EHRC 2018/131

Noodtoestand, Recht op vrijheid en veiligheid, Vrijheid van meningsuiting, Misbruik van macht, Ad-hoc rechter

GEGEVENS

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Partijen	Hasan Altan tegen Turkije
Regelgeving	- - -

SAMENVATTING

Klager Altan, professor en tevens presentator van een discussieprogramma op TV, wordt na de couppoging in Turkije in juli 2016 gearresteerd op verdenking van banden met de Gülen-beweging, die beweerdelijk verantwoordelijk was voor de coup. Het televisiekanaal waarop het discussieprogramma van klager te zien was, wordt na de coup gesloten. Klager wordt tal van beschuldigingen ten laste gelegd, waarvan de kern is dat hij zou sympathiseren met de coup en coupplegers en hun daden zou steunen en/of vergoelijken. Hij wordt uiteindelijk door de rechtbank in Istanboel veroordeeld tot levenslang, vanwege pogingen

om de constitutionele orde omver te werpen. Klager stapt naar het Constitutioneel Hof vanwege het in zijn ogen oneerlijke proces en een gebrekkige procedure tijdens het voorarrest en de detentie. Het Constitutioneel Hof meent dat de rechten op een eerlijk proces en de vrijheid van meningsuiting van klager in casu zijn geschonden. Gebrek aan bewijs om hem in politie- en voorarrest te nemen en de gebrekkige rechtspositie van de verdachte zijn de steen des aanstoots. Ook is er een schending van het recht op vrijheid van meningsuiting. Het Constitutioneel Hof stuurt zijn beslissing naar de rechtbank in Istanboel met het verzoek de noodzakelijke actie te ondernemen. De rechtbank weigert de verdachte echter vrij te laten en stelt dat de uitspraak van het Constitutioneel Hof niet rechtmatig is en daarom niet hoeft te worden gevolgd. Klager stapt vervolgens naar het EHRM, met een beroep op art. 5, 10 en 18 EVRM. De Turkse staat beroept zich onder meer op art. 15 EVRM, waarin is vervat dat bepaalde mensenrechten kunnen worden gederogeerd in tijden van nood. Het EHRM volgt het Constitutioneel Hof in grote lijnen en meent dat Turkije inderdaad een beroep kan doen op art. 15 EVRM, maar dat er toch een schending is van art. 5 EVRM (recht op vrijheid en veiligheid) en 10 EVRM (vrijheid van meningsuiting). Art.18 EVRM (misbruik van macht) wordt verder buiten beschouwing gelaten. De Turkse ad-hoc rechter schijft een uitgebreide dissenting opinion.

UITSPRAAK

I. Preliminary question concerning the derogation by Turkey

82. 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

83. 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.

84. 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.

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

86. 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.

87. 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

88. The Court considers that the question thus arising 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.

89. In this connection, the Court notes firstly that the notice of derogation by Turkey, indicating that a state of emergency has 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". Nevertheless, the Court observes that none of the parties have disputed that the notice of derogation by Turkey satisfied the formal requirement laid down in Article 15 § 3 of the Convention, namely to keep the Secretary General of the Council of Europe fully informed of the measures taken by way of derogation from the Convention and the reasons for them. Accordingly, it is prepared to accept that this formal requirement has been satisfied.

90. The Court further notes that under Article 15 of the Convention, any High Contracting Party has the right, in time of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention, other than those listed in paragraph 2 of that Article, provided that such measures are strictly proportionate to the exigencies of the situation and that they do not conflict with other obligations under international law (see *Lawless v. Ireland (no. 3)*, 1 July 1961, § 22, p. 55, Series A no. 3).

91. The Court reiterates that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 173, ECHR 2009). By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nevertheless, the Court would emphasise that States do not enjoy an unlimited discretion in this respect. The domestic margin of appreciation is accompanied by European supervision (see *Brannigan and McBride v. the United Kingdom*, 26 May 1993, § 43, Series A no. 258-B).

92. In the present case, the Court takes note of the Government's position that the attempted military coup and its aftermath have posed severe dangers to the democratic constitutional order and human rights, amounting to a threat to the life of the nation within the meaning of Article 15 of the Convention; it also notes that the applicant has not disputed this assessment.

93. The Court observes that the Constitutional Court, having examined from a constitutional perspective the facts leading to the declaration of a state of emergency, concluded that the attempted military coup had posed a severe threat to the life and existence of the nation (see paragraph 80 above). In the light of the Constitutional Court's findings and all the other material available to it, the Court likewise considers that the attempted military coup disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention.

94. 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.

II. The Government's preliminary objections

95. The Government raised two objections of failure to exhaust domestic remedies.

A. Objection of failure to bring a compensation claim

96. Regarding the applicant's complaints under Article 5 of the Convention concerning the lawfulness and 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 CCP. They contended that he could and should have brought a compensation claim on the basis of those provisions.

97. 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.

98. Firstly, as regards the complaint concerning the lawfulness and duration of the applicant's detention in police custody, the Court observes that the Turkish legal system provides applicants with two remedies in this respect, namely an objection aimed at securing release from custody (Article 91 § 5 of the CCP) and a compensation claim against the State (Article 141 § 1 (a) of the CCP) (see *Mustafa Avci v. Turkey*, no. 39322/12, § 63, 23 May 2017). The Court notes that one of the reasons why the Constitutional Court declared this complaint inadmissible was that there was no information in the case file as to whether the applicant had lodged an objection under Article 91 § 5 of the CCP against his detention in police custody (see paragraph 39 above). However, the Court observes that on 10 September 2016 the applicant did lodge an objection seeking his release from police custody, which was dismissed by the Istanbul magistrate's court on 12 September 2016 (see paragraph 21 above). He therefore availed himself of the remedy provided for in Article 91 § 5 of the CCP. Next, as regards the possibility of bringing a compensation claim under Article 141 § 1 (a) of the CCP, 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.

99. 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).

100. 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 CCP (see paragraph 39 above).

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

102. The Court points out, however, that this conclusion in no way prejudices any subsequent review of the question of the effectiveness of the remedy concerned, and in particular of the domestic courts' ability to develop a uniform, Convention-compliant approach to the application of Article 141 § 1 (a) of the CCP (see *Korenjak v. Slovenia* (dec.), no. 463/03, § 73, 15 May 2007).

103. Furthermore, with regard to the applicant's complaints concerning his initial and continued 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, and *Mustafa Avci*, cited above, § 60). It notes, however, that the remedy provided for in Article 141 of the CCP is not capable of terminating the applicant's deprivation of liberty.

104. The Court therefore concludes that the objection raised by the Government on this account must be dismissed.

B. Objection of failure to lodge an individual application with the Constitutional Court

105. The Government, relying mainly on the Court's findings in *Uzun v. Turkey* ((dec.), no. 10755/13, 30 April 2013) and *Mercan v. Turkey* ((dec.), no. 56511/16, 8 November 2016), contended that the applicant had failed to use the remedy of an individual application before the Constitutional Court.

106. The applicant rejected the Government's argument.

107. The Court reiterates that the applicant's compliance with the requirement to exhaust domestic remedies is normally assessed with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). Nevertheless, the Court accepts that the last stage of a particular remedy may be reached after the application has been lodged but before its admissibility has been determined (see *Karoussiotis v. Portugal*, no. 23205/08, § 57, ECHR 2011 (extracts); *Stanka Mirkovic and Others v. Montenegro*, nos. 33781/15 and 3 others, § 48, 7 March 2017; and *Azzolina and Others v. Italy*, nos. 28923/09 and 67599/10, § 105, 26 October 2017).

108. The Court observes that on 8 November 2016 the applicant lodged an individual application with the Constitutional Court, which gave its judgment on the merits on 11 January 2018 (see paragraphs 34-35 above).

109. Accordingly, the Court also dismisses this objection raised by the Government.

III. Alleged violation of Article 5 § 1 of the Convention

110. The applicant complained that his initial pre-trial detention and its continuation were arbitrary. He argued that there had been no evidence grounding a reasonable suspicion that he had committed a criminal offence necessitating his pre-trial detention. He also complained that insufficient reasons had been given for the judicial decisions ordering and extending his detention. The facts on which the suspicions against him had been based were linked to his criticisms of the country's leaders. Furthermore, he had been kept in pre-trial detention despite the Constitutional Court's finding of a violation of his right to liberty and security in its judgment of 11 January 2018. He complained that in those respects there had been a violation of 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;

..."

111. The Government contested that argument.

A. The parties' submissions

1. The Government

112. The Government, referring to the principles established in the Court's case-law in this area (citing *Klass and Others v. Germany*, 6 September 1978, Series A no. 28; *Murray v. the United Kingdom*, 28 October 1994, Series A no. 300-A; and *İpek and Others v. Turkey*, nos. 17019/02 and 30070/02, 3 February 2009), stated firstly that the applicant had been arrested and placed in pre-trial detention in the course of a criminal investigation initiated with a view to combating a terrorist organisation whose

members had infiltrated State institutions and the media. FETÖ/PDY had undertaken attempted coups since 17 December 2013, which were public knowledge, and yet the applicant had continued to work voluntarily within that organisation's media wing. In the Government's submission, the contents of the applicant's articles and statements showed that he had known even before 15 July 2016 that there would be an attempted military coup, and that he had sought to prepare the public for a putsch of this kind.

113. The Government submitted that from the evidence that had been gathered during the criminal investigation and included in the case file, it was objectively possible to conclude that there had been a reasonable suspicion that the applicant had committed the offences of which he was accused. On the strength of the evidence obtained during the investigation, criminal proceedings had been instituted against several individuals, including the applicant. Moreover, on 16 February 2018 the applicant had been sentenced to aggravated life imprisonment by the Istanbul 26th Assize Court for attempting to overthrow the constitutional order.

114. Lastly, the Government submitted that the applicant's complaint should be assessed in the light of the notice of derogation given on 21 July 2016 under Article 15 of the Convention.

2. The applicant

115. The applicant submitted that there were no facts or information that could satisfy an objective observer that he had committed the offences of which he was accused. The items of evidence produced by the Government to justify his pre-trial detention were superficial and inconsistent.

116. In addition, the applicant stated that notwithstanding the final and binding judgment in which the Constitutional Court had found a violation of his right to liberty and security and to freedom of expression and of the press, the Istanbul Assize Court had kept him in pre-trial detention. Accordingly, he also complained in correspondence of 18 January 2018 that his application to the Constitutional Court had not led to his release.

3. The third parties

(a) The Commissioner for Human Rights

117. 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

118. 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

119. 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

120. The Court notes that the period to be taken into consideration in the present case began on 22 September 2016, when the applicant was placed in pre-trial detention, and ended on 16 February 2018, when he was convicted by the Istanbul 26th Assize Court. From that date onwards, his deprivation of liberty has been covered by Article 5 § 1 (a) of the Convention and falls outside the scope of this application. The Court observes that it has examined and dismissed the Government's objections of failure to exhaust domestic remedies in so far as the objections related to the applicant's pre-trial detention (see paragraphs 103-04 and 109 above).

121. 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

122. The Court reiterates firstly 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 (see *Assanidze v. Georgia* [GC], no. 71503/01, § 169, ECHR 2004-II).

123. 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 paragraph 1 of Article 5 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, ECHR 2016 (extracts)).

124. 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 *Jecius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX; *Wloch v. Poland*, no. 27785/95, § 108, ECHR 2000-XI; and *Poyraz v. Turkey* (dec.), no. 21235/11, § 53, 17 February 2015). The "reasonableness" of the suspicion on which an arrest 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 upon 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).

125. 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 *Murray*, cited above, § 55; *Metin v. Turkey* (dec.), no. 77479/11, § 57, 3 March 2015; and *Yüksel and Others v. Turkey*, nos. 55835/09 and 2 others, § 52, 31 May 2016).

126. The Court's task is to determine whether the conditions laid down in Article 5 § 1 (c) of the Convention, including the pursuit of the prescribed legitimate purpose, have been 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 *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).

127. In the present case the Court observes that the applicant was taken into police custody on 10 September 2016 on suspicion of having links to the media wing of a terrorist organisation and was placed in pre-trial detention on 22 September 2016. It further notes that in a bill of indictment filed on 14 April 2017 the Istanbul public prosecutor sought the applicant's conviction for attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the government by force and violence and for committing offences on behalf of a terrorist organisation. The Court also observes that during the criminal investigation and the trial, all of the applicant's applications for release were rejected and that in a summary judgment of 16 February 2018 he was sentenced to aggravated life imprisonment, in accordance with Article 309 of the CC, for attempting to overthrow the constitutional order.

128. The Court further notes that after the applicant lodged an individual application with the Constitutional Court, that court held, in a judgment of 11 January 2018 which was published in the Official Gazette on 19 January 2018, 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. On the basis of the evidence presented by the prosecution, the Constitutional Court held that there were no strong indications that the applicant had committed the offences with which he was charged (see paragraphs 142-48 of the Constitutional Court's judgment). With regard to the application 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), it concluded that the right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed a criminal offence. In the Constitutional Court's view, the applicant's deprivation of liberty was therefore disproportionate to the strict exigencies of the situation.

129. The Court observes that it has been established by the Constitutional Court that the applicant was placed and kept in pre-trial detention in breach of Article 19 § 3 of the Constitution (see paragraph 150 of the Constitutional Court's judgment). It considers that this conclusion amounts in substance to an acknowledgment that his deprivation of liberty contravened Article 5 § 1 of the

Convention. In the particular circumstances of the present case, the Court endorses the findings which the Constitutional Court reached following a thorough examination.

130. The Court's scrutiny will therefore be limited to determining whether the national authorities afforded appropriate and sufficient redress for the violation found and whether they complied with their obligations under Article 5 of the Convention. In this connection the Court observes that although the Constitutional Court found a violation of Article 19 § 3 of the Constitution, the Istanbul 26th and 27th Assize Courts refused to release the applicant when ruling at final instance on his applications for release, the 26th Assize Court finding in particular that the Constitutional Court's judgment was not in compliance with the law.

131. The Court notes that the Constitution and Law no. 6216 confer jurisdiction on the Constitutional Court to examine applications lodged, following the exhaustion of ordinary remedies, by individuals claiming that their fundamental rights and freedoms as protected by the Constitution and the Convention and Protocols thereto have been violated.

132. The Court observes that it has already examined the remedy of an individual application to the Constitutional Court under Article 5 of the Convention, in particular in the case of *Koçintar v. Turkey* ((dec.), no. 77429/12, 1 July 2014). In that case, after examining the remedy in question, it found that none of the material in its possession suggested that an individual application to the Constitutional Court was not capable of affording appropriate redress for the applicant's complaint under Article 5 of the Convention, or that it did not offer reasonable prospects of success. In reaching that finding, it noted in particular that the Constitutional Court had jurisdiction to find violations of Convention provisions and was vested with appropriate powers to secure redress for violations, by granting compensation and/or indicating the means of redress; on that account the Constitutional Court could and should be able, if necessary, to prohibit the authority concerned from continuing to breach the right in question and to order it to restore, as far as possible, the *status quo ante* (see *Koçintar*, cited above, § 41). The Court observed that where the Constitutional Court found a violation of the right to liberty as guaranteed by Article 19 of the Constitution and the applicant remained in detention, it decided to transmit its judgment containing that finding to the appropriate court so that it could take "the necessary action". Taking into account the binding nature of the Constitutional Court's decisions in accordance with Article 153 § 6 of the Constitution (by which such decisions are binding on all State authorities and on all natural and legal persons), the Court found that the question of compliance in practice with that court's decisions on individual applications should not in principle arise in Turkey and that there was no cause to doubt that the judgments in which the Constitutional Court found a violation would be effectively implemented (ibid., § 43).

133. As indicated above (see paragraphs 46-54), following the publication of the Constitutional Court's judgment in the Official Gazette (see paragraphs 52-53), the Istanbul 26th Assize Court, by a majority, rejected the applicant's request for release on two grounds. Firstly, it found that the Constitutional Court did not have jurisdiction to assess the evidence in the case file and that that court's judgment was therefore not in compliance with the law. Secondly, it found that ordering the applicant's immediate release on the basis of the Constitutional Court's judgment would run counter to the general principles of law, the independence of the judiciary, the principle that no authority could give instructions to the courts, and the right to a court. The 26th Assize Court, having regard to the evidence before it, the large scale of the attempted military coup, the risk of the applicant's absconding, the current state of the case file and the severity of the potential sentence in the event of a conviction, ordered the continuation of the applicant's pre-trial detention.

134. In the light of the foregoing, it appears from developments in the domestic proceedings that, notwithstanding the Constitutional Court's finding that the applicant's pre-trial detention had infringed his right to liberty and security and his freedom of journalistic expression as safeguarded by the Turkish Constitution and the Convention, the assize courts refused to release him. The Court is therefore called upon to examine the extent to which this state of affairs at domestic level has a bearing on its own assessment of the applicant's complaint under Article 5 § 1 of the Convention.

135. The Court observes that under Turkish law, the measure of pre-trial detention is chiefly governed by Article 19 of the Constitution and Article 100 of the CCP. In this connection, it notes that the Constitutional Court's review is essentially performed from the standpoint of Article 19 of the Constitution, whereas the criminal courts consider the matter of an individual's detention primarily in relation to Article 100 of the CCP. It thus observes that the reasons given in the Constitutional Court's judgment and in the decision delivered by the 26th Assize Court suggest that the criteria applied by the two courts coexist, particularly as regards the discretion to assess the evidence in the case file. In this context, the Court cannot accept the 26th Assize Court's argument that the Constitutional Court should not have assessed the evidence in the case file. To hold otherwise would amount to maintaining that the Constitutional Court could have examined the applicant's complaint concerning the lawfulness of his initial and continued pre-trial detention without considering the substance of the evidence produced against him.

136. Next, the Court observes that in the present case, prior to the Constitutional Court's judgment of 11 January 2018, the Government had explicitly urged the Court to reject the applicant's application for failure to exhaust domestic remedies, on the grounds that his individual application to the Constitutional Court was still pending (see paragraph 105 above). This argument reinforced the Government's view that an individual application to the Constitutional Court was an effective remedy for the purposes of Article 5 of the Convention. Such a position is, moreover, consistent with the Court's findings in the case of *Koçintar* (cited above). To put it briefly, the Court considers that this argument by the Government can only be interpreted as meaning that under Turkish law, if the Constitutional Court has ruled that the applicant's pre-trial detention is in breach of the Constitution, the response by the courts with jurisdiction to rule on the issue of pre-trial detention must necessarily entail releasing him, unless new grounds and evidence justifying his continued detention are put forward. However, in the event, the 26th Assize Court rejected the application for the applicant's release following the Constitutional Court's judgment of 11 January 2018 by interpreting and applying domestic law in a manner departing from the approach indicated by the Government before the Court.

137. As the Court has regularly confirmed, although it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should therefore review whether the domestic law has been complied with (see *Mooren v. Germany* [GC], no. 11364/03, § 73, 9 July 2009). The Court must, moreover, ascertain whether the domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court emphasises that where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty should be satisfied (ibid., § 76). In laying down that any deprivation of liberty must be "lawful" and be effected "in accordance with a procedure prescribed by law", Article 5 § 1 does not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, it also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. Lastly and above all, no detention which is arbitrary can be compatible with Article 5 § 1, the notion of "arbitrariness" in this context extending beyond the lack of conformity with national law. In the

context of sub-paragraph (c) of Article 5 § 1, the reasoning of the decision ordering a person's detention is a relevant factor in determining whether the detention should be regarded as arbitrary (ibid., § 77 and 79).

138. The Court observes that it has already found in the *Uzun* decision (cited above) 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 (see *Uzun*, cited above, §§ 62-64). Furthermore, with regard to complaints under Article 5 of the Convention, in *Koçintar* (cited above) 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*, and as the Government explicitly submitted before the Court in the present case – 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 (see also *Mercan*, cited above, §§ 17-30).

139. On that basis, and having regard in particular to the Government's arguments before it as to the effectiveness of an individual application to the Constitutional Court for the purposes of Article 5 of the Convention, the Court observes that the reasons given by the Istanbul 26th Assize Court in rejecting the application for the applicant's release, following a "final" and "binding" judgment delivered by the supreme constitutional judicial authority, cannot be regarded as satisfying the requirements of Article 5 § 1 of the Convention. For another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications runs counter to the fundamental principles of the rule of law and legal certainty. The Court reiterates that these principles, inherent in the protection afforded by Article 5 of the Convention, are the cornerstones of the guarantees against arbitrariness (see paragraph 137 above). Although the Constitutional Court transmitted its judgment to the Assize Court so that it could take "the necessary action", the Assize Court resisted the Constitutional Court by refusing to release the applicant, with the result that the violation found by the Constitutional Court was not redressed. The Court has already stated (see paragraph 129 above) that it endorses the findings reached by the Constitutional Court in its judgment of 11 January 2018 regarding the period of pre-trial detention up to the date of that judgment. It observes that the case file discloses no new grounds or evidence showing that the basis for the detention has changed following the Constitutional Court's judgment. In that connection, it notes in particular that the Government have not demonstrated that the evidence purportedly available to the 26th Istanbul Assize Court justifying the strong suspicion against the applicant was in fact any different from the evidence examined by the Constitutional Court. That being so, the Court considers that the applicant's continued pre-trial detention, after the Constitutional Court had given its clear and unambiguous judgment finding a violation of Article 19 § 3 of the Constitution, cannot be regarded as "lawful" and "in accordance with a procedure prescribed by law" as required by the right to liberty and security.

140. Turning to the derogation by Turkey, the Court observes that the Constitutional Court expressed its position on the applicability of Article 15 of the Turkish Constitution, holding that the guarantees of the right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence (see paragraph 156 of the Constitutional Court's judgment). Accordingly, it found that the applicant's

deprivation of liberty was disproportionate to the strict exigencies of the situation. This conclusion is also valid for the Court's examination. Having regard to Article 15 of the Convention and the derogation by Turkey, the Court considers, as the Constitutional Court did in its judgment, that a measure of pre-trial detention that is not "lawful" and has not been effected "in accordance with a procedure prescribed by law" on account of the lack of reasonable suspicion cannot be said to have been strictly required by the exigencies of the situation (see, *mutatis mutandis*, *A. and Others*, cited above, §§ 182-90). In that context, the Court notes in addition that the Government have not provided it with any evidence that could persuade it to depart from the conclusion reached by the Constitutional Court.

141. In the light of the foregoing, there has been a violation of Article 5 § 1 of the Convention in the present case.

142. The Court would emphasise that the applicant's continued pre-trial detention, even after the Constitutional Court's judgment, as a result of the decisions delivered by the Istanbul 26th Assize Court, raises serious doubts as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention. However, as matters stand, the Court will not depart from its previous finding that the right to lodge an individual application with the Constitutional Court constitutes an effective remedy in respect of complaints by persons deprived of their liberty under Article 19 of the Constitution (see *Koçintar*, cited above, § 44). Nevertheless, it reserves the right to examine the effectiveness of the system of individual applications to the Constitutional Court in relation to applications under Article 5 of the Convention, especially in view of any subsequent developments in the case-law of the first-instance courts, in particular the assize courts, regarding the authority of the Constitutional Court's judgments. In that regard, it will be for the Government to prove that this remedy is effective, both in theory and in practice (see *Uzun*, cited above, § 71).

143. In view of its finding under Article 5 § 1 of the Convention concerning the applicant's complaint of a lack of reasonable suspicion that he had committed a criminal offence, the Court considers that it is not necessary to examine whether the authorities have kept him in detention for reasons that could be regarded as "relevant" and "sufficient" to justify his initial and continued pre-trial detention.

IV. Alleged violation of Article 5 § 4 of the Convention on account of the lack of access to the investigation file

144. 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:

"4. 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."

145. 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.

146. 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.

147. 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 (see paragraph 19 above).

148. It notes, as the Constitutional Court did, that the orders for the applicant's initial and continued pre-trial detention were mainly based on the following evidence against him: two articles he had written; comments he had made during the television broadcast on 14 July 2016; the fact that he had an account with Bank Asya; the allegation that he had avoided a criminal investigation through the assistance of members of the national police suspected of belonging to FETÖ/PDY; and the seizure at his home of a United States one-dollar bill with an "F" serial number.

149. In this connection, the Court observes that first the police, then the public prosecutor and finally the magistrate put detailed questions about all the above-mentioned evidence to the applicant, who was assisted by his lawyers, and that the contents of the questions were reproduced in the relevant records. It therefore concludes that although he did not have an unlimited right of access to the evidence, the applicant had sufficient knowledge of the substance of the evidence forming the basis for his pre-trial detention and thus had the opportunity to properly contest the reasons given to justify the detention (see *Ceviz v. Turkey*, no. 8140/08, §§ 41-44, 17 July 2012).

150. It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. Alleged violation of Article 5 § 4 of the Convention on account of the lack of a speedy judicial review by the Constitutional Court

151. 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".

152. The Government contested the applicant's argument.

A. The parties' submissions

1. The Government

153. 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.

154. 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

155. 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

156. 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

157. 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

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

B. The Court's assessment

1. Admissibility

159. 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 *Zúbor 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.

160. 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

161. 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*, cited above, § 106, and *Idalov v. Russia* [GC], no. 5826/03, § 154, 22 May 2012).

162. 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).

163. 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 were separate from proceedings before ordinary courts (see *Zúbor*, 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.

164. In 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's final judgment was given on 11 January 2018. The period to be taken into consideration thus amounted to fourteen months and three days.

165. 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 27-29 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 73 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 fourteen months and three days cannot be regarded as "speedy" (see *G.B. v. Switzerland*, no. 27426/95, §§ 28-39, 30 November 2000; *Khudobin v. Russia*, no. 59696/00, §§ 115-24, ECHR 2006-XII (extracts); and *Shcherbina*, cited above, §§ 62-71). However, in the present case the Court observes that the applicant's application to the Constitutional Court was a complex one, being 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. Moreover, bearing in mind the Constitutional Court's caseload following the declaration of a state of emergency, the Court notes that this is an exceptional situation.

166. That conclusion does not mean, however, that the Constitutional Court has carte blanche when dealing with any similar complaints raised under Article 5 § 4 of the Convention. In accordance with Article 19 of the Convention, the Court retains its ultimate supervisory jurisdiction for complaints submitted by other applicants alleging that, after lodging an individual application with the Constitutional Court, they have not had a speedy judicial decision concerning the lawfulness of their detention.

167. In the light of the foregoing, although the duration of fourteen months and three days before the Constitutional Court could not be described as "speedy" in an ordinary context, 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

168. 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:

"5. 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."

169. 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 CCP 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.

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

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

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

173. In so far as this complaint concerns Article 5 § 4 of the Convention, the Court considers that in view of the absence of a finding of a violation of that provision in its conclusions set out in paragraphs 144-67 above, the complaint is incompatible *ratione materiae* with the provisions of the Convention for the purposes of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

174. The Court observes that it has already found a violation of Article 5 § 1. Regarding the possibility of claiming compensation for that violation, the Court notes that Article 141 of the CCP 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 CCP, to anyone in a similar position to the applicant.

175. The Court notes, however, that an award was made to the applicant by the Constitutional Court in respect of the violation it had found. It reiterates that Article 5 § 5 does not confer a right to a particular amount of compensation, provided that the award made is not derisory or wholly disproportionate (see *Attard v. Malta* (dec.), no. 46750/99, 28 September 2000, and *Cumber v. the United Kingdom*, no. 28779/95, Commission decision of 27 November 1996), or considerably lower than what the Court would award in the event of a similar violation (see *Ganea v. Moldova*, no. 2474/06, § 30, 17 May 2011, and *Cristina Boicenco v. Moldova*, no. 25688/09, § 43, 27 September 2011).

176. The Court reiterates that for the purposes of its examination under paragraphs 1, 2, 3 and 4 of Article 5 of the Convention, an applicant may still complain of a violation of those paragraphs even if compensation has already been paid on that account, for example where the Court considers that the sum awarded is manifestly insufficient. However, the mere fact that the amount is lower than the award the Court would have made in similar cases does not *per se* entail a violation of Article 5 § 5 of the Convention (see, to similar effect, *Vedat Dogru v. Turkey*, no. 2469/10, §§ 42 and 64, 5 April 2016). In the present case, the Court observes that the applicant had a remedy by which to obtain compensation and the Constitutional Court awarded him TRY 20,000 (approximately EUR 4,500) for the violations it had found. Bearing in mind the Court's own practice, although this amount is lower than what the Court itself would have awarded, it cannot be regarded as wholly disproportionate either.

177. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

VII. Alleged violation of Article 10 of the Convention

178. The applicant also complained of a breach of his right to freedom of expression on account of his initial and continued pre-trial detention. He relied on Articles 10 and 17 of the Convention.

179. The Government contested the applicant's argument. They submitted that the applicant's complaint warranted an examination under Article 5 § 1 of the Convention alone, since the proceedings instituted against him did not in any way concern his activities as a journalist.

180. The Court reiterates that it is master of the characterisation to be given to the facts of the case (see, for example, *Sarigül 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 Government

181. 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.

182. Next, the Government submitted that the order for the applicant's pre-trial detention did not constitute 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 through force and violence, and committing offences on behalf of an armed terrorist organisation without being a member of it.

183. The Government 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.

184. 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 CC. 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.

185. 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.

186. 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. In that connection they cited the following comments by the applicant: "Within the State of the Republic of Turkey, there is probably another structure, whose components outside Turkey are closely observing and documenting all these events. It is not clear exactly when [it] will pull its hand out of the bag or how [it] will do so." Noting that the applicant had made these comments one day before the attempted military coup, the Government contended that the interference complained of had been proportionate and necessary in a democratic society.

2. The applicant

187. 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.

3. The third parties

(a) The Commissioner for Human Rights

188. 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.

189. 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

190. 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.

191. 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.

192. 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

193. 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

194. 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.

195. In the present case, the Court observes that the Constitutional Court found violations of Articles 26 and 28 of the Turkish Constitution on account of the applicant's initial and continued pre-trial detention and awarded him compensation by way of redress for those violations. However, despite the Constitutional Court's judgment, the competent assize courts rejected the applicant's application for release. Accordingly, the Court considers that the judgment did not afford appropriate and sufficient redress to the applicant and did not deprive him of his "victim" status.

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

2. Merits

(a) Whether there was an interference

197. 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; *Altug Taner Akçam v. Turkey*, no. 27520/07, §§ 70-75, 25 October 2011; and *Nedim Şener v. Turkey*, no. 38270/11, § 94, 8 July 2014).

198. 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 16 February 2018 the Istanbul 26th Assize Court sentenced the applicant to aggravated life imprisonment for attempting to overthrow the constitutional order, and the criminal proceedings instituted on that account are still ongoing. The Court therefore observes that the applicant was kept in pre-trial detention for approximately one year and five months.

199. The Court also notes that in its judgment of 11 January 2018, the Constitutional Court held that the applicant's detention on account of his articles and statements amounted to interference with the exercise of his right to freedom of expression and of the press. The Court endorses this particular finding by the Constitutional Court.

200. The Court considers, in the light of the Constitutional Court's judgment, that the applicant's pre-trial detention accordingly constitutes an "interference" with his right to freedom of expression within the meaning of Article 10 of the Convention (see *Şik v. Turkey*, no. 53413/11, § 85, 8 July 2014).

201. 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.

(b) Whether the interference was justified

202. The Court reiterates 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 observed in the present case 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.

203. In this connection, the Court reiterates that the expression "prescribed by law", within the meaning of Article 10 § 2, requires firstly that the impugned measure 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 (see *Müller and Others v. Switzerland*, 24 May 1988, § 29, Series A no. 133).

204. In the present case, none of the parties disputed that the applicant's pre-trial detention had had a legal basis, namely the relevant provisions of the CC and the CCP.

205. The question then arising is whether the interpretation and application of the provisions of the CC may reduce their accessibility and foreseeability. In the present case, given that the public prosecutor, in bringing the charges against the applicant, and the judges, in deciding to keep him in pre-trial detention, interpreted those provisions as covering the articles written by him and the comments he had made during the television programme in question, the Court considers that serious doubts may arise as to whether he could have foreseen his initial and continued pre-trial detention on the basis of Articles 309, 311 and 312 in conjunction with Article 220 § 6 of the CC. However, in view of its findings below concerning the necessity of the interference, the Court considers that it does not have to settle this question.

206. As regards the "legitimate aim" pursued by the interference, the Court is prepared to accept that it was intended to prevent disorder and crime. It thus remains to be determined whether the interference was "necessary" to achieve those aims.

207. In the present case the Court observes that the Constitutional Court concluded that the applicant's initial and continued pre-trial detention, following his expression of his opinions, constituted a severe measure that could not be regarded as a necessary and proportionate interference in a democratic society for the purposes of Articles 26 and 28 of the Constitution. Finding that the judges concerned had not shown that depriving the applicant of his liberty met a pressing social need, the Constitutional Court

held that in so far as his detention was not based on any concrete evidence other than his articles and comments, it could have had a chilling effect on freedom of expression and of the press (see paragraph 38 above).

208. In the circumstances of the case, the Court can see no reason to reach a different conclusion from that of the Constitutional Court. In this connection, it also refers to its own conclusions under Article 5 § 1 of the Convention (see paragraphs 127-41 above).

209. Against this background, the Court notes that the intervening parties highlighted the existence of a general problem in Turkey concerning the interpretation of anti-terrorism legislation by prosecutors and the competent courts. They submitted that journalists were often subjected to severe measures such as detention for dealing with matters of public interest. The Court notes in this connection that it has consistently held that where the views expressed do not constitute incitement to violence – in other words, unless they advocate recourse to violent actions or bloody revenge, justify the commission of terrorist acts in pursuit of their supporters' goals and can be interpreted as likely to encourage violence by instilling deep-seated and irrational hatred towards specified individuals – the Contracting States cannot restrict the right of the public to be informed of them, even with reference to the aims set out in Article 10 § 2, namely the protection of territorial integrity or national security or the prevention of disorder or crime (see *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 60, 8 July 1999, and *Şik*, cited above, § 85).

210. The Court is prepared to take into account the circumstances surrounding the cases brought before it, in particular the difficulties facing Turkey in the aftermath of the attempted military coup. The coup attempt and other terrorist acts have clearly posed a major threat to democracy in Turkey. In this connection, the Court attaches considerable weight to the conclusions of the Constitutional Court, which noted, among other things, that the fact that the attempt had taken place at a time when Turkey had been under violent attack from numerous terrorist organisations had made the country even more vulnerable (see paragraph 80 above). However, the Court considers that one of the principal characteristics of democracy is the possibility it offers of resolving problems through public debate. It has emphasised on many occasions that democracy thrives on freedom of expression (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 57, *Reports of Judgments and Decisions* 1998-I; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 129, ECHR 2012; and *Party for a Democratic Society (DTP) and Others v. Turkey*, nos. 3840/10 and 6 others, § 74, 12 January 2016). In this context, the existence of a "public emergency threatening the life of the nation" must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society. In the Court's view, even in a state of emergency – which is, as the Constitutional Court noted, a legal regime whose aim is to restore the normal regime by guaranteeing fundamental rights (see paragraph 80 above) – the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.

211. In this context, the Court considers that criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings. Should this not be the case, the national courts' interpretation cannot be regarded as acceptable.

212. The Court further notes that the pre-trial detention of anyone expressing critical views produces a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty, as in the present case, will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices (see, to similar effect, paragraph 235 of the Constitutional Court's judgment). The Court further notes that a chilling effect of this kind may be produced even when the detainee is subsequently acquitted (see *Şik*, cited above, § 83).

213. Lastly, with regard to the derogation by Turkey, the Court refers to its findings in paragraph 140 of this judgment. In the absence of any strong reasons to depart from its assessment concerning the application of Article 15 in relation to Article 5 § 1 of the Convention, the Court considers that these conclusions are also valid in the context of its examination under Article 10.

214. In the light of the foregoing, the Court concludes that there has been a violation of Article 10 of the Convention.

VIII. Alleged violation of Article 18 of the Convention in conjunction with Articles 5 and 10

215. On the basis of the same facts and relying on Article 18 of the Convention in conjunction with Articles 5 and 10, 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."

216. Having regard to the conclusions reached above under Article 5 § 1 and Article 10 of the Convention, the Court does not consider it necessary to examine this complaint separately.

IX. Application of Article 41 of the Convention

217. 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

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

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

220. The Court considers that the violation of the Convention has indisputably caused the applicant substantial damage. Accordingly, taking into account the sum already awarded to him at domestic level and making its assessment on an equitable basis, the Court finds it appropriate to award the applicant EUR 21,500 in respect of non-pecuniary damage. In addition, the Court notes that in a judgment of 16 February 2018 the Istanbul 26th Assize Court sentenced the applicant to aggravated life imprisonment, and that his pre-trial detention for the purposes of Article 5 § 1 (c) of the Convention ended with effect from that

date. The applicant's deprivation of liberty 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, as it has done in the case of *Alpay v. Turkey* (no. 16538/17, §§ 190-95, 20 March 2018, not final).

B. Costs and expenses

221. The applicant did not seek reimbursement of any costs and expenses incurred before the Convention institutions and/or 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

222. 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

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1. *Joins to the merits*, by a majority, 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*, by a majority, the application admissible as regards the complaints under Article 5 §§ 1 and 4 (lack of a speedy judicial review by the Constitutional Court) and Article 10 of the Convention;

3. *Declares* inadmissible, unanimously, the complaints under Article 5 §§ 3 (lawfulness of detention in police custody), 4 (lack of access to the investigation file) and 5 (right to compensation for unlawful detention) of the Convention;

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 is no need to examine separately the complaint that insufficient reasons were given for the judicial decisions ordering and extending the applicant's pre-trial detention;

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

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

8. *Holds*, unanimously, that there is no need to examine separately the complaint under Article 18 of the Convention;

9. *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 21,500 (twenty-one thousand five hundred 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;

10. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Concurring opinion of Judge Spano joined by Judges Bianku, Vucinic, Lemmens and Griţco

1. Today the Court delivers important judgments on the merits in cases brought by two prominent journalists detained in Turkey after the attempted *coup d'état* of 15 July 2016. I agree with every word in the Court's forceful reasoning. However, I write separately to comment on the arguments made by the *ad hoc* national judge in his dissenting opinion, which I respectfully disagree with, in particular his views on the principle of subsidiarity (see in particular paragraphs 2, 21, 23 and 24 of his opinion).

2. The principle of subsidiarity encapsulates a norm of power distribution between the Court and the member States, with the ultimate aim of securing to every person who finds himself or herself within the jurisdiction of a State the rights and freedoms provided by the Convention. Importantly, it is not the Strasbourg Court that is entrusted with the day-to-day responsibility of securing Convention rights; it is the member States. In other words, in accordance with Article 1 of the Convention, it is the national authorities which are the primary guarantors of human rights, subject to the supervision of the Court. When the member States fulfil their Convention role by applying in good faith the general principles deriving from the Court's case-law, the principle of subsidiarity implies that the Court may defer to their findings in a particular case. Its aim is thus to incentivise national authorities to fulfil their obligations to secure Convention rights, thus raising the overall level of human rights protection in the European legal space.

3. The Court's powers and jurisdictional competence are entrenched in Articles 19 and 32 of the Convention. It is the Court that is the final arbiter of the scope and content of the Convention. Member States demonstrate with their actions, in particular the reasoning provided by national courts, whether deference is due under the principle of subsidiarity. It follows that the operationalisation of the principle towards a more process-based review of domestic decision-making, within the conceptual framework of the margin of appreciation doctrine, does not in any way limit the Court's competence to ultimately review substantive findings at national level at the stage of the application of Convention principles embedded in the domestic legal systems. In short and to be clear, the robust and coherent application of the principle of subsidiarity by the Court has nothing to do with taking power away from the Court.

4. Moreover, as flows directly from the language of Article 15 of the Convention, these principles apply equally where a State is confronted with a public emergency threatening the life of the nation. Such a situation does not give States carte blanche. In other words, a state of emergency is not an open invitation to member States to erode the foundations of a democratic society based on the rule of law and the protection of human rights. Only measures which are strictly required by the exigencies of the situation can be justified under the Convention, and it is ultimately for the Court to pass judgment at the European level on whether such justification has been adequately demonstrated on the facts.

5. Finally, the member States are under an international-law obligation, finding its expression in Article 46 of the Convention, to execute judgments rendered by the Court. When a State has decided to secure to everyone within its jurisdiction the rights and freedoms guaranteed by the Convention and at the same time has decided to come within the jurisdiction of the Court, this

obligation to execute the Court's judgments becomes mandatory and without exception. It follows that it is now for the competent Turkish authorities to faithfully and expeditiously execute today's judgments under the supervision of the Committee of Ministers in a manner consistent with Turkey's obligations under the Convention.

Partly dissenting opinion of Judge Ergül

(Translation)

I

1. I fully agree with my colleagues' conclusion that the complaints alleging a violation of Article 5 §§ 3, 4 and 5 and Article 18 of the Convention should be rejected as inadmissible, or as disclosing no violation, or for any of the other reasons given in the judgment. However, I regret that I am unable to join the majority of the Court in finding that Article 5 § 1 and Article 10 of the Convention are both admissible and have been violated. I therefore disagree with the majority's findings of a violation for two reasons, one relating to admissibility and the other to the merits.

2. Regarding admissibility, I would first like to reiterate the well-established principles and settled case-law in this area. Article 35 of the European Convention on Human Rights provides: "The Court may only deal with the matter after all domestic remedies have been exhausted ..." It follows that in the Convention system, the domestic courts are the ordinary courts in relation to Convention law. They are entrusted with primary responsibility for enforcing the rights safeguarded by the Convention. This equates to the principle of subsidiarity, which underpins the Convention system (Frédéric Sudre, *Droit européen et international des droits de l'homme*, 9th edition, PUF, Paris 2008, p. 204). The Court has repeatedly stated that "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights" (see *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24; *Vuckovic and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-70, 25 March 2014; and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). The Convention leaves it first and foremost to the national authorities – and more specifically, the courts with jurisdiction in matters relating to the Convention – to secure the enjoyment of the rights and freedoms it enshrines. The Convention is therefore of a secondary nature in relation to national legislation, and its fundamental rules are in no way intended to replace the rules of domestic law. This rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Vuckovic and Others*, cited above, §§ 69-70, and *Brusco*, cited above).

3. According to the Court's case-law, in a legal system designed to protect fundamental rights and freedoms, it is incumbent on the aggrieved individual to test the extent of such protection (see *Mirazovic v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006, and *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (dec.), no. 55120/00, 19 June 2003). Furthermore, the applicant's compliance with the requirement to exhaust domestic remedies is normally assessed with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001 V (extracts)). Nevertheless, in certain exceptional cases "the Court accepts that the last stage of such remedies may be reached shortly after the lodging of the application but before it determines the issue of admissibility" (see *Karoussiotis v. Portugal*, no. 23205/08, § 57, ECHR 2011 (extracts)). Moreover, according to the Court's case-law, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust

domestic remedies (see *Vuckovic and Others*, cited above, § 74). In my view, the last-mentioned principle should apply *mutatis mutandis* to a situation where the applicant has applied to the Court while his case was pending before a domestic court offering an effective remedy.

4. With regard to an individual application to the Constitutional Court, the Court has already held that it "can see no reason to doubt the legislature's intention – as manifested in the explanatory report on the constitutional amendments ... – to ensure identical protection to that provided by the Convention machinery: Law no. 6216 expressly states that the [Turkish Constitutional Court's] jurisdiction *ratione materiae* covers the fundamental rights and freedoms safeguarded by the European Convention on Human Rights and the Protocols thereto, such rights and freedoms also featuring in the Turkish Constitution itself" (see *Uzun v. Turkey* (dec.), no. 10755/13, § 62, 30 April 2013).

5. In the present case, the applicant lodged an individual application with the Constitutional Court on 8 September 2016. He also applied to the European Court on 28 February 2017, under Article 34 of the Convention, while his application was still pending before the Constitutional Court. On 11 January 2018 the Constitutional Court gave a judgment in which it held, by eleven votes to six, that there had been a violation of the right to liberty and security and the right to freedom of expression and of the press. Therefore, the applicant did not await the outcome of his individual application to the Constitutional Court.

II

6. An examination of this case in the light of the above principles reveals, firstly, that the applicant has not satisfied the requirement of exhaustion of domestic remedies. Furthermore, in my opinion, the approach taken in *Karoussiotis v. Portugal* and other cases cited in the judgment cannot be applied to the present case. The case involves a specific legal system for the protection of fundamental rights and freedoms, and individual applications to the Turkish Constitutional Court are regarded as effective remedies that must be used before an application can be lodged with the Court, as the Court has consistently held (see *Uzun*, cited above, and *Mercan v. Turkey* (dec.), no. 56511/16, 8 November 2016).

7. In addition, the European Court's examination the present case cannot lead to a finding that the Constitutional Court has given judgment and that domestic remedies have therefore been exhausted. Instead, since the Constitutional Court's judgment was in the applicant's favour, he could no longer claim to be a "victim" within the meaning of Article 34 of the Convention in this case. As the Court has consistently held, "where the national authorities have found a violation and their decision constitutes appropriate and sufficient redress, the party concerned can no longer claim to be a victim within the meaning of Article 34 of the Convention" and "[w]hen those two conditions are satisfied, the subsidiary nature of the protective mechanism of the Convention precludes an examination by the Court" (see *Eckle v. Germany*, 15 July 1982, §§ 64-70, Series A no. 51; *Caraher v. the United Kingdom* (dec.), no. 24520/94, ECHR 2000-I; *Hay v. the United Kingdom* (dec.), no. 41894/98, ECHR 2000-XI; *Cataldo v. Italy* (dec.), no. 45656/99, ECHR 2004-VI, *Göktepe v. Turkey* (dec.), no. 64731/01, 26 April 2005; and *Yüksel v. Turkey* (dec.), no. 51902/08, § 46, 9 April 2013).

8. Regarding the assize courts' decisions refusing to release the applicant following the Constitutional Court's judgment, he will certainly be entitled to apply to the Court anew once the Constitutional Court has given its judgment on the assize courts' refusal. Indeed, on 30 January 2018 the applicant lodged a fresh individual application with the Constitutional Court, relying on Articles 5, 6 and 18 of the Convention and complaining mainly about his continued pre-trial detention despite the Constitutional Court's judgment of 11 January 2018. The Constitutional Court has decided to treat the applicant's application as a priority.

9. Hence, the reasons given by the majority to justify their position in the present case were unable to persuade me that the settled case-law and well-established principles outlined above should be disregarded. I can therefore see no reason to depart from the above-mentioned case-law and general principles in the present case.

10. According to the Preamble to the Constitution of the Republic of Turkey: "Having regard to the absolute supremacy of the will of the nation, sovereignty is vested fully and unconditionally in the Turkish nation and no individual or body authorised to exercise such sovereignty in the name of the nation may interfere with the liberal democracy enshrined in the Constitution or the legal order instituted in accordance with its requirements". The above principles from the Preamble correspond to the principles of democracy, the rule of law and the protection of human rights referred to in the Preamble to the Statute of the Council of Europe, of which Turkey is one of the founding members. Unfortunately, on 15 July 2016 an attempted coup in Turkey flouted those principles and sought to suppress fundamental rights and freedoms and to disregard the will of the nation.

III

11. As to the merits, I would like first of all to stress the scale and the severity of the threat to Turkey during the night of 15 July 2016. It involved a bloody attempted military coup by members of a *sui generis* terrorist organisation that had infiltrated all areas of society and the State apparatus. There has never been such a serious threat to the life of the nation, democracy and fundamental rights in any of the States Parties to the European Convention on Human Rights.

12. During the night of 15 to 16 July 2016 a faction of the Turkish armed forces linked to a terrorist organisation known as FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure") attempted to carry out a military coup aimed at overthrowing the democratically elected government and President of Turkey and ending democracy. The organisation had already been declared a terrorist organisation in a court judgment and in an advisory decision by the National Security Council. The coup instigators issued a statement on behalf of the "Peace at Home Council", announcing that martial law and a curfew had been declared throughout national territory. They also stated that the Turkish Grand National Assembly had been overthrown, that all political parties' activities had been terminated and that all the police had been placed under the control of the martial-law commanders.

13. Using helicopters and fighter planes, the coup instigators attacked and bombarded a large number of locations, including the Turkish Grand National Assembly building, the presidential compound, the Security Directorate headquarters, the Special Operations Command of the national police and the National Intelligence Organisation headquarters in the capital city, Ankara. They also attacked the hotel where the President was staying. Several senior military officers, including the Chief of General Staff and the commanders of the armed forces, were held hostage. In addition, the bridges over the Bosphorus linking Europe and Asia were sealed off, as were Istanbul's airports, by tanks and armoured vehicles. Many public institutions in locations across the country were occupied, or attempts were made to occupy them. During the coup attempt, various institutions and organisations, such as the Türksat satellite communications and cable television operations company, were attacked with the aim of interrupting television broadcasts and Internet access throughout the country. The premises of certain private television broadcasters were occupied and attempt were made to interrupt their broadcasts.

14. The coup attempt was rejected by representatives of all constitutional authorities, first and foremost the President and also the Prime Minister and the Constitutional Court. At the President's urging, the people gathered in the streets and public squares to act against the coup leaders. The security forces, acting under the orders and instructions of the legitimate authorities, took steps to

counter the attempted coup. All political parties represented in the Turkish Grand National Assembly, together with civil-society organisations, condemned the despicable coup attempt and declared that they would not accept any undemocratic government. The civilians who gathered in public squares and the streets resisted the coup participants alongside the security forces, despite the attacks from fighter planes, helicopters, tanks, other armoured vehicles and weapons deployed by the coup leaders. As the judgment points out, hundreds of civilians lost their lives in these attacks and thousands of people were injured, most of them civilians.

15. The prosecuting authorities acted promptly in initiating investigations in respect of those taking part in the attempted coup; this is worth highlighting, since the coup had not yet been foiled. As a result, the attempted coup was entirely averted on 16 July thanks to the efforts of the legitimate constitutional institutions and national solidarity. Moreover, millions of citizens organised overnight democracy vigils in city squares for about a month in protest against the attempted coup.

IV

16. It should be borne in mind that the Statute of the Council of Europe affirms, in its Preamble, the member States' conviction "that the pursuit of peace based upon justice and international cooperation is vital for the preservation of human society and civilisation". Ibn Khaldun (1332-1406), a great thinker, legal scholar, historical philosopher and sociologist and the founder of the science of civilisation (*umran*), explains in his masterpiece *Muqaddimah* that "one cannot imagine a [State] without civilisation, while a civilisation without [a State or] authority is impossible" (Ibn Khaldun, *Muqaddimah: an Introduction to History*, IV, 19, translated by Franz Rosenthal, Princeton University Classics, 1967) and that human rights violations (or injustices) ruin civilisation, and the ruin of civilisation leads to the complete destruction of the State (ibid., III, 41). Despite the difference in eras, some striking similarities can be noted between the two perspectives. These words and principles assume full significance during a state of emergency following an attempted military coup. In order to assess the severity of the threat posed by an attempted military coup, consideration should also be given to the risks that might have arisen had the coup attempt not been foiled. Practice has shown that the most serious violations of fundamental rights tend to occur during such periods. Moreover, the alarming conditions in a number of States dominated by regimes installed as a result of a military coup and the tragic situation in such societies, at the present time and throughout the world, corroborate the aforementioned great thinker's observations and the Council of Europe's founding principles. By preventing this serious public emergency threatening the life of the nation, the Turkish people have demonstrated how a people can preserve democracy, the rule of law and civilisation and take control of its own destiny.

17. Consideration should be given to the fact that Turkey gave notice of a derogation from the Convention under Article 15 on 21 July 2016 following the declaration of the state of emergency. I share the majority's opinion that the first formal requirement is easily satisfied, and also that, in view of the wide margin of appreciation left to the national authorities in this sphere, the attempted military coup undoubtedly gave rise to a "public emergency threatening the life of the nation" within the meaning of Article 15 of the Convention. Furthermore, the applicant's complaints do not concern rights from which no derogation is permitted. As regards the proportionality of the measures taken in the context of the derogation, I differ from the majority, since in my view this point warrants a careful examination in the light of the threat to the life of the nation and to the rule of law, democracy, the constitutional order and human rights in Turkey.

18. In a judgment delivered before the attempted coup, the Turkish courts found that FETÖ/PDY was an armed terrorist organisation (Erzincan Assize Court, judgment of 16 June 2016,). Furthermore, judgments delivered after 15 July 2016 have established a link between this terrorist organisation and the attempted coup. The conclusions reached on this point by the Criminal Division of the Plenary Court of Cassation are fairly instructive: "From the first years of the organisation's existence ... it appears from statements by individuals who were formerly active in the organisation that their goal was to take control of all constitutional institutions (legislature, executive, judiciary) of the Republic of Turkey, and at the same time to become a major political/economic power with an international impact by taking advantage of pupils who were trained in accordance with their principles and aims in educational establishments set up abroad and in Turkey through funds collected by way of 'favour' (*himmet*), and by making use of the economic and political power thus acquired to promote the organisation's interests and their ideology." The Criminal Division went on to observe: "It is understood that FETÖ/PDY uses public powers that should be under State control to further its own organisational interests. After going through various stages, members of the organisation embarking on a career – while remaining FETÖ/PDY soldiers and maintaining very strong links to that organisation – within the Turkish armed forces, the police and the National Intelligence Organisation are required to undergo ideological training so that they are ready to exploit their own authorisation to use weapons and force in following the orders of this illegal organisational hierarchy. A person in this position is [described] as a servant by the head of the organisation: 'persons linked to the service must be determined, persistent, obedient, responsible for everything, must not falter when attacked, must prioritise their rank within the service over their own rank when they have attained a high rank, must be aware that the duties to be accomplished can be difficult in the service, and must be ready to sacrifice their entire existence, life and love for the service [that is, the terrorist organisation] ..." According to the judicial authorities' findings, the following three principles have been established as FETÖ's working principles: confidentiality, intra-organisational solidarity and strict hierarchical relations. FETÖ's complex organisation is based on the principle of confidentiality, which it has faithfully observed since its creation, from the lowest cell to the highest branches.

19. On 20 July 2016 a state of emergency was declared for a period of three months as from 21 July 2016 to safeguard democracy, human rights and the rule of law, to remove elements that had infiltrated the State authorities and to eliminate any potential threats in future. The state of emergency has subsequently been extended several times by the Council of Ministers, chaired by the President, most recently with effect from 19 January 2018. On each occasion a notice of derogation from the Convention under Article 15 has been transmitted to the Secretary General of the Council of Europe.

20. In practice, the investigations and judicial proceedings and court judgments have shown that FETÖ/PDY is a complex, *sui generis* terrorist organisation carrying out its activities under a cloak of legality. In this context, the FETÖ/PDY media wing has played a significant role in legitimising the actions that gave rise to this organisation's despicable attempted military coup by manipulating public opinion. The applicant was placed in pre-trial detention in the context of an investigation into the organisation's media wing.

V

21. The attempted military coup and its aftermath, together with other terrorist acts, have posed severe dangers to the democratic constitutional order, human rights and public security and order, amounting to a threat to the life of the nation within the meaning of Article 15 of the Convention. The applicant's complaints should therefore be assessed with due regard to the notice of derogation issued on 21 July 2016 (and subsequently reiterated) under Article 15 of the Convention. The Court has found that the attempted military coup created a "public emergency threatening the life of the nation" within the meaning of the Convention.

However, it reached a different conclusion concerning the proportionality of the measures, without giving detailed reasons. In the assessment of proportionality, two dimensions must be taken into account. Firstly, it must be borne in mind that the applicant's complaints relate only to rights from which a derogation is permitted. That being so, the State should have had a greater margin of appreciation and the Court should have had regard to the risks and the difficulties with which the State was confronted.

22. Next, the Court's assessment should not give rise to a legal hierarchy between rights from which a derogation is permitted. As was emphasised in the Vienna Declaration and Programme of Action, adopted by consensus at the World Conference on Human Rights by the representatives of 171 States on 25 June 1993, a legal hierarchy between human rights should not in principle be accepted: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." However, Article 15 of the Convention does provide for a kind of hierarchy between right by classifying rights as derogable and non-derogable. Despite the clarity of the text of Article 15, a conclusion that creates a legal hierarchy between rights from which a derogation is permitted will run counter to the concern for practicality expressed by the drafters of the Convention. The derogation mechanism seeks to promote the balance which States must ensure between respect for human rights and preservation of the life of their nation.

23. In addition, it should be determined whether there is a sufficient basis to conclude that the measure of pre-trial detention linked to a right that remains within the scope of the derogation is strictly required by the exigencies of the situation of a public emergency threatening the life of the nation. In that regard, several factors are known to the Court, such as the severity of the threat to the life of the nation, the fact that the complaint concerns a judicial measure against which an objection may be lodged, the extreme complexity of the case concerning the media wing of the terrorist organisation behind the severe threat, the significant role of the FETÖ/PDY media wing in concealing the organisation's illegal activities and in legitimising the actions that gave rise to the despicable attempted military coup, the declaration of a state of emergency on account of the coup attempt and its extension since 21 July 2016, on each occasion with the approval of the Turkish Grand National Assembly. On account of those factors, and as the case is strictly linked to the incidents that gave rise to the state of emergency and the derogation, it has to be concluded that the measures taken were strictly required by the exigencies of the situation. For that reason, the derogation relating to an exceptionally severe threat should have prevailed in the assessment of the merits of the case.

24. In conclusion, I consider that in the circumstances of the case, even though it concerned Articles 5 and 10 of the Convention, the subsidiarity principle should have prevailed in the context of admissibility. In addition, the derogation relating to an exceptionally severe threat should have prevailed in the assessment of the merits of the case. Having regard to all the foregoing considerations, and contrary to the majority, I conclude that there has been no violation of the provisions of the Convention.

NOOT

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1. De eerste vraag die voorligt is of de Turkse staat een legitiem beroep kan doen op art.15 EVRM, dat bepaalt:

"1. In tijd van oorlog of in geval van enig andere algemene noodtoestand die het bestaan van het land bedreigt, kan iedere Hoge Verdragsluitende Partij maatregelen nemen die afwijken van zijn verplichtingen ingevolge dit Verdrag, voor zover de ernst van de situatie deze maatregelen strikt vereist en op voorwaarde dat deze niet in strijd zijn met andere verplichtingen die voortvloeien uit het internationale recht.

2. De voorgaande bepaling staat geen enkele afwijking toe van artikel 2, behalve ingeval van dood als gevolg van rechtmatige oorlogshandelingen, en van de artikelen 3, 4, eerste lid, en 7.

3. Elke Hoge Verdragsluitende Partij die gebruik maakt van dit recht om af te wijken, moet de Secretaris-Generaal van de Raad van Europa volledig op de hoogte houden van de genomen maatregelen en van de beweegredenen daarvoor. Zij moet De Secretaris-Generaal van de Raad van Europa eveneens in kennis stellen van de datum waarop deze maatregelen hebben opgehouden van kracht te zijn en de bepalingen van het Verdrag opnieuw volledig worden toegepast."

2. In wezen wordt in de jurisprudentie van het EHRM steeds minder getoetst of en in hoeverre dit artikel inderdaad van toepassing is (B. van der Sloot, 'Langs lijnen van geleidelijkheid: een jurisprudentieanalyse van artikel 15 EVRM', *NJCM-Bulletin*, 37 2012 (2)). Het EHRM neemt wel simpelweg aan dat er sprake is van een noodtoestand en toetst daarna slechts of aan het proportionaliteitsvereiste ('voor zover de ernst van de situatie deze maatregelen strikt vereist') is voldaan. Zo ook in deze zaak; het EHRM richt zich ten aanzien van art. 15 EVRM vrijwel uitsluitend op de proportionaliteitsvraag en behandelt de andere vereisten uit het artikel niet of slechts marginaal.

3. De vraag of in dit geval sprake is van 'oorlog of enig andere algemene noodtoestand die het bestaan van het land bedreigt' wordt positief beantwoord, zonder inhoudelijke analyse. Dat is opmerkelijk, omdat op het moment dat de rechtbank uit Istanboel besluit de uitspraak van het Constitutioneel Hof niet te volgen, de coup al anderhalf jaar achter de rug is en het sterk de vraag is wat nu eigenlijk nog het gevaar voor het bestaan van het land zou zijn. Is er kans op een nieuwe coup en zo ja, waaruit volgt dat? Zijn er andere gevaren ontstaan in het kielzog van de couppoging? Op dergelijke vragen gaat het EHRM niet in. Het stelt slechts vast dat het aannemelijk is dat op het moment van de coup inderdaad het voortbestaan van het land is bedreigt: "The Court observes that the Constitutional Court, having examined from a constitutional perspective the facts leading to the declaration of a state of emergency, concluded that the attempted military coup had posed a severe threat to the life and existence of the nation. In the light of the Constitutional Court's findings and all the other material available to it, the Court likewise considers that the attempted military coup disclosed the existence of a 'public emergency threatening the life of the nation' within the meaning of the Convention" (*Altan*, par. 93). Opmerkelijk is dus dat het EHRM niet toets of er nog steeds sprake is van een noodtoestand en ook niet kritisch analyseert in hoeverre deze nogal snel neergeslagen coup een daadwerkelijk bedreiging voor het land was.

4. De vraag, zoals het laatste onderdeel van lid 1 van art. 15 vereist, of de maatregelen al dan niet in strijd zijn met verplichtingen die voorvloeien uit het internationaal recht, wordt überhaupt niet meegenomen door het EHRM in de zaken van Altan en de op dezelfde dag door dezelfde rechters gewezen zaak *Alpay* (*Şahin Alpay* t. *Turkije*, EHRM 20 maart 2018, nr. 16538/17, ECLI:CE:ECHR:2018:0320JUD001653817).

5. Tot slot heeft Turkije weliswaar een melding gemaakt van de noodtoestand, maar heeft daarbij niet vermeld welke maatregelen er worden genomen en hoe die zullen raken aan de mensenrechten in Turkije. Turkije heeft simpelweg gemeld dat "measures taken may involve derogation from the obligations under the Convention". Toch ziet het EHRM hier geen schending in van het derde lid van art. 15 EVRM, ook al is de vraag of de Secretaris-Generaal inderdaad 'fully informed' is (*Altan*, par. 89).

6. Alles komt ten aanzien van art. 15 EVRM dus neer op een proportionaliteitstoets. Daarbij valt op dat, zoals steeds meer in zijn jurisprudentie ten aanzien van art. 15 EVRM te zien is (Van der Sloot 2012, reeds aangehaald), het Hof er niet voor kiest om eerst de strenge proportionaliteitstoets van dit artikel toe te passen, om vervolgens, als niet aan deze standaard is voldaan, na te gaan of

de genomen maatregelen alsnog legitiem zijn met verwijzing naar de gewone uitzonderingsclausules zoals die in de materiële bepalingen van het EVRM zijn opgenomen. Het kiest er liever voor om de zaak inhoudelijk te behandelen onder de materiële bepalingen van het EVRM om, als blijkt dat niet is voldaan aan de daarin vervatte uitzonderingsclausules, uiteindelijk te beoordelen of aan de mogelijkheden onder art. 15 EVRM is voldaan. Dat is vreemd, omdat als niet is voldaan aan de normale eisen van noodzakelijkheid en proportionaliteit, er zeker niet zal zijn voldaan aan de verzwaarde vereisten onder art. 15 EVRM, waarin wordt gerept van 'strictly required': "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" (*Altan*, par. 94). Hiermee wordt, zoals het EHRM steeds meer placht te doen, de hele zaak teruggebracht tot een vraag van proportionaliteit. Er wordt steeds minder nagegaan of er is voldaan aan de voorwaarden voor de toepasselijkheid van een recht of doctrine. Liever wordt die juridische haarkloverij overgeslagen, aangenomen dat dat inderdaad het geval is en vervolgens beoordeeld of als dat zo is, aan het vereiste van noodzakelijkheid en proportionaliteit is voldaan.

7. De genomen maatregelen zijn volgens het EHRM *in casu* in ieder geval niet proportioneel en ook niet 'strictly required'. Daar komt een wat merkwaardige analyse aan te pas. Het EHRM meent dat de handeling van de rechtbank in Istanboel niet rechtmatig was en dat die dus niet noodzakelijk was: "Having regard to Article 15 of the Convention and the derogation by Turkey, the Court considers, as the Constitutional Court did in its judgment, that a measure of pre-trial detention that is not 'lawful' and has not been effected 'in accordance with a procedure prescribed by law' on account of the lack of reasonable suspicion cannot be said to have been strictly required by the exigencies of the situation" (*Altan*, par. 140). Wat de logische correlatie is tussen de twee is niet duidelijk. Sterker nog, het staatsnoodrecht is nu juist bedoeld om in tijden van nood buitenwettelijk te kunnen handelen. Wetten, zo is de gedachte, zijn gemaakt voor normale omstandigheden. Maar nood breekt wet (*necessitas non habet legem*); in tijden van oorlog moeten soms buitenrechtelijke maatregelen worden getroffen om het land te verdedigen. Eigendom van burgers en bedrijven moeten kunnen worden geconfisqueerd, bijvoorbeeld huizen om manschappen in te huisvesten en auto's om legereenheden snel van A naar B te kunnen verplaatsen, ook al vereist het recht dat daar normaal een lange procedure aan voorafgaat, bijvoorbeeld in termen van onteigening of inbezitneming. De kern van het noodrecht is dus nu juist dat de wetten en procedures die normaal gelden kunnen worden uitgezonderd. De analyse van het EHRM lijkt daarom misplaatst.

8. Het EHRM kent een preliminair bezwaar van de overheid gedeeltelijk toe, namelijk dat de klagers niet de nationale rechtsmiddelen hebben uitgeput. Alhoewel het Hof twijfelt of de juridische middelen die openstaan wel zullen worden gerespecteerd en dus effectief zijn, verklaart het toch dat het de klachten over de politiehechtenis niet ontvankelijk zal verklaren. Dat geldt echter niet voor de kern van de procedure, over de handelswijze van de rechtbank in Istanboel, omdat het EHRM daar geen effectief rechtsmiddel voor open zag staan. Zo kon volgens het Turkse recht de straf van de levenslanggestrafte Altan niet meer worden teruggedraaid (*Altan*, par. 103). Dat is interessant, omdat de klagers uiteraard wel nogmaals naar het Constitutioneel Hof hadden kunnen stappen, om een nieuwe verklaring te bemachtigen, maar het Hof ziet dit niet als een effectief rechtsmiddel. In feite lijkt het EHRM hiermee dus te stellen dat het Constitutioneel Hof niet langer zijn functie kan uitoefenen, wat betekent dat in wezen de democratische rechtsstaat als zodanig niet functioneert. Dat nuanceert het EHRM later overigens expliciet, door te stellen dat het de gang naar het Constitutioneel Hof in Turkije in het algemeen nog steeds wel als effectief rechtsmiddel zal zien, maar dat dat in deze zaak niet zo is (*Altan*, par. 142).

9. De kern van de zaak gaat om de vraag of art. 5 lid 1 sub c EVRM is geschonden, dat stelt: “1. Een ieder heeft recht op vrijheid en veiligheid van zijn persoon. Niemand mag zijn vrijheid worden ontnomen, behalve in de navolgende gevallen en overeenkomstig een wettelijk voorgeschreven procedure: [...] (c) indien hij op rechtmatige wijze is gearresteerd of gedetineerd teneinde voor de bevoegde rechterlijke instantie te worden geleid, wanneer er een redelijke verdenking bestaat, dat hij een strafbaar feit heeft begaan of indien het redelijkerwijs noodzakelijk is hem te beletten een strafbaar feit te begaan of te ontvluchten nadat hij dit heeft begaan”. Interessant hierbij is dat het EHRM met name ingaat op het punt van rechtmatigheid (*lawful*) en daarbij een link legt met de doctrine van ‘the quality of the law’, een doctrine die aanvankelijk is ontwikkeld ten aanzien van het recht op privacy. In bepaalde zaken ten aanzien van het recht op privacy bestond het probleem dat politie en inlichtingendiensten vrij brede en onspecifieke bevoegdheden kregen om de privacy van burgers te beperken. Alhoewel hun handelen dus strikt genomen rechtmatig was, heeft het EHRM gesteld dat ook de wet zelf, op basis waarvan het handelen van de politie en de inlichtingendiensten wordt gelegitimeerd, aan rechtsstatelijke criteria moet voldoen. Dat wil onder meer zeggen dat er duidelijke criteria moeten zijn voor het toepassen van de bevoegdheden, dat er grenzen moeten zijn aan het toepassen van de bevoegdheden en dat er controle moet bestaan op de inzet van de bevoegdheden (B. van der Sloot, *Privacy as virtue*, Intersentia, Cambridge, 2017). De doctrine van ‘quality of the law’ is steeds dominanter geworden in de jurisprudentie van het Hof, zowel omdat overheden in de loop der tijd steeds meer en bredere bevoegdheden aan dergelijke diensten toekennen alsook omdat het EHRM met een verwijzing naar deze doctrine niet de specifieke zaak en de individuele klacht hoeft te analyseren, maar kan volstaan met een oordeel over de kwaliteit van de wet als zodanig. Interessant is dat deze doctrine steeds meer wordt toegepast op andere rechten dan het recht op privacy, art. 8 EVRM, en ook een prominente plaats inneemt in deze zaken tegen Turkije. Het EHRM meent dat de kwaliteit van de Turkse wettelijke bepalingen (een combinatie van constitutioneel recht, straf(proces)recht en noodrecht) en de principes die daarmee samenhangen *in casu* zijn geschonden, onder meer vanwege de arbitraire machtsinzet, de onduidelijkheid van enkele noodregelingen en het feit dat de gang van zaken, waarbij een lagere rechter een uitspraak van het Constitutioneel Hof vernietigt, niet goed te voorzien zijn (*Altan*, par. 137-139). Er is dus op dit punt een schending. Andere klachten over een schending van art. 5 EVRM worden afgewezen of niet-ontvankelijk verklaard. Wel wordt er een schending gevonden van het recht op vrijheid van meningsuiting. Het Hof vraagt zich af of er *in casu* wel een wettelijke basis was voor de beperking van de vrijheid van meningsuiting van de journalist en professor/tv-presentator maar gaat niet in op die vraag. Zoals wel vaker, gebruikt het de ‘even if’-constructie. Zelfs al zou er een wettelijke basis zijn en zelfs als er een legitiem doel zou zijn, dan nog is een inperking niet noodzakelijk in een democratische samenleving, redeneert het EHRM dan. In sommige zaken neemt het Hof zelfs zijn toevlucht tot drie of vier ‘even ifs’. Zelfs al zou het recht (bijvoorbeeld het recht op privacy of vrijheid van meningsuiting) *in casu* van toepassing zijn, zelfs al zou er een inbreuk zijn, zelfs al zou die inbreuk zijn voorgeschreven bij wet en een legitiem doel dienen, dan nog is de eventuele inbreuk op het eventuele recht noodzakelijk in een democratische samenleving, zo oordeelt het EHRM, en is er dus geen schending van het artikel waarop een beroep wordt gedaan (een bekend voorbeeld is een zaak over euthanasie: *Pretty* t. *Verenigd Koninkrijk*, EHRM 29 april 2002, nr. 2346/02, ECLI:CE:ECHR:2002:0429JUD000234602, «EHRC» 2002/47 m.nt. Gerards en Janssen). Door de ‘even if’-constructie worden de meeste lastige rechtsvragen overgeslagen en alles teruggebracht tot een kwestie van noodzakelijkheid en proportionaliteit. Wederom komt dat de rechtszekerheid en duidelijkheid niet ten goede. Er ontstaat bijvoorbeeld een situatie waarin onduidelijk is of een bepaalde handeling onder de reikwijdte van een recht valt, al wordt wel duidelijk dat als dat zo zou zijn, er in ieder geval geen onrechtmatige inbreuk op is gemaakt. Soms verwijst het EHRM dan later naar dit soort zaken om te beweren dat in een bepaalde zaak in ieder geval niet is ontkend dat een handeling onder een bepaald recht zou vallen (bijvoorbeeld euthanasie onder

art. 8 EVRM). Het ziet daarin dan een aanknopingspunt om dat later alsnog expliciet te bevestigen (*Haas* t. *Zwitserland*, EHRM 20 januari 2011, nr. 31322/07, ECLI:CE:ECHR:2011:0120JUD003132207, «EHRC» 2011/53 m.nt. Den Hartogh).

10. *In casu* valt het nog mee, er wordt slechts één 'even if'-redenering gebruikt. Het gaat dan wederom primair om de 'quality of law': "The question then arising is whether the interpretation and application of the provisions of the CC may reduce their accessibility and foreseeability. In the present case, given that the public prosecutor, in bringing the charges against the applicant, and the judges, in deciding to keep him in pre-trial detention, interpreted those provisions as covering the articles written by him and the comments he had made during the television programme in question, the Court considers that serious doubts may arise as to whether he could have foreseen his initial and continued pre-trial detention on the basis of Articles 309, 311 and 312 in conjunction with Article 220 § 6 of the CC. However, in view of its findings below concerning the necessity of the interference, the Court considers that it does not have to settle this question" (*Altan*, par. 205).

11. De beperking was niet noodzakelijk in het kader van nationale veiligheid en openbare orde, zo meent het Hof, omdat het belangrijk is om zelfs over zaken als een coup en de eventuele plegers van de coup, van gedachten te wisselen: "the Court considers that one of the principal characteristics of democracy is the possibility it offers of resolving problems through public debate. It has emphasised on many occasions that democracy thrives on freedom of expression. In this context, the existence of a 'public emergency threatening the life of the nation' must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society. In the Court's view, even in a state of emergency – which is, as the Constitutional Court noted, a legal regime whose aim is to restore the normal regime by guaranteeing fundamental rights – the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness" (*Altan*, par. 210).

12. Vervolgens refereert het EHRM aan art. 18 EVRM, waarin staat: "De beperkingen die volgens dit Verdrag op de omschreven rechten en vrijheden zijn toegestaan, mogen slechts worden toegepast ten behoeve van het doel waarvoor zij zijn gegeven." Daaruit volgt dat overheden geen misbruik mogen maken van hun mogelijkheden onder het EVRM om rechten te beperken en uit te zonderen. Het gaat hier dus om misbruik van macht en het artikel is daarmee de zusterbepaling van art. 17 EVRM, waarin is vervat dat burgers geen misbruik mogen maken van de rechten zoals die staan in het EVRM. Opmerkelijk is dat het EHRM er voor heeft gekozen om beide bepalingen zo veel mogelijk links te laten liggen en zich primair te richten op de materiële bepalingen zoals die zijn vervat in het Verdrag. Ten aanzien van art. 17 zijn er zo'n 100 uitspraken gewezen die van enig belang zijn. Die uitspraken gaan vrijwel allemaal over het misbruik van art. 10 EVRM (zie uitgebreid: Paulien de Morree, *Rights and Wrongs under the ECHR*, Intersentia, 2016). Deze bepaling wordt nimmer ingezet ten aanzien van art. 8 EVRM (bijvoorbeeld het gebruik van privacy voor het verbergen van staatsondermijnende activiteiten), art. 12 EVRM (bijvoorbeeld het trouwen puur en alleen om een verblijfsvergunning te krijgen) of andere rechten. Waar de huiverigheid van het EHRM ten aanzien van de doctrines van misbruik van macht en recht vandaan komt is niet duidelijk. Wel is duidelijk dat art. 18 EVRM een zowaar nog slapender bestaan heeft geleid in de jurisprudentie van het EHRM dan art.17 EVRM. Toch is daar het laatste decennium enige verandering in gekomen, juist als het ging om het misbruik van art. 5 EVRM door overheden. Het EHRM heeft een schending van art. 18 jo. 5 EVRM gevonden in een klein aantal gevallen, namelijk een zaak uit 2004 (*Gusinskiy* t. *Rusland*, EHRM 19 mei 2004, nr. 70276/01, ECLI:CE:ECHR:2004:0519JUD007027601, «EHRC» 2004/64 m.nt. Barkhuysen), een zaak uit 2007 (*Cebotari* t *Moldavië*, EHRM 13 november 2007, nr. 35615/06, ECLI:CE:ECHR:2007:1113JUD003561506), een zaak uit 2012 (*Lutsenko* t.

Oekraïne, EHRM 3 juli 2012, nr. 6492/11, ECLI:CE:ECHR:2012:0703JUD000649211), een zaak uit 2013 (*Tymoshenko* t. *Oekraïne*, EHRM 30 april 2013, nr. 49872/11, ECLI:CE:ECHR:2013:0430JUD004987211, «EHRC» 2013/206 m.nt. Van Kalmthout), een zaak uit 2014 (*Mammadov* t. *Azerbeidzjan*, EHRM 22 mei 2014, nr. 15172/13, ECLI:CE:ECHR:2014:0522JUD001517213, «EHRC» 2014/174), twee zaken uit 2016 (*Rasul Jafarov* t. *Azerbeidzjan*, EHRM 17 maart 2016, nr. 69981/14, ECLI:CE:ECHR:2016:0317JUD006998114, «EHRC» 2016/145 en *Merabishvili* t. *Georgië*, EHRM 14 juni 2016, nr. 72508/13, ECLI:CE:ECHR:2016:0614JUD007250813, «EHRC» 2016/195), waarvan er één in 2017 een vervolg kreeg voor de Grote Kamer (*Merabishvili* t. *Georgië*, 28 november 2017 (GK), nr. 72508/13, ECLI:CE:ECHR:2017:1128JUD007250813, «EHRC» 2018/41 m.nt. Tan en Mackic) en tot slot een zaak uit 2018 (*Mammadli* t. *Azerbeidzjan*, EHRM 19 april 2018, nr. 47145/14, ECLI:CE:ECHR:2018:0419JUD004714514, «EHRC» 2018/139 m.nt. De Lange). De klagers doen ook *in casu* een beroep op art. 18 jo. 5 EVRM. Het EHRM vervalt echter weer in zijn traditionele houding en laat dergelijke analyse liever aan zich voorbij gaan: "Having regard to the conclusions reached above under Article 5 § 1 and Article 10 of the Convention, the Court does not consider it necessary to examine this complaint separately" (*Altan*, par. 216).

13. Dan is er nog het vraagstuk van subsidiariteit, waarop in zowel de *concurring* als in de *dissenting opinion* wordt ingegaan. De *concurring opinion* is geschreven door rechter Spano, waarbij rechters Bianku, Vucinic, Lemmens en Grițco zich hebben aangesloten. De *dissenting opinion* is geschreven door ad-hoc rechter Ergül. Aangezien er maar zeven rechters oordeelden over de beide hier besproken zaken, is er slechts één rechter die het houdt bij de uitspraak van het EHRM als zodanig. Het merkwaardige feit doet zich dus voor dat er meer rechters voor de nadere uitleg en verdediging van het subsidiariteitsprincipe zijn dan voor de officiële uitleg zoals die in de uitspraak is te vinden. Welke interpretatie als leidend moet worden beschouwd is daarom onduidelijk. Nog opmerkelijker is dat de *concurring opinion* eigenlijk geen *concurring opinion* is, maar een reactie op de *dissenting opinion* van rechter Ergül (iets wat zelden tot nooit voorkomt en ook tekstueel merkwaardig leest omdat *concurring opinions* altijd voor de *dissenting opinions* worden weergegeven – de lezer krijgt dus eerst te zien de reactie op een stuk dat later komt).

14. Rechter Ergül wijst er op dat gezien het subsidiariteitsprincipe, dat kan worden afgeleid uit art. 13 EVRM (recht op een effectief rechtsmiddel) en art. 35 lid 1 EVRM (het vereiste om de nationale rechtsmiddelen uit te putten), het Verdrag in feite secundair is aan nationale wetgeving. Daarbij komt volgens de Turkse rechter dat er een noodtoestand was en dat de Turkse staat derhalve een nog grotere *margin of appreciation* zou moeten toekomen. Daarom is hij het oneens met het oordeel van het EHRM dat de door de Turkse staat genomen maatregelen niet proportioneel zouden zijn: "In the assessment of proportionality, two dimensions must be taken into account. Firstly, it must be borne in mind that the applicant's complaints relate only to rights from which a derogation is permitted. That being so, the State should have had a greater margin of appreciation and the Court should have had regard to the risks and the difficulties with which the State was confronted. Next, the Court's assessment should not give rise to a legal hierarchy between rights from which a derogation is permitted" (*Altan*, *dissenting opinion*, par. 21-22). Met deze laatste opmerking richt de rechter zich opmerkelijk genoeg tegen lid 2 van art. 15 EVRM, waarin staat dat bepaalde bepalingen in het EVRM in ieder geval niet mogen worden gederogeerd, zelfs niet ten tijde van een noodtoestand. Een dergelijke hiërarchie is volgens hem in strijd met het internationale recht. Kortom, alles moet uiteindelijk onder de discretionaire bevoegdheid van staten vallen, zeker in een noodtoestand. Tot slot stelt hij dat er *in casu* een extreem ingewikkelde noodsituatie was in Turkije, waar de Turkse staat het beste zicht op had: "On account of those factors, and as the case is strictly linked to the incidents that gave rise to

the state of emergency and the derogation, it has to be concluded that the measures taken were strictly required by the exigencies of the situation. For that reason, the derogation relating to an exceptionally severe threat should have prevailed in the assessment of the merits of the case" (*Altan, dissenting opinion*, par. 23).

15. De *concurring* rechters nemen fel afstand van deze benadering. Rechter Spano benadrukt dat nationale overheden een ruime *margin of appreciation* toekomt, maar wel als die ruimte bonafide wordt gebruikt: "When the Member States fulfil their Convention role by applying in good faith the general principles deriving from the Court's case-law, the principle of subsidiarity implies that the Court may defer to their findings in a particular case" (*Altan, concurring opinion*, par. 2). Het is het EHRM dat de uiteindelijk beslist over de reikwijdte en de inhoud van het EVRM: "Member States demonstrate with their actions, in particular the reasoning provided by national courts, whether deference is due under the principle of subsidiarity. It follows that the operationalisation of the principle towards a more process-based review of domestic decision-making, within the conceptual framework of the margin of appreciation doctrine, does not in any way limit the Court's competence to ultimately review substantive findings at national level at the stage of the application of Convention principles embedded in the domestic legal systems. In short and to be clear, the robust and coherent application of the principle of subsidiarity by the Court has nothing to do with taking power away from the Court" (*Altan, concurring opinion*, par. 3). Het bestaan van een noodtoestand doet daar niets aan af.

16. Een klein, maar niet minder interessant punt is dat de Turkse rechter een zogenoemde ad-hoc rechter is. Normaal gesproken dragen nationale lidstaten rechters voor, om te worden benoemd tot rechter in het EHRM. Daar gaat vervolgens nog een screening en een ballotage overheen. Art. 22 EVRM bepaalt: "Voor elke Hoge Verdragsluitende Partij worden de rechters gekozen door de Parlementaire Vergadering, met een meerderheid van de uitgebrachte stemmen, uit een lijst van drie kandidaten, voorgedragen door de Hoge Verdragsluitende Partij". Toch kan het zijn dat een rechter tijdelijk niet beschikbaar is, plots sterft of om een andere reden zijn werk tijdelijk of definitief niet langer goed kan uitoefenen. Voor zulke gevallen is er binnen het EVRM-systeem de mogelijkheid gecreëerd om een ad-hoc rechter aan te stellen. Art. 26 lid 4 EVRM bepaalt: "De rechter die is gekozen voor de betrokken Hoge Verdragsluitende Partij maakt van rechtswege deel uit van de Kamer en de Grote Kamer. In geval van ontstentenis of belet van die rechter, wijst de President van het Hof een persoon van een vooraf door die Partij overgelegde lijst aan om daarin als rechter zitting te hebben". Regel 29 uit het Reglement van het EHRM geeft in navolging daarvan onder meer aan: "1. (a) If the judge elected in respect of a Contracting Party concerned is unable to sit in the Chamber, withdraws, or is exempted, or if there is none, the President of the Chamber shall appoint an ad hoc judge, who is eligible to take part in the consideration of the case in accordance with Rule 28, from a list submitted in advance by the Contracting Party containing the names of three to five persons whom the Contracting Party has designated as eligible to serve as ad hoc judges for a renewable period of two years and as satisfying the conditions set out in paragraph 1 (c) of this Rule. The list shall include both sexes and shall be accompanied by biographical details of the persons whose names appear on the list. The persons whose names appear on the list may not represent a party or a third party in any capacity in proceedings before the Court". Het is een voor de hand liggende regel die zowel wenselijk als noodzakelijk lijkt.

17. Toch ligt misbruik van deze procedure op de loer. De ad-hoc rechter is immers niet formeel gekozen door de Parlementaire Assemblee van de Raad van Europa en slechts geselecteerd van een lijst van namen aangedragen door de nationale overheid. Overheden kunnen dus hen gezinde rechters naar voren schuiven, die niet onafhankelijk functioneren, maar in feite als pion en vooruitgeschoven post van de staat gelden. Het is dan ook geen verrassing dat een aantal keer van deze sluiproute gebruik is

gemaakt en dan niet door landen als Nederland en Luxemburg, maar met name door de landen in Oost-Europa. Het bekendste voorbeeld is dat Oekraïne twee jaar lang weigerde om een volwaardige procedure te volgen en een ad-hoc rechter aanstelde, een benadering die pas wijzigde na zeer zware internationale druk. Daarna is de regel in het EVRM opgenomen dat de president van een kamer de ad-hoc rechter moet benoemen (art. 26 lid 4 EVRM), om in ieder geval een stok achter de deur te houden. Toch wordt er nog geregeld gebruik gemaakt van deze mogelijkheid en is er nog steeds veel scepsis over deze mogelijkheid. Zo berekende een rapport van de Committee on Legal Affairs and Human Rights, gericht aan de Parlementaire Assemblee van de Raad van Europa (het rapport was aanvankelijk getiteld 'Ad hoc judges: a problem for the legitimacy of the European Court of Human Rights', maar onder druk hertiteld tot 'Ad hoc judges at the European Court of Human Rights: an overview'), dat ad-hoc rechters dubbel zo vaak *dissenting opinions* schrijven als er een negatieve beslissing wordt genomen tegen hun land dan officieel benoemde rechters. "In cases where the ruling went against the respondent state, 33% of ad hoc judges and 16% of regular judges dissented, compared to only 8% of other judges. A more recent study, which examined the voting pattern of ad hoc judges at the Court from 2006 – 2010, has indicated that, in the 26 judgments where ad hoc judges voted against the majority, they voted against the state that nominated them in only 8 out of the 26 cases. In 9 of the 26 cases, the ad hoc judge was the only one to vote against the finding of a violation" (AS/Jur (2011) 36, par. 20).

18. Ook *in casu* is sterk de vraag of de ad-hoc rechter nu een onafhankelijke en neutrale rechter is. Als neutrale lezer komt zijn argumentatie als mager over. Onder het EHRM mag een rechter met de nationaliteit van het land waartegen een zaak dient niet een zaak behandelen als hij de enige rechter is die de uitspraak doet, maar is voor grotere rechterlijke colleges, namelijk als er uitspraak wordt gedaan door zeven rechters of door de Grote Kamer, juist vereist dat één van de rechters de nationaliteit heeft van het land waartegen de zaak dient (regels 24 en 26 van het Reglement van het Hof). De gedachte hierachter is dat een dergelijke rechter niet de enige mag zijn die oordeelt over een zaak, dat zou de neutraliteit en onafhankelijkheid van de rechtspraak van het EHRM te veel onder druk kunnen zetten, maar dat het voor grotere rechtscolleges juist van belang is om van de expertise van een rechter met kennis van de situatie in een land en van het nationale rechtssysteem gebruik te kunnen maken. Als de trend zich voortzet dat zowel ad-hoc als gekozen rechters hun land steunen zonder sterke juridische onderbouwing, dan hoeft het niet te verbazen als het op termijn niet langer een eis zal zijn om in grotere rechtscolleges een dergelijke rechter zitting te laten nemen. De expertise over het rechtssysteem kan immers ook op andere wegen worden verkregen en de *dissenting opinions* van dergelijke rechters zijn vaak eerder bedoeld voor nationale consumptie dan voor rechtsvorming op Europees niveau. Het feit dat *in casu* vijf van de zes andere rechters zich genoodzaakt hebben gezien om expliciet afstand te nemen van de *dissenting* rechter geeft aan hoe hoog het hen zit. Wellicht dat op termijn ook de mogelijkheid om een ad-hoc rechter naar voor te schuiven sterker aan banden zal worden gelegd.

19. Tot slot is er klaarblijkelijk nog bezorgdheid bij het EHRM over of Turkije zijn uitspraak wel zal volgen of dat deze, net zoals de uitspraak van het Constitutioneel Hof, naast zich neer zal worden gelegd. In de *concurring opinion* wordt er derhalve ten overvloede op gewezen dat Turkije een internationaalrechtelijke verplichting heeft om de uitspraken van het EHRM te volgen: "Finally, the member States are under an international-law obligation, finding its expression in Article 46 of the Convention, to execute judgments rendered by the Court. When a State has decided to secure to everyone within its jurisdiction the rights and freedoms guaranteed by the Convention and at the same time has decided to come within the jurisdiction of the Court, this obligation to execute the Court's judgments becomes mandatory and without exception. It follows that it is now for the competent Turkish authorities to faithfully and expeditiously execute today's judgments under the supervision of the Committee of Ministers

in a manner consistent with Turkey's obligations under the Convention" (*Altan, concurring opinion*, par. 5). Steeds vaker komt het voor dat landen als Rusland en Turkije simpelweg de uitspraken van het EHRM naast zich neerleggen of zaken traineren. Daarop volgen reprimandes, maar die hebben lang niet altijd zin, omdat die eenvoudig genegeerd kunnen worden. *In casu* is het EHRM klaarblijkelijk zo bevreesd dat vijf van de zeven rechters nog eens expliciet menen te moeten benadrukken dat de uitspraak van het EHRM dient te worden gevolgd. Het is afwachten of de rechtbank in Istanboel ook de uitspraak van het EHRM naast zich neer zal leggen.

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