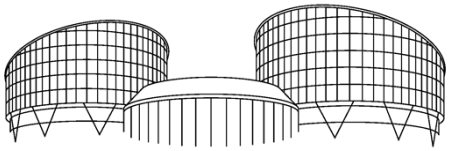

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF AHMET HÜSREV ALTAN v. TURKEY

(Application no. 13252/17)

JUDGMENT

Art 5 § 1 (c) • Unlawful pre-trial detention of journalist, accused without reasonable suspicion of involvement in illegal organisation and attempted coup Art 5 § 4 • Procedural guarantees of review • Inappropriate restriction on investigation file access during state of emergency, preventing effective challenge to pre-trial detention • Speediness of review • Period of more than fifteen months justified by exceptional caseload of the Constitutional Court following declaration of the state of emergency Art 15 • Derogation in time of emergency • Not "strictly required" Art 5 § 5 • Lack of access to effective remedy to obtain compensation Art 10 • Freedom of expression • Unlawful nature of detention impacting on lawfulness of interference Art 18 (+ Art 5) • Existence of an ulterior purpose not established

STRASBOURG

13 April 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ahmet Hüsrev Altan v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Branko Lubarda,
Carlo Ranzoni,
Saadet Yüksel, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to:

the application (no. 13252/17) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Ahmet Hüsrev Altan ("the applicant"), on 12 January 2017;

the decision to give notice to the Turkish Government ("the Government") of the complaints concerning Article 5 §§ 1, 3, 4 and 5 of the Convention and Articles 10 and 18 of the Convention and to declare the remainder of the application inadmissible;

the observations submitted by the Government and the observations in reply submitted by the applicant;

the written comments submitted by the Council of Europe Commissioner for Human Rights ("the Commissioner for Human Rights"), who exercised his right to intervene in the proceedings (Article 36 § 3 of the Convention and Rule 44 § 2 of the Rules of Court);

the written comments submitted by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression ("the Special Rapporteur"), and also by the following non-governmental organisations acting jointly: ARTICLE 19, the Association of European Journalists, the Committee to Protect Journalists, the European Centre for Press and Media Freedom, the European Federation of Journalists, Human Rights Watch, Index on Censorship, the International Federation of Journalists, the International Press Institute, the International Senior Lawyers Project, PEN International and Reporters Without Borders ("the intervening non-governmental organisations"), who were granted leave to intervene by the President of the Section (Article 36 § 2 of the Convention and Rule 44 § 3);

Having deliberated in private on 16 March 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant, who is a well-known novelist and journalist, alleged that his pre-trial detention had breached Articles 5, 10 and 18 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

2. The applicant was born in 1950 and is detained in Istanbul. He was represented by Ms F. Albuga Çalıkuşu, a lawyer practising in Antalya.

3. The Government were represented by their Agent.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The applicant's professional career, his alleged involvement in the "Balyoz" (Sledgehammer) case, and the newspaper articles that he had written prior to the attempted coup of 15 July 2016

1. Professional career

5. The applicant is a well-known journalist and novelist and has written columns in many newspapers and produced a number of television programmes. In 2007 he became one of the founders of the daily newspaper *Taraf*, and he was its editor-in-chief until his resignation in 2012. On 7 October 2015 the applicant started writing articles about current issues on a website called "haberdar.com".

2. The "Balyoz" (Sledgehammer) case

6. In 2010, the daily newspaper *Taraf* published a news story in which it was alleged that in 2002 and 2003 certain high-ranking military officers had plotted a military coup against the Government. In preparing the story, a journalist from *Taraf* relied on allegedly classified information and documents. On the basis of this piece of news, in 2010 the Istanbul public prosecutor's office opened a criminal investigation in respect of several high-ranking military officers alleged to be members of a criminal organisation called "Balyoz" (Sledgehammer). The officers were accused of planning a military coup in 2002 and 2003, aimed at the forcible overthrow of the democratically elected Government, an act punishable under Article 147 of the former Criminal Code as in force at the time of the events (for more detailed information on the "Balyoz" case, and the action plans relating thereto, see *Doğan v. Turkey* (dec.), no. 28484/10, 10 April 2012, and *Çakmak v. Turkey* (dec.), no. 58223/10, 19 February 2013). The accused officers were subsequently discharged from the army. In a

judgment of 21 September 2012, the Assize Court delivered its verdict in the "Balyoz" case, finding the accused guilty as charged and sentencing them to various terms of imprisonment. By a decision of 9 October 2013, the Court of Cassation upheld the convictions of the 237 accused.

7. In a judgment of 18 June 2014 on an individual application lodged by the accused military officers, the Constitutional Court ruled that their complaint relating to the right to a fair trial was well founded. It stated that the digital documents which had been used as the basis of the convictions had turned out to have been created or falsified in order to have large numbers of high-ranking army officers convicted and eliminated. The Constitutional Court thus concluded that there had been a violation of the right to a fair trial and decided to notify the Assize Court of its judgment so that it could do "what was necessary".

8. On an unspecified date, the Anadolu Assize Court decided to reopen the criminal proceedings against the accused military officers. By a judgment of 10 March 2015, it rendered its verdict in the "Balyoz" case. The accused officers were all acquitted. Finding that the evidence in the file had been falsified, the court also decided that action should be taken against those responsible for the alleged falsification. Accordingly, criminal proceedings were brought against the applicant, in his capacity as the editor-in-chief of *Taraf*, for divulging classified documents in the "Balyoz" case. The applicant categorically asserted that the documents had not been falsified and persistently maintained that the sources on which they had been based were genuine. According to the information in the case file, the criminal proceedings against the applicant are still pending before the domestic authorities.

3. Articles written by the applicant which subsequently constituted the basis of his detention and the ensuing criminal proceedings

(a) Article entitled "Absolute fear" (*Mutlak Korku*), published on the news website haberdar.com on 12 May 2016

9. This article reads as follows:

"Part of a famous quote by Lord Acton reads: '... absolute power corrupts absolutely'. I assume it is possible to make an addition to that. Absolute power brings with it absolute fear. Tayyip Erdoğan, who does not 'abide by the Constitution', and who violates all laws, and who, after taking control of the judiciary – in the words of his own party's Members of the Parliament – has taken full control of the executive, legislative and judicial powers, now unlawfully holds all the authority and power a dictator holds. From the colour of the carpet to be laid for a State ceremony to the minaret of a mosque to be built in Çamlıca, and from the persons to whom the most profitable undeveloped land should be sold to what should be talked about on TV food shows, he meddles in almost everything and he gets everything he wants done. People he points fingers at during his regular grand meetings with his beloved neighbourhood heads (*muhtarlar*) either get arrested or become the target of an armed assault. More often, they face both. Apparently, each party among his supporters acts in whichever way they take his instructions to be. The media are under his command. The majority

of the media are directly under his control. Nationalist media, along with Ergenekon, have sided with Erdoğan. Save for several decent newspapers and news websites that never give up resisting, and the brave people who work there, there is no one left in the media. The AKP [Justice and Development Party] in the meantime has all but given up being a political party and has turned into a group of 'office boys' running Erdoğan's errands. There is not a single State official in the country who can object to his orders, no matter how irrational they may be. If he believes it will help boost his vote, he will get any city demolished to the ground. He has burned people to death, he has people killed. Just recently, the United Nations High Commissioner for Human Rights stated that there were witness reports from Cizre claiming that more than 100 people had been besieged and burned to death and urged that a team of independent investigators conduct an investigation in that region. He always gets his own way, he meddles in everything, from advising people to drink a yogurt drink at night, to telling women to have three children. And yet there is no one as scared as this man in the entire country. He is scared of everything and everyone. He holds absolute power and lives in absolute fear at the same time. Just imagine, he suspected his Prime Minister Davutoğlu and he fired the man, he literally dismissed him, without compensation. We are talking about Davutoğlu here, the man who retracted every single word he had said the following day whenever Erdoğan corrected him, the man who became an accomplice in all crimes committed for the sake of his party's founding leader. Someone who has agreed to take responsibility for what is perhaps the bloodiest period in the history of Turkey. Erdoğan is so full of fear that he even suspected Davutoğlu and dismissed him ...

I think Erdoğan's political decline will be brought on by this absolute fear. Gradually, he will start suspecting and getting rid of every single person around him, replacing them with more and more inadequate people each time. Just like a vacuum cleaner fitted with a combine harvester, he will destroy whoever is close by. Those who are not close are already being destroyed. He is ripping the country apart. I guess this is a common trait shared by all law-defying people.

There is a TV show called *Narcos*. It tells the story of the notorious Colombian drug trafficker Escobar. ... At some point he wants to become the President of Colombia and he sincerely believes he can run the country better than anyone else. The road that leads to his disastrous end begins with his ambition to become President. Not only Colombia but also the rest of the world becomes aware of the possible consequences of such a man becoming the Colombian President. So they go after Escobar. But he is still powerful. He makes an unprecedented deal with the government in which he agrees to surrender on condition that he gets to design his own prison and choose his own guards and no State official can approach within three kilometres of the prison. The government is forced to agree.

But this absolute power, capable of even bringing a government to heel, gradually starts transforming into a state of absolute paranoia. ... He then begins to suspect two of his very old friends who are running the business while he is in prison. ... He has them both killed. And from that point on, it only gets worse. His thirst for absolute power, his absolute fear, and its inevitable consequence, paranoia, tears down the entire empire. ...

Absolute power creates absolute fear. The political arena in our country is currently going through a period of lawlessness, corrupted power and wealth, absolute power, absolute fear, and the elimination of companions has already begun. I have said this before, and I will say it one more time. This is not going to stop. This spiral of violence will continue to escalate, gaining momentum day by day. He will not only dispose of his rivals but his friends as well. We will go through a huge wave of

paranoia and violence. Ever since the day Erdoğan declared he would not abide by the Constitution, Turkey has been fast heading towards a catastrophe. But on the other hand, Erdoğan is running fast towards the end of his political career. No good usually comes out of panic, fear, and the desire for absolute submission, but these characteristics are no good for those who possess them either. The best thing that could happen for both Erdoğan and Turkey would be for him to return to the constitutional limits of his power, but probably it is too late for that by now. I guess we are watching the final act of a badly written stage play. The cost may be too heavy but it is still good to know that it will somehow end."

(b) Article entitled "Crushing through" (*Ezip Geçmek*), published on the news website haberdar.com on 27 June 2016

10. This article reads as follows:

"Upon reading it for the first time, it felt like I was hearing the deep, mechanical voice of Darth Vader, dressed in his black cape and with his black helmet on, giving orders for a planet to be destroyed. Destroy, he said, destroy. Have you seen what L.G. told H.K. during a recent interview for the *Özgür Düşünce* daily? These were his exact words: 'I am not going to say who, but a very high-profile bureaucrat paid a farewell visit to Mr Tayyip before his retirement. When Mr Tayyip told the bureaucrat about his forthcoming plans, the bureaucrat told him: "If you carried out half of these, civil war would break out in this country." Mr Tayyip replied: "Maybe, but we would walk all over them". I heard about this dialogue in person from the bureaucrat himself. So there is a leader who is ready to face up to a civil war. And for what reason? Individual ambitions.'

The man who runs Turkey is ready to face up to civil war; he says they would walk over the people. When a country's constitution-defying ruler says a civil war may break out, civil war does indeed break out. As it is, we are fast headed in that direction. Just like in the case of Darth Vader, who is unaware that he has just ordered the destruction of his own planet, Erdoğan is unaware that he has actually given the go-ahead for a civil war that will destroy his own country and moreover his very own life.

Just like when he mistakenly thought that he would be greeted with enthusiasm as the leader of all Muslims but embarrassed both himself and Turkey when he went to the United States to attend the funeral of Muhammad Ali, he will wreck both himself and Turkey with a civil war, which he consents to because he wrongly believes that he will crush his opponents.

Erdoğan is detached from reality. It's clear that in order to be able to evade a legal probe, he is ready to start a civil war, and moreover, he wants to start it, as we can understand from his words 'we would walk all over them'. He has no clue as to what civil war entails. When the walls of his palace come down with artillery fire, when people holding guns kill each other in the corridors, he will understand what a civil war is, but by then, it will already be too late. A civil war is the worst calamity that can ever happen to a community, no one can avoid becoming a victim of its tragedies. It is far more horrible than a war. You would never know where your enemy is, or who your enemy is; a horrible hatred turns everyone into a monster; people do not just kill each other, they even dismember the corpses of those they murder; they rape children, wives, lovers, sisters; they burn down each other's homes. Presumably, the media pool that supports a leader who says civil war may break out, the administrators and owners of those media outlets and their relatives assume they are safe. No one can be safe in a civil war. Even if some manage to escape, their relatives will remain

behind to become victims. They would lose not just their loved ones or relatives; even their neighbours would be murdered. AKP supporters who vote for a man who says civil war may break out are probably assuming that they would crush the others in such a war. They think that a civil war is using tanks and artillery to kill youths who dig ditches in Kurdish neighbourhoods. Civil war is when the man you greet every morning comes to your house to slit your throat. When he rapes your wife in front of your eyes. When your child is shot in the head, the minute he walks out on your doorstep, by a sniper hiding nearby. In the event that civil war breaks out in this country, do AKP supporters believe the only victims will be the others? They presumably do, but they are wrong. A civil war would pull everyone, the entire country, into a bloody vortex. Furthermore, right now, the amount of hatred and rage pumped into society is very close to the point of an explosion. The hatred is not just between Kurds and Turks. A terrible hatred is also growing between those who call those who don't pray animals, those who view people who don't pray as creatures that must be slaughtered, and those who are branded by the former as animals. Erdoğan and the adherents of the AKP are assuming that in the event of civil war, the army will remain under their command. Perhaps they would be able to keep some of the commanders to whom they have allegedly been paying huge sums, but in civil wars, armies too get split; from a single army are born several armies that are enemies of each other. Massacres will happen. Just look at what happened in Bosnia. Look at what happened in Rwanda. Look at what happened in Syria. If you are too lazy to read a book, check out the movies about these incidents. And see where a man who is blinded by his anger and who says that if a civil war breaks out, we will walk over our opponents, is dragging you. ... This is what civil war is. It is brothers shooting brothers. You think it would not happen here? Only yesterday photos showing an ISIS decapitator shooting a bullet at his brother's head got published. These are tragedies that would happen in a civil war, which Erdoğan says may break out. Those tiny bubbles that indicate that a pot of water sitting atop a stove is ready to boil are gradually becoming more visible: a bullet is launched at the leader of the main opposition party; preparations are being made to imprison the leader of another opposition party; the legislation that is meant to protect the safety of the community is obliterated; a horrible storm of anger and hatred is being created in the name of religion and patriotism. And the President of this country says a civil war may break out.

If the man ruling the country says a civil war may erupt, then civil war does erupt. The country would get torn into pieces, millions of people would die, hunger and poverty would be all around, people would literally rip each other apart to be able to escape and move to another country. And eventually they would tear down Erdoğan's palace. What remains would be a bloody desert torn into pieces. And no one can escape. This is not a horror story; many countries have been through these events before, their rulers too had said a civil war could erupt, there too events escalated step by step into civil war. All opposition parties have to devise their plans in accordance with what is imminent in Turkey, with what Erdoğan is ready to face up to. We are not face to face with a kind of trouble that can be slurred over with several statements. There is a serious disaster coming our way. Adherents of the AKP should also take this seriously. In the event that a civil war erupts in this country, they too will encounter it all, along with the rest of us. Running away will be no good because they will be tried as war criminals. We have heard Darth Vader's instruction to destroy the planet. Beware that the planet to be destroyed is your own country. Darth Vader might not know it, but you should. Behave accordingly."

(c) Article entitled "Montezuma", published on the news website p24blog.org on 10 July 2016

11. This article reads as follows:

"We are face to face with an incomprehensible situation. A man who has declared he would not abide by the Constitution is running the country singlehandedly in defiance of the Constitution. He has taken – to quote his supporters – the judiciary under his control, placed his adherents at almost every level of government, the media controlled by him adopts and supports all of his contradictory remarks without even questioning them, the political party that he once led has committed some kind of political suicide to turn into a crowd of servants, he can crush anyone who disagrees with him, administrative posts in universities are packed with those who fully submit to him, he can seize the property of businessmen who annoy him, opposition parties are watching all that is happening in a strange state of surrender, and moreover, they even support him when it comes to the most crucial matters. In the administration of this man who holds such immense and unlawful power, the wildest fantasies of the military tutelage which he used to say he was opposed to are being realised; all the aspirations of this tutelage that it could never achieve on its own are now becoming real. Kurdish cities are being razed to the ground with tanks and artillery; people are being burned to death in basements. Kurdish neighbourhoods are being wiped off the map. Kurdish deputies' parliamentary immunity is being lifted. All religious people who are thought to be members of the movement (*cemaat*) are being fired from their jobs, monitored, profiled, imprisoned. Laws that ban military officials from being prosecuted even if they commit a crime are being passed. The authority of the generals is made to outweigh civilian authority. The road is being paved for the military tutelage to seize back authority by way of legislation. Together, all of these make up an incomprehensible situation. Why would a man who seemingly holds power alone help realise all the aspirations of an establishment that seems to be his biggest enemy? It is difficult to come up with a reasonable answer. But a very similarly unreasonable situation does exist in history. In the 1520s the Spaniard Hernán Cortés and his men set foot in Mexico. He had an army of 40,000 men. He arrived in the Aztec Empire's capital city, which had a population of 200,000. The Aztecs were ruled by the Emperor Montezuma. The Aztecs were of course much greater in number than the Spanish. But Cortés had an unbelievably wicked plan. Accompanied by a group of his men, he went to Montezuma's palace, where they took the emperor captive. But he did not declare that the emperor was now a prisoner in his own palace. The Aztecs would not take orders from Cortés but they would if the orders came from their emperor. So Cortés had everything he wanted done through the emperor, which created an incomprehensible situation. ... A while later the Aztecs rebelled upon discovering that their empire had been conquered by the Spanish. Huge clashes took place. Some claim Montezuma was murdered by Cortés, while others argue that it was the Aztecs who killed him upon finding out about his treachery. The empire fell into turmoil, but the mystery was never solved. Now we too are living with a similar mystery.

How come at a time when Erdoğan seems so powerful, when he has seized all power alone by way of a constitutional violation, all the wishes of the military tutelage are becoming real? It seems as though all these were instructions given by Erdoğan, he is the one who is making the remarks. But when you take a closer look, they are all in fact the desires of the military tutelage. Is it really Erdoğan who is running the country with unlawful methods? Or has another unlawful establishment taken Erdoğan captive? Is Erdoğan, who has declared that he would not abide by the Constitution, in reality ruling his party and the country as the pawn of another force?

> Is this the reason why the nationalists, who are not as secretive as the Spaniards, have lately been bragging that the patriots have taken hold of Erdoğan? What is going on? Who is in control of whom inside the palace? Are we going through a case of the mystery of Montezuma? Does anyone know the answer? Or should I put it this way, is there anybody who wonders what lies behind this mystery?"

B. The attempted coup of 15 July 2016 and the declaration of a state of emergency

12. During the night of 15 to 16 July 2016 a group of members of the Turkish armed forces calling themselves the "Peace at Home Council" attempted to carry out a military coup to seize power in the country and to overthrow the democratically elected government.

13. During the attempted coup, soldiers under the instigators' control bombarded several strategic State buildings, including the parliament building and the presidential compound, attacked the hotel where the President was staying, held the Chief of General Staff hostage, attacked television channels and fired shots at demonstrators. During the night of violence, more than 300 people were killed and more than 2,500 were injured.

14. The day after the attempted military coup, the national authorities blamed Fetullah Gülen, a Turkish citizen living in Pennsylvania (United States of America) who was considered to be the leader of a terrorist organisation described by the Turkish authorities as the "Fetullahist Terrorist Organisation/Parallel State Structure" (*Fetullahçı Terör Örgütü / Paralel Devlet Yapılanması*), hereinafter referred to as "FETÖ/PDY". During and after the attempted coup, in order to dismantle the infiltration within the government and to eliminate the continuous threat to the government, public prosecutors' offices all around Turkey initiated criminal proceedings against those who had been directly involved in the attempted coup, and also against those who had not been directly involved but were suspected of being part of the structural organisation of FETÖ/PDY in various public, health, educational, commercial and media institutions. In the course of these criminal investigations, many people were arrested and subsequently placed in pre-trial detention.

15. On 20 July 2016 the Government declared a state of emergency for a period of three months as from 21 July 2016; the state of emergency was subsequently extended for further periods of three months by the Council of Ministers, chaired by the President.

16. On 21 July 2016 the Turkish authorities gave notice to the Secretary General of the Council of Europe of a derogation from the Convention under Article 15.

17. On 18 July 2018 the state of emergency was lifted.

C. The applicant's arrest and pre-trial detention and the ensuing criminal proceedings

1. The applicant's arrest

18. On an unspecified date, the Istanbul public prosecutor initiated a criminal investigation in respect of suspected members of FETÖ/PDY. In addition, on the basis of Article 3 § 1 (l) of Legislative Decree no. 668, he ordered restrictions on the right of the suspects' lawyers to inspect the contents of the investigation file or to obtain copies of documents in the file. In the course of the criminal investigation, on 9 September 2016 an arrest and search warrant in respect of the applicant was issued by the Istanbul Chief Public Prosecutor, as it was considered that he was part of the structural organisation of the media wing of FETÖ/PDY. In this connection, it was pointed out that in a television broadcast that had aired one day prior to the attempted coup of 15 July 2016, the applicant, along with the two other hosts, had disseminated subliminal messages to the public that were evocative of a coup. The search and arrest warrant stated:

> "The day prior to the attempted coup, which was organised by members of FETÖ/PDY, Ahmet Altan participated in a television talk show called *Free Thought* that was broadcast on the Can Erzincan TV channel via YouTube. In this programme, Ahmet Altan and the other two participants disseminated subliminal messages and threatened the Republic of Turkey and the President, and implied that a coup would take place. It is thus understood that they knew that a coup would take place and raised this topic specifically to influence public opinion in favour of a coup attempt. In no democratic society can supporting a coup attempt or threatening an elected government with a coup be covered by freedom of expression."

The prosecutor further argued that the applicant had committed the alleged offence jointly with the military officers who had participated in the attempted coup.

19. On 10 September 2016 the applicant was arrested at his home and taken into police custody on suspicion of having links to the media wing of the organisation in question. His home was also searched by the police officers. On the same day, the applicant lodged an objection against his arrest. Having examined the objection, on 12 September 2016 the Magistrate's Court rejected it.

20. The applicant remained in police custody for twelve days at the Istanbul police anti-terrorist branch.

21. On 20 September 2016, while at the police station, the applicant stated that he was asserting his right to remain silent.

2. The applicant's questioning by the public prosecutor and the investigating judge, and the decision regarding his pre-trial detention

(a) The applicant's questioning by the public prosecutor

22. On 21 September 2016 the applicant, in the presence of his lawyer, was questioned by the Istanbul public prosecutor on suspicion of attempting to overthrow the government or to prevent it from discharging its duties (Article 312 of the Criminal Code), and of being a member of the FETÖ/PDY terrorist organisation (Article 314 of the Criminal Code).

23. Before the questioning commenced, the offences of which the applicant was accused were explained to him. During the questioning, the public prosecutor asked the applicant: (i) whether he knew any of the military officers who were members of the FETÖ/PDY terrorist organisation and who had taken part in the attempted coup; (ii) about his comments during a television programme aired on Can Erzincan TV on 14 July 2016, when he had alleged that the President of the Turkish Republic, by his unconstitutional actions, had been inciting a coup and that his departure from the government was imminent; (iii) whether he had known about the attempted coup beforehand; (iv) about three articles he had written, namely "Absolute fear", "Montezuma" and "Crushing through"; (v) who had decided which news story would be published in the daily newspaper *Taraf*, of which the applicant had been a founder and the editor-in-chief; (vi) why, in his capacity as the editor-in-chief of *Taraf*, he had attempted to discredit an investigation into an alleged coup (the "Balyoz" case) by publishing news stories in that newspaper, and why *Taraf* had been the first newspaper to report on the purported coup on the basis of fabricated documents; (vii) whether *Taraf* had been acting under the instructions of the FETÖ/PDY terrorist organisation to manipulate public opinion; (viii) about his comments whereby he had sought to create an understanding that M.B., one of the journalists working for *Taraf*, had been convicted on account of his journalistic activities and by disseminating the view that freedom of expression did not exist in Turkey; (ix) who had provided financial support to *Taraf*, noting that the newspaper had been closed down by presidential decree following the attempted coup, as it was considered to be one of the media organisations used by the FETÖ/PDY terrorist organisation; and (x) for clarification of his remarks in two articles, one published on 3 March 2005 in the daily newspaper *Cumhuriyet*, entitled "I am here, talk to me", and another one in *Taraf*, entitled "The Prime Minister of his pasha".

24. In reply, the applicant denied all the accusations against him. He stated that he did not know any of the military officers who had links with the attempted coup. He explained that in the three articles referred to by the public prosecutor, he had merely been criticising the President, who was a politician who had come to power by means of a democratic election and who would leave following a democratic election as well. Those comments

were within his right to freedom of expression. Stating that a person who criticised a politician was attempting a military coup would amount to a total disregard for freedom of thought. The applicant further explained that at the material time when newspaper articles had been published regarding the "Balyoz" case, many politicians had also believed that the allegations made in that context were true and that even members of the Government at the time had made similar statements. He stated that he had sincerely believed that the documents regarding the "Balyoz" affair were genuine. The applicant further stated that he had resigned from *Taraf* in 2012, and that at the time when he had been the editor-in-chief, the newspaper had had no connections with the FETÖ/PDY organisation. The newspaper had been financially supported by B.A. and it was the editors who decided together which news items would be published each day in the newspaper.

(b) The applicant's questioning by the Istanbul 10th Magistrate's Court and the initial decision ordering his release

25. On the same day, following the applicant's questioning, the public prosecutor transferred the applicant to the Istanbul 10th Magistrate's Court in criminal matters, asking the court to place him in pre-trial detention. The prosecutor based his request on the fact that the applicant had attempted to justify the "Balyoz" affair, which had eventually turned out to be a plot against the Government; that he had created the impression amongst the public that there was no freedom of speech in Turkey by stating that the imprisonment of journalists who had in fact leaked government secrets had breached freedom of expression, and by doing so he had created an atmosphere conducive to a military coup; and that in his articles he had referred to the President as a dictator and had stated that his departure was imminent, thus influencing public opinion in favour of a military coup.

26. On 22 September 2016 the applicant appeared before the Istanbul 10th Magistrate's Court and was questioned about his alleged acts and the accusations against him. At the end of the hearing, the court ordered the applicant's release and placed him under judicial supervision. In its decision, the court held that there was already an ongoing investigation into the applicant's offending articles in the *Taraf* newspaper regarding the "Balyoz" case, and that conducting a separate investigation for the same acts would breach procedural provisions. As to the accusation of being a member of a terrorist organisation, and of attempting to overthrow the Government or to prevent it from fulfilling its duties, the court decided that there existed no strong suspicion that the applicant had committed those offences. Accordingly, the applicant was released.

(c) Objection of the public prosecutor to the applicant's release, and decision of the Istanbul 1st Magistrate's Court placing him in pre-trial detention

27. Following the applicant's release, the public prosecutor lodged an objection and requested that the applicant be placed in pre-trial detention.

28. On 23 September 2016 the Istanbul 1st Magistrate's Court re-examined the applicant's case, and at the end of the hearing the magistrate ordered his pre-trial detention. In his decision, the magistrate had regard in particular to the fact that the criminal proceedings that were pending against the applicant before the Istanbul Assize Court concerning the "Balyoz" case did not involve any charge relating to an attempt to overthrow the government or any accusation of being a member of a terrorist organisation, but instead concerned an alleged offence of being in possession of classified documents.

29. In its decision, the Istanbul 1st Magistrate's Court pointed out that the *Taraf* daily newspaper, of which the applicant was one of the founder members, had started its journalistic activities in order to implement the aims of FETÖ/PDY and to manipulate public opinion to that end. The newspaper had been reporting news stories in line with the orders and instructions of the terrorist organisation. News concerning the "Balyoz" coup plan had also been included in the headlines of the newspaper as part of this arrangement. The Magistrate's Court also noted that in the course of its journalistic activities, *Taraf* had reported many news stories on the "Balyoz", "Ergenekon", "Military Espionage", "Poyrazköy", "Assassination of Admirals", "OdaTV", "Headquarters" and other similar cases in order to shape public opinion in line with the organisation's aims. The applicant, as editor-in-chief of the newspaper, had determined its editorial policy and thereby engaged in acts which had caused several members of the army to be discharged following the "Balyoz" case. The falsely initiated investigations and proceedings had paved the way for members of FETÖ/PDY to obtain promotions in the army and to become more influential within the armed forces. By defining the editorial policy of *Taraf* as such, the applicant had participated in the crimes committed by FETÖ/PDY. Noting that although pursuant to Law no. 5187, the applicant's criminal liability for the articles he had written at the time when he was still the editor-in-chief of *Taraf* had expired, the statutory time-limit for his alleged offences of attempting to overthrow the government and being a member of a terrorist organisation had yet to be reached. The court also noted that *Taraf* had eventually been closed down by presidential decree following the attempted coup, as it was considered that the newspaper was one of the media organisations used by the FETÖ/PDY terrorist organisation.

30. The Magistrate's Court further referred to the fact that the judiciary wing of FETÖ/PDY had also attempted to overthrow the government by its actions on 7 February 2012 and from 17 to 25 December 2015, and that

those actions had been supported by certain newspapers, including *Taraf*, with the aim of manipulating public opinion and clearing the accused persons.

31. The Magistrate's Court pointed out that under the instructions of the leaders of FETÖ/PDY, on 14 July 2016 the applicant had participated in a TV programme on Can Erzincan TV to manipulate public opinion against the elected President and the current Government. The Magistrate's Court stated that it was convinced that the applicant had had prior knowledge of the attempted coup that would take place the day after, on 15 July. During the programme, the applicant, together with the other two participants, had appeared to be preparing the ground for an eventual military coup. The court indicated that during the programme, the applicant had threatened the Government and the President, stating that a coup would be staged. The court stated that it was impossible for the applicant not to have had knowledge of the coup attempt, as he had clearly made statements about this matter in such a way as to manipulate public perceptions. He had therefore appeared to have knowingly acted in unity of opinion and action with the terrorist organisation. In this connection, the court stated that the applicant had connections with members of FETÖ/PDY in the armed forces, judiciary and security forces, and that he had acted in cooperation with those persons, by expressing opinions and sharing posts in order to prepare the ground for the military coup attempt in the written and audiovisual media and on social networking sites prior to and in the course of the coup attempt. The court further pointed out that during the same TV programme the applicant had tried to vindicate the "Balyoz" investigation, which had been a fiction staged by members of FETÖ/PDY, and which had aimed to ensure that officers within the Turkish armed forces who were not members of FETÖ/PDY were discharged from the army and replaced by officers who were members of that organisation. It also found it established that during an extensive part of the TV programme, the applicant had accused the President and the members of the Government of paving the way for a military coup by using expressions containing defamation. The court pointed out that supporting a coup attempt or threatening the elected Government with a coup could not be considered to fall within freedom of expression and of the media in any democracy. It further stated that on 12 May 2016 the applicant had written an article entitled "Absolute fear". In the article, the applicant had maintained that President Erdoğan had acted contrary to the Constitution and had breached legislation, that he was a dictator who controlled the legislature, executive and judiciary, and that he had come to the end of his political life. In this connection, the applicant had stated: "I guess we are watching the final act of a badly written stage play. The cost may be too heavy but it is still good to know that it will somehow end." In another article, entitled "Crushing through", the applicant had stated that the President had expressed his wish for civil war. In this article,

the applicant had maintained that when the walls of President Erdoğan's palace came down with artillery fire, when people holding guns killed each other in the corridors, he would understand what a civil war was, but by then, it would already be too late. Furthermore, the court referred to a third article written by the applicant on 10 July 2016, entitled "Montezuma". The court noted that in that article the applicant had drawn a parallel between the President and the Aztec Emperor Montezuma, who had been taken hostage by the Spaniard Hernán Cortés. In the article, the applicant had explained that the President had also been taken hostage by the nationalists demanding military domination. In the light of all the material in its possession, the court held that the applicant had aimed to manipulate public opinion in favour of FETÖ/PDY in the run-up to the attempted coup of 15 July 2016 and had contributed to the coup process, of which he had had prior knowledge.

32. Considering the nature and seriousness of the offences with which the applicant was accused, the severity of the sentence prescribed by law for the alleged offences, the fact that they were among the offences listed in Article 100 § 3 of the Code of Criminal Procedure – the so-called "catalogue offences", for which a suspect's pre-trial detention was deemed justified in the event of strong suspicion – and the risk of the applicant's absconding, alternative measures to detention were not deemed to be sufficient. The Magistrate's Court accordingly decided to place the applicant in pre-trial detention.

(d) Subsequent decisions extending the applicant's pre-trial detention

33. On 28 September 2016 the applicant lodged an objection against his pre-trial detention order. In a decision of 7 October 2016, the Istanbul 2nd Magistrate's Court dismissed the objection, on the basis of the case file, holding that the reasoning and the decision of 23 September 2016 had been in line with domestic law.

34. On 14 October 2016 the applicant lodged a fresh application for his release.

35. In a decision of 26 October 2016, the Istanbul 3rd Magistrate's Court rejected the application. Considering the nature and seriousness of the alleged offences, and referring to the grounds cited in the previous detention orders, the court held that there was concrete evidence in the file that supported the allegation that the applicant had committed the alleged offences. Referring to the state of the evidence in the file, the severity of the sentence prescribed by law for the alleged offences, and the fact that they were among the offences listed in Article 100 § 3 of the Code of Criminal Procedure, it found that judicial supervision would not be sufficient. The Magistrate's Court further held that the applicant's continued detention was proportionate and, noting that there was no new evidence necessitating his release, it found that the grounds for keeping him in detention remained

unchanged. The court thus ruled that the applicant's pre-trial detention should continue.

36. On 3 November 2016 the applicant lodged an objection against the decision dated 26 October 2016.

37. In a decision delivered on 10 November 2016, the Istanbul 4th Magistrate's Court held that the reasoning and the decision of 26 October 2016 had been in line with domestic law. It accordingly dismissed the applicant's objection on the basis of the case file.

38. Following a request by the public prosecutor, on 24 November 2016 the Istanbul 5th Magistrate's Court once again examined the pre-trial detention of the applicant and four other co-accused persons. In its decision, the court noted that the accused were charged with being members of a terrorist organisation and attempting to overthrow the Government. The alleged offences were thus among the so-called "catalogue" offences, listed in Article 100 of the Code of Criminal Procedure. Having regard to the state of the evidence, the statements of the accused, police reports, the nature and seriousness of the alleged offences, and the length of the sentence that would be imposed on the accused if they were convicted as charged, the court decided that the grounds for keeping them in detention remained unchanged. The court further pointed out that the accused were charged with being members of a terrorist organisation, namely FETÖ/PDY. They were suspected of being part of the media wing of the terrorist organisation, and of disseminating propaganda on behalf of that organisation. They were also suspected of having roles as "elder brothers" or "elder sisters" (*abilik/ablalık görevi*) in the organisation and having connections with the leaders. Noting that FETÖ/PDY had been responsible for the attempted coup of 15 July 2016, the court also pointed out that the members of the terrorist organisation had taken over several administrative posts in the government. However, as it had not yet been possible to identify all legal entities infiltrated by the terrorist organisation and to find out the connections of the individuals concerned, the danger to the Turkish Republic and the Government continued. As there was strong suspicion that the accused persons were members of FETÖ/PDY, their detention appeared to be a proportionate measure in order to prevent them tampering with evidence and to elucidate their links to the terrorist organisation.

39. On 5 December 2016 the applicant requested his release.

40. On 8 December 2016 the Istanbul 6th Magistrate's Court dismissed the applicant's request on the basis of the case file, taking into account the length of the sentence prescribed by law for the offences in question, the existence of strong suspicion that he had committed the acts with which he was accused, and the nature and seriousness of the alleged offences. It held that alternative measures to detention appeared insufficient and that the pre-trial detention of the applicant was proportionate. Considering that there

was no new evidence necessitating his release, the court held that the grounds for keeping him in detention remained unchanged.

41. On 22 December 2016 the applicant requested his release.

42. On 29 December 2016 the Istanbul 11th Magistrate's Court decided to extend the applicant's pre-trial decision. In its decision, the court held that there existed strong suspicion that the applicant had committed the offence in question. Relying on the state of the evidence, the nature of the investigation, the severity of the sentence prescribed by law for the offences in question, and the fact that alternatives to detention remained insufficient, the court decided that the applicant should remain in pre-trial detention and that his continued detention was proportionate in the circumstances of the present case.

43. On 6 February 2017 the Istanbul 11th Magistrate's Court re-examined the applicant's pre-trial detention. Having regard in particular to the reasoning of the Istanbul 1st Magistrate's Court's decision of 23 September 2016 indicating the reasons for ordering the applicant's pre-trial detention, and bearing in mind that he was accused of attempting to overthrow the Government, the Magistrate's Court decided to extend his pre-trial detention. In its decision, the court also relied on the severity of the sentence prescribed by law for the offences in question, the state of the evidence, the fact that the alleged offences were among the so-called catalogue offences listed in Article 100 of the Code of Criminal Procedure, the nature and seriousness of the alleged offences. The Magistrate's Court held that the applicant's continued detention was proportionate and that alternative measures to detention would be insufficient. Noting that there was no new evidence necessitating the applicant's release, it held that the grounds for keeping him in detention remained unchanged.

44. In a decision dated 6 March 2017, the Istanbul 1st Magistrate's Court decided that the applicant should remain in pre-trial detention. In delivering that decision, the court had regard to the nature of the alleged offences, the state of the evidence, the fact that not all evidence had yet been collected, and the severity of the sentence provided for by law. It noted that the concrete evidence in the file gave rise to strong suspicion that the offences in question had been committed, and that there was no new evidence which could affect the grounds for keeping the applicant in detention. The court further considered that alternative measures to detention would be insufficient and that pre-trial detention was a proportionate measure in view of the length of the sentence prescribed by law for the offences in question.

3. Indictment and the ensuing criminal proceedings

45. On 14 April 2017 the Istanbul public prosecutor filed a bill of indictment with the Istanbul Assize Court in respect of seventeen accused persons, including the applicant, accusing them, under Articles 309, 311 and 312 in conjunction with Article 220 § 6 of the Criminal Code, of

attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the Government by force and violence, or to prevent them from discharging their duties, and of committing offences on behalf of a terrorist organisation without being members of it.

46. In his indictment, the public prosecutor firstly gave a detailed description of the structure of the FETÖ/PDY terrorist organisation and its illegal activities. Particular reference was made to the terrorist organisation's media structure. The prosecutor alleged that the applicant had repeatedly acted in accordance with the aims of the illegal organisation and actively participated in the failed coup attempt by preparing the ground for the military coup, of which he had had prior knowledge. In his indictment, the public prosecutor referred to the applicant's remarks during the television broadcast that had been aired on Can Erzincan TV one day prior to the attempted coup. The prosecutor noted that during the programme, the applicant had made insulting and threatening comments against the President and the serving Government, maintaining that their actions had been illegal and that they had been committing crimes. The prosecutor referred in particular to the applicant's remarks that "whatever the developments that led to the previous military coups in Turkey, by taking the same decisions President Erdoğan [was] paving the way for yet another coup" and that "he [would] be leaving the government soon, and [would] be prosecuted".

The prosecutor also alleged that the applicant had had prior knowledge that a coup would be taking place and had therefore tried to prepare the ground for the coup in his articles. To that end, he referred to the three articles "Absolute fear", "Montezuma" and "Crushing through", written by the applicant shortly before the attempted coup.

The indictment also referred to the statement of an anonymous witness with the code name "Söğüt", to another statement of a witness, referred to as N.V., as well as to telephone recordings. According to the indictment, telephone records indicated that the applicant had been in contact with senior members of the FETÖ/PDY terrorist organisation. Furthermore, in a statement given on 24 October 2016, N.V. had explained that the applicant had had regular meetings with A.K., who was the most powerful figure within the media structure of the FETÖ/PDY terrorist organisation, and who had served as the link between the applicant and Fetullah Gülen. Likewise, the witness with the code name "Söğüt" had explained that A.K. had had regular meetings with *Taraf*'s owner. This witness had noticed that shortly after the meetings, *Taraf* had been publishing news that targeted the Government. N.V. had also stated that in 2012 A.K. had contacted the applicant to inform him that Fetullah Gülen had been saddened because of an article that he had written and the applicant had been asked to retract his statements. The applicant had then written an article apologising to Fetullah Gülen. Finally, the indictment noted that the applicant's name had been

mentioned in a ByLock[1] conversation dated 18 February 2016 between a high-level FETÖ/PDY leader, E.T.A., and an unidentified user. According to the transcript of this message, the applicant's name was mentioned amongst the high-level people ("*üst kesim*") within FETÖ/PDY and it was stated that these high-level members should be asked to publish a report regarding the human rights violations that FETÖ/PDY members had been encountering. In the light of all the material in his possession, the public prosecutor argued that the applicant had had prior knowledge of the military coup and had persistently acted in accordance with the aims of the FETÖ/PDY organisation. In view of the foregoing, the prosecutor sought the imposition of three aggravated life sentences (under Articles 309, 311 and 312 of the Criminal Code) and a sentence of up to fifteen years' imprisonment (under Article 314 of the Criminal Code) on the applicant.

47. On 3 May 2017 criminal proceedings commenced before the Istanbul 26th Assize Court against the applicant and sixteen other accused persons. Before delivering its judgment on 16 February 2018, the trial court held five hearings. During the criminal proceedings, the applicant denied having committed any criminal offence. At the end of each hearing and in the *ex proprio motu* monthly reviews, the applicant's detention was examined by the court, and his release requests were rejected on the basis of the risk of absconding, the severity of the sentence prescribed by law for the offences in question, the state of the evidence, the fact that the alleged offences were among the so-called catalogue offences listed in Article 100 of the Code of Criminal Procedure, and the nature and seriousness of the alleged offences.

48. In a judgment of 16 February 2018, the Istanbul 26th Assize Court sentenced the applicant to aggravated life imprisonment, in accordance with Article 309 of the Criminal Code, for attempting to overthrow the constitutional order. In its decision, the Assize Court found it established that on account of his continuous actions and activities, the applicant had contributed to the aims of FETÖ/PDY. In this connection, it noted that the applicant had been the founder and editor-in-chief of the *Taraf* daily newspaper until his resignation in 2012. Subsequently, in 2015, the applicant had resumed his journalistic activities on an Internet news website called haberdar.com. According to the judgment, the website was owned by one of the leaders of the FETÖ/PDY organisation and had been disseminating propaganda in favour of that organisation. The Assize Court further took into consideration the fact that *Taraf* had been closed down as it had been considered to pose a threat to national security and to have links with the terrorist organisation. It pointed out that *Taraf* had taken an active role in promoting news about the "Balyoz" case and that this had led to the dismissal of several high-ranking army officers. Following the departure of

1. An encrypted messaging service allegedly used by members of FETÖ/PDY.

these officers, the terrorist organisation had introduced its own members into the army and thus prepared the ground for the attempted coup of 15 July. The Assize Court noted that the applicant had always vehemently supported the "Balyoz" investigation and had published articles asserting that the information published in *Taraf* was genuine. The Assize Court further based its decision on the remarks that the applicant had uttered during the television programme that had aired one day prior to the attempted coup. During the programme, the applicant had stated that whatever the developments that had led to previous military coups, President Erdoğan was taking the same decisions and paving the way for yet another coup. In its decision, the Magistrate's Court had concluded that the TV programme of 14 July 2016 had been broadcast to manipulate public opinion and to prepare the ground for the eventual military coup. The Assize Court also noted that in his statement of 24 October 2016 N.V., who was one of the leaders of FETÖ/PDY, had explained that the most powerful leader of the media structure, A.K., had acted as the contact between the applicant and Fetullah Gülen, and that the applicant had had several meetings with A.K. In another statement given by one of A.K.'s peers, whose codename was "Söğüt", it was maintained that A.K. had been providing financial support to *Taraf* and that he had had regular meetings with the newspaper's owner. This witness had noticed that shortly after the meetings, *Taraf* had been publishing news that targeted the Government. N.V. had also stated that in 2012 A.K. had contacted the applicant to inform him that Fetullah Gülen had been saddened because of an article that he had written and the applicant had been asked to retract his statements. The applicant had then written an article apologising to Fetullah Gülen. In the judgment, the Assize Court further referred to the articles written by the applicant and held that by repeatedly stating that the President was a dictator and that he would be removed from office in a short time, the applicant had been trying to prepare the ground for an attempted coup. Referring in addition to ByLock records, in which the applicant's name was mentioned as being part of the highest levels of the media structure of the illegal organisation, the court found it clearly established that the applicant had been part of the media wing of the FETÖ/PDY organisation.

49. Following an appeal, on 2 October 2018 the Istanbul Regional Court of Appeal upheld the judgment of the Istanbul Assize Court.

50. On 5 July 2019 the Court of Cassation quashed the judgment of the first-instance court. The Court of Cassation held that the impugned acts, which consisted of articles written by the applicant and his statements during a television programme, could be regarded as aiding a terrorist organisation without being part of its hierarchical structure, but overturned the sentence of aggravated life imprisonment imposed pursuant to Article 309 of the Criminal Code.

51. The case was accordingly remitted to the Istanbul 26th Assize Court for re-examination. On 4 November 2019 the Istanbul 26th Assize Court complied with the decision of the Court of Cassation and convicted the applicant of knowingly aiding and abetting a terrorist organisation without being a part of its hierarchical structure and sentenced him to a total of ten years and six months' imprisonment (Article 220 § 7 and Article 314 of the Criminal Code). Having regard to the time the applicant had spent in pre-trial detention, the court decided to release him under judicial supervision.

52. The criminal proceedings are still ongoing in the national courts. According to the latest information in the case file, following an objection by the Istanbul public prosecutor, on 11 November 2019 the Istanbul 27th Assize Court ordered the applicant's detention. In its decision, the Assize Court referred to the Constitutional Court's decision of 3 May 2019 in which it had found it established that the applicant's arrest and pre-trial detention had been lawful and proportionate. The court further took into account the decision of the Court of Cassation dated 5 July 2019 in which it was stated that although he was not a part of the terrorist organisation's hierarchical structure, the applicant had been aiding and abetting the organisation by using the media to create a positive perception of the attempted military coup. Finally, taking into account the fact that the applicant could be sentenced to a heavier punishment at the appeal stage, that there was a risk of his absconding, and that the offences with which he was charged were amongst those listed as "catalogue offences", the court decided that the application of alternative measures would not be sufficient, and ordered that the applicant be placed in detention.

D. Individual application to the Constitutional Court

53. On 8 November 2016 the applicant lodged an individual application with the Constitutional Court. He complained that he had been placed in pre-trial detention on account of his articles and statements, and alleged that this infringed his right to liberty and security, and his right to freedom of expression and of the press. He also submitted that he had been arrested and detained for reasons other than those provided for by the Constitution. In addition, he complained that his detention in police custody had been unlawful and excessively lengthy, that he had had no access to the investigation file in order to challenge his pre-trial detention, that the magistrates ordering his detention had not been independent or impartial, that no hearings had been held following his applications challenging his continued pre-trial detention, and that the conditions of his detention were incompatible with the prohibition of inhuman and degrading treatment.

54. On 3 May 2019 the Constitutional Court gave a judgment (no. 2016/23668) in which it held, by ten votes to five, that there had been no violation of the right to liberty and security or the right to freedom of

expression and of the press. At the outset, the Constitutional Court gave a description of the events surrounding the attempted military coup of 15 July 2016 and referred to the various investigations that had been initiated by the public prosecutors in respect of members of FETÖ/PDY. The court also noted that the Istanbul public prosecutor had initiated an investigation into the media wing of the FETÖ/PDY, concerning seventeen journalists, writers and academics, including the applicant. The Constitutional Court then gave a detailed description of the events surrounding the applicant's detention.

55. The Constitutional Court stated that in the present case, it should first determine whether the applicant's detention had had a legal basis in domestic law. In this connection, it observed that in the course of a criminal investigation into the structural organisation of the media wing of FETÖ/PDY, the applicant had been accused of attempting to overthrow the Government by force, or to prevent it from discharging its duties, and of being a member of a terrorist organisation. He had thus been placed in pre-trial detention pursuant to Article 100 of Law no. 5271. The Constitutional Court therefore concluded that the applicant's detention had had a legal basis. Before examining whether the detention order had pursued a legitimate aim and been proportionate, the Constitutional Court stated that it should be ascertained whether there were facts giving rise to a strong suspicion that the offence had been committed, this being a prerequisite for pre-trial detention.

56. The Constitutional Court first referred to the detention order made by the Istanbul 1st Magistrate's Court on 23 July 2016, in which the persistent remarks by the applicant in media outlets controlled by FETÖ/PDY had been considered to have prepared the ground for the attempted military coup. In this connection, it noted that in the TV programme that had aired on 14 July 2016 on Can Erzincan TV, the applicant had said: "Whatever the developments that led to the previous military coups in Turkey, by taking the same decisions President Erdoğan is paving the way for yet another coup." The Magistrate's Court had therefore concluded that the TV programme of 14 July 2016 had been broadcast to manipulate public opinion and to lay the foundations for a military coup. In the decision of 23 September 2016, it had also maintained that the applicant had had prior knowledge that a coup would be taking place and had therefore tried to prepare the ground for the coup in his articles. To that end, in the article entitled "Absolute fear" that had been published on 12 May 2016 the applicant had said: "I guess we are watching the final act of a badly written stage play. The cost may be too heavy but it is still good to know that it will somehow end." In another article published on 27 June 2016, entitled "Crushing through", he had stated: "When the walls of his palace come down with artillery fire, when people holding guns kill each other in the corridors, he will understand what a civil war is, but by then, it will already be too late." Moreover, the Magistrate's Court had pointed out

that the daily newspaper *Taraf*, of which the applicant had been the editor-in-chief, had started its journalistic activities in order to implement the aims of the FETÖ/PDY terrorist organisation, and to manipulate public opinion in that regard; that it had reported the news in line with the orders and instructions of the terrorist organisation, and that news concerning the "Balyoz" coup plan had been included in the headlines of the newspaper as part of this arrangement. The Magistrate's Court had also noted that in the course of its journalistic activities, *Taraf* had reported news on the "Balyoz", "Ergenekon", "Military Espionage", "Poyrazköy", and "Assassination of Admirals", "OdaTV", "Headquarters" and other similar cases in order to shape public opinion in line with the organisation's aims. The applicant, as editor-in-chief of the newspaper, had determined its editorial policy and had thereby engaged in acts which had caused several members of the army to be discharged. The falsely initiated investigations and proceedings had paved the way for members of FETÖ/PDY to obtain promotions and to become more influential within the armed forces. By defining the editorial policy of *Taraf* as such, the applicant had participated in the crimes committed by the FETÖ/PDY terrorist organisation.

57. Moreover, in the same decision of 23 September 2016 the Magistrate's Court had taken into account the fact that the judiciary wing of FETÖ/PDY had attempted to overthrow the Government through its actions on 7 February 2012 and from 17 to 25 December 2015 and that its actions had been supported by certain newspapers, including *Taraf*, with the aim of manipulating public opinion. Following the events, these newspapers had acted in collaboration to clear the accused persons. During the investigation, the investigating authorities had also taken into consideration the allegation that in the course of the investigation, it had become apparent that *Taraf*, of which the applicant was one of the founders and the editor-in-chief, had connections with the FETÖ/PDY terrorist organisation and that the applicant had decided on the newspaper's editorial policy in his capacity as editor-in-chief, namely to influence public opinion in support of the illegal organisation. In this connection, the investigating authorities had relied on a witness statement to show that the applicant was in contact with the illegal organisation's media-wing leaders. The witness had explained that one of the leaders of the media structure of FETÖ/PDY, namely A.K., had had dealings with the applicant and B.A., who was the owner of the *Taraf* newspaper. According to the recollection of the witness, B.A. had had regular meetings with A.K. and had received instructions as to which news stories would be published. The decision had also stated that in 2012 the applicant had been contacted by A.K. and had been informed that Fetullah Gülen had been saddened as a result of an article written by him, and that the applicant had been asked to rectify his statements. The applicant had then written an article apologising to Fetullah Gülen. The decision had also noted that the applicant had published articles on a website called

haberdar.com, which was a media outlet owned by FETÖ/PDY, and that in certain ByLock messages the applicant's name had been mentioned in a conversation between high-ranking leaders of FETÖ/PDY.

58. Taking into account all the above factors as cited in the decision of 23 September 2016 – namely the applicant's remarks during the TV programme that had aired one day prior to the attempted coup, the standpoint of the *Taraf* daily newspaper, the three articles written by the applicant and the witness statements that described his connections with the FETÖ/PDY terrorist organisation – the Constitutional Court concluded that the detention order had been based on facts that demonstrated a strong suspicion of guilt, and could not be regarded as arbitrary or biased.

59. After establishing that in the circumstances of the present case, there had existed strong suspicion, which was a prerequisite for a detention order, the Constitutional Court went on to examine whether the detention order had had a legitimate aim. In this connection, it noted that in ordering the applicant's pre-trial detention, the domestic courts had taken into account the severity of the sentence prescribed by law for the alleged offences, and the fact that the alleged offences were amongst those listed as catalogue offences, that there was a risk of his absconding and that other alternative preventive measures would be insufficient. The Constitutional Court stated that the offence with which the applicant had been charged, namely attempting to overthrow the Government, was punishable by aggravated life imprisonment, which was the heaviest penalty under Turkish law. The severity of the sentence thus entailed a risk of absconding. Furthermore, in order to ensure that all evidence could be collected and that an effective investigation could be conducted in the utmost confidentiality, other alternative preventive measures remained insufficient. In view of the very specific circumstances following the attempted coup, the risk of absconding or tampering with evidence could be higher than in normal circumstances. Consequently, having regard to the conditions at the material time, the Constitutional Court decided that the detention order issued by the Istanbul Magistrate's Court could not be considered unsubstantiated or arbitrary.

60. Accordingly, it held that in the particular circumstances of the present case, the applicant's pre-trial detention had been proportionate to the strict exigencies of the situation at a time that was immediately after the attempted coup and that his right to liberty and security, as safeguarded by Article 19 § 3 of the Constitution, had not been breached.

61. With regard to the complaint concerning freedom of expression and of the press, the Constitutional Court observed that the applicant's pre-trial detention had been found to be proportionate to the strict exigencies of the situation due to the attempted coup and that his right to liberty and security had not been breached. Therefore, it could not be maintained that the criminal proceedings that had been initiated against the applicant had been solely based on his articles and statements. The Constitutional Court

therefore held, by a majority, that there had been no violation of the applicant's right to freedom of expression.

62. With regard to the complaints concerning the lawfulness and duration of the applicant's detention in police custody, the Constitutional Court held that he should have brought an action under Article 141 § 1 (a) of the Criminal Code of Procedure but had refrained from doing so. Furthermore, it noted that there was no information in the application or the appended material as to whether the applicant had lodged an objection under Article 91 § 5 of the Criminal Code of Procedure against his detention in police custody. Accordingly, it declared these complaints inadmissible for failure to exhaust the appropriate remedies.

63. As to the complaint of a lack of independence and impartiality on the part of the magistrates who had ordered the applicant's pre-trial detention, the Constitutional Court dismissed it as being manifestly ill-founded, on the grounds that the magistrates were appointed by the High Council of Judges and Prosecutors and were entitled to the same constitutional safeguards as other judges.

64. Concerning the applicant's complaint that he had had no access to the investigation file, the Constitutional Court held that he had had sufficient means available to prepare his defence to the charges against him and challenge his pre-trial detention, in view of the contents of the detailed questions put to him during questioning by the public prosecutor and the magistrate, and the overall duration of the restriction on access to the case file. Accordingly, it declared this complaint inadmissible as being manifestly ill-founded.

65. With regard to the complaint that no hearing had been held during the examination of the applicant's applications challenging his pre-trial detention, the Constitutional Court found that there was no obligation to hold a hearing on each and every objection to pre-trial detention orders and their extension, and that where a person had been able to appear before the first-instance court considering the issue of detention, the fact that there was no hearing on a subsequent appeal did not in itself contravene the Constitution since it did not breach the principle of equality of arms. The Constitutional Court noted that the applicant and his lawyer had been present at the hearing on 23 September 2016, following which the applicant had been placed in pre-trial detention. It observed that he had lodged an objection against his detention on 28 September 2016, that the objection had been dismissed on 7 October 2016 and that fifteen days had thus elapsed between his previous appearance in court and the dismissal of his objection. Taking this period into account, the Constitutional Court considered that there had been no obligation to hold a hearing during the examination of his objection, and accordingly declared this complaint likewise inadmissible as being manifestly ill-founded.

66. Lastly, with regard to the applicant's complaint that the conditions of his detention were incompatible with the prohibition of inhuman and degrading treatment, the Constitutional Court observed that he had not raised this issue with the enforcement judge. Accordingly, it declared the complaint inadmissible for failure to exhaust the appropriate remedies.

67. The five judges who did not agree with the majority stated in their dissenting opinions that the Constitutional Court's decision in the applicant's case was in contradiction with the decision that it had delivered in the case of *Mehmet Hasan Altan* (see paragraphs 90-91 below). They stated that it was important to note that the applicant was a journalist and that all the allegations against him had been based on his writings and statements. They underlined the fact that the views expressed by journalists and writers cannot form the basis for detention unless they glorify violence, terrorism, or a terrorist organisation, or contain hate speech. It was noted that in a democratic society it was unacceptable to resort to the measure of pre-trial detention based solely on opinions and thoughts, no matter how harsh or contradictory the statements may be. Otherwise, the protection of freedom of expression and of the press, which is a must for the existence of a pluralistic democracy, would become impossible. It was for this reason that the Constitutional Court often emphasised in its judgments reviewing the lawfulness of detention, that the judicial authorities that decide on detention must act more carefully when determining the presence of a strong suspicion of crime in cases where there are serious claims or where it could be understood from the facts of the case that acts imputed to the suspect or defendant fall within the scope of basic rights and freedoms that are indispensable for the democratic order of society, such as freedom of expression and the media. Referring to the applicant's speech in the TV programme, the dissenting judges noted that the speech should be considered in its entirety and should not be taken out of context. In their view, it was not possible to describe the applicant's words against the Government, which he accused of "working hand in hand with military tutelage", as "paving the way for a coup" and consider them as a strong indication of a crime having been committed, when they were taken as a whole and in their context. It was also noted that the applicant had uttered the remarks in a live broadcast. Referring to the Court's case-law, the judges stated that in a live broadcast it was not possible to reformulate, change or withdraw the words uttered before announcing them to the public. Moreover, with regard to the three articles that had been used as the basis for the decisions on the applicant's detention, the judges maintained that the tone of the articles had been severely critical of the Government; however, from the writer's point of view this could be taken as a warning to the authorities. In their opinion, when the investigation authorities argued that the applicant had been aware of the coup attempt on the basis of a few sentences from the articles, they had failed to demonstrate a factual basis for

such an assertion. As to the applicant's involvement in *Taraf* newspaper, the dissenting judges noted that the investigating authorities had also failed to demonstrate factual grounds that news reports and articles that had led to the applicant's detention had been written in accordance with objectives of the terrorist organisation and as a result of its instructions. As to the witness statements and the ByLock conversation, it was considered that the statements did not constitute a strong indication of crime. The dissenting judges considered that there had been no reasonable suspicion capable of justifying the applicant's detention and therefore his detention could not be regarded as lawful. They further concluded that the detention had had a chilling effect on the applicant's right to freedom of expression.

II. RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Relevant provisions of the Constitution

68. Article 15 of the Constitution reads as follows:

> "In the event of war, general mobilisation, a state of siege or a state of emergency, the exercise of fundamental rights and freedoms may be partially or fully suspended, or measures derogating from the guarantees enshrined in the Constitution may be taken to the extent required by the situation, provided that obligations under international law are not violated.
>
> Even in the circumstances listed in the first paragraph, there shall be no violation of: the individual's right to life, except where death occurs as a result of acts compatible with the law of war; the right to physical and spiritual integrity; freedom of religion, conscience and thought or the rule that no one may be compelled to reveal his or her beliefs or blamed or accused on account of them; the prohibition of retrospective punishment; or the presumption of the accused's innocence until a final conviction."

69. The relevant parts of Article 19 of the Constitution read as follows:

> "Everyone has the right to personal liberty and security.
>
> ...
>
> Individuals against whom there are strong presumptions of guilt may be detained only by order of a judge and for the purposes of preventing their absconding or the destruction or alteration of evidence, or in any other circumstances provided for by law that also necessitate their detention. No one shall be arrested without an order by a judge except when caught *in flagrante delicto* or where a delay would have a harmful effect; the conditions for such action shall be determined by law.
>
> ...
>
> A person who has been arrested or detained shall be brought before a judge within forty-eight hours at the latest or, in the case of offences committed jointly with others, within four days, not including the time required to convey the person to the nearest court to the place of detention. No one shall be deprived of his or her liberty after the expiry of the aforementioned periods except by order of a judge. These periods may be extended during a state of emergency or a state of siege or in time of war.
>
> ...

Anyone who has been detained shall be entitled to request a trial within a reasonable time and to apply for release during the course of the investigation or criminal proceedings. Release may be conditioned by a guarantee to ensure the person's appearance throughout the trial, or the execution of the court sentence.

Everyone who is deprived of his or her liberty for any reason whatsoever shall be entitled to apply to a competent judicial authority for a speedy decision on his or her case and for his or her immediate release if the detention is not lawful.

Compensation shall be paid by the State for damage sustained by anyone who has been the victim of actions contravening the above rules, in accordance with the general principles of compensation law."

70. The first two paragraphs of Article 26 of the Constitution provide:

"Everyone has the right to express, individually or collectively, his or her thoughts and opinions and to disseminate them orally, in writing, through image or by any other means. This right also includes the freedom to receive or impart ideas or information without interference by the official authorities. This paragraph shall not preclude the imposition of rules concerning the licensing of radio, television, cinema or other similar enterprises.

The exercise of these freedoms may be restricted to preserve national security, public order, public safety, the fundamental characteristics of the Republic and the indivisible integrity of the State in terms of its territory and nation, to prevent crime, to punish offenders, to prevent the disclosure of information covered by State secrecy, to protect the honour, rights and private and family life of others, as well as professional secrecy as provided for by law, and to ensure the fulfilment of the judicial function in accordance with its purpose."

71. The relevant parts of Article 28 of the Constitution read as follows:

"The press is free and shall not be censored. ...

The State shall take the necessary measures to ensure freedom of the press and of information. The provisions of Articles 26 and 27 of the Constitution shall apply with regard to the restriction of freedom of the press.

..."

72. Article 90 § 5 of the Constitution provides:

"International treaties that are duly in force are legally binding. Their constitutionality cannot be challenged in the Constitutional Court. In the event of conflict between duly applicable international treaties on fundamental rights and freedoms and domestic statutes, the relevant provisions of the international treaties shall prevail."

B. Relevant provisions of the Criminal Code

73. Article 309 § 1 of the Criminal Code is worded as follows:

"Anyone who attempts to overthrow by force or violence the constitutional order provided for by the Constitution of the Republic of Turkey or to establish a different order in its place, or *de facto* to prevent its implementation, whether fully or in part, shall be sentenced to aggravated life imprisonment."

74. Article 311 § 1 of the Criminal Code reads as follows:

> "Anyone who attempts to overthrow the Turkish Grand National Assembly by force or violence or to prevent it, whether fully or in part, from discharging its duties shall be sentenced to aggravated life imprisonment."

75. Article 312 § 1 of the Criminal Code provides:

> "Anyone who attempts to overthrow the Government of the Republic of Turkey by force or violence or to prevent it, whether fully or in part, from discharging its duties shall be sentenced to aggravated life imprisonment."

76. In addition, Article 220 §§ 6 and 7 the Criminal Code, on punishment of offences committed on behalf of an illegal organisation, read as follows:

> "(6) Anyone who commits an offence on behalf of an [illegal] organisation shall also be sentenced for belonging to that organisation, even if he or she is not a member of it. The sentence to be imposed for membership may be reduced by up to half. This paragraph shall apply only to armed organisations.
>
> (7) Anyone who assists an [illegal] organisation knowingly and intentionally (*bilerek ve isteyerek*), even if he or she does not belong to the hierarchical structure of the organisation, shall be sentenced for membership of that organisation. The sentence to be imposed for membership may be reduced by up to two-thirds, depending on the nature of the assistance."

77. Article 314 §§ 1 and 2 of the Criminal Code, which provides for the offence of belonging to an illegal organisation, reads as follows:

> "1. Anyone who forms or leads an organisation with the purpose of committing the offences listed in the fourth and fifth parts of this chapter shall be sentenced to ten to fifteen years' imprisonment.
>
> 2. Any member of an organisation referred to in the first paragraph above shall be sentenced to five to ten years' imprisonment."

C. Relevant provisions of the Code of Criminal Procedure

78. Article 91 § 1 of the Code of Criminal Procedure provides that a person may not be held in police custody for more than twenty-four hours from the time of the arrest, not including the time needed to convey the person to a judge or court, which may not exceed twelve hours. The third paragraph of the same Article provides that in the case of an offence committed jointly with others, where there are difficulties in gathering evidence or there is a large number of suspects, the public prosecutor may order, in writing, the extension of the custody period up to a maximum of four days. Under paragraph 5 of the same Article, the arrested person or his or her representative, partner or relatives may lodge an objection against the arrest, the custody order or the extension of the custody period with a view to securing the person's release. The objection must be examined within twenty-four hours at the latest.

79. Pre-trial detention is governed by Articles 100 et seq. of the Code of Criminal Procedure. The relevant parts of Article 100 §§ 1 and 2 provide:

> "1. If there are facts giving rise to a strong suspicion that the [alleged] offence has been committed and to a ground for pre-trial detention, a detention order may be made in respect of a suspect or an accused. Pre-trial detention may only be ordered in proportion to the sentence or preventive measure that could potentially be imposed, bearing in mind the significance of the case.
>
> 2. In the cases listed below, a ground for detention shall be presumed to exist:
>
> (a) if there are specific facts grounding a suspicion of a flight risk ...;
>
> (b) if the conduct of the suspect or accused gives rise to a suspicion
>
> i. of a risk that evidence might be destroyed, concealed or tampered with,
>
> ii. of an attempt to put pressure on witnesses or other individuals ..."

For certain offences listed in Article 100 § 3 of the Code of Criminal Procedure (the so-called "catalogue offences"), there is a statutory presumption of the existence of grounds for detention. The relevant passages of Article 100 § 3 read:

> "3. If there are facts giving rise to a strong suspicion that the offences listed below have been committed, it can be presumed that there are grounds for detention:
>
> (a) for the following crimes provided for in the Criminal Code (no. 5237 of 26 September 2004):
>
> ... .
>
> 11. crimes against the constitutional order and against the functioning of the constitutional system (Articles 309, 310, 311, 313, 314 and 315);
>
> ..."

80. Article 101 of the Code of Criminal Procedure provides that pre-trial detention is ordered at the investigation stage by a magistrate at the request of the public prosecutor and at the trial stage by the competent court, whether of its own motion or at the prosecutor's request. An objection may be lodged with another magistrate or another court against decisions ordering or extending pre-trial detention. Such decisions must include legal and factual reasons.

81. Pursuant to Article 108 of the Code of Criminal Procedure, during the investigation stage, a magistrate must review a suspect's pre-trial detention at regular intervals not exceeding thirty days. Within the same period, the detainee may also lodge an application for release. During the trial stage, the question of the accused's detention is reviewed by the competent court at the end of each hearing, and in any event at intervals of no more than thirty days.

82. Article 141 § 1 (a) and (d) of the Code of Criminal Procedure provides:

> "Compensation for damage ... may be claimed from the State by anyone ...:

(a) who has been arrested or taken into or kept in detention under conditions or in circumstances not complying with the law;

...

(d) who, even if he or she was detained lawfully during the investigation or trial, has not been brought before a judicial authority within a reasonable time and has not obtained a judgment on the merits within a reasonable time;

..."

83. Article 142 § 1 of the Code of Criminal Procedure reads as follows:

"The claim for compensation may be lodged within three months after the person concerned has been informed that the decision or judgment has become final, and in any event within one year after the decision or judgment has become final."

84. According to the case-law of the Court of Cassation, it is not necessary to wait for a final decision on the merits of the case before ruling on a compensation claim lodged under Article 141 of the Code of Criminal Procedure on account of the excessive length of pre-trial detention (decisions of 16 June 2015, E. 2014/21585 – K. 2015/10868 and E. 2014/6167 – K. 2015/10867).

D. Provisions of the emergency legislative decrees

85. Article 6 § 1 (a) of Emergency Legislative Decree no. 667, which was in force when the applicant was in police custody, provided that the custody period could not exceed thirty days from the time of the arrest, not including the time needed to convey the person to a judge or court.

86. Under Article 3 § 1 (l) of Emergency Legislative Decree no. 668, if the right of counsel for the defence to inspect the contents of the case file or obtain copies of documents risked endangering the purpose of the investigation, the public prosecutor could decide to restrict that right.

87. In accordance with Articles 10 and 11 of Emergency Legislative Decree no. 684, which came into force on 23 January 2017, a person cannot be held in police custody for more than seven days from the time of the arrest, not including the time needed to convey the person to a judge or a court. Where there are difficulties in gathering evidence or there is a large number of suspects, the public prosecutor may order, in writing, the extension of the custody period for a further seven days.

E. Case-law of the Constitutional Court

88. In its decision of 20 June 2017 (*Aydın Yavuz and Others*, no. 2016/22169), the Constitutional Court provided information and assessments on matters including the attempted military coup and its consequences. The relevant parts of the decision read as follows:

"12. Turkey was faced with an armed coup attempt during the night of 15 July 2016.

13. It has been revealed that by the 'martial law directive' prepared by those attempting to stage the coup, the Turkish armed forces formed a 'Peace at Home Council' ('*Yurtta Sulh Konseyi*') to take over the administration of the State, in accordance with the chain of command, and that martial law and a curfew were to be declared all across the country. All appointments and assignments by virtue of public authority would be performed by the 'Peace at Home Council' or under the powers delegated by it, and actions performed by any other means would be deemed null and void. The current executive body would be removed from power. The Grand National Assembly of Turkey would be dissolved. All governors would be relieved of their duties, and all governors, district governors and mayors would be appointed by the 'Peace at Home Council'. All activities of political parties would be terminated. The police would be brought under the command of the martial law commanders. This directive and the enclosed appointment list of the martial law commanders were circulated to the relevant military units and the ministries by the coup plotters.

14. The coup plotters issued a declaration on behalf of the 'Peace at Home Council' via the Turkish Radio and Television Association (TRT) headquarters, which the coup plotters had occupied. The issues included in the 'martial law directive' were generally mentioned in this declaration.

15. In the course of the coup attempt, bombings and armed attacks were carried out by aeroplanes and helicopters at many sites including the Grand National Assembly, the presidential complex, the Ankara Security Directorate, the Special Operations Department of the Security General Directorate and the National Intelligence Organisation ('the MİT'). In addition, soldiers from among the coup plotters raided the hotel where the President was staying. However, as the President had left the hotel just before the armed raid, the coup plotters could not attain the aim pursued. Moreover, fire was opened on the convoy of the Prime Minister. Many high-level military officers including the Chief of the General Staff and commanders of the armed forces were taken hostage. The Bosphorus bridges connecting Europe and Asia and the airports in Istanbul were blocked and closed to traffic by tanks and armoured vehicles. A great number of public institutions located in various places across the country were forcibly occupied, or attempts were made to occupy them.

16. During the attempt, attacks were carried out on relevant institutions and organisations including the TURKSAT Satellite Communication Cable TV and Management Public Company ('TURKSAT') in order to stop television broadcasts and Internet access throughout the country. To that end, the headquarters of certain television channels were also occupied, and broadcast streams were interrupted.

17. According to the initial findings reported in the statement by the Turkish General Staff, 8,000 military personnel were involved in the coup attempt, and thirty-five aircraft including fighter aircraft, three ships, thirty-seven helicopters, 246 armoured vehicles including seventy-four tanks, and about 4,000 light weapons were used during the attempt.

18. The coup attempt was thwarted by all constitutional organs. At the President's call, the people took to the streets and reacted to the coup attempt. The security forces, acting in line with the orders and instructions of the legitimate State authorities, resisted the coup attempt. All political parties represented in the Grand National Assembly and non-governmental organisations denounced the coup attempt. Almost all media and press outlets delivered broadcasts against the coup attempt. The public prosecutors initiated investigations against those attempting to stage the coup and

ordered the security forces to arrest the coup plotters throughout the country. Ultimately, the coup was prevented through pervasive and strong resistance.

19. The security forces fighting against the coup attempt and the civilians taking to the streets in response to the coup attempt were attacked by aeroplanes, helicopters, tanks, other armoured vehicles and weapons. As a result of these attacks, a total of 250 persons, of whom four were military officers, sixty-three were police officers and 183 were civilians, lost their lives, and a total of 2,735 persons of whom twenty-three were military officers, 154 were police officers and 2,558 were civilians, were injured. The Prime Minister announced that thirty-six of the coup plotters had been killed, while forty-nine of them had been injured.

20. Following the prevention of the coup attempt, millions of people continued to keep watch throughout the night, for about one month, at almost every city square within the country.

21. The applicants have been accused of being members of an armed terrorist organisation and of attempting to overthrow the constitutional order by the use of force and violence, on the basis of the factual allegation that they were involved in the coup attempt of 15 July, and they have been detained on remand accordingly. Therefore, certain factual details regarding the structure behind the coup attempt should be provided.

22. In Turkey, there is a structure established by Fetullah Gülen, operating since the 1960s. It was defined as a religious group until recent years and referred to as ‘the Community’, ‘the Gülen Community’, ‘Fetullah Gülen’s Community’, ‘the Hizmet Movement’, ‘the Volunteers’ Movement’ and ‘the Fellowship’. Many investigations and prosecutions have been conducted in relation to the organisation and activities of this structure. In documents from the recent investigations and prosecutions, this structure has been called ‘the Fetullahist Terrorist Organisation (FETÖ)’ and/or ‘the Parallel State Structure’ (PDY).

23. At its meeting of 20 July 2016, the National Security Council deliberated over the coup attempt of 15 July. At the meeting it was stated that the coup attempt had been initiated by FETÖ members serving within the Turkish armed forces; this organisation ultimately aimed to take control of the nation and the State by dominating, influencing and infiltrating educational institutions, non-governmental organisations, media outlets, commercial institutions and public offices.

24. The various oral and written statements by the competent authorities generally indicate that the coup attempt was initiated upon the instructions of Fetullah Gülen, and that it was implemented, in line with the plan approved by Fetullah Gülen, by members or heads of FETÖ/PDY who had infiltrated the Turkish armed forces, the police and gendarmerie, and other key State institutions.

...

26. The competent authorities and the investigation bodies have reached many findings and assessments in the course of the investigations and prosecutions in respect of FETÖ/PDY to the effect that this organisation was the perpetrator of the coup attempt of 15 July. These findings and assessments may be summarised as follows.

(i) FETÖ/PDY initially performed activities in the fields of religion and education especially, with a view to gaining legitimacy in society.

(ii) FETÖ/PDY has brought young people under its influence in line with its targets through the ‘houses of light’ (for students), schools, dormitories and private teaching

institutions operating on behalf of the structure, and these persons have constituted the structure's human resources. A certain portion of the income earned by the members of the structure has been collected as 'benevolence', and those who want to leave the structure have been exposed to pressure and certain sanctions.

(iii) FETÖ/PDY has expanded the field of its activities as time has progressed and has extended its activities to over 150 countries, as well as Turkey. As a matter of fact, the structure has many institutions operating at home and abroad in various sectors such as education, health, media, finance, commerce and civil society.

(iv) FETÖ/PDY's legitimate activities in the social, cultural and economic fields relate to the civilian and private spheres, such as operating private teaching institutions, schools, universities, associations, foundations, trade unions, professional chambers, economic foundations, financial institutions, newspapers, journals, TV channels, radio channels, websites and hospitals. In addition, there is an illicit structure either hidden behind these legal institutions or organised and operated separately and independently from the legal structure, especially for carrying out activities in the public sphere.

(v) The organisation lays claim to holiness. As a result, it has an understanding that everything, including even the motherland, the State, the nation, ethics, the law and fundamental rights and freedoms is subordinate to it in value.

(vi) FETÖ/PDY has a vertical hierarchy based on obedience and submission in which Fetullah Gülen is at the top as 'the universe imam' and which consists of continental, country, State, provincial, district, neighbourhood, settlement and house imams, and a cell-type structure with cells that are affiliated to imams but independent from one another. There is also a separate structure which monitors the internal functioning of the organisation and reports the process to the leader through persons who are appointed by and known only to Fetullah Gülen. On the other hand, there is a responsible person who is appointed by the structure to each institution and organisation the structure has infiltrated. Such persons are referred to as '*abi*' or 'imam' and are appointed to institutions deemed important for the State administration, from among outsiders to those institutions.

(vii) The heads and members of FETÖ/PDY conduct their activities on the basis of confidentiality and using covert communication methods. A great number of the members have 'code names'. In this connection, it may be mentioned that the most important characteristic of the structure is confidentiality. A very high degree of significance is attached to the sense of confidentiality among the FETÖ/PDY members who have infiltrated the armed forces, the judiciary, the security directorate and civil authorities that are deemed important for the State administration. To that end, members of the structure have even occasionally endeavoured to show themselves as 'opponents' to Fetullah Gülen and the community. As a matter of fact, certain messages were found on the mobile phone of E.G., a deputy inspector who is among the suspects in respect of whom an investigation has been carried out following the coup attempt of 15 July. These messages, addressed to regional imams and sent on 16 July 2016 between 5.20 and 5.29 a.m., read as follows: 'Important and bad situation. This is an urgent notification. Convey this message to all provincial and district imams, *abi*, *abla* ("sisters") and imams of the institutions. Tell all members of the community to share posts strongly condemning the coup, to pour into the streets and camouflage themselves, to take photos and post them via social media and to say "democracy, will of the electorate". However, warn them not to mention the *Hocaefendi* ["respected teacher", a name given to Fetullah Gülen by his supporters]. We may be arrested and all together taken into custody. Everyone must say that they

were not aware of the coup and that they heard of it through TV. Never share a post that is unfavourable to the government and Tayyip. I am deleting this group right away' (indictment of the Istanbul Chief Public Prosecutor's Office dated 10 October 2016, no. E. 2016/3799).

(viii) The real aim of FETÖ/PDY is to take over the State. To that end, the organisation has placed its members in all public institutions and organisations, notably the armed forces, the security organisation, the MİT, the judicial bodies, the civil administration units and educational institutions. In this regard, Fetullah Gülen, the founder and leader of the structure, has issued instructions in his speeches and statements on various dates: 'Be everywhere. If you are not everywhere, you are nowhere'; 'Be flexible. Move through their vital points without coming into prominence!'; 'Progress towards the vital points of the system until you reach all the power centres, without letting anyone notice you!'; 'Each step until you take over power and strength in all constitutional institutions is deemed an early one, according to the State structure in Turkey'; 'The presence of our fellows in courthouses, the civil service or other critical institutions and organisations must not be considered and assessed as an individual existence. In other words, they are our guarantees in these units for the future. To some extent, they are the assurance of our existence.' FETÖ/PDY has organised itself within political parties, trade unions, foundations and associations and non-governmental organisations such as commercial companies and has attained significant power in these fields.

(ix) The loyalty of the public officers who are members of this structure is directed towards the structure rather than the State. Therefore, these persons prioritise the interests of the structure over the interests of the State and act in line with the aims of the structure. The structure has encouraged its members to work in the public institutions and organisations and especially to take office in strategic units (personnel, intelligence, private secretariat, information technology, accounting departments and so on). FETÖ/PDY's members holding office in public institutions have saved information about persons not taking part in the structure and have obtained and archived confidential information and documents belonging to the State.

(x) A basic characteristic of FETÖ/PDY's activities in the public institutions and organisations is that a public activity appears to be performed by a public officer competent to carry out the relevant duty; however, in practice the activity is performed not by the public officer's own will but according to the will of his hierarchical superior ('*abi*'), to whom he is affiliated in addition to the official hierarchy within the public institution.

(xi) This structure has a limited number of members in society. However, the ratio of its members within the public institutions and organisations is considerably high in comparison to the number of its members within society.

(xii) FETÖ/PDY has been organised in parallel to the current administrative system with a view to taking over the constitutional institutions of the State in order to reshape the State, society and citizens in accordance with its ideology and to manage the economy and social and political life through an oligarchic group. To this end, the structure has engaged in political and economic alliances at international level, and it has become an 'organisation of tutelage' *vis-à-vis* the State and the nation."

89. Following an evaluation of the above-mentioned facts, the Constitutional Court held that it was clear that the general conditions following the coup attempt did not require automatic detention of all the suspects investigated with respect to the events in question. It also noted

that the investigating authorities had not resorted to the measure of detention for all suspects in respect of whom they had conducted investigations in relation to FETÖ/PDY regardless of their involvement in the coup attempt. In this connection, a significant proportion of the suspects (about two-thirds) had been released on bail or without any preventive measures or had not been subjected to any procedure restricting their liberty. Similarly, thousands of suspects had been released after their detention. Considering both the general circumstances in which the applicants had been detained and the particular circumstances of the case before it, the Constitutional Court held that the legal grounds for the applicants' detention, the risk of their tampering with evidence and the suspicion that they might flee had a sufficient factual basis and that there was no reason to conclude that their detention during the investigation process had not been "necessary" as an element of the principle of proportionality. It therefore decided that there had been no violation as regards the alleged unlawfulness of the applicants' detention, and that the interference with the applicants' right to personal liberty and security as a result of their detention had not constituted a violation of the guarantees set forth in the Constitution (Articles 13 and 19).

90. In the case of *Mehmet Hasan Altan*, on 11 January 2018 the Constitutional Court delivered its decision (no. 2016/23672) and held that there had been a violation of the right to liberty and security and the right to freedom of expression and of the press. With regard to the applicant's complaint that his pre-trial detention had been unlawful, the Constitutional Court noted firstly that the evidence forming the basis for his detention had included: (i) an article entitled "The meaning of Sledgehammer" ("*Balyoz'un Anlamı*"), published in the *Star* newspaper in 2010; (ii) his statements during a television programme broadcast on Can Erzincan TV on 14 July 2016; and (iii) an article entitled "Turbulence" ("*Türbülans*"), published on his own website on 20 July 2016. After examining the substance of these items of evidence, the Constitutional Court held that the investigating authorities had been unable to demonstrate any factual basis that might indicate that the applicant had been acting in accordance with the aims of FETÖ/PDY or with the purpose of preparing the ground for a possible military coup. The Constitutional Court observed that, as well as having published the above-mentioned articles and made the statements in question, the applicant was accused of holding an account with Bank Asya, having avoided a criminal investigation through the connivance of members of the national police suspected of belonging to FETÖ/PDY, and having in his possession a United States one-dollar bill with an "F" serial number. Addressing those allegations, the Constitutional Court held, having regard to the applicant's testimony and line of defence, that no specific facts had been established that could refute his explanations, which were "consistent with the normal course of life". Similarly, regarding the contents of the

messages exchanged by other individuals via ByLock, the Constitutional Court held that the messages could not in themselves be regarded as significant indications that the applicant had committed an offence. Accordingly, it concluded that "strong evidence that an offence had been committed" had not been sufficiently established in the applicant's case. Next, the Constitutional Court examined whether there had been a violation of the right to liberty and security in the light of Article 15 of the Constitution (providing for the suspension of the exercise of fundamental rights and freedoms in the event of war, general mobilisation, a state of siege or a state of emergency). On this point, it noted firstly that in a state of emergency, the Constitution provided for the possibility of taking measures derogating from the guarantees set forth in Article 19, to the extent required by the situation. It observed, however, that if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence, the guarantees of the right to liberty and security would be meaningless. Accordingly, it held that the applicant's pre-trial detention was disproportionate to the strict exigencies of the situation and that his right to liberty and security, as safeguarded by Article 19 § 3 of the Constitution, had been breached.

91. With regard to the complaint concerning freedom of expression and of the press, the Constitutional Court observed that the applicant's initial and continued pre-trial detention on account of his articles and statements amounted to interference with the exercise of that right. Taking into account his arguments regarding the lawfulness of his pre-trial detention, the Constitutional Court held that such a measure, which had serious consequences since it resulted in deprivation of liberty, could not be regarded as a necessary and proportionate interference in a democratic society. It further noted that it could not be clearly established from the reasons given for ordering and extending the applicant's pre-trial detention whether the measure met a pressing social need or why it was necessary. Lastly, it found that it was clear that the pre-trial detention could have a chilling effect on freedom of expression and of the press, in so far as it had not been based on any concrete evidence other than his articles and statements. Referring to its findings concerning the lawfulness of the applicant's pre-trial detention, the court held that there had also been a violation of freedom of expression and freedom of the press as enshrined in Articles 26 and 28 of the Constitution.

III. NOTICE OF DEROGATION BY TURKEY

92. On 21 July 2016 the Permanent Representative of Turkey to the Council of Europe sent the Secretary General of the Council of Europe the following notice of derogation:

> "I communicate the following notice of the Government of the Republic of Turkey.

On 15 July 2016, a large-scale coup attempt was staged in the Republic of Turkey to overthrow the democratically-elected government and the constitutional order. This despicable attempt was foiled by the Turkish state and people acting in unity and solidarity. The coup attempt and its aftermath together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Republic of Turkey is taking the required measures as prescribed by law, in line with the national legislation and its international obligations. In this context, on 20 July 2016, the Government of the Republic of Turkey declared a State of Emergency for a duration of three months, in accordance with the Constitution (Article 120) and the Law No. 2935 on State of Emergency (Article 3/1b). ... The decision was published in the Official Gazette and approved by the Turkish Grand National Assembly on 21 July 2016. Thus, the State of Emergency takes effect as from this date. In this process, measures taken may involve derogation from the obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms, permissible in Article 15 of the Convention.

I would therefore underline that this letter constitutes information for the purposes of Article 15 of the Convention. The Government of the Republic of Turkey shall keep you, Secretary General, fully informed of the measures taken to this effect. The Government shall inform you when the measures have ceased to operate. ...”

THE LAW

I. PRELIMINARY QUESTION CONCERNING THE DEROGATION BY TURKEY

93. The Government emphasised at the outset that all of the applicant’s complaints should be examined with due regard to the derogation of which the Secretary General of the Council of Europe had been notified on 21 July 2016 under Article 15 of the Convention. Article 15 provides:

“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

A. The parties' submissions

94. The Government submitted that in availing itself of its right to make a derogation from the Convention, Turkey had not breached the provisions of the Convention. In that context, they noted that there had been a public emergency threatening the life of the nation on account of the risks caused by the attempted military coup and that the measures taken by the national authorities in response to the emergency had been strictly required by the exigencies of the situation.

95. The applicant submitted that there had been a violation of Articles 5, 10 and 18 of the Convention, without explicitly stating a position on the applicability of Article 15 of the Convention.

96. The Commissioner for Human Rights did not make any comments about the notice of derogation from the Convention in his intervention.

97. The Special Rapporteur stated that if the circumstances justifying the declaration of a state of emergency ceased to exist, individuals' rights could no longer be restricted in connection with the aforementioned derogation.

98. The intervening non-governmental organisations submitted that the Government had not shown that there was currently a public emergency threatening the life of the nation. They contended in addition that the applicant's initial and continued pre-trial detention could not be regarded as strictly required by the exigencies of the situation.

B. The Court's assessment

99. The Court considers that the question at hand is whether the conditions laid down in Article 15 of the Convention for the exercise of the exceptional right of derogation were satisfied in the present case.

100. In this connection, the Court notes firstly that the notice of derogation by Turkey, indicating that a state of emergency had been declared in order to tackle the threat posed to the life of the nation by the severe dangers resulting from the attempted military coup and other terrorist acts, does not explicitly mention which Articles of the Convention are to form the subject of a derogation. Instead, it simply announces that "measures taken may involve derogation from the obligations under the Convention".

101. However, the Court observes that the applicant did not dispute that the notice of derogation by Turkey satisfied the requirement laid down in Article 15 § 3 of the Convention. It further notes that in *Mehmet Hasan Altan v. Turkey* (no. 13237/17, § 93, 20 March 2018) it held, in the light of the Constitutional Court's findings on this point and all the other material in its possession, that the attempted military coup had disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention. In addition, it takes note of the position

expressed by the Turkish Constitutional Court, which in its judgment of 3 May 2019 found that the case brought by the applicant should be examined under Article 15 of the Constitution, by which, in an emergency, the exercise of fundamental rights and freedoms may be partially or fully suspended, or measures derogating from the guarantees enshrined in the Constitution in relation to those rights and freedoms may be taken (see paragraph 54 above).

102. In the light of the foregoing, the Court is prepared to accept that the formal requirement of the derogation has been satisfied and that there was a public emergency threatening the life of the nation (see *Mehmet Hasan Altan*, cited above, § 89).

103. In any event, the Court observes that the applicant's detention on 23 September 2016, following his arrest on 10 September 2016, occurred a very short time after the attempted coup – the event that prompted the declaration of a state of emergency. It considers that this is undoubtedly a contextual factor that should be fully taken into account in interpreting and applying Article 5 of the Convention in the present case (see *Alparslan Altan v. Turkey*, no. 12778/17, §§ 71-75, 16 April 2019). As to whether the measures taken in the present case were strictly required by the exigencies of the situation and consistent with the other obligations under international law, the Court considers it necessary to examine the applicant's complaints on the merits, and will do so below (see *Kavala v. Turkey*, no. 28749/18, § 88, 10 December 2019).

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

104. Regarding the applicant's complaints under Article 5 of the Convention concerning the duration of his detention in police custody, and the lawfulness of his pre-trial detention, the Government stated that a compensation claim had been available to him under Article 141 § 1 (a) and (d) of the Code of Criminal Procedure. They contended that he could and should have brought a compensation claim on the basis of those provisions.

105. The applicant contested the Government's argument. He asserted that a compensation claim did not offer reasonable prospects of success in terms of securing his release.

A. As to the length of police custody

106. Firstly, as regards the complaint concerning the duration of the applicant's detention in police custody, the Court observes that the Turkish legal system provides applicants with a compensation claim against the State (Article 141 § 1 (a) of the Code of Criminal Procedure) (see *Mustafa Avci v. Turkey*, no. 39322/12, § 63, 23 May 2017, and *Paşa Bayraktar and*

Aydınkaya v. Turkey (dec.), no. 38337/12, §§ 24-31, 16 May 2017). The Court notes that Emergency Legislative Decree no. 667, adopted following the declaration of a state of emergency, allowed individuals to be held in police custody for up to thirty days, not including the time needed to convey them to a court. In those circumstances, having regard to the wording of the relevant provisions, the Court has doubts as to the effectiveness of the remedy provided for in Article 141 § 1 (a), given that the applicant's period in police custody does not appear to have exceeded the statutory maximum duration prescribed by Article 6 § 1 (a) of Emergency Legislative Decree no. 667 as in force at the material time.

107. The Court reiterates, however, that where there are doubts as to a domestic remedy's effectiveness and prospects of success – as the applicant maintains in this case – the remedy in question must be attempted (see *Voisine v. France*, no. 27362/95, Commission decision of 14 January 1998). This is an issue that should be tested in the courts (see *Roseiro Bento v. Portugal* (dec.), no. 29288/02, ECHR 2004-XII (extracts); *Whiteside v. the United Kingdom*, no. 20357/92, Commission decision of 7 March 1994; and *Mustafa Avci*, cited above, § 65).

108. The Court notes in this connection that the Constitutional Court dismissed the applicant's complaints concerning the lawfulness and duration of his detention in police custody, finding that anyone held in police custody under conditions and in circumstances not complying with the law could bring a compensation claim under Article 141 § 1 (a) of the Code of Criminal Procedure (see paragraph 82 above).

109. In the light of the Constitutional Court's conclusion on this issue, the Court considers that, as regards his complaint concerning the duration of his detention in police custody, the applicant was required to bring a claim under Article 141 § 1 of the Code of Criminal Procedure before the domestic courts, but did not do so. It therefore allows the Government's objection and rejects the complaint raised under Article 5 § 3 of the Convention concerning the applicant's detention in police custody for failure to exhaust domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

B. As to lawfulness of applicant's pre-trial detention

110. In so far as the Government's preliminary objection concerns Article 5 § 4 of the Convention, namely the lawfulness of the applicant's pre-trial detention, the Court reiterates that for a remedy in respect of the lawfulness of an ongoing deprivation of liberty to be effective, it must offer a prospect of release (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 40, 6 November 2008; *Mustafa Avci*, cited above, § 60; and *Mehmet Hasan Altan*, cited above, §§ 103-04). It notes, however, that the remedy provided for in Article 141 of the Code of Criminal Procedure was not capable of

terminating the applicant's deprivation of liberty. The Court therefore concludes that the objection raised by the Government on this account must be dismissed.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

111. The applicant complained that his initial pre-trial detention and its continuation had been arbitrary. He contended that there had been no evidence grounding a reasonable suspicion that he had committed a criminal offence necessitating his pre-trial detention. He relied on Article 5 § 1 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ..."

112. The Government contested the arguments.

A. The parties' submissions

1. The applicant

113. The applicant maintained that there had been no "reasonable" suspicion to justify his detention at any time. He contended that no suspicion had been present either during the initial period immediately after his arrest or during the subsequent periods when his pre-trial detention had been authorised and extended by the judicial authorities. The applicant submitted that he had been placed in pre-trial detention on the basis of his articles and argued that there were no facts or information that could satisfy an objective observer that he had committed the offences of which he was accused. In his submission, the domestic authorities had used the coup attempt as a pretext to silence dissenting voices. He also maintained that the domestic courts had given insufficient reasons for their decisions ordering and extending his pre-trial detention.

114. More specifically, in respect of the allegation that he had been involved in the publication of documents obtained from members of FETÖ/PDY regarding the "Balyoz" operation, the applicant stated that he had believed that those documents were genuine. He also stated that

although the "Balyoz" operation had taken place in 2013, he had already resigned from the newspaper in 2012.

115. In respect of the accusation that in his articles he had paved the way for a military coup, he categorically denied the allegations, stating that he had only expressed his concerns about political developments and that such concerns had to be regarded as legitimate criticism.

116. As regards the testimony of N.V., the applicant stated that even if he had had contact with members of FETÖ/PDY, this did not show that he had been involved in any criminal activity.

117. The applicant further argued that the measure of pre-trial detention had not been proportionate as the courts could have opted for more proportionate methods, such as release on bail, or a ban on leaving the country.

2. The Government

118. At the outset the Government stated that FETÖ/PDY was an armed terrorist organisation established by Fetullah Gülen, with the purpose of suppressing, debilitating and directing all constitutional institutions, and overthrowing the Government of the Republic of Turkey by using force, violence, threats, blackmail and other unlawful means. The real aim of this terrorist organisation was to take over the State and establish a totalitarian system; to that end, members of the organisation had secured employment in all public institutions and organisations, particularly the Turkish armed forces, civil administration units, the judiciary, law-enforcement offices and educational institutions, and the members engaged in activities in line with the objectives of the terrorist organisation rather than those of the State. The Government further pointed out that the FETÖ/PDY terrorist organisation attached particular importance to positioning itself within the written and audio-visual media to legitimise its actions. It made efforts to manipulate perceptions through a number of tools, such as radio, television and newspapers within its own media structure. Over the years, FETÖ/PDY had not only established its own media network but had also placed its followers in other media organs, which it had used for its own purposes. Furthermore, by influencing certain media figures who were not members of the terrorist organisation and who were known to the public, it ensured that they played an important role in the legitimisation of the organisation's aims and activities in the public eye. The Government submitted that the proceedings instituted against the applicant did not in any way concern his activities as a journalist. In that connection, they emphasised that the applicant had been placed and kept in pre-trial detention on suspicion of attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the Government by force and violence, and of being a member of a terrorist organisation.

3. The third parties

(a) The Commissioner for Human Rights

119. The Commissioner for Human Rights pointed out that excessive recourse to detention was a long-standing problem in Turkey. In that connection he noted that 210 journalists had been placed in pre-trial detention during the state of emergency, not including those who had been arrested and released after being questioned. One of the underlying reasons for the high numbers of journalists being detained was the practice of judges, who often tended to disregard the exceptional nature of detention as a measure of last resort that should only be applied when all other options were deemed insufficient. In the majority of cases where journalists had been placed in pre-trial detention, they had been charged with terrorism-related offences without any evidence corroborating their involvement in terrorist activities. The Commissioner for Human Rights was struck by the weakness of the accusations and the political nature of the decisions ordering and extending pre-trial detention in such cases.

(b) The Special Rapporteur

120. The Special Rapporteur noted that since the declaration of a state of emergency, a large number of journalists had been placed in pre-trial detention on the basis of vaguely worded charges without sufficient evidence.

(c) The intervening non-governmental organisations

121. The intervening non-governmental organisations stated that since the attempted military coup, more than 150 journalists had been placed in pre-trial detention. Emphasising the crucial role played by the media in a democratic society, they criticised the use of measures depriving journalists of their liberty.

B. The Court's assessment

1. Admissibility

122. The Court notes that the period to be taken into consideration in the present case began on 23 September 2016, when the applicant was placed in pre-trial detention, and lasted until 16 February 2018, the date on which he was initially convicted by the Istanbul Assize Court. From that day onwards, the applicant's deprivation of liberty was covered by Article 5 § 1 (a) of the Convention and falls outside the scope of this application. Following the decision of the Court of Cassation, the applicant's trial recommenced before the Istanbul Assize Court and on 4 November 2019 he was convicted once again and was sentenced to a total of ten years and six months' imprisonment. The Court observes that it has examined and

dismissed the Government's objections of failure to exhaust domestic remedies in so far as they related to the applicant's pre-trial detention (see paragraph 110 above).

123. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The applicable principles

124. The Court first reiterates that Article 5 of the Convention guarantees a right of primary importance in a "democratic society" within the meaning of the Convention, namely the fundamental right to liberty and security. Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see *Assanidze v. Georgia* [GC], no. 71503/01, § 169, ECHR 2004-II; *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 311, 22 December 2020).

125. All persons are entitled to the protection of that right, that is to say, not to be deprived, or to continue to be deprived, of their liberty (see *Weeks v. the United Kingdom*, 2 March 1987, § 40, Series A no. 114), save in accordance with the conditions specified in Article 5 § 1 of the Convention. The list of exceptions set out in Article 5 § 1 is an exhaustive one (see *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV), and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see *Assanidze*, cited above, § 170; *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 99, ECHR 2011; and *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 84, 5 July 2016; *Selahattin Demirtaş*, cited above, § 312).

126. The Court further reiterates that a person may be detained under Article 5 § 1 (c) of the Convention only in the context of criminal proceedings, for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence (see *Jėčius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX; *Włoch v. Poland*, no. 27785/95, § 108, ECHR 2000-XI; and *Poyraz v. Turkey* (dec.), no. 21235/11, § 53, 17 February 2015). To be compatible with that provision, an arrest or detention must meet three conditions. First, it must be based on a "reasonable suspicion" that the person concerned has committed an offence, which presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence. Secondly, the purpose of the arrest or detention must be to bring the person concerned before a "competent legal authority".

Thirdly, an arrest or detention under sub-paragraph (c) must, like any deprivation of liberty under Article 5 § 1 of the Convention, be "lawful" and "in accordance with a procedure prescribed by law" (see *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 183-186, 28 November 2017).

127. The "reasonableness" of the suspicion on which deprivation of liberty must be based forms an essential part of the safeguard laid down in Article 5 § 1 (c). Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as reasonable will, however, depend on all the circumstances (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182; *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X; *Korkmaz and Others v. Turkey*, no. 35979/97, § 24, 21 March 2006; *Süleyman Erdem v. Turkey*, no. 49574/99, § 37, 19 September 2006; and *Çiçek v. Turkey* (dec.), no. 72774/10, § 62, 3 March 2015). In this regard, the fact that a suspicion is held in good faith is insufficient (see *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 116, 17 March 2016). Apart from its factual aspect, which is most often in issue, the existence of such a suspicion additionally requires that the facts relied on can reasonably be considered criminal behaviour under domestic law. Thus, clearly there could not be a "reasonable suspicion" if the acts held against a detained person did not constitute an offence at the time they were committed (ibid., § 118).

128. The Court has also held that Article 5 § 1 (c) of the Convention does not presuppose that the investigating authorities have obtained sufficient evidence to bring charges at the time of arrest. The purpose of questioning during detention under Article 5 § 1 (c) is to further the criminal investigation by confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation (see *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, § 87, 22 May 2014, and *Selahattin Demirtaş*, cited above, § 315). In this connection, the Court reiterates that the persistence of reasonable suspicion that the person arrested has committed an offence is a prerequisite for the lawfulness of the person's continued detention (see, among many other authorities, *Stögmüller v. Austria*, 10 November 1969, § 4, Series A no. 9, and *McKay v. the United Kingdom* [GC], no. 543/03, § 44, ECHR 2006-X). Accordingly, while reasonable suspicion must exist at the time of the arrest and initial detention, it must also be shown, in cases of prolonged detention, that the suspicion persisted and remained "reasonable" throughout the detention (see *Ilgar Mammadov*, cited above, § 90). The subsequent gathering of evidence in relation to a particular charge may sometimes reinforce a suspicion linking an applicant to the commission of terrorism-

related offences. However, it cannot form the sole basis of a suspicion justifying detention. In any event, the subsequent gathering of such evidence does not release the national authorities from their obligation to provide a sufficient factual basis that could justify a person's initial detention. To conclude otherwise would defeat the purpose of Article 5 of the Convention, namely, to prevent arbitrary or unjustified deprivations of liberty (see *Alparslan Altan,* cited above, § 139; *Selahattin Demirtaş*, cited above, § 321).

129. The Court's task is therefore to determine whether the conditions laid down in Article 5 § 1 (c) of the Convention, including the pursuit of the prescribed legitimate purpose, were fulfilled in the case brought before it. In this context, it is not normally for the Court to substitute its own assessment of the facts for that of the domestic courts, which are better placed to assess the evidence adduced before them (see *Baş v. Turkey*, no. 66448/17, § 173, 3 March 2020; *Ersöz v. Turkey* (dec.), no. 45746/11, § 50, 17 February 2015; and *Mergen and Others v. Turkey*, nos. 44062/09 and 4 others, § 48, 31 May 2016). The Court observes that it has already found in *Uzun v. Turkey* ((dec.), no. 10755/13, 30 April 2013) that the Turkish legislature has demonstrated its intention to entrust the Constitutional Court with jurisdiction to find violations of Convention provisions and with appropriate powers to provide redress for such violations (ibid., §§ 62-64). Furthermore, with regard to complaints under Article 5 of the Convention, in *Koçintar v. Turkey* ((dec.), no. 77429/12, 1 July 2014) the Court considered the nature and effects of decisions delivered by the Constitutional Court in accordance with the Turkish Constitution. Article 153 § 1 of the Constitution provides that the Constitutional Court's judgments are "final". Moreover, as the Court noted in *Koçintar*, Article 153 § 6 provides that decisions of the Constitutional Court are binding on the legislative, executive and judicial organs (see, to similar effect, *Uzun*, cited above, § 66). In the Court's view, therefore, it is clear that the Constitutional Court forms an integral part of the judiciary within the constitutional structure of Turkey and that – as the Court has previously noted in *Koçintar* – it plays an important role in protecting the right to liberty and security under Article 19 of the Constitution and Article 5 of the Convention by offering an effective remedy to individuals detained during criminal proceedings.

(b) Application of those principles to the present case

130. The Court observes that the applicant was suspected of attempting to overthrow the Government or to prevent it from discharging its duties, and of being a member of a terrorist organisation or of committing an offence on behalf of an illegal organisation without being a member. These are serious criminal offences which are punishable by imprisonment under Turkish law.

131. The Court's task under Article 5 of the Convention is to ascertain whether there were sufficient objective elements to satisfy an objective observer that the applicant could have committed the offences of which he was accused. In view of the seriousness of the offences and the severity of the potential sentence, the facts need to be examined with great care. In that connection, it is essential that the facts grounding the suspicion should be justified by verifiable and objective evidence and that they can be reasonably considered as falling under one of the sections describing criminal behaviour in the Criminal Code.

132. The Court is mindful of the fact that the criminal proceedings against the applicant are still pending at the appeal stage. However, this does not affect its examination of the present complaint, whereby the Court is called upon to determine whether the applicant's initial and continued detention was justified on the basis of the information and facts available to the authorities and whether there was a reasonable suspicion at the material time that he had committed a criminal offence.

133. In the present case, the Court should also take into consideration the unique circumstances at the time of the applicant's arrest, that is, the period immediately after the attempted coup of 15 July 2016. In this connection, it refers to the detailed submissions of the Government (see paragraphs 12-17 above) and to the findings of the Constitutional Court in the case of *Aydın Yavuz and Others* (see paragraphs 88-89 above) explaining the structure of the FETÖ/PDY organisation and the events surrounding the attempted coup. In view of the difficulties inherent in the investigation and prosecution of terrorism-related offences, the "reasonableness" of the suspicion justifying deprivation of liberty cannot always be judged according to the same standards as are applied in dealing with conventional crime (see *Selahattin Demirtaş*, cited above, § 323).

134. Bearing these specific circumstances in mind, the Court's task is to verify whether there existed sufficient objective elements that could lead an objective observer to reasonably believe that the applicant might have committed the acts, as alleged by the prosecuting authorities. In its assessment under Article 5 § 1 of the Convention, the Court should therefore limit its examination to the evidence before the domestic authorities at the material time.

135. The Court notes in that regard that the dispute between the parties in the present case does not concern the wording of the articles in question or the applicant's remarks on the TV programme that aired on Can Erzincan TV on 14 July 2016. There is also no dispute about the attributability of these remarks to the applicant. The dispute is about the plausibility of the accusations and their classification as criminal conduct.

136. As to the question about the plausibility of the accusations, the Court notes firstly that the authorities concerned were unable to refer to any concrete evidence capable of suggesting that FETÖ/PDY had issued

requests or instructions to the *Taraf* newspaper or to the applicant in person to publish specific news stories or to follow a particular editorial policy with the aim of manipulating public opinion in favour of a coup. Regarding the witness evidence which was subsequently added to the file following the indictment, the Court notes that these statements contained general impressions that the applicant had had contacts with the leaders of the said illegal organisation, and cannot be considered as confirming the suspicions against him. As to the content of the applicant's articles and his remarks on the TV programme, the Court considers that when read as a whole they cannot be regarded as relevant in establishing the existence of a reasonable suspicion that the offences of attempting to overthrow the Government, or to prevent it from discharging its duties, of being a member of a terrorist organisation, or of committing an offence on behalf of an illegal organisation without being a member of it, had been committed. These articles were written as part of journalistic activity and cannot be construed as grounding a reasonable suspicion that the applicant had committed the offences in question. The applicant's criticisms of the President's political approach cannot be seen as an indication that he had prior knowledge of the attempted coup of 15 July 2016.

137. The Court therefore considers that the logic applied in the present case by the authorities responsible for the pre-trial detention, equating these activities to the offences with which the applicant was charged, cannot be regarded as an acceptable assessment of the facts.

138. The Court should now also consider whether the evidence relied on as grounds for the suspicions against the applicant could reasonably establish an offence at the material time. The starting point of the Court's analysis should therefore be the domestic courts' decisions on the applicant's initial detention. Therefore the decision of the Istanbul 1st Magistrate's Court of 23 September 2016 is of crucial importance, since the applicant's initial pre-trial detention was based on the reasoning set out in that decision and the subsequent court decisions extending the detention mainly referred to the original decision.

139. In this connection, the Court observes that the material before the judicial authorities ordering and extending the applicant's pre-trial detention, as taken into consideration by the Constitutional Court in its judgment of 3 May 2019, can be divided into three groups. The first group relates to the involvement of the applicant in the Balyoz case, and his position as the editor-in-chief of the *Taraf* newspaper. The second group concerns the three articles written by the applicant, entitled "Absolute Fear", "Crushing Through", and "Montezuma". Finally, the third group relates to the applicant's remarks on the TV programme that aired on 15 July 2016 on Can Erzincan TV.

140. Firstly, the domestic judicial authorities had particular regard to the fact that the applicant, in his capacity as the editor-in-chief of *Taraf*, had

allegedly attempted to discredit an investigation into the "Balyoz" case by publishing news stories in that newspaper on the basis of fabricated documents and that *Taraf* had been acting under the instructions of the FETÖ/PDY terrorist organisation to manipulate public opinion. It was alleged that *Taraf* had started its journalistic activities in order to implement the aims of FETÖ/PDY and to manipulate public opinion to that end. In this connection, the courts referred to the news stories published in *Taraf* concerning the "Balyoz" case at the time (between 2007 and 2012) when the applicant was still the editor-in-chief and argued that by using documents which had been provided by FETÖ/PDY and which had subsequently turned out to be fictitious, the newspaper had published fake news. The news published in *Taraf*, while the applicant was still the editor-in-chief, had thus resulted in many high-ranking military officers being discharged from the army, and their vacant posts being filled by members of FETÖ/PDY. The domestic courts considered that in his capacity as the editor-in-chief of the *Taraf* newspaper, the applicant had published news based on fictitious documents fabricated and provided by members of FETÖ/PDY which suggested that certain high-ranking members of the military had been planning a coup.

141. Nevertheless, the Court notes that the "Balyoz" case took place in 2012, and that the detention of the applicant as a suspect, more than four years after the events in issue, cannot be regarded as a necessary measure. Moreover, at no stage of the investigation proceedings had the domestic authorities any concrete evidence capable of suggesting that the *Taraf* newspaper or, in particular, the applicant had acted under the instructions of the illegal organisation to publish specific news stories or to follow a particular editorial policy with the aim of manipulating public opinion in favour of a coup.

142. Secondly, the courts relied on the three articles that the applicant had written shortly before the attempted coup, namely "Absolute fear", "Montezuma" and "Crushing through". It was considered that in his articles, the applicant had maintained that the President was acting contrary to the Constitution, and that he was breaching the law. In the decision, it was stated that the applicant had portrayed the President as a dictator who controlled the legislature, executive and judiciary. Referring to certain specific sentences such as "I guess we are watching the final act of a badly written stage play. The cost may be too heavy but it is still good to know that it will somehow end", "...When the walls of his palace come down with artillery fire, when people holding guns kill each other in the corridors, he will understand what a civil war is, but by then it will already be too late" or when he drew a parallel between the President and the Aztec Emperor Montezuma, who had been taken as a hostage by the Spaniard Hernán Cortés, the court concluded that the applicant had aimed to manipulate public opinion in favour of FETÖ/PDY in the run-up to the attempted coup

of 15 July 2016 and he had thus contributed to the coup process of which he had had prior knowledge.

143. As to these articles, in which the applicant had expressed his views about Government policies, the Court considers it important that the applicant's remarks in the three articles should be viewed in their entirety. The metaphors used by the applicant cannot be taken as an unequivocal indication that he had prior knowledge about the coup and sought to manipulate public opinion. The messages conveyed in the three articles concerned an ongoing public debate in relation to which the applicant made an assessment of the potential risk of a military coup. In his analysis of the political situation, the applicant raised concerns and strongly criticised the Government. In the Court's view, on the basis of those remarks, the applicant cannot be regarded as having supported a campaign of violence or legitimised such violence, but instead, as a dissident writer, he can reasonably be seen as voicing criticism against the Government. The contents of the applicant's articles can be viewed as very harsh and may be regarded as offensive, shocking or disturbing by the State or a sector of the population. However, in the Court's view, they would not satisfy an objective observer that the applicant may have committed the offences for which he was placed in pre-trial detention, unless other grounds and evidence justifying his detention were put forward. The notion of "reasonable suspicion" cannot be interpreted so extensively as to impair the applicant's right to freedom of expression under Article 10 of the Convention (see *Selahattin Demirtaş*, cited above, § 328).

144. Thirdly, the judicial authorities referred to a television programme that had aired on Can Erzincan TV on 14 July 2016, when the applicant had stated that the President of the Turkish Republic, by his unconstitutional actions, had been inciting a coup and that his departure from the government was imminent. The courts considered that the applicant had been acting under the instructions of FETÖ/PDY with the aim of manipulating public opinion against the elected President and the Government. In this connection, they referred to the applicant's comments when he had stated that "Whatever the developments that led to the previous military coups in Turkey, by taking the same decisions, President Erdoğan is paving the way for yet another coup", and that "He will be leaving the Government soon, and will be prosecuted". Based on these remarks, the courts concluded that the applicant had had prior knowledge of the attempted coup that would take place the following day.

145. The Court considers that the applicant's remarks on the TV programme should not be taken out of their context and must be viewed in their entirety. It finds no elements to conclude that these remarks did not remain within the limits of freedom of speech, in so far as they cannot be construed as a call for violence. The fact that the applicant warned the

public about a potential coup or civil war cannot justify the applicant's pre-trial detention in relation to the offences in question.

146. The Court further observes that new items of evidence were added to the investigation file with the filing of the indictment. These included in particular statements of two witnesses who had confirmed the applicant's alleged links with the leaders of the said illegal organisation, and the transcript of a ByLock conversation where the applicant's name had been mentioned as amongst those of high level people in FETÖ/PDY. Nevertheless, even if the subsequent evidence could be capable of giving rise to suspicions justifying the applicant's continued detention, it appears from the decisions of the domestic courts that these new items of evidence were not specifically taken into consideration when they delivered their decisions (see paragraph 47 above).

147. Taken overall, the analysis of the applicant's acts shows that they fell within the exercise of his freedom of expression and freedom of the press, as guaranteed by domestic law and by the Convention. The Court finds no elements in the case file allowing it to conclude that the acts of the applicant were part of a plan pursuing an aim in breach of the legitimate restrictions imposed on those freedoms. It therefore considers that the acts in question cannot be regarded as capable of grounding a "reasonable suspicion" that the applicant had committed the alleged criminal offences.

148. In the light of these observations, the Court considers that the applicant could not be reasonably suspected, at the time of his placement in detention, of having committed the offences of attempting to overthrow the Government or to prevent it from discharging its duties, of being a member of a terrorist organisation or of committing an offence on behalf of an illegal organisation without being a member of it.

149. Turning to Article 15 of the Convention and the derogation by Turkey, the Court refers to its above finding that the evidence before it is insufficient to support the conclusion that there was reasonable suspicion against the applicant. Although imposed under judicial supervision, the contested measures were thus based on a mere suspicion.

Admittedly, the Council of Ministers, chaired by the President and acting in accordance with Article 121 of the Constitution, passed several legislative decrees placing significant restrictions on the procedural safeguards laid down in domestic law for anyone held in police custody or pre-trial detention (such as extension of the police custody period and restrictions on access to case files and on the examination of objections against detention orders). Nonetheless, in the present case, it was in application of Article 100 of the Code of Criminal Procedure that the applicant was placed in pre-trial detention on charges relating to the two offences set out in Articles 312 and 314 of the Criminal Code. It should be noted in particular that Article 100 of the Code of Criminal Procedure, which requires the presence of "factual elements giving rise to a strong

suspicion that the [alleged] offence has been committed" was not amended during the state of emergency. Instead, the measures complained of in the present case were taken on the basis of legislation which was in force prior to and after the declaration of the state of emergency, and which, moreover, is still applicable (see *Kavala*, cited above, § 158).

150. In consequence, the measures complained of in the present case cannot be said to have been strictly required by the exigencies of the situation (see, *mutatis mutandis*, *Mehmet Hasan Altan*, cited above, § 140). To conclude otherwise would negate the minimum requirements of Article 5 § 1 (c) regarding the reasonableness of a suspicion justifying deprivation of liberty and would defeat the purpose of Article 5 of the Convention.

151. In the light of the foregoing, the Court concludes that there has been a violation of Article 5 § 1 of the Convention in the present case on account of the lack of reasonable suspicion that the applicant had committed a criminal offence.

152. Having regard to the above finding, the Court considers it unnecessary to examine separately whether the reasons given by the domestic courts for the applicant's continued detention were based on relevant and sufficient grounds.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION ON ACCOUNT OF THE LACK OF ACCESS TO THE INVESTIGATION FILE

153. The applicant complained that his lack of access to the investigation file had prevented him from effectively challenging the order for his pre-trial detention. On that account he alleged a violation of Article 5 § 4 of the Convention, which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

154. The Government submitted that the applicant had been able to challenge his continued detention by lodging an objection. In view of the questions put to them by the police officers, the public prosecutor and the magistrate, the applicant and his lawyers had had sufficient knowledge of the substance of the evidence forming the basis for his pre-trial detention, and had thus had an opportunity to properly contest the reasons given to justify the detention. The Government further submitted that this complaint should be assessed in the light of the circumstances that had given rise to the declaration of a state of emergency and the notice of derogation under Article 5 of the Convention.

155. The Commissioner for Human Rights submitted that since the declaration of the state of emergency, the detention review procedure had been negatively affected, in particular by restrictions on access to

investigation files. The other intervening parties did not make submissions on this complaint.

156. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

157. The Court reiterates that Article 5 § 4 of the Convention entitles arrested or detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in terms of Article 5 § 1 of the Convention, of their deprivation of liberty. Although the procedure under Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 of the Convention for civil or criminal litigation – as the two provisions pursue different aims (see *Reinprecht v. Austria*, no. 67175/01, § 39, ECHR 2005-XII) – it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question (see *D.N. v. Switzerland* [GC], no. 27154/95, § 41, ECHR 2001-III).

158. In particular, proceedings in which an appeal against a detention order is being examined must be adversarial and must ensure equality of arms between the parties, the prosecutor and the detainee. Equality of arms is not ensured if counsel is denied access to documents in the investigation file which are essential in order to effectively challenge the lawfulness of his or her client's detention (see *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I; *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001; *Svipsta v. Latvia*, no. 66820/01, §§ 129-137, ECHR 2006-III (extracts); and *Mooren v. Germany* [GC], no. 11364/03, § 124, 9 July 2009).

159. The Court also recalls that any restrictions on the right of the detainee or his representative to have access to documents in the case file which form the basis of the prosecution case against him must be strictly necessary in the light of a strong countervailing public interest. Where full disclosure is not possible, Article 5 § 4 requires that the difficulties this causes are counterbalanced in such a way that the individual still has a possibility effectively to challenge the allegations against him (see *Ovsjannikov v. Estonia*, no. 1346/12, § 73, 20 February 2014, and *Gábor Nagy v. Hungary* (no. 2), no. 73999/14, § 86, 11 April 2017).

160. The Court observes that in a number of cases against Turkey, it has found a violation of Article 5 § 4 of the Convention on account of the restriction to the case file under Article 153 of the Criminal Procedure Code (see *Nedim Şener v. Turkey*, no. 38270/11, §§ 83-86 , 8 July 2014; and *Şık v. Turkey*, no. 53413/11, §§ 72-75, 8 July 2014). Nevertheless, the Court has not found a breach of this provision in several other cases, even though there was a restriction on the applicants' right of access to the investigation file (see, in particular, *Ceviz v. Turkey*, no. 8140/08, §§ 41-44, 17 July 2012; *Gamze Uludağ v. Turkey*, no. 21292/07, §§ 41-43, 10 December 2013;

Karaosmanoğlu and Özden v. Turkey, no. 4807/08, §§ 73-75, 17 June 2014; *Hebat Aslan and Firas Aslan v. Turkey*, no. 15048/09, §§ 65-67, 28 October 2014; *Ayboğa and Others v. Turkey*, no. 35302/08, §§ 16-18, 21 June 2016; and *Mehmet Hasan Altan*, cited above, §§ 147-150). In these cases, the Court reached its conclusion on the basis of a concrete assessment of the facts and found that the applicants had had sufficient knowledge of the evidence forming the basis for their pre-trial detention.

161. Turning to the facts of the present case, the Court observes that on an unspecified date, the Istanbul public prosecutor decided, on the basis of Article 3 § 1 (l) of Legislative Decree no. 668, to restrict the suspects' and their lawyers' access to the investigation file if that would involve a risk of compromise to the investigation (see paragraph 18 above).

162. The Court observes that at the material time the domestic authorities considered that there was an urgent need to protect national security due to the attempted coup of 15 July 2016. Balanced against this important public interest, however, was the applicant's right under Article 5 § 4 to procedural fairness.

163. In this connection, the Court notes that the applicant was indeed aware of some of the relevant evidentiary materials in the investigation file through the detailed interrogations conducted by the police and the public prosecutor during his police custody. However, according to the information in the case file, subsequent to his pre-trial detention, new evidence was included in the file. In particular, the Istanbul Public Prosecutor had taken statements from two witnesses who had confirmed the applicant's alleged links with the leaders of the said illegal organisation. These statements had been taken on 24 October 2016 and 10 November 2016, respectively. Moreover, the transcript of a ByLock conversation referring to the applicant's name was also included in the file during the investigation. The Court observes that these new items of evidence were brought to the attention of the applicant only after the filing of the indictment, namely on 14 April 2017.

164. In view of the shortcomings mentioned above, the Court considers that, in the circumstances of the present case, the applicant cannot be regarded as having a possibility to effectively challenge the allegations against him.

165. As to Article 15 of the Convention and the derogation submitted by Turkey, the Court recalls that the decision to restrict access to the investigation file was based on Article 3 § 1 of the Legislative Decree no. 668, which had entered into force during the state of emergency. Thus, this part of the application strictly involves a measure taken to derogate from the Convention. Having said that, the restriction to access the case file was based on the general order of the Istanbul Public Prosecutor regarding the criminal investigation in respect of suspected FETÖ/PDY members and it was issued before the applicant was arrested (see paragraph 18 above).

Moreover, the restriction to the investigation file was lifted with the indictment which was filed while the state of emergency was still in force. In the Court's view, even in the framework of a state of emergency, the fundamental principle of the rule of law must prevail. It therefore considers that this general order cannot be regarded as an appropriate response to the state of emergency, and such an interpretation would negate the safeguards provided by Article 5 of the Convention (see *Baş v. Turkey*, no. 66448/17, § 160, 3 March 2020).

166. The Court therefore concludes that there has been a violation of Article 5 § 4 of the Convention under this head.

V. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION ON ACCOUNT OF THE LACK OF A SPEEDY JUDICIAL REVIEW BY THE CONSTITUTIONAL COURT

167. Relying on Article 5 § 4 of the Convention, the applicant submitted that the proceedings he had brought before the Constitutional Court with a view to challenging the lawfulness of his pre-trial detention had not complied with the requirements of the Convention in that the Constitutional Court had failed to observe the requirement of "speediness".

168. The Government contested the applicant's argument.

A. The parties' submissions

1. The Government

169. First of all, the Government submitted that Turkish law contained sufficient legal safeguards enabling detainees to effectively challenge their deprivation of liberty. They noted that detainees could apply for release at any stage of the investigation or the trial and that an objection could be lodged against any decisions rejecting such applications. The question of a suspect's continued detention was automatically reviewed at regular intervals of no more than thirty days. In that context, the Government emphasised that the Constitutional Court was not to be regarded as a court of appeal for the purposes of Article 5 § 4 of the Convention.

170. Next, referring to statistics on the Constitutional Court's caseload, the Government stated that in 2012 1,342 applications had been lodged with that court; in 2013 that number had risen to 9,897, and in 2014 and 2015 respectively there had been 20,578 and 20,376 applications. Since the attempted military coup, there had been a dramatic increase in the number of applications to the Constitutional Court: a total of 103,496 applications had been lodged with it between 15 July 2016 and 9 October 2017. Bearing in mind this exceptional caseload for the Constitutional Court and the notice of derogation of 21 July 2016, the Government submitted that it could not

be concluded that that court had failed to comply with the requirement of "speediness".

2. The applicant

171. The applicant reiterated his assertion that the Constitutional Court had not decided "speedily" within the meaning of Article 5 § 4 of the Convention. He contended that the Constitutional Court was trying to avoid criticism from government circles and was accordingly refraining from conducting a review within a reasonable time of "sensitive cases" brought by journalists, politicians and academics.

3. The third parties

(a) The Commissioner for Human Rights

172. The Commissioner for Human Rights observed that, in relation to Article 5 of the Convention, the Constitutional Court had developed an approach in line with the principles established by the Court in its own case-law. While acknowledging the size of the Constitutional Court's caseload since the attempted military coup, he emphasised that it was essential for the proper functioning of the judicial system that that court should give its decisions speedily.

(b) The Special Rapporteur

173. The Special Rapporteur likewise noted that since the declaration of the state of emergency, the Constitutional Court had been faced with an unprecedented caseload.

(c) The intervening non-governmental organisations

174. The intervening non-governmental organisations did not make submissions on this complaint.

B. The Court's assessment

1. Admissibility

175. The Court reiterates that it has found Article 5 § 4 of the Convention to be applicable to proceedings before domestic constitutional courts (see *Smatana v. the Czech Republic*, no. 18642/04, §§ 119-24, 27 September 2007, and *Žúbor v. Slovakia*, no. 7711/06, §§ 71-77, 6 December 2011). Accordingly, having regard to the jurisdiction of the Turkish Constitutional Court (see, for example, *Koçintar*, cited above, §§ 30-46), the Court concludes that Article 5 § 4 is also applicable to proceedings before that court.

176. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

177. The Court reiterates that Article 5 § 4, in guaranteeing detainees a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see *Mooren v. Germany* [GC], no. 11364/03, § 106, 9 July 2009, and *Idalov v. Russia* [GC], no. 5826/03, § 154, 22 May 2012).

178. The question whether the right to a speedy decision has been respected must – as is the case for the "reasonable time" stipulation in Article 5 § 3 and Article 6 § 1 of the Convention – be determined in the light of the circumstances of each case, including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter (see *Mooren*, cited above, § 106, with further references; *S.T.S. v. the Netherlands*, no. 277/05, § 43, ECHR 2011; and *Shcherbina v. Russia*, no. 41970/11, § 62, 26 June 2014).

179. In order to determine whether the requirement that a decision be given "speedily" has been complied with, it is necessary to effect an overall assessment where the proceedings were conducted at more than one level of jurisdiction (see *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B, and *Mooren*, cited above, § 106). Where the original detention order or subsequent decisions on continued detention were given by a court (that is to say, by an independent and impartial judicial body) in a procedure offering appropriate guarantees of due process, and where the domestic law provides for a system of appeal, the Court is prepared to tolerate longer periods of review in proceedings before a second-instance court (see *Lebedev v. Russia*, no. 4493/04, § 96, 25 October 2007, and *Shcherbina*, cited above, § 65). These considerations apply *a fortiori* to complaints under Article 5 § 4 concerning proceedings before constitutional courts which are separate from proceedings before ordinary courts (see *Žúbor*, cited above, § 89). In this context, the Court notes that the proceedings before constitutional courts such as the Turkish Constitutional Court are of a specific nature. Admittedly, the Constitutional Court does review the lawfulness of an applicant's initial and continued pre-trial detention. However, in doing so it does not act as a "fourth-instance" body but determines solely whether the decisions ordering the initial and continued detention complied with the Constitution (see *Selahattin Demirtaş,* cited above, § 368).

180. Turning to the facts of the present case, the Court observes that the applicant lodged an individual application with the Constitutional Court on 8 November 2016 and that that court delivered its final judgment on 3 May 2019. However, in the meantime, on 16 February 2018, the Assize Court convicted the applicant as charged, and sentenced him to life imprisonment. Thus, from 16 February 2018 onwards the applicant was detained "after conviction by a competent court". Accordingly, his pre-trial detention ended on 16 February 2018 and thus the period to be taken into consideration in relation to the complaint raised under Article 5 § 4 amounted to fifteen months and eight days. Moreover, the period between 8 November 2016 and 16 February 2018 fell under the state of emergency that was declared following the attempted coup.

181. The Court observes that in the Turkish legal system, anyone in pre-trial detention may apply for release at any stage of the proceedings and may lodge an objection if the application is rejected. It notes that in the present case the applicant made several such applications for release, which were examined in conformity with the "speediness" requirement (see paragraphs 33-44 above). The Court observes in addition that the question of a suspect's detention is automatically reviewed at regular intervals of no more than thirty days (see paragraph 81 above). In a system of that kind, the Court can tolerate longer periods of review by the Constitutional Court. Where an initial or further detention order was imposed by a court in a procedure offering appropriate guarantees of due process, the subsequent proceedings are less concerned with arbitrariness, but provide additional guarantees based primarily on an evaluation of the appropriateness of continued detention. Nevertheless, the Court considers that even in the light of those principles, in normal circumstances a period of fifteen months and eight days cannot be regarded as "speedy". Having said that, the Court considers that the timing of the applicant's application to the Constitutional Court in the present case was complex, since it was one of the first of a series of cases raising new and complicated issues concerning the right to liberty and security and freedom of expression under the state of emergency following the attempted military coup. The Court has already noted that the resources rapidly deployed following the backlog that built up after the attempted coup seem to have produced significant results. In 2018 the Constitutional Court ruled on 35,395 individual applications, which made it possible to keep the volume of pending cases under control, in spite of the large number of new applications (see *Akgün v. Turkey* (dec.), no. 19699/18, § 43, 2 April 2019).

182. Having regard to the complexity and the diversity of the legal questions raised by the cases brought before the Turkish Constitutional Court after the attempted coup, and to the very large number of such cases, it seems reasonable that the Constitutional Court took a certain amount of time to obtain a comprehensive view of these questions and to determine

them by means of leading judgments (ibid., §§ 35-44). Moreover, bearing in mind the Court's approach as developed in the cases of *Mehmet Hasan Altan* (cited above, §§ 161-67) and *Şahin Alpay*, (cited above, §§ 133-39,) and the Constitutional Court's caseload following the declaration of the state of emergency, the Court notes that this is an exceptional situation. Notwithstanding the significant length of proceedings in the cases cited above – one year, two months and three days in *Mehmet Hasan Altan* (cited above, § 164), one year, four months and three days in *Şahin Alpay* (cited above, § 136) and one year and sixteen days in *Akgün* (cited above, § 38) – it found that the speediness requirement under Article 5 § 4 had been complied with. Nevertheless, it stated that this finding did not mean that the Constitutional Court had carte blanche when dealing with any similar complaints raised under Article 5 § 4 of the Convention. It added that in accordance with Article 19 of the Convention, the Court retained its ultimate supervisory jurisdiction for complaints submitted by other applicants alleging that, after lodging an individual application with the Constitutional Court, they had not had a speedy judicial decision concerning the lawfulness of their detention.

183. In the present case, although the duration of fifteen months and eight days could not be regarded as "speedy" in an ordinary context, the Court concludes that in the specific circumstances of the case, there has been no violation of Article 5 § 4 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

184. The applicant also complained that he had not had access to an effective remedy by which he could have obtained compensation for the damage sustained on account of his pre-trial detention. He alleged a violation of Article 5 § 5 of the Convention, which provides:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

185. The Government contested the applicant's argument. They stated that two remedies had been available to the applicant, namely a claim for compensation from the State under Article 141 § 1 of the Code of Criminal Procedure and an individual application to the Constitutional Court. In their submission, these remedies were capable of affording redress in respect of the complaint concerning the applicant's pre-trial detention.

186. The applicant submitted that the remedies suggested by the Government were not effective.

187. The intervening parties made no submissions on this complaint.

188. The Court reiterates that the right to compensation set forth in Article 5 § 5 of the Convention presupposes that a violation of one of the other paragraphs of that Article has been established, either by a domestic

authority or by the Convention institutions (see *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X).

189. In the present case, it remains to be determined whether the applicant had the opportunity to claim compensation for the damage sustained.

190. The Court notes that it has found a violation of Article 5 §§ 1 and 4 in the present case. Regarding the possibility of claiming compensation for that violation, the Court notes that Article 141 of the Code of Criminal Procedure does not specifically provide for a compensation claim for damage sustained by a person as a result of the lack of reasonable suspicion that he or she has committed a criminal offence. In that connection, the Government have failed to produce any judicial decision concerning the award of compensation, on the basis of this provision of the Code of Criminal Procedure, to anyone in a similar position to the applicant.

191. The Court further notes that the applicant's individual application to the Constitutional Court was rejected and he was therefore not awarded any compensation by the national courts (contrast *Mehmet Hasan Altan*, cited above, §§ 175-77).

192. Accordingly, the Court concludes that in the present case there has been a violation of Article 5 § 5 taken in conjunction with Article 5 §§ 1 and 4 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

193. Relying on Articles 10 and 17 of the Convention, the applicant complained of a breach of his right to freedom of expression on account of his initial and continued pre-trial detention.

194. The Government contested the applicant's arguments.

195. The Court reiterates that it is master of the characterisation to be given to the facts of the case (see, for example, *Sarıgül v. Turkey*, no. 28691/05, § 33, 23 May 2017, and *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 145, ECHR 2017). In the present case it finds that the applicant's complaint relates to his freedom of expression. This part of the application accordingly falls to be examined solely under Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or

rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The parties' submissions

1. The applicant

196. The applicant submitted that he had been placed in pre-trial detention on account of his opinions, which had not posed any threat to national security or public safety. He argued that his deprivation of liberty in itself constituted unjustified interference with his freedom of expression. In this connection, he argued that his comments were legitimate criticisms. He pointed out that in his article "Absolute fear", he had criticised the President for taking control of the legislature, executive and judiciary. In the article "Crushing through", the applicant had quoted a former bureaucrat who had claimed that the President was not against a civil war. Commenting on this information, the applicant had stated that no one would win if a civil war broke out. The applicant maintained that in his article he had not been threatening the President but had been warning him about the horrifying consequences of a civil war. Furthermore, in his article "Montezuma", the applicant had stated that the President had been taken captive by nationalists who wanted military tutelage to return in Turkey.

197. Finally, as to his remarks during the television programme that had aired on Can Erzincan TV one day prior to the attempted coup, he argued that he had uttered them within the limits of his freedom of speech and that there had been no incitement to violence.

2. The Government

198. The Government argued firstly that the applicant's complaint under Article 10 should be declared inadmissible for failure to exhaust domestic remedies, given that the criminal proceedings brought against him were still pending in the domestic courts.

199. Next, the Government submitted that the order for the applicant's pre-trial detention did not constitute an interference within the meaning of Article 10 of the Convention, since the subject matter of the proceedings instituted against him did not relate to his activities as a journalist. In that connection, they emphasised that the applicant had been placed and kept in pre-trial detention on suspicion of attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the Government by force and violence, and committing offences on behalf of an armed terrorist organisation without being a member of it.

200. The Government further submitted that, should the Court nevertheless conclude that there had been an interference, it should in any event find that the interference had been "prescribed by law", had pursued a

legitimate aim and had been "necessary in a democratic society" in order to achieve that aim, and therefore justified.

201. To that end, they noted that the criminal proceedings against the applicant had been provided for in Article 309 § 1, Article 311 § 1 and Article 314 §§ 1 and 2 of the Criminal Code. Furthermore, the impugned interference had pursued several aims for the purposes of the second paragraph of Article 10 of the Convention, namely protection of national security or public safety, and prevention of disorder and crime.

202. As to whether the interference had been necessary in a democratic society, the Government submitted that by making use of the opportunities available in democratic systems, terrorist organisations were able to form numerous ostensibly legal structures in order to achieve their aims. In the Government's view, the criminal investigations into individuals operating within such structures could not be said to concern their professional activities. In that regard, FETÖ/PDY was a complex, *sui generis* terrorist organisation carrying out activities under the guise of lawfulness. Against this background, the FETÖ/PDY media wing was primarily concerned with legitimising the organisation's activities by manipulating public opinion. The Government emphasised that the applicant had been placed in pre-trial detention in the context of an investigation of that nature.

203. The Government further submitted that, in view of the events of 15 July 2016, the call for a military coup had to be regarded as a call for violence and not as being covered by freedom of expression.

3. The third parties

(a) Commissioner for Human Rights

204. Relying mainly on the findings made during his visits to Turkey in April and September 2016, the Commissioner for Human Rights noted firstly that he had repeatedly highlighted the widespread violations of freedom of expression and media freedom in Turkey. He expressed the view that Turkish prosecutors and courts interpreted anti-terrorism legislation in a very broad manner. Many journalists expressing dissent or criticism against the government authorities had been placed in pre-trial detention purely on account of their journalistic activities, without any concrete evidence. The Commissioner for Human Rights thus rejected the Government's assertion that the criminal proceedings instituted against journalists were unconnected to their professional activities, finding that it lacked credibility in that often the only evidence included in investigation files concerning journalists related to their journalistic activities.

205. In addition, the Commissioner for Human Rights submitted that neither the attempted coup nor the dangers represented by terrorist organisations could justify measures entailing severe interference with media freedom, such as the measures he had criticised.

(b) The Special Rapporteur

206. The Special Rapporteur submitted that anti-terrorism legislation had long been used in Turkey against journalists expressing critical opinions about government policies. Nevertheless, since the declaration of the state of emergency, the right to freedom of expression had been weakened even further. Since 15 July 2016, 231 journalists had been arrested and more than 150 remained in prison.

207. The Special Rapporteur stated that any interference would contravene Article 10 of the Convention unless it was "prescribed by law". It was not sufficient for a measure to have a basis in domestic law; regard should also be had to the quality of the law. Accordingly, the persons concerned had to be able to foresee the consequences of the law in their case, and domestic law had to provide certain safeguards against arbitrary interference with freedom of expression.

208. In the Special Rapporteur's submission, the combination of facts surrounding the prosecution of journalists suggested that, under the pretext of combating terrorism, the national authorities were widely and arbitrarily suppressing freedom of expression through prosecutions and detention.

(c) The intervening non-governmental organisations

209. The intervening non-governmental organisations submitted that restrictions on media freedom had become significantly more pronounced and prevalent since the attempted military coup. Stressing the important role played by the media in a democratic society, they stated that journalists were often detained for dealing with matters of public interest. They complained on that account of arbitrary recourse to measures involving the detention of journalists. In their submission, detaining a journalist for expressing opinions that did not entail incitement to terrorist violence amounted to an unjustified interference with the journalist's exercise of the right to freedom of expression.

B. The Court's assessment

1. Admissibility

210. With regard to the Government's objection that the applicant had not exhausted domestic remedies as the criminal proceedings against him were still ongoing in the domestic courts, the Court considers that the objection raises issues that are closely linked to the examination of whether there has been an interference with the applicant's exercise of his right to freedom to of expression, and hence to the examination of the merits of his complaint under Article 10 of the Convention. The Court will therefore analyse this question in the context of its examination on the merits.

211. The Court further notes that the applicant's complaint submitted under this head is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and are not inadmissible. It must therefore be declared admissible.

2. Merits

(a) General principles

212. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 38, Series A no. 313; *Castells v. Spain*, 23 April 1992, § 42, Series A no. 236; *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; and *Jersild v. Denmark*, 23 September 1994, § 37, Series A no. 298).

213. Specifically, freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society (see *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103, and *Castells*, cited above, § 43).

214. Although the press must not overstep certain bounds, in particular in respect of the prevention of disorder and the protection of the reputation of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports of Judgments and Decisions* 1997-I; The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 65, Series A no. 30, and Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216). Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204). Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239, and *Bladet* Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick*, cited

above, § 38; *Thoma v. Luxembourg*, no. 38432/97, §§ 45-46, ECHR 2001-III; and *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V).

215. Furthermore, there is little scope under Article 10 of the Convention for restrictions on political speech or on debate concerning questions of public interest (see *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 60, 8 July 1999, and *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V). Moreover, the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media (see *Castells*, cited above, § 46).

216. Freedom of political debate, which is at the very core of the concept of a democratic society, also includes the free expression by prohibited organisations of their views, provided that these do not contain public incitement to commit terrorist offences, or condone the use of violence. The public has the right to be informed of the different ways of viewing a situation of conflict or tension; in that regard the authorities must, whatever their reservations, allow all parties to express their point of view. In order to assess whether the publication of material emanating from prohibited organisations entails a risk of incitement to violence, consideration must be given, first and foremost, to the content of the material in question and the background against which it is published, for the purposes of the Court's case-law (see, to similar effect, *Gözel and Özer v. Turkey*, nos. 43453/04 and 31098/05, § 56, 6 July 2010).

217. In this connection it is apparent from the Court's case-law that where the views expressed do not comprise incitement to violence – in other words unless they advocate recourse to violent actions or bloody revenge, justify the commission of terrorist offences in pursuit of their supporters' goals or can be interpreted as likely to encourage violence by expressing deep-seated and irrational hatred towards identified persons – Contracting States must not restrict the right of the general public to be informed of them, even on the basis of the aims set out in Article 10 § 2, that is to say the protection of territorial integrity and national security and the prevention of disorder or crime (see *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 60, 8 July 1999; *Gözel and* Özer, cited above, § 56; *Nedim Şener*, cited above, § 116; and *Şık*, cited above, § 105).

(b) Whether there was an interference

218. The Court refers first of all to its case-law to the effect that certain circumstances with a chilling effect on freedom of expression will confer on applicants who have yet to be convicted in a final judgment the status of victims of an interference with the freedom in question (see *Dink v. Turkey*, nos. 2668/07 and 4 others, § 105, 14 September 2010; *Altuğ Taner Akçam v. Turkey,* no. 27520/07, §§ 70-75, 25 October 2011; and *Nedim Şener v. Turkey*, no. 38270/11, § 94, 8 July 2014).

219. In the present case, the Court observes that criminal proceedings were instituted against the applicant on suspicion of attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the Government by force and violence, and of committing offences on behalf of an armed terrorist organisation without being a member of it. On 4 November 2019 the Istanbul 26th Assize Court convicted the applicant of knowingly aiding and abetting a terrorist organisation and sentenced him to a total of ten years and six months' imprisonment under Article 220 § 7 and Article 314 of the Criminal Code. The criminal proceedings are still pending and the applicant was kept in pre-trial detention for approximately seventeen months.

220. In the light of the foregoing, the Court considers that the applicant's initial and continued detention on account of his articles and statements amounted to an interference with the exercise of his freedom of expression (see *Mehmet Hasan Altan*, cited above, §§ 197-200).

221. For the same reasons, the Court dismisses the Government's objection of failure to exhaust domestic remedies in respect of the complaints under Article 10 of the Convention.

(c) Whether the interference was justified

222. The Court recalls that an interference will breach Article 10 of the Convention unless it satisfies the requirements of the second paragraph of that Article. It therefore remains to be determined whether the interference was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 and was "necessary in a democratic society" in order to achieve them.

223. The Court reiterates that the expression "prescribed by law", within the meaning of Article 10 § 2, requires firstly that the interference should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences, and that it should be compatible with the rule of law. A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual

adequate protection against arbitrary interference (see, among many other authorities, *Müller and Others v. Switzerland*, 24 May 1988, § 29, Series A no. 133; *Ezelin v. France*, 26 April 1991, § 45, Series A no. 202; and *Margareta and Roger Andersson v. Sweden*, 25 February 1992, § 75, Series A no. 226-A).

224. In the present case, the applicant's arrest and detention amounted to an interference with his right under Article 10 of the Convention (see paragraph 220 above). The Court has already found that the applicant's detention was not based on reasonable suspicion that he had committed an offence for the purposes of Article 5 § 1 (c) of the Convention, and that there has therefore been a violation of his right to liberty and security under Article 5 § 1 (see paragraph 152 above). It also notes that according to Article 100 of the Code of Criminal Procedure, a person may be placed in pre-trial detention only where there is factual evidence giving rise to strong suspicion that he or she has committed an offence, and considers in this connection that the absence of reasonable suspicion should, *a fortiori*, have implied an absence of strong suspicion when the national authorities were called upon to assess the lawfulness of the applicant's detention. The Court reiterates in this regard that sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and that no deprivation of liberty will be lawful unless it falls within one of those grounds (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 88, 15 December 2016).

225. The Court further observes that the requirements of lawfulness under Articles 5 and 10 of the Convention are aimed in both cases at protecting the individual from arbitrariness. It follows that a detention measure that is not lawful, as long as it constitutes interference with one of the freedoms guaranteed by the Convention, cannot be regarded in principle as a restriction of that freedom prescribed by national law.

226. It follows that the interference with the applicant's rights and freedoms under Article 10 § 1 of the Convention cannot be justified under Article 10 § 2 since it was not prescribed by law (see *Steel and Others v. the United Kingdom*, 23 September 1998, §§ 94 and 110, *Reports* 1998-VII, and, *mutatis mutandis*, *Huseynli and Others v. Azerbaijan*, nos. 67360/11 and 2 others, §§ 98-101, 11 February 2016; *Ragıp Zarakolu v. Turkey*, no. 15064/12, § 79, 15 September 2020). The Court is therefore not called upon to examine whether the interference in question had a legitimate aim and was necessary in a democratic society (see *Selahattin Demirtaş*, cited above, § 282).

227. Accordingly, there has been a violation of Article 10 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 5

228. On the basis of the same facts and relying on Article 18 of the Convention in conjunction with Article 5, the applicant complained that he had been detained for expressing critical opinions about the President and the Government.

Article 18 of the Convention reads as follows:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

A. Admissibility

229. The Court notes that this complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

230. The applicant stated that the Government had attempted to silence him by placing him in pre-trial detention. He stated that he had been identified as a target by pro-government media and the attempted coup had been used a pretext to silence the dissenting journalists.

(b) The Government

231. The Government contested the applicant's argument. They submitted that the applicant had failed to demonstrate convincingly that the authorities' real aim had differed from the one proclaimed. The Government stated that the criminal investigation in question had been conducted by independent judicial authorities and that the applicant had been placed in detention on the basis of the evidence in the case file. In the Government's opinion, the applicant had not furnished any evidence to show that the pre-trial detention in question had been imposed with a hidden intention.

(c) Third party interveners

232. In the view of the Commissioner for Human Rights, it was difficult to see how the use of pre-trial detention against journalists in Turkey could be linked to one of the legitimate aims provided for in the Convention. In the aftermath of the attempted coup many journalists had faced unsubstantiated terrorism-related charges under such provisions, in

connection with the legitimate exercise of their right to freedom of expression. The detention and prosecution of journalists on such grave charges resulted in a strong chilling effect on wholly legitimate journalistic activities and contributed to self-censorship among those who wished to participate in public debate. In the Commissioner's view, numerous instances of judicial actions targeting not only journalists but also human rights defenders, academics and Members of Parliament exercising their right to freedom of expression indicated that criminal laws and procedures were currently being used by the judiciary to silence dissenting voices.

233. Moreover, the intervening non-governmental organisations argued that the arbitrary and unwarranted use of the criminal law to target journalists and other media for the ulterior purpose of punishing and preventing dissemination of critical opinions amounted to a violation of Article 18 of the Convention.

2. The Court's assessment

234. The general principles concerning the interpretation and application of Article 18 of the Convention were established in the case of *Merabishvili* (cited above, §§ 287-317) and were subsequently confirmed in *Navalnyy v. Russia* ([GC], nos. 29580/12 and 4 others, §§ 164-65, 15 November 2018). In particular, the Court reiterates that Article 18 of the Convention does not serve merely to clarify the scope of the restriction clauses (such as, for example, the second sentence of Article 5 § 1 and the second paragraphs of Articles 8 to 11, which permit restrictions to those rights and freedoms). It also expressly prohibits the High Contracting Parties from restricting the rights and freedoms enshrined in the Convention for purposes not prescribed by the Convention itself, and to this extent it is autonomous (see *Merabishvili*, cited above, §§ 287-88, and *Selahhatin Demirtaş*, cited above, §§ 421-422). Indeed, as the Court pointed out in *Merabishvili* (ibid., § 291), the mere fact that a restriction of a Convention right or freedom does not meet all the requirements of the clause that permits it does not necessarily raise an issue under Article 18. Separate examination of a complaint under that Article is only warranted if the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case. There is still a need to examine the question whether – in the absence of a legitimate purpose – there was an identifiable ulterior one (see *Navalnyy*, cited above, § 166). For the same reason, a finding that the restriction pursues a purpose prescribed by the Convention does not necessarily rule out a breach of Article 18 either. Holding otherwise would strip that provision of its autonomous character (see *Merabishvili*, cited above, § 304).

235. A right or freedom is sometimes restricted solely for a purpose which is not prescribed by the Convention. But it is equally possible that a restriction is applied both for an ulterior purpose and a purpose prescribed

by the Convention; in other words, that it pursues a plurality of purposes. The question in such situations is whether the prescribed purpose invariably expunges the ulterior one, whether the mere presence of an ulterior purpose contravenes Article 18, or whether there is some intermediary answer (ibid., § 292).

236. Which purpose is predominant in a given case depends on all the circumstances. In assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law. In continuing situations, it cannot be excluded that the assessment of which purpose was predominant may vary over time (ibid., §§ 307-08).

237. The Court applies its usual approach to proof when dealing with complaints under Article 18 of the Convention (ibid., § 310). The first aspect of that approach is that, as a general rule, the burden of proof is not borne by one or the other party, because the Court examines all material before it irrespective of its origin, and because it can, if necessary, obtain material of its own motion. The second aspect of the Court's approach is that the standard of proof before it is "beyond reasonable doubt". That standard, however, is not co-extensive with that of the national legal systems which employ it. First, such proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. Secondly, the level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake. The third aspect of the Court's approach is that the Court is free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it. There is no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18 of the Convention or to apply a special standard of proof to such allegations. Circumstantial evidence in this context means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts. Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts, are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court (ibid., §§ 311 and 314-17).

238. The Court observes that the applicant's main complaint was that he had been targeted because of his strong criticisms against the Government and his pre-trial detention had a hidden agenda, namely to silence him. In this connection, it further recalls that the measures in question and those taken in the context of the criminal proceedings brought against other opposition journalists in Turkey were also criticised by the third party interveners. However, as the political process and adjudicative process are

fundamentally different, the Court must base its decision on "evidence in the legal sense", in accordance with the criteria it laid down in *Merabishvili* (cited above, §§ 275, 310-17) and on its own assessment of the specific relevant facts (see *Khodorkovskiy*, cited above, § 259).

239. In the present case, the Court has concluded above that the charges against the applicant were not based on a "reasonable suspicion" within the meaning of Article 5 § 1 (c) of the Convention. It has found in particular that the measure taken against the applicant was not justified by reasonable suspicion based on an objective assessment of the alleged acts; instead, it was essentially based on acts which could not be considered as behaviour criminalised under domestic law but were related to the exercise of Convention rights, and in particular the right to freedom of expression.

240. Nevertheless, whilst the Government failed to substantiate their argument that the measure taken against the applicant was justified by reasonable suspicion, leading the Court to find a violation of Articles 5 § 1 and Article 10 of the Convention, this would not by itself be sufficient to conclude that Article 18 has also been violated (see *Navalnyy*, cited above, § 166). There is, however, still a need to examine the question whether – in the absence of a legitimate purpose – there was an identifiable ulterior one.

241. The Court observes that the stated aim of the measures imposed on the applicant was to carry out an investigation to establish whether he had indeed committed the offences of which he was accused. In this connection, the Court notes that the applicant was placed in pre-trial detention shortly after the attempted coup, which had caused serious disruption and considerable loss of life. At the material time, the authorities were investigating the infiltration of all public institutions and organisations, as well as the media network that had been established by FETÖ/PDY to manipulate public perception and legitimise a potential coup. The applicant was subsequently placed in pre-trial detention and prosecuted, together with sixteen other accused persons, for attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the Government by force and violence, or to prevent them from discharging their duties, and of committing offences on behalf of a terrorist organisation without being a member of it. Given the serious disruption and the considerable loss of life resulting from these events, it was perfectly legitimate for the domestic authorities to carry out investigations following the attempted coup. In addition, it must not be overlooked that the attempted coup led to a state of emergency being declared throughout the country.

242. Moreover, there appears to be nothing untoward in the timing of the applicant's detention, having regard to the fact that he was arrested shortly after the attempted coup (see, conversely, *Kavala cited above*, §§ 225-28). Most of the acts of which the applicant was accused in the investigation opened at the end of 2016 had occurred shortly before the attempted coup of 15 July 2016. It cannot therefore be said that an excessive length of time

elapsed between his alleged acts and the opening of the criminal investigation in the course of which the applicant was placed in pre-trial detention. The Court also notes that the case file does not contain any speech or interference of any high-ranking public official which would suggest an ulterior purpose for the detention of the applicant. It further recalls in this connection that not all expressions of dissatisfaction amount in themselves to evidence of an ulterior purpose behind a judicial decision.

243. At this point, the Court reiterates that the mere fact that the applicant has been prosecuted or placed in pre-trial detention does not automatically indicate that the aim pursued by such measures was to silence him (see *Merabishvili*, cited above, §§ 323-25). In the Court's view, the authorities' acts do not substantiate any other interpretation of events than that the predominant purpose of keeping the applicant in detention was to ensure the smooth conduct of the criminal investigation.

244. That being said, the Court accepts that the applicant's detention based on such serious charges had a chilling effect on the applicant's willingness to express his views in public and was liable to create a climate of self-censorship affecting him and all journalists reporting and commenting on the running of the government and on various political issues of the day. Nevertheless, this finding is likewise insufficient by itself to conclude that there has been a violation of Article 18.

245. The Court further notes that the applicant was able to put forward his allegations before the domestic authorities and that his pre-trial detention was examined on several occasions by the national courts, and in particular by the Constitutional Court. In this connection, it notes that the Constitutional Court subjected the applicant's complaints under Articles 5 and 10 of the Convention to thorough scrutiny, and delivered its judgment in the case following in-depth discussion, as demonstrated by the dissenting opinions (see paragraph 67 above).

246. It follows that the elements relied on by the applicant in support of a violation of Article 18 of the Convention, taken separately or in combination with each other, do not form a sufficiently homogeneous whole for the Court to find that the applicant's detention pursued a purpose not prescribed by the Convention and representing a fundamental aspect of the case (ibid., § 256).

247. In the light of the foregoing, the Court holds that it has not been established beyond reasonable doubt that the applicant's pre-trial detention was ordered for a purpose not prescribed by the Convention within the meaning of Article 18.

248. Accordingly, there has been no violation of Article 18 of the Convention in the present case.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

249. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

250. In respect of non-pecuniary damage, the applicant claimed 1,000 euros (EUR) for each day he had spent in detention.

251. The Government submitted that this claim was unfounded and that the amount claimed was excessive.

252. The Court considers that the violation of the Convention indisputably caused the applicant substantial prejudice. Accordingly, making its own assessment on an equitable basis, the Court finds it appropriate to award the applicant EUR 16,000 in respect of non-pecuniary damage.

253. The applicant's detention is now covered by Article 5 § 1 (a) of the Convention. Having regard to this particular circumstance, the Court considers that there is no basis for indicating an individual measure to ensure the termination of the applicant's pre-trial detention at the earliest possible date (see *Mehmet Hasan Altan*, cited above, § 220).

B. Costs and expenses

254. The applicant did not seek the reimbursement of any costs and expenses incurred before the Court and/or before the domestic courts. That being so, the Court considers that no sum is to be awarded on that account to the applicant.

C. Default interest

255. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Joins to the merits* unanimously, the preliminary objection of failure to exhaust domestic remedies in respect of the complaint under Article 10 of the Convention and dismisses it;

2. *Declares* the application admissible unanimously, as regards the complaints under Article 5 § 1, Article 5 § 4 (lack of access to the investigation file and lack of speedy judicial review by the Constitutional Court), Article 5 § 5 (right to compensation for unlawful detention), Article 10 and Article 18 of the Convention;

3. *Declares* inadmissible unanimously, the complaint under Article 5 § 3 (lawfulness of detention in police custody);

4. *Holds*, by six votes to one, that there has been a violation of Article 5 § 1 of the Convention;

5. *Holds,* unanimously, that there has been a violation of Article 5 § 4 of the Convention on account of the lack of access to the investigation file;

6. *Holds*, unanimously, that there has been no violation of Article 5 § 4 of the Convention on account of the lack of a speedy judicial review by the Constitutional Court;

7. *Holds*, unanimously, that there has been a violation of Article 5 § 5 of the Convention;

8. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention;

9. *Holds*, by six votes to one, that there has been no violation of Article 18 of the Convention;

10. *Holds*, by six votes to one,
    (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 16,000 (sixteen thousand euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;
    (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

11. *Dismisses*, six votes to one, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 April 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Jon Fridrik Kjølbro
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Partly dissenting opinion of Judge Kūris;
(b) Dissenting opinion of Judge Yüksel.

J.F.K.
H.B.

PARTLY DISSENTING OPINION OF JUDGE KŪRIS

1. I respectfully disagree with the majority's conclusion regarding the applicant's complaint under Article 18 in conjunction with Article 5.

2. I have stated my views on the persecution of Turkish journalists – such as in the present case, which is one of a much greater number – in my separate opinion annexed to the judgment in the recent case of *Sabuncu and Others v. Turkey* (no. 23199/17, 10 November 2020). At the time of the writing of this opinion that judgment is not final, because a request for the referral of the case to the Grand Chamber is pending, as well as of the case of *Şık v. Turkey (no. 2)* (no. 36493/17), in which the judgment was delivered on 24 November 2020.

3. In the above-mentioned opinion I wrote about a "system", a "synergy" and a "policy" behind the violations established by the Court (see, in particular, paragraphs 26 and 36 of the opinion). That system, synergy and policy were not left unnoticed by the third-party interveners in *Sabuncu and Others* (cited above). Neither did the latter turn a blind eye to these matters in the present case. The case file contains a document entitled "Third party intervention by the Council of Europe Commissioner for Human Rights". The same document also featured in the case file in *Sabuncu and Others*, *Şık* (also cited above) and several other cases, some already examined by the Court and some still pending examination. (In order not to make this opinion too lengthy, I focus here on only one third-party intervener, but there have been more of them, and what is said about this third-party intervener's submissions is also applicable, *mutatis mutandis*, to their submissions.) By submitting to the Court that one single document the Commissioner intervened in not one but a series of *similar*, *related*, *repetitive* cases – as many as ten. That is why this document is noteworthy in its own right. Indeed, where there is a system, a synergy and a policy behind the measures taken by the State against representatives of the media in what, as is discovered upon examination, appears to be a violation of various provisions of the Convention, separate submissions in every single case would be repetitive. For these are not only individual cases that the Court has been called upon to deal with. By examining individual cases it shows how it deals with the broader problem.

4. No doubt courts must and, as a rule, do examine each and every case on its own merits, individually. However, this does not absolve the examining court, not excluding the Strasbourg Court, from considering the whole picture, let alone from at least trying to look at it or recognising its relevance – at least when that picture has been presented to it by an informed third-party intervener, especially one who usually would not intervene in trivial cases.

Alas, sometimes that general picture is ignored – for whatever reasons.

5. When that general picture is deemed irrelevant, the results are like those presented in the table below. The first column (C) indicates the cases in which the Council of Europe's Commissioner for Human Rights intervened by means of the above-mentioned submissions, as well as the relevant judgments (six of the cases have already been examined and judgments have been adopted). The cases are listed, without prejudice, in the same order as in the said submissions. The second column (V) indicates the violations of various provisions of the Convention found by the Court. Please bear in mind that in some of the cases already examined the Court has found that there was "no need" to examine certain complaints. The third column (A18) presents the Court's conclusion with regard to the applicants' complaints under Article 18, as formulated in the operative parts of the judgments already adopted.

C	*V*	*A18*
Ahmet Hüsrev Altan v. Turkey (no. 13252/17) – the present judgment	Article 5 § 1, Article 5 § 5, Article 10	No violation
Şahin Alpay v. Turkey (no. 16538/17) – judgment of 20 March 2018	Article 5 § 1, Article 10	No need to examine separately
Atilla Taş v. Turkey (no. 72/17) – judgment of 19 January 2021	Article 5 § 1, Article 10	No need to examine
Bulaç v. Turkey (no. 25939/17)	*Not yet examined*	
Ilıcak v. Turkey (no. 1210/17)	*Not yet examined*	
Mehmet Hasan Altan v. Turkey (no. 13237/17) – judgment of 20 March 2018	Article 5 § 1, Article 10	No need to examine separately
Murat Aksoy v. Turkey (no. 80/17)	*Not yet examined*	
Sabuncu and Others v. Turkey (no. 23199/17) – judgment of 10 November 2020 (not final)	Article 5 § 1, Article 10	No violation
Şık v. Turkey (no. 2) (no. 36493/17) – judgment of 24 November 2020 (not final)	Article 5 § 1, Article 10	No violation
Yücel v. Turkey (no. 27684/17)	*Not yet examined*	

6. This table requires little – or rather no – comment. I believe that it speaks for itself. It indicates the *patterns* and the *tendencies* – both the *pattern* and the *tendency* of the respondent State's stand *vis-à-vis* the independent media and the *pattern* and the *tendency* on the part of the Court in dealing with the respective complaints. I am far from sure that these are patterns and tendencies which would enjoy the same persuasiveness in the world outside the judicial ivory tower as within its halls.

7. In paragraph 243 of the judgment the majority conclude that "the mere fact that the applicant has been prosecuted or placed in pre-trial

detention does not automatically indicate that the aim pursued by such measures was to silence him" and subscribe to the view that "the authorities' acts do not substantiate any other interpretation of events than that the predominant purpose of keeping the applicant in detention was to ensure the smooth conduct of the criminal investigation".

This finding comes a bit ahead of schedule. At that stage, the examination of the applicant's Article 18 complaints has not been completed yet. The piecemeal methodology employed here would allow almost any "mere fact" to be interpreted in an authority-friendly (= applicant-unfriendly) way.

8. In the next paragraph (paragraph 244) the majority accept that "the applicant's detention based on such serious charges had a *chilling effect* on the applicant's willingness to express his views in public and was liable *to create a climate* of self-censorship affecting *him and all journalists* reporting and commenting *on the running of the government and on various political issues of the day*" (emphasis added). Yet this is followed by the consideration that "this finding is likewise insufficient by itself to conclude that there has been a violation of Article 18".

Truth to tell, in Article 18 cases almost everything looks "insufficient by itself". What is needed is the whole picture: the facts in their combination and, no less importantly, in their context.

Perhaps the above-cited finding could convince some, had the chilling effect and the media-unfriendly climate acknowledged by the Court been the result of the persecution of one journalist. Then the chilling effect and the climate created by the impugned measures could be downgraded to something incidental. But they are what the third-party interveners assert happened in a series of cases. Again: system, synergy and policy. One who did not want to see all that would not acknowledge it. But the reality does not disappear for the simple reason that it is not acknowledged.

9. Further, in paragraph 246, it is stated that "the elements relied on by the applicant in support of a violation of Article 18 ..., taken separately or in combination with each other, do not form a sufficiently homogeneous whole for the Court to find that the applicant's detention pursued a purpose not prescribed by the Convention and representing a fundamental aspect of the case".

The finding that the said "elements ... do not form a sufficiently homogeneous whole" could be reached only if those elements had been examined not only "separately" or in some kind of "combination with each other", but *separately* from their context and *not in combination* with anything that the Court has been reluctant to see as part of any uncomfortable combination – irrespective of the fact that the third-party interveners have demonstrated that what the facts of as many as ten cases constitute is a very convincing combination.

10. Here comes the final conclusion of the majority, which is stated in paragraph 247: "it has not been established beyond reasonable doubt that the applicant's pre-trial detention was ordered for a purpose not prescribed by the Convention within the meaning of Article 18".

That is correct: it has *not* been established by the Court. The question is: *could* it have been established?

I believe that it could, had the context been considered. And had the context been considered, the authorities' ulterior purpose *should* have been established.

11. After all, the Court has itself concluded that the charges against the applicant were not based on a "reasonable suspicion" within the meaning of Article 5 § 1 (c). Moreover, it has found that "the measure taken against the applicant ... was essentially based on acts which ... were related to the exercise of Convention rights, and in particular the right to freedom of expression" (see paragraph 239 of the judgment). And what is still more, "the Government failed to substantiate their argument that the measure taken against the applicant was justified by reasonable suspicion" (paragraph 240).

This begs the question: if the impugned measure was not based on any reasonable suspicion, *what was it based on*? The Government have not provided any plausible explanation. The Court thus had to conclude that: (a) either there was no reason behind the measure; or (b) there was an ulterior purpose, but it was not possible for the Court to identify it. The first option can be dismissed without much hesitation, because it is hardly conceivable that the machinery of the State (not only some erring individual official but various institutions) would resort to such measures without any reason. What we are left with is the second option: the ulterior purpose was there, but it was not established.

It is perfectly understandable why the Government failed to substantiate the impugned measure: it was because it could be substantiated only by admitting something which was ulterior to the Convention. The answer is in the very name of what Article 18 is all about: the *hidden agenda*.

Very well hidden, as it appears – for it has been impossible to ascertain that it indeed existed.

I believe that the ascertainment of its existence could have been possible and even easy. By way of comparison, for the third-party interveners, such as the Council of Europe's Commissioner for Human Rights, the establishment of that hidden agenda presented no great difficulty.

The difference is that the Commissioner looked at the whole picture, that is to say, at this case in its context.

12. The present case was communicated to the respondent Government together with the case of *Mehmet Hasan Altan* (cited above), the sixth case in the Human Rights Commissioner's list (see the joint communication report of 13 June 2017). Given the similar factual and legal background of

the two cases, their joint communication made sense. I think that the joint communication of all ten cases in the Commissioner's list would have made even greater sense. The unusual (but by all means commendable) celerity of the communication of these cases was also self-explanatory. But all this is by the by. There is another point that I want to make.

13. In *Mehmet Hasan Altan* the Court found that there was "no need to examine separately" the applicant's complaint under Article 18. In the present case, it has examined the complaint under that Article but has found no violation.

I do not know which is better, or rather, which is worse. Be that as it may, carrying out no examination is an omission, regrettable as it is, but in the end, not much more than that. It leaves the question regarding the authorities' hidden agenda open, unanswered.

In contrast to that, the explicit finding of no violation of Article 18 without an examination of the applicant's complaints under that Article *in their context* does answer that question. It answers it in the negative. By doing so, the Court's judgment (even if unwillingly) justifies the repression.

14. Here I need to make a side remark. At least one of the applications listed in the above table was lodged with the Court by an applicant who already had some experience in winning a case in Strasbourg against the State which had attempted to silence him. Namely, is Mr Şık not the same media figure who won his case in 2014? See *Şık v. Turkey* (no. 53413/11, 8 July 2014) – violations of Article 5 § 3, Article 5 § 4 and Article 10. It is hardly a coincidence that that case somehow related to Mr Şık's rights under Article 10.

When histories like these repeat themselves, they speak of something. Of a *pattern* and a *tendency*, for instance.

15. In paragraph 237 of the judgment the majority, referring to the Grand Chamber's landmark judgment in *Merabishvili v. Georgia* ([GC], no. 72508/13, 28 November 2017), very rightly state (emphasis added):

> "The Court applies its usual approach to proof when dealing with complaints under Article 18 of the Convention ... The first aspect of that approach is that, as a general rule, the burden of proof is not borne by one or the other party, because *the Court examines all material before it* irrespective of its origin, and because it can, *if necessary, obtain material of its own motion*. The second aspect of the Court's approach is that the standard of proof before it is 'beyond reasonable doubt'. That standard, however, is not co-extensive with that of the national legal systems which employ it. First, *such proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact*. Secondly, the level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake. The third aspect of the Court's approach is that the Court is free to assess not only the admissibility and relevance but also the probative value of each item of evidence before it. There is no reason for the Court to restrict itself to direct proof in relation to complaints under Article 18 of the Convention or to apply a special standard of proof to such allegations. *Circumstantial evidence in this context means*

information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts. Reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts, are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court ..."

16. In the present case the employment of this standard has not gone beyond mere quotation.

For clearly *not all* material before the Court has been examined.

Sufficiently strong, clear and concordant inferences about the primary facts have not been drawn.

Reports by international observers have been put aside.

Given all that, it would have been naïve to expect that the Court would attempt to *obtain material of its own motion*.

À propos, that material is in abundance.

17. If the Court's methodology as developed in *Merabishvili* (cited above) allows and even requires it to look into "sequences of events which can form the basis for inferences about the primary facts", here they are, the events in their sequence – in the table provided above. It presented no difficulty for the third-party interveners to draw inferences from this sequence about the primary facts. However, this appears to remain an insurmountable difficulty for judicial reasoning.

18. I have no explanation as to why the *pattern* and *tendency* in the determination of Article 18 complaints against Turkey (and, in my assessment, one other State) have come into being. It is only my impression that they are going to stay with the Court for a while. Perhaps too long a while, until the Court at last explicitly acknowledges the reality of what is going on.

For while the Court does not acknowledge that reality, its pattern and tendency in dealing with Article 18 complaints will only soothe and (even if indirectly and unwillingly) reinforce the pattern and the tendency of a certain type of conduct on the part of the authorities with regard to the independent media – not only to an isolated applicant whose case is examined "separately", but to independent media as such, *as an institution of civil society*. And that will be to the detriment of the values enshrined in the Convention.

19. When examining cases and rendering judgments, courts should confine themselves to the law. But the law is not an end in itself. It is of value only in so far as it is applied to reality – and this depends on how adequately it is applied to the latter. This is especially so as regards judge-made law. If courts make law on the basis of the application of legal clauses to such a reality, one important part of which has been not taken into due consideration, most likely the resulting judge-made law will turn out to be flawed.

So, the facts matter – also for the quality of judge-made law. The facts are persistent. The law is unable to alter them.

Rather, as I want to believe, at some point the facts, such as those presented to the Court by the third-party interveners in this case (as well as in the other nine cases mentioned in the above table), will impel the Court to change its pattern of dealing with Article 18 complaints (not only in Turkish cases), to reverse the tendency prevailing today and to alter its case-law so that the Court's pronouncements on the authorities' hidden agenda are not at odds with the reality.

20. Also, it is not true that judges are preoccupied only by law. Sometimes they listen to music. And sometimes they may even find certain lines of a song worthy of being cited in their opinions, especially if, paradoxically, these lines, the product of sheer artistic creativity, are closer to reality than the jurisprudence that the courts produce – although it is the lawyers and not the artists who are supposed to deal with real facts. Some judges may even quote their favourite songwriters in their opinions. And some may even do this more than once. For example, I have quoted Bob Dylan twice in my opinions (some might say that even that is too much). But here is one more quote – from Dylan's best-known song ("Blowin' in the Wind", from *The Freewheelin' Bob Dylan*, 1963, Columbia Records), which I see as striking at the very heart of the Court's (not only) Turkish Article 18 case-law. Just as everyone knows (I still want to hope that even courts know) what *pattern* and *tendency* in treating civil society in general and independent media in particular have been consolidated in the last few years in some countries, perhaps everyone also knows this song, including these lines:

> "Yes, and how many times can a man turn his head
> And pretend that he just doesn't see?"

Is the addressee of Dylan's question only some indeterminate "man"? I think not. His question goes equally to institutions. Courts among them, domestic and international alike.

DISSENTING OPINION OF JUDGE YÜKSEL

1. For the reasons set out below, I respectfully disagree with the conclusions reached by the majority under Articles 5 § 1 (c) and 10 of the Convention. Consequently, I voted against finding a violation of these provisions in the present case.

2. Before explaining the reasons for my dissent, I should firstly recall the unique circumstances at the time of the applicant's arrest on 10 September 2016, that is, the period immediately after the attempted coup of 15 July 2016. I refer in this respect to the text of the judgment, where detailed explanations are provided regarding the structure of FETÖ/PDY and the events surrounding the attempted coup (see paragraphs 12-17 and 88).

Article 5 § 1 of the Convention

3. At the outset, I would like to point out that facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge (for details regarding case-law, see paragraph 128 of the judgment). The case-law of the Court does not define what is to be regarded as "reasonable" and states that it will depend upon all the relevant circumstances. Thus, an assessment of whether there existed "reasonable suspicion" justifying the applicant's detention is very delicate. I should like to start by noting that the notion of "reasonable suspicion" has been defined by the Court as "the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence" (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182). In this regard, the fact that a suspicion is held in good faith is insufficient (see *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 116, 17 March 2016). Furthermore, the existence of reasonable suspicion requires that the facts relied on can reasonably be considered criminal behaviour under domestic law. In the present case, as is pointed out in paragraph 130 of the judgment, the applicant was suspected of attempting to overthrow the government or to prevent it from discharging its duties, and of being a member of a terrorist organisation or of committing an offence on behalf of an illegal organisation without being a member. In cases concerning the investigation and prosecution of serious offences, the Court affords some leeway to the national authorities. Yet this leeway is not unlimited, in particular in cases where the Court is called upon to examine a complaint under Article 5 of the Convention. Even the exigencies of dealing with terrorist crimes cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 § 1 (c) is impaired (see *Fox, Campbell and Hartley*, cited above, § 32; *Murray v. the United Kingdom*,

28 October 1994, § 51, Series A no. 300-A; and *O'Hara v. the United Kingdom*, no. 37555/97, § 35, ECHR 2001-X).

4. In the present case, in order to verify whether there existed sufficient objective elements that could lead an objective observer to reasonably believe that the applicant might have committed the acts alleged by the prosecuting authorities, the Court relies on three groups of relevant documents, namely the decisions relating to the applicant's pre-trial detention, the bill of indictment and the Constitutional Court's judgment. It then concludes in paragraph 137 that the logic applied by the authorities responsible for the pre-trial detention, equating these activities to the offences with which the applicant was charged, could not be regarded as an acceptable assessment of the facts.

5. While I agree with the taking into consideration of the three groups of relevant documents, I would point out that according to the Court's case-law, "it is not normally for the Court to substitute its own assessment of the facts for that of the domestic courts, which are better placed to assess the evidence adduced before them" (see *Mergen and Others v. Turkey*, nos. 44062/09 and 4 others, § 48, 31 May 2016, and *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 126, 20 March 2018). I therefore disagree with the conclusions of the majority for the following reasons.

6. Firstly, as regards the wording of the relevant decisions relating to the applicant's initial and continued detention, in my opinion the decisions of the domestic courts were adequately reasoned and provided sufficient explanations as to why there had been an evidentiary link to suspect the applicant of having participated in the crimes allegedly committed by the illegal organisation by using the media to influence public opinion in support of it and why detention was a proportionate measure. Secondly, the bill of indictment included new items of evidence strengthening the suspicions against the applicant and demonstrated the links between the acts allegedly committed by him and the evidence submitted in support of the accusations against him. Thirdly, the decision of the Constitutional Court studied each item of evidence (both the initial evidence and the subsequent evidence added in the indictment) before concluding that, having regard to the conditions at the material time, the domestic authorities had not acted arbitrarily and their decisions had not been unsubstantiated in holding that there had been a strong suspicion to believe that the applicant had committed the offences.

7. The explanations above indicate clearly that the decisions of the domestic courts ordering and extending the applicant's detention, the indictment and the decision of the Constitutional Court contained a detailed assessment of the specific facts of the case which reasonably demonstrated that the detention had been necessary for the normal progress of the case and that other preventive measures would not have achieved this goal. Consequently, in my opinion there was sufficient information in the case

file to satisfy an objective observer that the applicant might have committed at least some of the offences for which he had been prosecuted and that as a result, the domestic authorities' finding that there was reasonable suspicion that the applicant had committed the alleged offences appears to have been reasonable in the light of a contextual analysis of the case.

8. In the judgment, the Court, following the method of the domestic courts, further examines whether the acts of the applicant could be regarded as capable of grounding a "reasonable suspicion" that he had committed the alleged criminal offences (see paragraphs 139-145 of the judgment).

9. In that connection, the first group of evidence examined by the Court relates to the involvement of the applicant in the "Balyoz" case, and his position as the editor-in-chief of the *Taraf* newspaper. The second group concerns the three articles written by the applicant, entitled "Absolute fear", "Crushing through", and "Montezuma"; and finally, the third group relates to the applicant's remarks on the television programme that aired on 15 July 2016 on Can Erzincan TV (see paragraph 139 of the judgment). Reading as a whole and in the context at the material time, it is highly probable that these elements could have raised a reasonable suspicion on the part of the judges who examined the applicant's detention, specifically bearing in mind the timing of the events in question and the undeniable experience of the national judges in relation to the history and former coups that had taken place in Turkey. Moreover, the judgment also takes note of the new items of evidence that were added to the investigation file with the filing of the indictment (see paragraph 146 of the judgment). These included in particular statements of two witnesses who had confirmed the applicant's alleged links with the leaders of the said illegal organisation, and the transcript of a ByLock conversation where the applicant's name had been mentioned amongst those of high-level people in FETÖ/PDY.

10. I recall that reasonable suspicion must persist throughout a person's detention pending trial. Consequently, even if the applicant was not subsequently found guilty of the offences with which he was charged in September 2016 (attempting to overthrow the government and to prevent it from discharging its duties, and being a member of a terrorist organisation), this does not in itself lead to a violation of Article 5 of the Convention (see *Korkmaz and Others v. Turkey*, no. 35979/97, § 26, 21 March 2006). In the judgment, the existence of reasonable suspicion was addressed as a whole, without making a distinction between the initial and subsequent classification of criminal charges. While I may have some doubts as to whether the initial evidence could be considered as reaching the minimum level of reasonableness in relation to the offences of attempting to overthrow the government or to prevent it from discharging its duties and of being a member of a terrorist organisation, without a distinction between the initial and subsequent charges, I am unable to agree with the majority's assessment on the applicant's pre-trial detention. I find it important to note

that after the filing of the public prosecutor's indictment, new items of evidence were included in the file which supported and even strengthened the reasonable suspicion that the applicant had committed the offence with which he was charged, namely committing offences on behalf of a terrorist organisation without being a member of it. These new items of evidence, which indicate that the applicant was in contact with senior members of the said illegal organisation (see paragraph 46 of the judgment), taken together with the initial elements, could have raised a reasonable suspicion on the part of the authorities that the applicant had committed offences by using the media to create a positive perception in preparation for the eventual attempted coup of which he had had prior knowledge (see paragraphs 29-37 of the judgment).

11. I therefore consider that the applicant can be said to have been arrested and detained on "reasonable suspicion" of having committed a criminal offence, within the meaning of sub-paragraph (c) of Article 5 § 1 (see *Korkmaz and Others*, cited above, § 26, and *Süleyman Erdem v. Turkey*, no. 49574/99, § 37, 19 September 2006) and thus I voted against finding a violation of Article 5 § 1.

Article 10 of the Convention

12. As regards Article 10 of the Convention, the majority considered that the interference with the applicant's rights and freedoms under Article 10 of the Convention could not be justified under the second paragraph of that provision, on the ground that it was not "prescribed by law". In reaching this conclusion, the majority merely relied on the finding of a violation of Article 5 § 1 of the Convention, without carrying out a further examination under Article 10 (see paragraphs 222-227 of the judgment). I have already expressed my disagreement with this approach in my concurring opinions in the cases of *Ragıp Zarakolu v. Turkey* (no. 15064/12, 15 September 2020), *Sabuncu and Others v. Turkey* (no. 23199/17, 10 November 2020) and *Şık v. Turkey (no. 2)*, no. 36493/17, 24 November 2020). In my view, the Chamber should have continued its examination and analysed whether the interference with the applicant's freedom of expression could be regarded as necessary in a democratic society to maintain national security or public safety. Having said that, in any event, in the present case, I consider that there has been no violation of Article 10 for the following reasons.

13. As I have explained above, I consider that the applicant can be said to have been arrested and detained on "reasonable suspicion" of having committed the offences. Consequently, the applicant's detention was lawful as it was prescribed by law. As to the legitimacy of the aims pursued and the necessity of the interference, the criminal proceedings were initiated against the applicant for the purposes of the second paragraph of Article 10,

namely protection of national security or public safety, and prevention of disorder and crime. Thus, the interference pursued a legitimate aim (see *Mehmet Hasan Altan*, cited above, § 206).

14. In determining the necessity of the interference, the assessment of the case should be carried out by taking all elements into consideration as a whole, namely the three articles written by the applicant, his remarks on the television programme, and his role as the editor-in-chief of the *Taraf* newspaper. The background against which these remarks were made should also be borne in mind.

15. Regarding the three articles written by the applicant shortly before the attempted coup, the domestic courts considered that he had written them to manipulate public perception in favour of the illegal organisation in the run-up to the eventual military coup. It was also noted that certain statements in his articles bore striking similarities with the incidents that had occurred on the night of the attempted coup (see paragraphs 31, 46 and 56-58 of the judgment). Secondly, regarding the talk show that had aired on 14 July 2016, the domestic courts considered that the applicant had once again been justifying an eventual military coup, by stating that whatever the developments that had led to the previous military coups in Turkey, the President was taking the same decisions and paving the way for yet another coup (see paragraphs 31 and 56 of the judgment). Thirdly, the domestic courts found that the applicant, in his capacity as the editor-in-chief of the *Taraf* newspaper, had determined the newspaper's editorial policy by engaging in acts which had caused several members of the army to be discharged, and paved the way for members of the illegal organisation to obtain promotions and to become more influential within the armed forces (see paragraphs 29 and 56 of the judgment).

16. While I agree with the vital role played by the press in a democratic society, I stress once again that journalists cannot, in principle, be released from their duty to obey the criminal law on the basis that Article 10 affords them protection. Indeed, Article 2 of Article 10 defines the boundaries of the exercise of freedom of expression (see, *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I). In that connection, I would refer to the extensive case-law of the Court regarding the importance of responsible journalism (see *Jersild v. Denmark*, 23 September 1994, Series A no. 298; *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, ECHR 1999-IV; *Sürek v. Turkey (no. 2)* [GC], no. 24122/94, 8 July 1999; *Sürek v. Turkey (no. 3)* [GC], no. 24735/94, 8 July 1999; and *Saygılı and Falakaoğlu v. Turkey*, no. 22147/02 and 24972/03, 23 January 2007). I note in particular that in *Pentikäinen v. Finland* ([GC], no. 11882/10, § 90, ECHR 2015), the Court pointed out that the concept of responsible journalism also embraced the lawfulness of the conduct of a journalist, and that the fact that a journalist had breached the law was a relevant, albeit not decisive, consideration when determining whether he or she had acted responsibly. These considerations

play a particularly important role nowadays, given the influence wielded by the media in contemporary society; not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed (see *Stoll v. Switzerland* [GC], no. 69698/01, § 104, ECHR 2007-V).

17. Turning back to the facts of the present case, I repeat that the statements of the applicant, who is a well-known journalist with considerable influence, cannot be looked at in isolation. Moreover, I also underline the fact that the applicant was not only acting in his capacity as a journalist, but he was also the editor-in-chief of the daily newspaper *Taraf* and he was responsible for determining the newspaper's editorial stance. The statements were of significance, particularly in the circumstances of the present case, as the applicant must have realised. Specifically, the articles coincided with the attempted coup and could have been regarded by the authorities as likely to manipulate a positive reaction among the public, at a time when the authorities needed to be alert and to identify all the legal entities allegedly infiltrated by the illegal organisation and to find out the connections of the individuals concerned. Bearing in mind the specific and unique circumstances prevailing at the time of the applicant's detention, that is, shortly after the attempted coup, these remarks and the similarities between the metaphors used and the incidents that actually took place during the attempted coup could have given rise to a reasonable suspicion on the part of the domestic courts that the applicant had had prior information and had acted with the intention to manipulate public opinion. Furthermore, the reasons put forward by the domestic courts were relevant and sufficient for the purposes of Article 10 § 2.

18. Having regard to all the above factors and to the margin of appreciation which the authorities have in such cases, and without prejudice to the outcome of the criminal proceedings pending before the domestic courts, I consider that the opening of the criminal proceedings against the applicant could be seen as justified and that the interference with the applicant's exercise of his right to freedom of expression could reasonably be regarded by the national authorities as necessary in a democratic society (see *Zana v. Turkey*, 25 November 1997, §§ 58-62, *Reports of Judgments and Decisions* 1997-VII).