REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2012/1272

Date of Decision: 4/12/2013

FIRST SECTION

DECISION

President	:	Serruh KALELİ
Members	:	Mehmet ERTEN
		Zehra Ayla PERKTAŞ
		Burhan ÜSTÜN
		Zühtü ARSLAN
Rapporteur	:	Mustafa BAYSAL
Applicant	:	Mustafa Ali BALBAY
Counsel	:	Att. Mehmet İPEK

I. SUBJECT OF APPLICATON

1. The applicant asserted that he was detained although there was no concrete incident, fact and information which would justify his detention, that the detention exceeded the reasonable period, that his right to a fair trial and to political participation and freedom of expression were violated.

II. APPLICATION PROCESS

2. The application was directly lodged to the Constitutional Court on 26/12/2012. The deficiencies detected as a result of the preliminary administrative examination of the petition and its annexes were made to be completed and it was determined that no matter preventing the submission of the application to the Commission existed.

3. It was decided on 27/5/2013 by the First Commission of the First Section that the admissibility examination be carried out by the Section and that the file be sent to the Section as per paragraph (3) of article 33 of the Internal Regulation of the Constitutional Court.

4. In the session held by the Section on 6/6/2013, it was decided that the examination of admissibility and merits of the application be carried out together as per subparagraph (b) of paragraph (1) of article 28 of the Internal Regulation of the Constitutional Court and that a copy of the application be sent to the Ministry of Justice.

5. The Ministry of Justice presented its opinion to the Constitutional Court on 29/7/2013.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 31/7/2013. The applicant presented what he would say to the Constitutional Court within due period.

III. FACTS AND CASES

A. Facts

1. As expressed in the application and the documents attached thereto:

7. As expressed in the application petition and the annexes thereof, the relevant facts are summarized as follows:

8. The applicant was taken into custody on 1/7/2008 within the scope of an investigation which was conducted by the Office of the Chief Public Prosecutor of Istanbul.

9. His statement was taken by the office of prosecutor after the duration of custody expired and referred to the court with the request that he be detained on the date of 5/7/2008. The court dismissed the request that the applicant be detained on the same date, but decided on the application of judicial control. The objection filed against this decision was dismissed.

10. After the applicant was taken into custody this time in Ankara on the date of 5/3/2009 within the scope of the same investigation, he was taken to Istanbul. Following his statement in the office of prosecutor, he was referred to the court with the request that he be detained on the date of 6/3/2009.

11. The court on duty decided on the detention of the applicant following interrogation. "*The quality and nature of the alleged crime, the current state of evidence, the existence of a strong suspicion of crime, the fact that the crime is among the crimes stipulated in article 100/3 of the CCP, the suspicion of escaping and obfuscating the evidence*" was shown as the justification of detention.

12. The office of the chief public prosecutor filed a case on the date of 8/3/2009 with an indictment one of whose suspects was the applicant. In the indictment, it was requested that the applicant be punished due to the alleged crimes and "*the videos shot contrary to law*", "*the documents used in his books*", "*the data recovered through technological means although he erased them from his computer*", "*the telephone calls that he made*", "*the telephone calls that third parties made between them*" were included as evidence.

13. The defense of the applicant was taken on the date of 14/12/2009.

14. The applicant was elected as a deputy of the 24th Period in the general elections held on the date of 12/6/2011 and received his mandate on the date of 20/6/2011. He requested that a decision be issued on his release by taking into consideration this case, but this request of him was dismissed by the 13th Assize Court on the date of 23/6/2011. The relevant parts of this decision are as follows:

> *"Legislative immunity is a Constitutional rule which has been created within a certain political process in order to ensure that the members of legislative body dauntlessly fulfill their duty, to prevent them from being blamed because of their functions, to prevent that they are restrained from duty through simple allegations.*
>
> *Legislative irresponsibility is regulated under the title of "Legislative Immunity" in article 83 of the Constitution. According to a decision of the Supreme Court of Appeals; Legislative*

irresponsibility neither grants a personal privilege, nor is absolute (The 4th CC of the Supreme Court of Appeals, M. 2003/1548, D.2003/6601). Similarly, legislative immunity is not an absolute personal right either, it is relative and is a mechanism related to public order provided in our Constitution by considering public interest. How and in which way these rights will be restricted has been regulated in article 83 of our Constitution.

Following this brief explanation on the nature of legislative immunity, the determination of which crimes will be kept outside the scope of immunity is of importance.

General practice in current legal systems is that the criminal acts which could prevent deputies from participating in their legislative activities, fulfilling their assembly works and opposition functions in a convenient way are within the scope of legislative immunity.

As a rule, all modern Constitutions have kept the state of in flagrente delicto which requires heavy sentence outside the scope of legislative immunity. Keeping the state of in flagrente delicto which requires heavy sentence outside the scope by separating it from legislative immunity is a practice embraced by modern legal systems.

There is also a similar regulation in the Constitution of the Republic of Turkey dated 1982, numbered 2709.

The Constitution of the Republic of Turkey numbered 2709 has listed the cases which are covered by article 14 of the Constitution with the title of "Prohibition of Abuse of Fundamental Rights and Freedoms" among the exceptions of legislative immunity in addition to the state of in flagrente delicto which requires heavy sentence.

In the continuation of article 83 of the Constitution, the state of in flagrente delicto which requires heavy sentence and the cases in article 14 of the Constitution have been made an exception on the condition that their investigation is initiated before the election, kept outside the scope of legislative immunity, in such cases, it has been prescribed that the trial process in relation to the deputy is continued and that the deputy can be prevented from participating in the activities in the assembly, but in both cases, the court has been imposed with the obligation of notifying the circumstance to the Grand National Assembly of Turkey without any delay and in a direct manner.

In paragraphs one and two of article 14 of the Constitution titled "Prohibition of Abuse of Fundamental Rights and Freedoms", the provision "None of the rights and freedoms present in the Constitution can be exercised in the form of activities aiming to impair the indivisible integrity of the State with its territory and nation and to abolish the democratic and secular Republic which is based on human rights.None of the provisions of the Constitution can be interpreted in a way that enables the State or individuals to engage in an activity to abolish the fundamental rights and freedoms recognized by the Constitution or to restrict them more comprehensively than that specified in the Constitution" is included.

…

Similarly, according to article 6/3 of our Constitution, "Nobody or no organ can exercise a State authority that does not take its source from the Constitution". Our Court is also included therein. In the event that a detained accused for whom the conditions of release do not materialize due to a reason that is not listed as a reason for release in our Constitution and article 100 and the subsequent articles of the CCP is released, our court will release the accused based on a venue which is not granted by our codes, no one should expect such an act from our court. Therefore, deciding on the continuation of the state of detention of the detained accused for whom the conditions of release do not materialize is a decision which complies with the letter and spirit of our Constitution.

The immunity of a deputy who is caught in the state of in flagrente delicto which requires heavy sentence or is claimed to have committed the crimes in article 14 of the Constitution on the condition that the investigation thereof is initiated prior to the election will not be the case due to the attributed crime. In the event of the presence of one of the matters which are kept outside the scope of immunity specified in article 83 of the Constitution, there is no need for a decision of the Assembly in order to detain a person who is elected as a deputy within the scope of an investigation and prosecution or to decide on the continuation of the state of detention of a deputy who is under detention. No matter what kind of a decision is issued, it will be sufficient that the issued decision be notified to the assembly.

Although there is a regulation in the first sentence of article 83/2 of the Constitution of the Republic of Turkey numbered 2709 to the effect that "A deputy against whom there are claims of offending before or after election cannot be arrested, interrogated, detained and tried without the decision of the Assembly", it is seen that an exception thereof is included through a regulation in the second sentence of the same article to the effect that "A case of in flagrante delicto which requires a heavy penalty and the conditions specified in article 14 of the Constitution on the condition that the investigation thereof started before the election are out of the scope of this provision. However, in such a case, the authorized body must immediately and directly inform the Grand National Assembly of Turkey on the situation" and that a restriction is imposed on the deputy immunity in article 14 of the Constitution.

According to paragraph two of article 83 of the Constitution, in crimes committed towards the aims that are prohibited through article 14 of the Constitution with regard to legislative immunity; primarily

- Investigation should be initiated prior to an election

- The cases specified in article 14 of the Constitution should be present.

According to this provision, an exception for a deputy to make use of the protection provided within the scope of legislative immunity is the fact that there is a crime which is covered by heavy sentence and whose investigation is initiated prior to an election and that this attributed crime is considered to be covered by article 14 of the Constitution.

In article 14 of the Constitution, some certain types of crime are not directly mentioned, only some concepts, principles and activities are specified.

In the article, the activities aimed at "Impairing the indivisible integrity of the State with its territory and nation and abolishing the democratic and secular Republic which is based on human rights" and "Abolishing the fundamental rights and freedoms recognized by the Constitution or restricting them more comprehensively than that specified in the Constitution" are mentioned. This regulation predicates on the aim rather than the act or the type of crime.

According to the opinions in the doctrine, the actions which are considered as "misuse" in article 14 of the Constitution can be expressed as;

1- Impairing the indivisible integrity of the State with its territory and nation,

2- Abolishing the democratic and secular Republic which is based on human rights,

3- Engaging in an activity to abolish the fundamental rights and freedoms recognized by the Constitution or to restrict them more comprehensively than that specified in the Constitution.

In the evaluation that is carried out, it should be considered whether or not the performed action has been committed in line with the aims specified in the article and whether or not there is a type of crime regulated in the criminal code in this matter.

In this respect, when the Turkish Criminal Code is taken into consideration;

The crimes regulated under the heading "Crimes against the Security of the State" in Chapter Four (TCC Articles 302 to 308),

The crimes regulated under the heading "Crimes Against the Constitutional Order and the Operation of Said Order" in Chapter Five (TCC Articles 309 to 316),

The crimes regulated under the heading "Crimes Against National Defense" in Chapter Six (TCC Articles 317 to 325),

The crimes regulated under the heading "Crimes Against State Secrets and Espionage" in Chapter Seven (TCC Articles 326 to 339),

should be considered to be covered by article 14 of the Constitution.

The crimes regulated in these chapters of the Turkish Criminal Code are generally expressed as;

Disrupting the unity and territorial integrity of the State, Destroying the constitutional order and the operation of the constitutional order, Attempting to extirpate the order foreseen by the Constitution of the Republic of Turkey or to usher in another order in place of the said order or to prevent the ipso facto operation of the said order through the use of force and violence, Attempting to extirpate the Grand National Assembly of Turkey and the Government of the Republic of Turkey or to prevent the Grand National Assembly of Turkey and the Government of the Republic of Turkey from doing their duties partially or wholly through the use of force and violence.

The fact that trial (investigation and prosecution) procedures can be performed on a deputy who engages in an activity in line with the aims prohibited within the scope of article 14 of the Constitution and commits one of the acts which criminal codes consider as crime is possible on the condition that the action "is committed prior to the election and its investigation is initiated prior to the election".

In the event that these conditions are present, the trial procedures which are initiated on the deputy before s/he is elected will also continue following the election.

In other words, in the event that the exception provision is implemented, the deputy can be detained, interrogated and tried due to one of the crimes in article 14 of the Constitution on the condition that its investigation is initiated prior to the election. In these cases, due to the crime in question, the deputy will not be able to make use of the protection which legislative immunity has ensured any more.

As will be understood from the precedent decisions of the Supreme Court of Appeals, the deputies who are caught in the state of in flagrente delicto which requires the heavy sentence prescribed in paragraph two of article 83 of the Constitution or who engage in an activity and commit a crime in line with the aims prohibited in article 14 of the Constitution on the condition that its investigation is initiated prior to the election will not be able to make use of legislative immunity on the condition that it is limited to the crime in question in the event that they are elected as deputies.

Article 14 of our constitution sets forth the elements which are sine qua non for the existence of the Republic of Turkey. From this point of view, the lawmaker has considered it contrary to public interest for a deputy to continue to make use of immunity although s/he is accused of committing a crime against the existence of the Republic of Turkey. In other words, the lawmaker has renounced from this public interest by introducing an exception on legislative immunity in articles 14 and 83 of our Constitution, given priority and attached

importance to the trial of the persons on whom there are serious attributions as to the effect that they have committed the crimes listed in the article in accordance with the general provisions in the CCP.

The investigation related to the case in which the accused are tried was initiated long before the General Deputy elections of the 24th period which were held on 12 June 2011 and the articles which are applicable on them are related to the crimes which require a heavy sentence and are covered by article 250 of the CCP and are the allegations which contain a strong suspicion of crime.

The argument that the detained accused M.H. and Mustafa Ali BALBAY did not have a suspicion of escape any more as they were elected as deputies is a subjective evaluation. Moreover, the decisions of our court on the continuation of detention until now were not only predicated on the suspicion of escape.

All of the evidence could not be collected due to the abundance of the number of accused in the file. In the indictment, the taking of statements of other accused who are claimed to be connected with the requesting accused could not be completed and then, the hearing of witnesses and other stages of prosecution will be proceeded.

…

As its justifications are explained above, the release of the accused who are elected as deputies just by taking into consideration the argument that "being elected as a deputy will bear the consequence of release" which is not predicated on any legal base and the continuation of the current state of other accused who cannot be elected as deputies does not accord with any right and principle of equity and rule of equality. Such a release decision means the issuing of the decision by taking into consideration class and status and it is clear that this situation will bear a consequence that deeply shakes the reliability of courts and trust in justice and outrage public conscience.

It is concluded that the election of the requesting detained accused as Deputies is not a matter which affects their states of detention within the scope of the attributed crimes."

15. The 14th Assize Court of İstanbul which conducted an examination upon an objection against this decision decided on the dismissal of the objection through the decision dated 29/6/2011. In the decision it was stated that "*no inappropriateness which is contrary to the procedure and law has been observed in the decision of the 13th Assize Court by considering the quality and nature of the attributed crime, the existing situation of evidence, scope of the file, the suspicion of escaping and obfuscating the evidence and the fact that the attributed crime is among the catalogue crimes listed in article 100/3 of the CCP*".

16. The request for the reevaluation of the state of detention within the scope of the Code dated 2/7/2012 and numbered 6352 on the Amendment of Some Codes So As to Render Judicial Services Effective and the Postponement of Cases and Penalties as Regards the Crimes Committed Through the Press was dismissed by the Court through the decision dated 27/7/2012. Justification part of the decision is as follows:

"a-The dismissal of the requests for release and the continuation of the state of detention as it is understood that the reasons for detention dated 06.03.2009 on the accused have not disappeared yet,

b- That the taking of witness statements by the court has not been completed yet, that the suspicion of obfuscating the evidence still continues as there are investigations and findings as to the effect that interest, pressure and threat are used by some accused on witnesses and

accused confessors in order for them to change their statements in the stages of investigation and prosecution,

c- That the accused who is tried within the scope of the same organization and for whom heavy penal sanctions are requested also has the suspicion of escape as some accused who are tried by our court and are claimed to be directors of the organization and members of the organization are in the state of an escape by escaping abroad without the investigation having been initiated on them yet while some of them do so in the stage of investigation and prosecution,

d- That the period of detention is reasonable by taking into consideration the fact that no condition in relation to a maximum period is introduced for trial under detention in article 5 of the European Convention on Human Rights, that the practice of the European Court of Human Rights is also compliant therewith, that the reasonable period needs to specially determined for each case and in particular, for the cases which can be considered as complex such as this case, the unique structure of the case that is tried, the substantial size that it has reached in terms of quality and quantity, the number of joined cases and accused, the fact that the crime attributed to the suspect is covered by the Crimes against the security of the State and the Crimes against the constitutional order and the operation of said order which are regulated in article 100 of the CCP and considered to be within the scope of catalogue crimes and also by the Code on the Fight Against Terrorism, that the upper limit of detention period prescribed for these crimes in the code is 10 years, the lower and upper limits of the amount of fine for the attributed crimes as regulated in the code, the period during which the accused has passed under detention and practices in similar trials,

e- That it is seen that trial without detention is principal and detention has been applied as an exception in the practices of our court up to now when the total number of accused in the file, the number of accused detainees in the beginning of the case and the number of accused who are still detained are taken into account,

f- That objections against comments reflecting bias can be the case if the justifications of detention on the suspect are specified in a very detailed, concrete manner and by way of discussing the evidence, that for this reason, this situation was taken into consideration in the determination of the suspicion of crime,

g- That there is a strong suspicion of crime as to the effect that the accused committed the attributed crimes when the minutes of arrest and search, examination reports, telephone records, audio and video records which are present in our file, the information and documents captured in the computer and the computers of other accused, statements of the accused in stages and statements of other accused and witnesses are also taken into consideration, that it is also specified in the case-law of the Court that even reasonable suspicion of crime has been found to be sufficient for detention in the practices of the European Court of Human Rights, that for these reasons, the implementation of the measure of judicial control which is a lighter protection measure on the suspect on whom there is a strong suspicion of crime as to the effect that he committed the attributed crimes will prove to be insufficient".

17.The objection filed against the continuation of detention dated 18/9/2012 was dismissed by the 14th Assize Court on the date of 21/11/2012.

2. As expressed in the opinion of the Ministry of Justice:

a. The Process of Ergenekon Investigation

18. On the date of 12 June 2007, upon a notification made to the Provincial Gendarmerie Command of Trabzon by phone, a search was conducted by the police in a squatter in Ümraniye district of İstanbul. During this search, a total of 27 grenades were found

within a military case. The statements of A.Y. who resided in the squatter in question as tenant and the father of A.Y. were taken. In their statements, these persons specified that the person who brought the case in which there were 27 grenades into the house was Oktay Yıldırım who was a sergeant retired from the Turkish Armed Forces. Upon these statements, a search was conducted in the office and house of Oktay Yıldırım on the date of 13 June 2007. In these searches, a revolver, magazines and bullets and a knife and a computer memory and a flash memory were seized. In the examination carried out over the flash memory, a document named *"Lobi, Çok Gizli (Lobby, Top Secret)- Aralık (December) 1999/İstanbul"* was found. It was determined that, in the "*Giriş (Introduction)*" part of this document, there were statements as to the effect that *"(...) it is an inevitable reality that it is compulsory for 'Civilian Elements' to be organized under the 'Ergenekon' which engages in activities within the Turkish Armed Forces"*.

19. By considering the severity of the document in question seized on Oktay Yıldırım, its content and the grenades, the investigation was extended. In this framework, searches were conducted in the houses and offices of many persons who were tried in the case named Ergenekon, these persons were taken into custody and some of them were detained by the courts of venue. In the searches conducted and the computers of the relevant persons, many organizational documents and the documents which showed structure of the organization were seized.

20. In a search conducted in the house of another person who was subject to the investigation, 12 grenades, many guns, TNT charges and other explosive substances and various confidential military documents were found.

21. Similarly, in the searches conducted in some places, lots of evidence that constituted a crime was obtained. Among this evidence, there were blacklistings towards public officials and senior bureaucrats, the documents aimed at an illegal organization within the Turkish Armed Forces and a sketch that showed the building of the Supreme Court of Appeals in a detailed way and on which escape routes were shown. It was specified in the indictments that some documents were seized on different suspects within the scope of the investigation.

22. Based on the evidence obtained in the initial stage of the Ergenekon Investigation, the investigation was extended by the Office of the Chief Public Prosecutor and in this process, especially some retired or active generals and officers were included in the investigation. In the searches conduced in the houses and/or offices of these persons, the evidence which was claimed to have shown the hierarchical structure of the organization and some plans which were claimed to have been created in order to overthrow the Government by force were captured. Among the revealed plans, there are action plans named *"Sarıkız" (Yellow Girl), "Yakamoz" (Sea Sparkle), "Eldiven" (Glove), "Ayışığı" (Moonlight), "Kafes"* (Cage) and *"İrtica ile Mücadele" (Fight Against Reactionary Forces)*.

23. In the indictments drawn up by the Office of the Chief Public Prosecutor of İstanbul, it was stated that the action plans named *Sarıkız, Kafes* and *İrtica ile Mücadele Eylem Planı* were related to the process prior to the military coup and the main aim in these plans was to lay the groundwork for the military coup to be staged; that the action plan named *Yakamoz* was related to the staging of the military coup; that the action plan named *Eldiven* contained the plans with regard to the restructuring of the state and political institutions in the process following the military coup.

24. The action plan named "*Sarıkız*" which was claimed to have been drawn up by A.Y., Ö.Ö. and İ.F. who were the force commanders and M.Ş.E. who was the General Commander of Gendarmerie at the time was aimed at the activities to be performed in order to spread the belief that there was a general discontent in public against the Government and at guiding the press in this framework. This plan also prescribes the guiding of especially students, the members of civil society and the members of trade unions on the organization of protest demonstrations against the Government and the organization of demonstrations at national level.

25. In the *Kafes* Action Plan, the activities to be performed towards non-Muslims in Turkey were considered as an "*operation*" and it was stated that this operation was composed of various stages. *In the phase of preparation*, it was stated that activities would be performed in order to determine the names, addresses of non-Muslims in Turkey and the places at which and the dates on which they met. *In the phase of instilling fear*, it was stated that the list of subscribers of the newspaper AGOS which were determined would be published over internet, that threatening phone calls would be made to the subscribers, that threatening messages would be written on walls in the region of Adalar in İstanbul. *In the phase of creating a public opinion*, it was stated that by using the national press and web sites, the belief that the only one which was responsible for these actions was the government of Ak Party (the Justice and Development Party) and that this party acted in an impervious way in terms of minorities would be created. *In the phase of action*, it was stated that it was planned to detonate bombs in the regions where especially non-Muslims lived in İstanbul, to detonate sound bombs at the place where the newspaper AGOS was located and at similar places, to organize attacks towards non-Muslim cemeteries and to sabotage their houses, offices and vehicles.

26. *İrtica ile Mücadele Action Plan* contains the making of misleading news in order to eliminate the support of public for the governing Ak Party bu using mass media (media organs) in a similar way. This plan was aimed at eliminating the support of public for the governing party through black propaganda by performing propaganda as to the effect that the soldiers detained in the Ergenekon investigation were innocent.

27. The action plan named *Ayışığı* was primarily aimed at neutralizing the Chief of General Staff at the time H.Ö. who was known to have been against all kinds of anti-democratic actions or forcing him to retire from office. This plan was also aimed at ensuring that some deputies who were the members of Ak Party leave this party. Moreover, it was also aimed at receiving the support of the President for a military coup to be staged against the government or disabling the opposition that would be made by him.

28. As for the action plan named *Yakamoz*, this plan especially contains plans with regard to the implementation of the military coup to be staged and the government to be formed following the overthrowing of the government.

29. *Eldiven* action plan is related to the special measures to be taken following the staging of the planned military coup. In this action plan, plans were included in relation to the subjects of the restructuring of media and political formations, the reorganization of the armed forces, the election of a new President, the reorganization of some executive bodies and the redetermination of the foreign policy.

30. In the investigation process named *"Ergenekon Investigation"*, some assassination plans were captured. Some suspects were included by the office of prosecutor in this

investigation based on the obtained evidence on the ground that they were the perpetrators of some assassination incidents or plans.

31. Based on the evidence obtained in the investigation, the case in relation to the incident of attack organized in the headquarters of Cumhuriyet Newspaper and the incident of the Council of State was joined with the case tried before the Assize Court of İstanbul and named Ergenekon. The relevant accused are still tried before the 13th Assize Court of İstanbul within the framework of the Ergenekon case.

32. In the indictment of the Office of the Chief Public Prosecutor of İstanbul dated 8 March 2009 (p. 78), it was claimed through the evidence obtained within the scope of the investigation that some accused who were tried in the case named Ergenekon had relations with the terrorist organizations *PKK*, *DHKP-C* and *Hezbollah* in particular, that as a matter of fact, these organizations were taken under control and directed by the accused of the case in question.

33. In the document named "*Ergenekon - Analiz Yeni Yapılanma Yönetim ve Geliştirme Projesi"* (Ergenekon - Analysis, Restructuring, Management and Development Project) as seized on some accused, by examining the function of the media and its effects on the society, it was stated that the organization needed to form its own media institutions and to take under control the existing media institutions.

34. In the indictment of the Office of the Chief Public Prosecutor of İstanbul dated 26 August 2011 (p. 5), it was claimed that the document named *"Ulusal Medya 2001"* (National Media 2001) as seized in the searches conducted in the houses and/or offices of some accused was prepared in order to achieve the aim expressed above.

b. The Taking Into Custody of the Applicant, the Investigation Conducted on Him and the Course of the Case Filed

35. On the date of 1 July 2008, the applicant was taken into custody on the ground that he was linked with the aforementioned organization.

36. On the date of 5 July 2008, his statement was taken in the Office of the Public Prosecutor, he was referred to the court on duty with the request for detention on the same date, he was released by the court by issuing a judicial control decision on him.

37. In the examination conducted over the computer memory of the applicant, information related to the aforementioned coup plans were found. In the articles written in the form of a diary, *"anecdotes related to the coup preparations covering the years 2003 and 2004"* were found. In these notes, it was seen that there was information which created parallelism with the mentioned coup plans.

38. Upon the new evidence subsequently obtained in the investigation, the applicant was taken into custody again on the date of 5 March 2009 with the claim that he was the member of the Ergenekon Terrorist Organization.

39. The statement of the applicant was taken in the office of the Public prosecutor on the same date, he was detained by the court to which he was referred with the request for detention on the date of 6 March 2009.

40. In the indictment of the Office of the Chief Public Prosecutor of İstanbul dated 8 March 2009 in which a total of 56 suspects were included, the applicant was attributed to the

offenses of *"Being the member of an armed terrorist organization, attempting to extirpate the Government of the Republic of Turkey or to prevent it from doing its duty, destroying documents pertaining to the security of the State, using them outside their purpose, taking them by cheating, stealing them, provoking the public to armed revolt against the Government of the Republic of Turkey, attempting to extirpate the Grand National Assembly of Turkey or to prevent it from doing its duty, acquiring documents pertaining to the security of the State, acquiring confidential information whose disclosure is prohibited"* and it was requested to punish him.

41. In this indictment submitted to the Assize Court of İstanbul, the applicant was accused of being a member of the criminal organization known with the name Ergenekon who was involved in the senior management thereof and had a special duty (p. 850 etc.). According to the indictment, the applicant is responsible for the coordination of high-level persons and acquired and possessed many confidential documents including the confidential information and documents which belonged to the State. The applicant acquired the documents which were not possible for him to acquire with his identity as a journalist and belonged to many and various State units and most of which were important for the security of the State from the members and senior managers of the organization. The applicant actively took part in every stage of actions aimed at attempting to overthrow the executive body. In order to substantiate these claims, the Office of Prosecutor presented to the Assize Court the documents, DVD and computer records seized during the searches conducted in the houses of the relevant person and his partners in crime and telephone tapping reports as the elements of evidence.

42. The indictment dated 8 March 2009 which the Office of Chief Public Prosecutor of İstanbul drew up on the applicant and other accused was accepted by the 13th Assize Court of İstanbul on the date of 25 March 2009; as there was a legal and actual connection between the main file of *"Ergenekon"* and it, it was decided that the case files be joined and the trial of the applicant was initiated.

43. As of the date on which the opinion of the Ministry was prepared, in the trial which continued before the 13th Assize Court of İstanbul, a total of 320 separate hearings were held.

44. The cases which had been filed through 22 separate indictments were joined in the main file of "*Ergenekon*" through the decision of the 13th Assize Court of İstanbul numbered Merits 2008/191 as there was an actual and legal connection thereamong.

45. In the 320th hearing dated 21 June 2013 of the case file through which the trial of the applicant continued, the court decided that "*the hearing be postponed to 09:00 a.m. on 5 August 2013 for the preparation and pronouncement of the judgment by considering the scope of the file and the abundance of the number of accused*".

3. The Abstract Verdict Notified on the Date of 5/8/2013

46. In the abstract verdict with a notification date of 5 August 2013 as obtained through UYAP, it was adjudged on the applicant;

i. That although a public case was filed on him for the punishment of him separately as per articles 314/2, 311/1, 312/1 and 313/1 of the TCC numbered 5237, he be penalized with aggravated lifelong imprisonment in accordance with article 147 of the TCC numbered 765 which was appropriate for his action as it was proven that the actions of the accused as a

whole constituted the offense in article 312/1 of the TCC numbered 5237 and article 147 of the TCC numbered 765, that he committed the offense of "*Forcibly Overthrowing the Council of Ministers of the Republic of Turkey or Banning Them from the Execution of Duty*" stipulated in article 147 of the TCC numbered 765 *which was in force on the date of offense and in his favor by taking into consideration the fact that the date on which the actions that were suitable for the offense were carried out was prior to the date of 1 June 2005*; that he be penalized by discretion and consequence with an imprisonment of 16 years by way of making a reduction in his penalty in accordance with article 61/1 of the mentioned Code due to the fact that the action remained at the stage of attempt,

ii. That although a case was filed with the request for the punishment of him as per article 135 of the TCC, as it is understood that the action of the accused mentioned in the indictment constituted the offense in article 136 of the TCC; he be penalized with an imprisonment of 4 years by way of determining a penalty from the upper limit by discretion; that he be punished by consequence with an imprisonment of 7 years by making an increase in his penalty at a rate of 3/4 by discretion by considering the number of data as per article 43/1-2 of the TCC as it is understood that the accused committed the offense in a successive manner,

iii. That although a public case was filed with the request for the punishment of him as per article 326 of the TCC, as it is understood that the action of the accused constituted the offense in article 327 of the TCC; he be penalized with an imprisonment of 6 years by way of allocation from the lower limit by discretion as per article 327/1 of the TCC which was appropriate for his action; that he be punished by consequence with an imprisonment of 9 years by making an increase in his penalty at a rate of 1/2 by discretion by considering the number of information and documents which were the subject of offense as per article 43/1 of the TCC as it is understood that the accused committed the offense in a successive manner,

iv. That as it is proven that he committed the crime of acquiring the information which was prohibited, he be penalized with an imprisonment of 2 years by way of allocation from the lower limit by discretion as per article 334/1 of the TCC which was appropriate for his action; that he be punished by consequence with an imprisonment of 2 years and 8 months by making an increase in his penalty at a rate of 1/3 by discretion by considering the number of information and documents which were the subject of offense as per article 43/1 of the TCC as it is understood that the accused committed the offense in a successive manner,

That articles 53, 58/9 and 63 of the TCC numbered 5237 be also applied.

47. It is understood that the case on the applicant is at the stage of appeal.

B. Relevant Law

1. Constitution

48. Article 83 of the Constitution with the heading of *"Legislative immunity"* is as follows:

> *"Members of the Grand National Assembly of Turkey cannot be held responsible for the votes they cast and the words they speak during the activities of the Assembly, the opinions they put forward at the Assembly and for repeating and disclosing these unless a contrary decision is made by the Assembly upon the proposal of the Bureau in that sitting.*

A deputy against whom there are claims of offending before or after election cannot be arrested, interrogated, detained and tried without the decision of the Assembly. A case of in flagrante delicto which requires a heavy penalty and the conditions specified in article 14 of the Constitution on the condition that the investigation thereof started before the election are out of the scope of this provision. However, in such a case, the authorized body must immediately and directly inform the Grand National Assembly of Turkey on the situation.

The execution of a penal sentence given about a member of the Grand National Assembly of Turkey before or after election is delayed until the membership of the said member ceases; no statute of limitations will apply for the period of membership.

Investigation and prosecution against a re-elected deputy is subject to the lifting of his/her immunity once again by the Assembly.

Political party groups at the Grand National Assembly of Turkey cannot hold meetings and make decisions on legislative immunity.

49. Article 14 of the Constitution with the heading of *"Prohibition of Abuse of Fundamental Rights and Freedoms"* is as follows:

"None of the rights and freedoms present in the Constitution can be exercised in the form of activities aiming to impair the indivisible integrity of the State with its territory and nation and to abolish the democratic and secular Republic which is based on human rights.

None of the provisions of the Constitution can be interpreted in a way that enables the State or individuals to engage in an activity to abolish the fundamental rights and freedoms recognized by the Constitution or to restrict them more comprehensively than that specified in the Constitution.

The sanctions to be imposed against those who engage in activities contrary to these provisions are regulated by law."

2. The Turkish Criminal Code dated 1/3/1926 and numbered 765

50. Article 147 of the Code is as follows:

"*The aggravated heavy life imprisonment shall be imposed on those who forcibly overthrow the Council of Ministers of the Republic of Turkey or forcibly ban them from executing the duty and those who encourage them …*"

51. Article 61 of the same Code prescribes the punishment of the perpetrator with an imprisonment of fifteen to twenty years in the event that a crime which requires aggravated lifelong imprisonment at the time of delinquency remains at the stage of attempt.

3. The Turkish Criminal Code dated 26/9/2004 and numbered 5237

52. Article 136 of the Code is as follows:

"A person who unlawfully gives personal data to another, publishes or acquires it shall be penalized with a prison sentence of one to four years."

53. Article 137 of the Code is as follows:

"In the event that the crimes defined in the aforementioned articles are committed;
a) By a public official and through the abuse of the authority arising from his/her office,
b) By exploiting the advantage provided by a certain profession or art,

The penalty to be imposed shall be increased by half.

54. Paragraph (1) of article 311 is as follows:

"Those who attempt to extirpate the Grand National Assembly of Turkey or to prevent the Grand National Assembly of Turkey from doing its duties partially or wholly through the use of force and violence shall be penalized with an aggravated life imprisonment sentence."

55. Paragraph (1) of article 312 is as follows:

"An aggravated life imprisonment sentence shall be imposed on the person who attempts to extirpate the Government of the Republic of Turkey or to prevent it from doing its duties partially or wholly through the use of force and violence."

56. Paragraph (1) of article 313 is as follows:

"A prison sentence of fifteen to twenty years shall be imposed on the person who provokes the public to armed revolt against the Government of the Republic of Turkey. When the revolt has occurred, a prison sentence of twenty to twenty five years shall be decreed on the provocateur."

57. Paragraph (2) of article 314 is as follows:

"A prison sentence of up to ten years shall be imposed on those who join the organized group defined in clause one."

58. Article 326 is as follows:

"(1) A prison sentence of eight to twelve years shall be imposed on the person who partially or wholly destroys, demolishes documents or certificates pertaining to the security of the State or its domestic or external political benefits or who commits fraud thereon or, even if temporarily, uses them in another place than the place these are allocated for, acquires them fraudulently or steals them.

(2) If the above written acts have been committed during war or have endangered the State's preparations for war or its war effectiveness or military actions, a life imprisonment sentence shall be imposed."

59. Article 327 is as follows:

"(1) A prison sentence of three to eight years shall be imposed on the person who acquires the information with regards to the security of the State or domestic or external political benefits thereof which, due to its quality, needs to remain confidential.

(2) If the act has been committed during war or has endangered the State's preparations for war or its war effectiveness or military actions, a life imprisonment sentence shall be imposed."

60. Article 334 is as follows:

"(1) A prison sentence of one to three years shall be imposed on the person who acquires the information the disclosure of which have been prohibited by competent authorities as per law and regulations and which, due to their nature, need to remain confidential.

(2) If the act endangers the State's preparations for war or its war effectiveness or military actions, a prison sentence of five to ten years shall be imposed on the perpetrator."

4. The Code on the Fight Against Terrorism dated 12/4/1991 and numbered 3713

61. Paragraphs one and two of article 5 of the Code are as follows:

"The imprisonments or judicial fines to be determined on those who commit the offenses stipulated in articles 3 and 4 according to the relevant codes shall be adjudged by way of increasing them by half. In the penalties to be determined in this way, the upper limit of the penalty which is determined for both that act and all kinds of penalties can be exceeded. However, an aggravated lifelong imprisonment shall be adjudged instead of a lifelong imprisonment.

If it is prescribed that the penalty of the offense be increased in the relevant article due to the fact that the offense is committed within the framework of the activity of the organization; an increase shall be made over the penalty only according to the provision of this article. However, the increase to be made cannot be lower than two thirds of the penalty.

…"

5. The Code of Criminal Procedure dated 4/12/2004 and numbered 5271

62. Article 100 of the Code is as follows:

"(1) A decision of arrest can be issued about the suspect or accused in the presence of facts indicating the existence of strong suspicion of a crime and the presence of a ground for detention. A decision of detention cannot be issued in the event that importance of the case is not proportionate to the anticipated penalty and security measure to be imposed.
(2) Grounds for detention can be considered to exist in the following circumstances:
a) If there are concrete facts indicating that the suspect or accused will escape and arising suspicion towards the suspect or accused escaping or hiding.
b) If the suspect or accused's behaviors give rise to strong suspicion on the matters of;
1. Destruction, concealment or alteration of evidence,
2. Attempting to exert pressure on the witness, aggrieved or others.

(3) Grounds for arrest can be considered to exist in the presence of grounds for strong suspicion that the crimes below have been committed:
a) The following crimes stipulated in the Turkish Criminal Code dated 26.9.2004 and numbered 5237; (1)
…
9. Forming an organized group with intent to commit crime (Article 220, except paragraphs two, seven and eight),
10. Crimes against the Security of the State (Articles 302, 303, 304, 307, 308)
11. Crimes Against the Constitutional Order and the Operation of Said Order (Articles 309, 310, 311, 312, 313, 314, 315),
…
(4) ***(Amended: 2/7/2012-6352/96 art.)*** *A decision of detention cannot be made for crimes requiring only a judicial fine or whose imprisonment has an upper limit that is not more than two years."*

63. Article 109 with the heading of "*Judicial control*" is as follows:

"(1) ***(Amended: 2/7/2012-6352/98 art.)*** *It may be adjudicated for an accused to be placed under judicial control instead of being detained in the presence of grounds for detention set forth in article 100 in the investigation carried out due to a crime.*

(2) In the circumstances in which prohibition to detention is prescribed in the law, provisions pertaining to judicial control may also apply.

(3) Judicial control includes subjugation of the accused to one or more of the liabilities shown below:

a) Not going abroad.

b) Applying to the places specified by the judge, within the specified periods in a regular way.

c) Abiding by the summons of the authorities or persons stipulated by the judge and by the control measures regarding their professional occupation or continuation of training when necessary.

d) Not being able to operate all kinds of vehicles or some of them and when necessary, delivering their driving license in exchange for a voucher.

e) Being subject to and accepting measures of treatment and examination including hospitalization particularly with the purpose of ridding himself/herself from drug, stimulant or volatile substance addiction and alcoholism.

f) Depositing an assurance, whose sum and periods of payments in one lump sum or more than one installment shall be determined by the judge upon request of the Public prosecutor by considering the monetary situation of the suspect.

g) Not being able to keep or bear arms, turning in the arms to the property and evidence unit in exchange for a voucher when necessary.

h) Providing an in kind or personal assurance for the money, whose sum and period of payment shall be determined by the judge upon request of the Public prosecutor in order to secure the rights of the victim of the crime.

i) Providing an assurance that s/he will fulfill his/her family commitments and pay the alimony which s/he has been sentenced to pay as per judicial decisions in a regular way.

j) **(Additional: *2/7/2012* – ***art. 6352/98)*** *Not leaving his/her domicile.*

k) **(Additional: *2/7/2012* – ***art. 6352/98)*** *Not leaving a certain residential area.*

1) **(Additional: *2/7/2012* – ***art. 6352/98)*** *Not going to specified places or areas.*

(4) **(Additional: *25/5/2005* – ***art. 5353/14; Abolished: 2/7/2012* – *art. 6352/98)***

(5) The judge or Public prosecutor may allow the suspect to temporarily or permanently operate a vehicle in his/her professional occupation in application of the liability set forth in sub-paragraph (d).

(6) The period spent under judicial control cannot be deducted from the penalty by considering it a ground for restriction of personal freedom. This provision shall not apply in cases set forth in sub-paragraph (e) of paragraph three of the article.

(7) ***(Additional: 6/12/2006 – 5560/19 art.)*** *Provisions pertaining to judicial control may apply (...) for those released due to the expiration of the periods of detention prescribed in the codes."*

64. Article 260 of the Code is as follows:

"(1) Legal remedies against the decisions of the judge and court shall be open to the Public prosecutor, suspect, accused and those who, as per this Law, have obtained the title of intervening party and those whose motion for intervening has not been concluded, has been rejected or those who have been damaged by the crime in a way that may allow them to obtain the title of the intervening party.

(2) Public prosecutors in the criminal court of first instance may resort to legal remedies against the decisions of the criminal courts of peace in the judicial locality of the court; Public prosecutors in the high criminal courts can resort to legal remedies against the decisions of the criminal courts of first instance and of peace in the judicial locality of the high criminal court; Public prosecutors in the regional courts of justice can resort to legal remedies against the decisions of the regional courts of justice.

(3) The Public prosecutor can also resort to legal remedies in favor of the accused."

IV. EXAMINATION AND JUSTIFICATION

65. The individual application of the applicant dated 26/12/2012 and numbered 2013/1272 was examined during the session held by the court on 4/12/2013 and the following were ordered and adjudged:

A. Claims of the Applicant

66. The applicant asserted that articles 19, 28, 37, 83 and 141 of the Constitution and articles 5, 6, 10 of the European Convention on Human Rights and article 3 of the Protocol No 1 were violated by stating that there was no concrete incident, fact and information which would justify his detention, that the detention extended through stereotype and accordingly, unjustified decisions exceeded reasonable duration, that the court which held the trial was contrary to the principle of natural justice, that he was tried because of journalism activities, that although he was a deputy, he was not able to fulfill this duty and that he was not able to make use of his legislative immunity.

B. Evaluation

67. In paragraph three of article 148 of the Constitution and paragraph (1) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216, it is provided that everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force. In the continuation of paragraph three of article 148 of the Constitution, it is stated that in order to make an application, ordinary legal remedies must be exhausted, in paragraph four thereof, it is stated that in individual application, examination cannot be done on matters that need to be taken into account in the legal remedy.

1. In Terms of Admissibility

a. The claim that detention is not legal

68. The applicant complained about the fact that he was detained due to journalism activities and that his detention was sustained although there was no concrete incident, fact and information which could be shown as a justification for his detention and would convince an objective observer.

69. In its opinion, the Ministry of Justice did not make any separate evaluation assessment as regards this request.

70. Paragraph (2) of article 48 of the Code numbered 6216 with the side heading of *"The conditions and evaluation of admissibility of individual applications"* is as follows:

> *"The Court, ... can decide on the inadmissibility of the applications which are clearly devoid of basis."*

71. After the fact that everyone has the right to personal liberty and security is stipulated as a principle in paragraph one of article 19 of the Constitution, the cases in which persons can be deprived of their freedom are listed in a limited way in paragraphs two and three thereof on the condition that their forms and conditions are stipulated in the law. Therefore, the restriction of the right to liberty and security of a person can only be the case in the event that one of the cases specified within the scope of the aforementioned article of the Constitution exists (App. No: 2012/239, 2/7/2013, § 43).

72. In paragraph three of article 19 of the Constitution, it is provided that individuals against whom there is strong evidence of delinquency can only be detained through a decision by a judge in order to prevent their escape, to prevent the destruction or manipulation of evidence or in other cases which make detention compulsory and are specified in the law such as these. Accordingly, 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.

73. However, it is not certainly necessary that the evidence be collected at a sufficient level at the moment of arrest or detention in order for a person to be accused of a crime depending on this qualification. Because the aim of detention is to execute the judicial process in a more sound manner by proving the accuracy or removing the doubts which constitute the basis of the detention of a person during the executed investigation and/or prosecution. According to this, it is necessary not to evaluate the cases which will constitute the basis of the doubts that will form the basis of incrimination and the cases which will be discussed in the subsequent stages of criminal trial and constitute the justification of criminal sentence at the same level (for the decisions of the ECtHR, see *Murray v. the United Kingdom*, App. No. 14310/88, 28/10/1994, § 55; *Talu v. Turkey* (KE), App. No: 2118/10, 4/12/2012, § 25).

74. Detention is regulated in article 100 and the subsequent articles of the Code numbered 5271. According to article 100, a person can only be detained in the event that there are cases which indicate the existence of strong doubts on him/her as to the effect that s/he has committed a crime and a ground for detention. The grounds for detention are also specified in the article. According to this, a decision on detention can be delivered (a) if the suspect or accused escapes, hides or there are concrete cases which arouse the suspicion that s/he will escape, (b) if the behaviors of the suspect or accused constitute strong doubt in the cases of 1) destruction, concealment or alteration of evidence, 2) attempting to put pressure on witnesses, victims or others. In the regulation, the crimes in which a ground for detention will be assumed in the event that there is a strong suspicion as to the effect that they have been committed have been specified as a list (App. No: 2012/239, 2/7/2013, § 46).

75. On the other hand, as long as the rights and freedoms stipulated in the Constitution are not violated, the issues as regards the interpretation of the law or material or legal mistakes in the decisions of the courts of instance cannot be handled in the examination of an individual application. The interpretation of the provisions of law on detention and their application to concrete cases are also covered by the discretionary power of the courts of instance. However, in case of a clear arbitrariness in the discretion of the evidence through comments which are clearly contrary to the law or the Constitution, such decisions which result in the violation of a right and freedom should be examined in an individual application. The acceptance of the contrary does not accord with the aim of introducing the individual application (App. No. 2012/239, § 49).

76. In the concrete incident, the applicant was taken into custody within the investigation conducted on him on the date of 5/3/2009 and detained by the Judge on Duty at the Assize Court of İstanbul on the date of 6/3/2009. "*The quality and nature of the alleged crime, the current state of evidence, the existence of a strong suspicion of crime, the fact that the crime is among the crimes stipulated in article 100/3 of the CCP, the suspicion of escaping and obfuscating the evidence*" was shown as the justification of detention. The office

of the chief public prosecutor filed a case on the date of 8/3/2009 with an indictment one of whose suspects was the applicant. In the indictment, it was requested that the applicant be punished due to the alleged crimes and "*the videos shot contrary to law*", "*the documents used in his books*", "*the data recovered through technological means although he erased them from his computer*", "*the telephone calls that he made*", "*the telephone calls that third parties made between them*" were included as evidence (§§ 11,12). From the examination of the file, it was stated that 436 documents which needed to remain confidential due to their nature in terms of the security, domestic or external political benefits of the state were found in the searches conducted in the house and office of the applicant, that in the examination conducted over the memory of his computer, information related to coup plans was found. Moreover, in the opinion presented by the Office of Chief Prosecutor in relation to the merits, it was stated that the applicant obtained many documents which needed to remain confidential in accordance with the domestic and external political benefits of the state not through his title as a journalist, but based on the convertibility of information into money which was one of the main aims of the Ergenekon Terrorist Organization and the organizational importance of collecting intelligence and from the persons with whom he contacted due to organizational activities, that it was not possible for the applicant to obtain these documents most of which were related to the security of the state through his identity as a journalist when their content and quantities were taken into consideration, that he obtained them from the members of the organization of which he was a member.

77. In this case, it has been concluded that the applicant's claim as to the effect that he was detained only due to journalism activities and that his detention was sustained although there was no convincing ground for suspecting that he committed a crime is not appropriate. It is understood that as for their decisions on detention and the continuation of detention, the courts issued their decisions within their legal venues and competences on this matter. There is no issue indicating the contrary thereto within the scope of the application either. The issue of whether the decisions on the continuation of detention were *relevant* and *sufficient* or not should be handled during the examination of whether detention was reasonable or not.

78. Due to the reasons explained, it should be decided that this part of the application is inadmissible due to the fact that *it is clearly devoid of basis*.

b. The claim as to the effect that the right to a fair trial was violated

79. The applicant asserted that the case on him was tried by an extraordinary court in contrary to the principle of natural justice, that for this reason, the right to a fair trial was violated.

80. The Ministry stated that the public case filed against the applicant was pending before the court of first instance, that the application would not be able to be heard at this stage as legal remedies on the complaints in relation to the right to a fair trial except for those which were related to trial in a reasonable time were not exhausted yet.

81. The applicant was content with briefly repeating his claims in the application form with regard to the independence and impartiality of the court which tried the case without including any objection against this opinion.

82. Paragraph (2) of article 45 of the Code numbered 6216 is as follows:

> *"All of the administrative and judicial application remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before making an individual application."*

83. In accordance with this provision, in order for an individual application to be lodged to the Constitutional Court, all administrative and judicial remedies for the act or action that is claimed to have caused a violation need to be exhausted.

84. Yet, respect for fundamental rights and freedoms is a principle with which all organs of the state need to comply and primarily, an application should be made to the administrative authorities and the courts of instance of venue against a violation which occurs in the event that this principle is not complied with. Individual application to the Constitutional Court is a legal remedy with a secondary quality. It is necessary to settle the claims as to the effect that fundamental rights and freedoms have been violated primarily through ordinary legal remedies before general judicial authorities. The remedy of individual application can be resorted to in the event that the claimed right violations cannot be redressed within this ordinary review mechanism (App. No: 2012/946, §§ 17, 18, 26/3/2013).

85. The case on the applicant is pending and at the stage of appeal. Ordinary legal remedies have not been exhausted in terms of this complaint. For this reason, it should be decided that this part of the application is inadmissible due to the fact that "*application remedies have not been exhausted"*.

c. The claim as to the effect that the freedom of expression was violated

86. The applicant claimed that the freedom of expression was violated by asserting that he was tried due to journalism activities and that he was a detainee in this scope.

87. The Ministry of Justice stated that a case was filed on the applicant by the Office of the Chief Public Prosecutor of İstanbul with the indictment numbered 2009/188 with the claim that 436 documents which needed to remain confidential due to their nature in terms of the security, domestic or external political benefits of the state were found in the searches conducted in his house and office, that in the examination conducted over the memory of his computer, information related to coup plans was found; in the opinion presented by the Office of Chief Prosecutor in relation to the merits, it was claimed that the applicant obtained many documents which needed to remain confidential in accordance with the domestic and external political benefits of the state not through his title as a journalist, but based on the convertibility of information into money which was one of the main aims of the Ergenekon Terrorist Organization and the organizational importance of collecting intelligence and from the persons with whom he contacted due to organizational activities, it was considered that as it was not possible for the applicant to obtain these documents which belonged to many and various state units and most of which were also related to the security of the state through his identity as a journalist when their content and quantities were taken into consideration, he obtained them from the members of the organization of which he was a member.

88. Moreover, the Ministry stated that it was not able to be understood in which way and how the violations of the freedom of expression which the applicant asserted had occurred, that by referring to the decisions of the European Court of Human Rights (*Trofımchuk v. Ukraine,* App. no.4241/03, 28/10/2010 *and Baillard v. France*, App. no. 51575/99, 26/3/2002), it was not sufficient for an applicant to be content with stating that one or more articles in the Convention were violated in an application, that s/he needed to make an explanation with regard to how these articles were violated, that otherwise, the application was found to be inadmissible; that *as there was no explanation with regard to how the freedom of expression was violated in the concrete incident, the application was clearly devoid of basis.*

89. The applicant asserted that the "*evidence*" which the Ministry included in its opinion and was mentioned in the evaluations of the Office of Prosecutor was composed of the documents which he obtained within the framework of his own journalism activity up to that day and used in his books and the news and articles published in Cumhuriyet newspaper, that he was tried through the applicable articles in the indictment due to the meetings he made and the articles he wrote with his identity as a journalist. He claimed that it was not legally possible to attribute a crime to him due to the meetings he made, his articles in the newspaper, television and radio programs and the information or documents which were sent to him or which he received from news sources which he could not be forced to disclose directly or indirectly. The applicant argued that as he made most of his meetings on the condition that they were not published, he handled the information which he obtained from these meetings or used them as news by passing them through a journalism filter; that all information and documents which were claimed to have been obtained from his as a result of the search were obtained in the search conducted in his office, that it was clearly stated in the annexes of the indictment that no information and document was found in the search conducted in his house and in the computers in his house. He asserted that the information and documents obtained from him were used in his column in the newspaper or in his books named *"İran Raporu" (Iran Report), "Suriye Raporu" (Syria Report), "Irak Bataklığında Türk - Amerikan İlişkileri"* (Turkish-American Relations in the Swamp of Iraq) and *"Devlet ve İslam"* (State and Islam). Therefore, he asserted that the characterization of the documents which he obtained as a journalist or were sent to him or Cumhuriyet Newspaper as criminal element was contrary to article 28 of the Constitution and article 10 of the ECHR.

90. Paragraph (2) of article 45 of the Code numbered 6216 is as follows:

> *"All of the administrative and judicial application remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before making an individual application."*

91. In accordance with this provision, in order for an individual application to be lodged to the Constitutional Court, all administrative and judicial remedies for the act or action that is claimed to have caused a violation need to be exhausted.

92. The case on the applicant is pending and at the stage of appeal. Ordinary legal remedies have not been exhausted in terms of this complaint. For this reason, it should be decided that this part of the application is inadmissible due to the fact that "*application remedies have not been exhausted"*.

d. Other complaints

93. Complaint of the applicant as to the fact that the detention extended through unjustified and stereotype decisions exceeded reasonable duration and his complaint as to the effect that the right to be elected was violated are not clearly devoid of basis. Besides, as there is no other reason for inadmissibility, it must be decided that the part of the application as regards these complaints is admissible.

2. Examination on Merits

a. The claim as to the effect that paragraph seven of article 19 of the Constitution was violated

94. The applicant asserted that the detention exceeded reasonable duration due to the fact that his requests for release were continuously dismissed through the same and illegal

justifications. The applicant asserted that according to the established case-law of the ECtHR in terms of paragraph (3) of article 5 of the Convention, courts, in their decisions, had to discuss and justify the existence of a public interest which legitimized the introduction of an exception to personal liberty, the existence of a danger in relation to escape and why the measures which were alternative to detention were not applied also by considering the presumption of innocence, that justifications such as "the quality of the attributed crime" and "the state of the evidence" were not considered to be sufficient for the state of detention which was very long-lasting, that in article 141 of the Constitution, it was stipulated that it was ordered to write all kinds of decisions with justification, that according to this, the state of detention was contrary to article 141 of the Constitution due to the fact that the detention was unjustified, contrary to article 19 of the Constitution and article 5 of the ECHR due to the fact that there was no condition for detention.

95. In its opinion, the Ministry of Justice stated that the applicant was tried under detention within a case filed with the request for his punishment in accordance with the relevant provisions of the Turkish Criminal Code numbered 5237 and the Code on Fight Against Terrorism numbered 3713 with the claim that he committed the offenses of *"Being the member of an armed terrorist organization, attempting to extirpate the Government of the Republic of Turkey or to prevent it from doing its duty, destroying documents pertaining to the security of the State, using them outside their purpose, taking them by cheating, stealing them, provoking the public to armed revolt against the Government of the Republic of Turkey, attempting to extirpate the Grand National Assembly of Turkey or to prevent it from doing its duty, acquiring documents pertaining to the security of the State, acquiring confidential information whose disclosure is prohibited"*.

96. The Ministry argued that the case tried over the file of the 13th Assize Court of İstanbul numbered Merits 2009/191 was a comprehensive case as a result of the joinder of different cases which were filed with 22 separate indictments as there was an actual and legal connection thereamong, that a total of 275 accused including the applicant were tried in this case and the case file was composed of nearly 3.500 additional evidence folders; that the Court which tried the case held hearings on four days of the week, that in the decision of admissibility that it issued upon the application of a person who was tried in the same case with the applicant (*Gazi Güder v. Turkey,* App. No. 24695/09, 30/4/2013, [S.D.], § 54), the ECtHR determined that there was no inactivity process which could be attributed to the judicial authorities and extended the process of trial in the concrete incident as compared to the complexity of the criminal case which was tried on many accused with regard to serious, that according to this, there was no case which extended the process in the trial which was the subject of the application.

97. The Ministry stated that while the court was deciding on the continuation of detention, it relied upon justifications with regard to "*the quality and nature of the crime, the current state of evidence and the fact that the measure of judicial control would be insufficient when compared to the scope of documents, the fact that the attributed crime was among the crimes stipulated in article 100/3-a of the CCP"* for a certain period of time, that however, at the 210th hearing dated 27 July 2012 which was after the Code numbered 6532 which entered into force on the date of 5 July 2012, that it evaluated the applicant's request for release separately and in a detailed way, that in its subsequent evaluations of detention, it also showed in its decisions that justifications with regard to the continuation of detention of the applicant still existed by referring to the mentioned decision.

98. Moreover, the Ministry stated that the competent courts also discussed in their decisions whether or not resorting to any of the measures of judicial control while deciding on the continuation of detention measures would be appropriate, that therefore, the evaluation of the applicant's complaint as to the effect that his detention exceeded reasonable duration in terms of the conditions of admissibility and merits, the scope of the case in which the applicant was tried and its unique complexity level, the seriousness of the actions which were attributed to the accused and the severity of the possible penalties that he would receive, whether or not the judiciary authority sustained trial in a way to show all types of attention and prudence that were expected therefrom, the time during which the applicant was detained, the justifications that the local court used with regard to the detention of the applicant and specially, since the date of 27 July 2012 were in the discretion of the Constitutional Court by also taking into consideration the aforementioned decisions of the ECtHR.

99. The applicant objected against these evaluations of the Ministry. According to the applicant, his requests for release were dismissed through stereotype justifications with a general quality. Reasonable doubt in terms of committing an offense is not sufficient by itself for the measure of detention and requires the fact that the accused arouses doubt towards escaping, hiding, obfuscating the evidence, affecting the trial, disturbing public order or committing a new offense. After he was taken into custody for the first time within the scope of the investigation on the date of 1/7/2008, he was not detained by the court on duty to which he was referred with the request for detention and the measure of judicial control was applied on him. In this period, no incident which would cause him to arouse doubt towards escaping, hiding, obfuscating the evidence or committing a new offense occurred. In terms of the period after he was elected as a deputy, the existence of doubts towards escaping, hiding, obfuscating the evidence or committing a new offense cannot be claimed. He did not have the opportunity of being able to find out on which grounds the measure of judicial control would prove to be insufficient during the period of detention which was close to 4 years and 5 months. The decisions of continuation of detention were issued without any justification before their conditions occurred.

100. Although the applicant asserted that his right in article 141 of the Constitution was violated due to the fact that his requests for release were continuously dismissed through the same and illegal justifications, it has been concluded that examination based on the form of expression of the complaint needs to be conducted within the scope of paragraph seven of article 19 of the Constitution.

101. Paragraph seven of article 19 of the Constitution is as follows:

> "*Detained individuals have the right to request being tried within a reasonable time and being released during investigation or prosecution. Release can be linked to a guarantee in order to ensure that the relevant individual is present at the court during trial or that the sentence is executed*."

102. Through this provisions, the rights of individuals who are detained within the scope of a criminal investigation to request the conclusion of the trial within a reasonable period and being released during investigation or prosecution are guaranteed.

103. Whether the period of detention is reasonable or not should be evaluated depending on the characteristics of each case. The presumption of innocence that is stipulated as "*No one can be deemed guilty until they are found guilty by a court order*" in article 38 of the Constitution requires that the freedom of an individual is essential and detention is exceptional during the trial. The continuation of detention in spite of the presumption of

innocence can be considered to be justified in spite of the presumption of innocence only if there is a public interest which is more overriding than the right to personal liberty and security (App. No: 2012/237, 2/7/2013, § 61). For this reason, pursuing that detention does not exceed reasonable duration in a case is primarily the duty of the courts of instance. To this end, all incidents which affect the mentioned requirement of public interest should be evaluated by the courts of instance and these incidents and facts should be put forth in the decisions as regards the requests for release (App. No: 2012/237, 2/7/2013, § 62).

104. The measure of detention can be resorted to in the presence of a strong indication on the delinquency of individuals and in order to prevent these individuals from escaping, the destruction or alteration of the evidence. Even if these grounds for detention can be initially considered sufficient for the continuation of detention up to a certain period, after the expiry of this period, it is necessary to show that the grounds for detention still continue to exist together with their justifications in the decisions as regards extension. In the event that these justifications are considered as "*relevant*" and "*sufficient*", whether the trial process was diligently executed or not should also be examined. Factors such as the complexity of a case, whether it is related to organized crimes or not or the number of the accused are taken into account for the evaluation of diligence shown in the functioning of the process. (App. No: 2012/237, 2/7/2013, § 63). A conclusion can be reached in relation to whether or not the period is reasonable by the evalution of all these elements (for the decisions of the ECtHR in the same vein, see *Contrada v. Italy*, App. No. 27143/95, 24/8/1998, § 66-67; *Chraidi v. Germany*, App. No. 65655/01, 26/10/2006, § 42-45).

105. On the other hand, personal liberty should not be interpreted in a way that may result in rendering extremely difficult the effective fight of judicial authorities and security officers against organized crimes in particular. As a matter of fact, the ECtHR emphasizes that subparagraph (c) of paragraph one of article 5 of the Convention should not be interpreted in a way that may result in rendering extremely difficult the effective fight of security officers of the states that are party to the Convention against crimes, in particular those which are organized (see, *Dinç and Çakır v. Turkey*, App. No: 66066/09, 9/7/2013, § 46).

106. Beginning of the period in the calculation of the reasonable period is the date of being arrested and taken into custody in cases where an applicant was previously arrested and taken into custody or the date of detention in cases where s/he has been directly detained. The end of the period is, as a rule, the date on which the individual is released. However, if conviction of an individual is decided in a case in which s/he is tried under detention, the state of detention comes to an end as of the date of conviction (App. No: 2012/237, 2/7/2013, §§ 66, 67).

107. In the concrete incident, the applicant was taken into custody in Ankara on the date of 5/3/2009 and detained in İstanbul on the date of 6/3/2009. The 13th Assize Court of İstanbul issued a judgment of conviction on the applicant on the date of 5/8/2013. In this case, the period of detention which needs to be taken into consideration in terms of reasonable duration is 4 years and 5 months.

108. When the decisions with regard to detention as presented by the applicant and the Ministry of Justice are examined, it is seen that the justification of *"the quality and nature of the alleged crime, the current state of evidence, the existence of a strong suspicion of crime, the fact that the crime is among the crimes stipulated in article 100/3 of the CCP, the suspicion of escaping and obfuscating the evidence*" was included in the first decision of detention dated 6/3/2009. In the decision issued at the 28th hearing dated 25/12/2009, the reasons of "*Scope of the file, the allegations separately attributed to each accused in the*

indictment and the applicable articles related thereto, the fact the evidence is not completely collected and the accused have not finished their defenses yet, the fact that the existence of the reasons for strong suspicion as to the effect that the attributed crimes have been committed still continue and that these crimes are among the crimes stipulated in article 100/3 of the CCP" were relied upon as the justification.

109.Upon the election of the applicant as a deputy of the 24th Period in the general elections held on the date of 12/6/2011, against his request for a decision of release being issued by considering this case, the 13th Assize Court, in its decision of dismissal which it issued on the date of 23/6/2011, decided on the continuation of the state of detention on the grounds that "*the applicable articles are related to the crimes which require a heavy sentence and are covered by article 250 of the CCP, that the attributions contained a strong suspicion of crime, that the argument as to the effect that the applicant did not have a suspicion of escape any more as he was elected as a deputy is a subjective evaluation, that all of the evidence could not be collected due to the abundance of the number of accused in the file, that the taking of statements of other accused who are claimed to be connected with the applicant in the indictment could not be completed, that the hearing of witnesses has not been initiated yet*" by stating that the investigation on the applicant was initiated prior to the elections by taking into consideration articles 83 and 14 of the Constitution and the precedent decision of the 9th Criminal Chamber of the Supreme Court of Appeals and that his state complied with article 14 of the Constitution, that the fact that he was elected as a deputy did not constitute a reason for release by itself. The 14th Assize Court of İstanbul which conducted an examination upon an objection against this decision decided on the dismissal of the objection through the decision dated 29/6/2011 by stating that no inappropriateness which was contrary to the procedure and law was observed in the decision of the 13th Assize Court.

110.Article 67 of the Constitution guarantees the rights to elect, to be elected and to engage in political activity. According to paragraph one of Article 67, "*Citizens have the right to elect, to be elected and to engage in political activity independently or within a political party and participate a referendum in accordance with the conditions set forth by law*". Elections and political rights are the indispensable elements of the democratic state that is stipulated in Article 2 of the Constitution. Political rights cover the rights to vote, to be a candidate and to be elected as well as the right to engage in political activity.

111.The right to be elected contains not only the right to be a candidate in elections, but also the right to be present at the parliament as a deputy after being elected. This undoubtedly requires that the person can actually exercise his/her authority of representation with his/her title as a deputy after being elected. In this context, an intervention in the participation of the elected deputy in legislative activity can constitute an intervention not only in his/her right to be elected, but also in the right of voters to express their free will (for the decision of the ECtHR in the same vein, see *Sadak and Others v. Turkey*, App. No. 25144/94, 26149/95, 26154/95, 27100/95, 27101/95, 11/6/2002, § 33, 40). Based on the relation of deputy-voter, the ECtHR emphasized that the freedom of expression was important especially for the elected representatives of the public, that as a matter of fact, the deputy represented the voter, defended their interests by drawing attention to their demands, that therefore, an intervention in the freedom of expression of an opposing deputy required a more strict review (see, *Castells v. Spain*, App. No. 11798/85, 23/12/1992, § 42).

112.Article 83 of the Constitution includes the mechanisms of legislative irresponsibility and immunity in order to ensure that deputies can freely execute their legislative activities without being under any pressure and threat. In this context, an absolute irresponsibility has been granted to deputies due to their votes and speeches during their legislative activities. Moreover, deputies have been put under protection by way of immunity so as to ensure that they participate in their legislative activities against being arrested, detained, interrogated and tried due to the crimes which they are claimed to have committed. These guarantees are the protective measures towards ensuring that the opinions and thoughts of voters whom deputies represent are duly reflected in political domain rather than being a privilege or prerogative bestowed on them. As a matter of fact, the Constitutional Court, in its decision dated 30/12/1997, expressed the aim of immunity as "protecting the members of the legislative body against unnecessary allegations that will prevent them from fulfilling their duties in a complete manner" (CC, M. 1997/73, D. 1997/73, D.D: 30.12.1997).

113. However, some exceptions and restrictions have been introduced for legislative immunity in article 83 of the Constitution. According to this, immunity, as a rule, is limited to the duration of deputyship. Similarly, within this period, it is possible to lift the immunity of a deputy through the decision of the Assembly with the claim that s/he has committed an offense before or after the election. A state of in flagrante delicto which requires a heavy penalty and the cases in article 14 of the Constitution on the condition that the investigation thereof is initiated before the election have been kept out of the scope of immunity. From the justification of the court which tried the case, it is understood that it considered that the situation of the applicant remained within the scope of article 14 of the Constitution.

114. The exception introduced in article 83 of the Constitution by referring to article 14 should be interpreted in a narrow manner and in favor of freedom when the right to be elected in article 67 of the Constitution is taken into consideration. For this reason, in the event that a person on whom a decision on the continuation of detention has been issued is a deputy, a new conflicting value is added into the existing ones and the right to personal liberty and security as well as the public interest deprived as a result of the failure of the elected deputy to participate in legislative activity due to the fact that s/he is detained need to be taken into consideration. In this framework, while deciding on the continuation of detention of the persons who are elected as deputies, courts need to show the existence of an interest to be protected which is much more overriding than the interest arising from both the right to personal liberty and security and the exercise of the right to be elected and to engage in political activity based on concrete facts. As a result of this, while examining whether or not reasonable duration was exceeded, it should also be considered whether or not the claims which the applicant asserted following being elected as a deputy were duly evaluated in the decisions in relation to the continuation of detention. Therefore, in the event that a proportionate balance is struck between the applicant's right to engage in political activity and representation as an elected deputy and the public interest in the case being sustained while he was under detention, it can be concluded that the justifications with regard to the continuation of detention were relevant and sufficient.

115. For this reason, during the examination of the state of detention of a deputy who is tried with a criminal attribution within the scope of article 14 of the Constitution on the condition that its investigation is initiated prior to the election, it should not be ignored that this protection measure can render the right to be elected dysfunctional. It should be duly emphasized on the applicability of the protection measures, if any, which will not prevent a deputy who is elected for a certain period of time in order to represent the entire Nation from exercising this right. It is seen that provisions allowing for it are included in paragraph (3) of

article 109 of the Code numbered 5271, that the number of these has been increased as a result of the amendments made in the article through the Code numbered 6352 (§ 63).

116. While deciding on the continuation of detention, it is an obligation to take into consideration the general situation of a case as well as the special situation of the person requesting that s/he be released and to personalize the justifications of detention in this sense. The courts which examined the applicant's requests for release did not sufficiently personalize their justifications while dismissing these requests; at the same time, they failed to put forth convincing concrete facts as to the effect that the applicant who was elected as a deputy would escape or obfuscate the evidence.

117. Justifications of the court included in its decision dated 27/7/2012 which it issued upon the reevaluation of the state of detention within the Code numbered 6352 as to the effect that some of the accused who were tried within the scope of the case escaped or attempted to escape, similarly, some accused attempted to obfuscate the evidence cannot be evaluated as a presumption as to the effect that other accused can also do these. Otherwise, it is obvious that the presumption of innocence and accordingly, the principles related to personal liberty may be harmed. For this reason, assuming that others could also act in the same way by making a generalization in the evidence of the circumstances of some accused who are tried in the same case prevents personalization while it also does not accord with with the understanding as to the effect that freedom is essential and detention is exceptional. In this framework, it cannot be said that the justifications asserted in the decisions with regard to the continuation of detention are relevant and sufficient.

118. On the date of the decision related to the request for release which he filed after he was elected as a deputy and the decision issued upon objection against this decision, the applicant remained detained for approximately 2 years and four months. Especially as of the date of 5/7/2012 on which the amendment made with the Code numbered 6352 in relation to the judicial control provisions prescribed instead of detention in paragraph (3) of article 109 of the Code numbered 5271 entered into force, the possibility of applying them in favor of the applicant occurred. Nevertheless, it has been concluded that the current judicial control measures were not sufficiently taken into consideration in terms of the balance which needed to be sought between the legitimate aim targeted in the mentioned decisions and the intervention made. This consequence is more distinct in terms of the decisions issued upon the requests for release following the entry into force of the Code numbered 6352. In this case, it has been concluded that while deciding on the continuation of detention, no proportionate balance was struck between the public interest expected from the continuation of trial under detention and the applicant's right to be elected and to engage in political activity as a deputy and that therefore, the period during which he was detained was not reasonable.

119. Due to the reasons explained, it should be decided that paragraph seven of article 19 of the Constitution was violated in connection with paragraph one of article 67.

b. The claim as to the effect that paragraph one of article 67 of the Constitution was violated

120. The applicant asserted that although he was elected as a deputy, he was not able to make use of deputy immunity and was not released, that yet, there was no evidence showing that he had committed an offense in the file over which he was tried, that moreover, his requests for release were dismissed without considering that the reasons for detention such as obfuscating the evidence and the suspicion of escape also disappeared after he was elected

as a deputy, that as a result, he was not able to fulfill his duty of deputyship, that therefore, the freedom of political activity was violated.

121.The Ministry of Justice stated that the applicant's complaints under this heading needed to be evaluated within the scope of article 3 of the Additional Protocol No 1 to the ECHR and paragraph two of article 83 and article 14 of the Constitution. It stated that by referring to the decisions of the ECtHR, the right to elect and to be elected was not absolute, that states parties had a broad discretionary authority in relation to the regulations in this field, that the problem about the applicant was not related to the right to be elected, but to whether or not he would be able to make use of legislative immunity due to the fact that he was detained, that in this respect, it needed to be evaluated whether or not the restriction imposed on the freedom of political activity through the decision on the continuation of detention was proportionate.

122. The applicant did not agree with the opinion of the Ministry, stated that except for the decision of the Court on the continuation of detention which was devoid of legal basis, no basis which would justify the fact that he was not able to fulfill his duty of deputyship was asserted in the opinion of the Ministry.

123. It has been concluded that this complaint of the applicant who asserted that as he was not released although he was elected as a deputy, he was not able to fulfill this duty was in essence related to the right to be elected and needed to be examined within the scope of article 67 of the Constitution.

124. According to the provisions of paragraph three of article 148 of the Constitution and paragraph (1) of article 45 of the Code numbered 6216, in order for the merits of an individual application made to the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public power, must fall within the scope of the Convention and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to examine the merits of an application, which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (App. No: 2012/1049, 26/3/2013, § 18).

125. Paragraph one of article 67 of the Constitution with the heading of *"Right to elect, to be elected and to engage in political activity"* is as follows:

> "*Citizens have the right to elect, to be elected and to engage in political activity independently or within a political party and participate a referendum in accordance with the conditions set forth by law.*"

126. Article 3 of the Additional Protocol No 1 to the ECHR is as follows:

> "*The High Contracting Parties undertake to hold free elections atreasonable intervals by secret ballot, under conditions which willensure the free expression of the opinion of the people in thechoice of the legislature.*"

127. In article 67 of the Constitution, the right to elect, to be elected and to engage in political activity independently or within a political party is guaranteed. Political parties which are considered as the indispensable elements of pluralistic democratic regimes are institutions which play a decisive role for the formation of national will, the functioning of constitutional regime, the existence of political order. In a parliamentary democracy, deputies who are elected as the representatives of public through the elections determined according to democratic procedures and principles realize the connection between public and the political legitimacy of the parliament.

128. The parliament which is the holder of legislative authority and the deputies which comprise it are the representatives of different political views which are existing in the society within constitutional boundaries. The main field of duty of the deputies who are granted with the authority of decision-making on behalf of the public through free elections is the parliament and the field of duty that they own contains a superior public interest and importance.

129. Although it can be said that restrictions can be brought in terms of political activities through codes within the specific conditions of each country, it is obvious that deputies have a constitutional protection in legislation activities. What matters is not to prevent the political will of public and not to neutralize the essence of a right. Disproportionate interventions which will prevent elected deputies from fulfilling their legislation activities will eliminate the authority of political representation created with public will, prevent the reflection of the will of voters in the parliament.

130. The ECtHR accepts “the freedom of free election” as one of the most important principles of democracy, which is the basic element of the European public order. The ECtHR stated that the rights which article 3 of the Additional Protocol No 1 to the Convention protected were of vital importance for the establishment and sustainment of the foundations of an effective and meaningful democracy based on the rule of law (see, *Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81, 2/3/1987, § 47*; Ždanoka v. Latvia* [BD], App. No. 58278/00, 16/3/2006, § 103*; Yumak and Sadak v. Türkiye* [BD], App. No. 10226/03, 8/7/2008 § 105).

131.On the other hand, the right to be elected is not absolute and can be restricted for legitimate purposes. As a matter of fact, it is stated in article 67 of the Constitution that political rights will be owned in "accordance with the conditions stipulated in the law", some special restrictions are included in the article and some restrictions are prescribed for the exercise of these rights also in other articles of the Constitution. Restrictions imposed by law based on the reasons stipulated in the Constitution need to comply with the conditions stipulated in article 13 of the Constitution. Similarly, the ECtHR also accepted that these rights can be restricted, however, states that these restrictions should not be at such an extent as to impair "*the free expression of the opinion of the people in the choice of the legislative body*" and in this sense, to prevent certain persons or groups from participating in the political life of the country, to impair the essence of the right in question and to eliminate its effect and should be proportionate to the prescribed aim. (see, *Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81, 2/3/1987, § 52; *Tanase v. Moldova* [BD], App. No: 7/08, 27/4/2010, § 157, 158, 161)

132. In the concrete incident, the investigation on the applicant was initiated before he was elected as a deputy, he was elected as a deputy in the general election held on the date of 12 June 2011 while he was being tried under detention. Therefore, neither the conducted prosecution nor the state of detention of the applicant constituted any obstacle against the fact that he was elected as a deputy. In this respect, there was no intervention in the applicant's right to be elected, nor was any claim in relation to this asserted. However, as the applicant was not released after he was was elected as a deputy, he was not able to take the oath at the Grand National Assembly of Turkey and to actually fulfill his duty of deputyship. As the state of detention which prevented the fulfillment of this duty prevented the right to political activity and representation as a deputy, it is obvious that it constituted an intervention in the right to be elected.

133. As explained above, the applicant's request for release after he was elected as a deputy was dismissed by the relevant courts. As a result of the examination in the previous heading, it has been concluded that in the decisions with regard to the dismissal of the requests for release after the applicant elected as a deputy, a reasonable balance was not pursued between the applicant's right to be elected and representation and the public interest in the sustainment of the trial under detention, that therefore, paragraph seven of article 19 of the Constitution was violated (§ 94-119). The fact that the applicant remained under detention in an unreasonable way prevented him from participating in legislation activities. When the period during which the applicant remained under detention after he became a deputy is also considered, it cannot be said that this intervention in the right to be elected and to engage in political activity as a deputy is not appropriate and does not comply with the requirements of a democratic societal order.

134. Due to the reasons explained, it should be decided that paragraph one of article 67 of the Constitution was violated in connection with paragraph seven of article 19.

3. In Terms of Article 50 of the Code Numbered 6216

135. The applicant filed a request for compensation without mentioning its amount and type.

136. The Ministry of Justice did not submit any opinion as regards the applicant's request for compensation.

137. In paragraph (1) of article 50 of the Code numbered 6216, it is indicated that in the event that a violation decision is delivered at the end of the examination on merits, the necessary actions to remove the violation and its consequences are adjudged; however, it is adjudged that a review for legitimacy cannot be done, that a decision with the quality of administrative act and action cannot be delivered.

138. In the application, it has been concluded that paragraph seven of article 19 and paragraph one of article 67 of the Constitution were violated. When a decision of conviction was issued on the applicant, the state of detention of the applicant came to an end.

139. In return for the moral damages of the applicant which cannot be redressed only with the determination of violation, it should be decided that a moral compensation of 5.000,00 TL be paid by discretion to the applicant.

140. It should be decided that the trial expenses of 2,812.50 TL in total composed of the fee of 172.50 and the counsel's fee of 2,640.00 TL which were made by the applicant and determined in accordance with the documents in the file be paid to the applicants.

141. It should be decided that a copy of the decision be sent to the relevant court for due action.

V. JUDGMENT

It is UNANIMOUSLY decided on 4/12/2013 that the application

IS INADMISSIBLE due to the reasons that 1.a) "*it is clearly devoid of basis*" in terms of the claim that he was detained although there was no concrete incident, fact and information which would justify detention,

b) "*application remedies have not been exhausted*" in terms of the claims that the right to a fair trial and the freedom of expression were violated,

2. It **IS ADMISSIBLE** in terms of the claims that the right to be elected was violated and that the detention exceeded reasonable duration**,**

B- 1. In terms of the claim that the detention exceeded reasonable duration, paragraph seven of article 19 of the Constitution was **VIOLATED** in connection with paragraph one of article 67 thereof**,**

2. In terms of the claim that the right to be elected was violated, paragraph one of article 67 of the Constitution was **VIOLATED** in connection with paragraph seven of article 19 thereof**,**

C- A moral **COMPENSATION** of 5.000,00 TL be **PAID** to the applicant**,**

D- The trial expense of 2.812,50 TL in total composed of the fee of 172,50 and the counsel's fee of 2.640,00 TL which were made by the applicant **BE PAID TO THE APPLICANT**,

E- The payments be made within four months from the date of application of the applicants to the State Treasury following the notification of the judgment; if there happens to be a delay in payment, legal interest be accrued for the period elapsing from the date when this duration ends until the date of payment,

F- A copy of the decision be sent to its Court for due action.

President	Member	Member
Serruh KALELİ	Mehmet ERTEN	Zehra Ayla PERKTAŞ

Member	Member
Burhan ÜSTÜN	Zühtü ARSLAN