REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2012/931

Date of Decision: 26/6/2014

FIRST SECTION

DECISION

President	: Serruh KALELİ
Members	: Zehra Ayla PERKTAŞ
	Burhan ÜSTÜN
	Erdal TERCAN
	Zühtü ARSLAN
Rapporteur	: Recep ÜNAL
Applicant	: Zekiye ŞANLI
Counsel	: Att. Ebru TARAKÇI ÇİMEN

I. SUBJECT OF APPLICATON

1. The applicant has claimed that her rights to a fair trial, to social security and to property were violated upon the interventions in the ongoing judicial processes with the addition of paragraph five to the provisional article 20 of the abolished Social Security Code No. 506 dated 17/7/1964, where such addition has been made with the Code No. 6111, dated 13/2/2011, and has requested compensation.

II. APPLICATION PROCESS

2. The application was lodged on 29/11/2012 via the 11th Civil Court of First Instance of Ankara. In the preliminary administrative examination of the petition and its annexes, completion of the deficiencies that have been detected has been ensured and it was determined that no deficiency preventing their submission to the Commission existed.

3. It was decided by the Second Commission of the First Section on 18/3/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In accordance with the interlocutory decision of the First Section dated 24/7/2013, it was decided that the examination of admissibility and merits of the application be carried out together and a sample thereof be sent to the Ministry of Justice for its opinion.

5. The facts and cases which are the subject matter of the application were notified to the Ministry on 30/7/2013. The letter of opinion of the Ministry was submitted to the Constitutional Court on the date of 25/9/2013 and notified to the counsel of the applicant on the date of 9/10/2013 whereby the applicant submitted her petition of rebuttal against the opinion of the Ministry on the date of 23/10/2013.

III. FACTS AND CASES

A. Cases

6. As expressed in the petition of application and the annexes thereof, the incidents, in brief, are as follows:

7. In return for the premiums that she has paid during her employment at Vakıflar Bankası Türk Anonim Ortaklığı (the Bank) to T. Vakıflar Bankası T.A.O. Memur ve Hizmetlileri Emekli Sağlık Yardım Sandığı Vakfı (the Foundation), which has been established as per the provisional article 20 of the Code No. 506, the applicant earned the right to retirement on the date of 27/6/1995 and is still a recipient of retirement pension from the said fund.

8. The foundation is a legal entity which is extrinsic to the social security institutions that have been established by code but is considered equivalent to them, and has the quality of an institute of compulsory social security regarding the members of the fund.

9. The objective of the foundation has been expressed in article 4 of the Articles of Foundation as follows:

> *"...*
>
> *a) To assist the right holders within the scope of the provisions of the articles of foundation hereby in cases of retirement, invalidity, death, sickness, motherhood, work accidents and occupational diseases of the members, and in cases of sickness of their spouses and children and mother and father with the sustenance of whom the member is responsible, so as such assistance shall not be less than the assistance provided by the Codes of Social Security;*
>
> *..."*

10. The revenues of the foundation consist of the premium cuts made from the salaries of the members of the fund and from other incomes. And the bank each month transfers to the Foundation the sum, which is calculated within the framework of the same principles, as the employer's share.

11. The Foundation unilaterally determines the amount of the assistance that it shall provide for its members and hence the raises concerning the pensions within the framework of the provisions that are written in the Articles of Foundation, and this amount and raises shall not be lower than the minimum standard that has been determined by Code No. 506.

12. The members of the fund have filed cases of debt against the Foundation before labour courts with the justification that the raises incurred have not been made in compliance with the provisional article 20 of the Code No. 506. As a result of such litigations, a judicial case law has been established regarding how to understand and apply provisional article 20 of the Code No. 506. The decision of the Assembly of Civil Chambers of the Supreme Court of Appeals (ACC) dated 24/3/2010 and numbered M.2010/10-155, D.2011/170, which draws such framework is as follows:

> *"As is seen, the Code No. 506 establishes a lower limit for the obligatory funds of banks.*
>
> *This matter is understood from the provision '...' in Provisional Article 20 of the Code No. 506.*
>
> *On the other hand, the problem that needs to be solved is the issue as to what the meaning of the lower limit which is mentioned in the said article is. That is to say, should one*

think in terms of the amount of the seniority payment, which is actually paid as indicated by the Local Court or should action be taken by way of a comparison of the rates of increase to seniority pensions as touched upon in the writ of reversal of the Special Chamber in the determination of this lower limit?

The role of the State within the principle of the social state of law is not to leave obligatory assistance funds unattended but to ensure that they are strengthened and that, as such, the social security rights of those concerned are secured. Since such establishments perform the role of the State to ensure social security, which is a principal role thereof, in its name, it is normal that the state has a supervision and control right over such funds covering a wide area from the deeds of foundation and the content thereof to their financial statuses.

Considering the objective of the defendant Foundation, it is unthinkable to equate the seniority pensions of the members of the fund who have retired by paying higher premiums for years with the pensions of the recipients of seniority pensions as per Code 506 who have retired by paying lesser premiums, by incurring raises at lower rates to their salaries. Since the provisional article 20 prescribes a security for the obligatory bank funds, this shall give rise to the consequence whereby the raise rates that are to be incurred on the seniority pensions of its members shall be, at least, as much as those that will be incurred on those who are subject to the Code No. 506.

Even more so, in the Provisional article 20 of the Code No. 5510 on Social Insurances and the Universal Health Insurance that became effective during the trial on the date of 16.6.2006, the issue '...that the funds that are within the scope of the provisional article 20 of the Code No. 506 shall be transferred to the Social Security Institute within 3 years following the publication of this article and be taken within the coverage of this code...' is regulated. Considering the provision of the said article, the application of the rights concerning the monthly rates of raise, which is availed for those concerned by the Code No. 506 to those who are subject to the defendant funds shall not be contrary to the essence of introduction of the provisional article 20 of the Code No. 506.

As a conclusion, a judgment has been made, as specified in the writ of reversal of the Special Chamber and as a result of the negotiations of the Assembly of Civil Chambers, that, in the determination of the lower limit as touched upon in the provisional article 20 of the Code No. 506, the rates of raise as incurred on the salaries assigned by the defendant Foundation have to be found by way of a comparison thereof with the amount of raise incurred on the seniority pensions of the insured of the SSI (the Transferred SII), and in the event that such amount of raise being lower than that which is incurred on those who receive seniority pensions as per the Code No. 506, as an additional liability in terms of rate of raise for seniority pension would arise for the defendant Foundation, that persons the salaries of whom will be incurred upon a raise as per the arrangements in the Articles of Foundation shall in addition be entitled to benefit also from the provisions of the Code No. 506 concerning raises in pensions."

13. From the date of 1/7/2002 until the end of the year 2005 no raise has been incurred on the pension of the applicant. For this reason, the applicant has requested with the action of debt that she has lodged at the 4th Labour Court of Ankara (the Labour Court) against the Foundation on the date of 30/1/2009 that *"the seniority pensions that have been paid in short be determined and a decision regarding the collection from the defendant thereof be decided."*

14. In the report that has been submitted by the expert on the date of 13/1/2011 to the Labour Court, the total of the shortcoming payments between the dates of 1/6/2002 and 1/1/2009 regarding the applicant has been established as TRY 35,103.59.

15. In the application of paragraph five that has been added to the provisional article 20 of the Code numbered 506 by way of article 53 of the Code on the Restructuring of Some Receivables and Amendments in the Code of Social Insurance and Universal Health Insurance and Some Other Codes and Decrees in the Force of Code dated 13/2/2011 and numbered 6111, as well as sub-paragraph (b) of paragraph one of the same article, wherein the assistances for the retirees of the fund are regulated, it has been regulated that the comparison of the equivalent amount in the provision and assignment of assistances shall be taken as the basis in the determination of the lower limit and that this shall also be applied to existing cases.

16. Code No. 6111 has become effective upon its publication on the Official Gazette dated 25/2/2011 with the repeating No. 27857.

17. With its decision dated 8/3/2012 and No. M.2009/125, D.2012/517, the Labour Court has dismissed the case of the applicant because of the regulation in the paragraph which has been added to provisional article 20 of the Code No. 506 by way of article 53 of the Code No. 6111. The justification of the decision is as follows:

> *"... As with the new paragraph that has been added to the provisional article 20 of the Code No. 506 by way of article 53 of Code No. 6111 that has become effective upon its publication in the Official Gazette dated 25.02.2011 and No. 27857, the provision '...' has been prescribed; in the determination of the lower limit, a comparison of the amount of seniority pension, which is paid to the SII retiree and which is paid to the retiree of the Foundation shall be made, and in the event that the pension that is paid to the SII retiree is higher than that which is paid to the retiree of the fund as a result of such performance of such comparison, the difference in between has to be paid to the retiree of the fund for this would give rise to additional liabilities on the Foundation regarding the amount of the elderly pensions.*
>
> *... from the scope of the entire file, it is deemed that the pensions that have been paid to the claimant, who is a retiree of the Foundation, in compliance with the provisions of the articles of the Foundation in the period which is the concern of the case, have not fallen below neither the pension paid to nor the raises incurred on the salaries of the SII retiree, which constitute the equivalent of the latter; and upon the consideration of expert reports and decisions that were given by our court in similar files, a conclusion to the effect that the expert ... reports and additional reports submitted for this file of ours are incongruous with the scope of the file was reached, and the case lodged be dismissed... "*

18. The 10th Civil Chamber of the Supreme Court of Appeals, which has examined the file upon the appeal of the applicant, in its decision dated 9/10/2012 and No. M.2012/11783, D.2012/18117 has ruled that the said decision of the Labour Court be "*approved upon rectification*," hence legal remedies were extinguished. The justification of the Supreme Court of Appeals for approval upon rectification is as follows:

> *"...*
>
> *However, even though the parties have no responsibility in the previous judgment concerning the dismissal of the case, which, on the date of litigation, was in compliance with the provisions of the applicable legislation, on grounds that the arrangement that constituted the legal grounds of such a case was rescinded upon an amendment of the code that took place during the trial period, and by acting on the procedural rule that each case should be considered within the conditions applicable on the date of litigation; the judgment that the claimant be considered as the unrightful party of the case, ruling that she be charged with the counsel's fee is contradictory both to the procedure and to the code, and a reason for reversal.*

Yet, since the remedy of such mistake does not necessitate a re-trial, the judgment shall not be reversed, ... and shall be approved upon rectification as per article 438 of the Code of Civil Procedure No. 1086.

…"

19. The decision of approval was notified to the applicant on the date of 12/12/2012 and the applicant made an individual application at the Constitutional Court before this date, on the date of 29/11/2012.

B. Relevant Law

20. Sub-paragraph (b) of the provisional article 20 of the Code no. 506 is as follows:

*"... b) **...which shall at least provide the assistances prescribed in this code** in cases of work accidents and occupational diseases, illness, motherhood, invalidity, old age and death of such staff and in cases of motherhood of their spouses and cases of illness of the spouses and the children thereof..., "*

21. Paragraph (five) which was added to the provisional article 20 of the Code No. 506 with article 53 of the Code No. 6111 is as follows:

*"... In the application of sub-paragraph (b) of paragraph one, **in the determination of the lower limit** regarding the provision and assignment of assistances **the comparison of the equivalent amount shall be taken as the basis**." However, in the increase of incomes and salaries the provisions concerning the increase of incomes and salaries that are assigned as per Code No. 506 shall not be applied until the date of the transfer. Within the scope of the limitation in paragraph twelve of the provisional article 20 of the Code No. 5510, the provisions that are found in the articles of the foundation of funds and the applications of the funds shall be reserved. **Such provision shall also be applied to increases antedating its effect and also regarding cases that are being tried..."***

22. The main opposition party has made an application to the Constitutional Court for the revocation of the said legal arrangement on grounds that such an arrangement is against the law, and the General Assembly of the Constitutional Court in its meeting dated 9/5/2013 has deliberated the application for revocation within the scope of the file No. M.2011/42. The decision of the Constitutional Court is as follows:

"2 - The Question of Being Contradictory to the Constitution

In the petition for the case it has been indicated that the funds which have been indicated in the provisional article 20 of the Code No. 506 are organizations that have undertaken the duties which have been taken on and the rights that are granted by the SSI regarding the staff of the institutions that they are affiliated with within the legal regulatory framework so as not to fall below that limit , that the duties and responsibilities thereof are prescribed by law, that decisions to the effect that the lower limit of raises in the salaries that have been appropriated by the foundation funds shall not be less than the rate of the raise that is made for the recipients of salaries as per the Code No. 506 have been taken by the courts, that with the paragraph which is added it has been prescribed that the comparison of amounts shall be taken as the basis in the determination of the lower limit and that this, however, extinguishes the acquired rights, that it is contradictory to the principle that the law shall not be applied retrospectively and as such the cases the trials of which are ongoing are made obsolete, that some of the cases and that have been filed by the insured who are under the coverage of the fund regarding the raise of pensions have been finalized and some are still ongoing and with

the arrangement the ongoing cases have been extinguished and hence, the rule has been claimed to be in contrast with articles 2 and 138 of the Constitution.

The state of law as stated in article 2 of the Constitution is the state the acts and transactions of which are in compliance with the law, which is based on human rights, which protects and reinforces such rights and freedoms, which establishes, in all areas, a fair legal order and improves and sustains it, which refrains from circumstances and attitudes that are against the Constitution, which considers itself bound by the superior rules of law and which is open to the scrutiny of the judiciary.

One of the indispensable aspects of the principle of state of law which is prescribed in article 2 of the Constitution is that it ensures the legal security of the codes and that it shall be composed of future-oriented, foreseeable rules in line with this. For this reason, in order to preserve trust and stability in the state of law, the codes as a rule shall be applied to incidents that arise after the date of their effect. In compliance with the principle of non-retroactivity of codes, the codes shall be made, as a requirement of the public good and the public order, in principle, so as to be applied to incidents, transactions and actions which take place after the effect thereof with the exception of some individual cases such as the protection of acquired rights and the improvement of financial rights. It is among the general principles of law that the codes that have been enacted shall not bear effect on the past and legal situations which have taken on absolute quality.

The principle of respect for acquired rights is one of the general principles of law and an outcome of the principle of security of law. In order to be able to speak of an acquired right, such a right must have actually been acquired in line with the rules that have been effective before the new code, with all the outcomes thereof. The acquired right is a right which arises from the status of the person, which has been finalized for him/her and which has taken on a personal quality. Rights that are prospective and expected in relation with a status shall not bear such quality. As long as amendments that are made on codes do not affect acquired rights and damage the security of law, it cannot be claimed that such amendments are contradictory to the principle of supremacy of law.

Article 138 of the Constitution prescribes that the judges are independent in their tenure, that they shall make rulings with their conscientious judgments in line with the Constitution, the code and the law, that no organ, office, authority or person shall neither give orders and instructions nor send circulars, make recommendations or impositions to courts and to judges in the exercise of the authority to judge, that no questions regarding the exercise of the authority to judge in the Legislative Assembly shall be asked, no sessions shall be held or no declarations shall be made about an ongoing case regarding the exercise of the authority to judge, that the legislative and executive organs and the administration must abide by the court decisions, that such organs and the administration shall by no means change court decisions and delay the performance thereof.

The principle concerning the legislative organ not being able to change court decisions shall mean that the legislative organ cannot extinguish decisions which have been finalized via the code. The principle that the court decision cannot be changed via the code shall apply for cases whereby present court decisions are being changed via the code or where the application thereof are hampered as such, without incurring any changes on the material law.

In the provisional article 20 of the Code No. 506 the authority to establish funds in the form of foundations or associations has been given to certain organizations so as to ensure the social security of their staff. In the sub-paragraph (b) of paragraph one of the article, it has been indicated that the funds that have been established in compliance with this article shall provide their members at least with the assistances that have been specified in the Code numbered 506.

The rule has been developed so as to remedy the disputes which may arise in the application of the provision whereby it is provided that the assistances provided by the funds shall not be lower than those provided to the insured of the SSI, regarding that apart from the amounts of assistances, also the rates of monthly rates shall not be lower than the monthly raise rates that are applied to the insured of the SSI. With such an arrangement, it has been indicated that a comparison of the equivalent amount shall be taken as the basis in the determination of the lower limit of the assistances provided by the funds and as such, what needs to be understood from the existing provision and how the article could be applied in line with the wording and the purpose thereof have been clarified.

Such application by foundation funds who keep the rate of raise in the assistances that they provide to their members as required by the articles of the foundation at a limit lower than that of the SSI should be considered as an independent decision to restore the robustness of their financial structure and actuarial balance. Thus, as long as the funds are not in violation of the rule of the lower limit, it should be allowed that they determine a lower rate of raise than that of the SSI, for the assistances that they provide. Otherwise, the function of the fund to ensure the social security of its members, which is its principal task, shall be endangered.

That the codes shall pursue the aim of ensuring public good, that they include general, objective, fair rules and that they observe the criteria of equity and not violate acquired rights is a requisite of being a state of law as prescribed in article 2 of the Constitution. For this reason, in legal arrangements the law maker should exercise the discretionary power which has been awarded to it within constitutional limits and in a way that it takes into consideration the criteria of justice, equity and public good.

Considering the fact that it has been made so as to prevent the disputes that arise in relation with the application of the provision of the existing code to ensure that the principal task of the foundation funds, which is to ensure the social security of the members thereof is not endangered by way of maintaining the robustness of their financial structure and actuarial balance; the rule, which does not entail a new application and which only clarifies what has to be understood from the provision on hand by way of indicating that the equivalent amount comparison shall be taken as basis in the determination of the lower limit of the assistance that is provided by funds, has been made with the aim of public good, and has no contrarieties with the Constitution.

On the other hand, there is no circumstance whereby the principle of security of law is violated since it is understood that it has been retroacted with the assumption that it would be applied also for the raises antedating the arrangement whereby the equivalent amount comparison is taken as the basis in the raise of the salaries and incomes that are assigned by the funds concerned was accepted so as not to allow the violation of the rights of the members of the fund an action in the detriment of whom was taken as a result of such erroneous determination of the lower limit in raises imposed on assistances that are made by the fund.

The rule which was introduced by the law maker so as to ensure that the arrangements that have been made to prevent disputes arising from different interpretations of a provision of the law would also be applied to cases that have been lodged as a result of such disputes and which have not yet been finalized as of the date of effect of such arrangement, includes neither any statement concerning in which direction the trial would be made nor regarding how a judgment concerning certain material dispute would be made and neither has it any quality which leads to the issuance of any orders or any instructions for the courts and for the judges regarding the exercise of the authority to judge, which encumbers the judges' performance of their duties in full independence and which prevents them from making judgments by their conscientious reason in line with the Constitution, the code and the law.

The fact that each code has the quality of obligatory orders that must be adhered to by the addressees and practitioners thereof arises from the normative nature of the rules of law. In a state of law, each public authority shall be exercised in compliance with the law and as such, while making judgments regarding the disputes that have been brought before them, the courts have the liability to observe the codes concerned. For this reason, the rule which determines the principles that must be observed by the courts while making rulings regarding disputes arising from assistances to be provided by such funds cannot be said to have a quality which is in violation of the independence of the judiciary.

On the other hand, the cases that have been filed in relation with the incomes and salaries that will be paid by the fund giving rise to acquired rights would only come into question when a decision in favor of the insured is given and when such decision is finalized. That a case has been filed regarding said disputes shall neither mean that the dispute will be resolved in favor of the insured nor there are any acquired rights what so ever for such persons.

For the reasons explained, the rule which is the subject of the case is not contradictory to articles 2 and 138 of the Constitution. The request for revocation has to be dismissed.

Serdar ÖZGÜLDÜR regarding the entirety of the article; Mehmet ERTEN and Osman Alifeyyaz PAKSÜT regarding the fourth sentence of the article; Serruh KALELİ and Zehra Ayla PERKTAŞ regarding the section '...in raises antedating the effect of the article and...' in the fourth sentence of the article, have not taken part in this view.

IV. EXAMINATION AND JUSTIFICATION

23. The individual application of the applicant dated 29/11/2012 and numbered 2012/931 was examined during the session held by the court on 26/6/2014 and the following were ordered and adjudged:

A. Claims of the Applicant

24. The applicant has indicated that she was forced to receive the same amount of pension with those who have paid premiums of lesser amounts whereas she has been paying higher premiums; that, within this framework, with the paragraph which has been added to the provisional article 20 of the Code numbered 506 with article 53 of the Code No. 6111 the premiums that she had paid to the foundation were seized and that the provision thereof concerning the application of the said legal arrangement to ongoing cases renders inapplicable the case law of the Supreme Court of Appeals which is the basis of the action of debt she has filed in the Labour Court and which was in her favor; that with the Code that was enacted later, an ongoing judicial process was tampered with and that as a result, half of the premiums which have been collected from her have not been reflected on her pension of retirement, hence claiming that her rights to fair trial, to property and to social security which have been guaranteed by the Constitution have been violated and requested that the said provision of the Code be revoked and for a compensation.

B. Evaluation

1. In Terms of Admissibility

a. The Claim as Regards the Violation of the Right to Property

25. The applicant has claimed that her rights to property and to social security which have been guaranteed by the Constitution have been violated upon indicating that she was forced to receive the same amount of pension with those who have paid premiums of lesser

amounts whereas she had been paying higher premiums; that, within this framework, with the paragraph which has been added to the provisional article 20 of the Code No. 506 with article 53 of the Code No. 6111, the premiums that she had paid to the Foundation were seized. The claims of the applicant concerning the violation of rights which are based on the same incidents and facts have to be examined within the framework of the right to property.

26. The Ministry has indicated in its letter of opinion that, ownership of a pension of retirement or other social security rights comes under article 1 of the Protocol No. 1, that, even though the limitation of the interest within this scope affects the essence of the right, still this shall not be construed to mean that this provision guarantees for the individual the entitlement to the right to obtain a certain amount of retirement pension or a retirement pension which does not exist in the domestic law or to any other social security rights; that however, in cases where the making of a payment as a social aid under the condition that premiums have to be paid in advance or unconditionally has been prescribed in the legislation of the contracting state, regarding persons who fulfill such conditions, it has to be accepted that an interest which relates to property within the scope of article 1 is present and considering the case laws of the Supreme Court of Appeals which were applicable on the date when she filed the case and especially during the course of the trial, it is thought that the applicant has a legitimate expectation that she might be reimbursed the retirement pensions which have not been paid in full.

27. The applicant, in her petition of statement as a response to the letter of opinion of the Ministry has informed that in the letter of opinion of the Ministry her suffering, her request and the stages of the case have been accurately identified and that she had a legitimate expectation.

28. 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 European Convention on Human Rights (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).

29. The right to property which is the subject of the claim of violation of the applicant has been regulated in article 35 of the Constitution and article 1 of the additional Protocol No. 1 (Protocol No. 1).

30. Article 35 of the Constitution with the side heading *"Right to Ownership"* is as follows:

"Everyone has the right to property and inheritance.

These rights may be restricted by code only for the purposes of public interest.

The exercise of the right to property cannot be contrary to public interest."

31. Article 1 of the Protocol No. 1 is as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

32. The applicant who asserts that her right covered by article 35 of the Constitution has been violated has to prove that such a right exists. For this reason, it is primarily necessary to evaluate the legal status of the applicant at the point of whether or not she has an interest in relation to property which requires protection in accordance with article 35 of the Constitution (App. No. 2013/382, 16/4/2013, § 26).

33. The right to property is not inherent in the person of the individual and in order for an individual to benefit from legal protection within the scope of article 35 of the Constitution, the presence of the right to property shall be sought first. Article 35 of the Constitution and article 1 of the Protocol No. 1 take under protection not the request to acquire property but the individual's already existing right to property. This situation can also be expressed as the right being acquired or already being present.

34. In the case law of the European Court of Human Rights, regarding what can be the subject of the right to property, an *'autonomous interpretation'* is taken as the basis independently from the provisions of the legislation and the interpretation thereof of the courts of instance (see. *Depalle v. France* [BD], App. No: 34044/02, 29/3/2010 § 62; *Anheuser-Busch Inc. v. Portugal* [BD], App. No: 73049/01, 11/1/2007, § 63; *Öneryıldız v. Turkey* [BD], App. No: 48939/99, 30/11/2004, § 124; *Broniowski v. Poland* [BD], App. No: 31443/96, 22/6/2004, § 129; *Beyeler v. Italy* [BD], App. No: 33202/96, 5/1/2000, § 100; *Iatridis v. Greece* [BD], App. No: 31107/96, 25/3/1999, §54).

35. As much as an existing property *("existing possessions")* can fall within the scope of the benefits covered by the field of protection of article 35 of the Constitution and article 1 of the Protocol No. 1, so can claim rights (CC, M.2000/42, D.2001/361, D.D. 10/12/2001; CC, M.2006/142, D.2008/148, D.D. 24/9/2008) or demand rights*("claims")* that are defined in a definitive way. Within this scope, in order for a claims right or request to be protected within the scope of the right to property, a "property" can be established in the event that this is made executable on an adequate level via a court verdict, a decision of the arbitrator or an administrative decision (For a decision of the ECtHR in the same vein, see: *Krstić v. Serbia*, App. No: 45394/06, 10/12/2013, § 76). However, in some cases whereby the right has not been fully acquired, especially the requirements of the economic life and the understanding of legal security reveals the requirement that some circumstances of legitimate expectations expressing the judicial hope that the right would be present in the future be included in the scope of security of the right to property. However, in such cases the person has to have a legitimate expectation regarding the presence of the right rather than a mere hope that the right would be acquired (For a decision of the ECtHR in the same vein, see: *Maltzan and Others v.* Germany (s.d.) [BD], App. No: 71916/01, 71917/01, 10260/02, 2/3/2005, § 74).

36. One of the aspects that can bring into being such an expectation and that can ensure that a claimed interest of property can establish a value within the sense of article 35 of the Constitution, is the availability of a legal basis such as the established jurisprudence that supports such claim. However, claims that are made solely through application to a place of jurisdiction are far from providing a sufficient basis. What is important is that the said legal grounds is sufficient to activate the security as provided within the scope of article 35 of the Constitution. (For decisions of the ECtHR in the same vein, see: *Kopecky v. Slovakia*, App. No: 44912/98, 28/9/2004, § 52; *Draon v. France* [BD], App. No: 1513/03, 6/10/2005, § 68;

Maurice v. France [BD], App. No: 11810/03, 6/10/2005, § 66; *Özden v. Turkey*, App. No: 11841/02, 3/5/2007, § 27).

37. In line with the findings included here above, the presence of the right or the presence of a legitimate expectation to such effect has to be revealed by the applicant.

38. The subject of the application is, rather than the retirement pension of the applicant that has previously accrued or the amount of such pension, is the non-satisfaction of her expectations concerning her right to claim that arises from the difference which results from the raise of the pension that she claims was not made although it had to be made earlier. It is obvious that article 35 of the Constitution which secures the right to property does not provide individuals the right to claim regarding the receipt of a certain amount of retirement pension. However, in cases where such a claim has sufficient grounds in legal arrangements and case laws, it can be accepted to establish a property within the meaning of article 35 of the Constitution. In other words, an expectation regarding the acquisition of property can be considered as property only when it legally has a certain basis under certain conditions. Similarly, when the legal system includes arrangements concerning the provision to individuals of social security right and interests in relation thereto, a right to property on this issue originates, and in parallel to judicial case laws , it has to be accepted that the individual, who meets the conditions sought by the legislation concerned, has an interest which arises in relation to the property that comes under the scope of article 35 of the Constitution (For decisions of the ECtHR in the same vein, see: *Arras and Others v. Italy*, App. No: 17972/07, 14/2/2012, § 76; *Klein v. Austria*, App. No. 57028/00, 3/3/2011, § 41-47). What needs to be evaluated at this point is whether or not the legal expectation of the applicant concerning the rate of increase she claims that needs to be incurred on her pension has the sufficiency to provide an area of application to the provision on security within the scope of article 35 of the Constitution.

39. The applicant has materialized her said expectation with the action of claim that she filed on the date of 30/1/2009 at the 4th Labour Court of Ankara and it is obvious that the expectation as asserted by the applicant, within the framework of the writ dated 9/10/2012 and No. M.2012/11783, D.2012/18117 of the 10th Civil Chamber of the Supreme Court of Appeals which emphasizes that *the case was dismissed as a result of the extinguishment with the amendment of the code during the process of trial of the arrangement that provides the legal basis of the case which is in compliance with the legislation existing on the date of the filing of the case*, has a legal basis in the form of an established case law that supports the request (Moreover, see the decision of the ACC as reported in § 12).

40. It is understood that the actual claim of the applicant, which was put forth in line with the legislation and the legal practice before the said amendment of the code gives rise to a legitimate expectation in favor of the applicant and the expectation of the applicant which is the subject of the claim of violation comes within the scope of the security of article 35 of the Constitution and article 1 of the Protocol No. 1.

41. Due to the reasons explained, it has to be decided that the application, which falls under the authority of the Constitutional Court in terms of its subject and which is not clearly devoid of basis and where no other reason is deemed to exist to require a decision on its inadmissibility, is admissible.

b. The Claim as Regards the Violation of the Right to a Fair Trial

42. The applicant has claimed that her right to a fair trial has been violated by way of intervening in the ongoing trial processes with paragraph five that was added to the provisional article 20 of the Code No. 506.

43. The Ministry has not provided any opinion what so ever regarding the admissibility of this part of the application.

44. The claim of violation, which is based on the fact that the applicant was put in a disadvantaged position against the defendant Foundation upon the intervention in the ongoing trial process with a code that was passed by the legislative organ has to be evaluated within the framework of the principle of equality of arms which is an aspect of the right to a fair trial.

45. In order for the merits of an individual application that is made to the Constitutional Court to be examined, the right that is alleged to be intervened in by the public power has to exist within the scope of the shared area of protection of the Constitution and the Convention (§ 28).

46. In paragraph one of article 36 of the Constitution, it is stated that everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means. Since the scope of the right to a fair trial is not regulated within the Constitution, the scope and content of this right needs to be determined within the framework of article 6 of the Convention with the side heading "*Right to a fair trial*" (App. No. 2012/1049, 26/3/2013, § 22). Paragraph (1) of article 6 of the Convention with the side heading of *"Right to a fair trial"* is as follows:

> "*1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …*"

47. Since the material dispute which concerns the social security law concerns the rights and liabilities between private persons or between private persons and the state and exists within the scope of the concept of *"civil rights and liabilities"* which is expressed in article 6 of the Convention, there is no doubt that it exists within the area of protection of the right to a fair trial which is regulated in the Constitution and the Convention.

48. Due to the reasons explained, it has to be decided that the application, which exists within the authority of the Constitutional Court regarding its subject and which is not clearly devoid of basis and where no other reason is deemed to exist to require a decision on its inadmissibility, is admissible.

2. In Terms of Merits

a. The Claim Regarding the Violation of the Right to Property

49. The applicant has claimed that her right to property which has been guaranteed by the Constitution has been violated upon indicating that she was forced to receive the same amount of pension with those who have paid premiums of lesser amounts whereas she has been paying higher premiums; that, within this framework, with the paragraph which has been added to the provisional article 20 of the Code No. 506 with article 53 of the Code No. 6111, the premiums that she had paid to the Foundation were seized (§ 24).

50. In the letter of opinion of the Ministry, the issue whether or not the amendment that was made with the Code No. 6111 was appropriate in terms of public good was touched upon and it was asserted that public authorities, in interventions concerning the right to

property, have a certain area of discretion and that in potential interventions in the right to property that they make so as to enable economic and social benefits, it is assumed that there is a legitimate purpose. Moreover, it was stated that as per the preamble of the Code No. 6111, the aim of protecting, in general, the actuarial balances of foundation funds is pursued; that, for this reason there is a compulsory public benefit in the preservation of the balance between the resources and the services of institutions of social security; that many retirees of the fund may suffer in the event of failure of the fund to provide the services that it is liable for with the sources that it currently has and shall acquire in the future and that the lawmaker made the amendment in question considering the public good which arises as such. Lastly, in the letter of opinion it was stated that; the amendment that was made in the provisional article 20 concerning the raise to be made in the pensions of the retirees of the fund should impose no disproportionate and excessive burden on the applicant in order for it to be in compliance with article 1 of the Protocol No. 1, that in the examination of the issues concerning the preference of the legislative organ the ECtHR accepts that in the determination of what is for the public good, the national authorities are in a better position than international judges and furthermore, that social security assistances are not of absolute quality and that the national authorities are subject to the regular scrutiny of public requirements; that within this scope, the issue concerning that the lawmaker targeted the preservation of actuarial balances during the amendment of the criterion which is to be taken into consideration regarding the raises in the retirement pensions of the retirees of the fund, was clearly stated in the justification of the amendment.

51. In her petition of statement in response to the opinion of the Ministry, the applicant has reported that her suffering, her request and the stages of the case had been correctly established in the opinion of the Ministry, that she could not collect her receivable because of the Code No. 6111 and that she was bereaved of a certain portion of her pension, that the amendment of the code was not made for the continuation of the social security system, that in the event of admission of her case the extra trouble that this would introduce to the Foundation would not establish a burden and even if it would this does not require an intervention in the right.

52. In addition to the general regime which arises from the joint evaluation of article 35 of the Constitution with article 13 from the perspective of the limitations of the right to property and the securities thereof, although there are, in other articles of the Constitution, provisions concerning additional security and limitation concerning property; still, the most important one of all, without doubt, is article 35 which defines property as a right. In paragraph one of the article the right is defined in general; and in paragraphs two and three, the criteria for limitation and security are indicated. Such criteria of limitation and security have to be interpreted under the light of article 13 of the Constitution. The right to property, within this scope, can be limited with the aim of public good and by law in a way that the essence thereof remains untouched. Moreover, the limitations that are made cannot be contradictory to the wording and the spirit of the Constitution, the democratic order of the society and the principle of proportionality.

53. The principle of limitation by law is an indispensable aspect of the limitation of basic rights and freedoms and in cases where such condition cannot be ensured, the evaluation of other criteria of security shall have no meaning.

54. The aim of public good which is expressed by way of employment of inter-replaceable concepts such as social good, shared interest, general good, which is a common benefit different from, and as well, superior to personal interests is the special reason for

limitation as envisaged by article 35 from the perspective of the right to property, and it is interpreted broadly, in a way to cover expressions such as the general good and social good (CC, M.1999/46, D.2000/25, D.D. 20/9/2000). The concept of public good is an aspect which entails the authority of discretion of the state organs, and as such, it is essential that this criterion which is not fitting for an objective definition be separately evaluated on the basis of each incident on hand.

55. The right to property has to be limited in a way which complies with the wording and the spirit of the Constitution, and within this scope, the securities that have been prescribed for this right have to be adhered to by way of considering the entirety of the Constitution and that it has to be ensured that it is not limited for purposes other than public good and moreover, it has to be limited by adherence to the principle of proportionality, without tampering with the essence of the right. In the decisions of the Constitutional Court concerning the right to property, the said criteria are mostly applied jointly and the fair balance which has to be struck between the right of the individual and public good is underscored (CC, M.1999/33, D.1999/51, D.D. 29/12/1999). At this point, the weight of the sacrifice that falls on the individual against the public good which forms the basis of the measure that is alleged to establish a violation has to be taken into consideration.

56. The applicant filed an action of debt against the Foundation on the date of 30/1/2009 with the reason that from the date of 1/7/2002 until the end of the year 2005 a raise has not been made in her pension. In the fourth sentence of the fifth paragraph of the provisional article 20 of the Code No. 506, which has been added thereto with article 53 of the Code No. 6111 that entered into force on the date of 25/2/2011 while the process of trial was ongoing, a rule has been set that the equivalent amount comparison would be taken as the basis in the determination of the lower limit regarding the assistances and hence the raises in retirement pensions and that such arrangement would be applied to raises antedating the entry into force of the Code and to ongoing cases as well. The case filed by the applicant has been dismissed as a result of such regulation.

57. As the aspect of legal security which forms the basis of a large part of the legal interests that come under the category of legitimate expectations and the aspects of being foreseeable and definitiveness which are the requisites of such principle shall provide objectively reasonable reasons to the individual that s/he would acquire the right; legal transactions of retrospective quality which do not bear the quality of being foreseeable shall constitute an express intervention in legitimate expectations that rely on decisions or transactions in favor. And the rightfulness of such intervention can be ensured only upon adherence to the above mentioned criteria of limitation and security.

58. Social security is an important responsibility which is undertaken by the state and making some arrangements in order to ensure the sound fulfillment of the requirements of such responsibility is indispensable. Hence, the state has a broad authority of discretion regarding the area of social security. The ECtHR too, accepts that the regulations regarding social security are open to be amended, that the legislative organ cannot be impeded in this regard, that retirement rights that have been granted upon reliance to codes or court decisions can be amended with new codes which are retrospectively effective, that an arrangement within this scope shall meet the condition of legality as long as its explicit arbitrariness is not determined (See. *Arras and Others v. Italy*, App. No: 17972/07, 14/2/2012, § 81; *Maggio and Others v. Italy*, App. No: 46286/09, 52851/08, 53727/08, 54486/08, 56001/08, 31/5/2011, § 60; *Maurice v. France* [BD], App. No: 11810/03, 6/1/2005, § 81; *Draon v. France* [BD], App. No: 1513/03, 6/1/2005, § 73; *Kuznetsova v. Russia* [BD], App. No: 67579/01, 7/6/2007, § 50). The findings

which have been indicated are also valid in terms of the legal arrangement which is the basis of the intervention that is the subject of the application, and hence, within this scope, the outcome that the condition of legality of the intervention regarding the material incident has been met is achieved.

59. Regarding the acceptability of the arrangement which constitutes an impediment against the legitimate expectation as legitimate, it has to pursue the aim of realizing public good and the new situation that arose in the aftermath of the intervention and the disrupted balance of interests should not have reached an unbearable point regarding the individual.

60. In the justification of article 53 of the Code No. 6111 which has amended the provisional article 20 of the Code No. 506, the aim of the arrangement which is the subject of the material application is pointed out by way of mentioning that due to the disruption of the actuarial balances of said funds as a result of the raises which have been applied to the pensions assigned in line with the Code numbered 506 while increasing the salaries and incomes which are assigned by the funds that are within the scope of the said provisional article, a new arrangement has to be made so as to ensure that the equivalent amount comparison is taken as the basis in raises which will be made in salaries and incomes and to remedy the disputes which have arose and will arise thence.

61. According to such justification, it is understood that the purpose of the arrangement, essentially, is to prevent the disruption of the actuarial balance of the said funds as a result of the raises that are applied to the salaries in line with the Code No. 506. Actuarial balance in social security services means that the total of the existing and future assets is equal to the total of the existing and future liabilities and that the guarantees that are given to individuals in the system are offset by the system and as such, it is obvious that in the preservation of the financial balances of these funds that will be transferred to the Social Security Institution (SSI) after some time as per the provisional article 20 of the Code No. 5510, there is public interest of compulsory quality regarding the coverage of the individuals of the society who need protection more under the umbrella of social security within the framework of preservation of the financial structure of the system of social security and social security planning.

62. Regarding the application on hand, as a result of the legal arrangement which has amended the requirement to determine the rates of increases to be incurred on the pensions assigned by the defendant Foundation by way of comparison thereof with the amount of raises incurred on seniority pensions that are appropriated for the insured of the SSI with the requirement to take the equivalent amount comparison as the basis of the determination of the lower limit which has been touched upon in the provisional article 20 of the Code No. 506 regarding the provision and assignment of assistances; it was seen that the applicant was not entirely deprived of her pension or the security concerning the fact that the amount of her salary would not fall below a certain minimum standard; only that in the determination of the lower limit prescribed in the code, instead of the criterion of comparison with the amount of raises incurred on seniority pensions that are appropriated for the insured of the SSI, the basis of equivalent amount comparison was introduced, and that this situation gave rise to an outcome which is limited to the non-reimbursement to the applicant of the claim concerning the lacking payments (§ 14) which constitute the subject of her claim, and within this framework, the arrangement that is based on the aim public good of compulsory quality has not put the applicant under a heavy and unbearable burden and that the objective of the intervention is proportionate to the burden that has been imposed on the applicant.

63. For reasons explained above, it has to be decided that the right to property which has been taken under guarantee in article 35 of the Constitution is not violated as a result of such intervention that is the subject of application, which is understood to be not in contrast with the indicated limitation and security criteria.

b. The Claim Regarding the Violation of the Right to a Fair Trial

64. The applicant has claimed that the case laws of the Supreme Court of Appeals, which formed the basis of the action of debt that she has filed at the Labour Court and made her rightful have been revoked through the phrase concerning the application of the paragraph that has been added to the provisional article 20 of the Code No. 506 with article 53 of the Code No. 6111 also to ongoing cases ; and that with the code that was enacted the ongoing legal processes were intervened in and as such her right to a fair trial that is regulated in paragraph one of article 36 of the Constitution has been violated (§ 24).

65. In its letter of opinion the Ministry has stated that according to the case laws of the ECtHR the right to social security and social assistances come under the scope of article 6; that the complaint of the applicant concerns the principle of equality of arms and that such principle is covered under article 36 of the Constitution, that in a case where this principle is not protected it cannot be said that there is a fair trial; that the Constitutional Court, by way of relying at once, upon article 2 which regulates the state of law as well as by way of joint interpretation of articles 36 and 38, has made many requirements of the right to a fair trial a part of the Constitution; and that in some of its judgments it has handled and considered the enaction of retrospectively effective codes, under some circumstances, as an intervention of the state in trials to which it is a party in a way that was in violation of the principle of equality of arms.

66. Furthermore, the Ministry, in its letter of opinion, has indicated in reference to the case laws of the ECtHR that the principle of equality of arms requires that each party shall be provided with reasonable conditions whereby they can present their cases in a way where they do not find themselves in a seriously disadvantaged position against each other; that such principle is applied, as a rule, not only to criminal cases but also to cases concerning personal rights; that the principle of non-retroactivity of codes is one of the basic principles of law similarly to the principle of equality of arms; that when the state, in the case of a trial which it is party to, enacts retroactive codes so as to reap some outcomes which are in its favor, this would constitute a contradiction with the equitable trial in terms of the equality of arms within the framework of article 6 of the Convention; that article 6 prohibits any interventions that are made by the legislative organ so as to tamper with the judgment of the judiciary regarding a dispute and yet, that according to the ECtHR this prohibition is not absolute and also that; if the trial has not yet attained the stage of trial *inter partes*, if there is a motive of compulsory public good of the legislative, if the intervention concerned is foreseeable, a legal intervention in the trial process would not be contrary to the right to an equitable trial. In the letter of opinion, it was stated that the prohibition to retroactivate codes is also valid in cases where the state is not a party to the case, that regarding the present application an amendment on the article which was to be applied to the case was made with the Code No. 6111 while the action of debt that the applicant has filed was ongoing and that such amendment has also amended the case laws of the Supreme Court of Appeals and as such the legal arrangement has affected the outcome of the case and in the present incident neither the state nor public offices are direct parties of the case yet notwithstanding this, since the state has the duty of auditing and supervision upon private foundation funds which are of the quality of social security institutions, that the effects on the applicant of the legal amendment which has been made could be taken into consideration from the perspective of the principle of equality of arms.

67. The applicant, in her petition of statement in response to the opinion of the Ministry, has reported that the case law of the Assembly of Civil Chambers of the Supreme Court of Appeals dated 24/3/2010 takes her claim under guarantee, that accordingly, the amount of the claim has been calculated by an expert during the trial process, that notwithstanding this, as a result of the amendment which was made in the code during the course of the case and which affects the case on hand the principle of equality of arms was violated and moreover that article 6 of the Convention prohibits the intervention of the legislature in a way that affects the decision of the judiciary.

68. The applicant filed an action of debt against the Foundation on the date of 30/1/2009 with the reason that from the date of 1/7/2002 until the end of the year 2005 a raise has not been made in her pension. The case that was filed by the applicant has been dismissed by the Labour Court due to paragraph five that was added to the provisional article 20 of the Code No. 506 during the course of the trial via article 53 of the Code No. 6111 which became effective on the date of 25/2/2011. Within the framework of the issues that were touched upon in the justification of the decision of approval upon rectification of the 10th Civil Chamber of the Supreme Court of Appeals dated 9/10/2012 (§ 18), the claim of the applicant had a basis as she filed the case and hence her case had a high chance of success. Within this framework, the issue pertaining to whether or not the intervention, which has been made via the code in the legal process that the applicant has started with reliance upon the established case law of the Supreme Court of Appeals, constitutes a violation against the principle of equality of arms and as such to the right to a fair trial, constitutes the essence of the examination of the merits.

69. Firstly, it has to be stated that in the examination of the individual application which was performed by the Constitutional Court, differently from the norm control, it is not the code's compliance with the Constitution but the compliance with the Constitution of the practice in question which is based on the code that is being examined.

70. Another requisite of the principle of equitable trial as specified in the expression "*Everybody, … has the right to request that their cases ... concerning disputes in relation to their rights and liabilities ... be tried in a way that is ... in compliance with equity*" in article 6 of the Convention, is to ensure the equality of arms between the parties within the scope of the trial.

71. In disputes concerning civil rights and liabilities, the resolution of the conflict with a fair solution depends on the conduct of the trial between the parties in a way that is in compliance with equity. Within this scope, in parallel to the positions of the parties during the trial, they have to be under equal conditions as they dissert their theses and antitheses and none of them should be disadvantaged against the other.

72. When the state, regardless of whether or not it is a party, makes legal regulations which provide considerable advantages to one of the parties against the other, this constitutes a contradiction to the principle of equality of arms and hence to the rule that the trial to be conducted in a way that is in compliance with equity (For decisions of the ECtHR in the same vein, see: *Arras and Others v. Italy*, App. No: 17972/07, 14/2/2012, § 43; *Ducret v. France*, App. No: 40191/02, 12/6/2007, § 33). In other words, in cases where the legislative organ enacts codes in a way to give rise to outcomes that are in favor of one of the parties of the trial, it cannot be said that the parties of the case are in equal positions. In order to ensure this, the arrangement that is alleged to affect the judicial process has to reduce the chance of success of one of the parties in the case considerably, there has to be a link of causality between such outcome and

the legal arrangement and no further factors must have appeared that interrupts or weakens such link of causality.

73. In brief, during the evaluation of the security of equality of arms regarding the intervention of the legislature, it has to be determined whether or not the intervention that has been made has caused a disproportionate and express imbalance or disadvantage in the position of one of the parties of the trial in comparison to the other.

74. Within the framework of these explanations, when the special conditions of the case which is the subject of the application are considered, the case of the applicant which had a considerable chance of success within the framework of the case laws of the Supreme Court in the period before the applicant has filed the case and during the initial stages of the case has been dismissed because of paragraph five which was added to the provisional article 20 of the Code numbered 506 with article 53 of the Code numbered 6111. Thus, the applicant has lost her case, the chance of success of which was considerably high, as a result of the aforementioned amendment of the code which included the rule that such amendment would be applied to ongoing cases. It is understood that the Code which has been accepted by the legislative organ has directly affected the outcome of the case which is the subject of the application, putting the applicant to an incomparably disadvantaged position against the defendant Foundation when compared to her previous position. Put more expressly, article 53 of the Code No. 6111 has determined the outcome concerning the merits of the dispute, rendering the litigation, hence the continuation of the applicant of her case meaningless. It is clear that this situation constitutes an intervention in the principle of equality of arms, hence in the right to a fair trial.

75. Even though no reason for restriction is envisaged under article 36 of the Constitution regarding the right to a fair trial, it cannot be said that this is an absolute right, which cannot be restricted in any way what so ever. It is acknowledged that even rights for which no special reason for restriction is envisaged have certain limits stemming from the nature of the right. Moreover, even though no reason for restriction is included in the article that regulates the right, it can be possible to restrict these rights by relying on rules that are covered under other articles of the Constitution. It is clear that a number of regulations pertaining to the scope and utilization conditions of the right to a fair trial are rules that demonstrate the limits stemming from the nature of the freedom and determine the norm area of the right. However, these limitations cannot be in violation of the assurances contained within article 13 of the Constitution (CC, M.2010/83, D.2012/169, D.D. 1/11/2012). The principle of equality of arms, too, is not an absolute principle as an aspect of the right to a fair trial and it can be subjected to some limitations that can be accepted as legitimate.

76. Article 13 of the Constitution with the side heading "*Restriction of fundamental rights and freedoms*" is as follows:

> *"Fundamental rights and freedoms may only be restricted on the basis of the reasons mentioned in the relevant articles of the Constitution and by law without prejudice to their essence. These restrictions cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality."*

77. According to the said rule of the Constitution, the legal limitation on the principle of equality of arms, and hence on the right to a fair trial should not touch the essence of the right and should not be of a quality that is against the wording and the spirit of the

Constitution, the requirements of the democratic social order and the secular Republic, and the principles of proportionality.

78. The ECtHR too, agrees that within the framework of the intervention of the legislature in the trial process, the principle of equality of arms is not absolute and that the intervention, under certain conditions can be seen as legitimate. In order for this, the intervention should be of a foreseeable quality, the legislative organ should have compulsory justification based on public good so as to be able to make such an intervention and that the arrangement should have been made before the trial process has started between the parties. That at least one of these conditions have not been met shall suffice for the consideration of the intervention as a violation of a right. (*The National & Provincial Building Society, The Leeds Permanent Building Society And The Yorkshire Building Society v. United Kingdom*, App. No: 21319/93, 21449/93, 21675/93, 23/10/1997, § 112).

79. In a similar application, the ECtHR has reiterated the compulsory justification of public good. It has set forth a case law according to which, in order for the establishment of a retirement system of a homogeneous quality, the legal arrangement that revokes a privilege which has been recognized only for a certain category of retirees can be considered to be within the scope of public good in general, but which also requires that the justification of the government to be proven to be sufficient to the extent of eliminating the concerns arising from the retroaction of the code in a way to affect the ongoing trials (*Arras and Others v. Italy*, App. No: 17972/07, 14/2/2012, § 49).

80. The principles that emanate within the framework of the case laws of the ECtHR concerning the principle of equality of arms which is an aspect of the right to a fair trial and a requisite of an equitable trial, and the reasons that legitimize the intervention are in parallel to the principles of limitation in article 13 of the Constitution and whether or not the intervention in the principle of equality of arms which is the subject of the application has to be evaluated within the framework of such conditions.

81. While the purpose of the provisional article 20 of the Code No. 506 is to ensure that the amount of the salary and the income that is paid to the member staff of foundation funds do not remain under a certain lower limit, in practice it was seen that disputes regarding other than the amount of assistances, the rates of increase too, would not be lower than the monthly raise rates of the Social Security Institution arose and thinking that this would negatively affect the "*actuarial*" balances of the foundations concerned, the said paragraph five has been added to the provisional article 20 of the Code No. 506.

82. Until the Code No. 5510 which aimed to bring all of the social security institutions under one roof was enacted, the state has realized its constitutional liability regarding the right to social security with the codes that it has enacted and by the hand of the social security institutions, to the extent of financial capabilities. The state, concerning the completion of this function, has made legal arrangements to enable banks and insurance funds to provide social security services under the legal personality of a foundation and outside the social security system, and has taken some precautions so that services in this field would be soundly provided. Within this scope, with the provisional article 20 of the Code No. 506, the establishment of funds of assistance providing social security opportunities that are more developed than the universal social security system was enabled on the one hand, and bringing their services to certain standards by way of making some arrangements concerning such organizations was aimed. In line with this, for funds that fall within the scope of the provisional article 20 of the Code 506, the liability *"to provide at least the assistances that have been specified in this Code"* was prescribed and the provision of article 36 of the same Code that can be

accepted as a sort of *"insurance"* in terms of the social security system and the regulation that the funds which fail to ensure such minimum standard should be liquidated and transferred to the institution concerned were included. Yet, the duty to go above the standard provided by the universal social security system was not charged on the said funds and also no limitations otherwise have been envisaged.

83. Subjecting the raises concerning the pensions to be paid by such funds to their members to proportional scrutiny can lead to the disruption of the financial stability of such institutions and might also cause them to take on a financial burden the prediction of which is not possible. This situation can endanger the principal task of the fund of ensuring the social security of its members and would cause the liquidation and transfer to the respective public institution of the funds which fail to meet the standards that are expected from them. Moreover, since, according to the provisional article 20 of the Code No. 5510, the entirety of the said funds will be transferred to the Social Security Institute after certain amount of time, the Social Security Institute and hence the employees and retirees who are subject to the universal social security system may have to bear the burden of the funds the financial structure and the actuarial balances of which have been disrupted.

84. Taking the entirety of such issues into consideration, the conclusion that the justification of the regulation that has been made with the Code No. 6111 which is expressed as *"...disruption of the actuarial balance of the said funds by the raises that are applied to pensions..."* reflects the concern for the preservation of the stability of the universal social security system and as such, the aforementioned retroactive regulation is aimed at the compulsory public good which concerns the entire community was reached.

85. The liability that the funds shall *"...at least provide the assistances prescribed in this code in cases of work accidents, occupational diseases, illness, motherhood, invalidity, old age and death of such staff and in cases of motherhood of their spouses and cases of illness of the spouses and the children thereof..."* was prescribed in sub-paragraph (b) of paragraph one of the provisional article 20 of the Code No. 506, and this provision was interpreted by the Assembly of the Civil Chambers of the Supreme Court of Appeals (§ 12) as *"in the determination of the lower limit touched upon in the provisional article 20 of the Code No. 506, the rates of increase which are applied to the pensions that are assigned by the defendant Foundation has to be found by way of comparison with the rates of increase incurred on the seniority pensions that are assigned to the retirees of the Social Security Institution (the Transferred SII),"* and such case law has thus become established. Although such decision was taken after the date of 30/1/2009 when the applicant has filed the case, still, it is understood from the statements *"... in the previous judgment concerning the dismissal of the case, which, on the date of litigation, was in compliance with the provisions of the applicable legislation, on grounds that the arrangement that constituted the legal grounds of such a case was rescinded upon an amendment of the code that took place during the trial period ..."* that were included in the decision of approval upon rectification of the 10th Civil Chamber of the Supreme Court of Appeals (§ 18) which has examined the decision of the court of first instance upon the appeal of the applicant, that as of the date when the applicant has filed the case, her case relied upon the established case law of the Supreme Court of Appeals and that her chance of success was high. Although sub-paragraph (b) of paragraph one of the provisional article 20 of the Code No. 506 is open for interpretation in a different way and even more so to be understood as *"comparison of the equivalent amount"* as stated in paragraph five that was added by article 53 of the Code No. 6111, still, within the framework of the said decisions of the Supreme Court of Appeals, it is not possible to say that the paragraph that was added with the Code 6111 was predictable by the applicant.

86. In the incident on hand, the applicant filed her action of debt on the date of 30/1/2009. According to the findings that have been submitted in the additional expert report No. (2) dated 13/1/2011 that was presented by the expert within the scope of this case, it is understood that the claimant (applicant) and the defendant have participated in the trial dated 2/12/2010 and have made their claims and defenses concerning the case before the court, reciprocally and face to face, that within this framework the trial process between the parties have attained a certain stage; and that the legal regulation was enacted after this stage, on the date of 25/2/2011, hence the legal regulation was made after the commencement of the trial process between the parties.

87. As is seen, even though it was concluded that there was compulsory public good in the intervention of the legislator in the ongoing case by enacting a code effective thereupon, still it is clear that the intervention of the legislative has taken place after the commencement of the trial between the parties and it determined the outcome concerning the merits of the case, that as a result of such intervention the applicant's winning of the case has become impossible, whereas the applicant's winning the case was very likely within the established case law on the date when the case was filed, that within this framework the unpredictable intervention cannot be accepted as legitimate, that at the end of the intervention the Foundation has become considerably advantageous in comparison to the applicant, that in this way, the balance of benefits were disrupted to the detriment of the applicant who has thus incurred unbearable burdens and that this constitutes a disproportionate intervention in the right to equality of arms.

88. Due to the aforementioned reasons, it is inferred that the applicant's right to a fair trial guaranteed in Article 36 of the Constitution was violated.

C. Regarding Article 50 of the Code No. 6216

89. As per article 50 of the Code No. 6216, in case it is decided at the end of the examination of the merits that the right of the applicant has been violated, what needs to be done so as to eliminate the results of the violation have to be adjudged as well. Accordingly, if the violation identified resulted from the decision of a court, it has to be decided that the file be sent to the court concerned so that a retrial is made so as to eliminate the violation and the results thereof, and in cases where there is no legal benefit in retrial that a compensation be paid to the applicant or that the remedy to litigate at general courts be shown.

90. The applicant requested that a moral compensation of TRY 60,000.00 be adjudged in favor of herself.

91. Regarding the present application, although it was established that only the principle of equality of arms which is a procedural security of the right to a fair trial was violated, since it is understood that there is no link of causality between the established violation and the claimed material rights, it has to be decided that the applicant's request concerning material damages be dismissed.

92. On the other hand, the applicant requested that a moral compensation of 30,000.00 TL be adjudged in favor of herself.

93. As a result of the violation that has been determined, the applicant has lost her case which had a high likeliness of success. Under such circumstances it is clear that the applicant has incurred a moral damage that cannot be remedied only by way of determination

of violation. Within this framework, it has to be decided that a moral compensation of 5.000,000 TRY be paid to the applicant by discretion.

94. The examination of the application has been made over the file. It should be decided that the trial expenses of TRY 1.672,50 in total composed of the fee of TRY 172.50 and the counsel's fee of TRY 1,500.00 which were made by the applicant and determined in accordance with the documents in the file be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained: it was decided **UNANIMOUSLY**;

A. That the claims of the applicant,

1. Regarding the violation of her right to property that was guaranteed in Article 35 of the Constitution,

2. Regarding the right to equality of arms within the scope of the right to a fair trial that is guaranteed in article 36 of the Constitution was violated,

IS ADMISSIBLE,

B. That the applicant's

1. Right to property enshrined in Article 35 of the Constitution WAS NOT VIOLATED,

2. Right to a fair trial enshrined in Article 36 of the Constitution WAS VIOLATED**,**

C. That the applicant be paid a MORAL COMPENSATION of TRY 5,000.00 , that other requests of the applicant be DISMISSED,

D. That the trial expenses of TRY 1,672.50 in total comprising of the fee of TRY 172.50 and the counsel's fee of TRY 1,500.00 , which were made by the applicant be PAID TO THE APPLICANT,

E. That the payments be made within four months as of the date of application by the applicants to the Ministry of Finance following the notification of the decision; that in the event that a delay occurs as regards the payment, the legal interest be charged for the period that elapses from the date, on which this period comes to an end, to the date of payment,

On the date of 26/6/2014.

President	Member	Member
Serruh KALELİ	Zehra Ayla PERKTAŞ	Burhan ÜSTÜN

Member Erdal TERCAN	Member Zühtü ARSLAN