



In line with Resolution II adopted by the Circle of the Presidents at its meeting held on 13 June 2018 in Prague, the theme of the XVIIIth Congress of the Conference of European Constitutional Courts to be held in Prague from 26 to 29 May 2020 will be:

**HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS:
THE RELATIONSHIP OF INTERNATIONAL, SUPRANATIONAL AND NATIONAL CATALOGUES IN THE
21ST CENTURY**

**QUESTIONNAIRE FOR THE XVIIIth CONGRESS
OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS**

I. GENERAL PART: CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I.I International catalogues of human rights (ECHR, UDHR and ICCPR)

- In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?

Article 90 of the Turkish Constitution governs international treaties. Under the Article, international agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these treaties for constitutional review. In the case of a conflict between international treaties, duly put into effect, and the domestic laws concerning fundamental rights and freedoms, the provisions of international treaties shall prevail. Accordingly, international treaties on human rights prevail over domestic laws.

- What mechanism is used to invoke the international treaties in national court decision-making?

There is no specific mechanism for implementation of international treaty provisions, they can be invoked in law suits where relevant just like other laws.

- Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.

That does not seem possible in the Turkish legal system, an international treaty must be duly put into effect and only then it can be invoked or implemented as part of the domestic law.

I.II Supranational catalogues of human rights (the Charter)

- Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by “radiating” through the national catalogues (a substantive point of reference in other states)?
- Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?
- Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is conditioned by making a request for preliminary ruling with the Court of Justice of the EU?

Turkey is not an EU member. Therefore, this section does not apply.

I.III National human rights catalogues

- Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order)? What is its structure?

Chapter II of the Constitution is titled “**Rights and Duties of the Individual**” and dedicated to fundamental rights and freedoms. Each right is enshrined in a separate article from Article 17 through Article 40.

- What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?

Basic human rights were first adopted in the Kanun-ı Esasi (Basic Law) in 1876. In the subsequent constitutions of 1924, 1961 and 1982, the number and scope of the rights were expanded gradually. In the last Constitution of 1982, the rights and freedoms and their restrictions were formulated in consideration of international human rights documents and treaties.

- What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?

The fundamental rights are enshrined in the Constitution, and there is a rigid procedure for constitutional amendment. However, it is not always necessary to amend the Constitution to expand scope of a right, to adopt sub-principles or a novel right. The judiciary plays an important role through case-law in terms of interpreting and defining the scope of the rights. In particular, the Turkish Constitutional Court plays a major role through the individual application system in this regard. The Court affords protection for the rights in line with the case-law of the European

Court of Human Rights (ECtHR). Doing so, the Court adopt more elements or sub-elements/principles of rights and thereby broaden the scope of rights.

The Constitution has also been amended several times to adopt legal principles strengthening or furthering fundamental rights. For example, Article 38 of the Constitution were amended in 2001 to include the following protections in terms of personal liberty and right to life:

“Findings obtained through illegal methods shall not be considered evidence.”

“No one shall be deprived of his/her liberty merely on the ground of inability to fulfil a contractual obligation.”

“Neither death penalty nor general confiscation shall be imposed as punishment. The administration shall not impose any sanction resulting in restriction of personal liberty...”

I.IV The mutual relationship between different catalogues of human rights

- Can you give examples from the case law of your court related to the use of any of the international catalogues?

The Turkish Constitutional Court frequently refers to European Convention of Human Rights (ECHR) and the case-law of ECtHR in adjudicating individual applications against the alleged violation of human rights. There are abundance of cases on various rights ranging from right to life to freedom of expression. For example, under the right to fair trial, the ECtHR considers conflicting court decisions or domestic case-law as a violation fair trial. Following this interpretation of the right to fair trial by the ECtHR, the Turkish Constitutional Court delivered several judgments in same fashion stating that conflicting case-law must be adequately resolved or otherwise it may violate right to fair trial (*Türkan Bal* [Plenary], 2013/6932, 06/01/2015; *Ahmet Acar*, 2017/7060, 21/09/2016; *Hakan Altuncan* [Plenary], 2016/13021, 17/05/2018).

- Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?

The Court attributes the highest level of protection to the Constitution. In constitutional review, the Constitution is the only binding source, and international treaties serve as supportive norms. In individual application, however, the Constitution explicitly refers to the ECHR in determining the scope of the jurisdiction. Therefore, the Constitutional Court takes into account ECHR and follows the case-law of the ECtHR in adjudicating individual applications.

- Is there an established procedure for choosing a specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary.)

There exists no such procedure in the Turkish legal system.

II. SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS

II.I Right to life

- What is the original wording of the provision protecting this right in your national catalogue?

Under the subtitle of “*Personal inviolability, corporeal and spiritual existence of the individual*” Article 17 reads that “*Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence. The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent. No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.*”

- Is it possible to restrict the right? If so, how and under what conditions?

There is no restriction of this right however Article 17 lists situations which cannot be considered to violate right to life as follows: “*The act of killing in case of self-defense and, when permitted by law as a compelling measure to use a weapon, during the execution of warrants of capture and arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, or carrying out the orders of authorized bodies during state of emergency, do not fall within the scope of the provision of the first paragraph.*”

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

In *Serpil Kerimoğlu and Others* (2012/752, 17/9/2013, §§ 50 and 51), the Court defined the right to life as follows:

“The right to life and the right to protect and improve one’s material and spiritual existence of are among rights which are closely tied, inalienable and indispensable. As specified by the Constitutional Court, the fundamental right over the integrity of life and body is among the rights which impose a positive and negative liability on states within the scope of the right to life regulated in article 17 of the Constitution, as a negative liability, the state has the liability not to end the life of any individual who is within its jurisdiction in an intentional and illegal way. Furthermore, as a positive liability, the state has the liability to protect the right to life of all individuals who are within its jurisdiction against the risks which may arise out of the actions of public authorities, other individuals or the individual himself/herself. The state is responsible for protecting the material and immaterial existence of an individual from all kinds of dangers, threats and violence.”

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

There is no major difference between the case-law of the Court and case-law of international courts.

II.II Freedom of expression

- What is the original wording of the provision protecting this right in your national catalogue?

Under the sub-heading “*Freedom of expression and dissemination of thought*”, Article 26 formulates the freedom of expression as follows:

“Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing.”

- Is it possible to restrict the right? If so, how and under what conditions?

Second Paragraph of Article 26 lists the grounds for restriction:

“The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.”

The third and fourth paragraphs read as follows:

“Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented.

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

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Freedom of expression, in broad sense, has been considered by the Turkish Constitutional Court as comprising freedom of the press, freedom of information, right to publish periodicals and non-periodicals, freedom of science and the arts and right of rectification and reply. These rights and freedoms under freedom of expression are also enshrined respectively and separately in the Turkish Constitution.

In *Emin Aydın* (2013/2602, 23/1/2014, §§ 40-45), the Court defined the freedom of expression as follows:

“The freedom of expression covers not only the freedom to “have a thought and conviction” but also the existing freedom to “express and disseminate thought and conviction (opinion)” and the associated freedom to “receive and give information or opinion”. In this context, the freedom of expression refers to individuals' ability of having free access to the news and information, other people's opinions, not being condemned due to the opinions and convictions they have acquired and freely expressing, explaining, defending, transmitting to others and disseminating these either alone or with others.

Freedom of expression is one of the foundations of a democratic society and it is among the indispensable conditions for the development of the society and the self-development and self-realization of the individual. The light of truth springs forth from collision of ideas. In this context, establishing social and political pluralism is dependent on expression of all kinds of thoughts in a peaceful fashion and freely. In the same manner, an individual can realize his/her unique personality in an environment where he/she can freely express his/her thoughts and engage in discussion. The freedom of expression is a value that we need in defining, understanding and perceiving ourselves and others and, in this framework, in determining our relations with others.

...

The Constitution guarantees not only the thoughts and convictions but also the styles, forms and tools of expression. The means which can be resorted to in the exercise of the freedom of expression and dissemination of thought are listed in article 26 of the Constitution as "orally, in writing, in pictures or through other means" and with the expression "other means", it is demonstrated that all kinds of means of expression are under constitutional protection.

...

In this context, the freedom of expression is directly related to a significant portion of other rights and freedoms guaranteed by the Constitution. The freedom of the press which guarantees the dissemination of ideas, thoughts and information by means of visual and printed media tools is also one of the tools to be used in the exercise of the freedom of expression and dissemination of thought. While the freedom of the press is protected under Article 10 on the freedom of expression in the ECHR, it is specially regulated in articles 28- 32 of the Constitution.

The freedom of the press covers the right to explain and interpret thoughts and convictions via means such as newspapers, journals and books and the right to publish and distribute information, news and criticisms (see the Court's decision, E.1996/70, K.1997/53, 5/6/1997). The freedom of the press ensures that the individual and the society are informed by performing the transmission and circulation of thoughts. The expression of thoughts, including those who oppose the majority, via all sorts of means, garnering supporters to the thoughts which have been explained, fulfilling and convincing into fulfilling the thoughts are among the requirements of the pluralistic democratic order. Therefore, the freedom of expression and dissemination of thought and the freedom of the press are of vital importance for the functioning of democracy. As the freedom of the press is, in a way, the freedom of conveying news and opinions which concern people, it is, in another way, closely related to the right of people to receive this information and opinions."

In the same judgment, the Court referred to ECHR and ECtHR case-law (§§ 42 and 44):

"In this context, the freedom of expression is directly related to a significant portion of other rights and freedoms guaranteed by the Constitution. The freedom of the press which guarantees the dissemination of ideas, thoughts and information by means of visual and printed media tools is also one of the tools to be used in the exercise of the freedom of expression and dissemination of thought. While the freedom of the press is protected under Article 10 on the freedom of expression in the ECHR, it is specially regulated in articles 28- 32 of the Constitution.

As stated frequently by the ECtHR in its decisions pertaining to the freedom of expression, in order for the freedom of expression to fulfill its mentioned social and individual function, not only the "information" and "thoughts" which are considered to be positive, accurate or not harmful by the society and the state but also the information and thoughts which are considered to be negative or inaccurate by the state or a segment of the people and are disturbing for them should

be freely expressed and the individuals should be sure that they will not be subject to any sanctions due to these expressions. The freedom of expression is the basis of pluralism, tolerance and open-mindedness and without this freedom, "a democratic society" cannot be mentioned (see Handyside v. the United Kingdom, App. No: 5493/72, 7/12/1976, § 49)."

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The case-law of the Court is in line with international law and case-law.

II.III Right to privacy/right to respect for private life/right to private life

- What is the original wording of the provision protecting this right in your national catalogue?

Right to privacy is articulated in Article 20 under sub-heading of "*Privacy and protection of private life*". The wording is as follows: "*Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated.*"

- Is it possible to restrict the right? If so, how and under what conditions?

The second paragraph of Article 20 states the restriction grounds: "*Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law, in cases where delay is prejudicial, again on the above-mentioned grounds, neither the person, nor the private papers, nor belongings of an individual shall be searched nor shall they be seized. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall automatically be lifted. Everyone has the right to request the protection of his/her personal data. This right includes being informed of, having access to and requesting the correction and deletion of his/her personal data, and to be informed whether these are used in consistency with envisaged objectives. Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law.*"

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

The Court elaborated on this right in a constitutional review case (E. 2014/36, K. 2015/51, 27/5/2015) as follows:

"As it is stated in the legislative intent of Article 20 of the Constitution, "the right to demand respect for private and family life" aims to protect the privacy of private and family life and to prevent it from being exposed to public. In other words, it protects the individual's right to demand all issues and events in his private life to be known to only himself or those whom he wishes to reveal and disclose. Furthermore, it aims to prevent public authorities from interfering in individual's private life; i.e. it guarantees the individual's right to regulate and live his personal and family life according to his own sense and understanding. Therefore, the regulation

under Article 20 of the Constitution protects the private life and family life against the State, society and other people, subject to the exceptions stated in the Constitution.”

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

There is no major difference between the case-law of our Court and international courts.

II.IV Freedom of religion

- What is the original wording of the provision protecting this right in your national catalogue?

It has been stipulated in the Turkish Constitution as follows:

“VI. Freedom of religion and conscience

ARTICLE 24- Everyone has the freedom of conscience, religious belief and conviction. Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14. No one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions. Religious and moral education and instruction shall be conducted under state supervision and control. Instruction in religious culture and morals shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual’s own desire, and in the case of minors, to the request of their legal representatives. No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets.”

- Is it possible to restrict the right? If so, how and under what conditions?

As stated in Article 24, *“Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14.”* Article 14 reads that *“None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights. No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution. The sanctions to be applied against those who perpetrate activities contrary to these provisions shall be determined by law.”*

Article 24 further states that *“No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets.”*

The Constitutional Court of Turkey interprets these provisions according to the conditions of each concrete case. So far the Court has concluded that the aims demonstrated by the State such as security in prisons, the regulator role of the State in the election procedure of minority religious groups, prevention of crimes, protection of the rights of others and public safety should be considered as legal aims in the context of Article 24 of the Constitution.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

In *Tuğba Arslan* [Plenary] (2014/256, 25/6/2014, § 52-54) the Court explained the freedom of religion in the context of headscarf case as follows:

“...the religion is one of the main sources that the individuals, who are devoted to a religion, refer to so as to understand and give meaning to the life and it has an important function for the shaping of the social life is present in the origin of the fact that the freedom of religion and conscience is one of the foundations of the democratic society. Because of this function, it has been accepted at international level that the individuals have freedoms of religions and faith within certain measures independently from the positions of the religions against the freedoms. Just as other freedoms, the freedom of religion was also enshrined with certain legal and constitutional guarantees as a result of a long and difficult process. As a matter of fact, the freedom of religion is a right that is protected in most of the international declarations and conventions as regards the human rights at universal and regional level. 53. The fact that the right protected by Article 24 of the Constitution is indispensable is because the freedom of religion and conscience is of vital importance for establishment and sustainment of the foundation of an effective and meaningful democracy based on the rule of law. On the other hand, the freedom of religion and conscience can only be protected in a democracy based on the understanding of recognition, pluralism and impartiality.

In the context of the freedom of religion, "recognition" requires that the state accepts the existence of all religious and faith groups as regards the state-individual relations. The policy of the state for the pluralistic recognition on one hand forces the state to treat everyone equally in the society and on the other hand, does not allow the state to embrace any religion or ideology in an official way. The pluralism is only possible when everyone takes part in the social and political life through his/her own identity and as himself/herself. The pluralism cannot be mentioned in a place where the differences and those, who are different, are not recognized and protected against the threats. In the pluralistic society, the state shall be obliged to ensure that the individuals live as required by their own world views and faiths. The state does not have the authority to accept one of the views or life styles present in the society as "wrong". In this context, unless the reasons for limitation stipulated in the Constitution are present, making the differences exist together is a requirement of the pluralism although the majority or the minority does not like it. The third understanding that protects the freedom of religion and conscience is the impartiality arising out of the secularism which is the guarantee of the protection of the freedom of religion and conscience of the individuals in an equal way.”

It should be noted that, in the past, the Court has frequently invoked the principle of laicism to deny religious freedoms. More recently, the Court relaxed this rigid interpretation of laicism and rather employed a balance between this principle and freedom of religion. This approach of the Court expanded the sphere of religious freedoms

not only for majority group of Islam but also for minority group of Christian and Jews. In *B.S.* (2015/8491, 18.7.2018, § 54), the Court has formulated the relation between laicism and religious freedoms as follows:

The freedom of religion and conscience, enshrined in Article 24 of the Constitution, safeguards everyone's "freedom to manifest his/her religion and belief", "freedom to change his/her religion and belief", "freedom to have a belief or conviction of his/her choice" and "freedom to have no belief or conviction".

This right safeguarded by Article 24 of the Constitution is *sine qua non* as the freedom of religion is vital for building and maintaining an effective and sound democracy based on rule of law.

Those who are believers of different religions or who have no religion or belief are under the protection of the secular State. As a matter of fact, as defined in the legislative intent of Article 2 of the Constitution, secularism –which in no circumstances means irreligiousness– allows individuals to have a belief or sect of their own choice, to worship freely as well as prevents them from being subject to discrimination due to their religious belief. The State is to take necessary measures for providing an environment where the freedom of religion and conscience may be exercised.

In this sense, secularism imposes negative and positive obligations on the State. Negative obligation requires avoiding of any interference with the individuals' freedom of religion unless there are compelling grounds. Positive obligation entails the duty on the part of the State to eliminate obstacles before the freedom of religion and to provide appropriate environment and opportunities whereby individuals may live in the way they believe.

The argument that it is in breach of the principle of secularism to allow public officers on duty to wear headscarf on religious ground –without taking into consideration the specific circumstances of their public offices– can be in no way accepted. Considering the practices such as wearing headscarf by public officers to manifest religious beliefs as to threaten social unity is not in conformity with democracy and the understanding of pluralist secularism. Indeed, such practices reflect social diversity rather than constituting a threat against it.

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The general principles agreed on by the Constitutional Court in the context of freedom of religion and those adopted by the international courts, especially the European Court of Human Rights are basically similar and have the common aim of facilitating diversity in society. However, some differences may be observed in the practice such as the difference of this right's applicability in the European Court of Human Rights' case of *Leyla Şahin* [GC], 44774/98, 10/10/2005, and the Constitutional Court's case law in *Tuğba Arslan*, which provides far more protection for the freedom of religion than the European Court of Human Rights.

II.V Prohibition of discrimination

- What is the original wording of the provision protecting this right in your national catalogue?

Prohibition of discrimination is formulated along with the principle of equality:

“X. Equality before the law

ARTICLE 10- Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.

Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality.

No privilege shall be granted to any individual, family, group or class.

State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings.”

- Is it possible to restrict the right? If so, how and under what conditions?

Article 10 did not place any ground for restriction of this principle except stating that measures for positive treatment of women, children and elderly do not contradict prohibition of discrimination.

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

In examining whether the prohibition of discrimination has been violated, the Turkish Constitutional Court primarily ascertains whether there have been similar ground and difference in treatment within the meaning of Article 10 of the Constitution. In this respect, it is then assessed whether there has been any difference in treatment, among individuals who are of the same or similar status, in respect of the interference with the impugned right. If any, the Constitutional Court ultimately adjudicates the case by elaborating on the questions as to whether the difference in treatment has an objective and reasonable basis and whether the impugned interference is proportionate.

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The decisions/judgments rendered by the Constitutional Court both in the constitutionality review and individual application processes have been and are currently in harmony with the case-law established by the European Court of Human Rights.

II.VI Right to liberty

- What is the original wording of the provision protecting this right in your national catalogue?
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Article 19 of the Constitution states that *“Everyone has the right to personal liberty and security.”*

- Is it possible to restrict the right? If so, how and under what conditions?

Article 19 further provides:

“No one shall be deprived of his/her liberty except in the following cases where procedure and conditions are prescribed by law: Execution of sentences restricting liberty and the implementation of security measures decided by courts; arrest or detention of an individual in line with a court ruling or an obligation upon him designated by law; execution of an order for the purpose of the educational supervision of a minor, or for bringing him/her before the competent authority; execution of measures taken in conformity with the relevant provisions of law for the treatment, education or rehabilitation of a person of unsound mind, an alcoholic, drug addict, vagrant, or a person spreading contagious diseases to be carried out in institutions when such persons constitute a danger to the public; arrest or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued.

Individuals against whom there is strong evidence of having committed an offence may be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence, as well as in other circumstances prescribed by law and necessitating detention. Arrest of a person without a decision by a judge may be executed only when a person is caught in flagrante delicto or in cases where delay is likely to thwart the course of justice; the conditions for such acts shall be defined by law. Individuals arrested or detained shall be promptly notified, in all cases in writing, or orally when the former is not possible, of the grounds for their arrest or detention and the charges against them; in cases of offences committed collectively this notification shall be made, at the latest, before the individual is brought before a judge.

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, excluding the time required to send the individual to the court nearest to the place of arrest. No one can be deprived of his/her liberty without the decision of a judge after the expiry of the 9 above specified periods. These periods may be extended during a state of emergency or in time of war.

The next of kin shall be notified immediately when a person has been arrested or detained. Persons under detention shall have the right to request trial within a reasonable time and to be released during investigation or prosecution. Release may be conditioned by a guarantee as to ensure the presence of the person at the trial proceedings or the execution of the court sentence. 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.

Damage suffered by persons subjected to treatment other than these provisions shall be compensated by the State in accordance with the general principles of the compensation law.”

- Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

With regard to right to liberty and security, the Court has received many applications against pre-trial detentions. The Court has elaborated on the issue in *Mustafa Ali Balbay*; (2012/1272, 4/12/2013, § 72) as follows:

“...the detention of a person primarily depends on the presence of a strong indication that s/he has committed a crime. This is a sine qua non sought for the measure of detention. For this, it is necessary to support an allegation with plausible evidence which can be considered as strong. The quality of the cases and information which can be considered as plausible evidence is to a large extent based on the unique conditions of the concrete case.”

In *Şahin Alpay* [Plenary], 2016/16092, 11/1/2018, the Court stated that Article 19 § 1 of the Constitution, it is set out in principle that everyone has the right to personal liberty and security. In Article 19 §§ 2 and 3, it is provided that individuals may be deprived of liberty under the circumstances set forth therein and with due process of law. Therefore, the freedom of a person may be restricted only in cases where one of the circumstances specified in this article exists.

Moreover, an interference with the right to liberty and security constitutes a breach of Article 19 of the Constitution unless it also complies with the conditions set out in Article 13 of the Constitution in which the criteria with respect to the restriction of fundamental rights and freedoms are specified. It is therefore necessary to determine whether the restriction complies with the requirements enshrined in Article 13 of the Constitution; i.e., the requirements of being prescribed by law, relying on one or more valid reasons specified in the relevant articles of the Constitution, and not being contrary to the principle of proportionality.

Pursuant to Article 19 § 3 of the Constitution, the detention measure can be applied only for “individuals against whom there is a strong indication of guilt”. In other words, the prerequisite for detention is the existence of a strong indication that the individual has committed an offence. Therefore, in every concrete case, it must be assessed whether this prerequisite has been fulfilled or not prior to making an examination as to the other requirements of detention. Strong indication of guilt is acknowledged only in cases where the accusation is supported with convincing evidence likely to be regarded as strong.

In every concrete case, it falls in the first place upon the incumbent courts deciding detention cases to determine whether the prerequisites for detention, i.e., the strong indication of guilt and other grounds exist, and whether the detention is a proportionate measure. As a matter of fact, those authorities which have direct access to the parties and evidence are in a better position than the Constitutional Court in making such determinations. However, it is the Constitutional Court’s duty to review whether the judicial authorities have exceeded the discretion conferred upon them. The Constitutional Court’s review pertains especially to the detention process and the grounds of detention order within the scope of the circumstances of the concrete case.

- Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

In interpreting the right to personal liberty and security, its restriction and safeguards inherent in this right, the Turkish Constitutional Court takes into consideration the international conventions on human rights notably the European Convention on Human Rights, the reports issued by the Council of Europe and the other international institutions as well as practices and assessments of the European Court of Human Rights (ECHR) and other international judicial bodies dealing with human rights issues.

In this regard, there is no discrepancy, within the context of the protection of the right to personal liberty and security, between the Constitutional Court's case-law and the approach adopted by the international judicial bodies. As a matter of fact, in several applications which were brought before the ECHR by the applicants whose individual applications had been already concluded by the Constitutional Court, the ECHR found violations in only a few of these cases.

