REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

SECOND SECTION

JUDGMENT

OSMAN ERBİL APPLICATION

(Application No: 2013/2394)

Date of Judgment: 25/3/2015

Official Gazette Date- Issue: 18/6/2015-29390

SECOND SECTION

JUDGMENT

President : Alparslan ALTAN

Judges : Osman Alifeyyaz PAKSÜT

Recep KÖMÜRCÜ

Engin YILDIRIM

Celal Mümtaz AKINCI

Rapporteur : Murat ŞEN

Applicant : Osman Erbil

Counsel : Att. Asuman Esin ÖZBEY

I. SUBJECT OF APPLICATION

1. The applicant alleged that his right to liberty and security of person and right to hold meetings and demonstration marches were violated as he was taken into custody together with his friends and was prevented from making a press statement in front of the Embassy of the United States of America (USA) in order to protest some of the directors of Aydınlık Newspaper and of İşçi Party (Workers Party in Turkey) being taken into custody, of which he was a member, and as he was sentenced due to the offense of participating at an illegal demonstration.The applicant filed a request for retrial and compensation.

II. APPLICATION PROCESS

2. The application was lodged on 4/4/2013 with the 23rd Civil Court of First Instance of Ankara. As a result of the preliminary administrative examination of the petition and its annexes, it was determined that there was no deficiency which would prevent its submission to the Commission.

3. It was decided on 30/9/2014 by the Second Commission of the Second Section that the admissibility examination be carried out by the Section and that the file be sent to the Section.

4. It was decided on 30/10/2014 by the President of the Section that the examination of admissibility and merits of the application be carried out jointly and that a copy be sent to the Ministry of Justice for its opinion.

5. The facts, which are the subject matter of the application, were notified to the Ministry of Justice (Ministry) on 31/10/2014. The Ministry of Justice submitted its opinion to the Constitutional Court on 27/11/2014.

6. The opinion submitted by the Ministry of Justice to the Constitutional Court was notified to the applicant on 11/12/2014. The applicant submitted a counter-opinion on 26/12/2014.

III. THE FACTS

A. The Circumstances of the Case

7. As expressed in the application form and the annexes thereof and within the framework of the information and documents that are accessed through UYAP, the relevant incidents are summarized as follows:

8. The applicant who is the member of İşçi Party went with a group of 24 people in front of the Embassy of the United States of America (USA) on 24/8/2011 in order to protest the taking into custody of some directors of İşçi Party and Aydınlık Newspaper on 23/8/2011. The group aimed to draw attention of the public to pro-USA policies by making a press statement in front of the Embassy of the USA noting that practices, oppressions towards Aydınlık Newspaper and İşçi Party and custody procedures within this scope resulted from the policies originating from the USA.

9. While the group was about to make a press statement, the police arrived at the place of protest at 3:35 p.m.

10. Within the scope of the Minutes of Incident, Arrest and Custody dated 24/8/2011, when the police arrived at the crime scene, they determined that the group including the applicant chanted the slogans "*Freedom for Aydınlık, Down with the Fascist Dictatorship, Aydınlık will not Keep Silent, Down with the USA co-conspirator AKP, No Pasaran for Fascism - Aydınlık (Enlightened) Turkey, İşçi Party - the Fortress of Patriotism, Down with the AKP Dictatorship*" and one person from the group wrote with red spray paint on the wall of the embassy "*Ergenek, Bastard America, We Will Bring You to Book, İşçi Party will not Keep Silent*".

11. The police warned the group that what they did was an illegal demonstration, that they needed to disperse and that otherwise, a legal action would be taken about them. The warning was repeated at 3:38 p.m. Thereupon, two persons from the group indoctrinated the group not to disperse by saying "*We make our protest anywhere we like. The law grants us with the right to make a protest anywhere without receiving permission in advance, therefore we will continue to make our protest here*".

12. According to the claim of the applicant, the police intervened in the group at 3:45 p.m. and 23 protesters were taken into custody according to the aforementioned minutes. As one protester was found to be an attorney at law, s/he was released following identification.

13. Within the scope of the minutes of incident, arrest and custody, during the procedure of custody, the persons within the group interlocked with each other by their arms, threw themselves on the ground and attempted to kick and push the police officers who were performing the procedure of arrest.

14. The applicant was kept under custody until 11:25 a.m. on 25/8/2011 which was the next day. Then, the applicant was taken to the Courthouse of Ankara and released by the Public Prosecution Office.

15. A public prosecution was initiated at the 23rd Criminal Court of First Instance of Ankara through the indictment of the Office of the Chief Public Prosecutor of Ankara No. E.2011/578 of 22/9/2011 with a request for the punishment of the applicant and other persons who participated in the press statement in accordance with Article 28 of the Law on Meeting and Demonstration Marches No. 2911 of 6/10/1983.

16. At the hearing of the court on 3/4/2012, the statement of the police chief, who told those that made a press statement to disperse was taken as a witness. In his/her statement, the police chief stated that the accused who participated in the press statement did not show any resistance and use force in any way during the incident and that they only prevented the procedure by creating a chain together while the arrest was being performed and that s/he did not see any attack thereof towards the riot police.

17. Through its judgment No. E.2011/656, K.2012/1211 of 11/1/2012, the court eventually ruled on the punishment of the applicant and another accused with an imprisonment of five months in accordance with Article 32(1) of the Law No. 2911 that corresponded to the actions of the applicant and the other accused and decided on the suspension of the pronouncement of judgment by considering that he was not previously convicted due to an intentional offense according to his criminal record, that no concrete damage materialized due to the protest, personal characteristics of the applicant, his attitude and behavior at the hearing.

18. The justification of the court is as follows:

> "*Our court considers proven that the accused made a demonstration in front of the Embassy of the USA which is on Atatürk Boulevard and close to the Grand National Assembly of Turkey on the date of offense, that although the Governor's Office needed to be notified of the meeting at least 48 hours in advance as per Article 10 of the Law No. 2911, such notification was not made, that besides, as per Article 22(1) of the same Law, the meeting and demonstration march was made in places which were closer than 1 km to the Grand National Assembly of Turkey, that although the police units warned the accused to terminate the meeting and disperse, the accused did not terminate the meeting by themselves, that the Riot Police dispersed the demonstration by using force, that the accused created a chain in order not to disperse, that thus, all the accused committed the crime attributed to them and the following judgment has been rendered.*"

19. Objection of the applicant against the aforementioned judgment was dismissed with the judgment No. 2012/1037 Misc. Works of 26/11/2012 of the 8th Assize Court of Ankara. The judgment was notified to the applicant on 5/3/2013.

20. The applicant lodged an individual application on 4/4/2013.

B. Relevant Law

21. Article 3(1) of the Law No. 2911 is as follows:

> "*In accordance with the provisions of this Law, everyone has the right to hold meetings and demonstration marches, for specific purposes not considered as offense by laws, unarmed and free of aggression and without getting prior permission.*"

22. Article 10(1) of the same Law is as follows:

"*(Amended paragraph: Art. 5 of the Law No. 4771 of 3/8/2002) In order for a meeting to be held, a notification to be signed by all members of the organizing committee shall be submitted to the governor's or district governor's office to which the place of meeting is affiliated at least forty eight hours before the meeting and within the working hours.*"

23. Article 22 of the same Law is as follows:

"*Meetings cannot be held on public roads and in parks, sanctuaries, buildings and facilities where public services are delivered and their premises and within a distance of one kilometer to the Grand National Assembly of Turkey and demonstration marches cannot be held on intercity roads.*

In meetings at public squares, it shall be obligatory to abide by arrangements to be made by governor's offices and district governor's offices in order to ensure the passage of people and transportation vehicles."

24. Article 23 of the same Law is as follows:

"*The meetings and demonstration marches shall be deemed illegal if they are held; a) Without submitting a notification in a way that conforms to the provisions of Articles 9 and 10 or before and after the day and hour that are specified for the meeting or march;*

)…(

e) Without respecting the methods and conditions in Article 20 and the bans and measures in Article 22,

)….) "

25. Article 32 of the same Law is as follows:

"*(Amended article: Art. 1 of the Law No. 6008 of 22/7/2010.) If those who attend illegal meetings and demonstration marches insist on not to disperse despite warning and use of force, they shall be punished with an imprisonment of six months to three years. If those who hold the meeting and demonstration march commit this offense, the penalty to be imposed as per the provision of this paragraph shall be adjudged by being increased by half.*

In the event that the law enforcement is resisted to by force or threats despite warning and use of force, another penalty shall also be adjudged due to the offense that is defined in Article 265 of the Turkish Penal Code No. 5237 of 26/9/2004.

In the event that meeting and demonstration marches are dispersed by exceeding the authority limit without the occurrence of one of the conditions stipulated in Article 23 or without fulfilling the provision of Article 24, the penalties to be imposed on those who commit the acts stipulated in the above paragraphs can be applied by being reduced down to one quarter or imposing a penalty can be abandoned at all."

26. Article 231 of the Code of Criminal Procedure No. 5271 of 4/12/2004 is as follows:

"…

(5) (Additional paragraph: Art. 23 of the Law No. 5560 of 6/12/2006) If the penalty adjudged at the end of the trial carried out due to the offense the accused is charged with is an imprisonment of two years or less or a judicial fine, suspension of the pronouncement of the judgment can be decided upon. Provisions pertaining to conciliation shall be reserved. Suspension of the pronouncement of the judgment shall mean that the established judgment causes no legal consequence on the accused.

(6) (Additional paragraph: Art. 23 of the Law No. 5560 of 6/12/2006) In order for suspension of the pronouncement of the judgment to be decided on;

a) The accused not having previously been convicted due to an intentional offense,

b) The court reaching to a conviction that, considering the characteristics of the accused and his/her attitude and behavior during the trial, s/he will not commit an offense again ,

c) Full compensation of damages encountered by the victim or the public by reinstatement or restitution of the conditions prior to the offense or indemnification ,

shall be required. (Additional sentence: Art. 7 of the Law No. 6008 of 22/7/2010) In the event that the accused does not accept, suspension of the pronouncement of the judgment shall not be decided on.

(7) (Additional paragraph: Art. 23 of the Law No. 5560 of 06/12/2006) In the judgment whose suspension of pronouncement is decided on, the imposed sentence of imprisonment cannot be postponed and cannot be converted into alternative sanctions in the event that it has a short duration.

(8) (Additional paragraph: Art. 23 of the Law No. 5560 of 6/12/2006) In the event that suspension of the pronouncement of the judgment is decided on, the accused shall be subjected to a probation period of five years. (Additional sentence: Art. 72 of the Law No. 6545 of 18/06/2014) Within the probation period, suspension of the pronouncement of the judgment cannot be decided on again on the person due to an intentional offense.

…

(10) (Additional paragraph: Art. 23 of the Law No. 5560 of 6/12/2006) In the event that a new intentional offense is not committed and the liabilities pertaining to the probation measure are complied with, it shall be decided that the judgment whose pronouncement is suspended be revoked and discontinuance of action be ruled.

(11) (Additional paragraph: Art. 23 of the Law No. 5560 of 6/12/2006) In the event that s/he commits a new intentional offense or does not act in accordance with the liabilities pertaining to the probation measure, the court shall pronounce the judgment. However, the court can render a new judgment of conviction by deciding on the non-execution of a part of the penalty to be determined by itself up to the half of it or, in the presence of the relevant conditions, the postponement of the imprisonment in the judgment or the conversion thereof into alternative sanctions by considering the conditions of the accused who fails to fulfill the liabilities imposed on him/her."

IV. ASSESSMENT AND GROUNDS

27. Individual application of the applicant No. 2013/2394 of 4/4/2013 was examined during the session held by the Court on 25/3/2015 and the following were ordered and adjudged:

A. Applicant's Allegations

28. The applicant stated that they assembled in front of the Embassy of the USA in order to protest the taking into custody of some directors of Aydınlık Newspaper and İşçi Party of which he was a member, that the police arrived at the crime scene with a higher number than the group while a press statement was about to be made and that the police intervened, dispersed the group and took everyone into custody within a short period of time. He expressed that he was kept under custody for 13 hours in an unjust way with no legal basis, that he was sentenced to an imprisonment at the end of the public case filed against him and that however, it was decided to suspend the pronouncement of the judgment. He indicated that the group assembled for peaceful purposes, that there was no attack against the police, that in this way, they were prevented from holding a peaceful meeting and that the acceptance of the system of notification before the meeting constituted a concealed obstacle against the exercise of his rights. He alleged that his rights defined in Articles 11, 12, 13, 25, 26, 34, 36, 38 and 90 of the Constitution were violated and filed a request for retrial and compensation.

B. Assessment

29. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant and it appraises the legal definition of the facts and cases itself. Although it was alleged in the application petition that his rights defined in Articles 11, 12, 13, 25, 26, 34, 36, 38 and 90 of the Constitution were violated, the claims of the applicant are related to his being taken into custody in an arbitrary way without any legal basis and his being prevented from making a press statement and being sentenced to an imprisonment as a result of the public prosecution case filed against him.

30. Allegations as regards the custody were examined within the framework of the right to liberty and security of person as defined in Article 19 of the Constitution.

31. Allegations as to the effect that the freedom of expression and the right to hold meetings and demonstration marches defined in Articles 25, 26 and 34 were violated as he and his friends were not allowed to make a press statement and thus were sentenced as per the Law No. 2911 have been examined within the scope of the right to hold meetings and demonstration marches regulated in Article 34 of the Constitution in the evidence of the freedom of expression of the applicant by considering the autonomous situation of the right to hold meetings and demonstration marches and the fact that one of the aims thereof is to protect the freedom of expression, that the allegations as regards the freedom of expression in the incident which is the subject matter of the application cannot be fully separated from the right to hold meetings and demonstration marches, and the exclusive scope of the application.

1. Admissibility

a. Allegation on the Violation of the Right to Liberty and Security of Person

32. The applicant alleged that Article 19 of the Constitution was violated by stating that he was taken into custody in an arbitrary way and without any legal basis and kept under custody for 13 hours between 24/8/2011 and 25/8/2011.

33. The Ministry did not make any statement as to the admissibility of the application. On the other hand, it was stated that the measure of custody imposed on the applicant could be legally imposed in the case at hand and that legal conditions and duration were complied with in the process of custody.

34. Provisional Article 1(8) of the Law on the Establishment and Rules of Procedures of the Constitutional Court No. 6216 of 30/3/2011 is as follows:

> "*The court shall examine the individual applications to be lodged against the final actions and judgments that were finalized after 23/9/2012.*"

35. In accordance with this provision, the Constitutional Court examines the individual applications to be lodged against the final actions and judgments that were finalized after 23/9/2012. Therefore, the jurisdiction of the court in terms of *ratione temporis* shall only be limited to the individual applications that are lodged against the final actions and judgments that were finalized after this date. In the face of this regulation pertaining to public order, it is not possible to expand the scope of the jurisdiction in such a way to also cover the final actions and judgments that had been finalized prior to the mentioned date (App. No: 2012/832, 12/2/2013, § 14).

36. In the present case, the applicant was taken into custody on 24/8/2011 within the scope of the attributed offenses and released on 25/8/2011. The process of custody which is the basis of the claim of violation alleged by the applicant separately from the complaint as regards the judgment of conviction ruled on him was over with the judgment of release on 25/8/2011.

37. For the reasons explained, as it is understood that the complaint of the applicant as to the effect that he was taken into custody in an arbitrary way and with no legal basis and that he was deprived of his liberty for a period of 13 hours materialized and was over prior to the initiation of the jurisdiction of the Constitutional Court, it is necessary to decide on the inadmissibility of this part of the application on account of "*the lack of jurisdiction ratione temporis*".

b. Allegation on the Violation of the Right to Hold Meetings and Demonstration Marches

38. No evaluation was made as to the admissibility of the individual application in the opinion of the Ministry.

39. It needs to be decided that the application of the applicant as to the effect that the right to hold meetings and demonstration marches stipulated in Article 34 of the Constitution was violated is admissible as it is not manifestly ill-founded and there is no other reason to require a decision that it is inadmissible.

2. Merits

40. Article 34 of the Constitution is as follows:

"*Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.*

The right to hold meetings and demonstration marches can be restricted only by law and for the purposes of national security, public order, preventing the commission of crime, protecting public health and public morals or the rights and freedoms of others.

The formalities, conditions, and procedures to be applied in the exercise of the right to hold meetings and demonstration marches shall be prescribed by law."

41. Article 11 of the European Convention on Human Rights (Convention) is as follows:

"*1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, (…*(

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

42. The applicant stated that they assembled in front of the Embassy of the USA in order to protest the taking into custody of some directors of Aydınlık Newspaper and İşçi Party of which he was a member, that the police arrived at the crime scene with a higher number than the group while a press statement was about to be made and that the police intervened, dispersed and took into custody the group within a short period of time. He expressed that he was sentenced to an imprisonment because of the offense of contravening the Law No. 2911 at the end of the public prosecution case filed against him and that however, it was decided to suspend the pronouncement of the judgment. He indicated that the group assembled for peaceful purposes, that there was no attack against the police, that in this way, they were prevented from holding a peaceful meeting and that the acceptance of the system of notification before the meeting constituted a concealed obstacle against the exercise of his rights. He alleged that his right to hold meetings and demonstration marches was violated.

43. The Ministry referred to the case-law of the European Court of Human Rights (ECtHR) within the scope of Article 11 of the Convention and stated that it was determined by the court that the demonstration in which the applicant was also involved was an illegal demonstration as per the Law No. 2911, that in this case, the intervention of the law enforcement officers was based on a legal ground and that the aim of the intervention was to protect public order and national security and to prevent the commission of crime.

44. The applicant stated against the opinion of the Ministry that the ECtHR judgments specified in the mentioned opinion had the quality of supporting his own claims, that their assembly for a press statement was peaceful, that the police needed to behave in a more tolerant way and that his sentencing to an imprisonment of five months violated Article 11 of the Convention.

a. General Principles

45. The right to hold meetings and demonstration marches stipulated in Article 34 of the Constitution aims at protecting the opportunity for individuals to come together in order to defend their common ideas together and announce them to others. Therefore, this right is a special form of the freedom of expression that is prescribed in Articles 25 and 26 of the Constitution. The importance of the freedom of expression in a democratic and pluralistic society also applies to the right to hold meetings and demonstration marches. The right to hold meetings and demonstration marches guarantees the emergence, safeguarding and dissemination of different thoughts which are essential for the development of pluralistic democracies. In this scope, despite its unique autonomous function and field of exercise, the right to hold meetings and demonstration marches should be evaluated within the scope of the freedom of expression and thus, the narrower scope of the restriction of the freedom of expression in subjects regarding political and public interests should also be considered in the exercise of the right to hold meetings and demonstration marches (see *Öllinger v. Austria*, App. No: 76900/01, 29/6/2006, § 38; *Ezelin v. France*, App. No: 11800/85, 26/4/1991, § 37). Therefore, this right, which is one of the fundamental rights in a democratic society, should not be interpreted narrowly (See *G. v. Federal Republic of Germany*, App. No: 13079/87, 6/3/1989, § 256; *Rassemblement Jurassien Unité v. Switzerland*, App. No: 8191/78, 10/10/1979, § 93).

46. On the other hand, pluralism, tolerance and respecting others' thoughts and beliefs are the indispensable qualities of a democratic society. In pluralistic democracies, it cannot be alleged that the idea of the majority is superior in all cases and the guarantee for the protection of minority or opposing ideas and the expression thereof are the indicators of respect to democratic principles. The protection and guarantee of opposing and minority ideas even in cases where they are provocative or disturbing in comparison to the ideas of the majority are the requirements of pluralism, broadmindedness, tolerance and a democratic society (see *Handyside v. United Kingdom*, App. No: 5493/72, 24/9/1976, § 49).

47. The right to hold meetings and demonstration marches and the freedom of expression are among the most fundamental values of a democratic society. In the essence of democracy is the power to solve problems through an open discussion environment. Radical measures of preventive quality towards removing the freedom of assembly and expression, except for the cases of inciting violence and removing the principles of democracy, cause harm to democracy even in cases where officials consider the expressions and perspectives used in protests as surprising and unacceptable or where protests are illegal. In a democratic society based on the rule of law, the political ideas which oppose the existing order and are defended to be realized through peaceful methods should be given the opportunity to be expressed through the freedom of assembly and other legal means (see *Gün and Others v. Turkey*, App. No: 8029/07, 18/6/2013, § 70; *Güneri and others v. Turkey*, App. No: 42853/98, 43609/98 and 44291/98, 12/7/2005, § 76).

48. Article 34 of the Constitution guarantees the right to hold meetings and demonstration marches in order to express ideas without guns and without assaults, in other words, peacefully. Exercised collectively, this right gives the persons who want to express their thoughts the opportunity to express their thoughts through methods that exclude violence. Demonstrations attended to or organized by persons who intend to use violence remain out of the concept of peaceful assembly (see *Stankov and the United Macedonian*

Organization Ilinden v. Bulgaria, App. No: 29221/95 and 29225/95, 2/10/2001, § 77; *the United Macedonian Organization Ilinden and Ivanov v. Bulgaria*, App. No: 44079/98, 20/10/2005, § 99). In this scope, the aim of the right to assembly is to protect the rights of those individuals who do not take part in violence and put their ideas forward peacefully. Apart from that, the purpose with which the meeting or demonstration march is held has no importance.

49. The illegality of a meeting and demonstration march or the holding thereof contrary to laws does not remove the peaceful nature of the meeting or march *per se* (see *Oya Ataman v. Turkey*, § App. No: 74552/01, 5/12/2006 § 39). Therefore, it is apparent that all kinds of demonstrations held in public places may cause a certain disruption in the flow of daily life and lead to negative reactions. The existence of these circumstances does not justify the violation of the right to assembly (see *Achouguian v. Armenia*, App. No. 33268/03, 7/7/2008, § 90; *Berladir and others v. Russia*, App. No. 34202/06, 10/7/2012, §§ 38-43; *Disk and Kesk v. Turkey*, App. No. 38676/08, 27/11/2012, § 29).

50. Article 34(2) of the Constitution accepts that the right to assembly may be restricted in some cases. In the same manner, reasons for such restriction are set forth in Article 11(2) of the Convention. In this scope, the regulation of all kinds of restrictions to be introduced on the right to assembly through law as per Article 13 of the Constitution is a prerequisite. Even in situations set forth by law, interference with this right needs to be within the framework of legitimate purposes. In Article 34, legitimate purposes are stated as "*national security, public order, the prevention of the commission of crime, the protection of public health and public morals or the rights and freedoms of others*". A similar regulation is introduced in the Convention. Even restrictions to be introduced by law within the framework of legitimate purposes cannot be contrary to "*the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality*". Therefore, interference with the right to assembly should be required for a democratic society. Lastly, it must be proportionate in order to fulfill legitimate purposes.

51. The criterion of proportionality is used in order to determine whether or not a balance has been struck between the measures deemed to be necessary so as to achieve the legitimate purposes specified in Article 34 of the Constitution and the right to peaceful assembly. A conviction ruled because of a demonstration involving violence can be considered as an appropriate measure under certain conditions (*Osmani and Others v. the Republic of Macedonia* (summary judgment), App. No: 50841/99, 11/10/2001). However, the imposition of a sanction because of an illegal demonstration can also comply with the guarantees of the right to peaceful assembly (*Ziliberberg v. Moldova* (summary judgment), App. No: 61821/00, 4/5/2004). On the other hand, this right which involves attending to a peaceful demonstration guarantees the non-imposition of even a disciplinary penalty which can be accepted as the lightest one on the people that make unprohibited contributions to a demonstration as long as they are not involved in any reprehensible incident (*Ezelin v. France*, § 53). This situation should be evaluated by considering the conditions of each concrete incident.

52. Everyone's right to hold peaceful meetings and demonstration marches "*without prior permission*" is guaranteed in Article 34 of the Constitution. Within this framework, the procedure of notification is adopted for meetings and demonstration marches in Article 10 of the Law No. 2911. The subjection of meetings and demonstration marches to a procedure of

permission or notification does not generally harm the essence of the right as long as the purpose of these procedures is to provide officials with an opportunity to take reasonable and appropriate measures in order to guarantee the orderly conduct of all kinds of meetings, marches or other demonstrations (*see Bukta and others v. Hungary,* App. No: 25691/04, 17/10/2007, § 35; *Oya Ataman v. Turkey,* § 39; *Rassemblement Jurassien Unité v. Switzerland*, § 119; *Platform* "*Ärzte für das Leben*" *v. Austria,* App. No: 10126/82, 21/6/1988, §§ 32-34). In this scope, the application of permission and notification procedures is for ensuring the opportunity that the right to assembly is exercised effectively. In special cases when immediate reaction is justified and when the protest is done through peaceful methods, the dispersion of such kind of a protest solely on the justification that the obligation of notification is not fulfilled should be considered as an extreme restriction on the right to peaceful assembly (see *Bukta and others v. Hungary*, § 36; *Oya Ataman*, §§ 38-39, *Balçık and others v. Turkey,* App. No: 25/02, 26/2/2008, § 49, *Samüt Karabulut v. Turkey,* App. No: 16999/01, 27/1/2009, §§ 34-35).

53. On the other hand, the term "*restriction*" within the framework of the right to assembly includes not only some preventive measures before the enjoyment of the right as it is the case in the freedom of expression but also the treatments during or after the enjoyment of the right (see *Ezelin v. France*, § 39; *Gün and Others v. Turkey,* §§ 77-85; *Yılmaz Yıldız and others v. Turkey,* App. No: 4524/06, 14/10/2014, §§ 43-48). Therefore, what is done during a peaceful demonstration or investigations and punishments towards the attendees after the demonstration may also be accepted as behaviors restricting the enjoyment of the right to assembly.

54. The state's displaying patience and tolerance towards the behavior of crowds which have assembled for peaceful purposes that do not pose a threat in terms of public order and do not include violence as they enjoy their right to assembly is a requisite of pluralistic democracy.

b. Application of General Principles

i. Whether there is any Interference

55. It is obvious that the taking into custody of the applicant together with the group that made a press statement for the purposes of protest and the dispersion of the meeting constitute an interference with the right to assembly. However, given the "*restrictive*" impact on the right to assembly not only during the enjoyment of the right, but also as regards the treatments following the enjoyment thereof (see § 55), the ruling of an imprisonment of five months as an eventual result of the public prosecution case filed against the applicant should be accepted as an interference with the right to assembly even if it was ruled to suspend the pronouncement of the judgment.

ii. Whether the Interference Rests upon Reasonable Grounds

56. As per Article 34(2) of the Constitution and Article 13 of the Constitution, the right to assembly cannot be intervened in "*unless prescribed by law*" and except for the legitimate purposes specified in Article 34. At the same time, it needs to be determined whether or not a restriction to the right to assembly is in line with the conditions of bearing no prejudice to the essence, being prescribed by laws, not being contrary to the letter and spirit of

the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality specified in Article 13 of the Constitution.

ii. 1. Lawfulness of the Interference

57. In the incident that is the subject matter of the application, the legal basis of the interference is composed of Articles 10, 22 and 24 of the Law No. 2911. On the other hand, Article 32 of the Law No. 2911 constitutes the legal basis of the judgment of conviction regarding the applicant. Therefore, there are legal regulations required for the restriction of the right to assembly in accordance with Article 34(2) of the Constitution. For this reason, interference with the right to assembly has the element of "*lawfulness*".

ii. 2. Legitimate Aim

58. The applicant alleged that the interference made by the police did not have any legitimate aim considering that the group that assembled for a press statement did not obstruct the traffic and threaten public order.

59. In order for an intervention made in the assembly and demonstration march to be legitimate, it needs to be towards the purposes of "*national security, public order, the prevention of commission of crime, the protection of public health and public morals and the rights and freedoms of others*" as stipulated in Article 34(2) of the Constitution.

60. When the minutes kept by the police are examined, it is understood that the aim of the interference towards the group in which the applicant was involved was to prevent the disruption of public order and to ensure public security. For this reason, it should be accepted that the interference that the police made had a legitimate aim as per Article 34 of the Constitution.

ii.3. Necessity in a Democratic Society and Proportionality

61. The applicant and the group in which he was involved assembled in front of the Embassy of the USA in order to make a press statement so as to protest the taking into custody of some directors of Aydınlık Newspaper and İşçi Party. The main aim of the protest is to draw attention of the public to the custody action in question. Within the scope of the minutes of incident, arrest and custody dated 24/8/2011 and the statement of the police chief who intervened in the group delivered as a witness, the applicant and the participants did not conduct any action involving violence. In addition, the participants assembled on the pavement according to the aforementioned minutes. No matter was mentioned as to the effect that they hindered the traffic or disrupted the daily flow of life.

62. The police who were informed that an illegal demonstration would be held arrived at the crime scene at 15:35. The police made a warning for the dispersal of the group at around 15:38. Also within the scope of the claim of the applicant, 23 people including the applicant were taken into custody at around 15:45 without giving them the opportunity of making a press statement. There was no claim as to the effect that the participants put up an active resistance during the actions of arrest aimed at custody (see § 13, 17). Therefore, the applicant and other participants were taken into custody without allowing them to make a press statement during a demonstration which cannot be considered not to be peaceful. In the subsequent process, a public prosecution case was filed against the applicant and he was sentenced to an imprisonment of five months on account of holding an illegal demonstration

without prior notification and in an area that is one kilometer away from the Grand National Assembly of Turkey (GNAT). Thus, there were two separate interferences with the applicant's right to hold meetings and demonstration marches as the protest demonstration was broken up, he was taken into custody and he was sentenced to imprisonment because of this.

63. It is obvious that public authorities have a certain margin of appreciation in the restriction of the right to hold meetings and demonstration marches within the scope of Article 34(2) of the Constitution. However, this margin of appreciation should not be used contrary to "*the letter and spirit of the Constitution, the requirements of the democratic social order and of the secular Republic and the principle of proportionality*" as per Article 13 of the Constitution. In this respect, the duty of the Constitutional Court while examining the claims as regards the right to hold meetings and demonstration marches is to evaluate whether or not the relevant public authorities have made use of the margin of appreciation in a reasonable, cautious manner and within the framework of good will. Moreover, it is also to examine the interference that is the subject matter of the complaint as a whole and to determine, with regard to the achievement of the legitimate aim, whether or not it is proportionate for achieving the aim and the justifications thereof are "*relevant and sufficient*". Thus, it can be determined whether or not the decisions taken by the public authorities comply with Article 34 of the Constitution.

64. In the incident that is the subject matter of the application, the group in which the applicant was involved assembled in front of the Embassy of the USA without giving notification forty eight hours in advance as per Article 10 of the Law No. 2911 and within an area that is located one kilometer away from the GNAT contrary to Article 22 of the same Law. As a rule, it cannot be said that the subjection of meetings and demonstration marches to the procedure of permission or notification violates the right to assembly by itself. Otherwise, a wrong conclusion can be reached as to the effect that the right to hold meetings and demonstration marches prohibits the imposition of sanction due to the failure to fulfill obligations such as permission and notification (for the judgments in the same vein, see *Ziliberberg v. Moldova* (summary judgment); *Rai and Evans v. the United Kingdom* (summary judgment), App. No: 26258/07 and 26255/07, 17/11/2009).

65. Participants need to act in accordance with the legislation in force while exercising the right to hold meetings and demonstration marches (*Oya Ataman v. Turkey,* §§ 38, 39; *Balçık and others v. Turkey,* § 49). It cannot be said that the dispersion of a meeting or demonstration march which is held contrary to legal regulations, even if it is peaceful, violates the right to hold meetings and demonstration marches in principle. However, it is necessary that the police terminates an illegal meeting or demonstration march through reasonable and temperate behavior and the interference in an illegal peaceful demonstration should not be excessive and disproportionate. However, in special cases when immediate reaction is justified with regard to the participants and when the protest is done through peaceful methods, the breaking up of such kind of a protest solely on the justification that the obligation of notification is not fulfilled can be considered as a disproportionate restriction on the right to peaceful assembly (see § 54).

66. In the incident that is the subject matter of the application, there is no hesitation on the fact that the intervention towards the group in which the protesting applicant was involved resulted not only from the obligation of notification, but also from the occurrence of the

demonstration within an area that is located one kilometer away from the GNAT contrary to Article 22 of the Law No. 2911. It cannot be said that it is not reasonable to take legal and actual measures aimed at ensuring the security of the GNAT in which the national will becomes concrete within a certain area of security while it fulfills its duty. However, it is necessary to evaluate whether or not the practice of such an area of security is proportionate in terms of each case in order to achieve the aim of ensuring the security of the GNAT. In this sense, the determination by the public authorities intervening in a meeting and demonstration march that the meeting was contrary to law by considering the limit of distance from a formal point of view and accordingly, the intervention thereof in those who organize the meeting and demonstration march do not justify it by themselves. The justifications of interference should be "*relevant and sufficient*" within the framework of the existing conditions.

67. In the present case, it is obvious that the applicant and other participants who assembled for protest in front of the Embassy of the USA in order to draw the attention of the public to pro-USA policies were not aiming towards the GNAT. It cannot be said that expecting from the participants to make a notification in accordance with the Law No. 2911 so as to protest the taking into custody of some newspaper and party directors is reasonable due to the short period of custody and the fact that it resulted from a sudden incident, either. On the other hand, given the number of participants and their non-violent behavior, there is no hesitation as regards the peaceful quality of the demonstration. Moreover, there is no situation reflected in the minutes and statements as to the effect that the holding of the demonstration affected the social life and disrupted public order. Therefore, while the place of demonstration does not constitute any threat towards the security and working order of the GNAT, it does not have the impact and proximity that will intervene in the daily ordinary work thereof, either. In this case, it cannot be said that the taking into custody of the applicant and other participants by the police within a very short period of time such as nearly 15 minutes without allowing them to make a press statement instead of the termination of this demonstration with its reasonable and temperate behavior by taking necessary security measures is necessary and proportionate in a democratic society.

68. On the other hand, the applicant was sentenced to an imprisonment of five months on the ground that the peaceful demonstration in which he participated constituted the offense of contravention to the Law No. 2911 and it was decided to suspend the pronouncement of judgment by considering that he was not previously convicted due to an intentional offense according to his criminal record, that no concrete damage materialized due to the demonstration, personal characteristics of the applicant, his attitude and behavior at the hearing.

69. It cannot be said that being under the threat of a criminal sanction because of a peaceful demonstration has, in principle, struck the balance between the measures deemed necessary so as to achieve the legitimate aims and the right to peaceful assembly (see § 53) (*Akgöl and Göl v. Turkey*, App. No: 28495/06, 28516/06, 17/5/2011, § 43). The applicant participated in the demonstration held within an area that was located one kilometer away from the GNAT without making any notification in contravention of the Law No. 2911 and continued to hold the demonstration by not acting in accordance with the warning of the police for the dispersal of participants. On the other hand, the 23rd Criminal Court of First Instance of Ankara has only specified the actions that were contrary to the Law No. 2911 in the justification of the judgment of conviction. The matters of whether or not the action of protest was peaceful, the social life was affected, the public order was disrupted because of the demonstration and whether or not the place of demonstration had the impact and

proximity that would intervene in the daily ordinary work of the GNAT such as whether or not it constituted any threat towards the security and working order of the GNAT were not evaluated. In this context, the Court ruled a judgment of conviction such as an imprisonment of five months which cannot be considered to be proportionate without striking the balance between the measures deemed necessary to achieve the legitimate aims and the right to peaceful assembly.

70. It should also be evaluated whether or not the judgment of the suspension of the pronouncement of the imprisonment to which the applicant was sentenced constituted a disproportionate interference with the right. According to the judgment of the suspension of the pronouncement of the judgment as prescribed in Article 231 of the Law No. 5271, the convict shall be subjected to a probation period of five years; as per paragraphs (10) and (11) of the same article, it shall be ruled to eliminate the judgment whose pronouncement is suspended and to discontinue the case in the event that the convict does not commit a new offense intentionally and acts in accordance with the obligations as regards the measure of probation within the period of probation and it shall be ruled to pronounce the judgment in the event that the convict commits an intentional and new offense or fails to act in accordance with the obligations as regards the measure of probation within the period of probation.

71. There is a possibility where the judgment of suspension ruled on the applicant is pronounced and, accordingly, the imprisonment of five months is executed in the event that the applicant participates in another press statement or meeting and demonstration march and is convicted. Therefore, the applicant will be subject to a threat of penalty for five years because of a peaceful demonstration in which he had participated and the judgment of suspension will have a dissuasive impact on whether or not to participate in any meeting and demonstration march from now on (for a judgment in the same vein, see App. No: 2013/1461, 12/11/2014, §§ 72-76).

72. In the present case, while it cannot be stated that the sentencing of the applicant to an imprisonment of five months on the ground that the demonstration was illegal, although it was a peaceful one, is proportionate as it continued to keep the applicant under the threat of penalty even if it was ruled to suspend the pronouncement of the judgment and because of the dissuasive impact of the judgment, it cannot be said that it was necessary in order to ensure public order and national security specified in Article 34(2) of the Constitution, either (*Gün and Others v. Turkey,* §§ 77-85; *Yılmaz Yıldız and others v. Turkey,* App. No: 4524/06, 14/10/2014, §§ 43-48).

73. In the evidence of the above-mentioned matters, it cannot be stated that the intervention in the form of the termination of the action of press statement in which the applicant participated on the ground that it was contrary to Articles 10 and 22 of the Law No. 2911 and his being sentenced to an imprisonment of five months because of such action in accordance with Article 32 of the same Law is "*necessary in a democratic society*" and "*proportionate*" within the scope of Article 34 of the Constitution, even if it was ruled to suspend the pronouncement of the judgment. In this context, it was determined that the balance was not struck between the applicant's right to hold meetings and demonstration marches and the protection of public order and security.

74. For the reasons explained above, it is concluded that the applicant's right to hold meetings and demonstration marches which is guaranteed in Article 34 of the Constitution was violated.

3. In Terms of Article 50 of the Law No. 6216

75. The applicant claimed TRY 50,000.00 in respect of non-pecuniary damage and for a retrial as his right to hold meetings and demonstration marches was violated.

76. Article 50(2) of the Law No. 6216 with the side heading of "*Judgments*" is as follows:

> "*If the determined violation arises out of a court judgment, the file shall be sent to the relevant court for a retrial be held 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 judgment 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 judgment of violation."*

77. Within the scope of the applicant's right to hold meetings and demonstration marches, it is necessary to rule on the dismissal of the applicant's request for damages as it is considered that the determination of violation has constituted sufficient satisfaction in terms of the violation related to the intervention in the form of the dispersal of the demonstration and his being taken into custody.

78. It should be ruled that the trial expenses of TRY 1,698.35 composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00 which were made by the applicant and determined in accordance with the documents in the file be paid to the applicant.

79. It is necessary to rule upon sending the judgment to the 23rd Criminal Court of First Instance of Ankara for the retrial be held in order to remove the violation and the consequences thereof and to the Ministry of Justice and the Ministry of Interior for information as regards the determination of violation made by considering that the applicant is still under the measure of probation and, accordingly, the threat of penalty because of the suspension of the pronouncement of the judgment ruled on him and that this matter violated his right to hold meetings and demonstration marches.

V. JUDGMENT

In the light of the reasons explained, it was **UNANIMOUSLY** held on 25/3/2015

A. That the applicant's complaints in relation to the violation of Article 19 of the Constitution are INADMISSIBLE on the ground of "lack of jurisdiction *ratione temporis*",

B. That the applicant's complaints with regard to the violation of Article 34 of the Constitution are ADMISSIBLE,

C. That the applicant's right to hold meetings and demonstration marches which is guaranteed in Article 34 of the Constitution was VIOLATED,

D. That the judgment be SENT to the 23rd Criminal Court of First Instance of Ankara for retrial in order to remove the violation and the consequences thereof,

E. That the applicant's claim for damages be REJECTED,

F. That the trial expenses of TRY 1,698.35 in total, composed of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00 which were made by the applicant be PAID TO THE APPLICANT,

G. That a copy of the judgment be SENT to the Ministry of Justice and the Ministry of Interior for information.

H. That the payment be made within four months as of the date of application by the applicant to the Ministry of Finance following the notification of the judgment; that in the event that a delay occurs as regards the payment, the statutory interest be charged for the period that elapses from the date on which this period ends to the date of payment.