

The Joint Committee adopted Articles 1-5 of the text of the Senate of the Republic, and Article 8 of the text of the National Assembly without changes. It also adopted Articles 8-23 of the text of the Senate of the Republic, but it moved their numbering system back by one number and thus created a text of its own. At present three different texts exist; and pursuant to Article 92 (5)



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the National Assembly must adopt, as they are, either the text of the Joint Committee, the text of the Senate, or its previous own text.

Here we should put special emphasis on the expressions the "text" and "as they are". It is clear and beyond doubt that the expression "as they are" means "without changes". The word "text" is not a legal concept; it is defined in dictionaries as "the whole of the words which constitute a text with formal, literary and punctuation features". The writing, which consists of words as previously defined, can only be referred to as text. In the case under consideration, this writing may consist of one article, the entity of all amended articles or the whole draft. Accordingly, the scope and the content of the word "text" differ and the term could have different meanings. In order to determine in which sense the constitution-maker used this term in Article 92 (5), the other terms and the general purpose of the paragraph have to be taken into consideration.

Article 92 (5) establishes a system of lawmaking in which conflicts between the Senate of the Republic and the National Assembly are ultimately settled in the National Assembly. Thus, draft laws on which both parliamentary chambers agreed, cannot be an issue of conflict. In case there is disagreement about parts of the draft law, the term "text" in paragraph 5 cannot refer to the whole draft law. When it comes to the question of whether the phrase points to one of the disputed articles or the draft as a whole, the solution can be found in the first paragraph[746] beyond any doubt: "when the proposed amendment to articles is adopted by a vote of absolute majority of the plenary session of the Senate of the Republic, the National Assembly may adopt its own original text only by a vote of absolute majority of its plenary session". Using the expression "amendments to articles" with a plural ending instead of "the own original text of the National Assembly" the term "text" in paragraph 5 has to be understood as meaning "amendments of the articles as a whole". That is to say: the term "text" in paragraph 5 refers to one article only if the matter of conflict between the Senate of the Republic and the National Assembly centers around one article; if several articles are contested it refers to all of these articles; and it refers to the draft as a whole, if a draft as a whole is the matter of disagreement.

As the term "text" has been clarified, and since the fifth paragraph includes the rule that the "National Assembly which is under obligation to adopt without change either the text of the Joined Committee or that

746 The AYM refers to Article 92 (5), despite the fact that the quoted text corresponds to the forth paragraph of this article. This can only be explained by an editorial error of the justices.



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of the Senate of the Republic or the one previously prepared by itself", it is evident that any matter of conflict in each of those three texts must be resolved by voting on and adopting a text as a whole, and without splitting it into pieces. Any other action would violate the Constitution. This is indicated in the phrase "without changes", and it is also part of what the constitution-maker aimed at. Furthermore, it would always be possible that a fourth text, which is a mixture of the three texts, would be adopted by the National Assembly and by voting on each article one after the other. However, this would clearly result in a violation of the constitutional order that stipulates that either the text of the Joint Committee or that of the Senate of the Republic or the one previously prepared by the National Assembly itself has to be adopted.

Pursuant to the Rules of Procedure of both Legislative Assemblies, draft laws are debated first as a whole and then one article after another in the committees as well as in the plenary sessions of the National Assembly and the Senate of the Republic. Article 92 (5) of the Constitution does not include a provision or directive that may be interpreted as prescribing that these stages shall be repeated. As mentioned above, the paragraph includes a special and restricted arrangement in order to enact laws without postponement when a conflict between the two legislative assemblies occurs. In this case, it obliges the National Assembly to adopt one of the three texts as a whole, and thus to end the legislative process. This means that it is impossible to vote on single articles separately.

According to the Journal of Minutes of the National Assembly (4th Term, Volume 3, Meeting I, 74th Session of 14/05/1974, pages 559-620; 75th Session of 15/05/1974, pages 626-633 and 639-642), the articles of the draft for amendment of Law No. 1803 that are subject to conflict between the Senate of the Republic and the National Assembly, were voted one after the other in the National Assembly. As discussed in detail above, in consequence of this way of voting, Article 5 (A) of Law No. 1803 violates Article 92 (5) of the Constitution due to a lack of formal requirements; and thus it should be annulled.

Şahap ARlÇ, İhsan ECEMİŞ, Halit ZARBUN, Ahmet KOÇAK, Muhittin GÜRÜN and Ahmet Salih ÇEBİ did not agree with this opinion.

Nihat O. AKÇAKAYALIOĞLU agrees with the opinion of annulment, though he relies on a different reason.



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b) Issue of voting only the text of the Joint Committee without voting other texts

The voting on Article 5 (A) of Law No. 1803 in the third sitting of the 74th session in the Plenary of the National Assembly on 14/05/1974 was carried out in the following way (Journal of Minutes of the National Assembly, 4th Term, Volume 3, Meeting I, pages 567-569 and 609-612):

The first texts of Article 5, which were adopted in the Senate of the Republic, the National Assembly and the Joint Committee, were read out. Then, Article 5 of the Joint Committee was read out and it was put to open ballot. The President declared that 221 votes approved and 214 refused it; and since the proposed Article 5 was adopted as basis for discussion, there was no need for further voting. Then, the parliament moved on to debate the accepted Article 5 (since Articles 6 and 7 were counted as finalised). It was found that in this vote 435 members voted, 13 members did not vote, and 2 seats were unoccupied. The amendment of Article 5 by the Senate of the Republic was completed, as always, by open ballot, and adopted by an absolute majority vote. Under these circumstances, the National Assembly had to adopt its own text by absolute majority vote of the total number of members, which are 226 votes.

Pursuant to Article 92 (5) of the Constitution, the National Assembly had to have the opportunity to declare its will, since it had to adopt one of the three texts. But, once the text of the Joint Committee received 221 votes, the voting was closed and thus the National Assembly was deprived of this constitutional right; and the will of the Assembly was constricted. As the text of the Joint Committee was not adopted by absolute majority vote, the voting should have continued and the National Assembly should have had the opportunity to express its own will and its preferences. Having considered that the text was refused by 214 votes, to suppose that other texts would have received the same number of votes at the most and that, henceforth, there was no need and room for other votes, is legally invalid. This is because of the mandatory rule of the fifth paragraph, and because of the fact that 13 absent members attended other votes, and that there was a possibility that some of the members that voted for the text of the Joint Committee would have later voted for a second and a third text.

As mentioned and discussed above, Article 5 (A) of Law 1803 violates Article 92 (5) of the Constitution and has to be annulled, because to only vote on the text of the Joint Committee without voting on the two other texts conflicts with the constitutional prescription.



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Şahap ARlÇ, İhsan ECEMİŞ, Halit ZARBUN and Nihat O. AKÇAKAYALIOĞLU did not agree with this opinion.

Muhittin GÜRÜN reserved his right to give an additional justification.

2- Issue of unconstitutionality of the provision with regard to merits

Since it was determined that the provision in question violates the Constitution because it infringes on the procedures, there is no need to handle the issue of unconstitutionality in terms of substance.

3- Date of entering into force of the ruling for annulment

Pursuant to amended Article 152 (2) of the Constitution, laws, rules of procedures, or parts of both that are declared unconstitutional by the Constitutional Court, shall be annulled on the date of their publication in the Official Gazette. If necessary, the Constitutional Court may also define another date. This date cannot exceed one year after the date of publication in the Official Gazette.

In Article 50 (4) of Law No. 44 it is stated that in the case of the Constitutional Court considering the legal void caused by an annulment as threatening to public order, the date of its entering into force shall be determined separately, and the presidencies of the legislative assemblies and the Prime Ministry shall be notified of the situation.

As stated above, the Court found the application admissible since Article 5 (A) of Law No. 1803 violates the Constitution in terms of an infringement upon formal requirements. The ruling for annulment relies on the finding of the Constitutional Court that the law did not comply with the Constitution. As it is inconceivable that this law continues to be implemented and thus impacts the rights of part of the citizenry for some time, such an approach [i.e. no immediate annulment] is not in accordance with the statement of grounds of the laws unconstitutionality. By considering the content of Law No. 1803 regarding the quality and amount of crimes and punishments, it cannot be stated that the ruling for annulment may lead to a legal void that would threaten public order.

Therefore, there is no need to apply Article 152 (2) of the Constitution and to take an additional decision determining when the ruling for annulment will enter into force.



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Şahap ARlÇ, İhsan ECEMİŞ, Halit ZARBUN, Abdullah ÜNER, Kani VRANA, Ahmet H. BOYACIOĞLU did not agree with this opinion.

## V. CONCLUSION

On 02/07/1974 it was decided:

1- Regarding the legislative procedure of Art. 5 (A) of Law No. 1803 on Amnesty for Some Crimes Due to the 50th Anniversary of the Republic (18/05/1974), published in the Official Gazette No. 14890 (18/05/1975), which has been accepted in the second reading in the National Assembly;

a) Art. 5 (A) is found unconstitutional on procedural grounds, since the provisions at issue were voted on separately, with the concurring opinion of Nihat O. AKÇAKAYALIOĞLU, the dissenting votes of Şahap ARIÇ, İhsan ECEMİŞ, Halit ZARBUN, Ahmet KOÇAK, Muhittin GÜRÜN and Ahmet Salih ÇEBİ,

b) The provision at issue is unconstitutional on procedural grounds, since alternative texts were not submitted for voting, as the vote on the text of the Commission was considered to be sufficient. This is an additional reason for the annulment; decided by majority of votes, with the concurring opinion of Muhittin GÜRÜN and dissenting votes of Şahap ARIÇ, İhsan ECEMIŞ, Halit ZARBUN, Nihat O. AKÇAKAYALIOĞLU,

2- It is decided unanimously that since the provision at issue is found unconstitutional on procedural grounds, there is no reason to examine the provision in substance;

3- There is no need to decide on the date at which the decision of the Court should come into force according to the amended Article 152 (2) of the Constitution; decided by majority of votes, with dissenting votes of Şahap ARIÇ, İhsan ECEMİŞ, Halit ZARBUN, Abdullah ÜNER, Kâni VRANA and Ahmet H. BOYACIOĞLU,

(…)

## DISSENTING OPINION

### I. Whether the case falls into the jurisdiction of the Constitutional Court

The Court rejected this claim of a lack of jurisdiction before hearing the merits, by majority of votes (02/07/1974), on the grounds that this matter had been resolved in the decision of 11/06/1974. The matter of jurisdiction



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is very significant regarding public order. Therefore, such a claim can be put forward and argued in any phase of proceedings.
(…)

The matter of jurisdiction was not definitely discussed and concluded in the decision of 11/06/1974. The Court's decision to consider the case in substance cannot be understood as a simultaneous decision about the question whether it falls under the jurisdiction of the Constitutional Court, and thus it does not prevent the examination of this question. The Constitutional Court should have declared itself incompetent even in the merits stage, if it is clear that the case in question falls outside its area of competence. Otherwise, to decide on a case which is clearly outside its jurisdiction would lead to irreparable damages.
(…)

The case in question concerns an article of the law that defines some crimes and punishments as pardonable. The competence of the legislative organs to issue amnesties has the character of a decision but not of a law pursuant to the Constitution. Since decisions of legislative assemblies are not subject to constitutional review, this case does not fall into the area of responsibility of the Constitutional Court. This is so, because in Article 64 (1) of the Constitution it is stated that the Turkish Grand National Assembly is empowered to grant amnesty and pardon, to confirm death sentences declared by courts, to pass resolutions with regard to the minting of currency, and to enact, amend and repeal laws.

The principle in this provision is that the Turkish Grand National Assembly can only exercise its power to proclaim amnesty and pardon by issuing decisions. This principle was adopted because the power to proclaim amnesty and pardon is a competence that was left to the discretion of the Turkish Grand National Assembly, and cannot be exercised by issuing a law.

Whether the power of proclaiming pardon and amnesty should be exercised by law or decision, leads to very significant results in the world of law. The most severe is that acts of the Turkish Grand National Assembly in form of decisions are notsubject to constitutional review, whereas laws are subject to it (Article 147 of the Constitution). On the other hand, the Constitution provides various exceptions to this rule (as stipulated in Article 65 and 81).

In conclusion, the power of the Turkish Grand National Assembly to proclaim amnesty and pardon, which is to be exercised by decision, cannot be subject to constitutional review unless this is precisely declared by a constitutional provision. As there is no such provision, to review the power to grant amnesty may result in a transfer from the discretion of the



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Turkish Grand National Assembly to that of the Constitutional Court. The Constitution does not allow this.

To deem this act a law on the grounds that the legislative organs had to apply law procedures, despite the fact that the Constitution prescribes the exercise of this power by decision, does not comply with the Constitution.

Pursuant to the last paragraph of Article 4 of the Constitution, legislative organs shall not exercise a power which was not bestowed upon them. Despite this, to exercise the power by procedure of law making does not lead to the constitution of a law. Therefore, by considering this, we should count it as a decision with constitutional character.

Thus, the provision in question does not have the character of a law, and cannot be subject to constitutional review. (…)

II. Whether voting twice and separately on the provision at issue (Article 5 (A)) in the National Assembly violates the Constitution

(…)

The Senate of the Republic adopted the text of the National Assembly by amending it. Because the National Assembly did not adopt this amendment, a Joint Committee was set up. And the Joint Committee adopted Articles 1-5 and 8-23 of the text of the Senate of the Republic, and Article 8 of the text of the National Assembly without changes.

The National Assembly separately voted on those articles which were disputed between the National Assembly and the Senate of the Republic. It seems that there is no aspect that violates the Constitution, because Article 92 (5) of the Constitution does not prescribe a new procedural rule regarding the method of voting. In order to resolve the conflict in this case, at first the meaning of the concept text in the fifth paragraph should be determined; and then, due to the result, the expression in this paragraph, that is, "shall adopt one of the texts without changes", should be explained.

The term "text" in Article 92 of the Constitution refers to single articles in some cases, and also to all articles in others. Thus, it is evident that the term text in Article 92 has been employed with different meanings in different paragraphs. If all articles are meant, the purpose is explained by using the expression "draft rejected in toto" as in the eighth and ninth paragraphs. Therefore, in cases where not all articles as a whole are meant by the word draft, different obligations emerge. At this point, it is clear that the word draft does not mean all the articles as a whole in the fifth paragraph. Thus, the expression "shall adopt without change" in the fifth paragraph does not mean that the draft has to be voted on as a whole.



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Hence, it does not violate Article 92 (5) of the Constitution that the Turkish Grand National Assembly voted separately on those articles which are disputed between the Senate of the Republic and the National Assembly. (…)

If the term text is interpreted as requiring the voting of all articles at a whole, the will of the members of the National Assembly to freely vote on texts may be restricted. Such a result would also restrain the freedom of the will of the National Assembly to enact laws, which is bestowed on it by the Constitution. Therefore, the term text in Article 92 (5) cannot be interpreted as referring to complete articles. Otherwise it would violate the Constitution.

For the aforementioned reasons, the decision that the provision at issue was voted on separately and thus Article 5 (A) violates the Constitution on procedural grounds and has to be annulled cannot be accepted and is against the Constitution.

III. Issue of formal constitutionality of the provision at issue which was caused by voting only on the draft of the Joint Committee while skipping other drafts

*The Justice describes the process of voting on Article 5 (A).*

Article 5 (A) originates without any amendment from the text of the Senate of the Republic. Consequently, the National Assembly adopted the text of the Senate of the Republic by accepting it; and 221 votes are sufficient, that is to say, there is no need for 226 votes. Thus, there would be no conflict over paragraph A, since it is a product of compromise between both legislative assemblies. This text has been finalised and has become law. The texts which served as basis for this compromise have been counted as finalised for a long time. Thus, Article 5 (A) has become law, and it does not violate the procedural requirements of the Constitution. The Constitutional Court stated that the will of the National Assembly was impeded on the grounds that Article 5 (A) had not received 226 votes; and that only the text of the Joint Committee was subject to the vote. Hence, it found paragraph A contrary to Article 92 (5) of the Constitution and annulled it by majority of votes for not meeting procedural requirements.

As explained above, the text of the Joint Committee was adopted by an absolute majority vote, and this is sufficient for adoption. Yet, another point to be considered is the sum of rejection votes. This sum indicates the highest vote limit that the second and the third texts would receive. Moreover, it is very likely that this number would be divided between those texts.



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Accordingly, the text of the Joint Committee was adopted in the proper way, and the will of the Plenary of the National Assembly was freely constituted by votes for and against this text. Therefore, there was no further judicial need to discuss and vote on other texts, and it is clear that the voting of the National Assembly was not contrary to the Constitution.

On the other hand, the assumption that thirteen individuals who did not take part in the session of the Plenary Assembly could vote for other texts is assumptive and imaginary. But decisions of the Constitutional Court cannot depend on assumptions.

(…)

In Article 28 (1) of Law No. 44 it is stated that "the Constitutional Court does not have to rely on the claims of the applicants. It can declare violation of the Constitution relying on different reasons, provided that it remains liable for the requests". This does not mean it can do so for any reason. That is to say, the reason must be convenient to be employed in the case. Reasons for annulment that arise from other articles not subject to the review may be employed in the case only if the article in question violates the Constitution in terms of procedural points.

Since Article 5 (A) is not contrary to the Constitution, and it was among the articles which were not subject to the application, annulment of this article violates the Constitution because it relies on merits that arise from articles not subject to the case.

IV. Issue of deciding on the date of entering into force and the ruling for annulment separately

Law No. 1803 on Amnesty constitutes an integrated system including substantial provisions and exceptions. This system is destroyed if a procedural reason for annulment, which would result in the annulment of the whole law, is indicated as a reason for the annulment of a single paragraph of an exceptional article. The will of the legislative organ was expressed in the system as a whole.

The merits adopted by the majority to annul Article 5 (A) render Law No. 1803 and the complete Article 5 unconstitutional in terms of a violation of procedural requirements. In this case Article 28 (2) of Law No. 44 had to be applied and the law had to be annulled entirely. By doing so, the legislative assembly would have been given the opportunity to act according to its will and the internal consistency of the Law on Amnesty could have been preserved. However, the Constitutional Court did not opt for this solution and decided for annulment of Article 5 (A) because of a violation of procedure. Therefore, the Court would take a decision on the question if the ruling for annulment might come into force separately,



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because it would enable the Parliament to execute its legislative function in a correct way. This was necessary due to the provisions of Law No. 44, since Article 152 (2) of the Constitution states that "(t)he Constitutional Court may, in certain cases, set the date for the annulment decision to come into effect". Besides, Article 50 (3) of Law No. 44 has the same provision. The Court has discretion on these matters. And in this case it had to exercise its discretion.

For the aforementioned reasons, to avoid setting a date for the entering into force of a decision is contrary to the Constitution.

Conclusion: For reasons explained in this dissenting opinion, I do not agree with the arguments stated in paragraphs I, II, III, IV of the decision of the Court and find that they are not in accordance with the Constitution.

Member, Şahap ARIÇ

DISSENTING OPINION

1. Issue of unconstitutionality of the provision with regard to procedural requirements

(…)

Before examining the method of voting, it is important to highlight the following aspect of the issue: a violation of the Constitution would be possible if the Constitution had an explicit provision to regulate the matter in question, and if the action would contradict that provision and the regulation method governed under that provision. In cases where the violation of the Constitution results from procedural points, the violation should affect the substance of the provision significantly.

Accordingly:

A) The term text mentioned in Article 92 of the Constitution refers to terms which constitute draft laws. Related to different requirements, it may indicate parts or complete drafts. This is clarified in Article 92 (8, 9) for complete text. Moreover, hearing and voting on articles one after the other is prescribed by the Rules of Procedure, and this is a conventional method. Since a specific method is not prescribed under Article 92 (5) of the Constitution, one should concede that this general procedure should be employed here as well. And there is an expression in that paragraph confirming that view: (When the proposed amendment to articles is adopted by the Senate of the Republic with an absolute majority



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of its members, the National Assembly may adopt its own original and unamended text only by a vote from an absolute majority of its members).

(…) The expression "without change" means that the National Assembly cannot amend an article, cannot change words in an article, and must adopt one of the texts already formed within this process.

Therefore, to vote on amended articles separately is not contrary to the Constitution.

B) The Court found it contrary to the Constitution that the first text of the National Assembly had not been voted on, although the text of the Joint Committee was adopted.

(…)

However, to adopt the text of the Joint Committee complies with Article 92 (5) and Article 86 of the Constitution. Since no one can state that this decision does not represent the will of the Assembly, and since there is no constitutional provision that requires that voting must be carried out for each of the three texts separately and that then the one ranking best should be adopted, such a vote is unnecessary. And in my opinion it would be harmful.

(…)

Member, İhsan ECEMİŞ

DISSENTING OPINION

1- The Constitutional Court was established in the Turkish Republic, which is characterised as a democratic State governed by the rule of law, with the aim of providing and protecting the supremacy of constitutional provisions in their entirety.

(…)

Article 64 of the Constitution of the Turkish Republic reads: The Turkish Grand National Assembly is empowered to enact, amend and repeal laws, to debate and adopt the bills on the State budget and final accounts, to pass resolutions in regard to minting currency, proclaiming pardons and amnesties, and to the carrying out of definitive death sentences passed by courts.

The constitution-maker used the term "to take a decision", not "to enact a law", this approves that legislative acts regarding amnesty and pardons indeed have the character of a parliamentary decision, even though they have been named law for practical reasons. Hence, they cannot be subject to constitutional review from the point of constitutional law.



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On the other hand, to grant amnesty and pardon is within the absolute discretion of the Turkish Grand National Assembly. And it exercises this power in the name of the Turkish Nation. Thus, it must act without any external influence. If decisions for granting amnesty or pardon were counted as law, the Constitutional Court would come into play and thus it may intervene with the exclusive power of the Turkish Grand National Assembly. This does not comply with what the Constitution prescribes for the limits of powers and duties of the Turkish Grand National Assembly.

The Constitutional Court turns into an institution that extends its power for review prescribed by amended Article 147 (1) of the Constitution. By attempting a constitutional review of Article 5 (A) of Law No. 1803, it exercises a power which is not constitutionally assigned to it. This violates the boundaries of the fundamental rule, indicated in the last paragraph of Article 4 of the Constitution, that "(n)o person or agency shall exercise any State authority which does not derive its origin from the constitution".

(…)

2- I do not concur with the interpretation of the concept (text) in Article 92 (5) of the Constitution, that is, by considering the general meaning of the term and the aim of the constitution-maker. Here, the word (text) simply represents a written expression of any law. The basic aim of a parliamentary order with two assemblies is to get legislative acts passed. Establishing the Joint Committee for draft laws which are disputed by the National Assembly and the Senate of the Republic was envisaged as a way to issue laws for the good of the nation as quickly as possible. To opt for a way that would impede the National Assembly in adopting the most convenient, useful and mature legal rules, would therefore be contrary to the coherence and the purpose of the Constitution. For matters that cannot be dealt with in parts cannot not be put to vote separately, it cannot be defended judicially that there is an obligation to vote on matters as a whole which could be dealt with in parts, and that this would be in the nation's favour.

(…)

Member, Halit ZARBUN

## DISSENTING OPINION

1- The Group-Presidency of the Party of Justice (AP) asked for "a copy of the petition from the case regarding the annulment of Law No. 1803 on Amnesty (12/06/1974)".



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Pursuant to Article 30 (4), and the second subparagraph of Article 25 (1) of Law No. 44 on Establishment and Rules of Procedure of the Constitutional Court, the political party in question has the right to present a written memorandum to the Constitutional Court. It is evident that the party must see the petition and know the reasons for annulment in order to prepare this memorandum. There is neither a precise nor an indirect provision that forbids the handing of a copy of the petition to political parties. Thus, I think it necessary to give a copy of the petition to the parliamentary group of the political party in question in order to enable them to make use of their right.
2- (…)

Member, Abdullah ÜNER
(...)

DISSENTING OPINION

(…)

II- Issue of Unconstitutionality with Regard to Article 5 (A) of Law No. 1803 on Amnesty (15/05/1974)
(…)

The constitution-maker gave priority to the will of the National Assembly in law making, and articulated this principle precisely in Article 92 of the Constitution. Hence, from this fact a requirement arises to enable members of the National Assembly, especially those who did not participate in the first meeting and only joined the last hearing, to exercise their right to vote for articles in each of the three texts freely and without the influence of the Senate of the Republic. This would have only been possible if voting on articles of all three texts would have been done one after the other.
(…)
Member, Ahmet KOÇAK

DISSENTING OPINION

(…)

However, it is evident that there is no violation of the Constitution on the grounds that:
(…)

1. Article 92 (1, 2) speaks of drafts. There is no doubt that this means complete drafts.



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2. According to Article 92 (3, 4), it is obvious that the concept "text" is supposed to mean both "drafts" and "proposals". Pursuant to these paragraphs, if a draft adopted by the National Assembly is accepted by the Senate of the Republic without any changes, it becomes law.

Which provision of the Constitution should be applied in case of a partial adoption of a draft and the rejection or amendment of the rest?

The answer is to be found in Article 92 (3, 4, 5) of the Constitution:

Whereas it is indicated in this article that a law should be adopted if the Senate of the Republic adopts a draft without changes, Article 92 lacks any concretion for the case that only parts of articles are adopted without changes. However, since articles adopted by the Senate in an amended version which is not accepted by the National Assembly should be sent to the Joint Committee, it is clear that articles which were adopted without change by both legislative assemblies should be considered as concluded and finalised articles.

Article 92 (4) adopts the same principle when prescribing that if amendments made by the Senate are adopted by the National Assembly, they shall be finalised.

Therefore, we should conclude that the term text in the third and fourth paragraph also includes disputed articles in partly disputed drafts and proposals. And furthermore drafts adopted by both legislative organs without any changes.

By considering this, it may be stated that the term "text" in Article 92 means, depending on the context, entire drafts or single articles.

(…)

7- According to a well-established procedure of our legal system and our constitutional tradition, it is a general rule to negotiate and adopt drafts by discussing and voting on articles one after the other. If the constitution-maker envisaged an integrated voting or en-bloc voting procedure by deviating from this conventional method, as it is claimed in the ruling, it should have stated this precisely in the text of Article 92 or at least in the explanatory memorandum. Or the issue should have been discussed in the course of negotiations of the constituent assembly, which would be found in the related parliamentary minutes.

Since none of this can be retraced, it cannot be claimed that the constitution-maker aimed at such a voting method.

Furthermore, such a voting method may restrain the freedom of the members of the legislative assemblies to make laws, which is characteristic to a parliamentary regime that relies on general ballot. The described voting procedure may even lead to abandoning this freedom, because it obliges



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members of the legislative organs to vote for provisions that they would find inadmissible.

Already this reason would suffice to find that this voting procedure is against our constitutional principles.

(...)

Member, Muhittin GÜRÜN

## DISSENTING OPINION

*The Justice repeats what is said above concerning the scope of the jurisdiction of the Court.*

2- (…) I oppose the majority opinion which articulates that the voting of each article separately violates the Constitution, although I believe that articles amended by the Senate should have been considered as a whole and had to be put to a vote en-bloc. (…) The constitution-maker envisaged a specific method for the amendment of articles. From this it is clear that articles which were amended by the Senate by absolute majority vote should be adopted by the National Assembly also by absolute majority vote. As stated in detail in the report, the articles that did not receive an absolute majority vote in the Senate of the Republic still need an absolute majority vote in the National Assembly in order to be adopted. However, this restrains the law making initiative granted to the National Assembly. In case the Senate amends, for example, five articles while only one of the articles is adopted by absolute majority vote in the Senate, all articles must be adopted by the National Assembly with an absolute majority of votes. Such a situation would not arise if voting on articles was carried separately.

On the other hand, the expression "amendment to articles" in the fifth paragraph approves that voting shall be carried out article by article. If the constitution-maker envisaged voting on all articles amended together, it would not use the word "article" and would only say "adopted amendments".

(…)

Member, Ahmet Salih ÇEBİ

(…)



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## 3.14 Treatment of Prisoners and Visiting Rights

***Application Number:*** *2012/07* ***Decision Number:*** *2012/102*

***Date of Decision:*** *05/07/2012*

***Date of Publication and Number of the Official Gazette:*** *06/10/2012 - 28433*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Bakırköy First Court of Execution (Bakırköy Birinci İnfaz Hâkimliği)*

***Provisions at Issue:*** *The statement "for the purpose of not to amend once again" in Art. 83 (1) of Law No. 5275 on Execution of Sentences and Security Measures (13/12/2004)*

***Relevant Constitutional Provisions:*** *Art. 13, 17 (1982 TA)*

***Voting:*** *Rejected by majority of 10:3 justices*[747]

***Dissenting and Concurring Opinions:*** *1 DO*

***Justices:*** *President Haşim KILIÇ; Vice President Serruh KALELİ; Vice President* Alparslan ALTAN*; Members:* Fulya KANTARCIOĞLU, *Mehmet ERTEN, Serdar ÖZGÜLDÜR, Recep KÖMÜRCÜ, Burhan ÜSTÜN, Hicabi DURSUN, Celal Mümtaz AKINCI, Erdal TERCAN, Muammer TOPAL, Zühtü ARSLAN*

The Bakirköy 1st Court of Execution asked for the anulment of the expression "for the purpose of not to amend once again" in Article 83 (1) of the *Law on Execution of Sentences and Security Measures*. The application is based on substantial grounds concerning the treatment of prisoners and visiting rights: only minimal visitor rights are granted. The applicant states that the mentioned paragraph contradicts Article 17 (Personal inviolability, corporeal and spiritual existence of the individual) of the Constitution. Prisoners should have the right to change the list of visitors and they should have the opportunity to interact with others. This is in line with the objective of detention aiming at social bettering and re-socialisation. Furthermore, the submitting court argues that isolation hinders the individual and social development even when imprisoned and sentenced for crimes against society. In its decision the AYM rejects the complaint at issue stating that there is no violation of the Constitution. The decision of the AYM is criticised in a dissenting opinion by three justices, who see a violation of Article 13 (Restriction of Fundamental Rights and Freedoms) of the Constitution when it comes to the selection of the visitors of prisoners.

(…)

747 According to the new Law on the Establishment and the Rules of Procedure of the Constitutional Court (No. 6216) the Court consists of 17 justices. Article 21 (1) stipulates that the number of justices to decide is 12 members of the court plus one member of the AYM's Presidium, i.e. 13 justices in sum.



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## II. JUDICIAL REFERRAL

(…)

### REASONS FOR APPLICATION

Article 17 of our Constitution states, everyone has the right to life and the right to protect and improve their corporeal and spiritual existence. All of our valid laws must comply with this general framework stipulated by our Constitution. Hence, Article 3 of Law No. 5275 on Execution of Sentences and Security Measures states that the basic purpose of the execution is to enable prisoners to get acquainted with a way of life abiding by societal rules and taking responsibility for their acts.

This principle is directly linked to the fundamental right governed under Article 17 of the Constitution, for the objective of re-socialisation while serving a sentence in prison directly relies on the protection and improvement of the prisoner's corporeal and spiritual existence.

In order to become socialised, individuals have to communicate with others, have to be linked to a social domain, and have to take part in social life. For arrested and sentenced individuals these rights are legally restrained. However, they are granted several rights. One of these rights is the right to have visitors. Article 83 of Law No. 5275 regulated how these visits are to be organised, based on which the Ministry of Justice has issued a decree on visits to prisoners and detainees.

(…)

If the legally required preconditions are missing, the prisoner has no opportunity to change the list of names during the whole period of their detention. The wording of the law does not comply with social reality, as there is no possibility of appeal for an arrested or sentenced individual whose close friend is denied the right to visit. As can be seen in the case of …[748], who will have to wait eight years for conditional release, the impossibility of changing the list of admitted visitors during this period will hinder the development of his corporeal and spiritual existence in prison.

(…)

748 The name has been left out in the original version of the decision.



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## V. MERITS

(…)

As a natural consequence of a sentence restricting freedom, it is inevitable to restrain the social relations of a sentenced prisoner, whose freedom was restricted by a court decision. One of the reasons for the execution is to hinder the prisoner committing another crime after their release. Thus, the execution of the sentence aims on one hand at deterring the prisoner from committing another crime, and on the other hand at respecting their rights to improve their corporeal and spiritual existence by enabling them to communicate with the outside world and to rehabilitate socially. Nevertheless, it is evident that the right to have visitors has been restrained for all but legal representatives, spouses and relatives, for the purpose of protection of and order in the prisons. Therefore, there must be a reasonable balance between the right to have visitors, security, and order of prisons and the right of prisoners to develop their corporeal and spiritual existence.

Hence, the regulation allows a prisoner to change three persons on the visitor list in urgent cases. What constitutes an urgent case was left to be decided in the actual situation, thus providing for some flexibility. However, following Article 83 (2) of Law No. 5275 on Execution of Sentences and Security Measures, visits by anyone but the legal representative, the spouse, the relatives listed in the law or persons on the three person visitor list submitted to the prison management before, require authorisation in writing by the prosecution.

Following the aforementioned reasons, the provision at issue does not violate Article 17 of the Constitution. The application has to be rejected.

Serruh KALELİ, Fulya KANTARCIOĞLU and Muammer TOPAL did not agree with this opinion.

(...)

## DISSENTING OPINION

(…)

Compliance with the implementation of Article 13 of the Constitution depends on whether the restriction of the right to have visitors respects the condition of proportionality, and that it is appropriate to guarantee order in and security of prisons.



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To prohibit changing the names of visitors on the list except for in cases of imperative reasons means that the right to have visitors becomes invalid if the persons on the list desist from making visits. Although it would be possible to restrict the right to change the list of visitors often in terms of security and order of prisons, a complete prohibition to change it except for in cases of imperative reasons is a disproportional measure, and does not comply with Article 13 of the Constitution.

For the aforementioned reasons, we are convinced that the provision at issue violates Article 13 and 17 of the Constitution and do not agree with the majority opinion.

Vice President, Serruh KALELİ
Member, Fulya KANTARCIOĞLU
Member, Muammer TOPAL



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## 3.15 Unequal Standards in Military and Civilian Criminal Law

***Application Number:*** *2011/98* ***Decision Number:*** *2012/24*

***Date of Decision:*** *16/02/2012*

***Date of Publication and Number of the Official Gazette:*** *19/05/2012 - 28297*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Military Court of the Air Force Education and Training Command (Hava Kuvvetleri Komutanlığı Hava Eğitim Komutanlığı Askeri Mahkemesi)*

***Provisions at Issue:*** *Art. 28 of Law No. 4551 (22/03/2000) Amending Art. 132 of the Military Criminal Code No. 1632 (22/05/1930)*

***Relevant Constitutional Provisions:*** *Art. 2, 10 (1982 TA)*

***Voting:*** *Rejected by majority of 13:2 justices*

***Dissenting and Concurring Opinions:*** *1 DO*

***Justices:*** *President Haşim KILIÇ; Vice President Serruh KALELİ; Members: Alparslan ALTAN, Fulya KANTARCIOĞLU, Mehmet ERTEN, Serdar ÖZGÜLDÜR, Osman Alifeyyaz PAKSÜT, Zehra Ayla PERKTAŞ, Recep KÖMÜRCÜ, Burhan ÜSTÜN, Engin YILDIRIM, Nuri NECİPOĞLU, Hicabi DURSUN, Celal Mümtaz AKINCI, Erdal TERCAN*

The submitting court asks for annulment of Article 132 of the *Military Criminal Code* which foresees imprisonment of six months to five years for burglary against other military personnel, whereas the burglary provision in the civil Criminal Code foresees imprisonment of only one to three years. Besides, mitigation for committing burglary is foreseen in ordinary criminal law but not in military criminal law. This constitutes a violation of the principle of equality before the law (Articles 2 and 10 of the Constitution), because similar facts are treated differently. The AYM rejects this argument and argues that military personnel and civilians are in "different legal situations". Therefore, it is constitutional to judge military staff´s actions differently to those of civilians.

(…)

## V. MERITS

(…)

The State governed by the rule of law as established by Article 2 of the Constitution is a State based on human rights, that protects and strengthens these rights and freedoms, whose acts and proceedings are in compliance with the law, that establishes, develops and maintains a just legal order in every area, that refrains from unconstitutional circumstances and behaviour, where law governs the actions of all State organs, that considers itself bound by the Constitution and laws, and whose actions are open to constitutional review. In a State governed by the rule of law the



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legislator has the authority to regulate all the issues deemed necessary as long as this remains within the constitutional limits.

The "principle of equality before the law" provided for in Article 10 applies to those who find themselves in the same legal situation. This principle does not require de facto equality but legal equality. The aim of the equality principle is to ensure that all persons who find themselves in the same legal situation are subjected to the same proceedings and to prevent discrimination among people and the concession of privileges to some through laws. This principle prohibits persons and groups who find themselves in the same situation being subjected to different legal rules and thus their equality before the law being violated.

The choice of a system in the area of criminal and criminal procedure law for the combat of crime and delinquency concerns the State's policy in this area because criminal law is related to a society's culture and level of civilisation, social and economic life. Thus, concerning criminal law regulations the legislator has discretionary power – under the condition of complying with constitutional provisions and fundamental principles of criminal law – with regard to issues such as investigation and trial modalities, determination of punishable acts, punishment length and forms, or determination of aggravating and mitigating circumstances and acts.

The legislator can subject persons who find themselves in different legal situations to different sanctions. Military personnel and civilians are not in the same legal situation. As the military community by its nature requires relationships of mutual security and confidence, with regard to military personnel burglary can entail different legal consequences. The special provision at issue in the military criminal code has been established with regard to the possible distinct consequences that burglary can have if committed by someone in the aforementioned kind of relationships against his subordinate, superior or fellow soldier. As the provision at issue falls within the legislator's discretionary power to establish different sanctions for persons who find themselves in different legal situations, the principles of the State governed by the rule of law and equality have not been violated.

The provision at issue does not violate Articles 2 and 10 of the Constitution. The judicial referral is therefore rejected.

Engin YILDIRIM and Celal Mümtaz AKINCI did not agree with this opinion.

(…)



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DISSENTING OPINION

*The dissenting Justices hold that the aforementioned kind of relation (i.e. hierarchical relation and comrade relation) can also be found in other professions and that the particularities of military service do not justify such a differentiation. Otherwise, separate provisions would be necessary for every profession (e.g. the police). They further discuss the maximum penalty for burglary in military criminal law and the related case-law of the Military Court of Cassation.*

It is clear that it is necessary to take measures aimed at preventing crimes by military personnel in order to ensure military discipline. However, it is unacceptable that a provision enacted in order to establish and ensure military discipline gives rise to a restriction of individual rights and freedoms and injures the sense of justice. This situation would result in a violation of the State governed by the rule of law principle established by Article 2 of the Constitution.

While some persons freely chose the military profession, it is a compulsory service for others. If we consider that people see their freedoms restricted during compulsory military service, the fact that they are subjected to a distinct criminal punishment compared to civilians for an act such as burglary that is not only a military crime, violates the principle of equality as established in Article 10 of the Constitution. That military personnel and civilians find themselves in different legal situations because of the particularities of military service, does not justify distinct treatment in every circumstances. There are of course differences between military personnel and civilians, but where fundamental rights and freedoms are concerned, these differences should not be used to create inequalities to the detriment of military personnel. .

For the aforementioned reasons we disagree with the majority and consider that the provision at issue violates Articles 2 and 10 of the Constitution.

Member, Engin YILDIRIM
Member, Celal Mümtaz AKINCI



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## 3.16 Mitigation of Sentence for Rape Crimes

***Application Number:*** *1988/04* ***Decision Number:*** *1989/03*

***Date of Decision:*** *12/01/1989*

***Publication Date and Number of the Official Gazette:*** *10/01/1990 - 20398*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Antalya Second High Criminal Court (Antalya Ikinci Ağır Ceza Mahkemesi)*

***Provisions at Issue:*** *Art. 438 of the Turkish Criminal Code No. 765 (01/03/1926)*

***Relevant Constitutional Provisions:*** *Art. 10 (1), 12 (1), 17 (1), 19 (1) (1982 TA)*

***International Treaties/References:*** *CEDAW, UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*

***Voting:*** *Rejected by majority of 7:4 justices*

***Dissenting and Concurring Opinions:*** *3 DO*

***Justices:*** *President Mahmut C. CUHRUK; Vice President: Yekta Güngör ÖZDEN; Members: Necdet DARICIOĞLU, Muammer TURAN, Mehmet ÇINARLI, Servet TÜZÜN, Mustafa ŞAHİN, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Erol CANSEL, (Adnan KÜKNER)*[749]

The submitting court requested to annul Article 438 of the *Turkish Criminal Code*, which states that in the case of rape of a prostitute the perpetrators penalty might be mitigated due to the fact that the woman earns a living by prostituting herself. The Antalya 2nd High Criminal Court found this provision contrary to the rule of law principle, the principle of equality before the law (Art. 10), personal freedom and fundamental rights (Art. 12) and the right to personal liberty and security (Art. 17, Art. 19). The AYM rejects the application arguing that different groups of individuals require different rights; and in order to be able to protect chaste women the legislator applied the difference principle in favour of this group, and not to decidedly act against prostitutes.

(…)

### I. THE CASE

As a result of the notification from the police department which states that the victim of the crime, who it is claimed was abducted by the perpetrators, is "a woman prostituting as a profession", the court directly applied to the Constitutional Court for annulment of Article 438 of the Turkish

749 Justice Adnan KÜKNER did participate at the beginning of the proceedings. He retired on 01/07/1988 and was not present when the case was decided on 12/01/1989.



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Criminal Code, which may be implemented in this case, on the grounds that it violates the Constitution.

## II. JUDICIAL REFERRAL

*The submitting court held that the idea that a prostitute deserves less protection and mitigating the punishment because the victim is a prostitute is contrary to the equality before law principle. Article 438 of the Criminal Code is contrary to Article 10, 12 (1), 17 (1), 19 (1), and the general principles of law and a sense of justice.*

## III. THE LAW

### (a) Provision at Issue

Article 438 of the Turkish Criminal Code, Law No. 765 (01/03/1926), which is claimed to be contrary to the Constitution, follows below:

"Article 438: In the case of the rape and abduction crimes being committed against a woman whose profession is prostitution, the punishment may be mitigated by up to two-thirds."

(…)

## IV. PRELIMINARY EXAMINATION

(…)

## V. MERITS

(…)

### A. Content of the Provision Subject to the Application

Article 438 of the Criminal Code states: "in the case of rape and abduction crimes being committed against a woman whose profession is prostitution, the punishment may be mitigated by up to the rate of two-thirds." In the



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case of a woman that is raped or abducted prostituting as a business, by this provision the law deems this fact – that is to say her bad attribute – a legal mitigating circumstance.

(…) Although Article 350 of the Italian Criminal Code, the point of reference and origin of Article 438 of the Turkish Criminal Code, prescribes this mitigating circumstance for some crimes other than rape and abduction crimes governed under Chapter 8, the Turkish Criminal Code in contrast to its origin narrowed the implementation area of Article 438.

In the explanatory memorandum related to the Article of the Italian Criminal Code, it is stated that:

"Women, who live by prostitution, do not voluntarily relinquish their right to corporeal integrity and the safeguarding function of the law. But on the other hand, a prostitute's honour cannot be infringed as much as a fair woman's honour when raped or abducted. Besides, the resistance of the prostitute during the committing of the crime may have been rightfully considered as unserious by the offender."

There is no doubt that a woman's unchaste life cannot render any assault against her a lawful act. In accordance with this point of view, Article 438 of the Turkish Criminal Code indicates that the victim's situation could only affect the amount of the penalty but it could not serve as a reason deeming such an act lawful. Thus, it prescribes that in the case of a rape or abduction against a prostitute the punishment will only be mitigated.

## B. Issue of Unconstitutionality by the Provision Subject to the Application

### 1- Review of the provision with regard to Article 10 of the Constitution

(…)

In Article 10 of the Constitution the equality before law principle is depicted as: "Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds."

This provision of the Constitution acknowledges that the same legal rules should be applied to those in the same legal position. Applying different legal rules to those who are in different legal positions does not breach this principle.



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As emphasised in many rulings of the Constitutional Court, the equality before law principle does not mean that the same legal rules should be applied to everyone in all aspects. Any discrimination regarding language, race, color, sex, political opinion, philosophical belief, religion or sect and inequalities resulting from such acts cannot be yielded with regard to the Constitution. This absolute prohibition prevents application of different legal rules to persons in the same position and creates privileged persons and communities. Applying different legal rules to some citizens does ot violate the equality principle, if they are based upon a rightful reason. (…) The Constitution aims at legal not de facto equality. (…)

Pursuant to the continuous jurisdiction of the Court, in cases where a norm that is claimed to be contrary to the equality principle is based upon on a rightful cause or has been enacted in the public interest, we cannot assume that this norm violates the principle of equality.

From this standpoint it is compulsory to ascertain whether imposing a lighter punishment on someone who raped or abducted a prostitute rather than on someone who committed the same crime against a chaste woman is based upon a rightful cause.

The State is obliged to enable social peace, public order and safety for individuals. Occasionally the State tries to achieve this by imposing punishments. Because the legislator must consider public interest as well as individual interests, it may prescribe different punishments due to some crime's attributes, the manner of committing a crime, the harm to society. The personality of the victim and the amount of damage done to them also influences the determination of punishment. The legislator may prescribe a heavier punishment for a lighter crime, as well as it might prescribe different punishments for different crimes.

The harm suffered by a prostitute when she is raped or abducted cannot be counted equal to the harm suffered by a chaste woman exposed to the same crime. In the case of a chaste woman being raped or abducted, her honour is stained and discredited irreparably. However, there it is not possible to claim and acknowledge that a prostitute suffers in the same way. Since a prostitute exercises prostitution as a profession and acknowledges it as a commercial affair, the personal and sexual freedoms of such women are not deemed to be violated as much as those of chaste women. The legislator allows such a distinction in Article 438 of the Turkish Criminal Code on the grounds that the acts of rape and abduction are crimes against chastity, and that the harm suffered by a prostitute exposed to these crimes is far less than the harm suffered by a chaste woman.

(…)



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2- Review of the provision with regard to Article 12 (1) and 19 (1) of the Constitution

Article 12 of the Constitution, which defines the characteristic features of fundamental rights, bestows the inherent, inviolable and inalienable fundamental rights and freedoms to everyone; and in Article 19 (1) it is stated that everyone has the right to personal liberty and security.

The concept of personal liberty that enables an individual to act and to make a decision includes, first of all, individual sexual liberty. In this respect the laws should protect sexual liberty and prevent attacks against sexual liberty through criminal sanctions. Performing prostitution as a profession neither means the relinquishing of sexual freedom, nor does it render an attack legal. The legislator that adopted this principle aims to prevent attacks against the sexual and personal liberties of prostitutes, since it has prescribed criminal sanctions against these attacks. Moreover, pursuant to this aim it did not avoid defining rape and abduction against these women as criminal acts but only prescribed mitigation of punishment to a certain extent, through Article 438. The Constitution defines the principles relating to offences and penalties in Article 38, and it banned torture and corporal punishment as punitive measures incompatible with human dignity in Article 17. To decide what actions are defined as crimes and what kinds and amounts of punishment are to be imposed in the fields not covered by these restrictions, has been left up to the discretion of the legislator. Thus, according to the Constitution, setting the required punishment for a crime committed within these limits is within the discretion of the legislative organ, which has to consider its effects on societal life and its harm to individuals and society. The legislator who acts with such discretion has prescribed different punishments, after considering whether the woman raped or abducted is a prostitute or a chaste woman. In the case of abduction or rape being committed against a chaste woman, it is deemed that prescribing heavier punishments is compulsory in terms of the protection of public morality and public interest. Therefore, Article 438, which is subject to the referral does not violate Articles 12 (1) and 19 (1) of the Constitution.



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3- Review of the provision with regard to Article 17 (1) of the Constitution

(…)

On the other hand, it is stated in the Preamble of the Constitution that every Turkish citizen has a right to benefit from the fundamental rights and freedoms spelled out in the Constitution. In this respect, we should acknowledge that prostitutes have the right to life, the right to protect and improve their physical and spiritual existence; and any assault against their rights must be prevented by criminal sanction. Pursuant to this principle the Turkish Criminal Code prescribes assaults against freedoms, the right to life and physical and spiritual existence of prostitutes as crimes and strives to prevent any acts against them by means of criminal sanction.

As mentioned above, Article 38 of the Constitution defines the basic, compulsory principles that the legislator must abide by in terms of the the regulations of criminal law. These are principles such as no one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed, no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed, penalties, and security measures in lieu of penalties, shall be prescribed only by law, no one shall be considered guilty until proven guilty in a court of law, no one shall be compelled to make a statement that would incriminate themselves or their legal next of kin, or to present such incriminating evidence, criminal responsibility shall be personal and general confiscation shall not be imposed as punishment. In addition, Article 17 (3) of the Constitution states that no one shall be subjected to penalties or treatment incompatible with human dignity.

For there is no other mandatory or prohibitory provision other than the aforementioned in the Constitution, to issue the required provisions about crimes and punishments is within the discretion of the legislator. Apart from a few principles, such as the amount and type of punishment to be imposed for the acts deemed as crimes, the Constitution has not defined what kind of acts are deemed as crimes, and it has left this to the discretion of the legislator. Therefore, the legislator has discretion in these issues, which fall into its competence area. While exercising this discretion, the legislator should set the punishments considering the principles in Articles 38 and 17 and the aim of preventing reoffending and the rehabilitation of the criminals. Thus, in the Turkish Criminal Code there are matters in aggravation and matters in extenuation for the same crime. In some



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cases, different kinds of punishments with different levels of severity may be prescribed.

As mentioned above, acts of rape and abduction are crimes against chastity. For this reason, the Turkish Criminal Code does not regulate these kind of crimes under "Offenses against Persons" but under "Offenses Against Chastity and Family Order". In the case of the acts of rape or abduction causing the death of a victim this does not change the attribute of the crime. This is because when rape or abduction result in death or injury to the victim the act is not against the right to life and physical integrity of the victim but against her chastity. Although the result is the death of the victim, taking into account the unchangeable attribute of these crimes, the legislator adopted mitigation of punishment for the acts against a prostitute, in contrast to the same acts against a chaste woman.

Moreover, the Turkish Criminal Code adopts different types and amounts of punishments even for crimes against the right to life, that is to say homicides. In Articles 448, 449, 450, and 453 different punishments are prescribed with reference to the identity of the victim or the way of "committing the murder crime". (…)

It is not agreeable that the legislator has prescribed different punishments for the same act in different cases, for example, the victims' rights to life are protected in cases when the perpetrators are penalised pursuant to Articles 449 and 450 (life imprisonment or execution), but they are not protected in another case where the perpetrators are penalised pursuant to Article 448 (heavy imprisonment of 24-30 years). Likewise, the claim that Article 438 abolishes a prostitute's rights to life and protects physical and spiritual existence is not admissible. Because there is no doubt that when death occurs due to a direct assault on her right to life, the perpetrator should be penalised by Articles 448, 449 or 450 of the Turkish Criminal Code that prescribe punishment for crimes of murder, regardless of the victim's identity as a prostitute. In this respect, the provision subject to the referral does not have any attribute that eliminates the right to life and the right to protect and improve corporeal and spiritual existence, that is bestowed on everyone - including prostitutes - by Article 17 of the Constitution. As it is not possible to punish all acts of murder in the same way regardless of the victim and the method of committing the crime; all rape and abduction crimes should not be punished in the same way regardless of the victim either. To impose a mitigated penalty for these kind of crimes, when they are committed against chaste women, results from the discretion of the legislator. This is because, according to the Constitution, setting the punishment while considering the crime's gravity



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and effects on societal life is within the discretion of the legislative organ. Discretion of the legislator in its competence field and not contrary to the Constitution does not fall within the scope of constitutional review. The Constitutional Court makes a review of compliance, not a review of expediency. Put differently, it determines whether a provision violates the Constitution or not. The legislator can create regulations within the scope of its discretion that are not contrary to the basic principles that the Constitution provides for crimes and punishments, while using the legislative power in the field of criminal law.

Thus, since according to the Constitution, setting the necessary punishments for the acts deemed crimes considering their effects on societal life falls under the discretion of the legislative organ, and since Article 438 of the Turkish Criminal Code made by that discretion does not abolish the rights and freedoms, it does not violate, in any respect, the principles stipulated by the Constitution. Therefore, the Court did not find the claim of the referring court, that this provision violates Article 17 of the Constitution, admissible.

On the other hand, the referring court also claimed that Article 438 of the Turkish Criminal Code, which is subject to the referral, is contrary to the general principles of law and the sense of justice.

It is necessary to examine whether the proportionality of crime and punishment is lawful when considering the effects of a crime on society. Otherwise, a comparison with a punishment set for any other crime would not function to determine that proportionality. Moreover, when considering its features, Article 438 regulating crimes of rape and abduction against prostitutes, cannot be compared with other articles that set punishments for other crimes.

The legislator approved different punishments in accordance with the different situations of victims, while taking into account the effects of rape and abduction against a prostitute and against other women in society. In this way it adopted Article 438 of the Turkish Criminal Code, which is subject to the referral. After comparing the penalties for the crime of rape and abduction against a prostitute and the same crime against a chaste woman, the claims that to penalise a criminal act differently contradicts general principles of law and the sense of justice, has not been found admissible neither.



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## IV. CONCLUSION

On 12/01/1989,

it was ruled that Article 438 of the Turkish Criminal Code, Law No. 765 (01/03/1926), does not violate the Constitution; and the application was DISMISSED by majority of votes, with the dissenting votes of Mahmut C. CUHRUK, Yekta Güngör ÖZDEN, Necdet DARICIOĞLU and Servet TÜZÜN.

(…)

## DISSENTING OPINION

The provision which is asked to be annulled, which deems "committing rape" and "abduction" crimes against a prostitute a legal mitigating cause, should be annulled on the grounds that its substance severely violates human rights, human dignity and the principle of equality before the law. Therefore, I disagree with the majority opinion.

President, Mahmut C. CUHRUK

## DISSENTING OPINION

(…)

1- (…)

Aggravation or mitigation of a punishment that is determined by the gravity of the harm of the crime over society or individuals is made by private or general rules. In practice the titles of the victims regarding their assignments and authorities and their relationships with the perpetrators and with others are also taken into consideration. But, in cases of rape and abduction against prostitutes, the opinion that these women suffer less than chaste woman cannot be approved. Mitigation of punishment that relies upon such an assumption means negative discrimination against women by ranking among women, denying their existence and undervaluing them by reason of their particular conditions. An opinion saying that not mitigating the punishment for committing a crime against a woman who has a bad reputation on moral grounds would harm the morally straight women is not reasonable. Furthermore, the reasoning that assaulted unchaste women suffer less damage in cases resulting with injury or death has no basis. Even though the act is performed in order to rape or



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abduct and not to kill, if the result is death or injury it is not possible to claim that a prostitute suffers less. (…)

(…) On the other hand, such a provision, which provides mitigation of punishment for someone who offends against a prostitute and thereby leads to a threat for society and hurts the moral value judgments, is not found in criminal codes of European countries; except for the indirect implementation of Article 177 (2) of the German Criminal Code.

Everyone has the right to life governed under Article 17 of the Constitution without any discrimination. To strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice is one of the basic goals and assignments of the State pursuant to Article 5 of the Constitution. To protect the right to life, the most important of the fundamental rights and freedoms, to avoid any discrimination on this issue, is the leading obligation of the State. The most appropriate way to protect the right to life is to set efficient criminal sanctions for assaults against this right. Since there is no justification for mitigation of punishment, assaults against the right to life of prostitutes should be punished as much as assaults against any other citizen. Moreover, and due to their special circumstances, the possibility of meeting these threats is higher for these women. (…)

This injustice in criminal law is contrary to the principle of balance between crime and punishment and it violates the Constitution. The legislator may define crime and punishment, provided that they are compatible with the fundamental principles of the Constitution. In addition, they must be compatible with other provisions of the Constitution as well as the related special provision. Complying with the special provisions but not with any other provision is undesirable. It is necessary to take the conditions of the perpetrator together with the victim's conditions into consideration, to make sure of compatibility of the criminal sanction with the principles of human dignity. Prisoners also benefit from fundamental rights and freedoms within the frame of restrictions governed by the laws; thus, the opinion which isolates them from the fundamental rights and freedoms and which states that the punishments restricting liberties may violate general provisions, provided they comply with the special provisions of the Constitution, is not compatible with the superiority principle of the Constitution. In this case, violating Article 17 of the Constitution is the main reason for annulment.

2- The disputability of compatibility of a provision enacted many years ago within the Constitution is understandable. The Constitutional Court



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should deem to use interpretative methods to consider contemporary measures as an opportunity to sort through the anti-democratic provisions, while examining judicial referrals. The fact that a case is handled by a court proves that an issue is a serious problem in the country's agenda. To benefit from mitigation is the opposite of lawful implementation, because the conditions for this refer to another person and not [the victim] themself. To diminish the obligation of the State to protect all citizens and to divide sanctions by ranking them, results in a breakdown of the proportionality principle. While setting a punishment, taking into consideration the situation of the victim from the point of view of morality implies denying that the crime is committed against a human body, an individual. Beyond the legal and rightful reasons for the criminal and the victim,[750] like age and employment status, such a distinction between chaste and unchaste women proves this criterion is defined based on "the gender" principle. This shows that the existence and wellbeing of citizens are not esteemed in the manner of taking note of everyone equally. Prostitutes are counted as second class citizens and the ruling also represents an opinion justifying the criminals who commit crimes against them. What is important is to reduce crime rates. But such an implementation serves to increase them. This obsolete provision, which encourages an assault against three prostitutes instead of one woman who does not prostitute, is one of the provisions of the Criminal Code not appropriate for our era. They are all women, humans, and citizens of the State regardless of whether they are prostitutes or not. Having considered the changing thoughts, conditions and requirements of the era, such a provision has an insulting substance to our respectable women—who complete and strengthen our society and have a cardinal place and value in our history, national and private lives and who must be considered equal with our men as citizens and humankind. If this view is maintained a discrimination of citizens, men and women would be made for different reasons. If crimes against those who are not in good condition are tolerated, the social balance may be ruined. My personal view does not aim to condone prostitution, holding it as a profession or a source of income. Although it is expected that society and State should protect all of them, considering that among them are those who have psychological diseases, to protect a provision encouraging and provoking the committing of a crime is not incomprehensible. Considering the structure, modern definition and functions of the State,

750 The translation reconstructs the – unclear – Turkish wording and structure of the sentence.



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there is no room to hesitate to abolish customary norms and old value judgments.

(…) To deem the special condition of the victim, which is not related to the perpetrator, a lawful cause may be counted as a different form of violation of the character of the punishment principle.

(…) To grant mitigation of sentence because of the fact that the victims live off prostitution means to ruin these women's lives also by means of law. Mitigating the punishments for the crimes against them instead of reviewing the sanctions for their own undesirable acts cannot be found appropriate. A mitigation of sentence should be granted due to the personal characteristics of the perpetrator and the nature of the crime itself. To force the spouse into sexual interaction is not received favorably in our time; to implement mitigation of sentence in cases of assaults against some women (prostitutes) transmits a primitive picture. This amounts to a contradiction for it approves of some crimes against some women by law; and that is not compatible with the reasoning of the rulings about annulment of Articles 310 (2) and 443 (1) of the Civil Code.

(…)

For the aforementioned reasons I dissent from this decision.

Vice President, Yekta Güngör ÖZDEN

DISSENTING OPINION

1- (…) On the other hand, the implementation of Article 438 is not due to the awareness of the perpetrator that the victim is a prostitute. In cases where one realises that the victim supposed to be chaste is indeed a prostitute, the rapist ought to benefit from mitigation of sentence.

This provision, which also violates the principle of individuality of punishment, is a ridiculous and brutal example that displays the exclusion of prostitutes, who must enjoy fundamental rights and freedoms and equal protection and legal security in society.

It is certain that these women's unchaste lives do not render acts of rape against them legitimate. Moreover, earning their living by prostitution does not remove or affect the ownership of their bodies. In this respect, it is necessary to approach the problem from the point of fact that prostitutes are also human beings; they have been bestowed with dignity and honour, which all members of humanity have been endowed with.

To save these ill-fated people, who were not allowed to enjoy their youth and even childhood because of the heavy pressure and coercion of social



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and economic conditions and were bogged down by their bad fate, and to reintegrate them into society would only be possible by virtue of such an approach. Exclusion of prostitutes from the area of social protection, in contrast, will encourage and lead to protection of the ones who attempt to benefit from their desperateness and satisfy sexual desires by means of committing rape and crimes of abduction. The leading task of the State should be the rapid abolition of such a provision, which, in other words, facilitates and encourages these sorts of assaults.

The "Declaration on the Elimination of Discrimination against Women", drawn up by the "Commission on the Status of Women of the United Nations", includes measures to prevent exploitation of prostitution and making women subject to commercial activities. And the "Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others" compiles principles and standards for similar purposes in a single text. This fact, which holds an important place among United Nations' works regarding the issue of women, along with the absence of a provision in line with Article 438 in the first draft for the Turkish Criminal Code drawn up by the Commission formed by the Ministry of Justice, may be held up as a positive development confirming the accuracy of the aforementioned opinions and ideas.

To sum up, for sure, as stated by the referring court, prostitutes cannot be excluded from the scope of the principle of equality before law that is admissible for "everyone". There is no doubt that individual freedoms, sexual rights and legal security of those who suffered from the crimes governed under Article 438 of Turkish Criminal Code have been violated. Beyond the distinction between chaste and unchaste, pure women and prostitutes, to deem that prostitutes deserve less protection than others and hence to excuse those who committed crimes against them to a large extent may be contrary to the principle of equality before law in terms of either protection of rights and freedoms of victims or sentencing perpetrators; thus, concepts such as "peace of society", "perception of justice" and "respect for human rights" will be damaged.

2- Articles 414 and 416 of Turkish Criminal Code, without making any sexual distinction, employ the terms "a minor" and "anyone"; in Article 429, in the second part of the eighth section of the second chapter titled "Kidnapping Maid, Woman and Man", abduction of women is mentioned; in Article 430 kidnapping maid, woman and man is governed in general by employing the term "a person who is not major"; in Article 434 the words "maid", "woman" and "man" with special meanings is emphasised with the expression of "maid or woman kidnapped or detained";



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the Article 438 is content with the word "woman", in the case of, for instance, the crime being committed against a prostitute who remains a virgin for physical reasons, or a transsexual prostitute or a homosexual man. Therefore, the provision subject to the referral may not be applied to the perpetrator as the issue is not "a woman", and this will cause some negative results in terms of constitutional principles and provisions and especially the peace of society and perception of justice.

Similarly, adverse results may come into being with the terms "detention", "molestation" and "indecent assault". Likewise, in cases of rapes or abductions resulting in death or injury, the implementation of Article 438 of the Turkish Criminal Code along with Article 418 or 439 may cause problems.

When the actions of detention and indecent assault result in the death of or injury to the victim, considering their close connection with rape and abduction crimes, problems regarding interpretation and implementation should not be overlooked; for example, in cases where the action of rape results in death, the perpetrator shall not be executed because of applying Articles 418 and 438 together. Likewise, a lighter punishment may be imposed under Article 438 on a perpetrator who rapes a prostitute at the age of 15 than on any perpetrator who commits a crime of sexual abuse. Similar examples can be multiplied. In this case it should be underlined that unbalanced results of implementation of Article 438 separately or along with other relevant articles are of importance in terms of constitutional principles and provisions.

(…)

The most influential way of protecting a right is undoubtedly to prescribe criminal sanctions for assaults against this right which are proportional to the personality of the perpetrator and the gravity of the crime. Article 438 of the Turkish Criminal Code, which has an attribute violating the right to equal protection from the point of view of the individual and the obligation of equal protection from the point of view of the State, does not have content that actualises the principles mentioned above. Due to different and unbalanced implementation and absurd outcomes which do not fit the principle of justice and the principle of a balance of crime and punishment, it also sets typical examples of regulations in criminal law that are contrary to the Constitution.

It ought to be acknowledged that as Turkish citizens, prostitutes should completely enjoy the right to benefit from "fundamental rights and freedoms in accordance with equality and social justice" prescribed by the Constitution of the Republic of Turkey, on the grounds that there is



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no doubt that individual liberty includes the scope of institutionalised freedoms which enables individuals to make decisions and act freely; and the sexual liberty of an individual falls within the scope of the term individual liberty. Thus, it cannot be easily argued that Article 438 of Turkish Criminal Code, which is asked to be annulled, is a provision compatible with the Constitution from this point as well.

(…)

Members, Necdet DARICIOĞLU, Servet TÜZÜN



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## 3.17 Mitigation of Sentence for Honour Killings

***Application Number:*** *1997/45* ***Decision Number:*** *1998/48*

***Date of Decision:*** 16/07/1998

***Date of Publication and Number of the Official Gazette:*** 22/11/2003 - 25297

***Review Type and Applicant****: Concrete Constitutional Review Proceedings requested by Bakırköy Second Assize Court (Bakırköy Ikinci Ağır Ceza Mahkemesi)*

***Provisions at Issue:*** *Art. 462 of the Turkish Criminal Code No. 765 (01/03/1926)*

***Relevant Constitutional Provisions:*** *Preamble, Art. 5, 10, 12, 17, 19 (1982 TA)*

***Voting:*** *Rejected by majority of 7:4 justices*

***Dissenting and Concurring Opinions:*** *1 DO*

***Justices:*** President Ahmet Necdet SEZER; Members: Samia AKBULUT, Haşim KILIÇ, Yalçın ACARGÜN, Sacit ADALI, Ali HÜNER, Lütfi F. TUNCEL, Mustafa YAKUPOĞLU, Fulya KAN-TARCIOĞLU, Mahir Can ILICAK, Rüştü SÖNMEZ *(Yekta Güngör ÖZDEN, Selçuk TÜZÜN, Güven DİNÇER, Mustafa BUMİN)*[751]

The submitting court sought annulment of a provision of the *Turkish Criminal Code* (TCK) that allows mitigation of sentence in cases of attempted murder within the family. The provision specifies that a sentence might be mitigated when offender and victim are family members, and when the offender observes a situation of illegitimate sexual intercourse that leads to a panic reaction. Then, and only then, a court might argue that the crime was an emotional act and accordingly plead for mitigation of sentence. The AYM does not find this provision in violation of the Constitution, and hence the application is rejected.

(…)

751 In this case the bench changed during the proceedings: Yekta Güngör ÖZDEN retired 31/12/1997, Selçuk TÜZÜN retired 14/02/1998, therefore both were present when the case was openend but not on the day of the decision. They were replaced by Mahir Can ILICAK (elected 03/02/1998), and Rüştü SÖNMEZ (28/05/1998). Güven DİNÇER (retired 24/11/1999) and Mustafa BUMİN were also absent on 16/07/1998: the day of the decision BUMİN was prevented from taking part in the final decision because of his function as President of the Court of Jurisdictional Disputes, for DİNÇER retirement procedures had already started. BUMİN and DİNÇER were replaced by the reserve justices Samia AKBULUT and Mustafa YAKUPOĞLU.



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## I. THE CASE

The submitting court hears a case, in which the perpetrator shot his sister after having witnessed her having an illegitimate sexual intercourse. The perpetrator has been indicted for attempted murder under Articles 448 and 62 of the TCK. The submitting court asks for an annulment of Article 462 of the TCK since it violates the Constitution.

## II. JUDICIAL REFERRAL

(…)

## III. THE LAW

### A. Provision at Issue

In Article 462 of the Turkish Criminal Code (No. 765) it is stated that:

"Article 462- If the offenses regulated under the two sections above are committed by a wife/ a husband/ an ascendant/ a brother/ a sister against a husband or a wife or a sister or a descendant, or against their accomplice or against both of them, who was caught in the act of having illegitimate sexual intercourse or who was about to have illegitimate sexual intercourse or whose committal of adultery is obvious, punishment may be reduced to one eighth and the punishment of aggravated imprisonment is turned into imprisonment.

In these cases, a life sentence is replaced by imprisonment from four years to eight years and a death sentence is replaced by imprisonment from five years to ten years."

### B. Relevant Constitutional Provisions

The submitting court claims that the provision at issue violates the Preamble and Articles 5, 10, 12, 17 and 19 of the Constitution.
(…)



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## IV. PRELIMINARY EXAMINATION

(…)

## V. MERITS

(…)

### A. Issue of Restriction

(…)

### B. Meaning and Scope of the Provision at Issue

(…)

[In Article 462] the matter in question is adopted as a particularly unjust provocation, since it is considered that the descripted circumstance would affect the will of the offender and cause an outburst and psychological breakdown.

Conditions for such a particularly unjust provocation are listed below:

1. The victim must commit adultery or have illegitimate sexual intercourse, or they must be about to have or have just had such intercourse.
2. The victim must be husband, wife, sister or descendant of the offender or their sexual partner.
3. The offender must be wife, husband, ascendant, sister or brother.

In order to apply a mitigation of punishment regulated under Article 462 TCK, the act must be committed during periods and by persons specified in the provision; and the act must be targeted against the particular persons mentioned in the provision. Such an unjust provocation clause under the circumstances specified by the provision is adopted for it is considered that offenders would be seriously affected due to the detrimental effect of the act on the offender's self-esteem and familial dignity.

The mitigation of punishment [regulated under Article 462 TCK] shall not be implemented after the expiration of the specified time periods. Besides, those who have already benefitted from this mitigation provision shall not enjoy the mitigation regulated under Article 51 of the Turkish Criminal Code on the grounds of aggravated or unjust provocation.



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In both doctrine and practice, illegitimate sexual intercourse indicates intercourse out of wedlock.

C. Issue of Unconstitutionality

The submitting court claims that the provision subject to the application violates the principle of equality regulated under Article 10 of the Constitution since the provision discriminates among relatives, who indeed entail the same degree of blood kinship, for the determination of defendants and victims.

(…)

Equality before the law does not imply that everyone shall be subject to the same legal rules. In practice, any discrimination regarding language, race, skin color, gender, political thought, philosophical belief, religion and sect is forbidden. For this reason, no inequality should be implemented upon these differences. This principle prevents the implementation of different legal rules to those who are in the same circumstances, as well as the emergence of privileged individuals and communities. Providing that there are justifiable reasons regulating different legal rules for some citizens, such an implementation of different legal rules does not itself violate the principle of equality.

(…)

The provision at issue does not take into consideration whether the offender is a man or a woman in regulating a mitigation of punishment in the cases of murder or injury of sexual partners, even though sister is mentioned in the wording of the provision. Since there is no gender discrimination regarding mitigation punishment, the principle of equality is not violated. As sisters committing the same crime will be subject to the same provision regulating mitigation of punishment, there is no room for the claims of unconstitutionality on the grounds of a violation of Article 10.

Besides, providing that the legislator remains to be bound up with the fundamental principles of the Constitution and main provisions of criminal law, it has discretionary power to determine which acts would be counted as a crime, which type of punishment would be regulated, which circumstances and acts would be considered as matters of mitigation or



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aggravation of punishment, by taking into consideration criminal policy, socio-cultural structure and ethnic values of the country.

Due to the aforementioned reasons, the application has to be dismissed.
(…)

## DISSENTING OPINION

(…)

Article 51 of the TCK regulates any "unjust provocation" by distinguishing simple and aggravated provocation. In particular mitigations of punishment are accepted in reference to this distinction. Both Articles [51 and 462] adopt provocative acts as the reason for mitigation. However, Article 462 regulates further mitigation of punishment under the conditions mentioned in the provision. This results in privileging offenders.

Article 10 (1) of the Constitution regulates the principle of equality, and Article 10 (2) states that "no privilege shall be granted to any individual, family, group or class". Even though the principle of equality regulated under Article 10 of the Constitution prevents implementation of different practices among those who are under the same conditions, application of different legal rules to some of them depending on their features and positions cannot be considered as a violation of the principle of equality. However, as it is the case for the provision at issue, regulating different legal rules for those who entail the same conditions in order to bring forth greater protection for some, puts them in a privileged position in committing crimes; this does not comply with the principle of equality.

The designation of the injured party may only be determined by judges, while implementation of Article 51 of the Turkish Criminal Code for the personalisation of punishment; this clause on provocation cannot serve as a justification for providing privileges for some.

On the other hand, distinctions in the same Article [462 TCK]—such as between brother-sister and ascendants-descendants—lead to another kind of inequality. Such inequality is self-evident in the relevant part of the norm at issue, where a mitigation of punishment envisaged for a brother is not adopted for a sister.

To legitimise an offense against the right to life—which is regulated under Article 17 of the Constitution and has a privileged position among all other rights and freedoms—by means of offering a remarkable mitigation in favor of an offender cannot be accepted: even if the reason for the offense is related to the protection of honour, or personal dignity.



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Considering the priority given to the individual and the developments of criminal law in pluralist and libertarian democracies which have reached the level of contemporary civilisation, as noted in the Preamble and Article 174 of the Constitution, it is obvious that the provision at issue violates the Constitution.

(…)

Members, Mustafa YAKUPOĞLU, Mahir Can ILICAK, Fulya KANTARCIOĞLU, Rüştü SÖNMEZ



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## 3.18 Increase of Sentence in Domestic Violence Cases

***Application Number:*** *2005/151* ***Decision Number:*** *2008/37*

***Date of Decision:*** 03/01/2008

***Date of Publication and Number of the Official Gazette:*** *29/03/2008 - 26831*

***Review Type and Applicant****: Concrete Constitutional Review Proceedings requested by 34 different courts from various regions*

***Provisions at Issue:*** *Art. 86 (3) of the Turkish Criminal Code No. 5237 (26/09/2004) which was amended by Law No. 5328 (31/05/2005)*

***Relevant Constitutional Provisions:*** *Preamble and Art. 2, 5, 6, 10, 11, 12, 13, 17, 19, 20, 36, 38, 41, 74 (1982 TA)*

Voting: *Rejected by majority of 7:4 justices* (regarding the phrase "without consideration of any complaint" of Art. 86 (3) TCK)
*Rejected unanimously by 11 justices* (regarding "punishment shall be increased by half" Art. 86 (3) TCK)

***Dissenting and Concurring Opinions:*** *2 DO*

***Justices:*** *President Haşim KILIÇ; Vice President Osman Alifeyyaz PAKSÜT; Members: Sacit ADALI, Fulya KANTARCIOĞLU, Ahmet AKYALÇIN, Mehmet ERTEN, A. Necmi ÖZLER, Serdar ÖZGÜLDÜR, Şevket APALAK, Serruh KALELİ, Zehra Ayla PERKTAŞ; (Fettah OTO, Mustafa YILDIRIM)*[752]

The provision under review in this case determines that a sentence might be increased if a perpetrator attacks a family member. Furthermore, it prescribes that in domestic violence cases the complaint of a victim is not necessary because the State has to protect family and weak members of society. The submitting courts argue that this would amount to a violation of various constitutional provisions such as the rule of law, fundamental aims and duties of the State, equality before the law, nature of fundamental rights and freedoms, personal inviolability, corporeal and spiritual existence of the individual, privacy of private life, protection of the family. The AYM rejects the case because the courts didn't have the right to appeal. Moreover, it rules that the Criminal Code provision does not violate the Constitution. Therefore, a twofold dismissal of the case is articulated: on procedural grounds, and because there is no violation of the Constitution.

(…)

752 Justices Fettah OTO and Mustafa YILDIRIM did only participate at the beginning of the case. They articulated their dissenting vote during the preliminary examination.



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## III. THE LAW

### A. Provision at Issue

Article 86 of the Turkish Criminal Code No. 5237 (26/06/2004) states under the heading "Malicious Injury"

(1) A person intentionally giving harm or pain to another person or executes an act which may lead to the deterioration of health or mental power of others, is sentenced to imprisonment from one year to three years.

(2) (Supplementary 2nd paragraph: 5328 – 31/03/2005 / Article 4). In cases where it is possible to diminish the effect of malicious injury by a simple medical surgery, the offender is sentenced to imprisonment from four months to one year or punitive fine upon complaint of the victim.

(3) **In the case of commission of offense of malicious injury;**

**a) Against antecedents or descendants, or spouse or siblings,**

b) Against a person who cannot protect oneself due to corporal or spiritual disability,

c) By virtue of public office,

d) By undue influence based on public office,

e) By use of a weapon,

**the penalty shall be increased by half without consideration of any complaint.**

## IV. PRELIMINARY EXAMINATION

(…)

## V. STATEMENT OF GROUNDS FOR THE STAY OF EXECUTION

(…)

## VI. MERITS

### A- Decision of Joinder

(…)



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B- The Provision to be Applied and the Issue of Restriction

Pursuant to Article 152 of the Constitution and Article 28 of Law No. 2949 on the Establishment and Rules of Procedure of the Constitutional Court: if a court hearing a case finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it may apply to the Constitutional Court by asking for annulment of the law in question. But, first there must be a case which has been filed due to the process of law, and which falls within the jurisdiction of that court. Moreover, the law which is asked to be annulled must be the law to be applied in that case. The provisions to be applied in the case are the rules which may affect, either positively or negatively, the conclusion of the case or solution of problems which may come to the fore in various phases of applying the law.

The Constitutional Court dismissed the applications on 03/01/2008 UNANIMOUSLY for the following reason: the cases pending before the submitting courts concern crimes against antecedents or descendants, or spouses or brothers or sisters. Hence, there is no possibility to apply sub-paragraphs (b), (c), (d), (e) of Article 86 (3) of the Turkish Criminal Code No. 5237 (26/09/2004), which was amended by Law No. 5328 (31/05/2005), and applications regarding these sub-paragraphs do not fall into the jurisdiction of the submitting courts.

On the other hand, pursuant to Article 152 of the Constitution and Article 28 of Law No. 2949, the scope of applications to the Constitutional Court shall be restricted by the scope of the law to be applied in the case of the submitting court.

On the ground that the statement "penalty shall be increased by half without any complaint filed", which is to be found at the end of Article 86 (3) of the Turkish Criminal Code, might be applied in terms of all sub-paragraphs, the Court UNANIMOUSLY ruled on 03/01/2008 that further examination shall be undertaken from the viewpoint of sub-paragraph (a).

C- Issue of Unconstitutionality

(…)

The submitting courts state that malicious injury against antecedents or descendants, or spouse or siblings, is prosecuted without requiring a victim complaint. However, such complaint is required in cases where it is



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possible to ease the effect of malicious injury by a simple medical surgery. This means that perpetrators are sentenced with more legal seriousness and force in the former cases. Besides, they claim that a restriction of the right to withdrawal from a complaint leads to an increase of domestic violence and that this has adverse effects on families. This also results in the twofold sentencing of perpetrators. Injuries of unmarried partners that can be eased by a simple medical surgery may be persecuted, provided that the act of the perpetrator is complained; this impedes equal protection. Likewise, acts of domestic sexual abuse (Art. 102) are ex officio persecuted, although such a crime leads to more serious results than malicious injury in terms of the amount of punishment and the social and psychological effects on victims. By considering all this, they claim that the law in question violates the Constitution.

1- Examination of the notion "without complaint" with regard to sub-paragraph (a)

(…)

In Article 2 of the Constitution, which is titled "Characteristics of the Republic", it is stated that "The Republic of Turkey is a democratic, laicist and social State governed by the rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble".

Pursuant to Article 5 of the Constitution "Fundamental aims and duties of the State": "The fundamental aims and duties of the State are to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social State governed by the rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."

In Article 10 of the Constitution, which concerns "Equality before the law", it is stated that: "Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds. No privilege shall be granted to any individual, family, group or class. State organs and administrative



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authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."

In Article 12, which is titled "Nature of fundamental rights and freedoms", it is stated that: "Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable. The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals."

In Article 17 of the Constitution, with the title "Personal inviolability, corporeal and spiritual existence of the individual", it is stated that: "Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence. The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent."

Article 38 of the Constitution prescribes the principle of "legality of crimes and punishments" by stating in the first paragraph that "No one shall be punished for any act which does not constitute a criminal offence under the law"; in the third paragraph that "penalties, and security measures in lieu of penalties, shall be prescribed only by law"; and in the fourth paragraph that, "No one shall be considered guilty until proven guilty in a court of law."

Article 41 of the Constitution, which concerns "Protection of the family", includes the provision: "Family is the foundation of Turkish society and based on the equality between the spouses. The State shall take the necessary measures and establish the necessary organisation to protect peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice."

By elaboration of statistics of national and international institutions, it appears that crimes regarding domestic violence and their results are common problems of all nations. States have taken criminal, legal and administrative measures in order to prevent this kind of crimes by considering social traditions and tendencies of individual psychologies. In this context, some States adopt ex officio prosecution whereas others require a complaint of victims for prosecution. Within the scope of legal and administrative projects for punishment of perpetrators accused of crimes regarding domestic violence, and in order to prevent domestic violence, the legislator has adopted ex officio persecution by considering that complaints of victims might be impeded in cases of malicious injuries which are subject to simple medical surgery.



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The legislator may make a distinction between the crimes to be persecuted ex officio, and the crimes to be persecuted due to complaint. That such a distinction covers only some crimes but not all is within the scope of discretion of the legislator that considers the social needs. With respect to this, the legislator may prescribe the principle of direct persecution without any complaint in the case of those crimes being committed within families, where members have to behave tenderly to each other, in order to decrease crimes of domestic violence and not to conceal these crimes.

To apply the principle of equality before the law in criminal law does, undoubtedly, not entail application of the same standards to perpetrators who commit the same crime by ignoring some of the attributes of perpetrators. The principle of equality before the law prevents the creation of privileged individuals and communities, and that different rights are granted to individuals in similar situations. Different regulations for individuals in similar situations may lead to a violation of equality. The equality the Constitution aims for is not absolute and de facto equality, but legal equality. If the same legal conditions are exposed to the same legal rules and different legal conditions are exposed to different legal rules, the equality prescribed by the Constitution may not be violated.

Differences in the conditions of victims and offenders may entail that different legal rules are applied to them. Since the obligations of persons indicated in the provision in question are a result of their cohabitation, this distinguishes them from third persons, and application of different legal rules does not violate the principle of equality.

In order to enable members of a family to improve their physical and spiritual existence, safety and peace must be provided. For this, primarily, domestic violence must be prevented.

It is seen that the legislator, by exercising its discretion within the scope of the Constitution, grants family members and close relatives rather than a third person's particular protection through criminal law. Since this aims at the constitution of families with physically and mentally healthy members, that a complaint of a victim is not a condition for crimes of malicious injury committed by family members does not violate the principle of protection of the family governed under Article 41 of the Constitution.

The State is obliged to protect the mental and physical existence of the individual, the cornerstone of the family, from all threats, dangers and violence. In this respect, the law in question constitutes a reflection of the positive obligations of the State envisaged by Article 17 of the Constitution in criminal law.



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Due to the aforementioned reasons, the law in question does not violate Articles 2, 5, 10, 12, 17, 38 and 41 of the Constitution. The application for annulment has to be dismissed. Haşim KILIÇ, Ahmet AKYALÇIN, Serdar ÖZGÜLDÜR and Serruh KALELİ did not agree with this opinion.

The Court has not found any linkage of the law with the Preamble and Articles 6, 11, 13, 19, 20, 36 and 74 of the Constitution.

2- Examination of the notion "penalty shall be increased by half" with regard to sub-paragraph (a)

In present and former versions of Turkish criminal laws, the legislator approached positions of family members and their relatives as perpetrator and victim in two different ways. For some crimes, to be a family member or a relative may be a cause for increasing a penalty, whereas it may be a cause for mitigation or impunity in other cases.

In criminal law regulations, provided that the legislator remains within the basic principles of the Constitution and criminal law, the legislator has discretion in determining: which actions are to be deemed crimes; which type and amount of sanctions are to be imposed against these actions; which definition of causes may lead to increase and mitigation of the penalty.

Since an increase of sentence by half in the case of a crime being committed against persons defined in subparagraph (a) remains within the scope of discretion of the legislator, the law in question does not violate Articles 2, 5, 10, 17, 38 and 41 of the Constitution. The application must be dismissed.

The Court could not find any linkage of the law with the Preamble and Articles 6, 11, 12, 13, 19, 20, 36 and 74 of the Constitution.

## VII. CONCLUSION

On 03/01/2008 it was decided,

With regard to the amendment of Article 86 (3) of the Turkish Criminal Code No. 5237 (26/09/2004) by Article 4 of Law No. 5328 (31/03/2005):

1 - BY MAJORITY OF VOTES, that the phrase "… without consideration of any complaint …" is not deemed unconstitutional with respect to sub-paragraph (a), and therefore to REJECT the referral, with dissent-



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ing votes of Haşim KILIÇ, Ahmet AKYALÇIN, Serdar ÖZGÜLDÜR and Serruh KALELİ,

2 - UNANIMOUSLY, that the phrase "… punishment shall be increased by half …" is not deemed unconstitutional with respect to sub-paragraph (a) of the paragraph, and to REJECT the application.

(…)

DISSENTING OPINION

1- As precisely pointed out in former decisions of the Constitutional Court concerning the matter, to be prosecuted upon complaint or to be prosecuted ex officio for crimes falls into the discretion of the legislator in accordance with the crime and punishment policy. Moreover, in case that it complies with the principle of rule of law, the legislator has the discretion to opt for various criteria in order to ensure the public interest (Decision of the Constitutional Court of 17/06/2004, Application No. 2004/24, Decision No. 2004/82).

2- Prevention of domestic violence and taking disincentives to achieve this this may be seen as a natural consequence of the above mentioned crime and punishment policies. However, prevention of domestic violence cannot be handled apart from the protection of family, prosperity and warrant to provide peace. This is so, because in the explanatory memorandum of Article 41 titled "Protection of family" it is stated that: "The role of the family in societal life required to make a provision for the protection of the family in the Constitution. This article obliges the legislator to protect the family as the basis of the Nation and to provide its prosperity and peace as well (…)." Therefore, in a legal regulation that concerns the family directly, Article 2, 38 and 41 of the Constitution have to be taken into consideration.

3- Although toleration of domestic violence may never be legally approved, to avoid possibilities like the dropping of charges or reconciliation may not have positive effects on prevention of domestic violence. To assume that members of a family may not forgive each other without any pressure, and to attribute legal consequences to such an assumption, violates Article 2 of the Constitution. That is to say, to deprive family members and close relatives of the right to complain and the right to withdrawal of a complaint, does not comply with the notion "peace of society" governed under Articles 2 and 5, and the "concept of justice" governed under Article 2 of the Constitution.



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4- Despite the fact that increase of punishment by half for those who commit malicious injury against family members fits the purpose of the law, to require a complaint of victims when such a crime is committed by third persons deprives family members of this right, and violates Article 41 of the Constitution as it doesn't have the function to provide peace for families. To not allow a withdrawal of a complaint, though the will for complaint does not exist anymore, may lead to unrest in families. From this point of view the law in question does not provide protection of the family. In addition, regarding its consequences, it may lead to problems for other family members. Therefore, it is evident that it is not compatible with Article 41 of the Constitution. (…)
President, Haşim KILIÇ
Members: Ahmet AKYALÇIN, Serruh KALELİ, Serdar ÖZGÜLDÜR

DISSENTING OPINION

(…)

In the case of the submitting criminal court of first instance it is obvious that the act of the perpetrator constitutes an injury which can be eased by a simple medical surgery; under these circumstances the act falls within the scope of Article 86 (2). There is no doubt, that imprisonment from four months up to one year or a punitive fine shall be imposed for this offense. Therefore, the case falls within the scope of jurisdiction of the court of first instance.

(…)

The application should have been dismissed because the criminal court of first instance was not the competent court in the referred cases. Therefore, we do not agree with the decision concerning the examination of merits.
Members
Mehmet ERTEN, Mustafa YILDIRIM, A. Necmi ÖZLER, Serruh KALELİ, Fettah OTO



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## 3.19 Equal Treatment of Spouses in Case of Adultery I

***Application Number:*** *1996/15* ***Decision Number:*** *1996/34*

***Date of Decision:*** *23/09/1996*

***Date of Publication and Number of the Official Gazette:*** *27/12/1996 - 22860*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Şabanözü Criminal Court of First Instance (Şabanözü Asliye Ceza Mahkemesi)*

***Provisions at Issue:*** *Art. 441 of the Turkish Criminal Code No. 765 (01/03/1926)*

***Relevant Constitutional Provisions:*** *Art. 10 (1982 TA)*

***International Treatises/References:*** *UDHR, ECHR, CEDAW,*

***Voting:*** *Unanimously accepted*

***Justices:*** *Vice President Güven DİNÇER; Members: Selçuk TÜZÜN, Ahmet N. SEZER, Samia AKBULUT, Haşim KILIÇ, Yalçın ACARGÜN, Mustafa BUMİN, Sacit ADALI, Ali HÜNER, Lütfi F. TUNCEL, Fulya KANTARCIOĞLU*

The submitting court argues that Article 441 of the Turkish Criminal Code (TCK) violates Article 10 (Equality before the law) of the Constitution. Articles 441 and 442 TCK regulate the crime of adultery. While Article 441 TCK, which regulates adultery by men, requires not only sexual intercourse but also that both partners publicly live together as a couple either in his marital home or somewhere else, Article 442 TCK, which regulates adultery by women, only requires a singular sexual intercourse. The AYM decides unanimously that distinct provisions for husband and wife constitute a violation of the equality principle. As there is no difference between husband and wife with regard to the obligation of mutual fidelity, there is no justification to grant husbands such a legal superiority within the marital relationship.

(…)

### I. THE CASE

Considering that the argument of the public prosecutor that Article 441 TCK is unconstitutional has its merits, the lower court, which was trying a case of adultery, submitted this annulment case to the Constitutional Court. According to Articles 441 and 442 TCK the suspects of a case of adultery are to be tried and sentenced separately.

### II. JUDICIAL REFERRAL

(…)



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## III. THE LAW

### A- Provision at Issue

The provision at issue, Article 441 of the Turkish Criminal Code No. 765 provides:

"ARTICLE 441- (amend. 09/07/1953 - 6123/Art. 1)

A husband who keeps an unmarried woman[753] in order to live in a relationship with her[754] in his marital home or publicly somewhere else shall be punished with imprisonment for between six months and three years.

The woman who participates in this act knowing that the man is married shall receive the same punishment."

### B- Relevant Legal Provision

The relevant provision, Article 440 of the Turkish Criminal Code No. 765 provides:

"ARTICLE 440- (amend. 09/07/1953 - 6123/Art. 1)

The adulterous woman shall be punished with imprisonment for between six months and three years.

Anyone who abets this act knowing that the woman is married shall receive the same punishment."

### C- Relevant Constitutional Provisions

Article 10 of the Constitution, upon which the annulment claim is based, states:

"ARTICLE 10 - Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

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753 Here the literal translation is used in order to retain the idea of an underlying unequal power relationship; the man "keeps a woman" in the sense of maintaining a household for which he is financially responsible. Otherwise the first part could also be translated as "a husband who lives in a relationship with an unmarried woman", which, however, would be a rather too modern translation.

754 The literal translation would be "in order to live with her as if they were married".



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No privilege shall be granted to any individual, family, group or class.

State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."

## IV. PRELIMINARY EXAMINATION

(…)

## V. MERITS

(…)

### A- Meaning and Scope of the Provision at Issue

The crime of adultery has been regulated in Articles 440 - 444 of the Turkish Criminal Code.

As accepted in doctrine, adultery, the sexual intercourse outside a marriage, can be defined as a violation of the sexual fidelity imposed upon husband and wife by marriage.

The Turkish Criminal Code regulates adultery by women in Article 440 and adultery by men in Article 441. As the provisions concerning adultery by women and men form a unity any analysis of Article 441 concerning adultery by men, the provision at issue, needs to include Article 440 that regulates adultery by women.

According to Article 440 an adulterous woman receives the same punishment as well as anyone who knows that the woman is married and abets the crime.

However, Article 441, which regulates adultery by men, states that "A husband who keeps an unmarried woman in order to live in a relationship with her in his marital home or publicly somewhere else" receives the same punishment as the adulterous woman.

These provisions show that adultery by men and women are not based on the same elements of crime. In fact, Article 440 only speaks of "the adulterous woman" while Article 441 requires a "husband to keep an unmarried woman in order to live in a relationship with her". Another element of crime for adultery by men is to live in a relationship with an unmarried woman "in his marital home or publicly somewhere else".



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Another difference between both provisions is that adultery by men requires the woman to be unmarried while adultery by women does not impose this requirement for the man. Thus, while the marital status of the man is irrelevant for the constitution of the crime of adultery by women, adultery by men with a married woman would not fall within the scope of Article 440.

However, Article 440 (2) and 441 (2), which regulate the punishment of those who know that the man or woman is married and abet the crime, do not differentiate with regard to the abettor between adultery of men and adultery of women.

B- Issue of Unconstitutionality

In relation to Article 441 of the Turkish Criminal Code, which penalises adultery of men, the lower court holds that family order should be equally protected with regard to men and women in the Turkish Civil Code, in punishment and in social life; that with regard to the marital obligation of fidelity men and women are in an equal position; that, however, with regard to elements and constitution of the crime the provisions on adultery favour men over women, which violates the equality principle protected by Article 10 of the Constitution. Article 10 (1) of the Constitution provides that "Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds", while the second paragraph further specifies that "No privilege shall be granted to any individual, family, group or class".

According to the explanatory memorandum of the article, "[f]rom their birth human beings have, because they are human beings, an inherent worth and dignity. Because of this inherent right, discrimination based on any characteristic or denomination is prohibited. Laws must also not be applied differently among people. The principle of equality before the law thus protects one of the bases of the equality of all human beings".

The protection of the equality principle, which the judgements of the Constitutional Court turn from an abstract principle into a concrete applicable standard, should not be deferred till tomorrow. This is a legal fact that should be relied upon in all constitutional contexts.

The equality principle requires that: when under the same circumstances, men and women should have the same rights before the law. It would violate this principle if, because of the sex, a person would be privi-



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leged compared to the other sex. Gender cannot be a reason preventing equality before the law. However, with regard to gender-based distinctions it is important whether these have been established to protect women or to privilege men. In the first case it would constitute a distinction objectively required by nature and functional properties, while in the second case it would constitute a privilege based solely on gender despite all other conditions being equal. Equality should not be considered as implying that, disregarding any difference between individuals, everybody is always subject to the same legal rules. It would not violate the equality principle if there are justifiable reasons for subjecting some people to other legal rules. Consequently, while distinctions required by nature and functional properties are based on justifiable reasons, distinctions based solely on gender constitute an evident violation of the equality principle.

Gender-based discrimination is also prohibited by international human rights agreements that our country is party to. The Preamble of the Universal Declaration of Human Rights states that "The peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women". After establishing in Article 2 that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour [or] sex", Article 7 of the Declaration provides "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination". Furthermore, Article 16 underlines that men and women of full age have equal rights as to marriage, during marriage and at the dissolution of marriage.

The Preamble of the European Convention on Human Rights refers to the Universal Declaration of Human Rights and states that the Declaration aims at securing the universal and effective recognition and observance of the rights set forth in the Declaration. Article 14 of the Convention provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language [or] religion (...)".

After establishing its general principles with reference to the fundamental rights and freedoms established in the Charter of the United Nations and the Universal Declaration of Human Rights, and provided that these shall be enjoyed without distinction of any kind (including distinction based on sex), the preamble of the Convention on the Elimination of All Forms of Discrimination against Women indicates that a change in



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the traditional role of men and women in society is needed to achieve full equality between men and women and declares its determination to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women, and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations. According to Article 1 of the Convention the term "discrimination against women" means any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. In Article 2 of the Convention the contracting States: condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, and, to this end, undertake in paragraph (a) "To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle"; in paragraph (f) "To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women"; and, in paragraph (g) "To repeal all national penal provisions which constitute discrimination against women". According to Article 5 (a) of the Convention, the contracting States shall take all appropriate measures "To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women". According to Article 15 (1), State parties "Shall accord to women equality with men before the law". Article 16, which indicates that all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations shall be taken, specifies in paragraph (c) that "The same rights and responsibilities during marriage and at its dissolution" shall be provided to women.

There is no essential difference between Article 10 of the Constitution, entitled "Equality before the Law" and these international agreements, which, although they can only be considered in a constitutional review without forming its basis, prohibit gender-based discrimination or inequality. In these international agreements, which reflect the common ideals



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of the humanity of all Nations, the equality principle is the common starting point for the enjoyment of rights and freedoms. It appears that equality, which continues to form a basic principle in international agreements, constitutes the origin of many regulations in various areas that have developed as the list of rights and freedoms has expanded continuously over time due to the increasing value given to human beings. These developments of modern legal thought require that nations review their legislation anew and eliminate any breaches.

The lower court argues that in view of Article 440 (TCK), concerning adultery of women, Article 441 (TCK), which regulates adultery of men, violates the equality principle. Although the application only concerns Article 411, it is necessary to consider all relevant provisions together in order to determine whether the provision at issue violates the "equality principle". The reason for this is that equality before the law can be violated as much by a provision concerning only one of those being in the same situation as by establishing distinct provisions for both parties. While it is possible to solve the first case by analysing only one provision, it would be impossible to reach the correct conclusion by using the same method in the second case. Hence, as both spouses are in the same legal situation, it is necessary to consider Article 440, concerning adultery of women as well when reviewing Article 441, concerning adultery of men, with regard to the equality principle.

While according to Article 440 a single action is sufficient to establish the adultery of women, Article 441 requires a husband to "keep an unmarried woman in order to live in a relationship with her in his marital home or publicly somewhere else" for the constitution of adultery of men. Furthermore, while the marital status of the woman constitutes an element of crime of adultery of men, it does not play any role for the constitution of adultery by women. Consequently, while the legislator criminalises simple adultery by women, it criminalises adultery by men only if committed under certain qualifying circumstances.

This means, by requiring certain qualifying circumstances for the constitution of adultery by men compared to the simple adultery of women, husbands are granted legal superiority over wives. As there is no difference between husband and wife with regard to the obligation of mutual fidelity, there is no justification to grant husbands such a legal superiority within the marital relationship. Thus, the fact that simple adultery by men is not punishable violates gender equality by granting men a privilege over women, which is irreconcilable with a modern mindset.



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By taking into account societal developments and particularities the legislator is certainly free to decriminalise adultery as much as criminalise it under certain circumstances. However, while doing so the legislator cannot create laws that would discriminate between husband and wife who, with regard to the marital relationship, are in equal situations.

For the aforementioned reasons Article 441 of the Turkish Criminal Code violates Article 10 of the Constitution; it has to be annulled.

## C- Coming Into Force of the Decision

*The AYM holds that an immediate coming into force of the decision would create a legal gap that could threaten public order or violate public interest. Therefore, the coming into force is delayed by a year after publication in the Official Gazette.*

(…)



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## 3.20 Equal Treatment of Spouses in Case of Adultery II

***Application Number:*** *1998/3* ***Decision Number:*** *1998/28*

***Date of Decision:*** *23/06/1998*

***Date of Publication and Number of the Official Gazette:*** *13/03/1999 - 23638*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Torbalı Criminal Court of First Instance (Torbalı Asliye Ceza Mahkemesi)*

***Provisions at Issue:*** *Art. 440 of the Turkish Criminal Code No. 765 (01/03/1926)*

***Relevant Constitutional Provisions:*** *Art. 10 (1982 TA)*

***International Treatises/References:*** *UDHR, ECHR, CEDAW*

***Voting:*** *Accepted by majority of 9:2 justices*

***Dissenting and Concurring Opinions:*** *1 DO*

***Justices:*** *President Ahmet Necdet SEZER; Vice President Güven DİNÇER; Members:* Samia AKBULUT, *Haşim KILIÇ, Yalçın ACARGÜN, Mustafa BUMİN, Sacit ADALI, Ali HÜNER, Lütfi F. TUNCEL, Fulya KANTARCIOĞLU, Mahir Can ILICAK*

Article 441 of the Turkish Criminal Code (TCK), concerning adultery of men, has been annulled (cf. Equal Treatment of Spouses in Case of Adultery I). But Article 440 TCK, concerning adultery of women, remains in force. According to the submitting court this situation creates inequality between both sexes, which eventually constitutes a violation of Article 10 (Equality before the law) of the Constitution. As Article 440 TCK establishes a situation in which adultery by women continues to be punishable while adultery by men is no longer punishable, the AYM rules that the provision violates the principle of equality and consequently has to be annulled.

(…)

### III. THE LAW

#### A. Provisions at issue

Article 440 of the Turkish Criminal Code No. 765 provides:

"Article 440 - The adulterous woman shall be punished with imprisonment between six months and three years.

Anyone who abets this act knowing that the woman is married shall receive the same punishment."



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B- Relevant Constitutional Provisions

Article 10 of the Constitution upon which the annulment claim is based states that:

"Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

No privilege shall be granted to any individual, family, group or class.

State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."

## IV. PRELIMINARY EXAMINATION

(…)

## V. MERITS

(…)

A- Meaning and Scope of the Provision at issue

Chapter 8, Section 5 of the Turkish Criminal Code entitled "Offences against Public Decency and Family Order", which prohibits adultery, does not include a definition of the crime. Adultery can be defined as the violation of the marital obligation of sexual fidelity, in other words, the sexual intercourse of a spouse with a third person. Adultery has been criminalised in order to protect parentage[755] in families, which are based on monogamy and constitute the foundation of society.

In Article 440 of the Turkish Criminal Code adultery by a wife is regulated. Accordingly, an adulterous woman receives the same punishment as anyone who knows that the woman is married and abets the crime.

The Constitutional Court annulled Article 441 Turkish Criminal Code concerning adultery by men in its judgement of 23/09/1996 (Application No. 1996/15, Decision No. 1996/34) on the grounds of violating the princi-

755 In the sense of a clear affiliation, i.e. to prevent that the husband fathers another man's child.



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ple of "equality" protected by Article 10 of the Constitution. In order to give the legislator time to fill the resulting legal gap, the Court ruled that the decision should come into force one year after its publication in the Official Gazette. As the legislator failed to establish a new provision within the year following the publication of the judgement in the Official Gazette No. 22860 (27/12/1996), adultery of men has ceased to be punishable while adultery of women continues to be punishable according to Article 440 Turkish Criminal Code.

B- Issue of Unconstitutionality

The lower court requested annulment of Article 440 Turkish Criminal Code arguing: as adultery of men has ceased to be punishable as a result of the annulment decision of Article 441 Turkish Criminal Code through the Constitutional Court on 27/12/1997, and for the reason that the legislator failed to legislate within the year after the publication of the decision, but as adultery of women remains punishable according to Article 440 Turkish Criminal Code, the protection afforded by the Turkish Criminal Code for husbands puts them into a privileged situation compared to wives. This violates the equality principle protected by Article 10 of the Constitution.

Article 10 of the Constitution provides that "Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds".

The equality principle requires that when under the same circumstances men and women should have the same rights before the law. It would violate this principle if, because of the sex, a person would be privileged compared to the other sex. However, equality should not be considered to mean, while disregarding any difference between individuals, that everybody is always subject to the same legal rules. It would not violate the equality principle if there are justifiable reasons for subjecting some people to other legal rules. Consequently, while distinctions required by nature and functional properties are based on justifiable reasons, distinctions based solely on gender constitute an evident violation of the equality principle.

The "Preamble" of the Universal Declaration of Human Rights states that "The peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women". Article 2 establishes that "Everyone is entitled to all the rights and freedoms set



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forth in this Declaration, without distinction of any kind, such as race, colour [or] sex", and Article 7 of the Declaration provides that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

The Preamble of the European Convention on Human Rights refers to the Universal Declaration of Human Rights and states that the Declaration aims at securing the universal and effective recognition and observance of the rights set forth in the Declaration. Article 14 of the Convention provides that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language [or] religion (...)".

Moreover, the Preamble of the Convention on the Elimination of All Forms of Discrimination against Women refers to the fundamental rights and freedoms established in the Charter of the United Nations and the Universal Declaration of Human Rights and their provisions, which require that these rights and freedoms shall be enjoyed without distinction of any kind, including distinction based on sex.

There is no essential difference between Article 10 of the Constitution, entitled "Equality before the Law", and the international agreements that prohibit gender-based discrimination.[756]

Article 440 Turkish Criminal Code regulates adultery by women, however, Article 441 Turkish Criminal Code, which regulated adultery by men has been annulled by the Constitutional Court. Hence, adultery by men has ceased to be punishable. It violates the principle of "equality" that, although both spouses are in the same legal situation, adultery by women continues to be punishable while adultery by men is no longer punishable. The provision has to be annulled.
Sacit ADALI and Ali HÜNER did not agree with this view.

## C- Coming into Force of the Decision

*The AYM holds that an immediate coming into force of the decision would not create a legal gap that could threaten public order or violate public interest. Therefore, the coming into force will not be delayed. Justices*

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756 In these four paragraphs the text is identical with the first decision on equal treatment of spouses in case of adultery (E. 1996/15; K. 1996/34 (27/12/1996)).



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*Samia AKBULUT, Haşim KILIÇ, Saci ADALI, Ali HÜNER and Lütfi F. TUNCEL did not agree with this view.*

## VI. CONCLUSION

On 23/06/1998 it was decided,

A- BY MAJORITY OF VOTES, and with the dissenting votes of Sacit ADALI and Ali HÜNER that Article 440 of the "Turkish Criminal Code" No. 765 (01/03/1926) violates the Constitution and has to be ANNULLED,

B- BY MAJORITY OF VOTES, and with the dissenting votes of Samia AKBULUT, Haşim KILIÇ, Sacit ADALI, Ali HÜNER and Lütfi F. TUNCEL that NO OTHER DECISION IS REQUIRED FOR THE ANNULMENT DECISION TO COME INTO FORCE.

## DISSENTING OPINION

(…)

As discussed by the majority opinion, the crime of adultery has been regulated in Chapter 8, Section 5 of the TCK, entitled "Offences against Public Decency and Family Order". Adultery has been criminalised by all countries except a few. Adultery is the sexual relationship by a spouse with a third person. The establishment of marriage commits spouses to fidelity. Adultery has been criminalised because it violates this fidelity. Adultery is the violation of the marital obligation of fidelity. Thus, the violation of this obligation of fidelity, which constitutes a legal responsibility, has been criminalised. Adultery deeply upsets family and the establishment of marriage, which constitute the foundation of society. As much as it injures the other spouse in a marriage, the crime of adultery also harms public order. It not only has its repercussions on the concerned parties, but also on society and family structure, on children growing up and being brought up in families and on public order as a whole. The aim of punishing adultery is not only to address the spouse whose honour and feelings have been hurt, but to protect the sincerity, solemnity and dignity of marriage and to support the continuity of the family order within these sacred values. Thus, the serious violation of public order and harm caused for society by the annulment of the provision on adultery of women on grounds of violating the equality principle is greater than the harm caused by the inequality between husband and wife, men and women.



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Article 41 of the Constitution provides that family is the foundation of Turkish society and that the State shall take the necessary measures to protect the peace and welfare of the family, especially of mother and children. The power, strength and belief of Turkish society depend on the strength, power and solid foundations of family structure and the solidarity of spouses and fulfilment of the obligation of fidelity. This founding element comes first before everything else and constitutes the core of individual rights and freedoms.

The majority opinion argued, as adultery of men ceased to be punishable as a result of the annulment decision of Article 441 TCK through the Constitutional Court by the judgement of 23/09/1996 (Application No. 1996/15, Decision No. 1996/34), and for the reason that the legislator failed to legislate within the year after the publication of the decision, but as adultery of women remained punishable according to Article 440 TCK, this situation violated the equality principle protected by Article 10 of the Constitution, and, therefore, Article 440 TCK had to be annulled.

The "principle of equality before the law" protected by Article 10 of the Constitution does not imply that everyone should always be bound by the same legal rules. The Constitution prohibits any discrimination based on language, race, colour, sex, political thought, philosophical convictions, belief or sect in the application of laws. This absolute prohibition prevents the application of different legal rules to people in identical situations, and the creation of privileged people and groups. However, it does not violate the equality principle that some citizens are bound by different legal rules than others, if this is based on justifiable reasons. Their particular situation and circumstances might require different legal rules and implementation for some people or groups. Different provisions are not rendered illegal by justifiable reasons based on particularities and differences, but are admissible. The Constitution does not aim at de facto but at legal equality. Differing provisions based on necessities caused by situational differences, public interest or other justifiable reasons cannot constitute the grounds for a violation of the constitutional equality principle.

Article 441 TCK, which regulated adultery of men, was annulled through a decision of the Constitutional Court on 23/09/1996. It was annulled on the grounds that it violates the equality principle, as it required more actions to be taken into account to be considered a crime when compared to the simple adultery of women. Thereby, it privileged husbands over wives. The legislator was allowed one year to fill the resulting legal gap. However, as the legislator failed to legislate within a year, adultery of men ceased to be punishable. Through the decision of



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23/06/1998, our Court, considering that this situation violated the principle of equality, annulled Article 440 TCK and allowed no further delay between the publication of the decision in the Official Gazette and its coming into force. Thereby adultery of women ceased to be punishable.

As mentioned above, adultery has been criminalised to protect family, marriage and children. Adultery does not only concern the involved parties, husband and wife, but also the marital relationship, the children and the whole of society. As much as it injures husband or wife, adultery also harms public order. For these reasons the application should have been rejected as it does not violate the equality principle in the Constitution if on account of the differences in situation and circumstances differing legal rules are established based on public interest or other justifiable reasons. Hence, we do not agree with the majority, which annulled Article 440 on the grounds that it violates Article 10 of the Constitution.

> *Moreover, the two justices also disagree with the majority view concerning the coming into force of the decision by holding that a delay should have been allowed because the resulting legal gap would threaten public order and violate public interest.*

Members, Sacit ADALI and Ali HÜNER



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## 3.21 Work Permission of Female Spouses

***Application Number:*** *1990/30* ***Decision Number:*** *1990/31*

***Date of Decision:*** *29/11/1990*

***Date of Publication and Number of the Official Gazette:*** *02/07/1992 - 21272*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by İzmir Fourth Court of First Instance (İzmir Dördüncü Sulh Hukuk Mahkemesi)*

***Provisions at Issue:*** *Art. 159 (Occupation or Profession of the Wife) of the Turkish Civil Code No. 743 (17/02/1926)*

***Relevant Constitutional Provisions:*** *Art. 10, 49, 50 (1982 TA)*

***International Treatises/References:*** *UDHR; ECHR; CEDAW; German, Swiss and French Civil Code; German Constitution; European Social Charter; Helsinki Final Act of Organisation for Security and Cooperation in Europe, Charter of Paris for a New Europe*

***Voting:*** *Unanimously accepted by 11 justices*

***Justices:*** *President Necdet DARICIOĞLU; Vice President Yekta Güngör ÖZDEN; Members: Yılmaz ALİEFENDİOĞLU, Servet TÜZÜN, Mustafa ŞAHİN, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Erol CANSEL, Yavuz NAZAROĞLU, Güven DİNÇER*

The submitting court applied to the AYM requesting the annulment of Article 159 of the Turkish Civil Code on the grounds that it violates Article 10 (Equality before the law), Article 49 (Right and duty to work)[757] and Article 50 (Working conditions and right to rest and leisure) of the Constitution. The provision at issue stipulates that a wife has to ask for her husband´s permission before taking up employment or starting a profession. The AYM accepts the request for annulment unanimously and rules the provision at issue unconstitutional.

(…)

### III. THE LAW

### A. Provision at Issue

Article 159 of the Turkish Civil Code (17/02/1926), Law No. 743 published on 04/04/1926 and entered into force on 04/10/1926, is as follows:

757 Article 49 of the Turkish Constitution was amended in 2001.



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c) Occupation or profession of the wife

"Article 159: The wife may perform a profession or be engaged in a business by clear or implied permission of the husband and regardless of the procedure they agreed upon to manage their properties.

In the case of the husband refusing permission, the judge may rule for permission provided that the wife proves that performing a profession or business is a matter of interest for the whole family or the conjugal community.

In the case of the husband forbidding the wife to perform a profession or a business, unless it is proclaimed by the notary, it is not effectual over bona fide third persons."

(…)

## IV. PRELIMINARY EXAMINATION

(…)

## V. MERITS

After examination of the report on the substance of the case, the referral of the court and its attachments, the laws requested to be annulled, the respective constitutional provisions and the justifications of both constitutional provisions and the laws requested to be annulled and other legislative acts, the following was decided:

A. Examination of the Implementation of the Principle of Equality in Family Law in Civil Codes from the point of Comparative Law:

> *The AYM compares in this part of the ruling regulations of the Swiss, Turkish, German, and French Civil Codes. And the Court highlights especially the relation between the Turkish and the Swiss Civil Code. The justices hold that the Swiss Civil Code from 1912, which was basically adopted in Turkey in 1926, was for its time progressive in terms of gender equality. In Article 11 (2) the Swiss Civil Code established gender equality with the limitation that these rights have to be enjoyed without violating other laws. And this fact, they reason, leads to some differences concerning the rights and duties of spouses: even though the Swiss Civil Code was progressive for its time it did not establish absolute equality. Hence, in some cases and for the sake of the conjugal community, they continue, the woman is subject to the*



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> *man's sovereignty. This is the case for: the choosing of a residency and home (Swiss Civil Code, Art. 160 (2); Turkish Civil Code Art. 152 (2). Moreover, the woman has to adopt the husband's family name (Swiss Civil Code, Art 161; Turkish Civil Code Art. 153).*

As the aforementioned facts show, the Civil Code acknowledges the husband as the leader of the family and prescribes the rights and obligations of the wife and the husband in compliance with this. This results in different and preeminent rights for the husband.

Gains of women within social and economic life in the aftermath of World War II brought new interpretations of the equality of men and women to the agenda. The family model based on the dominance of the husband had been reconsidered in grand civil laws in the West. With this, all inequalities were abandoned and a new family model based on the legal equality of the spouses was established. For example, the French Civil Code was amended by the Law of 13/07/1965 and the new legal rule enabled women to perform their professions without the consent of their husbands (CCFR Art. 223). Each spouse was authorised to share the obligations of the conjugal community and to dispose of the rest of their income freely (Art. 224). They were authorised to educate and raise children and to make the contracts in order to meet the requirements of the family, and common responsibility of the spouses for debts was acknowledged (Art. 220).

> *The AYM refers to the marital property regime in French Law, provisions in the German Constitution regarding gender equality, as well as to a decision of the German Constitutional Court of 1954. Further, it refers to a German Law of 01/07/1957, which provided for an elimination of all the provisions in the German Civil Code that contravene gender equality. According to the AYM, the new family model in the German Civil Code provided for equality of women by entrenching equal responsibility for the family, the right to work, equal parental rights, as well as a new marital property regime.*

The family model based on the superiority of the husband in the Turkish Civil Code is still in force at present. However, the preliminary draft for the Turkish Civil Code, which was prepared and published by the Ministry of Justice in 1984, proposes contemporary solutions for gender inequality: Spouses choose their home together (Art. 148); spouses make contributions to meet the requirements of the family at the rate of their capacities (Art. 149); each spouse represents the conjugal community for the continuous needs of the family during their common life (Art. 151); spouses are jointly liable against third persons in cases where the representative power of the conjugal



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community is exercised (Art. 152); while opting for the job and profession and performing it, each spouse takes into consideration the interests of the conjugal community and of the other spouse (Art. 155).

The new regulations have also been adopted pursuant to the equality principle within marital property regimes. In this regard, the assumption that the wife renounces her personal responsibility by leaving the management of the properties to the husband, was eliminated. Moreover, the provision that each spouse has rights of management, benefit and disposition of their own properties has been prescribed (preliminary draft, Art. 177). It has been adopted that in the case of a spouse leaving the management of the properties to another spouse, the provisions of a procuration will be implemented unless agreed otherwise (preliminary draft, Art. 175).

In conclusion, with the legal regulations comparatively outlined, contemporary laws rely upon gender equality prescribing a new legal position for spouses with the reforms made in family law, and they abolish the former regulations based on the superiority of the husband. New provisions of the preliminary draft prepared by the Ministry of Justice, reflecting on gender equality in family law, have not been enacted as law yet. The Constitutional Court does not have the authority to scrutinise and annul - by reviewing the compatibility with the Constitution ex officio - all the provisions of the Civil Code that lead to inequality between the spouses in family law and grant the husband superiority. This is because the Constitutional Court may only review laws or parts of laws which are brought before the Court by abstract norm control or by referral from other courts. In the case at issue, the İzmir Fourth Court of First Instance referred to the Constitutional Court on the grounds that Article 159 of the Civil Code violates Articles 10, 49 and 50 of the Constitution. Hence, this provision's compatibility with the Constitution is reviewed. To eliminate all inequalities in family law and to provide a situation in accordance with the law for the spouses based on the rule of complete equality is an obligation falling within the discretion of the legislator.

B- Review of the claims for violation of Articles 10, 49 and 50 of the Constitution by Article 159 of the Civil Code with regard to the Constitution and International Covenants

a) Review with regard to Article 10 of the Constitution

1 - In the ruling referred to the Constitutional Court, the submitting court states: "Article 10 of the Constitution states 'Everyone is equal before the law



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without distinction as to language, race, colour, sex (...)'. As seen in the case at hand, the principle of equality is violated to the disadvantage of women. Priority is given to men, and women's work life has been rendered subject to the permission of their husbands pursuant to Article 159 of the Turkish Civil Code. Such a case contravenes the principle of equality governed by Article 10 of the Constitution."

The provision under Article 10 of the Constitution "Everyone is equal before the law without distinction as to (…) sex" is not a programmatic provision. In other words, a provision that determines a theoretical and ideal thought. Indeed, this Article is not as clear as the statement "women and men are equal" in Article 2 (2)[758] of the German Constitution. Nonetheless, the equality provision governed under Article 12 of the 1961 Constitution was subject to the case law of the Constitutional Court in various actions for annulment and judicial referrals, and it was also present in Article 10 of the 1982 Constitution. The Constitutional Court continued to develop the concept in other rulings. By this means, the concept of equality has gained a concrete form rather than an abstract one, and it has become a norm which is frequently applied in cases where an infringement of the equality provision is claimed. For example, the Constitutional Court reified gender equality with the statement: "Sex is not a factor that restrains equality before law", in the ruling of 25/10/1963 (Application No. 1963/148, Decision No. 1963/256, published in the Official Gazette on 10/03/1964).

Equality between women and men should be interpreted as women having an equal position to men. The opposite of this, that is to say: men having an equal position to women who have more restricted rights, means a negative interpretation and implementation of the equality principle. Yet, the purpose of equality between women and men is to render similar but not equalise aspects of both genders in a legally equal and constructive way. There is no doubt that different regulations for different aspects – for example maternity leave for women – do not influence such equality. This is because the aim of different legal regulations for different aspects of women and men is not to equalise them, but to find legal solutions for different characteristics of the two genders.

Equality between women and men entails a shift in the value judgments that create the inequality between the two genders. For ages, in most societies, the priority of men over women has been held as a settled value

758 By mistake the Court refers to Article 2(2) of the German Constitution ("Grundgesetz"). The principle of equality is regulated in Article 3 of the German Constitution.



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judgment and this was based on the assumption that women are helpless and in need of male protection (inbeccillitas sexus). For example, eleventh Century Chinese philosophy used to argue that women were the lowest level beings, and torture from their spouses was seen as natural. In medieval Europe women were inculcated to become used to torture, and violence against women by men was found right by canon law. Women who threatened their husbands, stole or opposed monks were killed. Although divine religions made positive contributions to freedom and enjoyment of rights for women, inequality between men and women has not been eliminated. Inequalities to the disadvantage of women were abolished faster in public law and women gained public rights identical with men's rights. Inequality between men and women remained in private law, in particular in family law and inheritance law. Napoleon Bonaparte, who initiated the French Civil Code of 1804, for example said: "La nature a fait de nos femmes nos esclaves = Nature has made our women slaves." In the French Civil Code this way of thought put women in the custody of their husbands, deprived them, like children, of the power of disposition, left their properties to the husbands' power and left their right to work to the permission and discretion of the husbands.

The Swiss Civil Code of 1912 used to be counted as a law that advocated gender equality ahead of its time. However, in particular under the family law section, it opted for the family model that gave priority to men. Therefore, it restricted some of the rights of married women that stem from family law.

When the Turkish Civil Code was adapted from the Swiss Civil Code in 1926, inequality between men and women in family law, which was regulated pursuant to Sharia Law, was partially eliminated. For example, privileges like the husband's right to beat his wife, permission to marry up to four women, to enjoy lone parental rights, to be able to divorce a spouse at any time, used to belong only to men. The Civil Code brought the legal rule of single marriage (monogamy) to Turkish family law and abolished other priorities of men over women that were formerly established by law. The Turkish Civil Code was progressive from this point of view. But, some restrictions referring to the status of women, and which prevented gender equality already in Switzerland, were adapted into Turkish family law by enacting the Civil Code. Today, some provisions of the Civil Code governing the legal positions of spouses contravene the legal rule of gender equality and are counted as outdated in terms of these restrictions.

Moreover, Art. 159 of the Turkish Civil Code contradicts both the basic principle of family law that stipulates that "spouses have equal rights", and



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Art. 10 of the Constitution that regulates gender equality. This is because, for Art. 159 (1), "(t)he wife may perform a profession or be engaged in a business by clear or implied permission of the husband and regardless of the procedure they agreed upon to manage their properties", grants the husband the prerogative of permission concerning the wife's profession. Since the Turkish Civil Code regulates the separation of property as the statutory matrimonial property regime (MK, Art. 170) contracts and legal transactions made with bona fide third persons by the wife who performs her business or profession are valid although they may be prohibited by the husband. However, unless this prohibited act of the wife is not found rightful by a judge (MK, Art. 159 (11)), in a divorce proceeding it might be treated as a negative presumption to the disadvantage of the wife (MK, Art. 134). In the case of the spouses having agreed upon joint marital community of property, the husband who prohibits his wife to perform a profession or to be engaged in a business is obligated to communicate his prohibition to third parties through a notary. If this has been done, the wife is responsible for her debts which result from legal transactions with third parties; but not with the entire property of the joint marital community of property, instead only with the exclusively protected share of the wife's property. Even if the husband did not communicate his prohibition, the result is the same for mala fide thirds parties (MK, Art. 204 (11), 217 (11)).

What is important in terms of constitutional review is the requirement of the husband´s permission for the wife to perform her business. Performance of business regardless of the prohibition of the husband may thus lead to grounds for a divorce suit and financial responsibility of the wife against third parties due to the type of marriage property. But this is a problem beyond constitutional review. The requirement of permission or prohibition for the wife to her job violates the personal rights of the woman and also contravenes the principle of gender equality governed under Article 10 of the Constitution.

*2- aa) The AYM cites from the Preamble and Articles 1, 7 and 16 of the Universal Declaration of Human Rights, and from the Preamble and Articles 2, 10 and 12 of the Turkish Constitution.*
*bb) The AYM cites from the Preamble and Article 14 of the European Convention on Human Rights (ECHR) regarding: the aim of enacting the Universal Declaration of Human Rights, the protection of fundamental rights, the prohibition of discrimination, and their relation with Article 10 and 12 of Turkish Constitution.*
*cc) The AYM cites Article 5 of the Annex Protocol No. 7 of the ECHR which provides that women and men have equal rights during and after marriage.*



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*dd) The AYM emphasises that Turkey has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and cites the Preamble and Articles 1, 2, 15, 16 of the CEDAW.*

It can be seen that the State of the Republic of Turkey entered a reservation to Article 15 (3) [of CEDAW], having considered Article 159 of the Civil Code. In fact, not to permit the wife to carry out a business or profession does not mean a restriction of her legal capacity. Albeit a prohibition of the husband, the wife has the capacity to carry out every sort of legal transaction.

Legal consequences for married women working without permission have also been scrutinised above under (b.1). Then, the reservation is not appropriate to prevent the incompatibility of Article 159 of the Civil Code with the Convention. Nevertheless Article 16 (I, subpara. g) of the Convention states: "the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation" shall be ensured. Since Article 159 of the Civil Code that prescribes that a woman may have a profession or an occupation by means of precise or implied permission of her husband contravenes the principle of equality, it is obviously contrary to Article 16 (I, subpara. g) of the Convention. Turkey did not enter a reservation to this paragraph in terms of Article 159.

There is no doubt that the principle of "equality of the two genders" under Article 10 of the Constitution complies with the "Preamble" and Article 1, 7 and 16 of the Universal Declaration of Human Rights, which emphasises that wife and husband have equal rights before the law and in family law irrespective of sex discrimination and which has been analysed in detail above; with the "Preamble" of the European Convention on Human Rights; with Article 5 of the Protocol No. 7 which is an Annex of this Convention and was signed but is still not ratified by Turkey; with the Preamble and Article 1, 2 (a), (c), (f), 14 and 16 (I-g) of the "Convention on the Elimination of All Forms of Discrimination against Women", which was ratified by Law No. 3232 and entered into force on 03/09/1981.

Nonetheless, the regulation of Article 159 of the Civil Code that prescribes that a woman requires the permission of her husband to perform an occupation or profession violates the principle that "wife and husband have equal civil rights" and the principle of "gender equality" – which have been universalised by international covenants that count as law with respect to Turkish national law, and Turkey is part of the community producing this law –, and Article 10 of the Constitution, which complies with those provisions. Therefore, Article 159 of the Civil Code must be annulled as a whole.



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b) Review with regard to Article 49 of the Constitution:

In its reasoning regarding the claim that Article 159 of the Civil Code violates Article 49 (1) of the Constitution, the submitting court holds: "It is evident that we need more employment of women in the 20th Century, in which huge progress has taken place. Women are making more effort in business life and are gaining importance in all domains. The contribution of women to business life is similar to that of men. In some domains it is even greater (…)". In Article 49 (1) of the Constitution it is stated that "everyone has the right and duty to work". This article is situated in the part on "Social Rights and Duties", in the second part of the Constitution on "Fundamental Rights and Duties"; and it represents one of the most important fundamental rights of individuals.

At the beginning of the 20th Century, when Article 159 of the Civil Code was adopted, as in German and French Civil Codes, only housework, childcare and helping their husbands were considered suitable duties for married women; and the patriarchal family model relying on male dominance was preferred. However, industrial developments since the beginning of the century have caused significant shifts in economic, social and legal structures of societies and individual ideas. Those shifts have created the common idea that people are equal by birth and have equal rights. The principle of gender equality has affected family structures, and the concept of legal equality of both wife and husband has gained importance.

Married women have gained the freedom of occupation and profession which may indeed be in favor of the marriage, besides the tasks within the unity of the family. Instead of getting permission from their husbands they gained the opportunity to work concurrently with their husbands.

> *In the subsequent paragraphs the AYM refers to Law No. 3232, with which CEDAW was ratified, and to provisions of international treaties including married women. It cites Article 11 (1-2) of the CEDAW, and mentions related articles of the "European Social Charter" regarding gender equality in labour life, the Preamble, Articles 14, 16 and 17 of Part I. and Article 1 and 4 (3) of Part II of the Charter. Finally, the AYM refers to the seventh paragraph of the "Helsinki Final Act of Organisation for Security and Cooperation in Europe" and the "Charter of Paris for a New Europe".*

Under these conditions, women, like men, have the right to choose their professions and occupations freely and perform activities which are useful for society. According to Article 12 of the Constitution, the right and freedom of labour is bound - inviolable, untransferable and inalienable - to the individ-



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uals, and it is one of the fundamental rights of married women. There is no difference, and no privilege in terms of the law, in comparison with the right and freedom of labour granted to the husband. For the safety of the marriage and the upbringing of children, spouses will, without a doubt, make the sacrifices necessary and enjoy their rights and freedoms to labour in mutual harmony and agreement. But Article 159 of the Civil Code enables the husband to cause a conflict by prohibiting his wife from working, from taking part in her profession, from improving her personality and from contributing to society. In this way, he may also create a reason for divorce by putting the blame on his wife because she continues to work in spite of the prohibition. Besides, as in the case subject to the application, he may revoke the permission to work in response to a divorce suit from his wife, who was only allowed to work in order to be exploited by him and therefore filed a divorce suit. Thus, the article in question violates the right to labour which is one of the fundamental rights, and is governed under Article 49 of the Constitution. Therefore, Article 159 of the Civil Code must be annulled.

c) Review with regard to Article 50 of the Constitution:

A link of this issue with working conditions and the right to rest has not been found. Thus, there is no need to scrutinise the claim of a violation of Article 50 of the Constitution.

## VI. CONCLUSION

On 29/11/1990,

The Court ruled unanimously that Article 159 of the "Turkish Civil Code" No. 743 (17/02/1926) is contrary to the Constitution and must be ANNULLED.

(…)



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## 3.22 Severance Payment for Female Employees

***Application Number:*** *2006/156* ***Decision Number:*** *2008/125*

***Date of Decision:*** *19/06/2008*

***Date of Publication and Number of the Official Gazette:*** *26/11/2008 - 27066*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by İzmir Sixth Labour Court (İzmir Altıncı İş Mahkemesi)*

***Provisions at Issue:*** *The statement "… termination within one year after the marriage date, at the request of woman…" in Art. 14 of the Labour Law No. 1475 (25/08/1971), amended by Art. 3 of Law No. 2869 (29/07/1983)*

***Relevant Constitutional Provisions:*** *Art. 10, 41, 50 (1982 TA)*

***International Treatises/References:*** *European Social Charter; CEDAW and the following ILO-Conventions: Convention concerning the Employment of Women on Underground Work in Mines of all Kinds, Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, Convention concerning Discrimination in Respect of Employment and Occupation, Convention concerning Minimum Standards of Social Security, Convention concerning Employment Policy*

***Voting:*** *Rejected by majority of 9:2 justices*

***Dissenting and Concurring Opinions:*** *1 DO*

***Justices:*** *President Haşim KILIÇ; Vice President Osman Alifeyyaz PAKSÜT; Members: Sacit ADALI, Mehmet ERTEN, Ahmet AKYALÇIN, Fulya KANTARCIOĞLU, A. Necmi ÖZLER, Serdar ÖZGÜLDÜR, Şevket APALAK, Serruh KALELİ, Zehra Ayla PERKTAŞ*

The submitting court holds that the right to severance payment for female employees after quitting a job in order to enter a conjugal community violates Article 10 (Equality before the law) of the Constitution. The AYM decides that the provision at issue does not violate the Constitution, since gender principles may allow for providing slightly different rights to women and men. Article 41 (Protection of the family[759]) of the Constitution stipulates that the family is the foundation of Turkish society, and since women are traditionally in charge of the family, it does not violate the equality principle if they decide to quit a job to start a family and take up the role of wife and mother, and for this decision receive a severance payment. Contrary to a violation of the equality principle, the Court even argues that the law would take account of Article 50 (Working conditions and right to rest and leisure) of the Constitution which protects "weak parts of society" (women, children, disabled etc.) considering their working conditions.

(…)

759 The phrase "and children's rights" was added in the constitutional text by Article 4 of Law No. 5982 on 12/09/2010.



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## I. THE CASE

The local court requested that the Constitutional Court assess the compliance of the provision at issue with the Constitution in a case where a female employee initiated proceedings requesting severance payment after quitting her job because of her marriage.

## II. JUDICIAL REFERRAL

The argument of the submitting court reads as follows:

"In the interim decision of 02/10/2006 of the case regarding a severance payment for terminating an employment because of marriage, which was initiated by Ayşe Bengiç against Öz Örnek İnş Eğit. Sağ. Güv. Hizm. San Tic Ltd Şti.[760], the court puts forwards the following:

Under Turkish Labour Law (No. 1475) severance payment is governed under Article 14. Despite the fact that Labour Law No. 4857 has entered into force, this law remained silent on the subject of severance pay. Hence Article 14 of Law No. 1475 has been kept in force for this matter.

Article 14 (1) of Labour Law No. 1475 (25/08/1971), which was published in the Official Gazette No. 13943 of 01/09/1971, reads as follows: "A contract of employment is terminated 1- In the case of it relying on grounds other than those governed under paragraph 17/II of this law, by the employer (other than legitimate grounds for the termination of the contract by the employer), 2- In the case of it relying on Article 16 of this law, by the employee (upon a legitimate ground by the employee), 3- Because of the person joining the army to perform military service, 4- For the purpose of receiving a payment or a retirement pension, or invalidity pension from the social security institutions, 5- In the case of employees fulfilling the premium payment period and insurance period for receiving an old age pension pursuant to provisional Article 81 of Law No. 506, and if they fulfill the preconditions under subparagraphs (a) and (b) of Article 60 (1) (A) of Law No. 506. If a contract of employment is terminated for the reasons of death of an employee, or of marriage of a female employee within one year of wedlock, or at an employee's own request or annulment under the circumstances listed above, the employee shall receive a severance payment, which amounts to a 30 day wage severance

760 The full name of the company is „*Öz Örnek İnşaat Eğitim Sağlık Güvenlik Hizmetleri Sanayi ve Ticaret Limited Şirketi*".



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payment for each year since the employee started to work, throughout the period of their work contract. Payments shall be made on a pro rata basis for the remainder of a one year period'.

Article 14 of Law No. 1475 does not prescribe a severance payment for all cases of termination of an employment contract. Briefly, this provision enables severance payments for employees whose contract of employment is annulled without a legitimate ground, or for employees who terminate the contract of employment at their own request relying on a legitimate ground. Furthermore, this provision prescribes a severance payment for employees who are obliged to terminate the contract of employment because they enjoy the right to a retirement pension (Article 62 (1) of Law No. 506 requires a written request after quitting the job in order to receive an old age pension), and finally, for employees who are obliged to terminate the contract of employment because of a force majeure (a health problem, being sentenced or being arrested as a result of a crime committed against anyone other than the employer, or not being allowed to work for the reason of preclusion of a husband pursuant to Article 159 of the Turkish Civil Code, which was in force at the date of enactment of the law in question).

Article 14 of Law No. 1475 (01/09/1975) prescribes that a woman shall gain the right to a severance payment if she terminates the contract of employment at her own request within one year of the beginning of her marriage. In Article 159 of the Turkish Civil Code No. 743 (17/02/1926), titled Profession and Occupation of the Wife, under the section "General Provisions of Marriage", which was in force at the date of enactment of Labour Law No. 1475, it is stated that "whatever procedure of marital property was chosen by married couples, a wife can have a job by implicit or explicit courtesy of her husband. In the case of a husband refraining from giving permission for his wife to work, that wife can also be permitted to work by a court if she proves that performing a profession or business is a matter of interest to the whole family or the conjugal community. In the case of a husband not declaring through a notarial act that he precludes his wife to work, this shall not be effectual against bona fide third parties". Since having an occupation as a wife (married woman) was subject to the permission of the husband, Article 14 of Labour Law No. 1475 prescribed a right to a severance payment for women who are obliged to quit their jobs not under their own will. However, the Constitutional Court annulled Article 159 of the Turkish Civil Code No. 743 in a decision of 29/11/1990 (Application No. 1990/30, Decision No. 1990/31). Moreover, Article 191 of the Turkish Civil Code of 22/11/2001, (entered into force



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01/01/2002, published in the Official Gazette No. 162 of 08/12/2001) titled Profession and Occupation of Spouses, and to be found under the section "General Provisions of Marriage", put an end to the need for the permission of the husband for the wife's occupation, as it states that "individuals are not obliged to be permitted by their spouses to have an occupation or profession. However, peace and benefit to the conjugal community shall be taken into consideration in choosing and running a profession or an occupation."

Furthermore, in Article 152 of the Turkish Civil Code No. 743, under the section `General Provisions of Marriage`, it is stated that "the husband is the chief of the (conjugal) community. He has the right to decide on where to live, and the duty to maintain his wife and children", and regarding the rights and duties of wives, it stipulates "... a wife is the assistant[761] and adviser[762] of her husband in providing peace at home as much as she can. The wife takes care of the home." Hence, the provision in question gives the duty of maintaining the family to the husband and the duty of care of home and home services to the wife; and it does not even give the right to a wife to expect help from her husband. To terminate her employment in order to dedicate herself to home care can be deemed a reasonable force majeure. On the other hand, when considering relevant provisions of the Turkish Civil Code No. 743, she may need to leave her job against her will on the ground that her husband has the right to choose the place of residence for the family. However, the new provisions of the Turkish Civil Code No. 4721 remain silent on whether the husband or the wife should enjoy the right to choose the place of residence, or has a duty of home care or maintaining the family. In contrast these new provisions introduce a new principle that spouses shall together decide on their common place of residence, and if this is not possible, the place of residence shall be determined through a court decision pursuant to Article 194 of Turkish Civil Code No. 4721. Article 195 prescribes that on other matters which spouses cannot agree upon, problems shall be dissolved through a court decision. In these cases, the court shall take the consent of spouses and opinions of experts into consideration. That is to say, rights and duties of men and women have become equal, women are no more subordinate to their husbands in terms of their rights. Therefore, now it is evident that

761 Here, the AYM uses the old, Ottoman expression for assistant (*muavin*) and adds the contemporary expression in brackets.

762 Here, the AYM uses the old, Ottoman expression for adviser (*müşaviri*) and adds the contemporary expression in brackets.



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one cannot allege that marrying leads to a force majeure to terminate the contract of employment, relying on the grounds that women have duties of home care and they must adopt the place of residence chosen by their husbands.

In this respect, whereas the marriage of a woman would lead to a force majeure to terminate the contract of employment at the date of the coming into force of Article 14 of Labour Law No. 1475, this cannot be the case anymore as of the coming into force of Turkish Civil Code No. 4721.

Furthermore, unequal provisions of the previous law were replaced with provisions of the Turkish Civil Code No. 4721 that prescribe equal rights to both spouses to choose the place of residence, and grants that they can apply to a court in the case of them not agreeing upon it. Thus, requirements of the equality principle of the Constitution have been fulfilled. However, Article 14 of Law No. 1475, – which prescribes "a woman should deserve the right to a severance payment, if she terminates the contract of employment at her own request within one year of the beginning of her marriage" – still exists; and it is evident that in practice this will result in married women prefering to quit their jobs when spouses have to reside in different places, (since married men have no right to gain a severance payment in these cases), and that women will need to choose their husbands' places of residence. This is obviously contrary to the equality principle of the Turkish Civil Code No. 4721. In the case of a spouse applying to the court to dissolve this matter, and when the court considers the interests of the parties and the conjugal community, it will take a decision in favor of the woman instead of the man, since the woman can gain a severance payment when she terminates the contract of employment. Thus, this article will have negative effects on the equality of spouses in enjoying their rights which stem from the Civil Code.

Despite the fact that the oppression of women in families still continues, since old and incorrect traditions in bringing up children and the traditional structure in our society still exist, men are still dominant over their wives in Turkish families; and the equality between spouses that laws aim for, has not been reached yet. The legislator and practitioners should use fairness and the fundamental principles of law as a basis, instead of incorrect social practices. This means, law provisions should orient social behaviour, that is to say, one should not let incorrect social practices dominate laws. Otherwise, social problems and wrongdoing cannot be corrected.

The fact that a woman gains the right to receive a severance payment when she terminates the contract of employment within one year of the beginning of marriage while a man cannot enjoy such a right, even



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though the Turkish Civil Code No. 4721 provided equal working rights for married men and women, leads to inequality between male and female employees. This violates Article 5 of Law No. 4857, which regulates the principle of equal treatment, and Article 10 of the Constitution, which concerns the principle of equality.

Inequality also arises in terms of the position of employers. After the Civil Code No. 4721 entered into force, termination of the contract of employment by a female employee within one year after beginning of her marriage depends entirely on her free will, but not on a force majeure or a legitimate ground. Therefore, an obligation of the employer to make a severance payment leads to inequality against the interests of the employee and also violates the purposes of the provision. This also causes inequality between a female employee that terminates her contract within one year from wedlock and other employees, who terminate their contracts without any legitimate grounds or a force majeure.

Inequality also arises in terms of the position of employers. After Civil Code No. 4721 came into force, termination of the contract of employment by a female employee within one year of the beginning of her marriage depends entirely on her free will, but not on a force majeure or a legitimate ground. Therefore, an obligation of the employer to make a severance payment leads to inequality against the interests of the employee and also violates the purpose of the provision. This also causes inequality between a female employee who terminates her contract within one year of wedlock and other employees, who terminate their contracts without any legitimate grounds or a force majeure.

As mentioned above, Turkish Civil Code No. 4721 (22/11/2001, came into force on 01/01/2002, and was published in the Official Gazette No. 162 of 08/12/2001) superseded the former Civil Code that prescribes that married women need their husbands' permission to work. Article 14 (1) of Labour Law No. 1475, – which prescribes that "a female employee shall be given a severance payment if she terminates the contract of employment at her own request within one year of the beginning of her marriage" – leads to inequality between female and male employees, although Turkish Civil Code No. 4721 provided equal working conditions for married men and women. This is because a female employee gains the right to receive a severance payment when she terminates the contract of employment within one year of marrying, whereas this is not the case for a male employee. Furthermore, this provision will compel female employees to quit their jobs in order to gain a severance payment, and this is not compliant with the equality principle of Turkish Civil Code No. 4721. Besides, as a result,



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the employers will make a severance payment to female employees who prefer becoming housewives instead of working, and who terminate their contract of employment without any legitimate ground or a force majeure. This will lead to inequality between them and other employees who terminate the contract of employment without relying on a legitimate ground or a force majeure. For all these reasons, Article 14 (1) of Labour Law No. 1475 – which prescribes that a female employee shall be given a severance payment if she terminates the contract of employment at her own request within one year of the beginning of her marriage – violates Article 10 of the Constitution, which governs the equality principle. Therefore, the court requests annulment of this article."

## III. THE LAW

(…)

## IV. PRELIMINARY EXAMINATION

(…)

## V. MERITS

After examination of the report on the substance of the case, the referral of the court and its attachments, the laws requested to be annulled, the respective constitutional provisions and the justifications of both constitutional provisions and the laws requested to be annulled and other legislative acts, the following was decided:

In the application it is stated that although the Turkish Civil Code No. 4721 adjusted the rights of married men and married women concerning working conditions, meaning that it grants equal rights to men and women, women do enjoy the right to severance payment within one year of the date of marriage in the case of them terminating their labour contract, whereas men do not enjoy such a right. This leads to inequality between men and women. Besides, even though there is no legitimate reason and force majeure, the employer is obliged to make payments. Therefore, the provision at issue also violates Article 10 of the Constitution.



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According to Article 29 of Law No. 2949 on the Establishment and Rules of Procedure of the Constitutional Court, the Court has the competence to review laws, statutory decrees and TBMM Rules of Procedure in terms of constitutional grounds other than those alleged by the parties. As this competence provided that the Court is only bound by the claim, it did the review according to Article 41 and 50 of the Constitution.[763]

The provision at issue prescribes that female workers shall have the right to receive severance payment within one year of the date of marriage, in the case of them cancelling their labour contracts at their own request.

The Constitution includes the principle of equality as one of the fundamental principles of law in Article 10, where it is stated that: *"Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds. Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice."*[764]

The principle of equality guaranteed by Article 10 of the Constitution does not imply that everyone shall always be bound by the same legal rules in every respect. Particular characteristics of situations and positions of some individuals or communities may entail different implementation of the respective regulations. Since responsibilities of women in societal and family life may require different implementation of regulation in favor of female workers, the provision in question does not violate the principle of equality of the Constitution.

In Article 41 of the Constitution it is emphasised that the family is the foundation of Turkish society, and that the State shall take the necessary measures to ensure the peace and welfare of the family. Article 50 states that *"No one shall be required to perform work unsuited to his/her age, sex, and capacity. Minors, women and persons with physical or mental disabilities shall enjoy special protection with regard to working conditions."*

Provisions that are aimed at protecting female employees can also be found within international conventions and regulations. These can be exemplified as: the Convention on the Elimination of All Forms of Discrimination against Women of 1979, the European Social Charter of 1961, the Convention concerning the Employment of Women on Underground Work in Mines of all Kinds No. 45 of 1935, the Convention concerning Equal

763 Law No. 2949 on the Establishment and Rules of Procedure of the Constitutional Court has been valid until 2011. On 02/04/2011 Law No. 6216 has come into force.

764 The Article 10 (2) was added on 07/05/2004 by Law No. 5170.



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Remuneration for Men and Women Workers for Work of Equal Value No. 100 of 1951, the Convention concerning Discrimination in Respect of Employment and Occupation No. 111 of 1958, the Social Security (Minimum Standards) Convention No. 102 of 1964, the Employment Policy Convention No. 122 of 1964, which were ratified by Turkey as well.

In the "doctrine" of family law, the majority opinion also presumes that, in light of the necessities of societal reality, there exists an obligation to protect women, to strengthen relations between family members and to create order and harmony in conjugal communities.

The provision could not violate the Constitution since it aims at protecting the unity of the family, and the position of female employees who terminate labour contracts at their own request by considering the extent and importance of the variety of tasks they have to perform when they enter a conjugal community.

For the aforementioned reasons, the provision at issue does not violate Articles 10, 41 and 50 of the Constitution. The application should be dismissed.

Fulya KANTARCIOĞLU and Zehra Ayla PERKTAŞ did not agree with this view.

## VI. CONCLUSION

(…)

## DISSENTING OPINION

Article 14 (1) of Labour Law No. 1475 prescribes a right to severance payments for female employees in the case of them terminating their labour contract within one year of the date of marriage at their own request. In the explanatory memorandum of the law, it is stated that when considering Article 159 of the Turkish Civil Code No. 743, which envisages that women could only perform a business or profession with the permission of their husbands, the reason for such a provision is that a female employee might have to quit her job if the husband does not allow her to work. Therefore, this is only a transfer of this provision into the Labour Law. However, this provision was annulled by the Constitutional Court (Application Number: 1990/30, Decision Number: 1990/31 of 29/11/1990) because it violates the principle of equality. Turkish Civil Code No. 4721



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(22/11/2001) does not involve such provisions anymore, and relies on the principle of equality in terms of rights and obligations in the conjugal community under Article 185 and the following articles in the third section of the Law under the "General Provisions of Marriage".

In Article 10 of the Constitution, legal equality is defined as ensuring that "Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds", and in the second paragraph, added with Law No. 5170 on 07/05/2004, it is stated that "Men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice". Thus it allows the State to positively discriminate in favor of women in order to entitle them to the same rights men possess. This provision was implemented to ensure women and men have an equal position in terms of political, social and economic rights. Therefore, it cannot be counted as a constitutional basis contributing to a loss of rights for men. Positive discrimination aims to impede depriving women of their rights.

As mentioned in Article 41 of the Constitution, the family is the foundation of Turkish society. And it is based on equality between spouses. Although the legislator deems quitting a job because of a marriage a valid reason to enjoy the right to a severance payment, it cannot favor one spouse over another. Gender difference cannot be a reason for such discrimination. This is not positive discrimination, but rather a negative reflection of the traditional gender roles of men and women that disadvantages men.

Moreover, it should be noted that to grant severance payments to women when they terminate a labour contract because of a marriage, may encourage women to act accordingly, and this may lead to their retirement from business life. Then, attempts to protect women with the help of traditional means may increase inequality between men and women; thereby, despite various legal provisions, de facto existing inequalities between men and women, that actually should have been abolished by amending Article 10, are further deepened. This should be perceived as an urgent constitutional problem. In our age women should be protected by the Constitution in order to give them an equal position to men, and not by traditional approaches. To deprive men of facilities that are enjoyed by women in cases where such protection is not required, leads precisely to inequality to the disadvantage of men; and thus, violates Article 10 of the Constitution.

For the aforementioned reasons, we claim that the provision at issue should be annulled and therefore we dissent from the majority opinion.
Members, Fulya KANTARCIOĞLU, Zehra Ayla PERKTAŞ



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## 3.23 Right of Female Spouses to Use Their Premarital Family Name I

***Application Number:*** *1997/61* ***Decision Number:*** *1998/59*

***Date of Decision:*** *29/09/1998*

***Date of Publication and Number of the Official Gazette:*** *15/11/2002 – 24937*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Ankara Fourth Civil Court of First Instance (Ankara Dördüncü Asliye Hukuk Mahkemesi)*

***Provisions at Issue:*** *Art. 153 (1) (Family Name) of the Turkish Civil Code No. 743 (17/02/1926)*

***Relevant Constitutional Provisions:*** *Art. 12, 17 (1982 TA) were claimed by the submitting court to be violated; Art. 10 is the provision the AYM found relevant*

***Voting:*** *Rejected by majority of 8:3 justices*

***Dissenting and Concurring Opinions:*** *1 DO*

***Justices:*** *President Ahmet Necdet SEZER; Members: Sacit ADALI, Fulya KANTARCIOĞLU, Samia AKBULUT, Haşim KILIÇ, Yalçın ACARGÜN, Mustafa BUMİN, Ali HÜNER, Lütfi F. TUNCEL, Mahir Can ILICAK, Rüştü SÖNMEZ*

Ankara Fourth Civil Court of First Instance submitted a case to the AYM, where a married woman, who has acquired her husband's surname due to legal obligation, initiated proceedings to use her premarital surname. The referral asked to decide whether this part (Art. 153 (1)) of the *Turkish Civil Code* was violating constitutional rights. The provisions addressed in the referral are Article 12 (Nature of Fundamental Rights and Freedoms), Article 17 (Personal inviolability, corporeal and spiritual existence of the individual) and Article 10 (Equality before the Law). The AYM rules, with one dissenting opinion by three Justices, that the prescription of the Civil Code obliging women to acquire their husbands' surname upon marriage does not violate constitutional principles and equality rights. Rather, this is viewed as a characteristic of Turkish tradition to which citizens have to conform in order to guarantee social peace and an orderly society.

(…)

### I. THE CASE

The submitting court, in the case where a married woman initiated proceedings in order to use the premarital surname as her family name[765], found pertinent the claim that Article 153 (1) of the Turkish Civil Code

765 The AYM uses two different terms for a woman´s surname: "surname" (*soyadı*) and "family name" (*aile ismi, aile soyadı, aile adı*). Additionally it uses the terms "maiden name" (*önceki soyadı, kızlık soyadı*) and "premarital surname" (*evilik öncesi soyadi*). The translation takes these terminological differences into account.



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No. 743 is contrary to the Constitution and applied for the annulment of said Article.

## II. JUDICIAL REFERRAL

*The AYM cites from the statement of grounds of the submitting court, which refers to Articles 12 and 17 of the Constitution: The submitting court holds that different regulations in favor of masculine domination can be found in Articles 153, 154, 196 (1-2), 197 (3), 200, 212, 263 of the Turkish Civil Code. They stand in contrast to the quest of identity of Turkish women, inspired by European society. This quest does not aim at excluding or subordinating men, rather it seeks equality in all fields.*

## III. THE LAW

(…)

## IV. PRELIMINARY EXAMINATION

(…)

## V. MERITS

After examination of the report on the substance of the issue, the application of the court and the annexes, the law which is considered unconstitutional, the concerning constitutional norms, the relating justifications and other legislative documents, the following is decided:

### A. Meaning and Scope of the Provision Subject to the Application

*The AYM explains the relevant regulations of family law in Article 153, 141 of the Civil Code, and Family Name Law No. 2525 and their implications for married women.*



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B. Issue of Unconstitutionality

*In the beginning the decision for judicial referral to the AYM and Article 12 and 17 of the Constitution are summarised.*

The legal rule "the woman acquires her husband's surname" stems from obligations imposed by social realities and institutionalisation of a tradition that struck roots throughout the years. The "family law" doctrine comprises opinions indicating that women were created differently from men, that protection of women against social realities and obligations is necessary, that strengthening family bonds is crucial, that providing order and harmony and preventing duality in the family are required.

By inheritance of the family name from generation to generation, unity and integrity of a family will endure. The legislator has given priority to one of the spouses so as to enable the unity of family. Public interest, public order and some necessities prove that it is rather preferred that the surname should be conveyed by the men. On the other hand, in the provision subject to the review, it is not prescribed that the family name should be defined only by men's surname, the provision also prescribes women can use their premarital surnames along with their husbands' surnames upon their request.

The argument that a distinction based on gender discrimination occurs when women assume their husbands' family names is neither appropriate. Equality, as prescribed in Article 10 of the Constitution, does not imply that everyone shall be bound by the same legal rules.

To apply different legal rules to persons while relying upon rightful reasons does not lead to a violation of the equality principle. Features of situations and positions may entail different legal rules and implementation for different persons. That the legislator gives priority to the family name of the husband does not violate the equality principle, considering the aforementioned rightful reasons.

Therefore, the provision subject to the application is not contrary to Article 10, 12, and 17 of the Constitution. Hence, the request for annulment must be dismissed.

Yalçın ACARGÜN, Mustafa BUMİN and Fulya KANTARCIOĞLU did not agree with this view.

## VI. CONCLUSION

On 29/09/1998,



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The Court ruled BY MAJORITY OF VOTES, with the dissenting votes of Yalçın ACARGÜN, Mustafa BUMİN and Fulya KANTARCIOĞLU that the provision "the woman takes her husband's surname" in Article 153 (1) of the Turkish Civil Code No. 743 (17/02/1926), amended by Law No. 4248 (14/05/1997), is not contrary to the Constitution, and DISMISSED the action.
(…)

DISSENTING OPINION

(…)

In Article 10 of the Constitution "Equality before the Law" is defined by the wording "All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations." Although our Constitution does not include a concrete legal rule such as "men and women shall have equal rights", as in Article 3 of the German Constitution, there is no hesitation that the description of general equality in Article 10 includes this principle as well. Within this context, the principle of equal rights for different genders, such as the concrete implementation of the general equality principle, entails that women and men are subject to the same rights irrespective of gender. As a result, this means that complete equality is provided in terms of rights, freedoms and obligations.

It is seen that the principle "different genders shall have equal rights", that is a concrete indicator of the general equality principle, is taken as the baseline in the "Convention on the Elimination of All Forms of Discrimination Against Women", one of the international covenants Turkey has ratified in 1985, and which is a product of a modern perception of law. The Convention ranks the right to life, the protection and improvement of material and spiritual existence, and having a life with dignity as the most important aspects of fundamental rights and freedoms which are inalienable, inviolable and indispensable. The Convention also aims at providing the required conditions and environment in order to put these rights and freedoms into effect.

*The remaining sentences of this paragraph refer to the Preamble of the Convention, recalling that discrimination against women violates the principles of equality of rights and respect for human dignity; and it moreover lists the content of Articles 1, 2 (g), 5 (a), 16 (c).*



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International treaties that prohibit gender discrimination as a principle, and transform the legal rule that "different genders have the same rights" into a common ideal, have been a very important impulse for national legal orders.

The "aim to attain the level of contemporary civilisations" governed under Article 174 and in the Preamble of the Constitution, and the reflection of this idea of civilisation in international treaties regarding fundamental rights and freedoms, must be evaluated alongside constitutional provisions.

From this standpoint, the provision subject to review, that is "the woman takes her husband's surname", apparently brings obligation only to women and facilitates male superiority over women; even though a woman and man in a marriage are subject to same legal status with respect to rights and obligations. Inequality emanating from this cannot be explained by means of abstract concepts such as public order or public interest. For it is evident that such a justification would only be admissible in case concrete facts of a violation of public order or harm of public interest would exist. There is no room to claim that to base a restriction of married women's personality rights regarding their family name on some possibilities or assumptions is compatible with a democratic society order. Therefore, the provision subject to application is contrary to Article 13 of the Constitution.

The German Constitutional Court – examining the provision of German Marriage and Family Law of 1976, which prescribes that spouses shall use a common family name and that either surname of the wife or husband could be chosen as the family name, and that if they do not come to a decision the surname of the husband will be the common family name – found the preference for the husband's surname contrary to the Constitution in the ruling of 05/03/1991. The opinions developed in the reasoning of the ruling are as follows: "The traditional structure of a relationship alone cannot justify unequal treatment. The constitutional command would forfeit its function to achieve gender equality in the future, if the existing social reality had to be accepted. The principle of equality must be applied strictly. This applies, in particular, where women are discriminated against; because Article 3 (2) of the Constitution should serve especially the dismantling of such discrimination. The birth name is an expression of the individuality and identity of a person; therefore, the individual may demand the legal order to respect and protect their name. Change of a name cannot be required unless very important reasons exist" (Ece Göztepe, Anayasal Eşitlik İlkesi Açısından Kadının Soyadı,



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AÜHFD, C. 45, S. 17).[766] The European Court of Human Rights stated in a judgment in 1994, where it found Switzerland in breach of the ECHR: that the name represents the identity of an individual and that an intervention into it counts as an intervention into the privacy of the family and is thus contrary to the equality principle.

The provision admitting the husband a certain superiority over the wife by not leaving the decision for a family name to the free will of the spouses, even though the individuals have equal rights in a conjugal community, is contrary to Article 17 of the Constitution; not only because it violates the equality principle, but also because it restricts personality rights of women with respect to their surname and thereby prevents them from exercising their right to protect and improve their physical and spiritual existence.

Due to the aforementioned reasons, we do not agree with the majority opinion and claim that the provision, which is contrary to Article 10, 13 and 17 of the Constitution, must be annulled.

President, Mustafa BUMİN

Members, Yalçın ACARGÜN and Fulya KANTARCIOĞLU

766 The source of this article has been cited incorrectly. The article has been published under the same title in: Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, 2 (54), 1999, 101-131.



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## 3.24 Right of Female Spouses to Use Their Premarital Family Name II

***Application Number:*** *2009/85* ***Decision Number:*** *2011/49*

***Date of Decision:*** *10/03/2011*

***Date of Publication and Number of the Official Gazette:*** *21/10/2011 - 28091*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by three courts: Fatih Second Family Court (Fatih Ikinci Aile Mahkemesi; Application Number: 2009/85); Ankara Eighth Family Court (Ankara Sekizinci Aile Mahkemesi; Application Number: 2010/35); Kadıköy First Family Court (Kadıköy Birinci Aile Mahkemesi; Application Number: 2010/94)*

***Provisions at Issue:*** *Art. 187 (Family Name) of the Turkish Civil Code No. 4721 (22/01/2001)*

***Relevant Constitutional Provisions:*** *Art. 2, 10, 12, 17, 41, 90 (1982 TA)*

***International Treaties/References:*** *UDHR, ECHR, CEDAW, ICESCR, ECtHR decisions: Ünal Tekeli v. Turkey and Burghartz v. Switzerland, Recommendation No. 1271 of 28/05/1985 and Resolution No. 37 by the Council of Europe*

***Voting:*** *Accepted by majority of 12:5 (regarding the admissibility of the case)*
*Rejected by majority of 9:8 justices (regarding Art. 187)*

***Dissenting and Concurring Opinions:*** *3 DO*

***Justices:*** *President Haşim KILIÇ; Vice President Osman Alifeyyaz PAKSÜT; Members: Fulya KANTARCIOĞLU, Ahmet AKYALÇIN; Mehmet ERTEN, Fettah OTO, Serdar ÖZGÜLDÜR, Serruh KALELİ, Zehra Ayla PERKTAŞ, Recep KÖMÜRCÜ, Alparslan ALTAN, Burhan ÜSTÜN, Engin YILDIRIM, Nuri NECİPOĞLU, Hicabi DURSUN, Celal Mümtaz AKINCI, Erdal TERCAN*

Three submitting courts requested to annul the provision concerning the family name (Art. 187). All three courts found that the provision that women have to assume their husband´s surname violated constitutional principles. Again, as already in an earlier decision on the same subject, the AYM rejects the application for annulment. It does not find the provision problematic stating that through this legal praxis one party of the conjugal community, the husband, is given priority over the other, the wife. Moreover, since the woman can also use her premarital surname and hence her identity is also respected, the legislative discretion to decide that the official family name should be the husband's surname is not violating the principles of rule of law and equality.

(...)

### I. THE CASE

The submitting courts requested the provision in question to be annulled on the grounds that they found, in proceedings which were brought before these courts and where it was asked whether married women could use only their previous surnames, that this provision violates the Constitution.



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## II. JUDICIAL REFERRALS

*The three submitting courts all base their reasoning on the Ünal Tekeli ruling of the ECtHR (Ünal Tekeli-Turkey, Application No. 29865/96, 16/11/2004), and hold that Art. 187 of the Civil Code is incompatible with the ECHR, CEDAW and other treaties having priority over conflicting national laws according to Article 90 (5) of the Constitution. They argue that the provision at issue results, among others, in a humiliation of daughters, inequality within the families as well as pressure on women to give birth to a son. If the provision at issue is annulled and the women are able to use their premarital family names, this will have positive effects on the Turkish family order.*

## III. THE LAW

### A. Provision at Issue

Article 187 of the Turkish Civil Code No. 4721 (22/11/2001) states:

**"A woman takes her husband's surname after marriage; yet she can retain her previous surname before her husband's surname by making a written application to the marriage officer or afterwards to the civil registry. A woman, who has two surnames, can benefit from this right only for one of her surnames."**

### B. Relevant Constitutional Provisions

The referrals of the courts were based on Articles 2, 10, 12, 17, 41 and 90 of the Constitution.

## IV. PRELIMINARY EXAMINATION

*The AYM decides unanimously to accept Application Number 2009/85, Application Number 2010/35 and Application Number 2010/94.*



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## V. JOINDER OF DECISIONS

*The AYM decides unanimously to join Application Number 2009/85, Application Number 2010/35 and Application Number 2010/94.*

## VI. MERITS

After examination of the referrals and the annexes, the report on the substance of the issue, the law which is considered unconstitutional, the concerning constitutional norms, the relating justifications and other legislative documents, the following is decided:

In the submitting courts´ decisions it is claimed that married women are compelled to take their husbands' surnames and are not allowed to use their own surnames separately, and that this situation is contrary to the principle of equality of spouses and to the right of improving corporeal and spiritual existence. Thus, the provision in question is contrary to Articles 2, 10, 12, 17, 41 and 90 of the Constitution.

*The Content of Article 187 of the Turkish Civil Code is summarised.*

In Article 2 of the Constitution it is stated that the Republic of Turkey is a State governed by the rule of law. The State governed by the rule of law is the State whose acts and transactions are lawful, who relies upon human rights, prevents and strengthens these rights, establishes a fair legal order in all realms, maintains and develops this, abstains from any act against the Constitution, counts itself dependent on the rule of law, and is open to constitutional review.

The purpose of the principle of equality indicated in Article 10 of the Constitution is to secure that persons with the same legal status are subjected to the same transactions according to law, and to prevent any discrimination and privilege for people before the law. By means of this principle, violating the principle of equality before the law by applying different legal rules to persons in the same legal position is forbidden. Not de facto equality but legal equality is envisaged by this principle. Equality before the law does not mean that everyone is subject to the same legal rules in all instances. Features of conditions and positions may require a different application of legal rules for some persons or communities. The equality principle governed by the Constitution is not violated if the same legal rules would be applied to same legal cases and different legal rules would be applied to different legal cases.



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In Article 12 of the Constitution it is stated that *"Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable. The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to society, his or her family, and other individuals."*, By granting individuals fundamental rights and freedoms, as is evident from the composition of the article, the constitution-makerstressed that these rights and freedoms cannot be held separately from obligations and responsibilities of the individual to society, family or other people. In Article 17 it is stated that *"Everyone has the right to life and the right to protect and develop his/her corporeal and spiritual existence"*; and in Article 41 that *"The family is the foundation of the Turkish society and based on the equality between the spouses. The State shall take the necessary measures and establish the necessary organisation to ensure the peace and welfare of the family, especially where the protection of the mother and children is involved, and recognise the need for education in the practical application of family planning."*

The surname is the name employed to distinguish members of one family from members of another family, and it is inherited from generation to generation. The surname, which is the most important fact to determine someone's identity, is an inalienable, inviolable, non-assignable personal right which is strictly dependent on the individual. Moreover, pursuant to the provision in Article 1 of the Family Name Law No. 2525 stipulating that *"Every Turk shall have a surname other than the given name"*, bearing a surname is an obligation for individuals. The surname, which has the same meaning with family name in Turkish law, has not only the function to determine the identity of individuals, but also to distinguish individuals from members of other families and determine their families and lineage. Due to these functions – and by reasons of keeping civil registration records properly, preventing any confusion in official documents, defining the descent, protecting the family – the legislator establishes legal regulations on the usage of the surname.

It is evident that the law subject to the application, *"The woman takes her husband's surname"*, was adopted due to public interest and public order requirements such as the following: keeping civil registration records properly, preventing any confusion in official documents, defining the descent, and notably protecting the unity of the family and strengthening family bonds.

The family, which enables the transmission of distinguishing qualifications of nations, value judgments, belief and thought patterns, and continuance of intergenerational relations, reflects features of all societies from past to present through the roles and functions it undertakes. In this



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respect, strength and perception of the family within society vary from society to society. The family, the basic element of society, is a sacred foundation where love, respect, tolerance and other humanitarian and moral values, traditions, customs, language, religion and other features are practiced and passed on to next generations.

In Article 41 of the Constitution, which defines the family as the basis of society, the importance of the family for the life of an individual and society is underlined and the State is assigned to enact the required regulations and establish the organisation in order to protect the family. As fundamental documents of international law, in Article 16 of the Universal Declaration of Human Rights and in Article 10 of the International Covenant on Economic, Social and Cultural Rights it is stated that the family is the natural and basic element of society and that it must be protected by the State; in Article 8 of the European Convention of Human Rights it is acknowledged that everyone has the right to respect for their family life.

By virtue of the provision subject to the application, by passing on the surname, used as a family name, the continuance of the unity and integrity of the family, which is the basis of the Turkish society, is ensured.

The fact that the surname is a personal right does not mean that it is under no circumstances possible to intervene in it. It is evident that the legislator has the discretionary power in the usage of a surname, provided compliance with the Constitution and accordance with the requirements of public order and public interest.

The European Court of Human Rights has examined applications regarding the surname in context of the principle of "protection of private life and family life" in Article 8 of the European Convention on Human Rights. In these decisions the court stated that pursuant to the requirements of public interest, in terms of recording the civil registrations completely and accurately, the importance given to the stability of family names, determining the personal identity, linking people bearing a certain name up with a family with a certain name, changing the surname could be restricted by legal regulations. The national legislator could have the discretionary power to choose the form of these restrictions in line with the historical and political structure of their own State.

Within this framework, it is not contrary to the status of the State governed by the rule of law that a legislative organ can enjoy discretionary power on family law issues, such as giving priority to one of the spouses by reason of a number of necessities stemming from public interest and public order, and notably protecting the unity and integrity of the family and strengthening the bonds of the family. Besides, a fair equilibrium



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between personal right and public order has been established in the provision which is subject of the application by noting that a woman may use her previous family name by putting it in front of her husband's surname provided that she makes an application for this.

The argument that a differentiation based on gender emerges in case the woman takes her husband's surname through marriage is neither proper. The features of situations and positions may require different treatment of legal rules for some people or communities. Due to the above mentioned reasons, giving priority to the fsurname of the husband as the family name by the legislative organ is not an act that stands in contrast to the principle of equality.

Due to the aforementioned reasons, the provision at issue is not contrary to Article 2, 10, 12, 17 and 41 of the Constitution. Therefore, the referral has to be rejected.

The provision subject of the application at issue has not been found relevant in light of Article 90 of the Constitution.

Osman Alifeyyaz PAKSÜT, Fulya KANTARCIOĞLU, Fettah OTO, Serdar ÖZGÜLDÜR, Serruh KALELİ, Zehra Ayla PERKTAŞ, Recep KÖMÜRCÜ and Engin YILDIRIM did not agree with this view.

## VII. CONCLUSION

On 10/03/2011 it was decided,

1. After having clarified the preliminary question of whether or not the Constitutional Court can decide on this issue without the necessary amendments to the Constitutional Court Law No. 2949, which are required after the amendment No. 5982 of 07/05/2010, BY MAJORITY OF VOTES and with the dissenting votes of Fulya KANTARCIOĞLU, Mehmet ERTEN, Fettah OTO, Zehra Ayla PERKTAŞ and Celal Mümtaz AKINCI– whose reasoning is elucidated in Decision 2010/68 – that nothing stands against the constitutional review,

2. that Article 187 of the Turkish Civil Code No. 4721 (22/11/2001) is not contrary to the Constitution, and DISMISSED the application, BY MAJORITY OF VOTES, with dissenting votes from Osman Alifeyyaz PAKSÜT, Fulya KANTARCIOĞLU, Fettah OTO, Serdar ÖZGÜLDÜR, Serruh KALELİ, Zehra Ayla PERKTAŞ, Recep KÖMÜRCÜ and Engin YILDIRIM.

(...)



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DISSENTING OPINION

*The content of Art. 187 of the Turkish Civil Code is summarised.*

In Article 10 of the Constitution it is emphasised that women and men have equal rights; and in Article 17 it is stated that everyone has the right to improve their corporeal and spiritual existence. The right of the individual to their surname is secured by Article 17 regardless of gender discrimination.

It is not possible to agree with the majority opinion confirming that the legislator may intervene in the usage of the family surname due to requirements of public order and public interest and that this intervention is necessary for the unity and integrity of family. Likewise, women do not need to use their husband's surname in order to show that the family bonds are consistent with legal and social requirements, it is not possible to explain why the surname of the man has priority over the surname of the woman, and why the woman is rendered as subordinate in the context of the Constitution. In a modern society under a liberal order, it is evident that distinguishing between the surnames of spouses by force of law for the purpose of protecting the family bonds is not acceptable.

This issue was dealt with in the decision Tekeli v. Turkey of the European Court of Human Rights. The Court held that impeding the single usage of previous surname- for women violates the Convention.

I do not agree with the majority's reasoning that the provision infringes Article 10 and 17 of the Constitution.

Vice President, Osman Alifeyyaz PAKSÜT

DISSENTING OPINION

*Article 187 of the Turkish Civil Code is summarised.*

(…) The same provision [of Article 187] was previously part of Article 153 (of the former Turkish Civil Code No. 743 (17/02/1926), amended by Law No. 4248 (14/05/1997)) and the application for annulment of this provision was dismissed by the Constitutional Court decision (Application Number 1997/61, Decision Number 1998/59 of 29/09/1998). The European Court of Human Rights ruled with reference to this issue in the decision



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Ünal Tekeli v. Turkey (16/11/2004, 29865/98) [1][767]and emphasised the dismissal by the Constitutional Court. It held that preventing Ayten Ünal Tekeli from using her maiden name was contrary to Article 14 of the Convention, which rejects discrimination, considering it together with Article 8 of the Convention, which stipulates the right to privacy. According to the court:[768]

> „*55. The applicant's complaint concerns the fact that, legally, married women cannot bear their previous surname alone after they marry whereas married men keep the surname they had before they married. This is undoubtedly a "difference in treatment" on grounds of sex between persons in an analogous situation.*
> *56. The factual differences between the two categories (married men and married women) to which the Government refer, that is, those relating to their social situation and their economic independence respectively, do not lead the Court to a different conclusion.*
> *It is precisely this distinction which is at the heart of the issue whether the difference in treatment complained of is justifiable.*
> *c. Whether there is objective and reasonable justification*
> *57. In the Government's submission, the interference in question pursued the legitimate aim of reflecting family unity through the husband's surname and thereby ensuring public order. The applicant refuted that argument.*
> *58. The Court reiterates that although the Contracting States have a certain margin of appreciation under the Convention regarding the measures to be taken in reflecting family unity, Article 14 requires that any such measure, in principle, applies even-handedly to both men and women unless compelling reasons have been adduced to justify a difference in treatment.*
> *In the present case the Court is not persuaded that such reasons exist.*
> *59. The Court reiterates in the first place that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. Two texts of the Committee of Ministers, namely, Resolution (78) 37 of 27 September 1978 on equality of spouses in civil law and*

767 In the following two dissenting opinions, the justices add several footnotes in squared brackets. We have reproduced the footnotes without editorial modification after the dissenting opinion of justice YILDIRIM.

768 The dissenters (justices KANTARCIOĞLU, OTO, ÖZGÜLDÜR, KALELİ, PERKTAŞ, KÖMÜRCÜ) quote from the ECtHR decision Ünal Tekeli v. Turkey (16/11/2004, 29865/98), but they do not quote with paragraph numbers and sub-headings. In order to stay close to the ruling of the ECtHR, we quote the original text with paragraph numbers and sub-headings.



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*Recommendation R (85) 2 of 5 February 1985 on legal protection against sex discrimination, are the main examples of this. These texts call on the member States to eradicate all discrimination on grounds of sex in, among other things, choice of surname. This objective has also been stated in the work of the Parliamentary Assembly (see paragraphs 19-22 above) and the European Committee on Legal Co-operation (see paragraphs 23-27 above).*

*60. On an international level, developments in the United Nations concerning the equality of the sexes are heading in this specific area towards recognition of the right of each married partner to keep his or her own surname or to have an equal say in the choice of new family name (see paragraphs 23-27 above).*

*61. Moreover, the Court notes the emergence of a consensus among the Contracting States of the Council of Europe in favour of choosing the spouses' family name on an equal footing.*

*Of the member States of the Council of Europe Turkey is the only country which legally imposes – even where the couple prefers an alternative arrangement – the husband's name as the couple's surname and thus the automatic loss of the woman's own surname on her marriage. Married women in Turkey cannot use their maiden name alone even if both spouses agree to such an arrangement. The possibility made available by the Turkish legislature on 22 November 2001 of putting the maiden name in front of the husband's surname does not alter that position. The interests of married women who do not want their marriage to affect their name have not been taken into consideration.*

*62. The Court observes, moreover, that Turkey does not position itself outside the general trend towards placing men and women on an equal footing in the family. Prior to the relevant legislative amendments, particularly those of 22 November 2001, the man's position in the family was the dominant one. The reflection of family unity through the husband's surname corresponded to the traditional conception of the family maintained by the Turkish legislature until then. The aim of the reforms of November 2001 was to place married women on an equal footing with their husband in representing the couple, in economic activities and in the decisions to be taken affecting the family and children. Among other things the husband's role as head of the family has been abolished. Both married partners have acquired the power to represent the family. Despite the enactment of the Civil Code in 2001, however, the provisions concerning the family name after marriage, including those obliging married women to take their husband's name, have remained unchanged.*



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*63. The first question for the Court is whether the tradition of reflecting family unity through the husband's name can be regarded as a decisive factor in the present case.* Admittedly, that tradition derives from the man's primordial role and the woman's secondary role in the family. *Nowadays the advancement of the equality of the sexes in the member States of the Council of Europe, including Turkey, and in particular the importance attached to the principle of non-discrimination, prevent States from imposing that tradition on married women.*

*64. In this context it should be recalled that while family unity can be reflected by choosing the husband's surname as the family name, it can be reflected just as well by choosing the wife's surname or a joint name chosen by the couple (see Burghartz, cited above, § 28).*

*65. The second question that the Court is asked to address is whether family unity has to be reflected by a joint family name and whether, in the event of disagreement between the married partners, one partner's surname can be imposed on the other.*

*66. The Court observes in this regard that, according to the practice of the Contracting States, it is perfectly conceivable that family unity will be preserved and consolidated where a married couple chooses not to bear a joint family name. Observation of the systems applicable in Europe supports this finding. The Government has not shown in the present case that concrete or substantial hardship for married partners and/or third parties or detriment to the public interest would be likely to flow from the lack of reflection of family unity through a joint family name. In these circumstances the Court considers that the obligation on married women, in the name of family unity, to bear their husband's surname – even if they can put their maiden name in front of it – has no objective and reasonable justification.*

*67. The Court does not underestimate the important repercussions which a change in the system, involving a transition from the traditional system of family name based on the husband's surname to other systems allowing the married partners either to keep their own surname or freely choose a joint family name, will inevitably have for keeping registers of births, marriages and deaths. However, it considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the name they have chosen (see, mutatis mutandis, Christine Goodwin v.the United Kingdom [GC], no. 28957/95, § 91, ECHR 2002-VI).*

*68. Consequently, the objective of reflecting family unity through a joint family name cannot provide a justification for the gender-based difference in treatment complained of in the instant case.*



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*Accordingly, the difference in treatment in question contravenes Article 14 taken in conjunction with Article 8."*

Article 10 (1) of the Constitution – which corresponds to Article 14 of the Convention, the basis of the ruling of the ECtHR – states that "all individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such considerations"; and following that it states in the second paragraph, added by Law No. 5170 (07/05/2004): "men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice (…).", and by another addition to this paragraph, with Law No. 5982 (07/05/2010), it is noted that measures taken for this purpose cannot be interpreted contrary to the principle of equality. As it is seen, after clearly emphasising the principle of equality rejecting gender discrimination in the Constitution, the legislator did not confine itself with it and took a further step by recognising positive discrimination for women with the 2004 and 2010 constitutional amendments. Thus, by reinforcing gender equality, it instructed the State to put such equality into practice. This primarily entails the review of laws which do not take gender equality into consideration and which give priority to men again.

It is also seen that there are developments in international law abolishing the laws which prevent men and women from benefiting from the same rights. Within this context, although including some reservations, in documents such as the Convention on the Elimination of All Forms of Discrimination Against Women, signed and ratified by Turkey in 1985, the European Convention of Human Rights, ratified in 1954 and its Protocol No. 7 signed but not ratified yet, the UN Covenant on Civil and Political Rights, ratified in 2003, gender discrimination is rejected and it is clearly admitted that spouses in a family must have the same rights. Furthermore, recommendations 27/09/1978 No. 2 and 05/02/1985 No. 2 of the Committee of Ministers of the Council of Europe include evaluation on this issue and call for abolition of the provisions leading to gender discrimination between spouses.

The Constitutional Court rejected the application about Article 187 of the Law No. 743, which had the same content as the provision of Law No. 4721, the law in question. Although Article 10 of the Constitution was amended in favor of women in 2004 and 2010, the Court insisted on the same conclusion by majority of the votes. That indicates that the Constitutional Court has not taken into consideration the relevant constitutional amendments and the ECtHR rulings which are evidence for developments in the international domain. This exposes that the amendments of Con-



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stitution and laws may not contribute to the construction of the environment needed to live a life with dignity and to improve corporeal and spiritual existence for people unless these amendments are internalised and actualised by courts which implement them. It can be seen as a positive development in law making that a draft for a law amending Article 187, which will enable a married woman to use only her family name, has been prepared, and presented for debate, by the Ministry of Justice.

As stated in the justification of the dissenting opinion of the previous decision on the same issue by the Constitutional Court (Application Number 1997/61; Decision Number 1998/59 of 29/09/1998), international treaties prohibiting gender discrimination as a principle and transforming the legal rule that "different genders have the same rights" to a common ideal have been a very important impulse for national legal orders.

The goal of achieving the stage of contemporary civilisation mentioned in the Preamble and in Article 174 of the Constitution requires that international documents on rights and freedoms, which are reflections of this civilisation, must be evaluated together with the provisions of the Constitution.

When this point of view is taken, the provision subject of the application, "the woman takes her husband's surname", which evidently brings an obligation only for women, grants the husband priority over the wife. This is so even though both parties are in the same legal position in terms of legal obligations and rights within the unity of the family. It is neither possible to explain this inequality with abstract concepts like public order or public interest, since such justifications may explicitly be valid only in cases of subversion of public order or damage of public interest. It cannot be claimed that restrictions of personal rights of a married woman in her surname are compatible with Article 10 of the Constitution, which takes the issue of gender equality to a point that provides positive discrimination in favor of women as distinct from former regulations.

In a case examining a provision of the German Federal and Family Law that stipulated that spouses would use a common family name and that, if they could not define a common family name, the husband's surname would be taken as the family name, the Federal Constitutional Court of Germany found this provision contrary to the Constitution in the ruling of 05/03/1991. What follows was phrased in the justification of the ruling: "…the traditional structure of a relationship cannot justify an unequal treatment. The constitutional command would forfeit its function to achieve gender equality in the future, if the existing social reality had to be accepted. The principle of equality must be applied strictly. This applies



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in particular where women are being discriminated against; because Article 3 (2) of the Constitution should serve especially in the dismantling of such discrimination. A name, as a birth right, is the expression of the individuality and identity of a person. Therefore, an individual may demand that the legal order respects and protects their name. A change of a name cannot be asked for unless very important reasons exist." [2] The European Court of Human Rights also states in a judgment that concluded with a condemnation of Switzerland, that the name represents the identity of an individual and any intervention into this is counted as an intervention into the privacy of the family and thus contrary to the equality principle.

It is evident that when handled together with Article 17 of the Constitution, which states that everyone has the right to life, protection and improvement of corporeal and spiritual existence, and Article 20, which states everyone has the right to demand respect for their privacy, the provision at issue contravenes Article 10.

On the grounds of the aforementioned reasons and relying on the persuasion that the provision at issue is contradictory to Article 10, 17 and 20 of the Constitution, we do not agree with the majority opinion.

Members, Fulya KANTARCIOĞLU, Fettah OTO, Serdar ÖZGÜLDÜR, Serruh KALELİ, Zehra Ayla PERKTAŞ, Recep KÖMÜRCÜ

## DISSENTING OPINION

"A wife should no more take her husband's name
than he should hers.
My (sur)name is my identity and must not be lost"
Lucy Stone

*Justice Engin YILDIRIM gives some background information on the person Lucy Stone, delineates oppression against women and developments for disadvantageous groups in their historical evolution and stresses the importance and function of the family name for women.*

Interventions into the surname, which formalises the individual and its identity, and which is located at the intersection of privacy and publicity, can be seen as not only as derivative of a violation of a right but also as a violation of human rights.[3]

*Different international treaties on gender discrimination are cited.*



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We can see various regulations concerning the surname in comparative law. The only country among the member countries of the Council of Europe that entails depriving the women of the own surname after marriage is Turkey. Change of surname with marriage is a legal obligation in some countries as well. For instance, according to the Japanese Civil Code taking the surname of one of the spouses is obligatory; but spouses can decide on whose surname should be taken [4]. A similar regulation is also present in Swiss law. In Common Law systems, for example in Britain, it is sufficient to ask their demand to be written on the marriage certificate if one of the spouses wants to take the family surname of the other one. It is in the States' initiative in the USA, since there is no federal regulation. Women have been accorded preferential rights to either use their own surname alone or to take their husbands' surname in all of the 50 States of the USA. [5]

(…)

In the US, the Tennessee Supreme Court held in the case Dunn v. Palermo, regarding an objection against a legal provision that mandates a married woman to register the electoral roll with her husband's surname, that "control over one's name implicates questions of freedom and equality." According to the court, "customs should not govern the law. The question cannot be avoided by administrative reasoning or as a trivial social practice." [7]

*Justice YILDIRIM refers to Art. 3/II of the German Constitution, a decision of the German Constitutional Court, the ECtHR decisions in Ünal Tekeli v. Turkey as well as the Burghartz v. Switzerland case (Art. 8 and 14 ECHR).*

It has been claimed that different surnames of spouses would weaken the unity of the family, that this would have adverse effects on children and as a result that the unity of the family might suffer from these effects [12]. The courts in the USA had refused that women use their premarital family names in registration for the electoral roll, application for a passport, and bringing actions before a court, by reason of "settled social customs and traditions" until the 1970´s. [13]

In a judgment of the Turkish Constitutional Court it was argued that the usage of the husband's surname by women stemmed from "obligations imposed by social realities and institutionalisation of a tradition that struck roots throughout the years". [14] According to the Court, the usage of the husband's surname is preferred by virtue of enabling the unity of family, public interest, public order and some other necessities.



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The claim that unity of the family is ensured when the woman takes her husband's surname must be proved. When we accept this claim for an instant, a question appears. Why is taking the husband´s surname counted as an assurance of the unity of the family and why is the opposite situation, i.e. taking a wife's surname, not deemed as an indicator of the unity of the family? The answer to this question, for sure, relies upon the fact that the male approach is the historically and socially prevailing approach. A common family name may be seen as the symbol of the unity of family. However, this should be realised by the free will of the individuals establishing the unity of the family, not by coercion.

Bearing a surname has been compulsory in our country since 1934. Therefore, the claim that usage of a premarital surname by the women would harm the unity of the family is paradoxical, since bearing a surname is not a tradition maintained by Turkish society for centuries. Thus, one may inevitably infer from such a claim that the unity of the family was weak before the Family Name Law in Turkish society.

The idea that taking the husbands surname would prevent any confusion in administrative transactions on the grounds that it provides a single name for the family might be found reasonable. On the other hand, regulations related to the TC Identity number, have reduced the surname's function of keeping the proper records of civil registry and preventing any confusion on official records.

The Constitutional Court has also ruled in cases that underline gender equality. For instance, with a ruling in 1964 the Court began to develop its case law on gender equality by stating that "gender is not a reason to obstruct equality before the law". [15] Likewise, Article 159 of the abolished Civil Code No. 743, which prescribed that women could only work depending on their husbands' consent, was annulled by the Constitutional Court on the grounds that it was contrary to the equality principle governed under Article 10 of the Constitution. In this case, the equality principle was violated to the detriment of the women, as the plaintiff was a woman; the husband was deemed superior since he is a man and the capability of the woman to work was subject to permission of the man according to Article 159 of the Constitution. The Court, rightfully, asked that "if everyone is equal before the law regardless of gender, even though the husband can work without any permission, why can the woman not enjoy the same right?" [16] The Constitutional Court refrained from asking this question in relation to the provision at hand, as it asked the same question rightfully in the case mentioned above.



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*Justice YILDIRIM holds that customs do not provide legitimacy for a legal arrangement as established in Article 187 of the Civil Code. The historical fact that in society some groups are treated different to others violates the principle of equality and therefore it cannot be justified today. He reasons, moreover, that if customs do not conform to constitutional principles, decisions have to be met in accordance with the latter. The participation of women in public life leads to changes of established traditions. The consequences of Article 187 of the Turkish Civil Code for women are that they disappear from social and political life with the marriage. The right to have a name and to continue with the same surname with which a woman is known is an inviolable right. Even Article 41 of the Constitution states that "Family is the foundation of the Turkish society and based on equality between the spouses". The provision at issue is still in force despite the fact that many constitutional and legal amendments were introduced to realise gender equality before the law.*

In almost all nations that exist on Earth, priority of men over women has been a settled value judgment, and at the core of it we find the assumption that women are the entities that are weak and depending on the preservation by men (*inbeccillitas sexus*). Construction of the family based on gender equality by allowing it to "build the minimum democracy in the heart of the society" may enable democracy and democratic values to be established at the societal level.

Consequently, I disagree with the majority opinion on the grounds that the provision subject of the application regarding the woman to take her husband's surname after marriage is contrary to Article 10, 12, 17 and 41 of the Constitution.

Member, Engin YILDIRIM

[1] Gökçiçek Ayata – Sevinç Eryılmaz Dilek – Bertil Emrah Oder, Kadın Hakları Uluslar arası Hukuk ve Uygulama, İstanbul Bilgi Üniversitesi Yayınları, 2010, ss. 634-636.

[2] Ece Göztepe, Anayasal Eşitlik İlkesi Açısından Evlilikte Kadının Soyadı, AÜHFD. cilt 45, s. 17.

[3] Tirosh, Yofi (2010), "A name of one's own: gender and symbolic legal personhood in the European Court of Human Rights", Harvard, Journal of Law and Gender, cilt 33, s. 255.

[4] MacClintock, Heather, (2010), "Sexism, Surnames, and Social Progress: The Conflict of Individual Autonomy and Government Preferences in Laws Regarding Name Changes in Marriage", Temple International and Comparative Law Journal, cilt 24, Spring, s. 281.

[5] MacClintock, Heather, (2010), s. 292.



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[6] Moroğlu, Nazan, "Medeni Kanun'a Göre Kadının Soyadı ve Bir Öneri, www.tukd.org.tr/dosya/kadinin_soyadi.doc (erişim tarihi, 26.04.2011).

[7] Suzanna, Kim, (2010) "Marital Naming/Naming Marriage: Language and Status in Family Law," cilt 85, Indiana Law Journal, s. 921.

[8] http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=tekeli%20%7C%20turkey&sessionid=70140449&skin=hudoc-en, (erişim tarihi 26.04.2011), Ünal Tekeli v.Turkey, Application no. 29865/96, paragraf 55.

[9] Tekeli v. Turkey, paragraf 53.

[10] Tekeli v. Turkey, paragraf 67.

[11] http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=burghartz&sessionid=70140449&skin=hudoc-en (erişim tarihi, 26.04.2011), Burghartz v. Switzerland, Application. No 16213/90, paragraf 24.

[12] Bu konuda Japonya'da yapılan tartışmalar için bkz. Shin, Ki-Young (2008), " 'The Personal is the Political': Women's Surname Change in Japan", Journal of Korean Law, cilt 8, s. 177.

[13] Anthony, Deborah, J. (2010), "A Spouse by Any Other Name", William & Mary Journal of Women and the Law, cilt 17, ss. 198-200.

[14] Esas Sayısı:1997/61, Karar Sayısı: 1998/59. http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=1427&content= (erişim tarihi, 26.04.2011).

[15] Esas Sayısı: 1963/148, Karar Sayısı: 1963/256, http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=72&content= (erişim tarihi, 26.04.2011).

[16] Esas Sayısı: 1990/30, Karar Sayısı: 1990/31, http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=923&content= (erişim tarihi, 26.04.2011).

[17] Göztepe, Ece (1999), "Anayasal Eşitlik İlkesi Açısından Evlilikte Kadınların Soyadı", AÜ SBF Dergisi cilt 54, sayı 2, s. 115.

[18] Leissner, Omi Morgenstern (1998), "The problem that has no name", Cardozo Women's Law Journal, cilt 5, sayı 4, s. 358.

[19] Leissner, (1998), s. 356.

[20] Aslan, Betül (2009), Devletin Temel Amaç ve Ödevleri Işığında Öznel Gelişme Hakkı, İstanbul: On İki Levha Yayıncılık, s. 88.

[21] Moroğlu, Nazan, "Medeni Kanun'a Göre Kadının Soyadı ve Bir Öneri, www.tukd.org.tr/dosya/kadinin_soyadi.doc (erişim tarihi, 26.04.2011).



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## 3.25 Rights of Children Born Out of Wedlock I

***Application Number:*** *1987/01* ***Decision Number:*** *1987/18*

***Date of Decision:*** *11/09/1987*

***Date of Publication and Number of the Official Gazette:*** *29/03/1988 - 19769*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Sorgun Court of First Instance (Sorgun Sulh Hukuk Mahkemesi)*

***Provisions at Issue:*** *Art. 443 (1, second sentence) and Art. 443(2) of the Turkish Civil Code No. 743 (17/02/1926)*

***Relevant Constitutional Provisions:*** *Art. 10, 12, 35, 41 (1982 TA)*

***Voting:*** *Accepted by majority of 6:5 (regarding Art. 443 (1), sec. sentence; 443 (2))*

***Dissenting and Concurring Opinions:*** *3 DO*

***Justices:*** *President Orhan ONAR; Vice President Mahmut C. CUHRUK; Members: Necdet DA-RICIOĞLU, Yılmaz ALİEFENDİOĞLU, Yekta Güngör ÖZDEN, Muammer TURAN, Selahattin METİN, Servet TÜZÜN, Mustafa ŞAHİN Vural F. SAVAŞ, Ahmet Oğuz AKDOĞANLI*

This case relates to the problem that the rights of children born outside of marriage are limited in Turkey. Legal doctrine prescribes here that children born out of wedlock may enjoy the same rights as legitimate children when they are accepted by their fathers, or in case a court ruling has established paternity. The submitting court argued that this provision would violate the Constitution, especially Article 10 (Equality before the law), Article 12 (Nature of fundamental rights and freedoms), Article 35 (Right to property), and Article 41 (Protection of the family) of the Constitution. The Constitutional Court did agree with the referral and consequently ruled that the provisions at issue had to be annulled.

(…)

### I. THE CASE

The plaintiff's counsel asked the Sorgun Court of First Instance by a petition of 11/09/1986 "to issue a certificate of inheritance for the plaintiff whose father´s name is registered as Ahmet, by claiming that he is an inheritor of Ahmet K."

The referring court found the plaintiff's counsel's claim pertinent regarding a violation of Articles 10, 12, 35 and 41 of the Constitution by Article 443 of the Turkish Civil Code, and it applied to the Constitutional Court for annulment of this provision.



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## II. JUDICIAL REFERRAL

(…)

## III. THE LAW

### A) Provision at Issue

Article 443 of the Turkish Civil Code No. 743 (11/02/1926) titled "Inheritance for Illegitimate Lineage" reads as follows:

"Article 443 - Relatives with illegitimate lineage have the right of heritage as the relatives with legitimate lineage from the mother's side. They may be inheritors of their fathers in cases where they are recognised by their fathers or paternity is established by a court ruling.

In cases of an illegitimate child or their descendant becoming heir together with legitimate descendants of their father, they shall inherit one half of what a legitimate child or their descendant inherits."

(…)

## IV. PRELIMINARY EXAMINATION

(…)

## V. MERITS

(…)

### A) General Explanation

Before examining the provisions at issue in terms of constitutional provisions, it is necessary to deal with the legal condition of a child born out of wedlock in general terms; and, moreover, to consider various opinions regarding the issue and the historical development of its regulation.



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A child who was born out of wedlock is an illegitimate child.[769]

It has consistently been argued in western law systems whether different conditions should be prescribed for children born out of wedlock; in other words, whether they should be treated as equal to legitimate children or not.

Those who demand equalisation of illegitimate children with legitimate children argue as follows:

To be legitimate or to be illegitimate is not something a child can influence. Even intolerance of society against extramarital relations and counting them as undermining the conjugal community cannot legitimise applying different status provisions on children who do not have any role within and fault for those relationships. To deprive illegitimate children of paternal inheritance or to pass them only half of what legitimate children inherit cannot be a solution.

To make a distinction between them and to maintain medieval thoughts does not correspond to the facts of our era.

The right to heritage is one of the natural and fundamental rights of individuals. This right can only be abolished if prescribed by law.

Supporters of this opinion put forward that there is no room to punish innocent children who are unaware of everything, and that the society will suffer more by weakening legal conditions of illegitimate children.

According to the view of supporters of a different view:

Supporters of the movement of thought that objects providing illegitimate and legitimate children the same legal conditions aim to protect the conjugal community, marital relationships and legitimate children. They claim that an improvement of the legal conditions of illegitimate children would harm families, and that an unmarried woman would interfere with the family life of a married man by means of her child and that this would violate the family order. Besides, they point out that equalisation of legitimate and illegitimate children may lead to a dangerous situation, that is a removing of the the border between marriage and free relationships; and, as a result of an improvement of the status of those kind of children, people that have extramarital relationships may abandon the idea of not having children.

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769 The original sentence is: "*Aralarında kanunun tanıdığı bir evlilik bağı kurulmayan kadınla erkeğin ilişkilerinden dünyaya gelen çocuk, evlilik dışı, diğer bir deyimle sahih olmayan nesepli çocuktur*." As this sentence is tautologic, we have opted for a shortened version in the translation.



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First attempts to improve the conditions of illegitimate children within society had begun with the rise of rationalism in the 18th century. It was claimed that a birth which occurred out of wedlock should not become a determinant over the whole life of a person, and that legitimate and illegitimate children should be equalised.

Supporters of socialism in the 19th Century stated that the bourgeois order drove illegitimate children and their mothers into poverty and desperateness. According to this opinion, the bourgeoisie issued laws in this manner for otherwise their class interests may have been harmed, they may have faced paternity suits, and proletarians may have leaked into their class.

Supporters of the "feminist movement" that strives to provide equality between men and women also demanded an improvement in the legal conditions of illegitimate children.

Finally, the school of thought that holds that the future and health of a nation depend on raising invulnerable generations and that bringing up all children well in terms of moral and physical development is the main duty of a State, has also been a significant factor in improving the conditions of illegitimate children. Opinions, which hold that childcare should be undertaken as well by the nation and not only by family alone have been influential over the abolishment of discrimination against illegitimate children.

In our century, in line with humanist thoughts, the opinion which values the protection of illegitimate children independent from marriage has become stronger and contemporary constitutions cover/include respective regulations.

In particular after World War II, the idea of improvement of "Lineage Law" was widely adopted in many European countries.

In this way, discrimination between legitimate and illegitimate children has been abolished. A legal relationship was established between children born out of wedlock and their fathers by means of an approval of paternity or a judicial ruling. In this way they have been bestowed the same rights as legitimate children enjoy.

The legal status of children born out of wedlock has been governed under Articles 290-314 of the [Turkish] Civil Code.

Illegitimate children are: those who were born out of wedlock and whose ancestry has not been clarified, or whose fathers were denied ancestry although they were born in wedlock.



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Children born out of wedlock can be grouped as follows:

4. Children whose fathers cannot be identified (They may never have had a legal relationship with their fathers, since they cannot claim any right against any men.);
5. Children whose fathers, even actually known, cannot be recognised for various reasons or about whom a ruling regarding natural fatherhood or complete fatherhood cannot be delivered;
6. Children who have been only naturally affiliated with their fathers by a court decision;
7. Children who have been entirely affiliated with their fathers;
8. Children who have been rendered legitimate by administrative means, i.e. depending upon authorisation by repentance laws, court decisions or marriage of their parents.

The article at issue concerns the first three groups since it prescribes that children cannot be inheritors in case their ancestry is not fixed by their fathers or a court decision.

The submitting court asks for annulment of the provision regarding a share of inheritance in certain cases, and for the provision which hinders determining ancestry by prescribing requirements for being a natural father and for being a father by recognition. Under these circumstances, the relationships of illegitimate children from the first three groups with their fathers should be scrutinised.

Affiliation between an illegitimate child and their mother derives from birth. This status is governed under the first sentence of Article 290 of the [Turkish] Civil Code, which states "the mother of an illegitimate child is who gave birth to them."

The same article states that the father of a child born out of wedlock should be determined by a court decision or by recognition of the father.

As it is clarified in Articles 291-294 of the [Turkish] Civil Code, recognition entails a declaration of acknowledgment of fatherhood of an illegitimate child by their father through a unilateral legal act, which creates a new legal status in compliance with the formal requirements of law. As a result of the recognition, an illegitimate ancestry relationship between a father and child born out of wedlock comes into effect. The legal effects of a recognition begin at the moment of conception.

Article 295 of the [Turkish] Civil Code prescribes that fatherhood can be declared by a court in order to determine the father of a child in case an illegitimate child is not recognised or not to be intended to be recognised by their father or grandfather.



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Pursuant to our law, paternity proceedings may result in a benefit of mother and child in financial matters. It may result in establishing an affiliation between father and child that grants rights to the child in terms of family name, citizenship and heritage, or registration.

Paternity proceedings with financial consequences aim at paying compensation to the mothers and maintenance for the child when the affiliation is established. In case a consequence of paternity proceedings is verification of paternity, a child born out of wedlock may be registered to the father's registry records, obtain his family name and citizenship, in addition to financial results. The child also gains rights linked to the illegitimate relation, including the right to heritage against relatives of their father and mother. In this way a legal relationship stemming from lineage is established. However, as it is prescribed under Article 443 of the [Turkish] Civil Code, illegitimate children who become successor of the same father together with legitimate children shall inherit one half of what legitimate children inherit.

If the father of a child born out of wedlock is known, natural lineage (natural paternity) is established between child and father once a court declares paternity with only financial consequences. In such a case, a legal relationship cannot be established between child and father.

As it is stated in Article 291 of the [Turkish] Civil Code, basic requirements for recognising an illegitimate child prescribe that the child is to be recognised by the father as born out of wedlock and that the child was definitely born out of wedlock. In addition, pursuant to Article 292 of the [Turkish] Civil Code, children "born of adultery and forbidden relations" cannot be recognised.

Article 310 of the [Turkish] Civil Code prescribes that the requirements for declaration of paternity by a court are the following: that a promise of marriage to the mother was made by the defendant; that the sexual intercourse between defendant and mother constituted a crime; or that the sexual intercourse was caused by the defendant misusing his influence over the woman.

The Article 310 (2) of the [Turkish] Civil Code, which states that "if the defendant is married at the time of the sexual intercourse, the judge cannot declare paternity", was annulled by a ruling of the Constitutional Court (Application No. 1980/29, Decision No. 1981/22, 21/05/1981).

The article at issue was the provision which impedes the illegitimate affiliation of children born of adultery with their fathers.

In the reasoning of the decision it was stated: "in the face of our Constitution which aims at creating a fair balance between interests of



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mothers and children that are excluded from the family, and in order to protect them, to make a distinction between children whose fathers were married to someone else than their mothers at the time of conception and children whose fathers were not married renders the former without a lineage and the latter with illegitimate lineage; this does not comply with the equality principle and it cannot rely on justifiable reasons."

According to the current conditions, the provision at issue impedes heritage of the children category mentioned above and illegitimate children can only inherit one-half of what legitimate children inherit, when they become co-heirs.

Examination with regard to human rights:

> *The AYM refers to and cites Article 16 and 25 of the Universal Declaration of Human Rights and Article 17 of the European Social Charter.*

These fundamental texts, which have been signed and ratified by Turkey as well, prescribe providing children, regardless of their birth in lawful wedlock, with all kind of opportunities in order to improve their standard of living. Likewise, the decision of the United Nations Economic and Social Council (18/05/1973) adopts legal equality of legitimate and illegitimate children as a principle. The experts committee introduced a draft convention on the legal position of children born out of wedlock to the European Committee on Legal Cooperation in order to send it to the Committee of Ministers of the European Council. This draft aims to adjust laws of member states in terms of fundamental provisions, and many states opted for abiding by conventions and amending their civil codes.

Examination with regard to the Civil Amnesty Laws:

Civil marriages that must be carried out in front of a civil marriage registrar have not become widespread, in particular in rural areas of our country. As a result of this, children of couples married by imam have been counted as illegitimate in the [Turkish] Civil Code.

The legislator that seeks a solution for this problem has enacted laws almost every five years since 1933, which are on some occasions called "Civil Amnesty Law" or "The Law on Non-Registered Relations and Registration of Children Born in These Relationships".

The first Civil Amnesty Law No. 2330, which was enacted in 1933 and attributed to the tenth anniversary of the founding of the Republic, was followed by Laws No. 2576 of 1934, No. 4727 of 1945, No. 6652 of 1956, No. 554 of 1965, No. 1826 of 1974 and No. 2526 of 1981.

This law came into force temporarily. It prescribed to legitimise children of a married man and an unmarried woman, and children of a



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married woman and a man other than her husband, provided that those couples were living together like married spouses.

In this way, children in such positions who are registered are rendered equal to legitimate children and they can inherit from their fathers like legitimate children.

Since the relevant provisions of the Turkish Civil Code cannot impede relationships out of wedlock, lineage of children born in these relationships has occasionally been corrected by laws provisionally.

B) Examination of Provisions at Issue with Regard to the Constitution

1. Review with regard to Article 10 of the Constitution:

The referring court claims that impeding children who are not affiliated to their fathers by recognition or by a court declaration, and to allow them only one half of what legitimate children inherit violates the equality principle.

(…)

In a decision of 21/05/1981, which was taken about a similar topic, the Constitutional Court states that "in the case of making an artificial discrimination between a child whose father was married to a woman other than their mother at the time of conception and a child whose father was not married, leaves the former child without a lineage and provides the latter child with an illegitimate affiliation with the father; this does not comply with the equality principle and cannot be justified. The protection of the unity of the family cannot be a justification, since it is not directly related to the issue. The idea of protecting the family by insulting and despising a number of children and depriving them of some fundamental rights cannot be a realistic approach to this social fact: For what threatens the unity of the family is not to accord fundamental rights to these kind of children, but the existence and continuance of abnormal relationships between men and women which lead to these circumstances. A child is not the reason but the result of these relationships. What matters for society is not to punish a child who is the product of these relationships by depriving them of rights and excluding them from society, but to eliminate abnormal relationships which are found immoral by society. Hence, the United Nations Economic and Social Council, in a decision of 18/05/1973, states that it adopts the provision of legal equality of legitimate and illegitimate children in principle.



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On the other hand, there is a general common doctrinal opinion that the distinction between a child born in wedlock and a child born out of wedlock should be eliminated, and that the [Turkish] Civil Code should be amended for this purpose.

We cannot find a legitimate reason that these children, who inherit fully from their mothers, may inherit from their fathers only half of what legitimate children gain. Promotion of legitimate marriages or the difficulty of determining the father of an illegitimate child can neither legitimise such a distinction.

For the aforementioned reasons, the provision at issue has been found contrary to Article 10 of the Constitution, which forbids discrimination between individuals unless a legitimate reason exists.

2- Review with regard to Article 12 of the Constitution

Article 12 (1) of the Constitution, titled "The Nature of Fundamental Rights and Freedoms", states that everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable. The second paragraph of this Article states "the fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, their family, and other individuals". As it is seen from the content of this article, the constituent power emphasises that fundamental rights and freedoms cannot be handled separately from duties and responsibilities of individuals against society, their families and other individuals. The provision at issue is not directly related to this article of the Constitution. Therefore, we will continue our argument in the following when dealing with the issue in light of Article 35 of the Constitution, which regulates the right to heritage.

3- Review with regard to Article 35 of the Constitution

The submitting court claims that "the right to heir can only be restricted if the restriction is in the public interest. However, the provision at issue restricts this right without the purpose of safeguarding public interest".

Article 35 of the Constitution states that everyone has the right to heritage and this right may only be limited by law if it is in the interest of the public.



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In the explanatory memorandum of Article 35, it is stated: "In this Article the rights to property and heritage have been regulated like other fundamental rights and at the same level. They have been guaranteed by the Constitution. The right to heritage is the continuance of the right to property and a special form of this right. Therefore, property and heritage have been regulated respectively under the same Article and are guaranteed by the Constitution. Here the aim is to prevent abandonment of the right to heritage because of being exposed to heavy taxation". In addition, it says that "it would be possible to make restrictions pursuant to Article 13 besides the public interest".

There is no reason to claim that it is in the public interest to foresee different restrictions for children whose paternity was decided by a court and whose natural affiliations with their fathers were declared by a court, whereas the mentioned restrictions affect the last group of children. In this case only the benefit of a certain group is considered.

The reasons for restrictions governed under Article 13 of the Constitution cannot legitimise the issuing of different provisions.[770] A different implementation for children born out of wedlock cannot enable a protection of public morality either. What happens in fact might be best described as the entire elimination of a right rather than the restriction of the implementation of a right.

Pursuant to Article 443 of the Turkish Civil Code, which is subject to the judicial referral, illegitimate children and their descendants can inherit half of the share of legitimate children if they are inheritors of the same father. It is evident that this provision rather aims at prioritising children born in lawful wedlock rather than the public interest. Although it can be pointed out that this is a result of favoring legitimate children, it cannot be held as a basis for discrimination. The quantity of extramarital relationships, former civil amnesty laws which enable legitimation by administra-

770 Here the Court refers to Article 13 before its amendment in 2001. The unamended Article 13 determined: "All fundamental rights and liberties shall be restricted by law in accordance with the letter and the spirit of the Constitution for the purpose of the protection of national security, the indivisibility of the State with its nation and the territory, national sovereignty, the republic, public order, public interest, public moral, and health, and shall also be restricted by the specific reasons which are stated in the relevant articles of the Constitution. General and specific restrictions which are stated for the fundamental rights and liberties shall not be in conflict with the requirements of the democratic social order and they shall not be exercised except for their stated aim" (Translation from Yazici 2006).



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tive procedure and laws that have been enacted since the adoption of the Turkish Civil Code indicate that such implementation does not impede extramarital relationships.

Thus, the law in question violates Article 35 of the Constitution since it causes discrimination against and restriction of the rights to heritage of illegitimate children.

4- Review with regard to Article 41 of the Constitution

In the second paragraph of this article of the Constitution it is stated that the State should take necessary measures to especially protect mothers and children.

These opinions were held in the explanatory memorandum to the article: "…the legislator has the duty to protect the family and to provide welfare and peace" and,

"The protection of mothers and children has also been regulated. The protection of the mother is basically ensured by law.

The Protection of the child has only generally been expressed and the principle for non-discrimination between legitimate and illegitimate children has been adopted. This may also be inferred from the equality principle."

In this way, the Constitution imposes a duty of protection of mother and child in addition to a protection of the family. Due to the regulation under the [Turkish] Civil Code, the position of illegitimate children is largely weaker than those of legitimate children. Since illegitimate children are labeled bastards, are insulted and despised, and cannot claim any right against their fathers other than allowance, they are excluded from society as they are disadvantaged in terms of economic conditions.

Hence, in the justification of the ruling of the Constitutional Court of 21/05/1981, it is stated that the Constitution, which prescribes the protection of the family and of children, is not in line with such a law; and this does not comply with the fundamental right of a free development of one´s personality. On the ground that the legislator finds it contrary to the Constitution, it found it necessary to suspend the prohibition in the [Turkish] Civil Code by enacting Civil Amnesty Laws.

In addition, because of a similarity with the issue, the opinion below may cover the conditions of all illegitimate children: "Our Constitution tends to strike a balance between the interests of the family on one hand, and the mother and the child who do not belong to any family on the



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other, by protecting the family as well as the child. It is necessary to approach the issue from that point of view and to argue as to whether the family would suffer if the provision at issue was annulled.

The correspondence of the provision at issue with the Swiss Civil Code was justified on the ground of protection of the family in the explanatory memorandum. This provision was recently removed from the Swiss Civil Code. However, there is no doubt that the Swiss legislator has not given up the principle of protection of the family. There is no possibility that western societies may relinquish the principle of the protection of family, which is found in many fundamental texts of human rights. Therefore, the only thing to do is to reconsider the opinion that this provision is directly related to protection of the family.

Having stressed that the original of the provision at issue was adopted from the Swiss Civil Code under influence of canon law, it is stated in doctrine that this ban was imposed for the purpose of,

a) the protection of the family's effectiveness and authority, the prevention of undermining family order of married men by unmarried women with or by means of their children,

b) the impediment or reduction of free relationships,

but this provision is not related to protection of the family.

The first one reflects a superficial opinion. Because the main reason that leads to a family's trauma is that a father has a child from another woman. An affiliation of a child with their father legitimately or illegitimately does not affect the family much. Due to the [Turkish] Civil Code, paternity is determined by a court ruling in paternity proceedings with financial consequences brought by children born out of adultery. Moreover, fixing affiliation of a child with their father does not automatically result in inclusion of this child into a father's family. Pursuant to Article 312 of the [Turkish] Civil Code, custody of an illegitimate child is awarded to father and mother by a court ruling. The last sentence of Article 298 states that if a judge finds it necessary, a guardian may be appointed to a child instead of awarding custody. If there is any indication that the unity of the family would suffer in case parental rights are bestowed to the father, as a matter of course, courts will take this into consideration.

We do not agree with the opinion that affiliation of children born out of adultery with their fathers causes an increase of extramarital relationships to the detriment of the family. Allowing children born out of wedlock to affiliate with their fathers legitimately or illegitimately is a measure to protect children who have a very bad position within the society although it is not their fault and this may not increase extramarital relationships. On



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the contrary, it may be alleged that it prevents extramarital relationships to some extent. This is so, for individuals who consider a child born out of wedlock will not get their family names and will not be their inheritor would enter into this kind of relationship without any feeling of responsibility. But, to be aware of having financial, social and legal responsibilities towards these children may lead them to behave more careful.

… Opinions that hold that the provision at issue prevents extramarital relationships, and that in case of absence of this provision these kinds of relationships may increase, are baseless and incoherent."

The reasons mentioned above explain in detail that provisions of the [Turkish] Civil Code that include distinctions between legitimate and illegitimate children violate the principle of the protection of children prescribed under Article 41 of the Constitution.

Therefore, by considering the principle of protection of the children, precisely Article 443 of the [Turkish] Civil Code, which prescribes nothing or half of what legitimate children inherit for illegitimate children, violates the Constitution. Likewise, a distinction between children born out of wedlock whose fathers were determined and children born out of wedlock whose fathers were declared by a court is contrary to the Constitution.

Once these provisions are annulled, the new situation will be as follows: pursuant to Article 443 of the [Turkish] Civil Code, illegitimate and legitimate children will continue to be inheritors of their mothers, and they will also be able to be inheritors of their fathers under Article 290 of the [Turkish] Civil Code.

The Ruling: Due to the reasons and circumstances mentioned in detail above;

The second sentence of Article 443 (1) of the [Turkish] Civil Code No. 743 (17/02/1926), which states: "They may be inheritors of their fathers in case they are recognised by their fathers or paternity is established by a court ruling" must be annulled, for it violates Articles 10, 35 and 41 of the Constitution.

Orhan ONAR, Muammer TURAN, Selahattin METİN, Mustafa ŞAHİN and Vural F. ŞAVAŞ did not agree with this opinion.

b) The second paragraph of the same article, which states that "In the case of an illegitimate child or their descendant becoming heir together with legitimate descendants of their father, they shall inherit one half of what a legitimate child or their descendant inherits" must be annulled, for it violates Articles 10, 35 and 41 of the Constitution.

Orhan ONAR, Muammer TURAN, Selahattin METİN and Vural F. ŞAVAŞ did not agree with this opinion.



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## VI. CONCLUSION

On 11/09/1987 it was decided

1. by majority of votes and with the dissenting votes of Orhan ONAR, Muammer TURAN, Selahattin METİN, Mustafa ŞAHİN and Vural F. ŞAVAŞ to annul the second sentence of the Article 443 (1) of the [Turkish] Civil Code No. 743 (17/02/1926),
2. by majority of votes and the dissenting votes of Orhan ONAR, Yekta Güngör ÖZDEN, Muammer TURAN, Selahattin METİN, and Vural F. ŞAVAŞ to annul the second paragraph of the same article.

(…)

## DISSENTING OPINION

Since an unborn child has legal capacity as of its conception, provided that it survives birth" and it is counted as an independent person, psychologically and biologically it is tightly affiliated with mother and father. Therefore, it cannot be considered entirely independent from mother and father. Like all other living creatures, children of mankind should be seen as creatures dependent on father and mother.

The Constitution provides that "the family is the foundation of Turkish society". Child, mother and father should be approached pursuant to this principle. Due to one of the leading principles of Atatürk's Revolution, a family consists of a married man and a woman and their children. The Constitution prescribes the protection of such a family in Article 41. The provision under Article 443 (…) protects the family adopted by Atatürk's Revolution, that is to say, the Constitution.

Even the Swiss society, which internalised marriage of a woman and a man for ages, needed such a provision until recently. The necessity of such a provision and a principle for our society is evident, as it strives to leave/overcome an Islamic polygamy system by Atatürk's Revolutions.

A married man and a woman who committed "adultery" together think about the future of their children as well. The provision of the Turkish Civil Code, which has been annulled by majority of votes, was an important provision that prevented adultery and an increase of children born out of adultery. If the number of children born out of adultery has not decreased so far, this is so because of the ones who still want to carry out an Islamic polygamy system. Also, Civil Amnesty Laws for registration



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of children of adultery impede a decrease of the number of children stemming from these kinds of relationship.

However, in spite of all this the Constitution and the provisions of the "Preamble" entail a protection and survival of the family constituted by marriages which are based on monogamy; that is among/ in the sense of Atatürk's reforms.

If a belief and consciousness of the fact that children born out of adultery cannot be recognised existed, the number of such children would certainly be reduced. Otherwise, the number of polygamous relationships (adultery) and children of such relationships may increase. This is contrary to both, morality and Atatürk's reforms.

The current legal status of children whose fathers are indeterminable does not violate the equality principle governed under Article 10. They are neither deprived of fundamental rights and freedoms governed under Article 12 nor of protection measures of the State and other public bodies regulated by the second paragraph of Article 41.

On the other hand, the last paragraph of Article 443 (…), which is at issue, was set by taking note of social and economic circumstances.

Pursuant to the Constitution, illegitimate children have the right to heritage like everyone else. However, the right to heritage, which is a general provision governed under Article 35 of the Constitution, is, unlike fundamental rights, not absolute and can be restrained in case the conditions governed under Article 13 are met.

Likewise, the last paragraph of Article 443 of the Turkish Civil Code prescribes a restriction considering public interest in terms of the right to heritage of illegitimate children.

This provision represents the most important measure for the protection of "family", which is the basis of Turkish society and which consists of mother, father and children. Since the adoption of equal rights to heritage for legitimate and illegitimate children will abolish concerns about the future, the number of such kind of children will increase and it will result in the destruction of "families".

In addition, distributing properties of families to illegitimate children, who have no contribution to build up such assets, will unsettle society. Especially, if it is inherited from a dead wife to her husband more disturbances will be the result. In this way, inequality and injustice would be generated instead of equality.

Since restrictions are foreseen due to aforementioned just reasons, inequality cannot be established here.



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To sum up, because of Article 292 and the following articles of the Turkish Civil Code (…), Article 443 of the Turkish Civil Code (…) does not violate Articles 10, 12, 35 and 41 of the Constitution.
Therefore, we are against the majority opinion.
President
Orhan ONAR
Members, Muammer TURAN, Selahattin METİN, Vural Fuat SAVAŞ

DISSENTING OPINION

The annulment of the second sentence of Article 443 (1), which does not comply with the contemporary attributes of the Turkish Civil Code, does not entail an annulment of the second paragraph. To be an inheritor of a father depends on being the child of a father, there is no further requirement. To be a child of a father should be proved by recognition through the father or a ruling for paternity. It also includes natural paternity proceedings. Since the first paragraph excludes this point, an annulment does not enable affiliation. Provisions regarding lineage are still in force and still have legal effects. The first paragraph prescribes heritage from mother and father, the second determines the shares of inheritance. An annulment of the second paragraph exceeds the scope of requests in the case, and it causes a legal gap. After annulment of the second paragraph, the applicant has been able to inherit a full share even though they are not a legitimate child. Since being legitimate is the exact opposite of being illegitimate, having equally inherited shares has caused a new inequality. Having considered this result, which may lead to harmful situations regarding the family order, forbidden relationships, justice and invalidity of some cases, the legislator should have been given extra time to issue a new regulation. Those without a lineage should have inherited at most a one-half share, like illegitimate children, or better the rate should have been left to the initiative of the legislator. By virtue of the ruling in question, the share of illegitimate children has been equalised to the share of legitimate children. Moreover, those without lineage gained the right to inherit full share like legitimate children. Different regulations for those who have the same positions are unlawful. I am against the majority opinion since there is no violation in this case.
Member, Yekta Güngör ÖZDEN



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## DISSENTING OPINION

Pursuant to Article 152 of the Constitution and Article 28 of Law No. 2949, courts can make an application to the Constitutional Court regarding a law provision provided that that provision is implemented in the referred case. Pursuant to Article 443 of the [Turkish] Civil Code, a certificate of inheritance, that is to be provided for illegitimate children by a court of peace, depends on the result of paternity proceedings before a court of first instance. Therefore, such a certificate or court ruling should have been asked to the applicant, and then the case should have been held as a preliminary issue. Since law provisions regarding judicial responsibility concern public order, a case cannot be handled by an incompetent court unless there is an opposite and precise provision about it. Thus, there is not any relevant provision to be implemented by the applicant court, because it is not possible to hear a case that falls within the scope of the judicial responsibilty of a court of first instance. Therefore, the application should have been dismissed in terms of judicial incompetence.

When it comes to merits:

Article 443 of the Turkish Civil Code deems birth as a source of affiliation with the mother, and recognition or declaration of paternity by a court as a source for the father. In other words, whereas for the mother natural affiliation is sufficient for heritage, for the father recognition or declaration of paternity is required. As is known, the [Turkish] Civil Code prescribes two different kinds of paternity proceedings. One is a paternity suit that results in financial rights, the other is a paternity suit that establishes an affiliation and thus results in personal rights. These two different paternity proceedings are not the consequence of Article 443 of the [Turkish] Civil Code. Therefore, regardless of the type of paternity proceeding, in order to provide the same status to children born out of wedlock such duality should be abolished. Thus, by amendment of Article 290 in a preliminary draft of the [Turkish] Civil Code, it is prescribed that in the case of recognition of a child or a "declaration of affiliation" a child shall become legitimate. As a consequence, recognised children or children for whom paternity has been declared are equalised with legitimate children with regard to their right to heritage. Although the law in force prescribes two different paternity proceedings, the draft for the new [Turkish] Civil Code targets in all cases affiliation of a child and a father, and it prescribes that in all three cases a relationship should be determined by a court declaration.



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Applicant and plaintiff, term of litigation, the burden of proof, and the rights of a plaintiff to refute an argument and to refute a legal presumption are common points for both these proceedings. In this respect, if the statement "…paternity is established by a court ruling" of Article 443 (1) is annulled and with it the equilibrating order regarding the protection of family, i.e. marital relationships, children born of wedlock may be completely devastated. In addition, a certificate of heritage, which is issued after the death of a father, may seal the fate of the whole family.

Article 443 is a procedural provision that indicates which documents are required for a certificate of inheritance. It is not a provision that regulates conditions for paternity of illegitimate children. What deprives this kind of children of inheritance is the provision that forbids declaration of paternity for a lack of particular conditions stipulated by Article 310, even though natural paternity was proved. By virtue of an amendment for paternity proceedings governed under this article, the scope of implementation of Article 443 may be widened automatically. The article at issue is not contrary to the Constitution since it does not breach any constitutional provision. Therefore, I am against the majority opinion that decides for annulment in order to widen the scope of the Article.

Member, Mustafa ŞAHİN



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## 3.26 Rights of Children Born out of Wedlock II

***Application Number:*** *1990/15* ***Decision Number:*** *1991/05*

***Date of Decision:*** *28/02/1991*

***Date of Publication and Number of the Official Gazette:*** *27/03/1992 - 21184*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by Almus Civil Court of First Instance (Almus Asliye Hukuk Mahkemesi)*

***Provisions at Issue:*** *Art. 292 of the Turkish Civil Code No. 743 (17/02/1926)*

***Relevant Constitutional Provisions:*** *Preamble and Art. 2, 5, 10, 12, 41 (1982 TA)*

International Treatises/References: ECHR, UNCRC, United Nations Charter, French Revolutionary Declaration of the Rights of Man and of the Citizen (1789)

***Voting:*** *Accepted by majority of 10:1 justices*

***Dissenting and Concurring Opinions:*** *1 DO*

***Justices:*** *President Necdet DARICIOĞLU; Vice President Yekta Güngör ÖZDEN; Members: Servet TÜZÜN, Mustafa ŞAHİN; İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Erol CANSEL, Yavuz NAZAROĞLU, Güven DİNÇER, Haşim KILIÇ*

The provision that is requested to be annulled defines that children who are born outside of a marriage will not be recognised officially as legitimate children. This fact is perceived by the submitting court as violating basic principles of rule of law regimes. The Constitutional Court accepts the application and rules that the provision under review violates four different articles of the Constitution (Article 5: Fundamental Aims and Duties of the State; Article 10: Equality before the Law; Article 12: Fundamental Rights and Freedoms; Article 41: Protection of the Family).

(…)

### III. THE LAW

#### A) Provision at Issue

Article 292 of the Turkish Civil Code states:

"A child born in a relationship of individuals who are not allowed to marry, or born out of adultery of married men and women, cannot be officially recognised."

(…)

### IV. PRELIMINARY EXAMINATION

(...)



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## V. MERITS

After examination of the report on the substance of the case, the referral of the court and its attachments, the laws requested to be annulled, the respective constitutional provisions and the justifications of both constitutional provisions and the laws requested to be annulled and other legislative acts, the following was decided:

### A) Issue of Restriction

The provision at issue impedes to grant legitimate lineage to children born out of wedlock with their fathers. The article distinguishes between children who were born in a relationship of individuals who are not allowed to marry, and children born out of adultery; and they become subject of recognition for various reasons.

The elaboration of these different groups of children is required due to a legal obligation. In the case before the submitting court, the child was born out of adultery committed by a married father. With respect to this point, the relevant part of Article 292 and not the whole article on the matter should be handled in the constitutional review.

Pursuant to Article 152 of the Constitution and Articles 28 of Law No. 2949, the content of applications to the Constitutional Court raising an issue of unconstitutionality should be restricted by the scope of jurisdiction of the submitting court and the provision subject to the case transferred to the Constitutional Court.

***The provision to be applied in a case signifies: the provisions that are considered to solve problems that may arise in different stages of a case; or, which may affect the conclusion of a case positively or adversely; or, which may be employed to conclude a case within the limits of requests and arguments of the parties.***

Provisions which can no longer be applied fall out of the constitutional review.

Both, Article 152 of the Constitution—which stipulates that "No claim of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits"—and Article 28 of Law No. 2949 require to emphasise issues of restriction for referring cases to the Constitutional Court.



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The submitting court ignored the issue of restriction while requesting annulment of Article 292. This is so, for the annulment request of the whole article is not the appropriate form of application in this specific case. Therefore, the request of the submitting court should be handled by restricting the matter to the relevant part of the provision to be applied.

The provision to be considered in this case is the part of Article 292 of the Turkish Civil Code which determines that children born out of adultery committed by married men cannot be recognised.

Therefore, the elaboration of Article 292 of the Turkish Civil Code No. 743 (17/02/1926) by the Court should be limited to the part of the provision which consists of the words "… men and …".

Erol CANSEL did not agree with this view.

(…)

B) Meaning and Scope of the Provision Subject to the Application

Lineage is defined in family law as "the kinship between some ones and mother" and has a tight and restricted meaning.

The father of a child born out of wedlock shall be defined by a court ruling or by recognition by the father (MK, Art. 290).

The provision at issue impedes the establishment of an illegitimate lineage between children born out of wedlock/adultery and their fathers.

Recognition by the father, which is a personal right, signifies the adoption of a child born out of wedlock/adultery by the father, pursuant to the conditions and procedures defined in the [Turkish] Civil Code, irrespective of age and without any time limitation.

Children exempted from this recognition by the father are defined in the [Turkish] Civil Code as children born in relationships of individuals who are not allowed to marry each other since they are close relatives (fücur mahsulü); and children born out of adultery (MK, Art. 292). According to this provision, a married man cannot recognise a child born out of adultery. In such a case, the law states that a kinship between father and child born out of wedlock is not possible. However, the legal relationship between child and mother, and accordingly, with the relatives of the mother, is established automatically (MK, Art. 290 (1)).

The child acquires the mother's family name, the right to her mother's citizenship, and she becomes her mother's inheritor. The relationship between her and her mother and her mother's relatives is the same as



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of legitimate children, except for the issues of custody, management and benefit of the child's commodities (MK, Art. 312 (last para.), 314).
(…)

1) The relevant regulation in the preliminary draft of the Turkish Civil Code

(…)
In the explanatory memorandum, it is stated that:

> "(…) the provision of Article 292 that illegalises recognition of children born out of adultery of married men or women is not included in the draft text. The draft even enables recognition of children born out of adultery of married men and women, with consideration of opinions regarding the protection and constitutional rights of children born out of adultery and the developments in comparative law. (…)"

2) The provision at issue with regard to the Civil Amnesty Laws

(…)
The aforementioned laws and their explanatory memorandums emphasise the following fact: Article 292 of the Turkish Civil Code, which prohibits the recognition of children born out of adultery of married men, did not suffice to impede extramarital relationships. In order to legitimise lineage of those children who are results of these relationships but never their causes, the Civil Amnesty Laws were issued occasionally and provisional measures were taken; thus, children were provided with opportunities to connect with their fathers legitimately.

3) Approach of the Constitutional Court on the legal status of children with illegitimate lineage

(…)



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C) Issue of Unconstitutionality of the Provision at Issue

1- Review with regard to Article 5 of the Constitution:

In Article 5, fundamental aims and duties of the State are enumerated as: "to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social State governed by the rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence".
(…)

A child in such a situation cannot enjoy personal fundamental rights, such as to be registered to their father's family, to inherit from their father, to have their father's family name.

They are held accountable for their mother's and father's faults and insulted within society. They are excluded from society as they cannot find an opportunity for physical and mental development.

Likewise, the German Constitutional Court declared its opinion on this matter: "it is evident that it does not comply with the fundamental right of free emergence and development of the personality and the equality principle to insult and despise those people merely because of matters out of their will and mistakes made before their birth".
(…)

Since the provision subject to the judicial referral restrains fundamental rights and freedoms of children born in adultery, by violating the principles of the social State, the rule of law and justice, it violates Article 5 of the Constitution. Therefore, it must be annulled.

2- Review with regard to Article 10 of the Constitution:

In Article 10 of the Constitution it is stated that "All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations (…) No privilege shall be granted to any individual, family, group or class".
(…)

Civilised countries have abolished all inequalities between legitimate and illegitimate children. They have also removed any discrimination



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between children in international treaties which could be defined as meta-constitutional norms.

Under any circumstance, the hindrance or reduction of the rights of any person who is born, and accordingly the creation of an exceptional legal situation compared to the children with legitimate lineage, does not comply with the principle of equality.

The provision at issue impedes the correction of the lineage of illegitimate children and even leads to a discrimination between children born out of wedlock with respect to whether their fathers are married or not.

Thus, it violates Article 10 of the Constitution and must be annulled.

3- Review with regard to Article 12 of the Constitution

In Article 12 (1) of the Constitution it is stated that "Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable. The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, their family, and other individuals." In this way, the legislator emphasises that duties and responsibilities of individuals cannot be handled separately from their duties and responsibilities to the society, their families and other individuals.

(…)

To discriminate against children born out of wedlock does not enable protection of public morality. Such implementation does not just restrict, rather it abolishes the right completely.

One could assume that the reason behind such discriminatory implementation is that children who are born in wedlock are more highly valued, and this is due to the fact that the institution of marriage stands above all. However, this cannot be a ground for such discriminatory act. When the number of Civil Amnesty Laws enacted since the adoption of the Turkish Civil Code as well as the number of extramarital relationships, are taken into consideration, it is obvious that such implementation was not able to prevent extramarital relationships.

(…)

The word "everyone" in this Article of the Constitution encompasses all children, even though they were born out of wedlock, for personality begins with birth and ends with death and children do not have a chance to choose their parents. To know their own parents, to be registered to their fathers' families and to enjoy the relevant rights, and to demand from



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their parents to fulfill their duties towards them, these are all personal fundamental rights of children.
(…)
The Convention on the Rights of the Child mentions that:
(…)
– States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national,
ethnic or social origin, property, disability, birth or other status.
– The child shall have the right from birth to a name, the right to acquire a nationality.
– The child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

For the aforementioned reasons, this provision violates Article 12 of the Constitution and must be annulled.

4- Review with regard to Article 41 of the Constitution:

The Constitution states that the family is the foundation of Turkish society. Moreover, it is determined that the State shall take the necessary measures, and establish the necessary organisation, to ensure the peace and welfare of the family; especially where the protection of the mother and children is involved. The family, as the basis of Turkish society, is an important part within the constitutional order and it is protected by special guarantees.
(…)
In this way, as the Constitution prescribes, the State is also obliged to protect children born out of wedlock. Pursuant to the [Turkish] Civil Code, the situation of children born out of wedlock is more disadvantaged in comparison to the one of children born in wedlock. Such a situation does not comply with the fundamental right of the free development of personality. This prohibition in the [Turkish] Civil Code is incompatible with the Constitution.

The Constitution enjoins the State to take necessary measures for the protection of mothers and children. This duty should be fulfilled irrespective of whether children were born in or out of wedlock. Modern and



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well-civilised countries have already abolished the distinction between legitimate and illegitimate lineage. Switzerland, from where the provision at issue was imported, also abolished this distinction by an amendment in 1978.

The explanatory memorandum of the Swiss Civil Code had justified the respective provision with the aim of protecting legitimate families. Since one cannot assume that the Swiss legislator has given up protecting the family by removing that provision, the most plausible explanation is that the views on protection of the family have changed.

(…)

In the preliminary draft of the 1961 Constitution it was stated that "laws shall prescribe provisions that enable children born out of wedlock have equal status in societal life with children born in wedlock". However, somehow this statement was removed from the draft and was not included in the Constitution.

The legal connection between child and father does not automatically result in participation of the child in the father's family. Pursuant to Article 312 of the [Turkish] Civil Code, custody of an illegitimate child, and according to Article 298 of the [Turkish] Civil Code, the appointment of a legal guardian to the child, is awarded to parents by a court decision.

To establish a legitimate lineage between children born out of adultery and their fathers does not lead to an increase of extramarital relationships. The approval of legitimate lineage between children born out of wedlock and their fathers is a measure taken in order to protect children who were put in a difficult position in society. It will not increase the number of extramarital relationships. In addition, the consciousness of financial, social and legal responsibilities of a not yet born child may lead people to be more cautious.

(…)

As a result of the provision that impedes the registration of a child to their father's family, the provision governed under Article 292[771] of the Turkish Civil Code, which bans marriage between close relatives, cannot be implemented partially. Therefore, the possibility arises that those children might marry their close relatives. Since children born out of wedlock may be insulted and isolated in society, and cannot be protected in economic terms, this law contravenes the constitutional provision concerning the protection of children. Children are very important in all societies. To

771 The Court refers to Article 292 instead of Article 92 by mistake.



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bring up healthy children is vital for the future of societies and it entails keeping them away from all dangers.

For the aforementioned reasons, the provision at issue violates Article 41 of the Constitution and must be annulled.

(…)

## VI. CONCLUSION

On 28/02/1991 it was decided

A. BY MAJORITY OF VOTES and with the dissenting vote of Erol CANSEL, that the examination of the provision at issue, Article 292 of the Turkish Civil Code No. 743 (17/02/1926), which prohibits the recognition of a child, is limited to the question of whether the child is born out of adultery of a married man. Therefore, the examination is limited to the wording "…men and…";

B. UNANIMOUSLY, that the examined wording "…men and" is found to be contrary to the Constitution and is therefore ANNULLED.

## DISSENTING OPINION

(…)

The Constitutional Court, by its restrictive interpretation, allowed the prohibition of recognition of children born out of adultery of married women. As a result of this ruling, children born out of adultery of married men may be recognised whereas this is not possible for children born out of adultery of married women. Such a restriction is contrary to the principle of equality. It should be noted that in the corresponding Article to Article 292 of the [Turkish] Civil Code, Article 302 of the Swiss Civil Code, before its abolition on 01/01/1978, it was stated that "children born out of adultery and children of those who are not allowed to marry cannot be recognised". That is to say, there was not a distinction between adultery of married men and married women. The correct regulation is the one in the original code, which is the Swiss Civil Code. I believe that the annulment aims at the well-being of children born out of adultery. Therefore, such a distinction between married men and women is pointless. Moreover, it is unfair for children born out of adultery of women. There is no doubt that recognition of a child born out of adultery of a married woman by their biological father depends on refusal of lineage



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by her husband (Art. 242 and following articles of the MK). If a husband does not enjoy the right to refuse lineage, relevant persons enumerated under Article 245 of the [Turkish] Civil Code may initiate proceedings for refusal. Since a child whose lineage was refused by their father may file a paternity suit against their real father (Art. 303), the real father should be allowed to recognise their child (See Tekinay, SS. Türk Aile Hukuku, 1971, İstanbul, p. 418). Actually, in Article 281 (3) of the preliminary draft of the Turkish Civil Code, which has been drafted by the Ministry of Justice, it is stated that "a child who has a lineage with another man cannot be recognised unless this lineage is invalidated". This is the precondition for recognition of a child born out of adultery of a married woman by their real father. The corresponding article of the Swiss Civil Code was abolished in January 1978. Therefore, the restrictive examination by the Constitutional Court only with the statement regarding "recognition of child born out of adultery of married man" does not comply with the previous form of the Swiss Civil Code. (…) The procedure for denying lineage by the husband of the adulteress for the purpose of recognition of a child by their real father may cause delays in the recognition process. However, the same values are protected as in the case of the protection of children born out of adultery of married men. From this point of view, such a restriction impedes recognition of a child by their real father and harms them. The preliminary draft of Article 292 of the [Turkish] Civil Code removes the ban of recognition of children born out of adultery (Art. 281).

For these reasons, I do not agree with the restrictive examination limited to the terms of the prohibition of recognition of children born out of adultery committed by married men.

Member, Erol CANSEL



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## 3.27 Social Equality and the Right to Receive Health Benefits

***Application Number:*** *1990/27* ***Decision Number:*** *1991/02*

***Date of Decision:*** *17/01/1991*

***Date of Publication and Number of the Official Gazette:*** *19/08/1991 - 20965*

***Review Type and Applicant:*** *Concrete Constitutional Review Proceedings requested by the Tenth Chamber of the Turkish Court of Cassation (Yargıtay Onuncu Hukuk Dairesi)*

***Provisions at Issue:*** *Statement of "…up to 18 months…" in Article 34 (3), titled "Period of Health Benefits", of Law No. 506 on Social Insurance (17/07/1964)*

***Relevant Constitutional Provisions:*** *Art. 10, 17, 56, 60, 65 (1982 TA)*

***International Conventions/References:*** *ECHR, European Convention on Social Security (CETS No. 078)*

***Voting:*** *Accepted by majority of 10:1 justices*

***Dissenting and Concurring Opinions:*** *1 DO*

***Justices:*** *President Necdet DARICIOĞLU; Vice President Yekta Güngör ÖZDEN; Members: Servet TÜZÜN, Mustafa ŞAHİN, İhsan PEKEL, Selçuk TÜZÜN, Ahmet N. SEZER, Erol CANSEL, Yavuz NAZAROĞLU, Güven DİNÇER, Haşim KILIÇ*

The submitting court referred to the AYM for annulment of the statement "up to 18 months…" in Article 34 (3), titled "Period of Health Benefits", of the Law on Social Insurance, which regulates the maxium period of health benefits to be received in case of diseases. The court claims that the provision at issue violates Article 10 (Equality before the law), because it applies to employees but not to self-employed and civil servants. It also claims a violation of Article 17 (Personal inviolability, corporeal and spiritual existence of the individual) and Article 56 (Health services and protection of the environment) of the Constitution because the limitation of insurance payment after 18 months in case of chronic deseases affects the fundamental right to life and protection of health. The AYM does find a violation of the equality principle (Art. 10), and it rules the provision at issue unconstitutional for violation of Article 17 as well as of Article 60 (Right to social security). It stipulates that a complete cut of health benefits after 18 months affects the core of both - the right to life and the right to protect corporeal and spiritual existence of individuals - in case of non-recovery. This violation of fundamental human rights cannot be justified by the state's obligation to foster economic stability stipulated in Art. 65.

(...)

### V. MERITS

After examination of the report on the substance of the issue, the referral of the court and its annexes, the law which is considered unconstitutional,



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the respective constitutional norms, the relating explanatory memoranda and other legislative documents, the following was decided:

A- Meaning and Scope of Article 34 of Law No. 506 on Social Insurance

Article 34 of Law No. 506 on Social Insurance regulates the period of health benefits for diseases other than occupational accidents and occupational diseases.

Article 34 (1) of the Law on Social Insurance prescribes health benefits until the recovery of a social insurant, and in the following paragraphs determines various time restrictions for benefits. A social insurant can receive health benefits up to a maximum of six months, and if they have recovered within this period benefits shall be discontinued. The third paragraph prescribes a conditional extension, if the insurant still suffers from the disease at the end of this period. In this case,

a. If a medical board confirms that the disability can be healed completely or to a sufficient extent, this period may be extended.
b. This period is the maximum limit to receive health benefits; if the mentioned preconditions do not apply, it is impossible to receive health benefits up to 18 months. In case of new disease, the time limit will start over. If the insurant does not recover after the 18 months period, and if they can fulfil the requirements established under Article 53 of this law, they will be counted as "disabled".

B- Issue of Unconstitutionality of the Provision at Issue

1. Review with regard to Article 10 of the Constitution

The submitting 10th Chamber of the Turkish Court of Cassation asks for annulment of the provision at issue on the grounds that "in the relevant provisions of the Law of Retirement Fund of Civil Servants and the Law of Retirement Fund of Self-Employed there is no such limit similar to the one in Article 34 of the Law on Social Insurance No. 506. This causes inequality between the insurant and a member of similar social security institutions".

The principle of equality before the law in Article 10 of the Constitution does not imply that everyone shall be subject to the same legal rules. Any discrimination and inequality regarding language, race, color, gen-



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der, political thought, philosophical thought, religion or religious sect in implementation of laws cannot be acceptable. This provision prevents the application of different legal rules to individuals with the same status, and also the emergence of privileged persons and communities. To impose different legal rules on some citizens on legitimate grounds does not violate the principle of equality. Some specific circumstances of status or position of individuals or communities may entail the application of different legal rules or regulations. Specific reasons, which are legitimate since they are based on the particular features of individuals or communities, render the application of different regulations effective. To apply different regulations for individuals with the same legal status violates the law. The equality targeted by the Constitution is not de facto equality, but legal equality. If different legal rules are applied to different legal statuses, and the same legal rules are applied to the same legal statuses, equality as prescribed in the Constitution will not be violated. In other words, different provisions of laws cannot be applied to individuals having the same personal qualities and positions. Laws envisage different modes of application. If these are based on compelling grounds, which rely on the differences in legal statuses, the interest of the public, or other justified reasons, it is impossible to speak of a violation of Article 10 of the Constitution.

As emphasised in the well-established case law of the Constitutional Court, if a provision relies on a legitimate ground and its enforcing is aimed at the public interest, it does not violate the equality principle.

The limitation of time period in Article 34 of the Law on Social Insurance does not rely on the reason of indispensability. If it was indispensable, the State should have amended the regulations regarding other social security institutions. There seems to be some necessary conditions related to the financial power of the State. However, the State must exercise its power while taking measures on social security without leading to any discrepancy in fundamental rights. This is so, for these regulations should not lead to inequality among individuals in terms of "the right to life".

Differences in legal positions may legitimise different regulations only in terms of issues other than the right to life.

Therefore, according to Article 10 of the Constitution the regulation in this article is unconstitutional.



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2. Review with regard to Article 17 and Article 56 of the Constitution

In Article 17 of the Constitution, it is stated that "everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence".

The right to life and the right to protect the corporeal and spiritual existence are inalienable and non-transferable rights, and they are strictly connected to each other. The State has the duty to impede all kinds of hindrances of these rights. The State shall protect the powerless against the powerful, enable real equality, protect social balance and thus accomplish the rule of law principle. The protection of the right to life – which is the objective of a State governed by the rule of law – shall be realised by enabling social security. The legal regulations regarding social security institutions must not include any provisions that may give harm to or demolish "the right to life and the right to protect corporeal and spiritual existence".

The relevant international conventions include provisions with the same objectives. Article 13 of the European Convention on Social Security, which was ratified by Law No. 3581 (16/06/1989), envisages providing all required health benefits in case of diseases.

The limit of "…up to 18 months…" in Article 34 of Law No. 506 violates Article 17 of the Constitution, since it affects the core of both the right to life and the right to protect corporeal and spiritual existence of individuals who did not recover at the end of a period of health benefits and who are still receiving medical treatment.

In order for individuals to maintain a healthy life, Article 56 (3, 4, 5) of the Constitution assigns the duty to regulate, to organise and to review services of medical institutes to the State. This means that the State should attain this goal through various social security institutions. Any regulation that limits or weakens the rights regarding this goal violates Article 56 of the Constitution.

3. Review with regard to Article 60 and Article 65 of the Constitution

(...)

In Article 65 of the Constitution it is stated that the State shall fulfil its duties, as laid down in the Constitution, in social and economic fields within the capacity of its financial resources, taking into consideration

(a) The protection of "economic stability";



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(b) The Social Insurance Institution provides social security to employees through premiums paid by employers and employees. Furthermore, this institution can benefit from the general budget in the case that it is impeded from fulfilling its duties, pursuant to Article 19 (9) of Law No. 4792. In this respect, the State is obliged to keep the financial structure of this institution strong. Thus, the State must act in accordance with the aforementioned principle.

There is no connection between the limitation principle in Article 65 and the statement of "… up to 18 months …" laid down in Article 34 of Law No. 506. In Article 60 of the Constitution the right to social security is granted to individuals. However, in Article 65 some restrictions are prescribed for the duty of the State to take measures to ensure this right. Yet, this social right, governed under Article 60, is strictly connected to the right to life and the right to protect corporeal and spiritual existence, governed under Article 17 of the Constitution. Hence, the State cannot issue any regulations which remove the right to life by restrictions applied in economic and social fields. Therefore, the statement of "…up to 18 months…" in Article 34 of Law No. 506 cannot be handled within the scope of Article 65 of the Constitution.

The statement of "…up to 18 months…" of the provision in question must be annulled, since it is contrary to Article 60 of the Constitution.
Mustafa ŞAHİN did not agree with this opinion.

## VI. CONCLUSION

On 17/01/1991 it was decided,

by majority of votes and with the dissenting vote of Mustafa ŞAHİN that the statement "…up to 18 months…" in Article 34 (3) of the Law No. 506 on Social Insurance (17/07/1964) violates the Constitution and must be annulled.
(...)



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