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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

TURKEY

CRIMINAL JUDGESHIPS OF PEACE

MEMORANDUM OF THE MINISTRY OF JUSTICE

I. INTRODUCTION

1. Criminal judgeships of peace were established by "the Law on Amendments to Turkish Penal Code and Certain Laws" No.6545 to take the decisions which need to be taken by a judge during all investigations, conduct the proceedings and review the appeals against them, thus the criminal courts of peace were annulled. The duties of the criminal courts of peace in regard to the trial proceedings were delegated to the criminal courts of general jurisdiction.
2. The establishment of the criminal judgeships of peace aimed specialization and to form a unity in implementation about the investigatory proceedings and also, to standardize the decision-making concerning the protective measures across the country.
3. In accordance with the amendment, the criminal judgeships of peace are tasked to decide upon protective measures such as arrest, pre-trial detention, search, seizure, taking under custody, physical examination of the suspect and taking samples from the body. Besides, judgeships will not carry out trial proceedings as opposed to criminal courts of peace.

II. HISTORICAL BACKGROUND

A. Criminal Courts of Peace When the Law No. 1412 was In Force

4. When the repealed Criminal Procedure Code No. 1412 was in force, judges of criminal courts of peace used to conduct trial proceedings concerning the offences which came under their competence and in addition, issue decisions regarding the protective measures such as pre-trial detention, search, seizure and mental examination of the accused within the scope of the ongoing investigations.

B. Criminal Courts of Peace In Accordance With the Law No. 5271

5. Code of Criminal Procedure (CCP) No. 5271 came into force on June 1, 2005, thus the Code No.1412 was repealed. In the CCP numbered 5271, the criminal proceedings were separated into two stages: "investigation" and "prosecution". The authority to decide upon protective measures during investigations was given, in principle, to the judge of criminal court of peace. Protective measures during the prosecutions are issued by the court hearing the case of the alleged offence.
6. Article 10 of the "*Law on the Establishment, Duties and Jurisdiction of the First Instance Courts of Civil Jurisdiction and Regional Courts of Appeal"* No. 5235 regulated the duties of criminal courts of peace, before it was amended by Article 48 of the Law No. 6545. **(Annex-1)** According to this article; without prejudice to the cases prescribed by law, application of the provisions regarding imprisonment up to two years (including two-years of imprisonment) and judicial fines to be imposed together related to them, judicial fines to be imposed separately and protective measures came under the duties of criminal courts of peace. Criminal courts of peace, on the one hand, conducted trial proceedings and on the other, issue the decisions regarding the protective measures during investigations.
7. Decision-making process concerning the protective measures constituted only at least half of the workload of criminal courts of peace. As the criminal courts of peace also carried out trial proceedings and they had an excessive workload, the trial proceedings were deemed their primary duty and the decisions which need to be taken by judges were deemed a part of their subsidiary duty. As a result of it, the criminal courts of peace could not handle the decisions on protective measures well enough, then serious violations of rights occurred. Moreover, judges who were issuing decisions restricting liberty such as pre-trial detention, expressed their opinions about the suspects during the justification of their decisions and later on, examined merits of the cases filed against the same persons. This was criticized by persons of legal profession and also by the European Court of Human Rights. In order to overcome these problems of implementation, an institution entitled "liberty judgeship" was established and included to our judicial system.

C. Liberty Judgeship & Criminal Court of Peace

8. Article 10 of **the Anti-Terrorism Law** was amended by the Law No. 6352 which came into force after its publication in the Official Gazette dated July 5, 2012. The subparagraph (c) of the third paragraph of this article rules that adequate number of judges shall be assigned to take decisions which need to be taken by a judge during investigations, examine appeals against these decisions and to conduct only such proceedings. **(Annex-2)** Through this amendment, judges titled "liberty judges" commenced their duty.
9. This amendment provided that liberty judges render decisions such as pre-trial detention, judicial control, search, interception of communication which need to be taken by a judge during the investigations, ***regarding the subjects in the jurisdiction of Regional High Criminal Courts, which were authorized by Article 10 of Anti-Terrorism Law***. Liberty judges did not carry out the proceedings other than these.
10. However, at the same period, decision-making process regarding the protective measures ***during investigations outside the scope of Article 10 of Anti-Terrorism Law***, continued to be within the jurisdiction of criminal courts of peace. Liberty judgeships were observed as a positive development ***during the consultative deliberations held with the experts in European Courts of Human Rights*** and it was recommended that liberty judgeships be widespread to the extent that they will incorporate the first instance courts.
11. Furthermore, within the scope of the joint project of the European Union and Council of Europe called "Improving the Effectiveness of Turkish Criminal Justice System", which was implemented in 2012-2013, it was underscored that the jurisdictions of liberty judgeships should be extended to all criminal courts.
12. By the Law No. 6526 which came into force after its publication in the Official Gazette on 6 March 2014, high criminal courts authorized in compliance with Article 10 of Anti-Terrorism Law and liberty judgeships which were in charge of the investigations in this scope were annulled **(Annex-3).**
13. As a result of the formation of specially authorized high criminal courts, three different high criminal courts emerged. There was a belief that there is factual hierarchy among the judges and public prosecutors and that special judges, special courts, special prosecutors exist. In addition, specially authorized courts and public prosecution offices caused disputes regarding the right to a fair trial. Considering the above-mentioned reasons, this amendment was made to annul specially authorized courts, specially authorized public prosecution offices, special investigatory and prosecution procedures and also to ensure that all high criminal courts are subject to same procedural rules.
14. As a result of this amendment, the work carried out by the liberty judges, being in charge of terrorist offenses, was undertaken by criminal courts of peace in accordance with the general principles of CCP.

D. Criminal Judgeship of Peace

15. By the "*Law on Amendments to Turkish Penal Code and Certain Laws"* No. 6545 which entered into force after its publication in the Official Gazette on 28 June 2014, the criminal courts of peace were replaced with criminal judgeships of peace to take the decisions which need to be taken by a judge in the ongoing investigations, conduct the proceedings and review the appeals. **(Annex-4)**
16. Prior to the relevant law amendment, criminal courts of peace were authorized to issue protective measures which required the ruling of judge during the investigations, and they also tried the criminal cases within their jurisdiction. With this amendment, the duties of criminal courts of peace related to trial proceedings were delegated to criminal courts of general jurisdiction; duties and powers related to the decisions about protective measures such as taking under surveillance, physical examination of the suspect, taking samples from his/her body, search, seizure, arrest and pre-trial detention were delegated to the criminal judgeships of peace.

17. In the justification document of the law amendment, it was indicated that the absence of an independent judgeship in the criminal proceedings system to render decisions on protective measures caused many different implementations and troubles in practice. In the document, the fact that decisions on protective measures are taken without having sufficient grounds, that there is not one single method of implementation among the courts issuing such decisions and if an action is brought, the judge issuing the detention order for the suspect also gives judgement for the same court case or participates in the decision-making process, incited heavy criticism. It is also said that, the amendment will serve above all to specialization and to establish a unity in implementation regarding such proceedings and, as the criminal judgeships of peace interact more with each other, to ensure that decision-making process on protective measures become standardized in the entire country.
18. Criminal judgeships of peace which are only in charge of the protective measures regardless of the type of the offence were established in the entire country to ensure specialization and standardization. In this respect, compared with the "liberty judgeship", a broader regulation was introduced.

1. Reasons for removing the distinction between criminal court of peace and criminal court of general jurisdiction

19. During the meetings called "Situation Analysis in the Judiciary" and "Law Negotiations" which were organized by High Council of Judges and Prosecutors in 2011-2012, it was suggested to lift the distinction of work between the criminal court of peace and criminal court of general jurisdiction.
20. Carrying out works to remove the distinction between criminal courts of general jurisdiction and Criminal Courts of Peace were foreseen in Objective 6,4 of strategic plan of High Council of Judges and Prosecutors which was effective in 2012-2016.
21. Before the establishment of criminal judgeships of peace, criminal courts of peace could not have enough time to deal with the demands for protective measures apart from their other duties, thus they were not able to review these demands thoroughly and carefully. Inappropriate decisions related to protective measures might have been taken on account of insufficient grounds. The absence of judges to deal solely with the protective measures caused diversity in practice. (For example: for the same activity, one judge could order detention while another might release the person). There was an unjust distribution of workload between the criminal courts of peace and general jurisdiction. Because of the decisions of non-jurisdiction between criminal courts of peace and general jurisdiction, the trial process was prolonged. The judge who gave the pre-trial detention order, adopted negative attitude in reasoning not to make pre judgement, in case he/she might hear the case in the future.

2. Procedure of appointment for criminal judgeships of peace

22. Peace judges are not different from other judges serving in criminal courts in terms of appointment and personal rights. They are appointed in accordance with the principles of "impartiality and independence of judges" as provided in the Constitution by High Council of Judges and Prosecutors (HCJP), having administrative and financial autonomy pursuant to Article 159 of the Constitution. They are subject to the same procedure of appointment. According to decision of Constitutional Court numbered 2014/164 E., 2015/12 K., peace judges are appointed by HCJP as this is the case for every judge, they have the guarantee of tenure of judge provided in the Constitution and in addition, there is no reason to suggest that these judges are in a different position in terms of impartiality or they do not have to comply with principle of impartiality as much as other judges.

3. Appeals against the decisions of criminal judgeship of peace

23. According to subparagraph (a) of the third paragraph of Article 268 of the CCP No.5271 which regulated the procedure of appeal,

- where there is more than one criminal judgeship of peace in that region, the review of appeals against decisions of criminal judgeship of peace shall be undertaken by the judgeship having the following number; the review of the appealed decisions of last numbered judgeship shall be undertaken by the judgeship with the first number,
- In the regions where there is no high criminal court and only one criminal judgeship of peace, the reviews shall be handled by the criminal judgeship of peace in the jurisdiction of the high criminal court to which the challenged judgeship is connected with,
- If there is one criminal judgeship of peace near a high criminal court, the reviews shall be dealt with by the criminal judgeship of peace in the jurisdiction of the nearest high criminal court,
- The same procedure shall apply if there is an appeal against a detention order which is issued upon the appeal procedure following the rejection of the request for detention. However, the criminal judgeship of peace which rejected the request for detention order shall not be able to review the appeal against the detention order issued for the same case by another criminal judgeship of peace.

24. The law-maker clearly prescribed that the appealed decisions of criminal judgeships of peace shall be finalized again by these judgeships who are specialized for taking decisions during investigation,. This amendment complies with the purpose of the law-maker to separate the investigatory and prosecution proceedings.
25. In accordance with Article 267 of the Law No. 5271, decisions of judges shall be subject to appeals and there is a procedure regarding effective review of decisions taken on protective measures during the investigations. This procedure is in line with Articles 5, 6 and 13 of the European Convention for Human Rights.
26. Considering the facts below, the handling of objected decisions taken during investigations by a criminal judgeship of peace again by another criminal judgeship of peace, pursuant to Article 268 of the Law No. 5271 is appropriate;
    - Criminal judgeships of peace do not have duties during the trial period, they complete their duties by the time the prosecution starts,
    - They are not authorized to render final decisions concerning suspects or accused persons,
    - Their decisions on protective measures which are taken during the investigatory period will be reviewed by the court conducting the prosecution once the indictment is accepted.
27. The fact that appeals against decisions of a criminal judgeship of peace will be reviewed again by a criminal judgeship of peace is another factor which will ensure specialization and consistency in practice.
28. Pursuant to the amendment on examining the appeals, it is not possible for peace judges in criminal matters to examine the decisions of one another and this ensures an objective review of decisions.
29. Any comment made by the criminal courts of general jurisdiction regarding the appeals against decisions of criminal judgeships of peace will contradict with the purpose of forming criminal judgeships of peace.

4. Training programs for criminal judgeships of peace

30. Various training programs have been organized since the establishment of criminal judgeships of peace to specialize the judges and create consistency in practice. Within this scope, Justice Academy of Turkey organized the following vocational training programs;
    - 98 Peace Judges participated in the program titled "Duties and Powers of Criminal Judgeships of Peace Established by the Law No.6545" on 25-26 September 2014 in Ankara,
    - 70 Peace Judges and Public Prosecutors participated in the program titled "Effective Techniques for Investigation" on 1-3 December 2014 in Antalya,
    - 103 Peace Judges participated in the program titled "Protective Measures and Proceedings carried out by Criminal Judgeships of Peace" on 23-25 November 2015, in Ankara,

➢ Training seminar titled "Protective Measures" is planned to take place on February 10-12, 2017, in Ankara, for the Peace Judges in Criminal Matters, within the scope of 2017 Vocational Training Plan.

5. Whether criminal judgeship of peace is contrary to the principle of natural judge

31. The principle of "natural judge" constitutes one of the fundamental principles which must be complied with while the courts are established and their functions are determined. Article 37 of our Constitution titled "principal of natural judge" prescribes that no one shall be tried by an authority other than the court which they are legally subject to.
32. Natural judge is the judge of a court the duty, power and the trial procedure of which are determined by laws in force, before the conflict occurred. In other words, a natural judge works in a court which was established before the litigation took place and was not established related to the litigation. Such a court must have been established impartially and the duties and jurisdictions must have been determined *in abstracto*. In order to ensure compatibility with this principle, the duties and jurisdiction of a court must be determined by laws, in general and *in abstracto*, before the litigation took place. Furthermore, the judge or judges who will trial the case must be determined before conflict in question is brought to court.
33. Moreover, establishment of new courts in the judicial system of a country does not contradict with the "principle of natural judge", providing that they are established by laws and the reason that an established court is annulled or replaced with a new court is not to try a specific incident or person, but fulfill the needs of the trial system in the country. Such occasional changes aiming to offer better and more effective legal services, can be observed in all trial systems. If such changes having no relation to specific cases, are deemed contrary to the principle of natural judge, it will never be possible for the legislative organs to establish new courts. Even the replacement of judges due to appointments, promotions or death will be deemed contrary to the above-mentioned principle. Thus, the courts will not be able to try the cases properly.

III. DETERMINATIONS IN INTERNATIONAL DOCUMENTS

34. The advisory visit reports prepared for our country since 2003, progress reports and other European Union documents make no criticism regarding the Criminal Judgeships and Courts of Peace.
35. On the other hand, European Commission's independent expert, Luca Perilli speaks highly of the liberty judges who were authorized in 2012-2014 in the report titled "Criminal Justice" and prepared in 2014, emphasizes the need to re-establish these judgeships.
36. The report includes the following determinations and recommendations regarding the liberty judgeships:
    - Liberty judgeships were established by the third judicial reform package of 2 July 2012 and they were authorized to handle "protective measures" (pre-trial detention orders, search, interception of communication, undercover agents, seizures).
    - Liberty judgeships were annulled in February 2014.
    - The whole process that brought, in only few years, from the establishment of specially authorized courts to their abolishment and from the establishment of the regional high criminal courts to the overall suppression of special courts, special prosecutors and liberty judges, raises serious concerns both for the independence and the effectiveness of Turkish criminal justice.
    - The suppression of liberty judgeships most probably will lead to other adverse outcomes for the effectiveness of the criminal justice system.
    - Since the liberty judgeships are specialized in protective measures related to freedoms and fundamental rights of the accused persons (property and privacy), generally, they have been observed as a highly positive development.
    - Another important novelty put forward by the third judicial reform package is liberty judgeships which are entitled to decide upon "protective measures" such as detention,

appeals to detention, search, seizure and interception of communication during the investigations. Thus, it is ensured that the judge who issued protective measures about the accused person during investigations cannot participate in the trial of the case.

- Liberty judgeships are entitled to deal with the decisions independently concerning "protective measures" such as search, seizure, arrest, detention and interception of communication and the appeals to these decisions. Liberty judges cannot participate in the trials in order to protect the impartiality of the trying judges.
- Liberty judges were provided with particular in-service training. Some judges made visits to "liberty courts" in Italy to be informed about their practices.
- The negative attitude of judges in reasoning pre-trial detention orders could be positively changed by the third package of judicial reform, that introduced liberty judges with the sole task to devote time and efforts to reasoning "protective measures".
- There are judges with similar competences in EU Member States (for example in Italy). Liberty judges were particularly trained for this new task.
- Liberty judges, entrusted independently with handling decisions and objection against decisions regarding protection measures such as search, seizure, arrest, detention, and detection of communication, should be re-established.

IV. DECISIONS OF CONSTITUTIONAL COURT

A. Decisions on Norm Reviews

37. Upon the application for annulment of law amendments regarding the establishment of criminal judgeships of peace, the issue was examined by the Constitutional Court.
38. According to the decision of the Constitutional Court 2014/164 E., 2015/12 K. **(Annex-5):**
    - It is observed that the formation of the criminal judgeships of peace enables the decisions, which need to be taken by judges, to be taken by judges specialized in the investigation phase, is in the public interest. For this reason, the regulation is not against the principal of rule of law,
    - The objected rule which provides for the establishment of criminal judgeships of peace in order for the decisions, which need to be taken by a judge, to be taken by specialized judges during investigations and which entitles the judgeships to "take decisions which need to be taken by judges during investigations", does not aim to designate the judicial authority which will hear the case after the commission of a crime. Furthermore, the rule is applicable to all of the cases within its range following its coming into force and therefore it is not against the principal of natural judge.
    - Peace judges in shall be assigned by High Council of the Judges and Prosecutors (HSYK) as well as all other judges and they have the security of tenure of judges. Therefore, there is no reason to suggest that peace judges in have a different status than other judges regarding their independence and that their independent status is undermined.
    - It is understood that the criminal judgeships of peace, along with other courts, are organized in line with the principles of security of tenure of judges and the independence of the courts as ruled in the Constitution. Considering their structure and functioning, there is no reason to suggest that they cannot act independently. However, if it is indicated that a judge is not deciding objectively in the light of concrete, objective and convincing evidence, there are procedural provisions which prevent the judge from hearing the case,
    - The regulations in relation to the legal remedy against the decisions of criminal judgeships of peace are within the scope of discretionary power of the law-maker and the rules providing that the criminal judgeships of peace should examine the objections against the decisions of a criminal judgeship of peace in order to maintain specialization and consistency, are not against the principle of the rule of law and the right to a fair trial. Thus, the Constitutional Court decided that rules regulating the Criminal Judgeships of Peace do not violate the principle of natural judge and rejected the application for their annulments.

39. Besides, an application for annulment was lodged to the Constitutional Court claiming that, the duty of three judged high criminal courts, to finalize applications for annulment against decisions of non-prosecution was delegated to peace judges and it is against the principle of natural judge and affects the fight against crime negatively.
40. The Constitutional Court held in its decision numbered 2014/146 E. and 2015/31 K. **(Annex-6)** that, criminal judgeships of peace were entitled as authorities for appeal against decisions of non-prosecution in order to reduce the workload of high criminal courts. Therefore, rules authorizing the criminal judgeships of peace to function as authorities for appeal against decisions of non-prosecution do not aim to designate the judicial authority which will try the case after the commission of a particular crime and shall be applied to all cases within their range as of the entry into force. Thus, considering the reasons above, the court rejected the application for annulment on the grounds that this implementation is not contrary to principle of natural judge.

B. Individual Applications

41. Individual applications were submitted to the Constitutional Court on allegation that right to a fair trial is violated because criminal judgeships of peace violate principles of natural, impartial and independent judge and their decisions cannot be appealed against in higher courts.
42. The Constitutional Court examined the complaints within the framework of in question cases in the individual application file of Hikmet Kopar and Others (Appl. No. 2014/14061) **(Annex-7).**
43. General Assembly of the Constitutional Court ruled in its decision taken upon this application that, criminal judgeships of peace perform their duties based on a general legal regulation and as a result of appointment made by HCJP. Therefore, it is not possible to accept that the relevant judges did not act impartially and independently for political or personal reasons, considering the phenomena, the reality and nature of which cannot be definitely determined, and the assessments and interpretations about political debates, without the existence of a concrete prejudiced proceeding and attitude towards the applicants. On similar grounds, the allegations that applications to annul detention orders are submitted to criminal judgeships of peace which raise doubts concerning their impartiality and independence and higher courts cannot examine the state of being detained, are inadmissible since they are devoid of basis.
44. The Constitutional Court ruled other applications concerning the same issue inadmissible for similar grounds. (See, Individual Application of Hidayet Karaca Appl. No. 2015/144, 14/7/2015 **(Annex-8),** Individual Applications of Mehmet Fatih Yiğit and Others Appl. No. 2014/16838, 9/9/2015 **(Annex-9),** Individual Application of Mustafa Başer and Metin Özçelik, Appl. No. 2015/7908, 20/1/**2016 (Annex-10)** and Individual Application of Mehmet Baransu, Appl. No. 2015/7231, 17/5/2016 **(Annex-11).**

V. EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

45. The European Court of Human Rights (ECtHR) has evaluated the characteristics which should be obtained by the court lifting the custody, issuing the detention order or reviewing the appeal to detention, in its case-law.
46. According to paragraph 3 of Article 5 of the ECHR, a detained person shall be brought promptly before a judge or other officer authorized by law to exercise judicial power, if the detained is not released at the end of the maximum custodial limit at the latest. "The judge" or "officer authorized by law to exercise judicial power" means "the competent legal authority" mentioned in subparagraph (c) of the first paragraph of Article 5 of the Convention. ECtHR examines whether the suspects/accused persons are brought before a judge or other judicial officer who have met the conditions laid down in the third paragraph of Article 5 of the Convention in terms of their status, functions and trial procedures. Above all, the judge or judicial officer shall be independent from the executive body and the parties of the case. Secondly, according to ECtHR, the judge or officer authorized to exercise judicial power should be entitled to listen to the person brought before them and examine whether it is

appropriate to detain that person based on legal standards. If the person's detention is not appropriate, this judicial officer should be entitled to take binding decisions to release the detained person (See Schiesser v. Switzerland, December 4, 1979, par 31). Thus, in accordance with the third paragraph of Article 5 of the Convention, the judge or officer authorized to exercise judicial power should be entrusted with examining the merits of the case.

47. To sum up, a judge should be able to 1). check if there is reasonable suspicion about the commission of the crime by a person, 2). search if the reasons of detention provided in the domestic law exist, 3). listen to the suspect by organizing a hearing and 4). decide to detain the person, if the circumstances require detention, if not, should be able to decide to release her/him.
48. The fourth paragraph of Article 5 of the Convention guarantees a person deprived of his/her liberty by arrest or detention, a domestic remedy by stating that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. The court mentioned in the fourth paragraph of Article 5 of the Convention should be entitled to decide on the lawfulness of detention and if it is not lawful, should be entitled to order release (See Weeks v. United Kingdom, par. 61, March 2 1987).
49. The court to which the detained may appeal, within the framework of the fourth paragraph of Article 5 of the Convention, do not have to be a classical court that is integrated into the judicial mechanism of a country. However, the court in question should provide some procedural guarantees and be of "judicial nature". Therefore, the above-mentioned court should be independent from the executive body and parties of the case (See Stephens v. Malta, No. 11956/07, par. 95, April 21, 2009 and Weeks v. United Kingdom, par. 61, March 2, 1987).
50. Within the framework of Article 5/4 of the Convention, "the court" should be authorized to release the accused if the detention is deemed unlawful; the authority to make recommendation is not enough (See Benjamin and Wilson v. United Kingdom, No. 28212/95, par 33 and 34, September 26, 2002). The proceedings should be adversarial in the court examining the appeal to detention and "equality of arms" principle should be obeyed between the parties (See Reinprecht v. Austria, No. 67175/01, par. 31; A. and Others v. United Kingdom. [BD], No. 3455/05, par. 204).
51. The court indicated in its decision *Campell and Fell v. United Kingdom,* the criteria it takes into consideration during evaluating the condition of independence: While evaluating the independence of an organ, the court shall consider the procedure of appointment, term offices of members of the organ, whether they have guarantees against pressure from outside and whether this organ is independent (See Campbell and Fell v. United Kingdom, No. 7819/77, par. 78, June 28, 1984).
52. Impartiality is not being prejudiced or biased. In order to meet this condition, the court should comply with both subjective and objective tests. (See *Hauschildt v. Denmark*, No. 10486/83, 24.05.1989). The court separated two circumstances which would cause violation of the condition of impartiality in its decision *Kyprianou v. Cyprus*. These are the circumstances where there might be "functional or personal" bias. The first one is where one person "has different functions within the scope of judicial activities or has hierarchical or other bonds with other judicial actors" and this raises reasonable suspicion concerning the impartiality of the court. As to personal bias, whether the judge's personal attitude raises such suspicion or he acts with personal bias should be evaluated (See *Kyprianou v. Cyprus*, No. 73797/01, December 15, 2005).
53. Peace judges in criminal matters are appointed by HCJP based on their career, competence and qualification just as other judges. Likewise, peace judges in criminal matters have the security of tenure of judges provided in Article 139 of the Constitution and they are organized in compliance with the independence of courts and security of tenure of judges, just as all other courts, as prescribed in the Constitution. There is no reason to suggest that criminal judgeships of peace are not impartial in terms of their structure and functioning, besides if it is proven by concrete, objective and convincing evidence that a judge lost his impartiality,

there are procedural provisions in our procedure law which will prevent him from trying the case.

54. The decisions of the Constitutional Court and the above-mentioned ECtHR case-law regarding the similar cases demonstrate that criminal judgeships of peace functioning since 2014, are in line with the principles of natural judge, independence and impartiality in terms of the procedures of appointment, functions, powers to take decisions and working conditions of peace judges in criminal matters.

VI. INFORMATION REGARDING THE PROTECTIVE MEASURES ISSUED BY CRIMINAL JUDGESHIPS OF PEACE

55. If demanded by the Public Prosecutor during the investigation, Peace Judges in Criminal Matters may issue the following protective measures:
    - In accordance with the first paragraph of Article 60 of CCP, a witness, who refrains from testimony or from taking the oath without a legally accepted ground, may be subject to disciplinary imprisonment not exceeding a period of three months while the lawsuit is pending, in order to make him take the oath or to take the witness stand. If the individual complies with his duties as a witness, he shall be released immediately,
    - In accordance with the third paragraph of Article 69 of the CCP, during the investigation phase, the motion to exclude expert hat has been denied by the public prosecutor shall be examined by the Peace Judge in Criminal Matters,
    - In accordance with the first paragraph of Article 74 of the CCP, if strong indications of suspicion are present, which tend to show that the suspect or the accused committed the criminal conduct; then in order to clarify whether the suspect or the accused is mentally ill, and if so, the duration of the illness, and whether this affected his actions, the Peace Judge in Criminal Matters during the investigation phase, and the trial court during the prosecution phase, may order the suspect or the accused to be stationed in a public medical center upon the proposal of the expert, after hearing both the public prosecutor and the defense counsel,
    - In accordance with the first paragraphs of Articles 75 and 76 of the CCP, in order to obtain evidence of a committed crime, an order may be issued to conduct a physical bodily examination on the suspect or the accused, or to take sample from his body,
    - In accordance with Article 79 of the CCP, molecular genetic tests can be conducted on the evidence gathered pursuant to Articles 75 and 76,
    - In accordance with the fifth paragraph of Article 91 of the CCP, the examination of the appeals against the written order by the public prosecutor on arrest, taking the individual into custody or on the extension of the custody period,
    - In accordance with the first paragraph of Article 98 of CCP, during the investigation phase, if the suspect does not appear upon a summons, or if it is not possible to serve a summons on him, Peace Judge may issue an apprehension order upon the motion of the public prosecutor and also in case the motion on detention has been rejected and there is an opposition to this decision,
    - In accordance with the first paragraph of Article 101 of CCP, detention orders may be issued during investigation,
    - In accordance with the first paragraph of Article 108 of CCP, during the investigation phase, the status of detention may be examined in time limits not exceeding 30 days each,
    - In accordance with the first paragraph of Article 110 of CCP, during the investigation phase, judicial control can be ordered for the suspect,
    - In accordance with the first paragraph of Article 119 of CCP, search warrant can be ordered except for the circumstances where delay might disrupt the proceedings,
    - In accordance with the first and third paragraphs of Article 127 of CCP, seizure may be conducted except for the circumstances where delay might disrupt the proceedings. Where a seizure was made without a warrant of a judge, the seizure shall be submitted to the judge who has jurisdiction for his approval,

- In accordance with Article 128 of CCP, seizure may be imposed and when necessary, a trustee may be appointed for the administration of real estate, rights and assets receivable which were seized in compliance with this article,
- In accordance with the first paragraph of Article 129 of CCP, communications that are at the post office, may be seized if there is probable cause to believe that these items are comprising evidence of the crime and it is deemed necessary to keep those items in the court during the investigation or prosecution in order to reach the truth,
- In accordance with Article 132 of CCP, in cases where there is a present danger that the seized item is going to be damaged or to suffer a substantial loss of value, that item may be liquidated before the judgment is made,
- In accordance with Article 133 of CCP, in cases where there are strong grounds of suspicion that the crime is being committed within the activities of a firm and it is necessary for revealing the factual truth, a trustee can be appointed with the aim of running the business of the firm during an investigation or prosecution,
- In accordance with the first paragraph of Article 135 of CCP, interception, listening and recording of communication, pursuant to the fifth paragraph, the location of the mobile phone may be established in order to be able to apprehend the suspect,
- In accordance with Articles 139 and 140 of CCP, undercover investigator may be appointed and surveillance by technical means may be ordered,
- In accordance with the second paragraph of Article 153 of CCP, the power of the defense counsel to examine the file and to take copies of documents may be restricted under certain circumstances,
- In accordance with the second paragraph of Article 154 of CCP, defense counsel's interview with the suspect may be limited to 24 hours under certain circumstances,
- In accordance with Article 163 of CCP, in cases where the offense is detected in the act, as well as where delay might disrupt the proceedings, if the public prosecutor is out of reach or the incident is broad and comprehensive and therefore would be beyond the scope of the duties of the public prosecutor, all investigatory proceedings can be conducted,
- In accordance with the first paragraph of Article 173 of CCP, the decisions of non-prosecution taken by the public prosecutors can be examined,
- In accordance with the first paragraph of Article 248 of CCP, with the aim of getting the fugitive suspects to get in contact with the public prosecutor, his belongings in Turkey and his rights and credits may be seized, in line with the purpose,
- In accordance with Article 259 of CCP, decision of confiscation shall be given for the items that are not contraband and are only subject to confiscation.

56. Apart from these measures, Peace Judges in Criminal Matters issue measures such as blocking access to internet pursuant to "*the Law on Organizing Online Publications and Fighting Against Crimes Committed through Online Publications*".

VII. CONCLUSION

57. The purpose of establishing criminal judgeships of peace is to ensure specialization and unity in practice regarding the investigatory proceedings and standardization of the decisions taken on protective measures.
58. This amendment was made especially because the courts in our country were under heavy workload, judges of criminal courts of peace used to conduct trial proceedings and also were entrusted with issuing protective measures during investigations, thus, due to their excessive workload, they were not able to examine the requests about the ongoing investigations properly. Furthermore, prior to the amendment, when demands of protective measures are lodged after the working hours, they used to be handled by judges of other courts, based on the turn of duty. In that case, civil judges who did not deal with criminal procedure for years, were supposed to make decisions concerning protective measures, in particular restriction of liberties, thus causing differences in practice. Considering the above-mentioned facts, with the amendment made by the Law No 6545; duties of criminal courts of peace concerning

trial proceedings were delegated to criminal courts of first instance; other duties and jurisdictions regarding investigatory proceedings such as taking under surveillance, physical examination of the suspect, taking samples from the body, search, seizure, arrest and detention were delegated to criminal judgeships of peace. Therefore, the purpose of these changes is to ensure specialization about protective measures, guarantee fundamental rights and freedoms more effectively and conduct more fair trial proceedings.

59. The establishment of criminal judgeships of peace helped prevent the judge who will try the case in the future, from handling the demands of protective measures during investigation. It also prevented occurring of some serious problems, in particular violation of the right to a fair trial. The judge issuing protective measure for the suspect could not write his reasons in detail as that would mean acting with bias, nor could he write reasons with few detail as this would raise criticism as to the appropriateness of the measure. Therefore, this situation has been prevented. Indeed, many decisions of ECtHR mention this subject. The establishment of criminal judgeships of peace has played an important role in overcoming such criticism. Peace judges in criminal matters are specialized only in proceedings of the investigation phase. This ensures the right to a fair trial and also guarantees the exercise of the rights and authorities by the parties of the trial, in line with the principle of equality of arms.
60. There are provisions in detail in the Laws No. 5235 and 5271 concerning the duties, jurisdictions and formation of specialized, independent and impartial Peace Judges in Criminal Matters who do not have duties in the prosecution phase. Thus, the principle of clarity and definiteness, one of the most important characteristics of a democratic state governed by rule of law is observed in compliance with the standards prescribed in the ECHR. The envisaged system offers important guarantees in regard to fundamental rights and freedoms of individuals.
61. Before the establishment of criminal judgeships of peace, it is unlikely that criminal courts of peace could both conduct trial proceedings and examine properly the detention requests lodged in the investigation phase. Criminal judgeships of peace were established to overcome this situation and since they began functioning, the detention orders have decreased substantially in our country compared to previous years **(Annex-12)**. This drop in the number of detention orders shows that criminal judgeships of peace carry out more detailed examinations on protective measures which constitute their principle duty. Since the criminal judgeships of peace started to function, due to the fact that concerns about acting with bias have been overcome, the detention orders seem to contain more detailed reasons.
62. Since the judgeships started to operate, judges have been able to examine the investigation files comprehensively, thus judicial controls were imposed as an alternative to the measure of detention. In that way, important steps were taken to prevent any violation to individual rights and freedoms which might arise from detention orders.
63. After evaluating the countries of Council of Europe, it is understood that similar implementations exist in some countries of the Council of Europe. For example, decisions in regard to detention, extension of detention, release, judicial control, search, seizure and interception of communication are taken by "liberty and detention judges". These judges perform the duties assigned to them apart from their principle duties. Investigation judges exist in the Netherlands who are entitled to deal with protective measures to be taken only during the investigation phase and do not participate in the trials.

ANNEX- 1

THE LAW CONCERNING THE ESTABLISHMENT, DUTIES AND JURISDICTION OF THE FIRST INSTANCE COURTS OF CIVIL JURISDICTION AND REGIONAL COURTS OF APPEAL

Law No: 5235
Date of Acceptance: 26./0.2004

Duty of the Criminal Judgeship of Peace

ARTICLE 10- Without prejudice to the cases prescribed by law, the implementation of the provisions in relation to imprisonment up to two years (including two years) and the judicial fines related to these fines, the judicial fines to be imposed independently and safety measures shall be vested in the jurisdiction of criminal judgeships of peace.

ANNEX- 2

THE LAW CONCERNING THE AMENDMENTS TO CERTAIN LAWS TO INCREASE THE EFFICIENCY OF JUDICIAL SERVICES AND CONCERNING THE ADJOURNMENT OF CASES AND PUNISHMENTS FOR OFFENSES COMMITTED THROUGH THE MEDIA

Law No: 6352
Date of Acceptance: 02/07/2012

ARTICLE 75- Article 10 of the Law No. 3713 has been amended with its title as below.
"Determination of duty and district of jurisdiction, the procedure of investigation and prosecution"

ARTICLE 10- The cases filed against the offenses within the scope of this Law; shall be heard in high criminal courts, the district of jurisdiction of which will be comprised of more than one province and determined by the High Council of Judges and Prosecutors upon the proposal of the Ministry of Justice. The president and members of these courts cannot be appointed to other courts or duties by justice commissions of civil jurisdiction.

The provisions regarding the people to be tried by the Constitutional Court and the Court of Cassation and the duties of military courts shall be preserved.

Concerning the offenses within the scope of this Law;

a) The investigation shall be carried out by the public prosecutors who are assigned to the investigation and prosecution of these offenses by the High Council of Judges and Prosecutors. These public prosecutors cannot be assigned to other courts or duties by the Chief Public Prosecutor's Office.
b) Investigations shall be launched directly by public prosecutors concerning the offenses regulated in articles 302, 309, 311, 312, 313, 314, 315 and 316 of Turkish Criminal Code despite the fact that the offenses are committed on duty or because of the duty. Provision in article 26 of the Law on State Intelligence Services and the National Intelligence Organization No. 2937 dated 1/11/1983 shall be preserved.
c) Adequate number of judges shall be assigned to the investigations to take the decisions which need to be taken by a judge, review the objections against these decisions and take only these actions.

ANNEX- 3

THE LAW CONCERNING THE AMENDMENTS TO ANTI-TERRORISM LAW, CODE OF CRIMINAL PROCEDURE AND CERTAIN LAWS

Law No: 6526
Date of Acceptance: 21/02/2014

ARTICLE 1- The provisional article below has been appended to Anti-Terrorism Law No. 3713 dated 12/4/1991.

PROVISIONAL ARTICLE 14- High Criminal Courts operating in accordance with 2nd provisional article of the Law No. 6352 dated 2/7/2012 and high criminal courts authorized in accordance with article 10 of Anti-Terrorism Law which was annulled by this Law, were abolished on the date of entry into force of this Law.

The president and members in the high criminal courts which were abolished and the public prosecutors and judges assigned to the investigation of offenses within the scope of Anti-Terrorism Law shall be assigned by the High Council of Judges and Prosecutors to a duty determined in accordance with the fifth paragraph and with reference to their acquired rights, within ten days after the termination of their office.

The investigation files, conducted by public prosecutors authorized in accordance with article 10 of Anti-Terrorism Law which was annulled by this Law shall be delegated to the competent Chief Public Prosecutor's Offices on the date of entry into force of this Law.

The pending files in the high criminal courts which operate in accordance with the 2nd provisional article of the Law No. 6352 and the high criminal courts authorized in accordance with article 10 of Anti-Terrorism Law annulled by this Law shall be delegated to the competent and authorized courts on the date of the entry into force of this Law in order to continue the prosecution. Subsequently, the examination of the files in the chambers of the Public Prosecutor's Office and the Court of Cassation continues.

ANNEX- 4

THE LAW TO AMEND TURKISH CRIMINAL CODE AND CERTAIN LAWS

Law No: 6545
Date of Acceptance: 18/06/2014

ARTICLE 48- Article 10 of the Law No. 5235 has been amended with its title as below.
"Criminal Judgeship of Peace

ARTICLES 10- Without prejudice to the cases prescribed by law, the criminal judgeships of peace are established to take the decisions and actions which need to be taken by a judge and review the objections to their decisions.

More than one criminal judgeship of peace can be established in the districts where the workload requires it. In this case, the criminal judgeships of peace are enumerated. The judges assigned independently to a criminal judgeship of peace cannot be assigned other duties or to other courts by justice commissions of civil jurisdiction.

There shall be a director of publications and adequate number of personnel in a criminal judgeship of peace.

Criminal judgeship of peace shall be established in every provincial center and the districts determined by the Ministry of Justice in accordance with the geographic condition and the workload with the positive remark of the High Council of Judges and Prosecutors.

Criminal judgeship of peace shall be given the name of their province or the district.
The district of jurisdiction of the criminal judgeship of peace shall be within the administrative boundaries of the provincial centers and districts along with the districts legally attached to them.

The district of jurisdiction of the criminal judgeship of peace referred to with the name of its province and district within the boundary of the metropolitan municipality in the provinces where there are high criminal courts and metropolitan municipality, shall be determined by the High Council of Judges and Prosecutors upon the proposal of the Ministry of Justice regardless of the provincial or district boundaries.

The High Council of Judges and Prosecutors shall decide upon annulling a criminal judgeship of peace or altering its district of jurisdiction considering the geographic condition and the workload upon the proposal of the Ministry of Justice."

ANNEX- 5

DECISION OF THE CONSTITUTIONAL COURT

Case Number : 2014/164
Decision Number : 2015/12
Decision Date : 14.1.2015
Official Gazette Date-No: 22.5.2015-29263

OBJECTING AUTHORITY: Eskisehir 1st Criminal Judgeship of Peace
(C.2014/164, C.2014/174)

SUBJECT-MATTER OF OBJECTIONS: It is claimed that:

1- Article 10 of the Law dated 26.9.2004 and No. 5235 on the Establishment, Duties and Jurisdiction of First Instance Courts of Civil Jurisdiction and Regional Courts of Appeal amended by Article 48 of the Law dated 18.6.2014 and No. 6545,

2- Subparagraphs (a) and (b) of the paragraph (3) of Article 268 of the Criminal Procedure Law dated 4.12.2004 and No. 5271,amended by Article 74 of the Law dated 18.6.2014 and No. 6545,

are contrary to Articles 2, 19, 36 and 37 of the Constitution and their annulments are requested.

I- FACT

The Court deciding that the objected provisions are contrary to the Constitution in the course of the examination of the objection made against the issued arrest warrant and the request for arrest warrant for suspects, applied for the annulment of the provisions.

II- GROUNDS FOR OBJECTIONS

A- Grounds for the application for objection No. C. 2014/164:

"1- In accordance with the regulation which entered into force after being published in the Official Gazette dated 28 June 2014, No.29044, criminal courts of peace were replaced with criminal judgeships of peace, this new system is considered against the principles such as "the principle of rule of law", "the principle of personal liberty and security", "the principle of natural judge", "the right to a fair trial" laid down in Articles 2, 19, 36, 37 of the Constitution and due to the fact that the interrogation is an urgent process, interrogation documents were concluded without prejudicial question. I request the annulment of Article 48 of Law No.6545 on the grounds below.

2- Article 48 of the Law No.6545 amended Article 10 of the Law No.5235 along with its title. The amended article is as follows:

Criminal Judgeship of Peace

Article 10- (Amendment date: 18/6/2014, Article: 6545/48)

Without prejudice to the cases prescribed by laws, criminal judgeship of peace was established in order to take the decisions which need to be taken by a judge in the investigations, perform the duties of a judge and review the objections against its decisions.

More than one criminal judgeship of peace can be established in a place if the workload requires it. In this case, criminal judgeships of peace are numbered. Judges independently assigned to the criminal judgeships of peace shall not be assigned to other courts or duties by justice commissions in civil jurisdiction.

There are an editor and an adequate number of personnel in the criminal judgeship of peace.

The Ministry of Justice shall establish criminal judgeship of peace in every provincial center and with regard to the geographical conditions and the workload, in every district by taking the positive opinion of the High Council of Judges and Prosecutors.

Criminal judgeship of peace shall be given the name of their province or district.

The district of jurisdiction of criminal judgeship of peace is within the administrative borders of districts legally attached to the provinces and districts where they are situated.

In the cities where high criminal courts and metropolitan municipality are located, district of jurisdiction of criminal judgeship of peace named after the province and the district within the borders of metropolitan municipality shall be determined regardless of borders of the province or the district by the High Council of Judges and Prosecutors upon the proposal of the Ministry of Justice.

The High Council of Judges and Prosecutors shall decide upon the proposal of the Ministry of Justice whether to remove criminal judgeship of peace or change its district of jurisdiction by taking into consideration the geographical condition and workload.

Thus, criminal courts of peace were removed and instead criminal judgeship of peace was established. The fundamental duties of this judgeship are taking the decisions that need to be taken by a judge in the investigations, perform the duties and review the objections made against its decisions. Therefore, it was provided that the requests of protection measure such as search, seizure and arrest warrant in particular are reviewed only by these judges.

Judges assigned to judgeships more than one of which will be established in the districts determined by taking into account the geographical condition and workload and in every province shall not be assigned to any other duty. Their judicial boundaries are within the provincial centers, districts and the administrative boundaries of districts legally attached to them and the district of jurisdiction of the provinces with metropolitan municipalities shall be determined by the High Council of Judges and Prosecutors.

Another fundamental duty of these judgeships was determined through the amendment made in Article 173 of the Law no. 5271 by Article 71 of the Law mentioned. The amended article is as follows:

Objection against the decision of the public prosecutor:

Article 173- (1) Victim may object to criminal judgeship of peace where high criminal court is located, in the judicial district of which the public prosecutor issuing the decision is on duty, within fifteen days after the notification on decision not to prosecute.

(2) Facts and evidence which may require filing of a criminal case shall be indicated in the petition of objection.

(3) (Amendment date: 18/6/2014, Article: 6545/71) If criminal judgeship of peace finds the extension of inquiry necessary to make its decision, it may make a request to chief

public prosecutor's office by clearly indicating the subject. If the grounds are not sufficient to file a criminal case, it reasonably rejects the request; sentences the petitioner to pay the court expenses and sends the file to the public prosecutor. The public prosecutor announces the decision to the petitioner and the suspect.

(4) (Amendment date: 25/5/2005, Article: 5353/26) If criminal judgeship of peace finds the request suitable, the public prosecutor issues bill of indictment and presents to the court.

(5) This provision is not applicable in the circumstances which public prosecutor exercises his/her judicial discretion not to file a criminal case.

(6) In the case that the objection is rejected; filing of a criminal case due to new evidence by public prosecutor depends on the decision of criminal judgeship of peace which made a decision about the previous petition.

Therefore, these judgeships shall also be given the authority of reviewing the objections against decisions of non-prosecution issued within the district of jurisdiction *of these judgeships.*

Thus, one or several judges who will be assigned to these judgeships according to their workload shall be authorized to examine all search and seizure decisions, arrest and the objections made against it in the investigations. The final judgment with regard to the objections against decisions of non-prosecution previously examined by the High Criminal Courts can be given by these judgeships.

These regulations considering the regulations made in the Law on the High Council of Judges and Prosecutors which de facto attach this Council to the Ministry of Justice, it is evident that the fate *of the investigations conducted in every part of Turkey by a limited number of judges were left to the initiatives of political power through this limited number of judges. Therefore, judges are assigned by the approval of "appropriate" people to judgeships, the numbers of which are limited with one, two or several judges in accordance with the extent of the district of jurisdiction, as a result of that, it is now possible that investigations going on* in entire Turkey *are prevented before they begin, influenced or directed. Because issuing search and seizure decisions may not be possible with regard to the political identities of the people against whom investigations are carried out, thus, evidence may not be gathered; arrest measure may never be applied to when necessary or on the other hand, it will be possible that the members of the opposition are oppressed with other intentions, assimilated and deprived of their freedom for a certain period of time.*

Taking the judgeships under control was aimed through the new regulated system and appointments which were made accordingly, and it was made almost impossible to launch investigations against members of the ruling party (politicians, municipalities, etc) and conduct them properly. As far as the opposition to the political power is concerned, this system is thought to be used as a weapon through investigations which will be conducted under arrest and measures were not implemented against it. These are contrary to the principles of separation of powers, impartiality and independence of the judiciary, thus the principle of rule of law.

Besides, through the new regulations, personal liberty and security is not guaranteed as it should be and it was made a lot easier now to influence every investigation carried out. By means of these regulations, a system in which a limited number of people will be entitled to perform very important duties such as objecting to decisions not to prosecute, arrest, search and seizure. Such a system without a doubt *falls behind the global standards with regard to*

personal freedoms, it will be enough to simply compare the provisions prior to the regulation and after the regulation for understanding it.

Therefore, these new regulations are contrary to the Constitution by their nature and in many aspects. The relevant articles are listed as follows:

CONCERNING THE RULE OF LAW AND THE PRINCIPLE OF NATURAL JUDGE

Article 2 of the Constitution titled "Characteristics of the Republic" is as follows:

"The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Ataturk, and based on the fundamental tenets set forth in the preamble."

Article 37 of the Constitution titled "Principle of natural judge" is as follows:

"No one may be tried by any judicial authority other than the legally designated court.

Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established."

According to the Constitutional Court, state governed by rule of law set forth in Article 2 of the Constitution "is based on human rights and freedoms which it protects and strengthens, actions and proceedings of which are in line with law, establishes a fair legal order, maintains and develops it in every field, avoids any situation and attitude contrary to the Constitution, regards the law above all government bodies, subject to the Constitution and laws, open to the judicial control."

According to the Court, "one of the fundamental principles of the state governed by rule of law is 'the principle of security of the law'. Security of the law requires that the norms are foreseeable, individuals can have confidence in the government and in all of its actions and procedures and the government avoids any actions in legislative arrangements which may undermine this confidence. In a state governed by rule of law, legal documents should be regulated in a way that relevant people can predict the consequences of a certain proceeding to a certain extent under present conditions. According to the principle of 'Clarity', legislative arrangements should be clear, explicit, applicable and objective to avoid any suspicion and uncertainty, also should include protective measures against arbitrary implementations of public authorities."

One of the most important components of the state governed by rule of law is the principle of natural judge. Because the principle of natural judge is one of the prerequisites to maintain security of the law, one of the subcomponents of the state governed by rule of law. Individuals cannot act in safety within a system where the principle of natural judge does not exist. In case of a legal dispute, individuals should know which judicial authority will make the judgment and with respect to which provisions. Otherwise, security of the law and legal predictability cease to exist. As set forth in the decisions *of Constitutional Court, if the security of the law requires that the norms are foreseeable, individuals can have confidence in all actions and procedures of the government, and the government avoids any action which may undermine this confidence in the legislative arrangements, the principle of natural judge which is the compulsory prerequisite of the security of the law should certainly be established.*

Thus, British philosopher of law A.V. Dicey clearly stated that the principle of natural judge is a compulsory component of a state governed by rule of law by saying that one of the fundamental components of the state governed by rule of law is that every individual is subject

to natural law and courts. According to F. Hayek, one of the prominent philosophers in this day and age, state governed by rule of law requires that state complies with certain permanent provisions which were previously declared in all of its actions and procedures. These provisions determine how the political power should act in certain situations and as a result, provide predictability, thus, security of the law for individuals. According to Hayek, the constitutional state indicates prohibition of arbitrariness by its nature. The writer thinks that security of the law constitutes the core of the constitutional state and in this sense any regulation threatening the security of the law is contrary to this principle.

As mentioned above, the principle of natural judge is one of the most important components of a constitutional state. The principle of natural judge is indicated in the Constitutional Court decisions *and doctrines as determining by law the judicial authority which will hear the case before the commission of the crime or filing of a lawsuit. In other words, the principle of natural judge prevents the forming of judicial authorities after the conflict arises or assignment of judges with regard to the parties to the case.*

The principle of natural judge one of the fundamental components of the constitutional state was regulated in the Constitution of 1982. Under Article 37 of the Constitution, everyone shall benefit from the principle of natural judge. In Article 37 of the Constitution, it is stated that "No one may be tried by any judicial authority other than the legally designated court. Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established." As set forth in the previous decisions *of the Constitutional Court, 'the principle of natural judge' is defined as 'determining by law the judicial authority which will hear the case before the commission of the crime and the emergence of the conflict'. In other words, the principle of natural judge prevents the formation of judicial authorities after the conflict arises or assignment of judges with regard to the parties to the case.*

In this regard, according to the Court "For the legal structuring of a judicial authority such as its formation, duty, proceedings and trial procedure to comply with the principle of natural judge, determining the authority by law is not enough on its own. Moreover, the judicial authority should be designated before the conflict occurs." Therefore, within the context of the principle of natural judge, "determining before wards" along with "lawfulness" is included. Furthermore, according to the Court, "the principle of natural judge regulated in Article 37 forms the basis of 'right to a fair, independent and impartial trial' which is the most fundamental element of the right to a fair trial set forth in Article 36 of the Constitution."

The principle of natural judge which prevents the formation of extraordinary tribunals does not prevent the formation of specialized courts which follow particular investigation and prosecution procedures. In other words, extraordinary tribunals are not the same as specialized courts. In a legal system, judicial authorities which follow particular prosecution and investigation procedures may be established in order to fight against certain crimes effectively. For instance, such specialized courts may be established in order to fight terrorism and organized crimes effectively. However, in that case, specialized courts should be established by law before the commission of the crime, thus, should not have the status as an extraordinary tribunal.

The principle of natural judge is valid in all trials and much more important in criminal proceedings. Criminal investigations and prosecutions constitute a direct and radical intervention to freedom which is one of the fundamental rights of the individuals. Because personal freedom is very important, individuals should be provided with more enhanced guarantees in the criminal proceedings. The principle of natural judge is the primary guarantee of the guarantees mentioned. A judicial authority should be established and function properly for a fair and guaranteed trial. Otherwise, guarantees such as trial within a reasonable time, equality of arms and contradictory trial in an independent and objective judicial authority within

the scope of right to fair trial will not have any importance. That is to say, all of these guarantees will be functional if natural courts exist. Therefore, Constitutional Court indicated in its various decisions that the principle of natural judge constitutes the basis of the right to a fair trial.

Assessment of Compatibility of the Relevant Provisions with the Constitution

Article 10 of the Law No.5235 was amended by Article 48 of the Law No.6545 dated 18/6/2014, "criminal courts of peace" were annulled and instead without prejudice to the cases prescribed by laws, criminal judgeships of peace were established in order to take the decisions which need to be taken by a judge in the investigations, perform the duties of a judge and review the objections against its decisions. Under Article 74 of the Law No.6545, criminal judgeships of peace will review the objections made against the relevant decisions in relation to protection measures.

Criminal judgeship of peace was established as a new judicial authority by Article 46 of the Law No 6545. Whereas it appears that criminal judgeships of peace were established to investigate all criminal offenses designated by Turkish Criminal Law No.5237, it is clearly known by the public opinion that their primary objective is to investigate security officers working in the investigations of corruption. Indeed, some politicians plainly stated that investigations would be opened against the security members in relation to allegations of illegal wiretapping and they would be tried, long before the new judicial authorities were established. Again long before the establishment of the judicial authorities in question, investigations were launched in different provinces in relation to allegations of illegal wiretapping, consequently trial without arrest of security members were decided. Because this counter move against the investigations did not receive the necessary reaction from the public opinion, other legislative arrangements were made such as the formation of criminal judgeships of peace.

Certain politicians were not pleased with the decisions of natural judicial authorities in the legal system and, within this framework, legislative arrangements which would enable them to achieve their aims were realized. Within these arrangements, criminal court of peace, one of the natural judicial authorities in the criminal justice system was annulled; instead criminal judgeships of peace were established in order to make the necessary decisions in the investigations in relation to the allegations against security officers. The arrangement in its present form violates the principle of natural judge which the people against whom the investigations are carried out should enjoy. Because, instead of the natural courts which would follow the necessary procedures, criminal judgeships of peace with an extraordinary nature which are authorized to conduct the investigations on its own were established. Thus, people against whom investigations are carried out are deprived of their rights of predictability and security of the law.

Moreover, Article 74 in relation to the regulation of objections made against the decisions of criminal judgeship of peace is a violation of the principle of natural judge. For, according to the article, criminal judgeship of peace is again designated as the judicial authority to decide upon the applications for objection. Judgeships have a limited number of councils and only suitable judges are assigned to them, therefore, results of the objections against them should not be expected to be in line with the law.

As a result of the explanations above, regulations in Articles 46 and 74 of the Law No. 6545 are contrary to Articles 2 and 37 of the Constitution.

CONCERNING THE RIGHT TO PERSONAL LIBERTY AND SECURITY

Under Article 19 of the Constitution, the right to personal liberty and security is guaranteed and it was ruled that no individual can be deprived of their liberty arbitrarily. In the paragraphs two and three, it is stated that individuals can be deprived of this right in exceptional

cases the forms and conditions of which are set forth in the law. The objective of this article is to prevent the arbitrary deprival of the liberty of individuals. Therefore, limitations that may be imposed on personal liberties in exceptional cases set forth in the article should be in line with the purpose of the law and should not pave the way to arbitrary implementations.

Under the paragraph five of the same article, the person arrested or detained shall be brought before a judge within at latest forty-eight hours and in case of offences committed collectively within at most four days; in the paragraph eight, persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful.

In case of serious violation of personal liberties such as detention, arrest, rejection of the release request, continuation of detention, the guarantees in the article should be provided for the relevant people. Arrest in particular is a protection measure which seriously restricts the personal liberties, therefore, if a judge who is absolutely independent and impartial makes the decisions, and if the objection against the arrest warrant is decided upon by a judge or a committee of judges of the same nature, this serves as a strong guarantee for the individual facing this measure.

However by means of the legislative arrangements, a closed circle consisting of 2-6 judges of criminal judgeship of peace was established. If the decision of one of them is objected against, the other judge in the closed circle is entitled to make the final judgment.

For instance while seven judges of criminal judgeship of peace and seven judges of criminal court of first instance were in charge of investigation, search, arrest and objections and three judges were in charge of decisions of non-prosecution, after the regulations, all of these duties are now performed by two judges in Eskisehir. The situation in Istanbul and Ankara is more worrying.

Certainly this regulation cannot be an effective method concerning arrests and objections against them. Taking into account the assessment of objections, investigation of the suspects without exceeding the maximum amount of time in comprehensive investigations will not be possible with a few judges in the relevant judgeships; consequently it is made impossible to provide the guarantees in Article 19 of the Constitution in time and properly for the individuals. However, the objective of the relevant article is to establish an effective judicial system for the government which will assess speedily the limitations imposed on personal liberties. In the meantime, because of this controversial system ECHR may sentence our country to pay a large amount of compensation.

It appears that the criminal judgeships of peace were established with a completely different intention. Because a short while ago, Article 12 of the Law No. 6526 dated 21/2/2014 amended Article 135 of the Criminal Procedure Law No.5271 and as a result, decisions in relation to the assessment of communication, wiretapping and recording of communication should be taken by high criminal court unanimously and in case of an objection to these decisions, measures should also be taken by a unanimous vote. However, the decisions of arrest which is a serious violation of personal liberty and the objections against them are submitted to a closed circle of people and this is highly contradictory and behind the standards.

Criminal judgeship of peace regulated in Article 10 of the Law No.5235 by Article 48 of the Law No.6545 is contrary to Article 19 of the Constitution, thus should be annulled.

CONCERNING THE RIGHT TO A FAIR TRIAL

Under Article 36 of the Constitution, 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.

Through the amendment in Article 173 of the Law no 5271 made by Article 71 of the Law, the authority to review the objections against decisions of non-prosecution by the public prosecutors shall be vested in the criminal judgeships of peace. It was indicated that in the amended paragraph (3) of Article 173, if criminal judgeship of peace finds the extension of inquiry necessary, it may make a request to chief public prosecutor's office by clearly indicating the subject; in paragraph (4) if criminal judgeship of peace finds the request suitable, public prosecutor issues bill of indictment and presents to the court; in paragraph (6), in cases that the objection is rejected; the public prosecutor is dependent on the decision of criminal judgeship of peace which decided upon the petition previously given in order to file a criminal case because of new evidence.

The fate *of the investigations conducted in the entire country is left to the initiative of this narrow and restricted system. As mentioned above, while decisions of measures in the Criminal Procedure Law enable the potential investigations to be prevented before they begin, objections made against decisions of non-prosecution by the public prosecutor in that judicial authority remain in vain by means of the mentioned regulation. It appears that the objective of the regulation is to neutralize the objections against the court files which could not be concluded because of the interventions of the political power to the judiciary in the investigations against the ruling party, but concluded afterwards by the verdict of non-prosecution as a result of the assignments of chief prosecutors and public prosecutors. This objective is so obvious that it will be enough to read the amendments made in Article 277 titled "Influencing judicial bodies" of the Turkish Criminal Law No. 5237 by Article 69 of the same Bag Bill (No.6545 dated 18/6/2014). As a result of this amendment, the statements "or in a continuing investigation," and "the suspect or" were removed from the first paragraph of the article. Within this context, committed offenses are no longer regarded as crimes in the investigations and committers of crime are offered a kind of amnesty. After that, the problem (!) was resolved completely (!) by the formation of the criminal judgeship of peace. If there is an intervention to the judiciary during the investigations in terms of the criminal law, intervention during the proceedings would not be necessary. Because an intervention to an already vulnerable process consisting of the collection and protection of evidence would be more than necessary to achieve the results that one would need.*

CONCLUSION:

Considering the reasons mentioned above, it is certain that this regulation was brought in order to direct the criminal investigations conducted by a limited number of judgeships instead of serving for the public interest. This is most certainly contrary to the principles such as "right to a fair trial", "the principle of natural judge", "the principle of personal liberty and security", "constitutional state" with regard to the claimants, defendants, suspects and accused people who claim or will claim their rights in judicial bodies. With this regulation leaving almost all investigations in the hands of the political power, one cannot assume that individuals' right to a fair trial is guaranteed.

Article 10 of the Law No.5235 and Article 48 of the Law No.6545 which amended the former are contrary to Articles 2, 19, 36 and 37 of the Constitution and therefore should be annulled.

B- Grounds for the application for objection No. C.2014/174

1- "In accordance with the regulation came into force after being published in the Official Gazette dated 28 June 2014, No.29044, Criminal Courts of Peace were replaced with Criminal Judgeships of Peace, Article 268 of the Criminal Procedure Law regulating the objections against court decisions, is considered against the principles such as "the principle of rule of law", "the principle of personal liberty and security", "the principle of natural judge" "right to a fair trial" laid down in Articles 2, 19, 36, 37 of the Constitution and due to the fact that the objections against arrest should be carried out speedily, interrogation documents were concluded without prejudicial question. I request the annulment of Article 48 of Law No.6545 on the grounds as follows:"

2– Article 268 of the Criminal Procedure Law and its title gained the following form after its amendment by Article 74 of the Law No. 6545.

Procedure of objection and the examining authorities

Article 268- (1) If the Law did not regulate with a special regulation, opposition against the decision of a judge or a court shall be filed through rendering a written application to the authority that rendered the decision or an oral submission to the court clerk that shall be taken into records within seven days after the interested parties had learned about the decision, as ruled in Article 35. The president of the court or the judge shall approve the submission or the signature, which had been taken into the records. The provision of Article 263 is preserved.

(2) The judge or the court the decision of which is objected may rectify the decision if it/he deems the objection suitable; if not, shall delegate the objection to the authority entitled to review the objection within at latest 3 days.

(3) Authorities entitled to examine the objection are as follows:

a) (Amendment date: 18/6/2014, Article: 6545/74) If the decisions of a criminal judgeship of peace are objected against in a region where there are more than one criminal judgeship of peace, the judgeship with the next number is entitled to examine the objection; the judgeship with the first number is entitled to examine the objection against the judgeship with the last number; in the regions where there are no high criminal court and only one criminal judgeship of peace, the criminal judgeship of peace functioning within the district of jurisdiction of the high criminal court is entitled; if there is only one criminal judgeship of peace near high criminal court, criminal judgeship of peace situated next to the nearest high criminal court is entitled.

b) (Amendment date: 18/6/2014, Article: 6545/74) In case that the arrest warrants issued for the first time by the criminal judgeships of peace are objected, procedure in paragraph (a) applies. However, the judgeship which rejected the arrest request cannot examine the arrest warrant as the objecting authority.

c) The high criminal court in the same district of jurisdiction is entitled to examine the objections against the decisions of the judge of criminal court of first instance and in case that there are a lot of chambers of the high criminal court in that region, the chamber with the next number is entitled to examine the objections made against decisions of the high criminal court and its president; the chamber with the first number is entitled as far as the chamber with the last number is concerned; if there is only one chamber of the high criminal court, the authority is vested in the nearest high criminal court.

d) The assessment of objections against the delegated judge is carried out by the president of high criminal court, objections against decisions of the rogatory court are examined

by the president or the court in the same district of jurisdiction in accordance with the statements in the abovementioned subparagraphs.

e) Concerning the objections against the decisions of the criminal department of Regional Court of Appeal and criminal department of Court of Cassation when they were serving as the fundamental courts in the court cases; head of the department is entitled to examine the objections against the decisions of a member, the criminal department with the next number examines the decisions of the criminal department and head of department; the first criminal department examines the decisions of the last criminal departments.

One or several judges who will be assigned in accordance with the workload to the criminal judgeships of peace which were established by Article 48 of the Law No.6545 are authorized to review the objections against the decisions of search, seizure and arrest in the investigations conducted within the judicial authority. From now on, these judgeships will make the final judgment in relation to the objections made against the decisions of non-prosecution formerly examined by High Criminal Courts.

Considering the regulations made in the Law of the High Council of Judges and Prosecutors which de facto attach this Council to Ministry of Justice, it is evident that the fate of investigations conducted in every part of Turkey by a restricted number of judges were left to the initiatives of political power through this limited number of judges. Therefore, judges are assigned by the approval of "appropriate" people to judgeships numbers of which are limited with one or two judges in accordance with the district of jurisdiction, as a result of that and depending on the judicial authority, it is now possible that investigations going on in the entire Turkey are prevented before they begin, influenced or directed. Because issuing search and seizure decisions may not be possible in accordance with political identities of people against whom investigations are carried out, thus, evidence may not be gathered; arrest measure may never be applied to when necessary or on the other hand, it will be possible that members of the opposition are oppressed with other intentions, assimilated and deprived of their freedom for a certain period of time.

Taking the judgeships under control were aimed through the new regulated system and the appointments which were made accordingly, and it was made almost impossible to launch investigations against the members of the ruling party (politicians, municipalities, etc) and conduct them properly. As far as the opposition to the political power is concerned, this system is thought to be used as a weapon through investigations which will be conducted under arrest and measures were not implemented against it. These are contrary to the principles of separation of powers, impartiality and independence of the judiciary, thus the principle of rule of law.

Besides, through the new regulations, personal liberties and security are not guaranteed properly and it was made a lot easier now to influence every investigation carried out. By means of these regulations, a system where a limited number of people will be entitled to perform very important duties such as objecting to decisions not to prosecute, arrest, search and seizure. Such a system without a doubt falls behind the global standards with regard to personal liberties and it will be enough to simply compare the provisions prior to the regulation and after the regulation for understanding it.

In accordance with the regulation brought by the Law No. 6545 of Article 268 of the Criminal Procedure Law, objections of decisions such as arrest, search, seizure and non-prosecution with extremely important results taken directly by a criminal judgeship of peace shall be reviewed by another criminal judgeship of peace which is its equivalent. This is against the case law of European Court of Human Rights stating that objections should be reviewed by a higher court and also causes a controversy in Article 268 of the Criminal Procedure Law; that is to say, whereas paragraph (c) of the same article states that the decisions of a High Criminal

Court shall be objected by a High Criminal Court of a higher level, previous subparagraphs state that decisions affecting important rights such as personal liberty and security by the criminal judgeships of peace shall be examined only by a criminal judgeship of peace at the same judicial level.

Therefore, these regulations are contrary to the Constitution in many aspects.

Relevant articles are listed as follows:

CONCERNING THE RULE OF LAW AND THE PRINCIPLE OF NATURAL JUDGE

Article 2 of the Constitution titled "Characteristics of the Republic" is as follows:

"The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Ataturk, and based on the fundamental tenets set forth in the preamble."

Article 37 of the Constitution titled "Principle of Natural Judge" is as follows:

"No one may be tried by any judicial authority other than the legally designated court.

Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established."

According to the Constitutional Court, state governed by rule of law set forth in Article 2 of the Constitution "is based on human rights and freedoms which it protects and strengthens, actions and proceedings of which are in line with law, establishes a fair legal order, maintains and develops it in every field, avoids any situation and attitude contrary to the Constitution, regards the law above all government bodies, subject to the Constitution and laws and open to the judicial control."

According to the Court, "one of the fundamental principles of the state governed by rule of law is 'the principle of security of the law'. Security of the law requires that the norms are foreseeable, individuals can have confidence in the government and in all of its action and procedures and the government avoids any actions in legislative arrangements which may undermine this confidence. In a state governed by rule of law, legal documents should be regulated in a way that relevant people can predict the consequences of a certain proceeding to a certain extent under present conditions. According to the principle of 'Clarity', legislative arrangements should be clear, explicit, applicable and objective in order to avoid any suspicion and uncertainty, and should include protective measures against arbitrary implementations of public authorities."

One of the most important components of the state governed by rule of law is the principle of natural judge. Because the principle of natural judge is one of the prerequisites to maintain security of the law, one of the subcomponents of the state governed by rule of law. Individuals cannot act in safety within a system where the principle of natural judge does not exist. In case of a legal dispute, individuals should know which judicial authority will make the judgment and with respect to which provisions. Otherwise, security of the law and legal predictability cease to exist. As set forth in the decisions of Constitutional Court, if the security of the law requires that the norms are foreseeable, individuals can have confidence in all actions and procedures of the government, and the government avoids any action which may undermine this confidence in the legislative arrangements, the principle of natural judge which is the compulsory prerequisite of the security of the law should be established.

Thus, British philosopher of law A.V. Dicey clearly stated that the principle of natural judge is a compulsory component of a state governed by rule of law by saying that one of the fundamental components of the state governed by rule of law is that every individual is subject to natural law and courts. According to F. Hayek, one of the prominent philosophers in this day and age, the state governed by rule of law requires that state complies with certain permanent provisions which were previously declared in all of its actions and procedures. These provisions determine how the political power should act in certain situations and as a result, provide predictability, thus, security of the law for individuals. According to Hayek, the constitutional state indicates the prohibition of arbitrariness by its nature. The writer thinks that security of the law constitutes the core of the constitutional state and in this sense any regulation threatening the security of the law is contrary to this principle.

As mentioned above, principle of natural judge is one of the most important components of a constitutional state. The principle of natural judge in the Constitutional Court decisions *and doctrines is indicated as determining by law the judicial authority which will hear the case before the commission of the crime or filing a lawsuit. In other words, the principle of natural judge prevents the formation of judicial authorities after the* conflict *arises or assignment of judges with regard to the parties to the case.*

The principle of natural judge, one of the fundamental components of the constitutional state was amended in the Constitution of 1982. Under Article 37 of the Constitution, everyone shall benefit from the principle of natural judge. In Article 37 of the Constitution, it is stated that "No one may be tried by any judicial authority other than the legally designated court. Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established." As set forth in the previous decisions of the Constitutional Court, 'the principle of natural judge' is defined as determining by law the judicial authority which will deal with the case before the commission of the crime and the emergence of the dispute. In other words, 'the principle of natural judge' prevents the formation of judicial authorities after the conflict arises or the assignment of judges with regard to the parties to the case.

In this regard, for the legal structuring of a judicial authority such as its establishment, duty, proceedings and trial procedure to comply with the principle of natural judge, determining the authority by law is not enough on its own. Moreover, the judicial authority should be designated before the conflict *occurs. Therefore, within the context of the principle of natural judge. "determining* before wards*" along with "lawfulness" are included. Furthermore, according to the Court, "the* guarantee *of natural judge amended in Article 37 forms the basis of 'the right to be tried before a* just, independent and impartial *court' which is the most fundamental element of the right to a fair trial set forth in Article 36 of the Constitution."*

The principle of natural judge which prevents the formation of extraordinary tribunals does not prevent the formation of specialized courts which follow particular investigation and prosecution procedures. In other words, extraordinary tribunals are not the same as specialized courts. In a legal system, judicial authorities which follow particular prosecution and investigation procedures may be established in order to fight against certain crimes effectively. For instance, such specialized courts may be established in order to fight against terrorism and organized crimes effectively. However, in that case specialized courts should be established by law before the commission of the crime, thus, should not have the status as an extraordinary tribunal.

The principle of natural judge is valid in all trials and much more important in criminal proceedings. Criminal investigations and prosecutions constitute a direct and radical intervention to liberty which is one of the fundamental rights of the individuals. Because personal liberty is very important, individuals should be provided with more enhanced guarantees in the criminal proceedings. The principle of natural judge is the primary guarantee

of the guarantees mentioned. Firstly, a judicial authority should be established and function properly for a fair and guaranteed trial. Otherwise, guarantees such as trial within a reasonable time, equality of arms and contradictory trial in an independent and impartial judicial authority within the scope of right to fair trial will not have any importance. That is to say, all of these guarantees will be functional if natural courts exist. Therefore, Constitutional Court indicated in its various decisions that the principle of natural judge constitutes the basis of the right to a fair trial.

Assessment of Compatibility of the Relevant Provisions of Law with the Constitution

Article 10 of the Law No. 5235 was amended by Article 48 of the Law No.6545 dated 18/6/2014, criminal courts of peace were annulled and instead without prejudice to the cases prescribed by laws, criminal judgeship of peace were established in order to take the decisions which need to be taken by a judge in the investigations, perform the duties of a judge and review the objections against its decisions. Through Article 74 of the Law No.6545 indicates that criminal judgeship of peace will review the objections made against the relevant decisions in relation to protection measures.

Criminal judgeship of peace was established as a new judicial authority by Article 46 of the Law No 6545. Whereas it appears that criminal judgeships of peace were established to investigate all criminal offenses designated by Turkish Criminal Law No.5237, it is clearly known by the public opinion that their primary objective is to investigate security officers working in the investigations of corruption. Indeed, some politicians plainly stated that investigations would be opened against the security members in relation to allegations of illegal wiretapping and they would be tried long before the new judicial authorities were established. Again long before the establishment of the judicial authorities in question, investigations were launched in different cities in relation to allegations of illegal wiretapping consequently, trial without arrest of security members were decided. Because this counter move against the investigations did not receive the necessary reaction from the public opinion, other legislative arrangements were made such as the formation of criminal judgeships of peace.

Certain politicians were not pleased with the decisions of natural judicial authorities in the legal system and within this framework, legislative arrangements which would enable them to achieve their aims were realized. Within these arrangements, criminal court of peace one of the natural judicial authorities in the criminal justice system was annulled, instead criminal judgeships of peace were established in order to make the necessary decisions in the investigations in relation to the allegations against security officers. The arrangement in its present form violates the principle of natural judge which the security officers should enjoy. Because instead of the natural courts which would follow the necessary procedures, criminal judgeships of peace with an extraordinary nature which are authorized to conduct the investigations on its own were established. Thus, people against whom investigations are carried out are deprived of their rights of predictability and security of the law.

Moreover, Article 74 in relation to the regulation of objections made against the decisions of criminal judgeship of peace is a violation of the principle of natural judge. For, according to the article criminal judgeship of peace is again designated as the judicial authority to decide upon the applications for objection. Judgeships have a limited number of councils and only suitable judges are assigned to them, therefore, results of the objections against them should not be expected to be in line with the law.

As a result of the explanations above, regulations in Article 268 of the Criminal Procedure Law and Article 74 of the Law No. 6545 which amended the former are contrary to Articles 2 and 37 of the Constitution.

CONCERNING THE RIGHT TO PERSONAL LIBERTY AND SECURITY

Under Article 19 of the Constitution, the right to personal liberty and security is guaranteed and it was ruled that no individual can be deprived of their freedom arbitrarily. In the paragraphs two and three, it is stated that individuals can be deprived of this right in exceptional cases the forms and conditions of which are prescribed by law. The objective of this article is to prevent the arbitrary deprival of the freedom of individuals. Therefore, limitations that may be imposed on personal liberties in exceptional cases set forth in the article should be in line with the purpose of the law and should not pave the way to arbitrary implementations.

Under the paragraph five of the same article, the person arrested or detained shall be brought before a judge within at latest forty-eight hours and in case of offences committed collectively within at most four days; in the paragraph eight, persons whose liberties are restricted for any reason are entitled to apply to the competent judicial authority for speedy conclusion of proceedings regarding their situation and for their immediate release if the restriction imposed upon them is not lawful.

In case of serious violation of personal liberties such as detention, arrest, rejection of release request, continuation of detention, the guarantees in the article should be provided for the relevant people. Arrest in particular is a protection measure which seriously restricts the personal liberties, therefore, if a judge who is absolutely independent and objective makes the decisions, and if the objection against the arrest warrant is decided upon by a judge or a committee of judges of the same nature, this serves as a strong guarantee for the individual facing this measure.

However by means of the legislative arrangements, a closed circle consisting of 2-6 judges of criminal judgeship of peace was established. If the decision of one of them is objected against, the other judge in the closed circle is entitled to make the final judgment.

For instance while seven judges of criminal judgeship of peace and seven judges of criminal court of first instance were in charge of investigation, search, arrest and objections and three judges were in charge of decisions of non-prosecution, after the regulations, all of these duties are now performed by two judges in Eskisehir. The situation in Istanbul and Ankara is more worrying.

Certainly this regulation cannot be an effective method concerning the arrests and objections against them. Because, taking into account the assessment of objections, investigation of the suspects without exceeding the maximum amount of time in comprehensive investigations will not be possible with a few judges in the relevant judgeships, it is made impossible to provide the guarantees in Article 19 of the Constitution in time and properly for the individuals. However, the objective of the relevant article is to establish an effective judicial system for the government which will assess speedily the limitations imposed on personal liberties. In the meantime, because of this controversial system ECHR may sentence our country to pay a large amount of compensation.

It appears that the criminal judgeships of peace were established with a completely different intention. Because a short while ago, Article 12 of the Law No. 6526 dated 21/2/2014 amended article 135 of the Criminal Procedure Law No.5271 and as a result, decisions in relation to the assessment of communication, wiretapping and recording of communication should be taken by high criminal court unanimously and in case of an objection to these decisions, measures should also be taken by a unanimous vote. However, the decisions of arrest which is a serious violation of personal liberty and the objections against them are submitted to a closed circle of people and this is highly contradictory and behind the standards.

In accordance with the grounds mentioned, criminal judgeship of peace regulated by Article 268 of the Criminal Procedure Law amended by Article 74 of the Law No. 6545 is contrary to Article 19 of the Constitution, thus should be annulled.

CONCERNING THE RIGHT TO A FAIR TRIAL

Under Article 36 of the Constitution, 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.

Through the amendment in Article 173 of the Law no 5271 made by Article 71 of the Law, the authority to review the objections against decisions of non-prosecution by the public prosecutors shall be vested in the criminal judgeships of peace. It was indicated that in the amended paragraph (3) of Article 173, if criminal judgeship of peace finds the extension of inquiry necessary, it may make a request to chief public prosecutor's office by clearly indicating the subject; in paragraph (4) if criminal judgeship of peace finds the request suitable, public prosecutor issues bill of indictment and presents to the court; in paragraph (6), in case that the objection is rejected; public prosecutor is dependent on the decision of criminal judgeship of peace which decided upon the petition previously given in order to file a criminal case because of new evidence.

The fate of the investigations conducted in the entire country is left to the initiative of this narrow and restricted system. As mentioned above, while decisions of measures in the Criminal Procedure Law enable the potential investigations to be prevented before they begin, objections made against decisions of non-prosecution by the public prosecutor in that judicial authority remain in vain by means of the mentioned regulation. It appears that the objective of the regulation is to neutralize the objections against the court files which could not be concluded because of the interventions of the political power to the judiciary in the investigations against the ruling party, but afterwards concluded with the verdict of non-prosecution as a result of the assignments of chief prosecutors and public prosecutors. This objective is so obvious that it will be enough to read the amendments made in Article 277 titled "Influencing judicial bodies" of the Turkish Criminal Law No. 5237 by Article 69 of the same Bag Bill (No.6545 dated 18/6/2014). As a result of this amendment, "or in a continuing investigation," and "the suspect or" were removed from the first paragraph of the article. Within this context, committed offenses are no longer regarded as crimes in the investigations and committers of crime are offered a kind of amnesty. After that, the problem (!) was resolved completely (!) by the formation of the criminal judgeships of peace. If there is an intervention to the judiciary during the investigations in terms of criminal law, intervention during the proceedings would not be necessary. Because an intervention to an already vulnerable process consisting of the collection and protection of evidence would be more than necessary to achieve the results that one would need.

CONCLUSION:

Considering the reasons mentioned above, it is certain that this regulation was brought in order to direct the criminal investigations conducted by a limited number of judgeships instead of serving for the public interest. This is most certainly contrary to the principles such as "the right to a fair trial", "the principle of natural judge", "the principle of personal liberty and security", "the constitutional state" with regard to the claimants, defendants, suspects and accused persons who claim or will claim their rights in the judicial bodies. With this regulation leaving almost all investigations in the hands of the political power, one cannot assume that individuals' right to a fair trial is guaranteed.

In accordance with the grounds explained, Article 268 of the Criminal Procedure Law and Article 74 of the Law No. 6545 which amended the former are contrary to Articles 2, 19, 36 and 37 of the Constitution and therefore should be annulled.

III- LEGAL TEXTS

A-The Objected Provisions

1- The objected article 10 of the Law No. 5235 titled "Criminal judgeship of peace" is as follows:

"Article 10- (Amendment date: 18/6/2014, Article: 6545/48)

Without prejudice to the cases prescribed by laws, criminal judgeship of peace was established in order to take the decisions which need to be taken by a judge in the investigations, perform the duties of a judge and review the objections against its decisions.

More than one criminal judgeship of peace can be established in a place when it is required by the workload. In this case, criminal judgeships of peace are numbered. Judges independently assigned to the criminal judgeships of peace shall not be assigned to other courts or duties by justice commissions in civil jurisdiction.

There are an editor and an adequate number of personnel in the criminal judgeship of peace. Ministry of Justice shall establish criminal judgeship of peace in every provincial center and with regard to the geographical conditions and the workload, in every district by taking the positive opinion of the High Council of Judges and Prosecutors.

Criminal judgeship of peace shall be given the name of their province or district. The district of jurisdiction of criminal judgeships of peace is within the administrative borders of districts legally attached to the cities and districts in which they are situated.

In the cities where high criminal court and metropolitan municipality are located, district of jurisdiction of criminal judgeship of peace named after the province and the district within the borders of metropolitan municipality shall be determined regardless of borders of the province or the district by the High Council of Judges and Prosecutors upon the proposal of Ministry of Justice.

The High Council of Judges and Prosecutors shall decide upon the proposal of Ministry of Justice whether to remove criminal judgeship of peace or change its district of jurisdiction by taking into consideration the geographical condition and workload."

2- Article 268 of the Law No.5271 titled "The procedure of objection and the examining authorities" which includes the objected provisions is as follows:

*"**Article 268-** (1) If the Law did not regulate with a special regulation, opposition against the decision of a judge or a court shall be filed through rendering a written application to the authority that rendered the decision or an oral submission to the court clerk that shall be taken into records within seven days after the interested parties had learned about the decision, as ruled in Article 35. The president of the court or the judge shall approve the submission or the signature, which had been taken into the records. The provision of Article 263 is preserved.*

(2) The judge or the court the decision of which is objected may rectify the decision if it/he deems the objection suitable; if not, shall delegate the objection to the authority entitled to review the objection within at latest 3 days.

(3) Authorities entitled to examine the objection are as follows:

a) (Amendment date: 18/6/2014, Article: 6545/74) If the decisions of a criminal judgeship of peace are objected to in a region where there are more than one criminal judgeship of peace, the judgeship with the next number is entitled to examine the objection; the judgeship with the first number is entitled to examine the objection against the judgeship with the last number; in the regions where there are no high criminal court and only one criminal judgeship of peace, the criminal judgeship of peace functioning within the district of jurisdiction of the high criminal court is entitled; if there is only one criminal judgeship of peace near high criminal courts, criminal judgeship of peace situated next to the nearest high criminal court is entitled.

b) (Amendment date: 18/6/2014, Article: 6545/74) In case that the arrest warrants issued for the first time by the criminal judgeships of peace are objected, the procedure in paragraph (a) applies. However, the judgeship which rejected the arrest request cannot examine the arrest warrant as the objecting authority.

c) The high criminal court in the same district of jurisdiction is entitled to examine the objections against the decisions of the judge of criminal court of first instance and in case that there are a lot of chambers of the high criminal court in that region, the chamber with the next number is entitled to examine the objections made against decisions of the high criminal court and its president; the chamber with the first number is entitled as far as the chamber with the last number is concerned; if there is only one chamber of the high criminal court, the authority is vested in the nearest high criminal court.

d) The assessment of objections against the delegated judge is carried out by the president of high criminal court, objections against decisions of the rogatory court are examined by the president or the court in the same district of jurisdiction in accordance with the statements in the abovementioned subparagraphs.

e) Concerning the objections against the decisions of the criminal departments of Regional Court of Justice and the criminal departments of Court of Cassation when they were serving as the fundamental court in the court cases; head of the department is entitled to examine the objections against the decisions of members, the criminal department with the next number examines the decisions of the criminal department and head of department; the first criminal department examines the decisions of the last criminal departments."

B-The Relevant Constitution Provisions and the Provisions Referred To

Application decisions referred to Articles 2, 19, 36 and 37 of the Constitution and Article 142 was seen relevant.

III- FIRST INQUIRY

A- Concerning the Application No. C.2014/164

Under the provisions of House Regulations of the Constitutional Court, the problem of "the case under trial" in particular was discussed in the first inquiry meeting held on 22.10.2014 with the participation of Haşim KILIÇ, Serruh KALELİ, Alparslan ALTAN, 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, Zühtü ARSLAN, M. Emin KUZ and Hasan Tahsin GÖKCAN.

In accordance with Article 152 of the Constitution and Article 40 of the Law No.6216, 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 convinced of the seriousness of a claim of unconstitutionality submitted by

one of the parties, it is entitled to apply to the Constitutional Court for the annulment of the provision. However, for a court to apply to the Constitutional Court under these provisions, it should have a case which was properly filed and under the jurisdiction of the court and the provisions demanded to be annulled should be applicable in that case. The provisions of the law are to be applied to settle the problems which would emerge in various stages of the case or to affect the conclusion of the case positively or negatively.

It is understood from the case under trial in the objecting Court that the Court was requested to implement the arrest measure for the suspect and the Court referred to objection for the annulment of the objected provision after reviewing this request. In this regard, whereas it can be assumed that the objecting Court does not have any file or document, the concept "case under trial" should be interpreted comprehensively in the case of important and urgent decisions such as arrest measure. For this reason, it would be enough if the objecting court has a case filed in accordance with the procedure during the objection. Therefore, the objecting authority can both implement the provisions which it sees unconstitutional and conclude the case and also apply to the Constitutional Court in exceptional and compulsory cases in terms of the same decision. In case the opposite is accepted, submitting a provision deemed unconstitutional to the Constitutional Court for objection will be prevented.

An extremely important and urgent subject such as the arrest measure was concluded during the case heard by the court which referred to objection and the Constitutional Court was applied to after deciding upon the unconstitutionality of the objected provisions. For this reason, the case which is being heard by the objecting Court was accepted and further inquiry was seen necessary.

Nuri NECİPOĞLU, Hicabi DURSUN, Celal Mümtaz AKINCI, Muammer TOPAL, M. Emin KUZ and Hasan Tahsin GÖKCAN disagreed with the decision.

B- Concerning the Application No. C.2014/174

Under the provisions laid down in the House Regulations of the Constitutional Court, further inquiry was decided due to no missing file by a majority vote with negative votes of Hicabi DURSUN, Celal Mümtaz AKINCI, Muammer TOPAL, M. Emin KUZ and Hasan Tahsin GÖKCAN. in the first inquiry meeting held on 13.11.2014 with the participation of Haşim KILIÇ, Serruh KALELİ, Alparslan ALTAN, 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, Zühtü ARSLAN, M. Emin KUZ and Hasan Tahsin GÖKCAN.

V-DECISION OF UNIFICATION

The unification of the case in relation to the application for objection to annul the subparagraphs (a) and (b) of paragraph 3 of Article 268 of the Criminal Procedure Law No.5271 dated 4.12.2004 which was amended by Article 74 of the Law No.6545, dated 18.6.2014 with the case No. C. 2014/164 due to their legal relation, closing of the file No. C.2014/174, and the inquiry to be implemented on the file No. C.2014/164 were decided UNANIMOUSLY on 13.11.2014.

VI-CASE INQUIRY

After examining the application decisions and annexes, the report prepared by Rapporteur Mustafa Çal, the objected provisions of the law, the relevant Constitution provisions and the provisions referred to, their grounds and other legislative documents, it is decreed that:

A- Assessment of Article 10 of the Law No. 5235 Amended by Article 48 of the Law No.6545

In the application decision, it was stated that under the provision objected against, the fate of all of the investigations conducted in the entire Turkey is left to the initiative of the ruling party through the limited number of judgeships, the criminal judgeship of peace is designated as the examining authority to review the decisions of non-prosecution, thus restricts the right to legal remedies of the victims and contradicts with the right to personal liberty and security. Moreover, this authority is contrary to the principle of judicial independence and the principle of natural judge, thus the provision is claimed to be against Articles 2, 19, 36 and 37 of the Constitution.

According to Article 43 of the Law No. 6216, the provision objected against was reviewed in relation to Article 142 of the Constitution due to their relation.

Under the provision, without prejudice to the cases prescribed by law, it was ruled that the criminal judgeship of peace was established to make the decisions which need to be made by a judge in the investigations, perform the duties and review the objections made against its decisions, the judges working independently in the judgeships should not be assigned to other courts or duties by justice commissions in civil jurisdiction and the criminal judgeships of peace would be established in every provincial center and the districts determined in accordance with the workload and geographical conditions by Ministry of Justice after receiving the positive opinion of the High Council of Judges and Prosecutors.

The state governed by rule of law set forth in Article 2 of the Constitution is a state the actions and proceedings of which are in line with the law, that respects and protects the human rights, forms and maintains a legal order which is fair in every field, avoids any situation or attitude contrary to the Constitution and is bound by the rule of law and the Constitution and open to the judicial control.

Article 142 of the Constitution provides that the formation of the courts, their duties and jurisdictions, trial procedures and their functioning shall be regulated by law.

In a constitutional state, provisions in relation to the offenses and criminal proceeding are determined according to the criminal policy which will be identified by taking into account the main principles of the criminal law and the relevant provisions in the Constitution in particular, the cultural and social structure of the country, ethical values and the needs of the economic life. As the law-maker has the judicial discretion to determine the aggravating and extenuating circumstances, the actions which will be regarded as crimes and the range and type of the penal sanctions which will be imposed against them when it exercises its power to penalize, it also has the discretion to determine the provisions in relation to criminal procedure and within this framework make the necessary regulations in relation to the formation, structure, duties, jurisdictions and trial procedures of the courts on condition of compatibility with the Constitution.

Through the amendment in Article 10 of the Law No.5235 by Article 48 of the Law No.6545, the criminal courts of peace with the authority to implement the provisions on safety measures and hear the cases in relation to the offenses which would necessitate judicial fines and imprisonment for up to two years were annulled and instead the criminal judgeships of peace were established. Therefore, the authority of "making the decisions which need to be made by a judge in the investigation" exercised previously by the criminal courts of peace was given to the criminal judgeships of peace.

In the general grounds of the Law No. 6545, it was stated that "the criminal judgeships of peace are established in order to take the decisions which need to be taken by a judge, the

objective of this formation is to be specialized about the protection measures, guarantee the fundamental rights and freedoms more effectively and make the trial proceedings more fair"; and it was stated in the grounds of the provision objected against that "After this regulation, the interactions between the criminal judgeships of peace will be maintained with time and the objective of this is to attain a standard countrywide in the decisions on protection measures". The purpose of the formation of the criminal judgeships of peace was indicated through these statements.

Because of the excessive workload of the criminal courts of peace, the cases were regarded as the principle duty, taking the decisions which need to be taken by a judge in the investigations was regarded as subsidiary duty. After that, criminal courts of peace could not concentrate on the decisions to be taken during the investigations and several serious rights violations occurred as a result of that. Furthermore, the fact that the judges who issued arrest warrants for the suspects and attended the court case after that were criticized by legal circles including European Court of Human Rights.

In order to overcome these problems "judgeships of liberty" were established in 2012 under Article 250 of the Criminal Procedure Law No.5271 to perform the duties which are in the jurisdiction of the special courts where the violations mentioned above took place seriously and these judgeships were authorized to take the decisions which need to be taken by a judge on the subjects in the jurisdiction of special courts in the investigations. In this regulation, it was provided that the decisions which should be taken by the judges or the courts such as arrest, search and assessment of communication in the investigations, should be taken by the judges of liberty, not the special courts and also judges of liberty should not be given any other duty such as solving the case and etc. The relevant regulation was not ruled unconstitutional under the decision of the Constitutional Court dated 4.7.2013 and No. C.2012/100, D.2013/84.

In the state governed by the rule of law set forth in Article 2 of the Constitution, the laws should be removed to protect the public interest. The assessment to be made by the Constitutional Court on "public interest" will only be to identify whether the law is issued in the public interest or not. Whether or not the concept of public interest of the law-maker is appropriate is not within the limits of the constitutionality control. By taking into account the grounds mentioned above in the provision objected against, the authority of "taking the decisions which need to be taken by a judge" previously exercised by criminal courts of peace was given to the criminal judgeships of peace. It is observed that the formation of the criminal judgeships of peace which enables the decisions which need to be taken by judges to be taken by specialized judges, is in the public interest. For this reason, the regulation is not against the principle of rule of law.

On the other hand, "No one may be tried by any judicial authority other than the legally designated court. Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established." is ruled in Article 37 of the Constitution.

As stated in the previous decisions of the Constitutional Court, the principle of natural judge is defined as the designation of the judicial authority by law before the commission of a crime or the emergence of the conflict. The principle of natural judge prevents the formation of the judicial authority after the commission of a crime or the emergence of the conflict or the assignment of the judge; in other words, prevents the assignment of the judge with regard to the accused or the parties of the case.

However, the principle of natural judge does not indicate that newly formed courts or the judges who are just assigned to the courts cannot hear the cases in relation to the offenses committed. It is not contrary to the principle of natural judge that a newly formed court or a judge just assigned to a court hears the cases of conflicts emerged before the formation of the

court or his/her assignment. Otherwise, trial of the pending cases by the judges who are assigned to judicial authorities for a limited time period would be regarded against the principle of natural judge; however the principle has no such objective.

The provision objected against which provides for the establishment of criminal judgeships of peace to take the decisions which need to be taken by a judge by specialized judges in the investigations and the authority of "taking the decisions which need to be taken by a judge in the investigations" to be granted to the judgeships, aims to determine the judicial authority which will hear the case after the commission of a crime. Furthermore, the provision is applicable in all of the cases within its range following its coming into force and therefore is not against the principle of natural judge.

In the decision concerning the objection due to unconstitutionality, the criminal judgeships of peace are claimed not to be independent and objective. Impartiality and independence are the fundamental elements which create a court. Article 9 of the Constitution provisions that the judicial authority is exercised by independent courts; and Article 138 explains the independence of the courts. Article provisions that "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." Impartiality indicates that a court acts independent from the parties of the case, legislative, executive and other judicial bodies when settling a conflict and is not influenced by them.

As emphasized in the decisions of ECHR, when examining the independence of a court, the form of the assignments of the members of the court, their working period, the presence of protection mechanisms against external pressure and whether or not its institutions are independent should be taken into account. (Langborger/Sweden, Application Number: 11179/84, Decision Date: 22.6.1989, § 32).

The judges of criminal judgeship of peace are assigned by the High Council of the Judges and Prosecutors as well as all other judges and have the security of tenure of judges. Therefore, there is no reason to justify that the judges of criminal judgeship of peace have a different status than other judges in accordance with the impartiality of the courts and their impartiality are undermined.

The impartiality of the courts is determined by considering the corporate structure of the court when hearing the cases and the attitude of the judge authorized to hear the case. Firstly, the legislative and administrative arrangements with regard to the formation of the courts and their structuring should not reflect the partiality of the courts. In fact, corporate impartiality is linked to the independence of the courts. In order for the impartiality to prevail, the independence should be realized and the court should not have a corporate structure which seems partial. As explained above, by taking into account the Constitution and the regulations in the provisions concerning the independence as well as the guarantees of impartiality and independence for the judges who will work in the judgeships, it cannot be indicated that the impartiality is not provided.

The second element with regard to the impartiality of the courts is about the subjective attitude of the judges in relation to the cases. A judge hearing the case should make his/her decisions according to his/her own personal conviction within the framework of the provisions of law, without being subject to any pressure or suggestion, but acting objectively and without prejudice in the face of the both parties of the case and treating them equally. This is what is expected from the judges in accordance with the Constitution and the laws. Behaviors contrary to the provisions mentioned above shall be subject to sanctions in criminal law and disciplinary actions within the framework of the legal order. As well as every other judge in the judicial system, the independence of the judges of the criminal judgeships of peace from the legislative, executive and other judicial bodies and the public are guaranteed by the Constitution and the

provisions, thus, it is understood that they have the necessary guarantees which enable them to act objectively while performing their duties. The allegation of subjectivity in the case under trial is explained in the laws of procedure and is not within the limits of constitutional control. Therefore, it cannot be inferred that the provision for which the annulment is requested does not provide for the impartiality of the judges of criminal judgeship of peace.

As mentioned above, it is understood that the criminal judgeships of peace were organized in line with the provisions of security of tenure of judges and the independence of the courts as ruled in the Constitution as well as other courts and there is no reason to suggest that they cannot act objectively in terms of their structure and functioning. However, if it is suggested that the judge is not deciding objectively in the light of concrete, objective and convincing evidence, there are provisions of procedure which prevent the judge from hearing the case.

In the light of the reasons explained, the provision objected against is not contrary to Articles 2, 37 and 142 of the Constitution. Rejection of the application for annulment is required.

This provision has no relevance to Articles 19 and 36 of the Constitution.

B-Assessment of the Subparagraphs (a) and (b) of Paragraph (3) of Article 268 of the Law No.5271 amended by Article 74 of the Law No. 6545

It was stated in the decision of application that a system consisting of a limited number of criminal judgeships of peace was formed under the provisions objected against, if a decision is objected by one of them, it shall be concluded definitively by another authority in the same system and this method cannot be an effective way concerning the objections. Besides, it was argued in the application that neutralizing the process of objection is not in line with the right to a fair trial, personal liberty and security, the principle of natural judge and the constitutional state, thus, the provision was claimed to be against Articles 2, 19, 36 and 37 of the Constitution.

In accordance with Article 43 of the Law No. 6216, the objected provision was examined also with regard to Article 142 of the Constitution due to the relation between them.

The objected subparagraph (a) of the paragraph (3) of Article 268 of the Law provides that if the decisions of a criminal judgeship of peace are objected to in a region where there are more than one criminal judgeship of peace, the judgeship with the next number is entitled to examine the objection; the judgeship with the first number is entitled to examine the objection against the judgeship numbered the last; in the regions where there are no high criminal court and only one criminal judgeship of peace, the criminal judgeship of peace functioning within the district of jurisdiction of the high criminal court is entitled; if there is only one criminal judgeship of peace near high criminal courts, criminal judgeship of peace situated next to the nearest high criminal court is entitled.

The objected subparagraph (b) of the paragraph (3) of the article rules that in case that the arrest warrants issued for the first time by the criminal judgeships of peace are objected, procedure in paragraph (a) applies. However, the judgeship which rejected the arrest request cannot examine the arrest warrant as the objecting authority.

The first paragraph of Article 36 of the Constitution rules 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." The freedom to claim rights and the right to a fair trial guaranteed by this article are the most fundamental guarantees which enable the individuals to enjoy other fundamental rights and freedoms as necessary and protect them.

The process of legal remedies enables a decision of a judicial authority allegedly against the law to be examined by another authority. The objective of this process is to create a

more secured judicial service in which the decisions of a judicial authority can be examined by another authority. The right to apply to legal remedies is included within the scope of the right to a fair trial. How it will be realized is explained in the provisions of procedure.

In Article 142 of the Constitution, the regulation of the "trial procedures" by law is provided. The regulations concerning the legal remedies are within the scope of the trial procedures. Thus, determining the form of the legal remedy and the authority is vested in the judicial discretion of the law-maker. However, the law-maker should comply with the general law principles and provisions in the Constitution, especially the principle of the rule of law and the right to a fair trial when exercising its judicial power. In order for the right of litigation to be provided effectively which is guaranteed under Article 36 of the Constitution, the law-maker should have the authority to amend the decision under examination when necessary.

The objected provision states that the decisions of the criminal judgeship of peace can be objected, through this provision individuals are provided with the right of litigation and the authorities entitled to review the objection are determined. There is no constitutional norm stating that the objections against the decisions of the criminal judgeship of peace should be reviewed by a court of higher jurisdiction or another court. The main principle of the criminal procedure is the examination of the criminal decisions effectively by a different authority independent from the court which took the first decision and this authority does not have to be of higher jurisdiction or a high level authority.

It is certain that, the "*chambers*" of the courts a few of which were established as long as the workload required and having the name of a province or a district cannot be regarded as the same court with regard to the assessment of trial procedures and applications of litigation. The judicial authorities can make an "administrative" choice with regard to their organization and choose to operate in different chambers under one single name. Under the paragraph (3) of Article 268 of the Law No. 5271 in relation to objections, the criminal judgeships of peace designated as the examining authorities are entitled to examine the objected provision and make a decision upon it. Therefore, the legal remedy is understood to be effective.

On the other hand, the conclusion of the objections against the decision of a court by another court with the next number at the same place is an implementation being used for a long time in the law of legal and military jurisdiction and the civil procedure law. For example, under Article 268 of the Law No. 5271, the objections against a high criminal court are examined and concluded by the high criminal court with the next number. Some of these regulations have been subject to the control of the Constitutional Court. In fact, under Article 353 of the Enforcement and Bankruptcy Law numbered 2004, objections against the decisions of disciplinary penalties by criminal courts in the matters of execution of judgment may be filed to the chamber of the execution court with the next number if there are more than one chamber and the Constitutional Court rejected the claim that the provision of law mentioned above is unconstitutional in its decision numbered C.2011/64, D. 2012/168, dated 1.11.2012.

Therefore, it cannot be claimed that the regulation in relation to the judicial authority is contrary to the principles of law on criminal procedure and the Constitution. Whether the judicial discretion of the law-maker concerning the identification of the type of legal remedy and the authority is in line with the public interest may be examined within the scope of the Constitutionality review. In other words, the propriety of the regulation and the method of objection or whether the method of objection corresponds to the purposes of the law on criminal procedure cannot be examined within the scope of the Constitutionality review. It is assumed that the judges who are independently assigned to the criminal judgeship of peace will be specialized in the protection measures and the fact that the objections against the decisions of judges of criminal judgeship of peace are filed to another judge of the judgeship is based on the public interest.

In this regard, the regulations in relation to the procedure of legal remedy to be applied for against the decisions of criminal judgeships of peace are within the judicial power of the law-maker in accordance with the objected provision and the provisions that the criminal judgeships of peace should examine the objections against the decisions of criminal judgeships of peace in order to maintain specialization and consistency are not against the principle of the rule of law and the right to a fair trial.

With respect to the reasons above, the objected provisions are not contrary to Articles 2, 36 and 142 of the Constitution. The rejection of the application for annulment is required.

The provisions of law are irrelevant to Articles 19 and 37 of the Constitution.

Haşim KILIÇ, Alparslan ALTAN, Serdar ÖZGÜLDÜR, Osman Alifeyyaz PAKSÜT and Erdal TERCAN disagreed.

VII-CONCLUSION

A- It has been UNANIMOUSLY decided on 14.1.2015 that, Article 10 of the Law on the Establishment, Duties and Jurisdiction of First Instance Courts of Civil Jurisdiction and Regional Courts of Appeal No. 5235 dated 26.9.2004 amended by Article 48 of the Law dated 18.6.2014 No. 6545 is not contrary to the Constitution and the application for annulment is DISMISSED,

B- It has been decided on 14.1.2015 BY A MAJORITY VOTE and the dissenting votes of Haşim KILIÇ, Alparslan ALTAN, Serdar ÖZGÜLDÜR, Osman Alifeyyaz PAKSÜT and Erdal TERCAN that, the subparagraphs (a) and (b) of the paragraph (3) of Article 268 of the Criminal Procedure Law No. 5271 dated 4.12.2004 amended by Article 74 of the Law No.6545 dated 18.6.2014 are not contrary to the Constitution and the application for their annulments are DISMISSED.

President Haşim KILIÇ	Vice-president Serruh KALELİ	Vice-president Alparslan ALTAN
Member Serdar ÖZGÜLDÜR	Member Osman Alifeyyaz PAKSÜT	Member Recep KÖMÜRCÜ
Member Burhan ÜSTÜN	Member Engin YILDIRIM	Member Nuri NECİPOĞLU
Member Hicabi DURSUN	Member Celal Mümtaz AKINCI	Member Erdal TERCAN
Member Muammer TOPAL		Member Zühtü ARSLAN
Member M. Emin KUZ		Member Hasan Tahsin GÖKCAN

ANNEX-6

DECISION OF THE CONSTITUTIONAL COURT

Case Number	:2014/146
Decision Number	**:2015/31**
Date of Decision	**:19.3.2015**
O.G. Date-Number	**:13.6.2015 - 29385**

APPLICATION FOR ANNULMENT BY: Members of Grand National Assembly of Turkey M. Akif HAMZACEBI and Engin ALTAY along with 122 other deputies

APPLICANT: Izmir Regional Administrative Court of Appeal (C.2014/159)

SUBJECT OF THE CASE AND APPLICATION: It prescribes the claims that

1- statement of *"to the criminal judgeship of peace in the district of jurisdiction of the high criminal court"* in paragraph no (1),
2- paragraph no (3),
3- statement of *"Criminal judgeship of peace"* in paragraph no (4),
4- statement of *"of the criminal judgeship of peace"* in paragraph no (6) under Article 173 of Code of Criminal Procedure No. 5271 dated 4.12.2004 amended under Article 71 of the Law No. 6545 dated 18.6.2014 to amend the Turkish Criminal Code and Certain Laws contradict with Articles 2, 10, 13, 36, 37, 74 and 125 of the Constitution. Thus, the annulment and abolishment of these articles have been decided.

REVIEW OF THE CASE

Review of statement of *"to the criminal judgeship of peace in the district of jurisdiction of the high criminal court "* in paragraph no (1), statement of *"Criminal judgeship of peace"* in paragraph no (3), (4) and statement of *"of the criminal judgeship of peace"* in paragraph no (6) under article 173 of Code of Criminal Procedure No. 5271 dated 4.12.2004 amended under Article 71 of Law No. 6545 dated 18.6.2014 to amend the Turkish Criminal Code and Certain Laws

It is alleged in the petition that the provisions of law subject to constitutionality review contradict with Articles 2 and 37 of the Constitution by indicating, that it is contrary to the principle of natural judge that in accordance with the provisions of law subject to constitutionality review, the authority to decide on applications for annulment of decisions not to prosecute is withdrawn from the high criminal courts consisting of three judges and appointed to the judges of criminal judgeship of peace; that the provisions negatively affect the fight against crime; that they increase the possibility that the public prosecutor who takes the decision not to prosecute and the judge of criminal judgeship of peace who will review the objection will affect the decisions of each other since they will be in the same district of jurisdiction and possibly work in the same building; that this prohibits the revelation of the material fact in the criminal proceedings.

It was provided in paragraph no (1) of Article 173 of Law No. 5271 that the court reviewing the objection against the decisions not to prosecute is "*high criminal court in the nearest district of jurisdiction having the high criminal court where the public prosecutor who takes the decision works.*" However, the text of article has been amended and it regulates that the court reviewing

the objection against the decisions not to prosecute is "*the criminal judgeship of peace in the district of jurisdiction having high criminal court where the public prosecutor works.*"

In paragraph no (3) under the article mentioned above, the authority to demand the extension of investigation from the chief public prosecutor's office if deemed necessary in order to take a decision and to reject the demand on grounds if no sufficient reason is found to bring the public action, is entrusted to the judge of criminal judgeship of peace. In paragraph no (4), an obligation to write an indictment is imposed on the public prosecutor in the event that the application is justified by the judge of criminal judgeship of peace. In paragraph (6), the public prosecutor can bring the public action due to existence of new evidence after the judge of criminal judgeship of peace rejects the application for annulment providing that the criminal judgeship of peace which decides on the previous petition decides on this issue.

In the state of law, provisions of law on criminal proceedings are provided according to the penal policy which will be determined especially with respect to the main principles of criminal law, the provisions of the Constitution about the issue and the social, cultural structure, ethical values and the requirements of economic life in the country. The law maker is authorized to determine the provisions of law on criminal proceedings and within this framework to regulate the formation, duties, powers, functioning, trial procedures and structure of the courts on the condition that it is subject to the provisions of the Constitution. Indeed, it is ensured in Article 142 of the Constitution that the formation, duties, powers, functioning and trial procedures of the courts will be regulated by law.

Within the context of the authority of the law maker to determine the duties, powers and trial procedures, the authority given to the criminal judgeship of peace as the court reviewing the objection against the decisions not to prosecute falls within the scope of the discretion of the legislative body and it does not contradict the principle of state of law in the provisions of law.
On the other hand, considering that the state of law necessitates the provision of judicial independence as a prerequisite, there is no doubt that this prerequisite will be equally valid for all judicial bodies. It cannot be accepted that there is a difference between the judges who use the duties and powers delegated to the courts in terms of their impartiality, independence and commitment to the Constitution and the laws (Constitutional Court decision no C.2012/100, D.2013/84 and dated 4.7.2013). The judges of criminal judgeship of peace, like all other judges, are appointed by the High Council of Judges and Prosecutors (HCJP) and they have the "legal guarantee of tenure of judges" provided in Article 139 of the Constitution. Within this framework, there is no constitutional ground for the claims that the judge of criminal judgeship of peace will be less efficient than those of high criminal courts in the review of the decisions not to prosecute or will be influenced by the public prosecutor who takes the decision not to prosecute since they work in the same district of jurisdiction.

It is indicated in Article 37 of the Constitution that "*No one can be brought before any authority except for the court which he/she is legally subject to. No emergency authority that has the jurisdiction which creates the consequences of bringing a person before any other authority than that which he/she is subject to can be established.*"

As indicated in the previous decisions of the Constitutional Court, "*the principle of natural judge*" is defined as the determination of the judicial authority by law which will hear the case with competence to try conflicts or crimes that took place before their emergence. In other words, the principle of natural judge prohibits the establishment of judicial authorities or appointment of judges with competence to try conflicts or crimes that take place after their establishment and appointment. However, the principle of natural judge shall not be interpreted as the newly-established courts or the judges newly-appointed to an existing court can by no means try the cases related to crimes committed before. It does not contradict the principle of natural judge in cases when a newly-established court or a judge newly-appointed to an existing court tries conflicts or crimes that took place before their establishment or appointment provided that such

courts or judges are not created or appointed for trying a specific case, person or group. It otherwise prevents the judges working on the basis of job rotation from hearing the pending cases, which is not the objective of the principle mentioned above.

It is understood from the provisions of law subject to constitutionality review that the criminal judgeships of peace are authorized as the courts reviewing the objection against the decisions not to prosecute in order to reduce the work load of high criminal courts. Therefore, the provisions of law that authorize the criminal judgeships of peace as the courts reviewing the objection against the decisions not to prosecute do not aim to determine the judicial authority which will hear the case after the commission of a specific crime or do not contradict the principle of natural judge since they are implemented in all the cases within the scope of these provisions of law after they are put into practice.

For the reasons explained, the provisions of law subject to constitutionality review do not contradict with Article 2 and 37 of the Constitution. The applications for annulment should be rejected.

Alparslan ALTAN, Osman Alifeyyaz PAKSÜT and Erdal TERCAN did not agree with this opinion. Serdar ÖZGÜLDÜR did not agree with this opinion except for paragraph (3) in Article 173 of the Law No. 5271 amended by the Article 71 of the Law No. 6545.

CONCLUSION

Concerning the paragraphs of Article 173 in the Code of Criminal Procedure No. 5271 dated 4.12.2004 amended by Article 71 of the Law No. 6545 dated 18.6.2014 to amend the Turkish Criminal Code and Certain Laws , it was decided on 19.3.2015 that;

1- statement of *"to the criminal judgeship of peace in the district of jurisdiction of the high criminal court "* in paragraph no (1) is not unconstitutional and the application for annulment IS REJECTED by MAJORITY VOTE with the counter votes of Alparslan ALTAN, Serdar ÖZGÜLDÜR, Osman Alifeyyaz PAKSÜT and Erdal TERCAN, ,

2- paragraph no (3) is not unconstitutional and the application for annulment IS REJECTED by MAJORITY VOTE with the counter votes of Alparslan ALTAN, Osman Alifeyyaz PAKSÜT and Erdal TERCAN,

3- statement of *"Criminal judgeship of peace"* in paragraph no (4) is not unconstitutional and the application for annulment IS REJECTED by MAJORITY VOTE with the counter votes of Alparslan ALTAN, Serdar ÖZGÜLDÜR, Osman Alifeyyaz PAKSÜT and Erdal TERCAN, ,

4- statement of *"of the criminal judgeship of peace"* in paragraph no (6) is not unconstitutional and the application for annulment IS REJECTED by MAJORITY VOTE with the counter votes of Alparslan ALTAN, Serdar ÖZGÜLDÜR, Osman Alifeyyaz PAKSÜT and Erdal TERCAN,.

President Zühtü ARSLAN	Deputy President Serruh KALELİ	Deputy President Alparslan ALTAN
Member Serdar ÖZGÜLDÜR	Member Osman Alifeyyaz PAKSÜT	Member Recep KÖMÜRCÜ
Member Burhan ÜSTÜN	Member Engin YILDIRIM	Member Nuri NECİPOĞLU
Member Hicabi DURSUN	Member Celal Mümtaz AKINCI	Member Erdal TERCAN
Member Muammer TOPAL		Member M. Emin KUZ

Member
Hasan Tahsin GÖKCAN

Member
Kadir ÖZKAYA

ANNEX-7

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT
GENERAL ASSEMBLY

DECISION

IN THE APPLICATION OF HİKMET KOPAR AND OTHERS
(Application Number: 2014/14061)

Date of Decision: 8/4/2015
O.G. Date - Issue: 8/7/2015-29410

GENERAL ASSEMBLY
DECISION

President	: Zühtü ARSLAN
Vice-president	: Serruh KALELİ
Vice-president	: Alparslan ALTAN
Members	: Serdar ÖZGÜLDÜR
	Osman Alifeyyaz PAKSÜT
	Recep KÖMÜRCÜ
	Burhan ÜSTÜN
	Engin YILDIRIM
	Nuri NECİPOĞLU
	Hicabi DURSUN
	Erdal TERCAN
	Muammer TOPAL
	M. Emin KUZ
	Hasan Tahsin GÖKCAN
	Kadir ÖZKAYA
Rapporteur	: Şükrü DURMUŞ
Applicants	: 1.Hikmet KOPAR
	2. Tolga GÜZELTAŞ
	3. Muhammed Ali IKLI
	4. Mesut YILMAZ
	5. Abdulhalim SÖNMEZ
	6. Muhammed İkbal KAYADUMAN
	7. Ali Fuat YILMAZER
	8. Ali İhsan TEZCAN
	9. Metin CANBAY

10. Erol DEMİRHAN
11. Hayati BAŞDAĞ
12. Harun AYDIN
13. Hasan Hüseyin DANACI

Counsel : Att. Hüseyin ATAOL

14. Osman Özgür AÇIKGÖZ
15. Mehmet ÖRS
16. Yurt ATAYÜN
17. Erhan KÖRTEK
18. Ensar DOĞAN
19. Yunusemre UZUNOĞLU
20. Ali Fuat ALTUNTAŞ
21. Muhammed KAYA
22. Şahin AKDENİZ
23. Aytekin KOÇAK
24. Ömer KÖSE
25. Abdulkadir AĞIR
26. Kürşat DURMUŞ
27. Ramazan BOLAT
28. Erkan ÜNAL
29. Serdar BAYRAKTUTAN

Counsel : Att. Ömer TURANLI

30. Selahattin ERGİN
31. Erkan PALAS

Counsel : Att. Murat İNCEKARA

32. Ramazan Orkun ALTINIŞIK

Counsel : Att. Fatih ŞAHİNLER

33. İsmail TORLAR

Counsel : Att. Deniz ATMACA

34. Şeref BOLAT

Counsel : Att. Suphi BAT

35. Mehmet DİLAVER
36. Fatih KINCIR

Counsel : Att. Osman YALÇIN

I. SUBJECT-MATTER OF THE APPLICATION

The application concerns the allegations that the right to personal liberty and security provided in Article 19, the right to a fair trial provided in Article 36 and the presumption of

innocence provided in Article 38 were violated on the ground that the applicants were detained without any strong suspicion and reason of detention, by a court established contrary to the principles of natural judge, impartiality and independence; that there were irrelevant and insufficient grounds for the decisions taken upon detention and objection to detention ; that there was no effective legal remedy against the decision of detention ; that the detention period was exceeded; that unlawful evidence was used; that access to the investigation file was restricted and the presumption of innocence was violated.

The Applicants' Allegations

49. An investigation was launched against the applicants by the Chief Public Prosecutor's Office regarding the legal investigations dated 17/12/2013 and 25/12/2013 within the context of the allegations about *"parallel state."* The applicants alleged that, as indicated in the declarations of the Prime Minister dated 22/6/2014 and 20/7/2014, firstly the criminal judgeship of peace was established; that three judges appointed to 6 judgeships in İstanbul decided in favor of the suspects in the investigations dated 17 and 25 December 2013 but that the news release showed that one judge shared a message written "*live long, tall man"* with reference to the Prime Minister on his *facebook* account.

50. The applicants alleged that the mentioned law amendments are contrary to Articles 10, 19 and 37 of the Constitution due to the fact that the judicial process concerning the essential prosecuting procedures about the investigation was abolished following the amendments in Articles 46, 47, 48, 49, 71, 74, 83 and 84 of the Law to Amend the Turkish Criminal Code and Certain Laws No. 6545 dated 18.6.2014 and therefore demanded the application to the General Assembly for the annulment of the mentioned provisions of law.

51. The applicants continuously indicated that;

i. the Criminal Judgeships of Peace which gave the detention order are contrary to the principle of natural judge and it is sufficiently suspected that they are dependent and partial due to the fact that the criminal judgeships of peace were established after the investigations were launched against them; that the intervention in the investigations was decriminalized with the amendment of Article 277 of the Law No. 5237; that the Public Prosecutor's Office did not conduct any proceedings until these judgeships were established and the detention process started shortly after the new courts were established; that there were diverting political narratives before and during the mentioned investigations and that the judges appointed to the criminal judgeships of peace decided in favor of the suspects in the investigations on 17 and 25 December 2013.

Assessment

The Allegation that the Principles of Natural Judge, Impartiality and Independence were violated

101. The applicants alleged that the judges of the Criminal Judgeship of Peace which gave the detention order are contrary to the principle of "natural judge"; that it is sufficiently suspected that these judges are not independent and impartial due to the investigations, legal regulations in this process, appointments of judges to the established criminal judgeship of peace and political narratives.

102. In the remark of the Ministry of Justice, it was briefly indicated that if the principle of natural judge was strictly interpreted as establishment of the courts before the emergence of the incidents to be tried, then each newly established court would be inevitably considered contrary to the principle of natural judge during the passage of time until the date of its establishment; that what is important concerning the principle of natural judge is to abstain from establishing extraordinary courts and appointing judges specific to a concrete case in the aftermath; that it is understood that these judgeships were established

in order to specialize and standardize the protection measures in the country for the reason of law amendment; that the judges were appointed by the High Council of Judges and Prosecutors (HCJP) based on their career, competence and loyalty; that the Criminal Judgeship of Peace, the independence and impartiality of which are disputed in the concrete case, also decided in favor of the suspects and contrary to the demands of the public prosecutor's office.

103. The applicants briefly indicated in the counter statement to the remark of the Ministry that the Prime Minister showed reaction to the release of the policemen detained under different previous legal investigations in Adana and Ankara in the group meeting dated 15/4/2014 and in the declaration in a national gazette dated 23/6/2014; that therefore an intense propaganda process continued with the qualification of all judicial organs which decided in favor of the applicants as "parallel jurisdiction" among the public opinion from the very beginning; that one of the judges who were appointed after the change in the 1st Chamber of HCJP upon the request of the Ministry of Justice and gave the detention order, shared complimentary statements about the Prime Minister on Facebook and the same judge held a meeting with the policemen in his room during the adjournment of the hearing dated 27/7/2014; that the Prime Minister continuously claimed that the investigation dated 17 December 2013 was a coup against the Government and that the judges who gave the release order for the detained suspects in this investigation were appointed to the newly-established courts and thus the judges are not impartial or independent.

104. The principle of natural judge defined as the determination of a judicial authority with competence to try conflicts or crimes that took place before its establishment, lays the foundation of the right to "a trial before a natural, independent and impartial court" which is the most important instrument of the right to a fair trial. The principle of natural judge provided in Article 37 of the Constitution prohibits the establishment of judicial authorities or appointment of judges with competence to try conflicts or crimes that took place after their establishment or appointment; does not allow the appointment of judges according to the parties of the defendant or the case. It is prohibited to bring a case before a court which shall be established by law after the commitment of the crime concerning the principle and thus to establish a court specific to a "person" or an "event" (AYM, C.2009/52, D.2010/16, D.Date 21/1/2010).

105. It is obligatory to conduct each proceeding according to the law then in practice due to the fact that it is necessary to immediately enforce the laws on legal procedures upon their enactment independently of the will of parties since they are associated with the public order. The issue to be considered in the enforcement of the norms of procedural law in terms of time is whether the proceedings were concluded when the new law was enacted. If the proceedings did not definitely end, it is necessary to enforce the new law as a rule in the legal proceedings conducted as of the enactment of the new law (AYM, C.2009/52, D.2010/16,D.Date 21/1/2010).

106. Within this scope, it shall not be considered contrary to the principle of natural judge providing that a provision of law does not aim to determine the judicial authority which will hear the case of a crime after the mentioned crime is committed and that it is enforced on every case in its context after the enactment (AYM, C.2009/52, D.2010/16, D.Date 21/1/2010). Indeed, the Constitutional Court did not find the provisions of the Law no. 6545 on the establishment of the criminal judgeship of peace contrary to the principle of natural judge and rejected the demand for annulment (AYM, C.2014/164, D.2015/12, 14/1/2015).

107. In the first paragraph of Article 138 of the Constitution, it is indicated that the judges are independent in their duties and they shall decide based on their personal conviction in accordance with the Constitution, code andlaw . In the second paragraph, it is stated that no organ, authority or person shall give orders and instructions to the courts and judges in using the jurisdiction, shall issue a circular, give recommendations or suggestions and it is ensured that the independence of courts is an obligation to be a state of law.

108. In Article 6 of the Convention, the right to demand for a trial before an impartial court is clearly indicated as an instrument of the right to a fair trial. In Article 36 of the Constitution, the impartiality of courts is not explicitly mentioned. However, in accordance with the legal precedent of the Constitutional Court, this right is also a tacit instrument of the right to a fair trial. Furthermore, considering that the impartiality and independence of courts are two complementary instruments, it is obviously necessary to take into consideration Articles 138, 139 and 140 of the Constitution while evaluating the right to a trial before an impartial court in accordance with the principle of integrity of the Constitution (Tahir Gökatalay, Application No. 2013/1780, 20/3/2014, § 60).

109. In order to determine whether a court is independent from the administration and the parties of the case, it is important to be informed of the procedure of appointment and terms of office of the members, of the presence of their safeguards against external pressure and of the independent image of the court (Yaşasın Aslan, Application No. 2013/1134, 16/5/2013, § 28).

110. Impartiality refers to the fact that there should be no prejudice, partiality or interest which will affect the resolution of the case and that there should be no opinion or interest for and against the parties of the case . Impartiality has subjective and objective dimensions and, within this context, the impression of the judge as an institution should also be considered as well as the personal impartiality of the judge as an individual in the present case (Tahir Gökatalay, §§ 61-62).

111. It is also seen that the Criminal Judgeships of Peace which were alleged to be partial and dependent in the concrete case rejected the demands of the Public prosecutor and decided in favor of the suspects .

112. It is not possible to say that the judges charged in the detention or detention reviews are not impartial by considering the decisions made in their previous duties on irrelevant issues to the applicants.

113. Within this context, the votes that the judge occasionally cast in the previous cases/disputes are completely related to the judicial duty of the judge. It is obvious that the previous decisions and votes of the judge cannot be considered to raise doubts about his impartiality and thus, this shall not be accepted as the ground for challenge of judge (AYM, C.2011/139, D.2012/205, D.Date.27/12/2012).

114. Based on a general legal regulation and as a result of the appointment made by HCJP, it is understood in the concrete case that the relevant judges performed the mentioned duties. Therefore, it is not possible to accept that the relevant judges did not act impartially and independently for political or personal reasons, from the point of the phenomena, the reality and nature of which, cannot be definitely determined, of the assessments and interpretations about political debates, without the existence of a concrete prejudiced proceeding and attitude towards the applicants.

115. For the reasons explained, it should be decided that the allegation that the principles of natural judge, impartiality and independence were violated be INADMISSIBLE due to the fact that it is "clearly devoid of basis".

116. Alparslan ALTAN and Erdal TERCAN did not agree with this opinion.

JUDGMENT

For the above-cited reasons, it was held on 8/4/2015 that

the allegation that the applicants were detained by a judicial authority contrary to the principle of natural judge, impartiality and independence is INADMISSIBLE due to the fact that

it is *"clearly devoid of basis"* with the counter votes of Alparslan ALTAN and Erdal TERCAN, **BY MAJORITY VOTE,**

the court expenses are charged on the applicants, **BY UNANIMOUS VOTE**.

President Zühtü ARSLAN	Vice-president Serruh KALELİ	Vice-president Alparslan ALTAN
Member Serdar ÖZGÜLDÜR	Member Osman Alifeyyaz PAKSÜT	Member Recep KÖMÜRCÜ
Member Burhan ÜSTÜN	Member Engin YILDIRIM	Member Nuri NECİPOĞLU
Member Hicabi DURSUN	Member Erdal TERCAN	Member Muammer TOPAL
Member M. Emin KUZ	Member Hasan Tahsin GÖKCAN	Member Kadir ÖZKAYA

ANNEX-8

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

GENERAL ASSEMBLY

DECISION

APPLIED BY HİDAYET KARACA
(Application No: 2015/144)
Date of Decision: 14/7/2015
O.G. Date - Number: 9/10/2015-29497

GENERAL ASSEMBLY

DECISION

President :Zühtü ARSLAN

Deputy President:Alparslan ALTAN

Deputy President:Burhan ÜSTÜN

Members :Serruh KALELİ

Osman Alifeyyaz PAKSÜT

Recep KÖMÜRCÜ

Engin YILDIRIM

Nuri NECİPOĞLU

Hicabi DURSUN

Celal Mümtaz AKINCI

Erdal TERCAN

Muammer TOPAL

M. Emin KUZ

Hasan Tahsin GÖKCAN

Kadir ÖZKAYA

Rıdvan GÜLEÇ

Rapporteur :Hüseyin TURAN

Applicant :Hidayet KARACA

Counsels :Att. Fikret DURAN, Att. Gültekin AVCI

I. SUBJECT OF APPLICATION

1. The application prescribes the violation of the right to personal liberty and security and the right to a fair trial and freedom of expression without any strong suspicion and reason of detention due to detention on the assumption of illegal evidence as strong suspicion, arrest

order by a court established contrary to the principles of natural judge, impartiality and independence, irrelevant and insufficient reasons of the decisions taken upon detention and review of detention, passage of detention periods, exposure to maltreatment of public officials during legal proceedings which does not comply with human dignity, restriction on freedom of expression and restriction on access to the file of investigation .

A. Claims of the Applicant

33. The applicant

alleged that Article 37 of the Constitution was violated, demanded for discharge and compensation by indicating that the Criminal Judgeships of Peace which review the detention and the objection against the detention do not have the nature of "*tribunal"* in terms of the decisions of European Convention on Human Rights (Convention) and European Court of Human Rights; that they shall not be accepted "*independent*" and "*impartial*"; that they are established contrary to the principle of natural judge provided in Article 37 of the Constitution; that they do not give any chance of success to persons through discharge and objection; that the legal proceedings of the judgeships which do not have the nature of "tribunal" are invalid and that his detention upon the decisions of these judgeships is unconstitutional and contradicts with the Convention.

B. Assessment

Claim that the Principles of Natural Judge, Impartiality and Independence were Violated

67. The applicant alleged that the Criminal Judgeships of Peace that gave arrest order do not have the nature of *"tribunal"* and these judgeships cannot be considered *"independent"* and *"impartial"* as they are established contrary to the principle of natural judge (See § 33, i).

68. It was briefly stated in the remark of the Ministry of Justice that if the principle of natural judge is strictly interpreted as the establishment of a court before emergence of the incident to be tried, each newly established court would inevitably contradict with the principle of natural judge during the passage of time of the legal cases carried out until the date of its establishment ; that it is indeed important for the principle of natural judge that no emergency court is established or no judge is appointed merely for a concrete case after its emergence; that it is understood that these judgeships are established in order to provide the specialization and standardization in terms of protection measures across the country on the grounds of law amendment; that the judges are appointed by the High Council of Judges and Prosecutors (HCJP) with respect to their career, competence and qualification; that the Criminal Judgeship of Peace whose independence and impartiality are disputed in the concrete case has also taken decisions in favor of the suspects whose arrests are demanded contrary to the demands of the prosecution office within the same proceedings.

69. The applicant briefly indicated in the counter statement to the remark of the Ministry that the courts established before 2009 should carry out the legal proceedings concerning the crimes which are alleged to have been committed although the actions which form the basis of the attributed crime were carried out in 2009; that this contradicted with the principle of natural judge whereas the criminal judgeships of peace were established by the law came into force in 2014 notably in order to conduct judicial actions in the proceedings against a certain stratum in which they are also involved and especially against the police which carried out the proceedings of corruption; that there are a number of data about this and these courts are not independent and impartial.

70. Article 37 of the Constitution is as follows:

"No one can be brought before any authority except for the court which he/she is legally subject to.

No emergency authority that possesses the jurisdiction which creates the consequences of bringing a person before any other authority than that he/she is subject to can be established."

71. The notion of natural judge defined as the appointment of a judicial authority that will hear the case with competence to try conflicts or crimes that took place before their establishment forms the basis of the right to *"trial before a lawful, independent and impartial court",* the most important instrument of the right to a fair trial. The principle of *natural judge* provided in Article 37 of the Constitution prohibits the establishment of judicial authorities or appointment of judges with competence to try conflicts or crimes that took place after their creation; it does not allow the assignment of a judge according to the parties of the suspect or the case. The principle forbids bringing a case before a court which will be established by a law to be enacted after the commitment of the crime and thus prohibits establishing a court specific to a *"person"* or a *"case"* (AYM, C.2009/52, D.2010/16, D. Date. 21/1/2010).

72. It is obligatory to carry out each legal proceeding in accordance with the law in practice on that date since the laws on the criminal procedure should be implemented immediately and independently from the wills of the parties after they are put into practice due to their relation to public order. It should be considered whether the proceeding ended when the new law was enacted while implementing the norms of jurisdiction in terms of time. If the jurisdiction did not finally end, the new law should be put into practice as a rule in the legal proceedings that will be carried out after the new law is enacted (AYM, C.2009/52, D.2010/16, D. Date. 21/1/2010).

73. Within this context, if a provision of law does not aim to determine the judicial body which will hear the case of a specific crime after the commitment of the crime, the breach of the principle of natural judge shall not be in question in case of its implementation in all cases within its scope after it is put into practice (AYM, C.2009/52, D.2010/16, D. Date. 21/1/2010).

74. It is ensured in the first paragraph of Article 138 of the Constitution that judges are independent in their duties and will decide in accordance with the Constitution, the code and the law and according to their personal conviction while the second paragraph of the same article provides that no organ, office, authority or person can give orders or instructions, issue a circular and give advice and suggestion to the courts and judges while using the jurisdiction and that the independence of courts, one of the requirements for being a law state, is ensured.

75. Article 6 of the Convention explicitly mentions the right to demand for bringing a case before an independent court as an instrument of the right to a fair trial. While Article 36 of the Constitution does not directly address the impartiality of courts, this right is also a tacit instrument of the right to a fair trial in accordance with the jurisprudence of the Constitutional Court . Concerning that the impartiality and independence of courts are two complementary instruments, it is obvious that it is also necessary to consider Article 138, 139 and 140 in the assessment of the right to trial before an impartial court by force of the principle of integrity of the Constitution (*Tahir Gökatalay*, Application. No. 2013/1780, 20/3/2014, § 60).

76. The mode of appointment of the members and their terms of office, the existence of safeguards against external pressures and the independent image of the court are important in determining the independence of the court from the administration and the parties of the case (*Yaşasın Aslan*, Application . No. 2013/1134, 16/5/2013, § 28).

77. Impartiality is the absence of prejudice, partiality and interest which will affect the solution to the case and the lack of opinion or interest in the face of, for and against the parties of the case.

Impartiality has subjective and objective dimensions and it is necessary to pay attention to the personal impartiality of the judge as an individual in the current case and to the impression that the court leaves on a person as an institution (*Tahir Gökatalay,* §§ 61-62).

78. It is seen that the Criminal Judgeships of Peace which are alleged dependent and partial in the concrete case, rejected the demands of the public prosecutor and decided in favor of the suspects whose arrests are demanded within the scope of the proceedings (See § 23). It is understood that the relevant judges performed the mentioned duties based on a general legal regulation and as a result of an appointment made by HCJP. Therefore, it is not possible to accept that the relevant judges did not act independently and impartially for political and personal reasons without the evidence of a concrete prejudiced proceeding or attitude towards the applicant in terms of the phenomena the merits and nature of which are not definitely confirmed.

79. Indeed, the Constitutional Court rejected the demand for the review of the provision which creates the Criminal Judgeships of Peace by justifying that the judges of criminal judgeships of peace, like all other judges, are appointed by the High Council of Judges and Prosecutors (HCJP) and they have the "legal guarantee of tenure of judges" provided in Article 139 of the Constitution; that they are organized in accordance with the principles of judicial independence and legal guarantee of tenure of judges as provided in the Constitution as well as in all other courts; that there is no instrument that necessitates the conclusion that they cannot act impartially in the structuring and functioning of these courts; that the procedure has provisions that prevent the judge from hearing a case in the event that it is revealed that the judge violates the principle of impartiality with concrete, objective and convincing evidence (AYM, C.2014/164, D.2015/12, D.Date 14/1/2015).

80. For the reasons explained, it should be decided that the claim of the violation of the principles of natural judge, impartiality and independence is inadmissible due to *"explicit lack of grounds".*

81. Alparslan ALTAN and Erdal TERCAN did not agree with this opinion.

V. JUDGMENT

For the reasons explained, it is decided on 14/7/2015 that;

A. The applicant's

claim that the violation of the principles of natural judge, impartiality and independence is INADMISSIBLE due to "*explicit lack of grounds"*, by MAJORITY VOTE and with counter votes of Alparslan ALTAN and Erdal TERCAN,

B. the trial expenses be left on the applicant by UNANIMITY.

President Zühtü ARSLAN	Deputy President Alparslan ALTAN	Deputy President Burhan ÜSTÜN
Member Serruh KALELİ	Member Osman Alifeyyaz PAKSÜT	Member Recep KÖMÜRCÜ
Member Engin YILDIRIM	Member Nuri NECİPOĞLU	Member Hicabi DURSUN
Member Celal Mümtaz AKINCI	Member Erdal TERCAN	Member Muammer TOPAL
Member M. Emin KUZ		Member Hasan Tahsin GÖKCAN
Member Kadir ÖZKAYA		Member Rıdvan GÜLEÇ

ANNEX-9

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT
FIRST SECTION

DECISION

IN THE APPLICATION OF MEHMET FATİH YİĞİT AND OTHERS
(Application Number: 2014/16838)

Date of Decision: 9/9/2015
O.G. Date - Issue: 4/11/2015-29522

FIRST SECTION

DECISION

President : Burhan ÜSTÜN

Members : Hicabi DURSUN
Erdal TERCAN
Kadir ÖZKAYA
Rıdvan GÜLEÇ

Rapporteur : Şükrü DURMUŞ

Applicants : 1. Mehmet Fatih YİĞİT

Counsel : Att. Engin Emrah BİÇER
2. Yakub SAYGILI

Counsel : Att. Murat ERDOĞAN
3. Mehmet Habip KUNT
4. İbrahim ŞENER

Counsel : Att. Uğur ÇİFCİBAŞI
5. Kazim AKSOY

Counsel : Att. Murat ERDOĞAN

I. SUBJECT-MATTER OF THE APPLICATION

1. The application concerns the allegations that the right to personal liberty and security was violated due to the fact that the detention order was unlawfully given by the courts established contrary to the principles of natural judge, impartiality and independence and that they were not informed of their rights concerning the offences being charged; that the prohibition of ill-treatment was violated due to the fact that the public officials acted contrary to human dignity during the investigation; that the presumption of innocence was violated due to the fact that they were considered guilty despite the lack of a final court order and the

prohibition of discrimination and the right to an effective remedy were violated due to the fact that they were dismissed and exposed to false investigation owing to the hate and discriminative speeches on the community of which they were alleged to be the members.

The Applicants' Allegations

The applicants alleged that they were accused and arrested due to the fact that an investigation launched with the instruction of the public prosecutor charged as judicial police in the Directorate of Security Branch Office for Financial Crimes in İstanbul; that the investigation was intervened through law amendments, establishment of the criminal judgeship of peace and change in the structure of the High Council of Judges and Prosecutors (HCJP) ; that the court which will review the decisions of custody and detention should be impartial and independent in accordance with the provisions of the Constitution and the European Convention on Human Rights (Convention); that it is not possible to say that the judges appointed to the established criminal judgeships of peace are impartial and independent; that the criminal judgeships of peace were established contrary to the principle of natural judge. They indicated that the right to personal liberty and security provided in Article 19 of the Constitution was violated and demanded that a release order be given and compensation be awarded.

Assessment

The Allegation that the Principles of Natural Judge, Impartiality and Independence were violated

85. The applicants alleged that the criminal judgeship of peace which rendered the detention order was established contrary to the principle of natural judge provided in Article 37 of the Constitution and was not impartial and independent.

86. It was briefly stated in the remark of the Ministry of Justice that the principle of natural judge prohibited the establishment of the judicial authorities , that is, extraordinary judicial authorities which vary in terms of person and concrete case; that the abstract and general regulation of the judgeships in the country which will decide on certain protection measures in order to ensure the specialization and implementation unity shall not be claimed contrary to Article 37 of the Constitution; that the criminal judgeships of peace subject to the review were established by law; that it was stated as the ground of the Law that the criminal judgeships of peace were established in order to provide specialization and standardization in terms of protection measures; that the 1st Chamber of the HCJP appointed the judges among those then in office according to career, qualification and ability after the enactment of the relevant Law; that the judge who conducted the proceedings and gave the detention order in the concrete case was already in office in the same vicinity as one of the three judges of the criminal judgeship of peace authorized in accordance with Article 250 of the Law No. 5271 before the criminal judgeships of peace were established and any appointment was made by the 1st Chamber of the HCJP ; that, during the examination of the claims of independence and impartiality, it would be appropriate to consider that the criminal judgeship of peace, the independence and impartiality of which were disputed, rejected the demand of the investigating authority for the detention of the applicants for "providing confidential information of the state for political or military espionage" on the grounds that there is no sufficient evidence that the applicants committed the offence being charged after the assessment of the demand of detention and the file contents.

87. In their counter statements to the remark of the Ministry, the applicants briefly indicated that the criminal judgeship of peace is at project phase, was created to perform a certain process; that the evidence was created and if necessary, the enactment of law are the cases prominent to the public opinion; that the head of the relevant chamber of the HCJP

accepted that they made a mistake in the appointment of the judges, which is one of the cases prominent to the public opinion.

88. The concept of natural judge defined as the determination of judicial authority with competence to try conflicts or crimes that took place before its establishment, lays the foundation of the right to "a trial before a natural, independent and impartial court" which is the most important instrument of the right to a fair trial. The principle of natural judge provided in Article 37 of the Constitution prohibits the establishment of judicial authorities or appointment of judges with competence to try conflicts or crimes that took place after their establishment or appointment ; does not allow the appointment of judges according to the parties of the defendant or the case. It is prohibited to bring a case before a court which shall be established by law after the commitment of the crime concerning the principle and thus to establish a court specific to a "person" or an "event" (AYM, C.2009/52, D.2010/16, D. Date. 21/1/2010).

89. It is obligatory to conduct each proceeding according to the law then in practice due to the fact that it is necessary to immediately enforce the laws on legal procedures independently of the will of the parties upon their enactment since they are associated with the public order. The issue to be considered in the enforcement of the norms of procedural law in terms of time is whether the proceedings were concluded when the new law was enacted. If the proceedings did not definitely end, it is necessary to enforce the new law as a rule in the legal proceedings conducted as of the enactment of the new law (AYM, C.2009/52, D.2010/16, D. Date. 21/1/2010).

90. Within this context, it shall not be considered contrary to the principle of natural judge providing that a provision of law does not aim to determine the judicial authority which will hear the case of a crime after the mentioned crime is committed and that it is implemented on every case in its context after the enactment (AYM, C.2009/52, D.2010/16, D. Date. 21/1/2010). Indeed, the Constitutional Court did not find the provisions of the Law no. 6545 on the establishment of the criminal judgeships of peace contrary to the principle of natural judge and rejected the demand for annulment (AYM, C.2014/164, D.2015/12, 14/1/2015).

91. In the first paragraph of Article 138 of the Constitution, it is indicated that the judges are independent in their duties and they shall decide based on their personal conviction in accordance with the Constitution, law and code. In the second paragraph, it is stated that no organ, authority or person shall give orders and instructions to the courts and judges in using the jurisdiction, shall issue a circular, give recommendations or suggestions and it is ensured that the independence of courts is an obligation to be a state of law.

92. In Article 6 of the Convention, the right to demand for a trial before an impartial court is clearly indicated as an instrument of the right to a fair trial. In Article 36 of the Constitution, the impartiality of courts is not explicitly mentioned. However, in accordance with the legal precedent of the Constitutional Court, this right is also a tacit instrument of the right to a fair trial. Furthermore, considering that the impartiality and independence of courts are two complementary instruments, it is obviously necessary to take into consideration Articles 138, 139 and 140 of the Constitution while evaluating the right to a trial before an impartial court in accordance with the principle of integrity of the Constitution (Tahir Gökatalay, Application No: 2013/1780, 20/3/2014 § 60).

93. In order to determine whether a court is independent from the administration and the parties, it is important to be informed of the procedure of appointment and terms of office of the members, of the presence of their safeguards against external pressure and of the independent image of the court (Yaşasın Aslan, Application. No. 2013/1134, 16/5/2013, § 28).

94. Impartiality refers to the fact that there is no prejudice, partiality or interest which will affect the resolution of the case and that there is no opinion or interest before, for and against

the parties of the case before the latter. Impartiality has subjective and objective dimensions and, within this scope, the impression of the judge as an institution should also be considered as well as the personal impartiality of the judge as an individual in the present case (Tahir Gökatalay, §§ 61 and 62).

95. It is also seen that the criminal judgeships of peace which are alleged to be partial and dependent in the concrete case rejected the demands of the public prosecutor and decided in favor of the applicants. Within this context, it was seen that the Public Prosecutor's Office demanded the detention order concerning the crime of providing confidential information of the government for purposes of political or military espionage but the demand was rejected.

96. It is not possible to say that the judges charged in the detention orders or reviews are not impartial by considering the decisions made in their previous duties on irrelevant issues to the applicants.

97. Within this context, the votes that the judge occasionally cast in the previous cases/disputes are completely related to the judicial duty of the judge. It is obvious that the previous decisions and votes of the judge cannot be considered to raise doubts about his impartiality and thus, this shall not be accepted as the ground for challenge (AYM, C.2011/139, D.2012/205, D. Date 27/12/2012).

98. Based on a general legal regulation and as a result of the appointment made by HCJP, it is understood in the concrete case that the relevant judges perform the mentioned duties. Therefore, it is not possible to accept that the relevant judges did not act impartially and independently for political or personal reasons, from the point of the phenomena, the reality and nature of which, cannot be definitely determined, of the assessments and interpretations about political debates, irrespective of the background of these debates and the public interest and without the existence of a concrete prejudiced proceeding and attitude towards the applicants.

99. For the reasons explained, it should be decided that the allegation that the principles of natural judge, impartiality and independence were violated is inadmissible due to the fact that it is "clearly devoid of basis".

100. Erdal TERCAN did not agree with this opinion.

JUDGMENT

For the reasons explained;

On 9/9/2015, it has been held BY MAJORITY VOTE that the part of the application concerning the alleged violation of the principles of natural judge, impartiality and independence is INADMISSIBLE due to the fact that it is "*clearly devoid of basis"*, with the counter vote of Erdal TERCAN, and

It has been held UNANIMOUSLY that the court expenses shall be charged on the applicants.

President	Member	Member
Burhan ÜSTÜN	Hicabi DURSUN	Erdal TERCAN

Member	Member
Kadir ÖZKAYA	Rıdvan GÜLEÇ

ANNEX-10

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

DECISION

APPLICATION OF MUSTAFA BAŞER AND METİN ÖZÇELİK
(Application Number: 2015/7908)

Date of Decision: 20/1/2016
Official Gazette Date and Number: 22/3/2016-29661

FIRST SECTION

DECISION

President	:	Burhan ÜSTÜN
Members	:	Serruh KALELİ
	:	Hicabi DURSUN
	:	Erdal TERCAN
	:	Hasan Tahsin GÖKCAN
Rapporteur	:	Aydın ŞİMŞEK
Applicants	:	1. Mustafa BAŞER
	:	
Counsels	:	1.Att. Celal SİS
		2. Metin ÖZÇELİK
Counsel	:	2.Att.Önder DURDU

I. SUBJECT-MATTER OF APPLICATION

1. The applicants asserted that, due to the fact that they were arrested by an incompetent court which is not impartial or independent and established against the principle of natural judge without the existence of a strong suspicion of a crime or the ground for arrest on the grounds of the decisions made by the applicants who are judges and they were unable to benefit from their right of objection effectively, their right to personal liberty and security; due to the previous statements and publications the presumption of innocence, the right of protection of personal dignity and reputation; because of being discriminated on the grounds of their religious feelings and thoughts associated with a certain religious group, the right of privacy of private life and the freedom of religion and conscience are violated.

Allegations of the Applicants

77. The applicants asserted that they are first category judges, the Court which issued the arrest warrants is incompetent and unauthorized due to the fact that other courts were on duty on the dates of the investigations and the issue of the arrest warrant and the applicants

were not caught in *flagrante delicto* which is within the jurisdiction of the high criminal court; this Court was established against the principle of "natural judge" in order to hear the cases in relation to terrorism offenses and on the grounds that they were not given the copies of the documents of the investigation files about the suspects who are allegedly acting together and of the same opinion, they were unable to benefit from their right of objection effectively; thus their right to personal liberty and security in accordance with Article 19 of the Constitution was violated, as a result, they demanded a measure which would provide for their release, determination of violation of right and compensation.

Assessment

Allegation With Reference To Their Arrest by an Incompetent Court against the Principle of Natural Judge, Independent and Impartial Judge

119. The applicants asserted that they are first category judges, they were not caught in *flagrante delicto* which is within the jurisdiction of the high criminal court and they were arrested by a Court which is not impartial or independent, established against the principle of "natural judge" by the executive body in order to hear the cases in relation to terrorism offenses and also incompetent on the grounds that it was not on duty on the dates of the issue of arrest and seizure warrants.

120. In the opinion of the Ministry, it was indicated that Article 88 of the Law No. 2802 is relevant to the offenses which are committed by judges and prosecutors and not related to their duty, thus the article does not prevent the arrest, the applicants are investigated in accordance with the allegation that they violated the law by acting contrary to the requirements of their duty and they were caught in *flagrante delicto,* Bakırköy 2nd High Criminal Court which issued the arrest warrant is on duty as ruled in Article 89 of the Law No.2802, authorized to examine terrorism offenses as a specialized court by the High Council of Judges and Prosecutors and is "the authority entitled to decide upon launching the last investigation" and the applicants did not state the grounds for their allegations that they were investigated and arrested by authorities which are not independent or impartial.

121. The applicants did not make any supplementary explanation regarding their allegations against the opinion of the Ministry.

122. As indicated in the previous decisions of the Constitutional Court, the principle of natural judge is defined as determining by law the judicial authority which will hear the case before the commission of the crime or the emergence of the conflict. The principle of natural judge prevents the assignment of judges or the formation of the judicial authorities after the commission of the crime or the emergence of the conflict; in other words, prevents the assignment of judges with regard to the accused person or the parties of the case (Constitutional Court, C. 2014/164, D. 2015/12, 14/1/2015).

123. In addition, the principle of natural judge does not mean that the newly founded courts or the judges who are just assigned to the courts cannot hear the cases in relation to previously committed offenses. It is not against the principle of natural judge that a newly founded court or a judge who is newly assigned to a court handles a conflict which is not limited to a certain situation, person or a group and occurred before the formation of the court or the assignment (Constitutional Court, C. 2014/164, D. 2015/12, 14/1/2015).

124. In this regard, if a provision of law does not seek to determine the judicial authority which will hear the case in relation to the crime after the commission of the crime and is applied to all cases within its scope following its entry into force, the principle of natural judge is not violated (Constitutional Court, C. 2009/52, D. 2010/16, 21/1/2010).

125. It is ruled that in Article 9 of the Constitution that the judicial power shall be exercised by independent courts; and in Article 138, the meaning of the independence of the courts is explained. According to that, *"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."* Independence means that a court should be independent from the legislative, executive and other judicial bodies as well as the district of jurisdiction and the parties of the case and should not be influenced by them (Constitutional Court, C.2014/164, D. 2015/12, 14/1/2015).

126. The method of assignment of the members, the term of office, the existence of guarantees against external pressure and whether the court appears independent are important when determining whether the court is independent from the administration or the parties of the case (*Yaşasın Aslan,* Application No: 2013/1134, 16/5/2013, § 28).

127. The right to demand trial of the case by an impartial court is clearly explained in Article 6 of the Convention as a component of the right to a fair trial. Whereas the independence of the courts is not clearly explained in Article 36 of the Constitution, this right is an implicit component of the right to a fair trial in accordance with jurisprudence of the Constitutional Court. Considering that the impartiality and the independence of the courts are two complementary components, it is certain that the Articles 138, 139 and 140 of the Constitution should be taken into account when reviewing the right to be tried in an independent court as required by the principle of Constitutional integrity (*Tahir Gökatalay,* Application No: 2013/1780, 20/3/2014, § 60).

128. The impartiality of the courts is explained with reference to the attitude of the judge who is entitled to hear the case and the corporate structure of the court when hearing the cases. First of all, the legal and administrative regulations regarding the formation and the structuring of the courts should not reflect that they are not impartial. In fact, the corporate impartiality is linked to the independence of the courts. The independence should be realized as a prerequisite to establish impartiality and in addition, the corporate structure should not appear partial (Constitutional Court, C. 2014/164, D. 2015/12, 14/1/2015).

129. The second element concerning the impartiality of the courts is about the subjective attitude of the judges in relation to the case. The judge who will handle the case should treat the parties of the case equally without being partial or prejudiced and decide through his/her personal conviction within the framework of the provisions of law without being subject to any suggestion or pressure. This is what is expected from the judges in the light of the Constitution and the laws. Contrary behaviors are subject to sanctions in criminal and disciplinary law by the legal order (Constitutional Court, C.2014/164, D.2015/12, 14/1/2015).

130. In the concrete fact, in order to realize specialization and with reference to the paragraph five of Article 9 of the Law No. 5235, Bakırköy 2nd High Criminal Court is given the authority to hear the cases in relation to the offenses within the scope of Anti-Terrorism Law No.3713 dated 12/4/1991 and the offenses defined in the sections four, five, six and seven of chapter four of volume two of the Law No. 5237 (excluding Articles 318, 319, 323, 324, 325 and 332) as well as the cases in accordance with the general provisions by the decision of the First Chamber of the High Council of Judges and Prosecutors dated 12/2/2015. The judges working in Bakırköy 2nd High Criminal Court who decided the applicants' arrest are assigned by the High Council of Judges and Prosecutors and have the security of tenure of judges provided in Article 139 of the Constitution as well as every other judge. Therefore, as the court was authorized by the High Council of Judges and Prosecutors to hear the cases in relation to certain offenses as a specialized court before the date of the applicants' arrest, it is impossible to accept that it was established against the principle of "natural judge", in addition, there is no reason that the judges working in this court gain a different status regarding *"the independence of the courts"* other than the judges working in other high criminal courts in Bakırköy Courthouse. On the

other side, the judges in Bakırköy 2nd High Criminal Court have guarantees which assure independence and impartiality as well as other judges as ruled in the Constitution and the provisions of law. That is to say, it cannot be asserted that the judges working in the relevant court are not impartial.

131. It is impossible to accept that, although they did not act in prejudice during the proceedings, the judges who are working in Bakırköy 2nd High Criminal Court which is authorized to try the cases in relation to terrorism offenses based on a general legal regulation by the High Council of Judges and Prosecutors in order to provide specialization, is not acting independently or impartially on political or personal grounds in accordance with the facts, the authenticity and nature of which cannot be certainly proved and also the assessments and comments made during political discussions (*Hikmet Kopar and others,* § 114).

132. On the other hand, Office of the Chief Inspector of the High Council of Judges and Prosecutors applied to Bakırköy 2nd High Criminal Court and requested the issue of the arrest warrant for the applicants. The abovementioned Court was authorized as a specialized court to try the cases in relation to certain offenses defined as "terrorism offenses" based on the paragraph five of Article 9 of the Law No. 5235 dated 12/2/2015 by the First Chamber of the High Council of Judges and Prosecutors (see § 76). There is an uncertainty in the legislation regarding whether its authority given by the First Chamber of the High Council of Judges and Prosecutors includes the protection measures to be issued by high criminal court, as ruled in the relevant law in the investigations of terrorism offenses. The authority to decide launching the last investigation in relation to the offenses concerning the abuse of the authority allegedly committed by the applicants who were working as Istanbul judges on the date of the event is vested in Bakırköy High Criminal Courts as the nearest high criminal court. While the permission of prosecution of the applicants was granted by the High Council of Judges and Prosecutors, it was decided that Bakırköy Chief Public Prosecutor's Office should issue the bill of indictment addressed to Bakırköy 2nd High Criminal Court and this subject was indicated in the bill of indictment. The bill of indictment issued by the Chief Public Prosecutor's Office was sent directly to Bakırköy 2nd High Criminal Court and it was decided that the last investigation regarding the applicants should be launched by the mentioned Court (see §§ 45, 49). The offenses of *"attempting to prevent the government of Republic of Turkey partially or completely from performing its duty and eliminate it and being a member of an armed organization"* which are attributed to the applicants and caused them to be arrested are among the offenses which 2nd High Criminal Court shall try as a specialized court (in the regions where there are two or more high criminal courts) as indicated in the decision of the First Chamber of the High Council of Judges and Prosecutors dated 12/2/2015. Therefore, the reason that the High Council of Judges and Prosecutors decided that the bill of indictment should be (directly) addressed to Bakırköy 2nd High Criminal Court when granting the permission of prosecution for the applicants, is based on the fact that the offenses which are attributed to the applicants are among the "terrorism offenses" which the mentioned Court as the specialized court should handle as indicated in the decision of the First Chamber of the High Council of Judges and Prosecutors dated 12/2/2015. Thus, as Bakırköy 2nd High Criminal Court is the judicial authority entitled to launch the last investigation regarding the applicants in accordance with the first paragraph of Article 89 of the Law No. 2802, it cannot be asserted that the Court has committed a discretional error or acted arbitrarily regarding its authority to conclude the arrest request for the applicants in accordance with Article 85 of the same Law.

133. Due to the abovementioned reasons, as it is certain that there is no violation concerning the allegation that the applicants were arrested by an incompetent court which is not impartial or independent and established against the principle of *"natural judge",* it should be decided that this section of the application is inadmissible due to *"lack of explicit grounds".*

JUDGMENT

Due to the abovementioned reasons;

It has been UNANIMOUSLY decided on 20/1/2016 that the allegation that the right to personal liberty and security of the applicants is violated on the grounds that they were arrested by an incompetent court which is not impartial or independent and established against the principle of natural judge is INADMISSIBLE due to *lack of explicit grounds*,

It has been UNANIMOUSLY decided on 20.1.2016 that the litigation costs are IMPOSED on the applicants.

President	Member	Member
Burhan ÜSTÜN	Serruh KALELİ	Hicabi DURSUN

Member	Member
Erdal TERCAN	Hasan Tahsin GÖKCAN

ANNEX-11

REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

DECISION

APPLICATION OF MEHMET BARANSU (2)
(Application Number**:** 2015/7231)

Date of Decision: 17/5/2016

Official Gazette Date-Number: 17/6/2016-29745

SECOND SECTION

DECISION

President	:	Engin YILDIRIM
Members	:	Osman Alifeyyaz PAKSÜT
		Recep KÖMÜRCÜ
		Alparslan ALT AN
		Celal Mümtaz AKINCI
Rapporteur	:	Aydın ŞİMŞEK
Applicant	:	Mehmet BARANSU
Counsel	:	Att. Sercan SAKALLI

I. SUBJECT-MATTER OF THE APPLICATION

1. The applicants asserted that, on the grounds that arrest warrant was issued due to procurement of documents of a news report published in the nature of journalism, although there is no reason of arrest or an offense committed, the criminal judgeship of peace which issued the arrest warrant is against the principle of natural judge, independence and impartiality of the courts, the file could not be examined due to the decision of interdiction and the right of objection to arrest could not be exercised effectively due to a closed circuit objection system, their right to personal liberty and security, freedom of expression and press were violated.

Allegations of the Applicant

61. The applicant indicated that he was arrested on the grounds that he procured the documents which are called "Sledgehammer Coup Plot" by the public opinion and related to the news report published five years ago in the Taraf newspaper where he worked; the Judgeship decided his arrest for the procurement of these documents whereas his arrest request for the publication of the documents were rejected by the Judgeship due to the lapse of time which is

required to file a criminal case and regulated in article 26 of the Law No. 5187 as a condition for judgment; in addition, the Criminal Judgeship of Peace which decided upon arrest is against the principle of natural judge and does not provide the guarantees for independent and impartial court. Therefore, the applicant asserted that the right to personal liberty and security guaranteed under Article 19, the freedom of expression and press guaranteed under Articles 26 and 28, the right to a fair trial guaranteed under Article 36, the principle of natural judge guaranteed under Article 37 and the right to an effective remedy guaranteed under Article 40 of the Constitution are violated and firstly demanded a measure which will ensure his release and the determination of violation of right.

Assessment

Allegation That Criminal Courts of Peace are Contrary to the Principle of Natural Judge, Independent and Impartial Judge

64. The applicant asserted that the Criminal Judgeships of Peace which decided upon arrest are contrary to the principle of natural judge and do not provide the guarantee of independent and impartial court.

65. In the opinion of the Ministry, with reference to similar decisions of the European Court of Human Rights, it was indicated that the "court" which restricts the right of freedom and security must have been established by law, the method of assignment of members, their term of office, the existence of guarantee mechanisms in the face of external pressures and whether the corporate structure of the courts appears independent are important when examining the independence of the courts, the criminal judgeships of peace were established in accordance with the Law No. 6545 dated 18/6/2014, the judges are assigned to criminal judgeships of peace by taking into account their career, competency and qualification by the High Council of Judges and Prosecutors and the criminal judgeships of peace are organized in line with the security of tenure of judge and independence of the courts as well as other courts.

66. Contrary to the opinion of the Ministry, the applicant asserted that the "judge" or the "court" should possess certain fundamental judicial guarantees, qualifications and qualities in accordance with Article 5 of the European Convention of Human Rights, the judicial bodies should be established by law, have the guarantees of independence and impartiality, respect the principles of contradictory trial and equality of arms, in addition, the judicial body entitled to issue arrest warrant should respect the principle of natural judge, that one of the characteristics that courts must have is to build trust, that the formation of the courts by law means the formation before the commission of a crime in accordance with the criminal law, the Criminal Judgeships of Peace which issued the arrest warrant was established after the commitment of the alleged offense as a project by the political power and these judgeships are not impartial or independent.

67. As stated in the previous decisions of the Constitutional Court, the principle of natural judge is defined as determining by law the judicial authority entitled to hear the case before the commission of a crime or the emergence of the conflict. The principle of natural judge prevents the formation of judicial authorities or the assignment of the judge after the commission of a crime or emergence of the conflict, in other words, prevents the assignment of a judge in accordance with the accused or the parties of the case (Constitutional Court, C. 2014/164, D.2015/12, 14/1/2015).

68. However, the principle of natural judge does not mean that newly founded courts or judges who are newly assigned to the courts cannot hear the cases in relation to offenses previously committed. It is not contrary to the principle of natural judge that a newly founded court or a judge who is newly assigned to a court handles the conflicts which are not limited to a

certain fact, person or group and occurred before the date of formation or assignment. (Constitutional Court, C. 2014/164, D. 2015/12, 14/1/2015).

69. In this regard, if a provision of law does not seek to determine the judicial authority which will hear the case in relation to the crime after the commission of the crime and is applied to all cases within its scope following its entry into force, the principle of natural judge is not violated (Constitutional Court, C.2009/52, D. 2010/16, 21/1/2010).

70. It is ruled that the judicial power shall be exercised by independent courts in Article 9 of the Constitution; and in Article 138, the meaning of independence of courts is explained. According to that, *"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."* Independence means that a court should be independent from the legislative, executive and other judicial bodies as well as the district of jurisdiction and the parties of the case and should not be influenced by them when settling a conflict (Constitutional Court, C. 2014/164, D. 2015/12, 14/1/2015).

71. The method of assignment of the members, the term of office, the existence of guarantees against external pressures and whether the court appears independent are important when determining whether the court is independent from the administration or the parties of the case (Yaşasın Aslan, Application Number: 2013.1134.16.5.2013, § 28).

72. The right to demand trial of the case by an impartial court is clearly explained in Article 6 of the Convention as a component of the right to a fair trial. Whereas impartiality of the courts is not clearly explained in Article 36 of the Constitution, this right is an implicit component of the right to a fair trial under the jurisprudence of the Constitutional Court. Considering that the impartiality and the independence of the courts are two complementary components, it is evident that Articles 138, 139 and 140 of the Constitution should be taken into account when reviewing the right to be tried in an impartial court -as required by the principle of Constitutional integrity-(*Tahir Gökatalay, Application Number:* 2013/1780, 20/3/2014, §60).

73. The impartiality of the courts is explained with reference to the attitude of the judge who is entitled to hear the case and the corporate structure of the court when hearing the cases. Firstly, the legal and administrative regulations regarding the formation and the structuring of the courts should not reflect that they are not impartial. In fact, the corporate impartiality is linked to the independence of the courts. The independence should be realized as a prerequisite to establish impartiality and in addition, the corporate structure should not appear partial (Constitutional Court, C. 2014/164, D. 2015/12, 14/1/2015).

74. The second element concerning the impartiality of the courts is about the subjective attitude of the judges in relation to the case. The judge who will hear the case should treat the parties of the case equally without being partial or prejudiced and decide through his/her personal conviction within the framework of the provisions of law without being subject to any suggestion or pressure. This is what is expected from the judges in the light of the Constitution and the laws. Contrary behaviors are subject to the sanctions in criminal and disciplinary law by the legal order (Constitutional Court, C.2014/164, D.2015/12, 14/1/2015).

75. In the concrete fact, it is understood that the Criminal Judgeships of Peace which are allegedly not impartial or independent rejected the request of the public prosecutor and decided in favor of the suspects, in this regard, the arrest request for the offenses of revealing the documents which should be kept secret in relation to security and political interests of the government and founding an organization to commit crimes is rejected by Istanbul 5th Criminal Judgeship of Peace.

76. It is understood that the relevant judges fulfilled the mentioned duties based on a general legal regulation and following the assignment by the High Council of Judges and Prosecutors. Therefore, it is not possible to accept, without adopting a prejudiced attitude towards the applicant in the proceedings, that the relevant judges did not act impartially or independently on political or personal grounds with reference to the comments and assessments delivered in political discussions and the facts, the authenticity and the nature of which cannot be proved (*Hikmet Kopar and the others [General Assembly],Application Number:* 2014/14061, 8/4/2015, § 114; *Hidayet Karaca* [*General Assembly*], Application Number: 2015/144, 14/7/2015, § 78).

77. Thus, the Constitutional Court rejected the request for annulment of the provision which created the criminal judgeship of peace on the grounds that the judges of the criminal judgeships of peace are assigned by the High Council of Judges and Prosecutors as every other judge and have the security of tenure of judges provided in Article 139 of the Constitution, the judgeships are organized in line with the independence of the judges and security of tenure of judges as other courts in accordance with the Constitution, there is no reason to suggest that they cannot act impartially regarding their structuring or functioning and moreover, there are provisions of procedure which would prevent the judges from hearing the case when it is proven that the judges are no longer impartial due to concrete, objective and convincing evidence (Constitutional Court, C. 2014/164, D. 2015/12, 14/1/2015).

78. Due to the abovementioned reasons, as it is certain that there is no violation regarding the allegation that the applicant was arrested by an incompetent judgeship which is not impartial and independent and established contrary to the principle of natural judge, it should be decided that this section of the application is inadmissible due to *lack of explicit grounds.*

Alparslan ALT AN disagreed with this view.

V. JUDGMENT

Due to the abovementioned reasons;

It has been decided on 17/5/2016 BY A MAJORITY VOTE and the dissenting vote of Alparslan ALTAN that the allegation that the criminal judgeships of peace are contrary to the principle of natural judge, independent and impartial judge within the scope of the right to personal liberty and security, is INADMISSIBLE due to *lack of explicit grounds.*

President	Member	Member
Engin YILDIRIM	Osman Alifeyyaz PAKSÜT	Recep KÖMÜRCÜ

Member	Member
Alparslan ALTAN	Celal Mümtaz AKINCI

2000 – 2016 DETENTION RATES IN THE PENAL INSTITUTIONS

YEARS	DETAINED	TOTAL	RATE
31/12/2000	24,657	49,512	**49.8%**
31/12/2001	28,068	55,609	**50.5%**
31/12/2002	24,621	59,429	**41.4%**
31/12/2003	27,240	64,296	**42.4%**
31/12/2004	27,565	57,930	**47.6%**
31/12/2005	26,425	55,870	**47.3%**
31/12/2006	34,412	70,277	**49.0%**
31/12/2007	38,028	90,837	**41.9%**
31/12/2008	40,172	103,235	**38.9%**
31/12/2009	40,340	116,340	**34.7%**
31/12/2010	34,248	120,814	**28.3%**
31/12/2011	35,987	128,604	**28.0%**
31/12/2012	31,707	136,020	**23.3%**
31/12/2013	27,693	145,478	**19.0%**
31/12/2014	22,306	158,837	**14.0%**
31/12/2015	25,220	178,089	**14.2%**
31/01/2016	25,829	181,416	**14.2%**
29/02/2016	26,420	184,878	**14.3%**
31/03/2016	26,482	187,647	**14.1%**
30/04/2016	26,300	189,219	**13.9%**
31/05/2016	26,527	191,445	**13.9%**
30/06/2016	25,463	191,721	**13.3%**

**** This chart is not within the scope of the Official Statistics Program which entered into force by the Council of Ministers Decision No. 2008/13472 which was published in the Official Gazette dated 19/04/2008 and No. 26852 and it was prepared especially for service-related reasons**

ANNEX-12