



REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECOND SECTION

DECISION

Application No: 2012/850

Date of Decision: 7/11/2013

SECOND SECTION

DECISION

President : Alparslan ALTAN

Members :Serdar ÖZGÜLDÜR
Osman Alifeyyaz PAKSÜT
Recep KÖMÜRCÜ
M. Emin KUZ

Rapporteur : Cüneyt DURMAZ

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Mevlüde EROL
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Counsel : Att. Murat Kemal GÜNDÜZ

I. SUBJECT OF APPLICATON

1. The applicants alleged that the right to life and the freedom to claim rights were violated by indicating that their relatives had lost their lives after being buried under the rubble of a hotel as a result of the earthquake that occurred in Van province on 9/11/2011 and that they could not obtain any results despite having seized legal remedies.

II. APPLICATION PROCESS

2. The application was directly lodged by the attorney of the applicants on 30/11/2012. In the preliminary examination in terms of administrative aspects, it has been

determined that there is no situation to prevent the submission of the application to the Commission.

3. It was decided by the Second Commission of the Second Section that the admissibility examination be carried out by the Section, that the file be sent to the Section as per clause (3) of article 33 of the Internal Regulation of the Constitutional Court.

4. In the session held by the Section on 29/7/2013, it was decided that the examination of admissibility and merits of the application be carried out together as per subparagraph (b) of paragraph (1) of article 28 of the Internal Regulation of the Constitutional Court.

5. The facts and cases, which are the subject matter of the application, were notified to the Ministry of Justice on 2/8/2013. The Ministry of Justice presented its opinion to the Constitutional Court on 2/10/2013.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 3/10/2013. The applicant presented its opinion to the Constitutional Court on 22/10/2013.

III. FACTS AND CASES

A. Facts

7. As expressed in the application petition, the incidents are summarized as follows:

8. A 7,2 magnitude earthquake occurred in Van province on 23/10/2011 and numerous people lost their lives. Aftershocks continued after the earthquake and a second 5,6 magnitude earthquake occurred on 9/11/2011. 24 people that were staying at Bayram Otel located in the city centre of Van province including Cem EMİR, Sebahattin YILMAZ and Önal EROL, who are the relatives of the applicants, lost their lives when the hotel building collapsed as a result of the second earthquake.

9. The Office of the Chief Public Prosecutor of Van initiated ex officio an investigation following the incident. In the expert report that was prepared within the scope of the investigation, to which all of the applicants participated as complainants, it was determined that multiple individuals had responsibility, that the relevant units, which had not carried out damage assessment at the building, were negligent.

10. Within the scope of the investigation that was conducted by the Office of the Chief Public Prosecutor of Van, a separate viewing was carried out, core sample, reinforcement sample and other samples were taken from the rubble of the building via experts, the investigation file and the samples that were obtained were delivered to the experts in order for them to draft the report. In the decision that was delivered at the end of the investigation on 26/7/2012 in light of the report prepared by the experts, it was indicated that the building in question was constructed in an arbitrary fashion without its static project and statements being performed in its year of construction (1964), that the materials and reinforcements did not fulfill the criteria of the Regulation on Structures to be Constructed in Disaster Areas of the time, that the fact that it had an additional floor compared to the construction license resulted in excessive load on the building, that it was understood that although it remained standing after the first earthquake, it collapsed after having been affected by the aftershocks between the two earthquakes.

11. At the end of the investigation, it was decided that a public action be lodged at Van Assize Court regarding the hotel operator for the crime of leading to the deaths of multiple persons with conscious negligence, that there were no grounds for prosecution on behalf of the public regarding the owner of the building and the other suspects, that a decision of lack of jurisdiction be delivered regarding the Governor of Van and the officials of the Disaster and Emergency Management Authority (AFAD) as per articles 3 and 12 of the Code on the Trial of Civil Servants and other Public Officials dated 2/12/1999 and numbered 4483 and that the investigation file be sent to the Office of the Chief Public Prosecutor of the Supreme Court of Appeals..

12. The Office of the Chief Public Prosecutor of the Supreme Court of Appeals decided on 9/10/2012 that the complaint not be put into process with the justification that the allegations pertaining to misuse of duty regarding the Governor of Van and the officials of AFAD were not based on concrete information and documents and that no situation that constituted a crime and would require a preliminary examination regarding the concerned existed, this decision was notified to the attorney of the applicants on 1/11/2012.

13. The applicants submitted an objection petition to the Council of State via their attorneys on 12/11/2012 with the request that the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process be revoked and that a preliminary examination be held as per the Code numbered 4483.

14. No objection remedy is envisaged in the Code numbered 4483 against the action of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process, there is no information in the petition with regard to the outcome of the objection filed by the applicants to the Council of State.

15. In its opinion dated 2/10/2013 pertaining to the incidents that are the subject of the application (§ 5), the Ministry provided the following additional information, which was confirmed by the applicants in their statements in response to the opinion of the Ministry:

16. As a result of the objection filed by the attorney of the applicants against the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals dated 9/10/2012 and numbered investigation 2012/128, not putting in process D.2012/55, the 1. Chamber of the Council of State dismissed the complaint without examination in its decision dated 4/12/2012 and numbered M.2012/1699, D.2012/1856 due to the fact that no objection remedy exists in the Code against the decisions of the Offices of Chief Public Prosecutors.

17. In their statements in response to the opinion of the Ministry regarding the admissibility of the application, the applicants alleged that the administrative justice remedy was seized in order to determine the administrative responsibility and the remedy stemming from the responsibility, that however, the mere reception of compensation would not be sufficient in the event that the right to life was violated, that the state had the positive liability to install an effective and preventive criminal system.

18. The full remedy action in question has not yet been concluded.

19. The applicants lodged an individual application on 30/11/2012 within due time following the notification of the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting the complaint in process to them.

B. Relevant Law

20. The provisions of the Turkish Criminal Code dated 26/9/2004 and numbered 5237 pertaining to the crimes of “reckless homicide” and “misconduct in office”, which were made the subject of the complaint in the incident that is the subject of the application are as follows:

“Reckless homicide

ARTICLE 85. –

(1) A person who causes the death of another through negligence shall be sentenced to a prison sentence of two to six years.

(2) If the act has caused the death of more than one person or the death of one or more persons along with the injury of one or more persons, the person shall be sentenced to a prison sentence of two to fifteen years.

...

Misconduct in office

ARTICLE 257. - (1) A public official who, outside the circumstances otherwise set forth as a crime in the law, causes the grievance of individuals or loss to the public or who derive unjust benefit for persons by acting in contrary to the requirements of his/her duty shall be penalized with a prison sentence of six months to two years.

(2) A public official who, outside of the circumstances otherwise set forth as a crime in the law, causes the grievance of individuals or loss to the public or who derive unjust benefit for persons by showing neglect or delay in carrying out the requirements of his/her duty shall be penalized with a prison sentence of three months to one year.

(3) In the event that this does not constitute the crime of malversation, a public official who derives benefit from individuals for himself/herself or for another person so that s/he behaves in compliance with the requirements of his/her duty or for this reason shall be penalized as per the provision of paragraph one.”

21. Paragraph (1) of article 160 of the Code of Criminal Procedure (CCP) dated 4/12/2004 and numbered 5271 with the side heading of “Duty of a Public prosecutor who finds out that a crime has been committed” is as follows:

“The Public prosecutor who, through a denunciation or other means, is informed about a situation which gives the impression that a crime has been committed shall immediately commence investigating the fact of the matter in order to decide whether there are grounds to initiate a public action or not.”

22. Nevertheless, the trial of civil servants and other public officials due to crimes they have committed as a result of their duties depends on permission, and the instances authorized to give permission and the procedure to be followed are regulated in the Code numbered 4483.

23. Paragraph one of article 12 of the Code numbered 4483 with the heading of “Instances to carry out the preliminary investigation” is as follows:

“The preliminary examination shall be carried out by the competent Office of the Chief Public Prosecutor of venue as per the general provisions. However, a preliminary investigation to be carried out with regard to the Secretary General of the Office of the President of the Republic, Secretary General of the Grand National Assembly of Turkey, undersecretaries and governors shall be conducted by the Chief Public Prosecutor or the Deputy Chief Public Prosecutor of the Supreme Court of Appeals, a preliminary investigation regarding district governors shall be carried out by the Chief Public Prosecutor or the Deputy Chief Public Prosecutor of the province.”

24. As per the final sentence of article 3 of the Code numbered 4483, in the event that a subordinate civil servant and a superior civil servant participate in the same act, the permission is to be sought from the instance to which the superior civil servant is answerable. In this case, the instance that is authorized to give the trial permission that is requested for a governor or the civil servants serving under him/her is the Chief Public Prosecutor or the Deputy Chief Public Prosecutor of the Supreme Court of Appeals, which is the instance that is authorized to give trial permissions with regard to governors.

25. Paragraphs three and four of article 4 of the Code numbered 4483 with the heading of *“Referring the incident to the authorized instance, denunciations and complaints that will not be put in process”* are as follows:

“As per this Code, it shall be compulsory that the denunciations and complaints to be made regarding civil servants and other public officials not be abstract and general in nature, that individuals or incidents be indicated in the denunciations or complaints, that the allegations be based on serious findings and documents, that the correct name, surname and signature as well as the work or residential address of the petition owner figure on the denunciation or complaint petition.

The denunciations and complaints that do not fulfill the conditions under paragraph three shall not be put in process by Chief public prosecutors and the instances that are authorized to give permission and the situation shall be notified to the individual who has filed the denunciation or complaint. However, in the event that the allegations are demonstrated via documents whose authenticity do not arouse suspicion, the condition that the name, surname and signature as well as the work or residential address be correct shall not be sought. Chief public prosecutors and the authorized instances shall be obliged to keep the identity information of the denunciator or the complainant confidential.”

26. Article 9 of the Code numbered 4483 with the heading "Objection" is as follows:

“The authorized instance shall notify its decision regarding the issuance or non-issuance of the trial permission to the Office of the chief public prosecutor, the civil servant or other public official regarding whom the examination has been carried out and the complainant, if applicable.

The civil servant or other public official regarding whom the examination has been carried out can seize the objection remedy against the decision pertaining to the issuance of trial permission; the Office of the chief public prosecutor or the complainant can seize the objection remedy against the decision pertaining to the non-issuance of the trial permission. The period of objection shall be ten days starting from the notification of the decision of the authorized instance.

The Second Chamber of the Council of State shall hear the objection for those listed under subparagraphs (e), (f), g (except for the permission granted by the President) and (h),

the regional administrative court located within the jurisdiction of the authorized instance shall hear it for others.

Objections shall be examined with priority and concluded within three months at the latest. The decisions that are delivered shall be final.”

27. No objection remedy is envisaged regarding the decision of not putting in process delivered with regard to denunciations and complaints due to the fact that they do not possess the qualities included under paragraph one of article 4 of the Code numbered 4483.

28. Paragraph (1) of article 13 of the Code of Administrative Procedure dated 6/1/1982 and numbered 2577 with the heading of "*Directly filing a full remedy action*" is as follows:

"Those whose rights are violated due to administrative actions need to request the fulfillment of their rights by applying to the related administration within one year following the date on which they are informed about these actions upon written notification or in any other way and within five years following the date of the action in any case before they file an administrative case. In the event that these requests are partly or fully dismissed, a case can be filed within the period starting from the date following the notification of the action about this matter or, if no response is provided about the request within sixty days, following the date on which the period for response expires."

29. Article 49 of the Turkish Code of Obligations dated 11/1/2011 and numbered 6098 with the heading of "*Responsibility*" which regulates obligation relations arising from tort actions is as follows:

"Those who incur damages on others as a result of negligent and illegal acts shall be responsible for compensating for such damages.

Even though in the case of absence of a rule of law that prohibits damaging acts, those who intentionally harm others as a result of unethical deeds and actions shall be responsible for compensating for such harm."

30. Article 74 of the Code numbered 6098 which regulates the relation of obligation relations arising from tort actions with the Criminal Law is as follows:

"As the judge decides on the fault of the damaging party and on whether or not the latter has a discerning power whatsoever, s/he shall neither be bound by the provisions on responsibility of the criminal law nor shall s/he be bound by the acquittal decision as ruled by the criminal judge. Similarly, the decision of the criminal judge concerning the evaluation of the fault and establishment of the damage shall not be binding on the judge of common law."

31. Article 4 and article 13 with the heading of "*Technical works to be done in disaster zones*" of the Code on Measures to be Taken and Aid to be Delivered Due to Disasters Impacting Public Life dated 15/5/1959 and numbered 7269 are as follows:

"Article 4 – A regulation covering the general principles regarding emergency assistance organization and programs shall be prepared by the Ministries of Interior, Development and Housing, Public Works, Health and Social Assistance and Agriculture.

Within the framework of the principles of this regulation, a program that is to be implemented in matters such as rescue, treatment of the injured, accommodation, burial of the deceased, extinguishing fires, clearing up debris and catering for disaster victims to be fulfilled following the occurrence of a disaster and assigns duties and officials, determines the points of assembly shall be drawn up by the governors' offices and the required vehicles shall be prepared and preserved.

The implementation of these programs shall be ensured by the rescue and assistance committees to be established by governors' offices.

...”

“Article 13 – a) The state of the terrain where the disaster occurred as well as all structures and public facilities shall be examined by the public works boards to be established by the Ministry of Development and Housing and a damage assessment report shall be drafted.

(Amended: 31/8/1999 - DIFC - 574/1 art.) In circumstances where this is necessary, upon the request of the Ministry of Public Works and Housing, other ministries, organizations and institutions, local administrations, universities and trade associations shall be liable to immediately assign a sufficient number of civil engineers and/or architects, who are experienced in their fields, to damage assessment efforts in order to determine the damage that has taken place in structures.

(Amended: 31/8/1999 - DIFC - 574/1 art.) A separate report shall be submitted to the most senior administrator of the province and subprovince in question regarding the buildings that need to be demolished or evacuated given the hazardous state of the terrain or the damage suffered by them. These kinds of buildings shall be immediately evacuated by these instances. A maximum period of 3 days shall be provided for those that need to be demolished and the owners shall be notified to eliminate the hazard. In the event that there is no owner found on the premises, the situation shall be announced through local means and the notification shall be considered to be made.

...

b) ...

c) ...

ç) In disasters such as landslide or rockfall, the buildings that are evacuated upon the continuation or the possibility of recurrence of the hazard shall not be allowed to be occupied or repaired, for those that have been damaged, until definitive precaution is taken against the hazard. In the event that it is decided that no precaution can be taken, the buildings that are within the hazardous zone shall be demolished within the framework of the above principles. If the Ministry of Development and Housing deems it more economical to take the necessary precautions against the disaster in the terrain than to demolish the buildings that are prone to hazard and to relocate the community elsewhere, the required allocation for taking these precautions shall be paid from the fund prescribed under article 33. Expenditures made for precautions pertaining to the elimination of the hazard shall not be subject to borrowing.

d) Shacks and houses can be built, commissioned to be built, leased or purchased in order to ensure the temporary accommodation of those who have become or are likely to become disaster victims in places where they are present or in other places.

In circumstances where it will not be possible to fulfill these precautions in a short period of time, financial aid can also be provided to those who wish to take their own temporary accommodation precautions.

...”

32. Articles 1, 2, 4 and 18 of the Code on the Organization and Duties of the Disaster and Emergency Management Authority dated 29/5/2009 and numbered 5902 are as follows:

“Aim and scope

ARTICLE 1 – (1) The aim of this Code shall be to regulate the establishment, organization as well as the duties and authorities of the Disaster and Emergency Management Authority answerable to the Office of the Prime Minister in order for it to deliver the services pertaining to disasters and emergencies as well as civil defense. The Prime Minister can exercise his/her authorities pertaining to the Authority via a minister.

(2) This Code shall cover the taking of necessary precautions in order to effectively deliver the services pertaining to disasters and emergencies as well as civil defense on the national level and preparation prior to the occurrence of incidents and damage reduction, ensuring coordination between the organizations and institutions that carry out the interventions to be made during incidents and the recovery efforts to be conducted in the aftermath of incidents and the production and implementation of policies in these subject matters.

Definitions

Article 2 - (1) The following included in the Code shall mean the following;

a) Emergency: Incidents and a state of crisis created by these whereby the normal lives and activities of the entirety or certain segments of the society are halted or disrupted and which require immediate response,

b) Disaster: Incidents of natural, technological or human origin that create physical, economic or social losses for the entirety or certain segments of the society, halt or disrupt normal life and human activities,

c) ...

h) Risk: Degree of values to be lost according to the hazard possibility in a given area,

i) Risk reduction: All sorts of planned interventions to be made in order to prevent, reduce to acceptable scales or share the possible risks according to disaster scenarios developed in a given section or area,

i) *Risk management: Efforts to determine, reduce and share the risk types and levels on the country, region, city scale and local scale and the planning principles in this field,*

j) ...

k) *Damage reduction: Risk management and prevention precautions, which aim to eliminate or reduce damages that can potentially occur in disasters and emergencies,*

...”

“*ARTICLE 4 – (1) In order to assess information in circumstances of disaster and emergency, determine the precautions to be taken, ensure their implementation and inspect, ensure the coordination between organizations and institutions as well as civil society organizations the Disaster and Emergency Coordination Board shall be established under the presidency of the Undersecretary of the Office of the Prime Minister and shall consist of the undersecretaries of the Ministries of National Defense, Interior, Foreign Affairs, Finance, National Education, Public Works and Housing, Health, Transport, Energy and Natural Resources, Environment and Forestry and the State Planning Organization, the president of the Disaster and Emergency Management Authority, the Director General of the Turkish Red Crescent Society as well as the senior officials of other ministries and organizations to be assigned by the President of the Board depending on the type of disaster or emergency.*

(2) The Board shall convene at least for times per year. Moreover, the Board can convene in extraordinary fashion upon the call of the President of the Board. The Presidency shall act as the secretariat of the Board.”

“*Provincial directorates of disaster and emergency*

ARTICLE 18 – (1) Provincial directorates of disaster and emergency shall be established in provinces, within special provincial administrations, answerable to the governor. The governor shall be responsible for the command and control of the directorate.

(2) The duties of provincial directorates of disaster and emergency shall be the following:

a) *Determining the disaster and emergency hazards and risks of the province.*

b) *Drafting and implementing provincial disaster and emergency prevention and intervention plans in cooperation and coordination with local administrations as well as public organizations and institutions.*

c) *Managing the provincial disaster and emergency control center.*

ç) *Determining the losses and damage that occur in disasters and emergencies.*

d) ...

...

g) *Setting up and managing warehouses for necessary search and rescue equipment and food, tools, instruments and materials to be used to cater for the accommodation, nutrition and health requirements of the population in disasters and emergencies.*

ğ) ...

...

(3) ...

...

(5) *The appointment of the provincial disaster and emergency director and other personnel shall be done by the governor.*

...”

33. Articles 4, 6, and 32 of the Regulation on Emergency Assistance Organization and Planning Principles for Disasters published in the Official Gazette dated 19/5/1998 and numbered 19808 are as follows:

“Responsibility

Article 4 – Governors and district governors, the ministry, organizations and institutions in charge as well as military units shall be separately responsible for fulfilling the duties that are assigned to them via emergency assistance plans and directives pertaining to emergency assistance to be regulated as per the relevant legislation and this Regulation.

Starting from the occurrence of a disaster, the administrative official of the place where the disaster has occurred shall be responsible for taking all sorts of emergency precautions that need to be taken and fulfilling emergency assistance without waiting for an order.”

“Article 6 – Within the framework of the rules and principles of this Regulation:

a) In order to conduct emergency assistance services, provincial search and rescue committees shall be established in provinces under the chairmanship of the governor, sub-provincial search and rescue committees shall be established in sub-provinces under the chairmanship of district governors,

b) Governors and district governors shall be responsible in the first degree for the drafting, execution and keeping up to date of the province and sub-province emergency assistance plans. Ministries and central organizations and institutions as well as military units shall assist to the drafting and execution of these plans,

c) The rural organizations of Ministries, organizations and institutions shall be covered within the provincial and sub-provincial plans,

d) The central organizations of Ministries, organizations and institutions as well as military garrison commands in the region shall draft reinforcement and support plans pertaining to their own duties in order to assist the provinces and sub-provinces.

e) In the planning of emergency assistance services, the utilization of the powers and resources of the public organizations and institutions within the boundaries of the sub-province and/or province primarily shall be the basis.

In the event that the requirements cannot be met on time or sufficiently via these resources, the following shall be done in order:

1. Assistance shall be requested from the military units in the region, neighboring governors and district governors,

2. They shall be met through the private enterprises and real persons in the region via liabilities.

...

Preliminary Damage Assessment and Temporary Housing Services Group

Article 32 – The establishment, duties, planning and services of the Preliminary Damage Assessment and Temporary Housing Services Group:

a) Establishment:

...

b) Duties:

1. It shall determine where and in what numbers to send preliminary damage assessment teams based on the news that are received,

2. It shall determine the areas where damage is intensive,

3. It shall provide the required information for definitive damage assessments,

4. It shall take the precautions to ensure the assessment of damage in housing units, all official and private structures and animal shelters in the shortest possible period of time after the disaster,

5. Annex example of Preliminary Damage Assessment Forms: It shall be made to be completed as per 16. Annex example of Summary forms: It shall be drafted as per form 17 and submitted to the disaster bureau,

6. It shall determine buildings that are unfavorable to be residing in in terms of life security and that need to be demolished,

7. *It shall determine buildings and facilities that can be used for the requirements of official organizations and the housing of disaster victims,*

8. *It shall commission the necessary actions in order for the determined buildings to be prepared for utilization,*

9. *It shall ensure the temporary housing of families that are left outside after having completed preliminary assessment efforts,*

10. *It shall ensure the allocation of primarily tents, intact schools and other official and private buildings for the short term housing of disaster victims,*

11. ...

...

c) *Planning:*

1. *Determining the list of personnel, equipment and instruments to be assigned to services by the organizations as per the principles of paragraphs (l) and (m) of article 12,*

2. *Places from which reinforcement teams can be supplied in the event that the personnel that will carry out preliminary damage assessment does not suffice,*

3. *Since the temporary housing of disaster victims will be initially ensured in buildings belonging to official organizations, in buildings and facilities belonging to private individuals in the event that these buildings do not suffice, prior determination of these sorts of buildings and facilities,*

4. ...

...”

IV. EXAMINATION AND JUSTIFICATION

34. The individual application of the applicant dated 30/11/2012 and numbered 2012/850 was examined during the session held by the court on 7/11/2013 and the following were ordered and adjudged:

A. Claims of the Applicant

35. The applicants alleged that the right to life, which is defined under article 17 of the Constitution, was violated by indicating that the Governor of Van and the officials of AFAD misused their duty by means of not fulfilling the duties assigned to them in the legislation, that no damage assessment was conducted at the hotel, that entry into the hotel was not prohibited despite the damage and that led to deaths by negligence, that however, the public officials who were negligent were not investigated in an effective manner. The applicants secondly alleged that the freedom to claim rights, which is regulated under article 36 of the Constitution, was violated by indicating that no instance to which they could apply so that a criminal investigation would be conducted against the decision of the Office of the

Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process of the complaint that had been submitted due to the inability to find concrete information and documents existed.

B. Evaluation

1. Claim That Article 17 of the Constitution Was Violated

a. In Terms of Admissibility

36. While an assessment as to the admissibility of the complaints is done in the opinion of the Ministry with a view to the applicants' claim that article 17 of the Constitution was violated, it was stated that no information existed to the effect that the applicants had filed an action for compensation against the administrations in question, that the principle that an individual application can only be lodged after the exhaustion of legal remedies needed to be taken into consideration.

37. In their statements in response to the opinion of the Ministry regarding the admissibility of the application, the applicants alleged that the administrative justice remedy was seized in order to determine the administrative responsibility and the remedy stemming from the responsibility, that however, the mere reception of compensation would not be sufficient in the event that the right to life was violated, that the state had the positive liability to install an effective and preventive criminal system.

38. In order to decide pertaining to the matter of exhausting legal remedies while the admissibility examination pertaining to the complaints of the applicants with regard to article 17 of the Constitution was going on, the scope of the positive liability to “*establish an effective judicial system*” that the State has in order to protect the right to life within the framework of article 17 of the Constitution needs to be determined. Therefore, the evaluation regarding this matter will be conducted jointly with the examination pertaining to the merits.

39. In paragraph (1) of article 46 of the Code numbered 6216, it is adjudged that only those whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation have the right to individual application. Due to the inherent quality of the right to life, regarding individuals who have lost their lives, an application pertaining to this right can only be lodged by the relatives of the deceased individuals, who have been aggrieved by the incident of loss of life, which has taken place. The applicants are the spouse, children, parents and siblings of the individuals who passed away in the incident that is the subject of the application. Therefore, there is no deficiency in terms of the capacity to apply.

40. It is seen that the part of the application lodged by the above listed relatives of the individuals who lost their lives in the incident, which is to the effect that article 17 of the Constitution was violated is not clearly devoid of justification as per article 48 of the Code numbered 6216. As no other reason for inadmissibility was observed, it should be decided that this part of the application is admissible.

b. Examination in Terms of Merits

41. The applicants alleged that the right to life, which is defined under article 17 of the Constitution, was violated by indicating that the Governor of Van and the officials of AFAD did not fulfill the duties assigned to them in the legislation, that no damage assessment was conducted at the hotel, that entry into the hotel was not prohibited despite the damage and

that they led to the deaths of their relatives by negligence, that however, the public officials who were negligent were not investigated in an effective manner.

42. In the opinion of the Ministry, while the complaints to the effect that article 17 of the Constitution was violated were being evaluated, the principles adopted by the European Court of Human Rights (“ECtHR”) with a view to the right to life were mentioned, it was stated that matters such as the uncertainty as to when the risk to which the relatives of the applicants were subject due to circumstances bearing a life-threatening hazard could materialize, the status of the individuals who have a role in the emergence of these kinds of circumstances and whether or not the action or negligence attributed to these individuals is intentional need to be taken into consideration during the examination on merits of a certain case in order to determine the responsibility carried by the State with a view to the right to life.

43. In the opinion of the Ministry, it was stated that, within the context of article 2 of the European Convention on Human Rights (“ECHR”), a distinction needed to be observed between cases pertaining to a death incident occurring as a result of intention, attack or ill treatment and cases pertaining to a death incident occurring as a result of negligence. Within this framework, an opinion was included to the effect that the ECtHR concluded that the positive liability regarding the “*establishment of an effective judicial system*” did not require the filing of a criminal action in each and every incident if the violation of the right to life or physical integrity had not been deliberately caused and that it could be sufficient to have civil, administrative and even disciplinary remedies open for the victims.

44. Moreover, it was indicated in the opinion of the Ministry that the state could have access to relevant information and documents more easily in cases pertaining to manslaughter and hazardous activities with loss of life as a result of incidents occurring under the responsibility of public instances according to the ECtHR, that it was accepted that the state had the liability to conduct an official investigation, that in order for this criteria to be applied in the case in question first the public instance to which the duty to conduct examinations regarding the matters of construction of the buildings first and, in the following period, regarding earthquake resistance belonged to and then whether or not the instance in question had fulfilled its duty needed to be determined.

45. The applicants alleged against the opinion of the Ministry regarding the merits of the application that there was a tendency to apply the ECtHR standards pertaining to the liability of the state to investigate dispositions causing death, which is included in the field of protection of the right to life referred to in the opinion, to the period prior to the first earthquake without taking the petition into consideration, that however the investigation that was conducted focused on causing death as a result of failure to carry out a damage assessment, that the allegations were erroneously evaluated as per article 6 of the ECHR.

46. Article 17 with the heading of “*Inviolability and material and spiritual existence of the individual*” of the Constitution is as follows:

“Everyone has the right to life and the right to protect and improve their material and spiritual existence.

Except for medical necessity and the cases specified in law, the bodily integrity of the individual is inviolable; the individual cannot be subjected to scientific and medical experiments without his/her consent.

No one can be subjected to torture or torment; no one can be subjected to a penalty or treatment which is incompatible with human dignity.

The acts of killing taking place in the cases of self-defense, the execution of warrants of arrest and detention, the prevention of the escape of a detainee or convict, the quelling of a riot or insurgence, and under compelling circumstances when law permits the use of a weapon during the execution of the orders given by an authorized body during martial law or state of emergency is out of the scope of the provision of the first paragraph."

47. The right to life and the right to protect and improve his/her material and spiritual existence of an individual are among the rights which are closely tied, inalienable and indispensable and the state has positive and negative liabilities about this subject. As a negative liability, the state has the liability not to end the life of any individual within its jurisdiction intentionally and unlawfully, moreover; it has the positive liability to protect the right to life of all individuals within its jurisdiction against risks which can stem from the actions of public instances, other individuals or the individual himself/herself (App. No. 2012/752, 17/9/2013, § 50-51).

48. Article 17 of the Constitution gives the State the principal liability to use all available means to protect the right to life in circumstances where loss of life occurs under conditions that can require the responsibility of the State (App. No: 2012/752, 17/9/2013, § 52-53). The positive liabilities that the state has within the scope of the right to life have also a procedural aspect. Within the framework of this procedural liability, the state is obliged to carry out an effective official investigation which can ensure that those who are responsible for each incident of death which is not natural are determined and, if necessary, punished. The main aim of this type of investigation is to guarantee the effective implementation of the law that protects the right to life and, in the incidents in which public officials or institutions are involved, to ensure that they are accountable against the deaths which occur under their responsibility (App. No: 2012/752, 17/9/2013, § 54).

49. It is necessary to determine the type of investigation required by procedural liability in an incident depending on whether the liabilities as regards the essence of the right to life require a criminal sanction or not. Therefore, in cases pertaining to incidents of death occurring as a result of intention or assault or ill-treatment, the state has the liability to conduct criminal investigations of the nature to allow for the determination and punishment of those responsible for the case of lethal assault as per article 17 of the Constitution. In these kinds of incidents, the mere payment of compensation as a result of the administrative and civil investigations and cases that are conducted is not sufficient to eliminate the violation of the right to life and to remove the title of victim (App. No: 2012/752, 17/9/2013, § 55).

50. However, a different approach needs to be adopted with a view to cases pertaining to incidents of death occurring as a result of negligence. As a result, if the violation of the right to life or physical integrity has not been caused intentionally, the positive liability regarding the "*establishment of an effective judicial system*" does not require the filing of a criminal action in each and every incident. It may be sufficient to have civil, administrative and even disciplinary legal remedies open for the victims (App. No: 2012/752, 17/9/2013, § 59).

51. In addition to this, in circumstances where State officials or organizations are negligent to a point that surpasses a judgment error or lack of attention in incidents of death

occurring as a result of negligence, or in other words in circumstances where the instances in question fail to take the required and sufficient measures to eliminate hazards occurring as a result of a disaster or a hazardous activity by means of neglecting the duties attributed to them despite being aware of the potential consequences, regardless of the legal remedies that may have been applied to by individuals on their own initiative, the lack of any accusation against the individuals who have endangered the lives of people or the failure to try these individuals may result in the violation of article 17 (App. No: 2012/752, 17/9/2013, § 60-62).

52. In the incident that is the subject of the application, the relative of the applicants lost his life as a result of the collapse of the hotel where they were staying during the 5,6 magnitude earthquake that took place on 9/11/2011 during the aftershocks which happened in the aftermath of the 7,2 magnitude earthquake on 23/10/2011. With a view to the incident that is the subject of the application, the legal and administrative framework for the liability to protect the right to life, which is included in the liabilities of the state within the framework of the right to life, needs to be constituted and it needs to be demonstrated whether or not the responsibility to implement this framework as it should be exists.

53. In order for a liability of the state to be applicable, it needs to be known by public officials that the life of a specific individual is in real and imminent danger or after the acceptance of the existence of circumstances where this should be known, within the framework of this kind of a situation, it needs to be determined that public instances have failed to take precautions in such a way as to prevent the realization of this danger within reasonable limits and the authorities they have (App. No: 2012/752, 17/9/2013, § 53).

54. The applicants alleged that the Governor of Van and the officials of AFAD did not fulfill the duties assigned to them in the legislation, that they had not taken the necessary precautions between the two earthquakes, that no damage assessment was conducted at the hotel, that entry into the hotel was not prohibited despite the damage and that they led to the deaths of their relatives by negligence (§ 41). In the opinion of the Ministry, it was stated that matters such as the uncertainty as to when the risk to which the relatives of the applicants were subject due to circumstances bearing a life-threatening hazard could materialize, the status of the individuals who have a role in the emergence of these kinds of circumstances and whether or not the action or negligence attributed to these individuals is intentional needed to be taken into consideration (§ 42).

55. In the case of the occurrence of a disaster such as an earthquake, with a view to the officials regarding whom the applicants request a criminal investigation to be conducted, the duties of immediately determining damaged buildings, evacuating and demolishing those buildings that constitute a hazard as per the damage they have sustained, ensuring the temporary accommodation of disaster victims or those who may potentially become disaster victims wherever they are or in other places are clearly determined in the legislation (§ 31-33) regarding the subject (App. No: 2012/752, 17/9/2013, § 67-71).

56. When the provisions of the legislation mentioned above are taken into consideration, it is understood that the Governor and AFAD officials, who are alleged by the applicants to have caused the deaths of their relatives by means of failing to take the necessary precautions in the aftermath of the first earthquake, have primary responsibilities with a view to precautions to be taken.

57. Numerous aftershocks occurred in the aftermath of the first big earthquake that took place. The buildings that sustained damage to a certain degree during the first earthquake were in danger of collapsing during the aftershocks that occurred. It needs to be

accepted that this situation is a foreseeable risk. The relatives of the applicants lost their lives by being buried under the rubble of the hotel, which collapsed during the 5,6 magnitude earthquake that occurred 16 days after the first big earthquake. It is also evident that disaster victims or those that came to that city as a result of the earthquake that had occurred would consider using the hotel, which was one of the facilities with the highest capacity among the accommodation places open to the public in the city where the earthquake had occurred, for their accommodation needs. In this case, it can be expected from those responsible to carry out the damage assessment regarding the hotel and to decide that it be evacuated if necessary within the 16 days that had elapsed after the first earthquake.

58. Clauses (1) and (2) of article 45 of the Code numbered 6216 with the side heading "*Right to individual application*" are as follows:

“(1) Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force.

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

...”

59. Similar to what is accepted in the case law of the ECtHR (App. No: 2012/752, 17/9/2013, § 74), the condition of exhausting the legal remedies included under paragraph (2) of article 45 of the Code numbered 6216, is a natural outcome of the fact that the individual application is a final and extraordinary remedy to prevent the violation of fundamental rights. In other words, the fact that administrative instances and courts of instance are primarily liable to resolve violations of fundamental rights renders compulsory the condition of exhausting legal remedies (App. No: 2012/1027, 12/2/2013, § 20-21).

60. The full remedy action (§17-18) filed by the applicants for the determination of the administrative responsibility and the compensation resulting from the responsibility has not yet been concluded, no permission was granted to file a criminal investigation regarding the Governor and AFAD officials. In this case, the material aspect of the positive liabilities of the State within the framework of the right to life in the incident that is the subject of the application, that is, whether or not it used all the available means in order to duly implement the legal and administrative precautions envisaged to protect the right to life (§ 48) cannot be examined and no decision thereon can be delivered by the Constitutional Court at this stage.

61. It is not possible to say the same thing as regards the conducting an effective criminal investigation aspect of the State's positive liabilities with a view to the right to life and there is no obstacle preventing the Constitutional Court from delivering a decision regarding the matter of whether or not the right to life was violated due to the decision of not putting in process that was finalized. Moreover, it is not compulsory for the full remedy actions filed against public administrations to have been concluded in order for the Constitutional Court to be able to conduct this kind of an examination. Indeed, as mentioned

above (§ 51), the prevention of the examination of the responsibilities of officials who are alleged to have put the lives of individuals in danger by means of neglecting their duties and authorities regarding the matter of eliminating foreseeable risks that occur as a result of a hazardous activity or natural disasters can result in the violation of article 17 of the Constitution by itself. However, it must be noted that the aim of the criminal investigation that needs to be conducted is to ensure that the provisions of the legislation which protects the right to life are implemented in an effective way and that those who are responsible, if any, in the incident of death that has occurred are brought to justice in order for their responsibilities to be determined. This is not a liability of result, but a liability to use the appropriate means. On the other hand, the assessments that are contained herein do not refer to the absolute obligation of determining the civil or criminal responsibility of any individual or public instance with regard to the incident (App. No: 2012/752, 17/9/2013, § 56).

62. In this case, in terms of the incident that is the subject of the application, as brought forward in the opinion of the Ministry, while the examination of the admissibility of the complaints is carried out, the objection that the legal remedies were not exhausted due to the fact that the applicants had not filed an action for moral or material compensation against the relevant administrations or that the actions they had filed were not concluded (§ 36) cannot be accepted as regards the decision of not putting in process that was finalized (with regard to the procedural aspect of the positive liabilities of the state within the framework of the right to life). The essence of the application is the allegation that the procedural aspect of the positive liability of the state stemming from the right to life had been violated due to the fact that no criminal investigation was initiated regarding the Governor and AFAD officials whom they allege to have caused the deaths of their relatives by failing to take the necessary precautions in the aftermath of the first earthquake.

63. In the incident that is the subject of the application, a decision of lack of jurisdiction with regard to the Governor of Van and AFAD officials was delivered in the criminal investigation conducted by the Office of the Chief Public Prosecutor of Van and the investigation file was sent to the Office of the Chief Public Prosecutor of the Supreme Court of Appeals. The Office of the Chief Public Prosecutor of the Supreme Court of Appeals decided that the complaint not be put into process with the justification that the allegations pertaining to misuse of duty regarding the Governor of Van and the officials of AFAD were not based on concrete information and documents and that no situation that constituted a crime and would require a preliminary examination regarding the concerned existed.

64. One of the matters to be taken into consideration when evaluating the effectiveness of the investigation that was conducted with regard to these individuals is the effectiveness and the sufficiency of the criminal investigation so as to allow for the determination and punishment of those responsible. In order for effectiveness and sufficiency to be fulfilled, the investigation instances need to take action ex officio and all evidence that could elucidate the death incident and serve to identify those responsible need to be collected. A deficiency in the investigation that would reduce the likelihood of discovering the cause of the death incident or those responsible bears the risk of clashing with the rule of effective investigation (App. No: 2012/752, 17/9/2013, § 57).

65. With regard to the incident that took place, first of all an investigation needs to be initiated in order to establish to what extent the responsibility can be attributed to the negligence of relevant public officials (whom the complainants also allege to be responsible) except for the effect of the natural disaster. In order to be able to answer this question, expert

opinions including technical and administrative assessments need to be sought and information that can only be obtained by public authorities need to be accessed. These matters are not matters that individuals (complainants in the incident that is the subject of the application) can prove (App. No: 2012/752, 17/9/2013, § 82).

66. Within the framework of the first investigation that was conducted by the Office of the Chief Public Prosecutor of Van, a viewing was conducted, samples were taken and examined, opinions of experts were obtained, the deficiencies and faults that were present in the additions that were later made to the building in question were referred to in light of the report prepared by experts, it was indicated that it was understood that although it stood standing during the first earthquake, it collapsed during the second one after having been affected by the aftershocks between the two earthquakes.

67. With regard to the incident that had consequences as severe as the death of 24 people, the Office of the Chief Public Prosecutor of the Supreme Court of Appeals decided not to put the complaint in process with the justification that the allegations pertaining to misuse of duty were not based on concrete information and documents and that no situation that constituted a crime and would require a preliminary examination regarding the concerned existed without providing any assessment as to the matters that had been taken into consideration during the first investigation by the Office of the Chief Public Prosecutor of Van and the matters that were made the subject of complaint by the applicants (§ 12). With regard to the principal complaint of the applicants of causing the deaths by means of the failure of the officials to conduct a damage assessment between the two earthquakes and to take other administrative precautions, the Office of the Chief Public Prosecutor did not put the request of initiating an investigation in process without including any evidence or assessments that would demonstrate what sort of actions had been taken by the officials in terms of damage assessment and the prohibition of entry into damaged buildings. Whereas the decision in question could have been subject to oversight through the means of objection had a decision not to give permission for investigation been delivered at this stage by the Office of the Chief Public Prosecutor, the decision that was already delivered by the Office of the Chief Public Prosecutor prevented the evaluation of the request to pursue the investigation by an instance of objection.

68. Another matter to be taken into consideration when evaluating the effectiveness of the investigation that is conducted is whether or not the investigation and its consequences are open to public scrutiny in order to ensure accountability in practice as in theory and that, in addition, the applicants are able to take part in the investigation that is conducted in such a way as to be able to ensure the openness of the investigation and protect their legitimate interests (App. No: 2012/752, 17/9/2013, § 58).

69. In the incident that is the subject of the application, the 1. Chamber of the Council of State dismissed the objection filed by the individuals who had lost their relatives against the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process without examination by referring to the fact that no objection remedy is envisaged in the Code numbered 4483 against these decisions of Offices of Chief Public Prosecutors. There is no instance where the applicants can object to the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process. In this case, it is not possible to consider the investigation to be effective due to the fact that the investigation conducted with regard to these individuals and its consequences are not open. Indeed, the ECtHR ruled in a similar fashion that the fact that the close relatives of the applicant (Firat Dink) in the Dink v. Turkey case were able to object to the objection

instances that had conducted their examination merely based on the file could not remedy the deficiencies in the investigations in question with regard to the matter of protecting the legitimate interests of the victims (*Dink v. Turkey*, 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14/9/2010, § 89).

70. For the explained reasons, as it is understood that an effective and deterrent criminal investigation had not been conducted, it needs to be accepted that the procedural aspect of the right to life regulated under article 17 of the Constitution was violated.

2. Claim That Article 36 of the Constitution Was Violated

71. The applicants secondly alleged that the freedom to claim rights, which is regulated under article 36 of the Constitution, which corresponds to article 13 of the ECHR, was violated by indicating that no instance to which they could apply so that a criminal investigation would be conducted against the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process of the complaint that had been submitted with the justification that no concrete information and documents existed.

72. In response to the applicants' allegation of violation of article 36 of the Constitution, the Ministry indicated that the rights and principles pertaining to fair trial under article 6 of the ECHR, which regulates the right to a fair trial, were applicable during the conclusion on the merits of "*disputes pertaining to civil rights and obligations*" and "*a criminal charge*", that the fact that the applicants did not have the title of the accused in the criminal investigation in question needed to be taken into consideration and that therefore a decision of rejection of venue in terms of subject needed to be delivered, that article 9 of the Code numbered 4483 only refers to the provisions of objection against decisions delivered by administrative instances, that objections could not be examined as per this provision due to the fact that no regulation is introduced with regard to the decisions of the Office of the Chief Public Prosecutor of not putting in process as per article 4 of the Code numbered 4483, that however, there is not a significant deficiency from a legal point of view given that the applicants whose complaints that are conveyed to Offices of Chief Public Prosecutors are not put in process have the means to take the same matter before the instance of permission and object to any decision emanating from the instance of permission.

73. Article 36 of the Constitution with the heading of "*Freedom to claim rights*" is as follows:

“Everyone has the right to make claims and defend themselves (Amended expression: 3.10.2001-4709/14 art.) either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means.

No court can avoid hearing a case within its own jurisdiction.”

74. Article 40 of the Constitution with the heading of "*Protection of fundamental rights and freedoms*", which primarily corresponds to article 13 of the ECHR that adjudges that anyone whose rights and freedoms defined under the ECHR are violated has the right to apply to an effective remedy before a national instance, even if the violation in question is carried out by individuals who are charged to conduct an official service, is as follows:

“Anyone whose rights and freedoms vested by the Constitution are violated has the right to ask for being granted the opportunity to apply to an authorized body without any delay.

(Additional paragraph: 3.10.2001-4709/16 art.) The State is obliged to indicate in its proceedings the legal remedies and authorities the relevant individuals should apply and the time frames for these.

Damages incurred by any individual through unfair treatment by public officials are compensated for by the State as per the law. The State reserves the right of recourse to the relevant official having responsibility.”

75. Within the framework of the procedural liability of the state to “*establish an effective judicial system*” with regard to the right to life in relation to the incident that is the subject of the application, when assessments were made as to whether or not an effective criminal investigation that could ensure the identification and, if necessary, punishment of those responsible had been conducted in addition to and beyond the legal and administrative remedies for the victims, since the lack of an instance to which the applicants could apply against the decision of the Office of the Chief Public Prosecutor of the Supreme Court of Appeals of not putting in process the complaint so that a criminal investigation would be conducted was accepted as a deficiency and a decision of violation was delivered, it was not deemed necessary to conduct a separate examination on the same subject within the context of articles 36 and 40 of the Constitution.

V. IMPLEMENTATION OF ARTICLE 50 OF THE CODE NUMBERED 6216

76. Paragraph (2) of article 50 of the Code numbered 6216 is as follows:

“(2) If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. In cases where there is no legal interest in holding the retrial, the compensation may be adjudged in favor of the applicant or the remedy of filing a case before the general courts may be shown. The court, which is responsible for holding the retrial, shall deliver a decision over the file, if possible, in a way that will remove the violation and the consequences thereof that the Constitutional Court has explained in its decision of violation.”

77. In the application, the applicants, who are the relatives of Cem EMİR, Sebahattin YILMAZ and Önal EROL who lost their lives in the incident, did not request any compensation as they only asked for the determination that the procedural aspect of the right to life regulated under article 17 of the Constitution and the freedom to claim rights regulated under article 36 had been violated.

78. The applicants requested the collection of the counsel's fee and trial expenses from the defendants. It must be decided that the trial expenses made by the applicants be paid to the applicants.

79. Taking into account the fact that the failure to conduct an effective and deterrent criminal investigation violated the right to life with a view to the incident that is the subject of the application, in accordance with paragraphs (1) and (2) of article 50 of the Code numbered 6216, it should be decided that a copy of the decision be sent to the Office of the Chief Public Prosecutor of the Supreme Court of Appeals in order for the violation and the consequences thereof to be removed.

VI. JUDGMENT

In the light of the reasons explained, it was decided **UNANIMOUSLY** on 7/11/2013 that;

A. The complaints pertaining to the violation of article 17 of the Constitution brought forward in the application by the relatives of the three individuals who lost their lives in the incident ARE ADMISSIBLE,

B. The right to life guaranteed under Article 17 of the Constitution WAS VIOLATED,

C. That the separate EXAMINATION of the complaints to the effect that articles 36 and 40 of the Constitution were violated WAS NOT NECESSARY,

D. That the trial expenses of 2,812.50 TL in total composed of the fee of 172.50 and the counsel's fee of 2,640.00 TL, which were made by the applicants BE PAID TO THE APPLICANTS,

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

F. That a copy of the decision be sent to the Office of the Chief Public Prosecutor of the Supreme Court of Appeals in order for the violation and the consequences thereof to be removed as per clauses (1) and (2) of article 50 of the Code numbered 6216.

President
Alparslan ALTAN

Member
Serdar ÖZGÜLDÜR

Member
Osman Alifeyyaz PAKSÜT

Member
Recep KÖMÜRÇÜ

Member
M. Emin KUZ