



**REPUBLIC OF TURKEY**  
**CONSTITUTIONAL COURT**

**FIRST SECTION**

**DECISION**

Application No: 2013/2602

Date of Decision: 23/1/2014

## FIRST SECTION

### DECISION

**President** : Serruh KALELİ  
**Members** : Mehmet ERTEN  
Zehra Ayla PERKTAŞ  
Burhan ÜSTÜN  
Nuri NECİPOĞLU  
**Rapporteur** : Selami TURABİ  
**Applicant** : Emin AYDIN  
**Counsel** : Att. Murat ÖZCAN

#### I. SUBJECT OF APPLICATON

1. The applicant filed a request for compensation by asserting that his freedom of expression and the press was violated due to the fact that an investigation had been initiated on him due to the columns he had written in a local newspaper and that it had been decided by the Criminal Court of First Instance of Çine that the pronouncement of the judgment due to the offenses of insult and slander be postponed.

#### II. APPLICATION PROCESS

2. The application was lodged on 10/4/2013 via the Criminal Court of First Instance of Çine. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the Third Commission of the First Section that the examination of admissibility of the application be conducted by the Section and the file be sent to the Section.

4. It was decided by the Section during the meeting held on 14/11/2013, that the examinations for admissibility and merits be conducted together and a copy of the application be sent to the Ministry of Justice.

5. The Ministry of Justice presented its opinion to the Constitutional Court on 25/12/2013.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 7/1/2014. The applicant presented what she would say to the Constitutional Court within due period.

### III. FACTS AND CASES

#### A. Facts

7. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

8. The applicant is the chief editor of Çine Madran Newspaper which is operating in Çine district and acts as a columnist of the newspaper at the same time.

9. Due to the column of the applicant titled "*Being cheap*" in the issue of Çine Madran Newspaper dated 2/4/2012, an investigation was initiated by the Chief Public Prosecutor's Office of Çine and a public case was filed due to the offense of insult with the claim that the applicant attacked the personal rights of H.Y. who was the deputy director of security of Çine district.

10. The column titled "*Being cheap*" which was written by the applicant is as follows:

#### ***"Being cheap***

*A joke which has been told by one of my distinguished elders was one of those from which a lesson would be taken.*

*A public order commander was appointed to one of the villages in Ottoman period. The commander was despising the people in the village, offending its men in front of women, teasing the prominent people in the village, in short, he was abusing the public duty assigned to him. Landlord of the village who wanted to teach this commander a lesson organized a dinner and also invited the commander to dinner.*

*During the dinner, one of the grandchildren of the Landlord came and said "Grandfather, those in the nearby village requested 35 thousand liras". The Landlord gave the answer "Do not give, my son". After a while, the second grandchild came and gave the information "Grandfather, those in the other village are requesting 45 thousand liras". The Landlord gave the instruction "Do not give to that, either". When the third grandchild came and said "Grandfather, those in the opposite village requested 550 thousand liras"; the Landlord said with a great pleasure "All right, my son, give it immediately".*

*Thereupon, the commander became curious and asked to the landlord "My landlord, what are you buying?"*

*"I have a grandson at marriage age, we are buying a bride for him"*

*The commander asked "My landlord, is 550 thousand liras the bridewealth?"*

*"Yes"*

*When the commander said "My landlord, isn't it too expensive?, even my father bought my mother at 2,5 liras"*

*The landlord said "My son, it is obvious that you were born by a cheap woman" and taught the commander an important lesson.*

*We are experiencing those experienced in this joke in very different fields and different ways today.*

*We can categorize in the class of "**the Cheap**" the institution chiefs who place a private plate (whose last three figures are the same) to his motorcycle by using his public authority, the public officials who give false testimony for fawning over the highest authority, the politicians who see the positions they have achieved with the will of public as a place for gaining benefit and rising even more and use the resources extravagantly, those who think themselves of highly with their authorities and positions, those who ignore the existence of public and act as the soldier of the rich, the servant of the powerful and a lot more.*

*I also categorize in the class of "**the Cheap**" the community engineers and nation formers who fail to use the existing newspapers and journalists for their personal interests and vulgarities, fail to impose their fraudulences on the society over them and try to create an alternative.*

*I place at the seat of honor of this group those who take credit for this column and try to deal with us as in the past.*

*Moreover, I think that their mothers are not the ones to put the blame on for their cheapness, that their situation results from their own characterlessness, greed and ugly worldly ambitions.*

*Putting a premium at a cheap price is also cheapness. Therefore, we should give up appealing to the cheap and appreciate the distinguished ones who produce high quality works and services for the benefit of humanity and society although they are not rich.*

***Before the cheap cheapen all of us! ... "***

11. The applicant published a second column titled "*The Vagabonds on motorcycles*" in the issue of the same newspaper dated 2/10/2012 while being tried due to the offense of insult in the file of the Criminal Court of First Instance of Çine numbered merits 2012/386 because of his column titled "*Being cheap*".

12. A second investigation was initiated on the applicant by the Chief Public Prosecutor's Office of Çine due to this column and again, a public case was filed with the claim that he committed the offense of insult and slander against H.Y. who was the deputy director of security of the district.

13. The column of the applicant dated 3/10/2012, titled "*The Vagabonds on motorcycles*" is as follows:

***"The Vagabonds on motorcycles***

***Hello, my mayor, the police officers caught my son on a motorcycle. He has no driving license, no plate, he is fast on the motorcycle, there was a beautiful girl in the place through which he was passing, its exhaust was open, its steering wheel was recumbent. Can you call the director of security so that he will not impose a fine?"***

*- Hello, Mr. Mustafa, Sorry for disturbing you.*

*- Do not mention it. Go ahead, mayor!*

- *Something happened to a friend from our party, we need your help.*

- *With pleasure, mayor, I hope there is something we can do.*

- *You are on good terms with them. As a company, you wait them on hand and foot. You even buy a car. You can tell the Director/Chief so that they will overlook that motorcycle.*

- *All right, mayor, I will talk to them. You do a lot of work for us. Let me know if you need anything.*

*Then, the motorcycle is released. The boy becomes very happy. His father shows off to his wife at home; "My lady, you are angry with me and snarl at me because I engage in politics, am a delegate, spend more time on politics than you, but you see?"*

*The mayor becomes happy and proudly talks at the party meeting; "We saved the motorcycle of that delegate. Owing to Mr. Mustafa and the chief" Mr. Mustafa reports to the boss, "The mayor is indebted to us again. He will have difficulty in confronting us with the fallacies of 'For people, for the oppressed, for the innocent'"*

*Similar situations are also sorted out through similar methods in other parties.*

*Later on, the directorate of security performs an application that exceeds its authority and announces to the men in Çine that it is forbidden to sit in front of coffee houses because they look at women and girls and verbally molest them.*

*In the face of this application which is indeed an insult to the entire society, the politicians who are the representatives of public remain silent.*

*Do not consider it as something like the lack of political authority.*

*The vagabonds on motorcycles are the only ones to be blamed."*

14. The Criminal Court of First Instance of Çine joined two separate cases and, through its decision dated 9/1/2013 and numbered M.2012/386, D.2013/16, imposed a judicial fine of 7.080 TL due to the offense of insult to public officer because of the article titled "*Being cheap*", an imprisonment of 10 months due to the offenses of slander because of the article titled "*The Vagabonds on motorcycles*" and a judicial fine of 7.080 TL due to the offense of insult to public officer and decided on the applicant that the pronouncement of the judgments ruled be postponed.

15. The justification of the court decision is as follows:

"...

*As a result of the trial conducted by our Court; it is understood from the claimant, the defense of the accused, the declaration of the intervenor, newspaper publications and the print-out of internet page, the correspondence of the Directorate of Security, census-criminal record and the scope of the entire file that the Intervenor works as a deputy director/chief of security in the District Directorate of Security of Çine, that the accused is the chief editor of Çine Madran Newspaper and writes columns in the same newspaper and the internet site*

*named www.cinemadran.com, that after the accused primarily referred to an incident in Ottoman period in his column titled 'being cheap' on the page 3 of the issue of Çine Madran Newspaper dated 02/04/2012 and on its internet site and concluded his story by saying addressed to the public officer mentioned in that incident "...my son, it is obvious that you were born by a cheap woman", he insulted, in an incident which is similar to this one, by stating that the intervenor would also be in the class of "the cheap" by describing him as the institution chief who had public authority, whose motorcycle plate's last 3 figures were the same and used a private plate, that although the name of the intervenor was not clearly stated in the column, as can be understood from the documents sent for the file, it is obvious that the accused meant the intervenor in his column in the face of the fact that the intervenor is the deputy director/chief of security, that the last 3 figures of the motorcycle that belongs to the intervenor are "888", that the intervenor is the only person at the position of institution chief whose motorcycle's last three figures are the same, that his statement was taken as a witness in the judicial investigation conducted on the District Governor of Çine, that for this reason, the defense of the accused as to the effect that his column was not directed towards a certain person will not be taken into consideration.*

*It is understood that the accused Emin Aydın, in his column titled 'the vagabonds on motorcycles' on the page 3 of the issue of Çine Madran Newspaper dated 03/10/2012 and on the internet site named 'www.cinemadran.com' following the aforementioned incident, stated in a way which was not indeed present that the director/chief of security released the motorcycle which was caught without a plate and driving license in an illegal way without performing any action and that although he essentially knew that the intervenor did not commit any crime, he incriminated him in order to ensure that an investigation and prosecution be initiated on him, that he stated, towards the end of his column, that the directorate of security performed an application which exceeded its authority in the district and announced to the men in Çine that it was forbidden to sit in front of coffee houses as they looked at women and girls and verbally molested them, that the vagabonds on motorcycles are the only ones to blame on this, that such an application was performed in Çine district, that, as can be understood from the information given in detail in this column and the foregoing sections, he meant the intervenor and insulted the intervenor through the press by saying 'the vagabonds on motorcycles', that although the name of the intervenor was not clearly stated in the columns of the accused, there was a situation that could not be hesitated in the quality of the columns and that it was directed towards the intervenor's personality, that therefore, as both his name will be considered to have been specified and the insult will be considered to have been revealed in accordance with article 125 of the TCC, the accused committed the offenses of slander to the alleged intervenor and of insult to the public officer through the press.*

*The accused and the defense counsel stated, in their defenses in stages, that he did not commit the alleged crimes as he mentioned about a phenomenon within the scope of the right to criticism which constituted the reason for compliance with the law and in the subjects which concerned the society in general due to the fact that the subject was directly related to the freedom of expression, that for this reason, the elements of the crime did not occur. As known, in article 10 of the European Convention on Human Rights (ECHR) which is a part of our domestic law and in articles 25 and 26 of the Constitution, the freedom of expression has been enshrined in the broadest terms. The freedom of expression which is one of the main foundations of a democratic society constitutes one of the main conditions of the progress of*

*the society and the improvement of each individual. However, this right is undoubtedly not limited. In paragraph two of article 10 of the ECHR, it is provided that this right is subject to the limitations which should not be interpreted in a narrow scope. In the established case-law of the European Court of Human Rights, it is indicated that article 10 of the ECHR does not enshrine a completely unlimited freedom of expression even in the handling by the press of the subjects which are of particular concern to public. In accordance with paragraph two of the article in question, the exercise of this freedom brings about various "duties and responsibilities" which are also valid for the press. These duties and responsibilities gain importance when an attack against the reputation of natural persons and the damaging of "the rights of others" are in question as in the incident which is the subject matter of the public case. The guarantee that article 10 grants to journalists in relation to reporting on the subjects which are of concern to public interest due to the duties and responsibilities required by the exercise of the freedom of expression is subject to the condition that the journalists act in good faith in order to report accurate and reliable news in a way which complies with press ethics (The decision of Goodwin v. the UK, 27.03.1996). In the concrete incident, in the face of the use of the words which exceed the aforementioned borders of the freedom of expression and which clearly have the quality of insult in the columns directed towards the intervenor as "born by a cheap woman" and "the vagabond on motorcycle", the defenses of the accused have not been taken into consideration, according to the conscientious conviction which is formed as to the punishment of the accused due to the alleged offenses, it has been necessary to rule a judgment as follows on Behalf of the Turkish Nation."*

16. The applicant filed an objection before the 1st Assize Court of Aydın against the issued decision, it was decided that the objection be dismissed with the decision of the Court dated 7/3/2013 and numbered Miscellaneous Action 2013/390.

17. The justification of the decision of dismissal is as follows:

“... ”

*Although the decision of the Criminal Court of First Instance of Çine dated 09/01/2013 and numbered 2012/386-2013/16 was objected by the defense counsel of the accused and the attorney of the intervenor; by considering that the assessment of the evidence and the legal qualification of the offense could not be conducted by our court, that the matters asserted will be evaluated by the appeal authority in the event that the judgment is pronounced in the future, that there is no concrete damage and that the accused was not previously convicted of an intentional crime, with the conviction that the conditions in article 231/5-6 of the CCP have occurred, it has been necessary to decide on the dismissal of the objections separately."*

18. The decision of dismissal was notified to the applicant on 2/4/2013.

## **B. Relevant Law**

19. The relevant parts of article 125 of the Turkish Criminal Code dated 26/9/2004 and numbered 5237 with the side heading "Insult" are as follows:

*"(1) A person who attributes a concrete act or phenomenon, of a quality which can hurt his/her honor and reputability, to an individual or who attacks the honor and reputability of an individual by way of cursing shall be penalized with a prison sentence of three months to two years or a judicial fine. In order for the defamation in absentia of the aggrieved to be able to be penalized, the act should be committed in the presence of at least three persons."*

*(2) In the event that the act is committed through an audio, printed or visual message which is addressed to the aggrieved, the penalty set forth in the above clause shall be decreed.*

*(3) In the event that the crime of defamation be committed;*

*a) Against a public official by virtue of his/her duty,*

*b) ...*

*In the event of commission, the lower limit of the penalty cannot be less than one year."*

20. Article 126 of the Code numbered 5237 with the side heading "*Determination of the aggrieved*" is as follows:

*"Even if the aggrieved party's name has not been explicitly specified or the allegation has been covertly made in the commission of the crime of defamation, if there is no hesitation as to its nature or that it is addressed against the aggrieved party's person, both his/her name shall be considered to have been specified and defamation shall be considered to have been expressed."*

21. Paragraph (1) of Article 127 of the Code numbered 5237 with the side heading of "*Proof of Allegation*" is as follows:

*"In the event that the alleged and crime-constituting act has been proven, penalty shall not be imposed on the person. In the event that a finalized verdict of conviction be ruled on the affronted due to said crime, the allegation shall be considered to have been proven. In circumstances other than this, the acceptance of the request of proof of allegation shall depend on there being public weal in the determination of whether or not the alleged act is true or the plaintiff consenting to the proving."*

22. Paragraph (1) of Article 267 of the Code numbered 5237 with the side heading of "*Defamation*" is as follows:

*"A person who attributes an unlawful act to an individual in order for the initiation of an investigation and prosecution or the imposition of an administrative sanction on him/her despite knowing that s/he has not committed said act by denouncing or filing a complaint with the competent authorities or through the press and publication shall be penalized with a prison sentence of one to four years."*

23. The relevant parts of article 231 of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271 are as follows:

*"(5) If the penalty judged at the end of the adjudication done due to the crime the accused is charged with an imprisonment of two years or less or a judicial fine, postponement of the pronouncement of the verdict may be decided. Provisions pertaining to conciliation shall be reserved. Postponement of the pronouncement of the verdict shall mean that the established verdict causes no legal consequence on the accused.*

*(6) In order for postponement of the pronouncement of the verdict to be decided on;*

*a) The suspect not having previously been convicted due to a willful crime,*

*b) Reaching of a conviction by the court that, considering the characteristics of the accused and his/her behaviors and conducts during the trial, s/he will not commit a crime again ,*

*c) Full compensation of damages encountered by the victim or the public by reinstatement or restitution of the conditions prior to the crime or indemnification shall be necessary. In the event that the accused does not accept, postponement of the pronouncement of the verdict cannot be decided on.*

*(7) In the verdict whose postponement of pronouncement is decided on, the convicted imprisonment may not be postponed and may not be converted into arbitrary sanctions in the event that it has a short duration.*

*(8) In the event that postponement of the pronouncement of the verdict is decided on, the accused shall be subjected to a probation period of five years... The statute of limitations shall halt during the probation period.*

*(9) In the event that s/he fail to immediately fulfill the condition stipulated in subparagraph (c) of paragraph six; postponement of the pronouncement of the verdict may also be decided on condition that the accused fully restitutes the damages s/he has posed to the aggrieved or the public by paying the damages in monthly installments during the probation period.*

*(10) In the event that a new willful crime is not committed and the liabilities pertaining to the probation measure are complied with, the verdict whose pronouncement is postponed shall be revoked and discontinuation of action shall be ruled.*

*(11) In the event that s/he commits a new willful crime or does not act in concordance with the liabilities pertaining to the probation measure, the court shall pronounce the verdict. However, the court may render a decision on not executing a part up to one half of the penalty it shall determine or postponement of the imprisonment in the verdict in the presence of the conditions thereof or conversion thereof into arbitrary sanctions by assessing the state of the accused who fails to fulfill the liabilities s/he is charged with and establish a new verdict of conviction.*

*(12) The decision on postponement of the pronouncement of the verdict may be objected.*

*(13) The decision on postponement of the pronouncement of the verdict shall be recorded in a system specific for these decisions. Said records may only be used for the purpose stated in this article in the event that they are requested by the Public prosecutor, judge or court in connection with an investigation or prosecution."*

#### **IV. EXAMINATION AND JUSTIFICATION**

24. The individual application of the applicant dated 10/4/2013 and numbered 2013/2602 was examined during the session held by the court on 23/1/2014 and the following were ordered and adjudged:

##### **A. Claims of the Applicant**

25. The applicant stated that he worked as the chief editor of Çine Madran Newspaper and as a columnist thereof at the same time, that an imprisonment of 10 months and two judicial fines of 7.080 TL were ruled by the court on him due to the columns that he had written on 2/4/2012 with the title "Being cheap" and on 3/10/2012 with the title "The

*vagabonds on motorcycle*" and it was decided that the pronouncement of the judgment be pronounced, that he did not use the name of the deputy director of security in his columns, that he criticized the incidents which were experienced, that when the entire column was taken into consideration, it was clearly seen that it did not include the aim of attacking the personal rights of anyone, that the subject was directly related to the freedom of expression and press, that the court issued a decision on this subject as a result of deficient examination and investigation without getting an expert review performed.

26. Moreover, the applicant states that, within the scope of the freedom of expression and press, the press is authorized and responsible for following, investigation, evaluating, disseminating incidents and accordingly, informing, enlightening and directing people, that the duty of the press is to enlighten people about all incidents which are directly or indirectly related to the interest of the society in a way which will reflect the truths by remaining within objective rules. He asserted that the freedom of thought and expression and accordingly, the right to criticism was an indispensable right in democratic societies, that it was obligatory for the advancement and development of societies, that the freedom of expression would also be applied for the news and thoughts which are against the state or a part of the population and disturb them as well as those which are favorable, that his two columns also remained within the scope of criticism, that the ability of criticism was a difficult action, that, in both of his columns, he wanted to draw attention to the fact that all public officers needed to duly exercise their public authorities while performing their duty, that the decisions issued as a result of the criminal cases filed due to the columns which he had written violated the freedom of expression and press regulated in articles 26 and 28 of the Constitution, filed a request for the determination of violation and retrial and compensation.

## **B. Evaluation**

### **1. In Terms of Admissibility**

27. In the opinion of the Ministry as regards the claims of the applicant as to the effect that his freedom of expression and press was violated; it was stated that it would be appropriate to interpret the provisions of the Constitution in relation to the freedom of expression in the evidence of article 10 of the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR) on this subject while evaluating the complaints in terms of admissibility.

28. The applicant stated that he had nothing to say against the opinion of the Ministry on the admissibility of the application and made explanations on the merits by requesting the delivery of a decision on the acceptance of his application.

29. It is seen that the complaints of the applicant in relation to articles 26 and 28 of the Constitution are not clearly devoid of basis. As no other reason for inadmissibility has been observed, it should be decided that the application is admissible.

### **2. In Terms of Merits**

#### **a. The Opinions of the Applicant and the Ministry on the Merits**

30. The applicant asserts that his freedom of expression and press was violated due to the fact that an investigation had been initiated on him due to the columns he had written in a

local newspaper, that he had been sentenced by the Court due to the offenses of insult and slander and that it had been decided that the pronouncement of the judgment be postponed.

31. The Ministry of Justice states, in its opinion on the merits, that, by referring to the decisions of the ECtHR, the freedom of expression is one of the essential conditions for the advancement and development of societies and the requirement of pluralism, tolerance and open-mindedness, that a democratic society could not be mentioned without these, that the freedom of expression can only be restricted for a legitimate purpose, that it would be appropriate to apply the criteria stipulated in article 10 of the ECHR on whether or not there is an intervention in the freedom of expression, that for this reason, an examination needs to be carried out on the basis of whether or not the intervention has been prescribed by the law in relation to the concrete incident, whether or not the intervention is based on legitimate purposes and whether or not the intervention is necessary in a democratic society.

32. The Ministry states that it can be examined by domestic courts which one of the factual claim or value judgment will cover the words spoken when it comes to the freedom of expression in accordance with the case-law of the ECtHR, that when it comes to the freedom of a journalist and politician, an interpretation which extends the freedom of expression has been made by extending the concept of value judgment, that the value judgments such as an opinion and comment are not suitable for proving, that in the event that journalists predicate on facts which have the quality of an attack on the personal rights of individuals, they need to present reliable evidence in order to substantiate this claim of him, that they have duties and responsibilities towards acting in good faith so as to provide accurate and reliable information by behaving in a way which complies with the ethics of journalism. Consequently, the Ministry stated that an evaluation be made within this framework and that the Constitutional Court has discretion as regards the concrete incident.

33. Against the opinion of the ministry, the applicant stated that it would be appropriate to carry out an evaluation in terms of the freedom of expression in line with article 10 of the ECHR and the decisions of the ECtHR, that when the role of journalists to act as the eye and ear of public was taken into consideration according to the case-law of the ECtHR, the imposed punishments posed the risk of preventing the execution of this role, that his column was a value judgment column which was completely of general quality, that the imposed punishment was unfair, that moreover, the deputy director of security filed an action for compensation of 30.000 TL on him, that a compensation of 10.000 TL was judged by the court against him, that the decision was in the stage of appeal, that an attachment of 14.752.02- TL was levied on him because of this compensation, that a proceeding of the enforcement of attachment was performed on his vehicle by the directorate of security at the morning hours and the vehicle was taken from in front of his workplace and taken to the directorate of security, that he started abstaining from writing columns.

34. Moreover, the applicant stated, in relation to the content of the column titled "*Being cheap*", that the article was initiated with a joke, that it was not correct to establish a connection between the public order commander mentioned in the joke and the deputy director of security, that he adapted the incidents mentioned in this joke to our day by way of analogy, that the motorcycle was given as an example, that when the statistics were taken into consideration, the newspaper and the internet site were followed from 126 countries and 42 provinces, that he could not understand why an evaluation was made on the owner of the vehicle whose motorcycle's last three figures were the same by only considering the district of Çine, that he generally wrote his column by considering all persons who followed him in the world and within the country, that for this reason, they objected against the determination as to the effect that only one person had a motorcycle whose last three figures were the same in Çine which is a small district, that they requested from the court for the determination of the institution chiefs whose plates' last three numbers were the same in the entire Turkey, that however, the court did not accept this request of them, that the vehicle of motorcycle was given as an example in the column as it was the smallest motor vehicle, that it was not directly directed towards any person and institution.

35. The applicant stated, in relation to his column titled "*The vagabonds on motorcycles*", that he wrote the article in order to criticize an application performed in the district of Çine, that because the Director of Security of the district of Çine A.T.T verified the criticism that he wrote by saying, "... *There was motorcycle terror especially in Çine. We advanced on the issue... That application was reproached by the people who were present at respectable positions in the state as to the effect that "you put a lot of pressure on us, why are you messing with people?, don't you have anything else to do?, why are you seizing motorcycles?"*" in his statement titled "*There was motorcycle terror in Çine*" that he gave to Aydın Denge Newspaper as reflected in the press, that he criticized the ban on the sitting of men in front of the coffee houses in Çine and opened this application to public discussion, that the aim of his column was to open discussions guiding for thinking, to criticize administrators and to inspect them in this respect and to fulfill the duty and responsibility of the press, that he did not target anyone individually, that he completely expressed his value judgments, that he did not exceed the limit of criticism, that the imposed punishments were severe, that his freedom of expression and press was violated.

#### **b. General Principles**

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

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

37. Article 26 of the Constitution with the side heading of "*Freedom of expression and dissemination of thought*" is as follows:

*"Everyone has the right to express and disseminate their thoughts and convictions orally, in writing, in pictures or through other means individually or collectively. This freedom*

*includes the liberty of receiving or imparting information or ideas without interference by official authorities. ...*

*The exercise of these freedoms may be restricted for the purposes of national security, public order, public security, protecting the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing offending, punishing offenders, not revealing information duly classified as a State secret, protecting the reputation or rights and private and family lives of others or protecting professional secrets set forth in the law or duly performing the duty of hearing cases.*

*Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts on the condition that the transmission of information and thoughts is not prevented.*

*Forms, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought are regulated by law.”*

38. The relevant parts of article 28 of the Constitution with the side heading of "Freedom of the press" are as follows:

*“The press is free; it cannot be censored. ...*

*The State takes the measures to ensure the freedom of the press and getting information.*

*Provisions of articles 26 and 27 of the Constitution are applied in the restriction of the freedom of the press.*

*...”*

39. Article 3 of the Press Code dated 9/6/2004 and numbered 5187 is as follows:

*"The press shall be free. This freedom shall cover the rights to obtain, disseminate information, criticize, interpret and to create works.*

*The exercise of the freedom of the press can only be restricted in accordance with the requirements of a democratic society in order to protect the reputation and rights of others, public health and ethics, national security, public order, public security and territorial integrity, to prevent the revelation of State secrets or the committal of crimes, to ensure the authority and impartiality of judicial power."*

40. As per the said regulations, the freedom of expression covers not only the freedom to “have a thought and conviction” but also the existing freedom to “express and disseminate thought and conviction (opinion)” and the associated freedom to “receive and give information or opinion”. In this context, the freedom of expression refers to individuals' ability of having free access to the news and information, other people's opinions, not being condemned due to the opinions and convictions they have acquired and freely expressing, explaining, defending, transmitting to others and disseminating these either alone or with others.

41. Freedom of expression is one of the foundations of a democratic society and it is among the indispensable conditions for the development of the society and the self-development and self-realization of the individual. The light of truth springs forth from collision of ideas. In this context, establishing social and political pluralism is dependent on expression of all kinds of thoughts in a peaceful fashion and freely. In the same manner, an individual can realize his/her unique personality in an environment where he/she can freely

express his/her thoughts and engage in discussion. The freedom of expression is a value that we need in defining, understanding and perceiving ourselves and others and, in this framework, in determining our relations with others.

42. As stated frequently by the ECtHR in its decisions pertaining to the freedom of expression, in order for the freedom of expression to fulfill its mentioned social and individual function, not only the “*information*” and “*thoughts*” which are considered to be positive, accurate or not harmful by the society and the state but also the information and thoughts which are considered to be negative or inaccurate by the state or a segment of the people and are disturbing for them should be freely expressed and the individuals should be sure that they will not be subject to any sanctions due to these expressions. The freedom of expression is the basis of pluralism, tolerance and open-mindedness and without this freedom, “a democratic society” cannot be mentioned (see *Handyside v. the United Kingdom*, App. No: 5493/72, 7/12/1976, § 49).

43. The Constitution guarantees not only the thoughts and convictions but also the styles, forms and tools of expression. The means which can be resorted to in the exercise of the freedom of expression and dissemination of thought are listed in article 26 of the Constitution as “*orally, in writing, in pictures or through other means*” and with the expression “*other means*”, it is demonstrated that all kinds of means of expression are under constitutional protection.

44. In this context, the freedom of expression is directly related to a significant portion of other rights and freedoms guaranteed by the Constitution. The freedom of the press which guarantees the dissemination of ideas, thoughts and information by means of visual and printed media tools is also one of the tools to be used in the exercise of the freedom of expression and dissemination of thought. While the freedom of the press is protected under Article 10 on the freedom of expression in the ECHR, it is specially regulated in articles 28-32 of the Constitution.

45. The freedom of the press covers the right to explain and interpret thoughts and convictions via means such as newspapers, journals and books and the right to publish and distribute information, news and criticisms (see CC, M.1996/70, D.1997/53, D.D. 5/6/1997). The freedom of the press ensures that the individual and the society are informed by performing the transmission and circulation of thoughts. The expression of thoughts, including those who oppose the majority, via all sorts of means, garnering supporters to the thoughts which have been explained, fulfilling and convincing into fulfilling the thoughts are among the requirements of the pluralistic democratic order. Therefore, the freedom of expression and dissemination of thought and the freedom of the press are of vital importance for the functioning of democracy. As the freedom of the press is, in a way, the freedom of conveying news and opinions which concern people, it is, in another way, closely related to the right of people to receive this information and opinions.

46. In a democratic system, in terms of ensuring that those who possess the public powers exercise their authorities within the limits of the law, the press scrutiny and the public scrutiny play a role just as effective and are equally important as the administrative scrutiny and the judicial scrutiny. Since the functioning of the press which acts as a public observer on behalf of the society is dependent on its being free, the freedom of the press is a freedom which is applicable to and vital for everyone (see CC, M.1997/19, D.1997/66, D.D. 23/10/1997), (for the decisions of the ECtHR in the same vein, see *Lingens v. Austria*, App. No: 9815/82, 8/7/1986, § 41; *Özgür radyo – Ses Radyo Televizyon Yapım ve Tanıtım AŞ v.*

*Turkey, App. No: 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30/3/2006, § 78; Erdoğan and Ince v. Turkey, App. No: 25067/94, 25068/94, 8/7/1999, § 48; Jersild v. Denmark, App. No: 15890/89, 23/9/1994, § 31).*

47. The freedom of the press, which complements and ensures the exercise of the freedom of expression and dissemination of thought, is not absolute and limitless just like the freedom of expression and dissemination of thought. In order for the press to be able to fulfill its social function stated above, it needs to act with a sense of responsibility as much as it should be free. In this context, the press which influences the thoughts and convictions of large masses of people and can set people into motion needs to comply with the press ethical rules, to refrain from the attitudes and violations that will violate the rights and freedoms of individuals. As a matter of fact, the freedom of expression and dissemination of thought and the freedom of the press as guaranteed by articles 26 and 28 of the Constitution can be restricted due to the reasons stated in these articles in accordance with the conditions in article 13 of the Constitution. As per article 13 of the Constitution, restrictions on fundamental rights and freedoms can only be imposed by law and they can neither be contrary to the requirements of the democratic order of the society and the principle of proportionality nor infringe upon the essences of rights and freedoms.

48. It should be noted that the state and public bodies have discretion over the restrictions in relation to the freedom of expression and the press. However, this sphere of discretion is also subject to the scrutiny of the Constitutional Court. During the scrutiny which will be conducted within the framework of the criteria of conforming to the requirements of the democratic order of the society, proportionality and not infringing upon the essence, instead of a general or abstract evaluation, there is a requirement to conduct a detailed evaluation which differs according to various elements such as the type, form and contents of the expression, the time when it is expressed, the quality of the reasons for restriction. The criteria of not infringing upon the essence or conformity with the requirements of the democratic society require that the restrictions on the freedom of expression should primarily be in the form of a compulsory or exceptional measure and that they should be considered to be the last remedy to be resorted to or the last measure to be taken. As a matter of fact, the ECtHR concretizes being a requirement in the democratic society as a "*pressing social need*". According to this, if the restrictive measure is not in the form of meeting a pressing social need or is not the last remedy to resort to, it cannot be considered as a measure which is in conformity with the requirements of the democratic order of the society. Similarly, while looking into the existence of a pressing social need, an abstract evaluation should not be made but various elements such as the title of the individual who gets involved in the medium of expression and who also expresses, the identity and level of reputation of the targeted individual, the content of the expression, the contribution the expressions make to a discussion in relation to the general interest which concerns the public opinion must be taken into account. (For the ECtHR decisions on this subject, see *Axel Springer AG v. Germany*, [BD], App. No: 39954/08, 7/2/2012; *Von Hannover v. Germany* (no. 2), [BD], 40660/08 and 60641/08, 7/2/2012).

49. In relation to the rightfulness of an intervention to be made in the freedom of expression and the press, it should be separately dwelled on "*the identity of the targeted person and the content of the expression*". It is necessary to make evaluations by making a differentiation between simple citizens and public figures, between public officers and politicians in terms of the necessity of an intervention in the freedom of expression in

democratic societies within the scope of the protection of rights and reputation of persons. It should be taken into account that when the reputation of public figures, in particular, politicians and journalists is in question, they need to be more tolerant about criticism by considering the right of the society to receive news in relation these persons and that it is broader than the freedom of the press in this field, that public officers need to have public confidence in order to duly fulfill their duties in the news and comments on public officers, that it can be ensured through the protection of public officers against groundless allegations.

50. In terms of the content of expressions, it should be remembered that an examination needs to be made depending on whether or not the word used, writing, picture and similar things are a factual claim or value judgment, that it is not suitable for the opinions and comments which represent a value judgment to be proven, that in the event that journalists predicate on facts which have the quality of an attack on the personal rights of individuals, they need to present reliable evidence in order to substantiate this claim of them, that they have duties and responsibilities towards acting in good faith so as to provide accurate and reliable information by behaving in a way which complies with the codes of conduct of the press. As a principle, it should be stated that in the event of the presence of call for violence or hate speech in a democratic society, an intervention can be made by public authorities in the freedom of expression and the press on the condition that it is through legitimate aims and means and is proportionate, that it is necessary to impose a sanction on all kinds of expressions which encourage and even consider as legitimate hatred and violence and to prevent them.

51. The intervention should be based on just reasons and during the restriction of rights and freedoms, the essence of the rights should not be infringed upon and it should be proportional. Restrictions which significantly complicate and make difficult the exercise of the right in conformity with the objective thereof implicitly render it useless and eliminate its impact and infringe upon the essence (see CC, M. 2006/121, D. 2009/90, D.D. 18/6/2009). Through the principle of proportionality which is described as striking a just balance between the objective of restriction and the tool of restriction, the aim is to prevent regulations which restrict rights and freedoms more and introduce more severe liabilities on individuals who will exercise the rights although it is possible to attain the objective of restriction by means of less restrictive or less severe measures. Thus, if a restrictive measure taken in order to attain a specific objective is more severe and strict than required, that restriction is neither proportional nor is a restriction which is in conformity with the democratic order of the society.

52. There are special reasons for limitation which can be resorted to in the restriction of the freedom of expression and the press and are stipulated in articles 26, 27 and 28 of the Constitution. In this context, it is stipulated under paragraph three of article 28 of the Constitution that the provisions of articles 26 and 27 will apply in the restriction of the freedom of the press. Thus, the freedom of the press has been subjected to the restriction regime stipulated within article 26, which acts as the general provision regarding the freedom of expression and dissemination of thought, and in article 27 regarding artistic and academic expressions. Other restrictions aimed at the freedom of the press are stipulated within paragraph four and the following clauses of article 28. According to article 26, one of the

reasons for the restriction of the freedom of expression is the protection of the reputation or rights, private and family lives of others or their professional secrets prescribed by law.

53. The honor and reputation of an individual is included within the scope of "*spiritual existence*" which is stipulated in article 17 of the Constitution. The state is obliged not to intervene in honor and reputation which are a part of the spiritual existence of an individual and to prevent the attacks of third parties. The intervention of third parties in honor and reputation can also be made through visual and audio publications as well as many possibilities. Even if a person is criticized within a public debate through a visual and audio publication, the honor and reputation of that person should be considered as a part of his/her spiritual integrity (App. No: 2013/1123, 2/10/2013, § 33).

54. The positive liability of the State within the framework of establishing effective mechanisms against the interventions of third parties on the material and spiritual existence of individuals shall not necessarily entail the performance of a criminal investigation and prosecution. It is also possible to protect an individual against the unjust interventions of third parties through civil procedure. As a matter of fact, both criminal and legal protection have been envisaged in our country for the interventions which are made by third parties in honor and reputation. Insult is considered as a crime in terms of criminal law, as an unjust act in terms of private law and can be subjected to an action for compensation. Therefore, it is also possible for an individual to ensure a remedy through a civil case with the claim that an intervention has been made by third parties in his/her honor and reputation (App. No: 2013/1123, 2/10/2013, § 35). While an intervention is made by courts in the freedom of expression and the press, it should be taken into consideration that individuals are not subjected to criminal investigations unless there is call for violence or hate speech in the content of the expressed words, writings, pictures and similar things by considering the role of the press in the transmission and dissemination of thought, the contribution that it has provided to the information of individuals and society and the fact that, in this sense, it is one of the indispensable elements of the pluralistic democratic order, in particular, the imposition of an imprisonment should be avoided and other measures should be prioritized for the protection of individuals against unfair interventions.

55. The state has both positive and negative liabilities in relation to the freedom of expression. Within the scope of negative liability, public bodies should not ban the expression and dissemination of thought as long as this is not compulsory within the scope of articles 13 and 26 of the Constitution whereas, within the scope of positive liability, it should take the measures necessary for the actual and effective protection of the freedom of expression (for a similar opinion of the ECtHR, see *Özgür Gündem v. Turkey*, App. No: 23144/93, 16/3/2000, § 43).

56. Within the framework of its positive liabilities in relation to the protection of the material and spiritual existence of individuals, the state needs to strike a balance between the right to the protection of honor and reputation and the right of the other party to exercise the freedom of expression which is enshrined in the Constitution (For the decision of the ECtHR in the same vein, see. *Von Hannover v. Germany* (no.2) [BD], 40660/08 and 60641/08, 7/2/2012, § 99). While striking this balance, through the limited reasons and legitimate objectives prescribed by law within the scope of articles 13 and 26 of the Constitution, it is necessary to observe a proportional balance between the objective and means of restriction

and the essence of the right should not be infringed upon by taking into consideration the requirements of the democratic order of the society.

57. As a matter of fact, the ECtHR, in *Axel Springer AG* case, has developed some criteria towards determining whether or not conflicting interests are balanced in the event that there is a conflict between the freedom of expression and the reputations of others and accordingly, whether or not the intervention is necessary and proportional in a democratic society. These criteria have been stated as a) contribution of reports or expressions in the press to a debate of general interest which concerns public, b) how well known is the person targeted and what is the subject of the report, c) prior conduct of the person concerned, d) method of obtaining the information and its veracity, e) content, form and consequences of the publication and f) severity of the sanction imposed (see *Axel Springer AG v. Germany*, [BD], App. No: 39954/08, 7/2/2012).

58. Among these criteria, especially "how well known is the person targeted and what is the subject of the report" has special importance. Because, the ECtHR makes evaluations by making a differentiation between simple citizens and public figures, between public officers and politicians in terms of the necessity of an intervention in the freedom of expression in democratic societies within the scope of the protection of rights and reputation of others. In the event that especially the freedom of expression and the rights and reputation values of others are in conflict, if the person whose reputation is in question is a simple citizen, it ensures protection at high level in favor of reputation, if the reputation of a politician is in question, as a principle, it makes its preference in favor of the freedom of expression.

59. The ECtHR exhibits a different attitude in relation to public officers. Although it does not consider the acceptable limit of criticism of public officers as that of simple citizens, it emphasizes that it is not as broad as the limit of criticism accepted for politicians, that public officers need to have public confidence in order to duly fulfill their duties, that it can only be ensured through the protection of public officers against groundless allegations (see *Steur v. the Netherlands*, App. No: 39657/98, 28/10/2003, §40; *Lesnik v. Slovakia*, App. No: 35640/97, 11/3/2003, §53). Moreover, the Court emphasizes that the press is obliged to act in accordance with its duties and responsibilities while exercising the freedom of expression, that the restrictions introduced in relation to the "*protection of the honor and rights of others*" should be taken into account as the news published within the scope of these duties and responsibilities has a risk of creating severe effects on the honor and reputation of individuals (see *Observer and Guardian v. the United Kingdom*, App. No: 13585/88, 26/11/1991).

60. In the criterion of "the content of publication" in terms of striking a fair balance between the protection of the rights and reputations of individuals and the freedom of expression and the press, as a principle, the ECtHR states that in the event of the presence of speeches encouraging hatred and violence, an intervention can be made by public authorities in the freedom of expression and the press on the condition that it is through a legitimate aim and is proportional, that in democratic societies, it is necessary to impose a sanction on all kinds of expressions which encourage hatred including intolerance and even consider it as legitimate and even to prevent them on the condition that their "*formalities*", "*conditions*", "*restrictions*" or "*sanctions*" are proportional to the pursued legitimate aim (see *Sürek v. Turkey*, (No:1), App. No: 26682/95, 8/7/1999, § 62; *Jersild v. Denmark*, App. No: 15890/89, 23/9/1994).

61. The Constitutions Court will evaluate, according to the unique characteristics of each incident, whether or not an intervention is necessary in a democratic society, whether or not the essence of a right is infringed upon while the intervention is made, whether or not the intervention is proportional and whether or not a fair balance is struck between the freedom of expression and the press and the rights and reputation values of others in the event that they are in conflict with each other.

### **c. Application of General Principles to the Concrete Incident**

62. In the concrete incident, the applicant asserts that his freedom of expression and the press was violated due to the fact that it was decided that the imprisonment judgments ruled upon him due to two columns he had written in a local newspaper were postponed. Following the explanation of the general principles, during the application of these general principles to the concrete incident, it will be determined "*whether there is an intervention or not*" in the freedom of expression and the press, if there is an intervention, "*whether the intervention is based on just reasons or not*", if there is a just reason, "*whether the intervention is required for the democratic order of society and whether it is proportional or not*".

63. In terms of the presence of the intervention, first of all, the issue of whether or not the application of postponement of the pronouncement of judgment constituted an intervention in the freedom of expression and the press should be clarified. Because, the applicant was sentenced by the court of instance to an imprisonment of 10 months and two judicial fines of 7.080 TL and as a result, it was decided that the ruled imprisonment judgments be postponed.

64. The application of postponement of the pronouncement of judgment regulated in article 231 of the Code numbered 5271 is not a decision of imprisonment due to its quality and is an application which bears the consequence of the removal of the postponed judgment and the dismissal of the public case in accordance with article 223 of the same Code in the event that a new crime is not intentionally committed and the obligations are complied with within the period of probation.

65. In cases where the postponement of the pronouncement of judgment is decided, there is a conscientious conviction reached as to the effect that the accused is guilty and this conviction does not become effective subject to the condition of not committing "*a new crime intentionally*". Indeed, the postponement of pronouncement of judgment refers to the fact that the court which has reached a conscientious conviction on imprisonment postpones the pronouncement of judgment in relation to this for a certain period of time, that the judgment does not bear any legal consequence on the accused within this period and that the judgment whose pronouncement has been postponed is removed and the case is dismissed in the event that the individual does not commit any crime at the end of this period, that in the event that a new crime is committed within the period of probation, a decision is issued on the pronouncement of the postponed judgment *verbatim*. For this reason, as individuals are under a threat of punishment in criminal cases which result in the postponement of pronouncement of judgment, even if these decisions are not considered as imprisonment, it is obvious that they will be accepted as an intervention in the freedom of expression and the press.

66. In the concrete incident, a criminal investigation was initiated on the applicant, the criminal investigation passed the phase of prosecution and as a result, a judgment of imprisonment was ruled by the court and it was decided on the postponement of

pronouncement of judgments. Therefore, there is no intervention made in the freedom of expression and the press through a court decision.

67. The intervention made by the Criminal Court of First Instance of Çine in the freedom of expression and the press was made due to the offenses of insult and slander regulated in the Code numbered 5237 (see §§19-22) and there is no objection asserted by the applicant against the legal regulation of these crimes and the provisions of the postponement of pronouncement of judgment. Therefore, it is clear that the intervention in the freedom of expression and the press of the applicant is prescribed by law.

68. When the legitimate aim which requires intervention is examined, it is understood that the offenses of insult and slander are provided in order to protect the reputation and rights of others in accordance with paragraph (2) of articles 17 and 26 of the Constitution and that in the concrete incident, the public authorities intervened in the freedom of expression to this end. For this reason, it is seen that the intervention has a legitimate aim.

69. It is stated above (§§ 48-51) which general principles would be used as basis of action in relation to whether or not the intervention is required in a democratic society and whether or not proportionality is maintained while making the intervention. The most important issue to be taken into account during the application of these general principles in the concrete incident is the issue of how a fair and proportionate balance will be struck in the event that the freedom of expression and the press and the rights and reputation values of others are in conflict with each other. In the concrete incident, it is seen that due to a slander case and two separate insult cases filed on the ground that an attack was made on the reputation and personal rights of the deputy director of security of the district because of two columns of the applicant, a decision was issued on an imprisonment of 10 months due to the offense of slander and two judicial fines of 7.080 TL due to the offenses of insult for the applicant and on the postponement of pronouncement of the ruled judgments of imprisonment. Therefore, there are two separate columns and the punishments imposed due to two separate columns. For this reason, it is considered as useful to separately evaluate the issues of whether or not the punishments imposed due to two separate columns are required in a democratic society, whether or not a fair and proportionate balance was struck between the conflicting rights in the evidence of general principles by considering the contents of the columns.

***i. In terms of the column titled “Being cheap”***

70. A judicial fine of 7.080 TL was imposed by the Criminal Court of First Instance of Çine due to the offense of insult because of the column titled "*Being cheap*" as written by the applicant and a decision was issued on the postponement of pronouncement of the ruled judgment. In the justification of the Local Court; it is stated that the applicant, in his column titled "*Being cheap*" on the page three of the issue of Çine Madran Newspaper dated 2/4/2012, talked about a story between a commander and a landlord in Ottoman period and that the landlord said addressed to the public officer mentioned in that incident "...my son, it is obvious that you were born by a cheap woman", that subsequently, he insulted by stating that the intervenor director of security would be in the class of "*the cheap*" by describing him as the institution chief who had public authority, whose motorcycle plate's last three figures were the same and used a private plate in a similar incident, that although the name of the intervenor was not clearly stated in the column, as can be understood from the documents sent for the file, it is obvious that the accused meant the intervenor in his column in the face of the fact that the intervenor is the deputy director/chief of security, that the last three figures of the motorcycle that belongs to the intervenor are "888", that the intervenor is the only person at the position of institution chief whose motorcycle's last three figures are the same, that his statement was taken as a witness in the judicial investigation conducted on the District Governor of Çine, that for this reason, it is deduced and concluded that the defense of the accused as to the effect that his column was not directed towards a certain person cannot be taken into consideration.

71. In the examination of the file; it is seen that the victim works as the deputy director in the Directorate of Security of Çine, that title of the column titled "*Being cheap*" was determined by being inspired from a story that was set in Ottoman period, that there were speeches between a commander who was appointed to a village and was responsible for public order and the landlord in the story, that as the bridewealth of the mother of the commander was low, the landlord told the commander "...my son, it is obvious that you were born by a cheap woman". The author adapted "*the class of the cheap*" to our day by being inspired from this story and it is stated that he saw those who are in the class of the cheap the institution chiefs who place a private plate to his motorcycle, the public officials who give false testimony for fawning over the high authority, the politicians who use the positions they have achieved with the will of public for their own interests, those ignore the public and act as the soldier of the rich, the servant of the powerful, the community engineers and who fail to use the newspapers and journalists for their personal vulgarities, fail to impose their fraudulences on the society and try to create an alternative, those who take credit for the column and try to deal with him, that as a result, that their mothers were not the ones to put the blame on for their cheapness, that they were the ones to put the blame on as they abused public authority, were characterless, greedy and had ugly worldly ambitions.

72. When the article is examined as a whole, it is seen that it has the purpose of criticism towards the form of the exercise of authorities by some public officers. The applicant built his criticisms in the column in question over the concept of "*being cheap*". It is clear that this concept was used in order to trivialize the individuals. Moreover, when the connection established between the story narrated in the beginning of the column and the concept is taken into consideration, it is seen that the concept of "cheapness" was predicated on a sexist speech as to the effect that a woman could be commodified and purchased with money and the value of a woman could be determined with its monetary equivalent.

73. The issue of who was attempted to be trivialized with this concept included in the form of "*being cheap*" is of importance. Because, a name is not clearly stated in the column. In this subject, by referring to the expression as "*The institution chiefs who place a private plate (whose last three figures are the same) to his motorcycle by using his public authority...*" used in the column, the court of instance states that as a result of the examination they carried out, the relevant sentence was targeting one individual, that he was the complainant deputy director of security H.Y. whose motorcycle's last three figures were the same (888) and worked as the institution chief in the district of Çine, that they did not have any hesitation as to the effect that the applicant targeted the deputy Director of Security of Çine in accordance with article 126 of the Code numbered 5237. Unless an obvious arbitrariness and an evident discretionary mistake is present in the conclusion that the court of instance reached with this evidence, the Constitutional Court cannot intervene in it. It is clear that the expressions "*containing insult*" used in the column were directed towards the deputy director of security and had a quality of attacking his personal rights. For this reason, it is understood that the intervention in the freedom of expression and the press in relation to the article which is the subject matter of the application within the scope of the protection of moral integrity of the complainant is required for the just and democratic order of society.

74. It should be evaluated whether or not a reasonable balance was struck between the freedom of expression and the press of the applicant and the right to reputation of the complainant and accordingly, whether or not the intervention in the freedom of expression of the applicant is proportionate. Both rights which are mentioned here are constitutional rights and need to be equally protected.

75. As specified above, when the entire article is taken into account, although it is seen that it had an aim of general public criticism, it is understood that this criticism was made by way of defamation of the public officers in question. It is seen that expressions as to the effect that the complainant was in the class of "*the cheap*" as he misused his public authority and took a special plate, that therefore, he was a person who was characterless, greedy and had a worldly ambition just like other members of the class of the cheap, that in this case, his mother was not to be blamed had the aim of defaming the complainant rather than informing the public. The evaluations included in the article contain the value judgments of the author rather than a case. In this framework, even if the author is not expected to prove these, it should be expected that the content of the article generally complies with the ethics of the press. Although it is accepted that the profession of journalism can tolerate exaggeration or even provocative judgments to a certain extent, this does not mean that the constitutional rights of third parties can be violated in any way.

76. Even if public officers need to tolerate more criticism when compared to ordinary persons as they exercise public authority, since the fact that these persons can duly perform their duties depends on the trust of the public to a certain extent, the criticisms towards them should not reach to a level which will bear the consequence of defamation thereof before the public. Of course, persons have to tolerate the consequences of their actions. In the concrete incident, although it is not clear which previous actions of the complainant directed the

applicant to make such criticism, it cannot be concluded that the person took a plate whose last three figures were the same by using his influence, that therefore, he needed to tolerate the judgment as to the effect that he was included in the class of "*the cheap*". In particular, it cannot be stated that the sexist speech used in the article in question and expressions such as the fact that their mothers were not to be blamed for their cheapness need to be protected in a democratic society.

77. As a matter of fact, the ECtHR, in *Janowski* case, by examining the sentencing of the applicant who was a journalist by the local court as a result of the fact that he had used the expressions "*oafs*" and "*dumb*" to the faces of municipal officers within the scope of the freedom of expression, by asserting that these words of the applicant were not within the scope of an exchange of ideas made on the subjects which concern public, that these words were uttered in an area which was open to public and in front of many persons, that therefore, the applicant would not be considered as a journalist, but as an ordinary citizen, that this insult made against the public officers exceeded the limit of acceptable criticism, decided that the words uttered could not be considered within the scope of the freedom of expression and the press (*see Janowski/Poland*, App. No: 25716/94, 21/1/1999, §§32-35).

78. On the other hand, while the proportionality of an intervention is evaluated, another issue that needs to be taken into consideration is the severity of the sanction imposed. In the incident in question, it is seen that a judicial fine of 7.080 TL was imposed on the applicant on the ground that the mentioned article constituted the offense of insult and that the pronouncement of judgment was postponed.

79. In the event that a punishment restricting freedom is ruled in relation to the offenses of insult which are committed through the press, it should be taken into consideration that this may put pressure on the entire press and dissuade journalists from discussing subjects which concern public opinion, that thus it may turn into a self-censor institution. Therefore, unless there are expressions such as call for violence or hate speech which are aimed at abolishing pluralistic democracy in a democratic society, it is necessary to refrain from ruling a punishment restricting freedom. In the concrete incident, although a criminal case was filed on the applicant and he was tried, it is seen that it was abstained from imposing an imprisonment sentence against the applicant and that a judicial fine was ruled and the penalty imposed was not applied by way of the postponement of pronouncement of the judgment.

80. In the framework of the foregoing explanations, when matters such as content and aim of the article titled "*Being cheap*", identity and position of the person targeted, context of the article, severity of the sanction imposed are evaluated as a whole, it cannot be said that the intervention made in the freedom of expression and the press of the applicant is disproportionate.

81. Due to the reasons explained, as it is understood that the intervention in the freedom of expression and the press is required and proportionate in a democratic society, it is necessary to decide that the rights protected in articles 26 and 28 of the Constitution were not violated.

**ii. In terms of the column titled "*The vagabonds on motorcycles*"**

82. An imprisonment sentence of 10 months was imposed by the Criminal Court of First Instance of Çine on the applicant due to the offense of slander and a judicial fine of 7.080 TL due to the offense of insult because of the column titled "*The vagabonds on motorcycles*" written by the applicant and a decision was issued on the postponement of pronouncement of the ruled judgment. When the reasoned decision of the court is examined; it is stated that the applicant, in his column titled "the Vagabonds on motorcycles" on the page 3 of Çine Madran Newspaper and on the internet site named 'www.cinemadran.com', stated in a way which was not indeed present that the deputy director of security released the motorcycle which was caught without a plate and driving license in an illegal way without performing any action and that although he essentially knew that the intervenor did not commit any crime, he incriminated and slandered him in order to ensure that an investigation and prosecution be initiated on him, that he stated, towards the end of his column, that the directorate of security performed an application which exceeded its authority in the district and announced to the men in Çine that it was forbidden to sit in front of coffee houses as they looked at women and girls and verbally molested them, that the vagabonds on motorcycles were the only ones to blame on this, that such an application was performed in Çine district, that it was concluded that he, also in this column, slandered and insulted through the press by meaning the intervenor and calling him 'the vagabond on motorcycle'.

83. When the article is evaluated as a whole; it is seen that during the application of a criminal action when the son of a citizen who was understood to be from a political party was stopped by the police officers while riding his motorcycle at a high speed without any driving license or plate and when its exhaust was open, the citizen called someone who was understood to be the district head of a party in order to prevent the penalty and wanted him to call the director of security and to prevent the penalty, that the district head of the party called a company executive and that the dual conversations therebetween as to the effect that the penalty in question be not imposed were included , that the district head told the company official that the relevant company waited the directorate of security on hand and foot, that it even granted a car to the directorate of security, that for this reason, the penalty could not be imposed in the event that the company official called the director of security. These sections of the article refer to a value judgment with a general quality which points to a problem in general and criticizes the relations between politics, private sector and public institutions and does not target certain persons. In the subsequent sections of the article, it is stated that the directorate of security banned the men living in Çine district from sitting in front of the coffee houses on the ground that they verbally molested girls, that this circumstance constituted an insult against the society, that in the face of this circumstance, the politicians who are the

representatives of the public remained silent, that the vagabonds on motorcycles were the only ones to be blamed.

84. It is seen that the Criminal Court of First Instance of Çine issued a decision on the conviction that the offenses of both insult and slander occurred in the article in question. According to the evidence that it collected, the Court states that it came to the conclusion without doubt that the incident was real due to the fact that the application of "*ban on the sitting of men in front of the coffee houses in Çine district*" was carried out in Çine, that for this reason, the Directorate of Security of Çine was targeted, that in a way which was not indeed present, the deputy director of security released the motorcycle which was caught without a plate and driving license in an illegal way without performing any action, that although he essentially knew that the director of security did not commit any crime, he incriminated him in order to ensure that an investigation and prosecution be initiated on him and committed the offense of slander, that in the face of the fact that it was stated that the reason for all unlawfulnesses specified in the article was the vagabonds on motorcycles, this vagabond was the director of security whose motorcycle's last three figures were the same because of the article "*Being cheap*", that he was called "*the vagabond on motorcycle*".

85. When the article of the applicant, the reasoned decision of the Criminal Court of First Instance of Çine, all evidence included in the file are evaluated as a whole; it is seen that the sanction prescribed for the applicant due to the offenses of insult and slander because of the article written by the applicant constitutes an intervention in the freedom of expression and the press. It should be evaluated whether or not this intervention is just, foreseeable, is required in a democratic society and is proportionate within the framework of the aforementioned principles.

86. It is understood that in the article, he generally exhibited a critical approach which contained a value judgment on politics, private sector and security institutions, that the criticisms aimed to contribute to a discussion which concerned the public and was related to general interest, that it did not contain a call for violence or hate speech, that it was not clearly specified who were the politicians, security officers and private company owners included in the article, that the matter of whether the director of security or the likes of the son on motorcycle of a person from the party as specified in the beginning of the article were meant by the phrase "*the vagabonds on motorcycles*" used in the article was left open. As a person was not directly targeted in the article, it was not deemed necessary to separately examine the matters of whether the words uttered referred to a value judgment on the persons or to a case. From the examination of the article as a whole, it cannot be clearly understood that the addressee of the expressions in question was the complainant. For this reason, it cannot be mentioned that the sanction imposed on the applicant due to the article which is the subject matter of the application was imposed in order to protect the moral integrity of the complainant and that this intervention in the freedom of expression and the press is required in a just and democratic society.

87. On the other hand, while the proportionality of an intervention is evaluated, one of the issues that need to be taken into consideration is the severity of the sanction imposed. In the concrete incident, it is seen that an imprisonment sentence of 10 months and a judicial fine of 7.080 TL were imposed on the applicant and it was decided that the pronouncement of judgment be postponed. Even if the decisions on the postponement of pronouncement of judgment do not have the quality of an imprisonment judgment, in the event that an intentional offense is committed within five years, the prescribed penalties shall be imposed *verbatim*. When the amount of the postponed penalties and the severity of the threat of

penalty subjected are taken into account by considering the fact that the threat of imprisonment sentence will play a role which dissuades journalists from discussing public problems and could result in self-censor, it cannot be said that the intervention made in the freedom of expression and the press is proportionate. In this framework, even if it is accepted that the aim of the intervention is to protect the honor and reputation of the complainant, it cannot be concluded that a fair balance was struck between this right of the complainant and the freedom of expression and the press of the applicant as a journalist.

88. In the framework of the foregoing explanations, when matters such as content and aim of the article titled "*the Vagabonds on motorcycles*", identity and position of the person targeted, context of the article, severity of the sanction imposed are evaluated together, it has been concluded that the penalty imposed by the Criminal Court of First Instance of Çine on the applicant had the quality of a disproportionate intervention in the freedom of expression and the press.

89. Due to the reasons explained, as it is understood that the intervention in the freedom of expression and the press is not required and proportionate in a democratic society, it is necessary to decide that the rights protected in articles 26 and 28 of the Constitution were violated.

### **3. Application of Article 50 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216**

90. The applicant filed a request for a moral compensation of 30.000 TL.

91. The Ministry of Justice did not submit any opinion as regards the requests of the applicant for compensation.

92. Paragraphs (1) and (2) of article 50 of the Code numbered 6216 are as follows:

*"(1) At the end of the examination on merits, it shall be decided that the right of the applicant has been violated or has not been violated. In the event that a decision of violation is delivered, what needs to be done for the removal of the violation and its consequences shall be adjudged. However, legitimacy cannot be reviewed, no decision with the quality of an administrative act and action cannot be delivered.*

*(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."*

93. In paragraph (1) of article 50 of the Code numbered 6216, it is stated that in the event that a decision of violation is delivered as a result of the examination of merits, what needs to be done for the removal of the violation and its consequences shall be adjudged; in paragraph 2, it is provided that in the event that the violation results from a court decision, the file shall be sent to the relevant court, that the court shall be obliged to review the file because of the violation and to issue a decision in a way which will redress the violation.

94. In the concrete incident, by considering the fact that an unlawful intervention was made in the freedom of expression and the press in terms of the article titled "*the Vagabonds on motorcycles*", 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 Criminal Court of First Instance of Çine in order for the violation and the consequences thereof to be removed.

95. As it is understood that the moral losses of the applicant will be completely redressed by way of the determination and removal of the violation, it should be decided that there is no ground for the payment of moral compensation to the applicant.

96. As the applicant has requested the collection of the counsel's fee and trial expenses, it should be decided that the trial expenses of 1.698,35 TL which were made by the applicant be paid.

## V. JUDGMENT

Due to the reasons explained, it is **UNANIMOUSLY** decided on 23/1/2014;

**A.** That the application is **ADMISSIBLE**,

**B.** That the freedom of expression and the press enshrined in articles 26 and 28 of the Constitution was **NOT VIOLATED** in terms of the column dated 2/4/2012 and titled "*Being cheap*" as written by the applicant,

**C.** That the freedom of expression and the press enshrined in articles 26 and 28 of the Constitution was **VIOLATED** in terms of the column dated 3/10/2012 and titled "*the Vagabonds on motorcycles*" as written by the applicant,

**D.** That the requests for moral compensation by the applicant be **DISMISSED**,

**E.** That the trial expenses of 1.698,35 TL in total composed of the fee of 198,35 and the counsel's fee of 1.500,00 TL which were made by the applicant **BE PAID TO THE APPLICANT**,

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

**G.** That a copy of the decision be sent to the Criminal Court of First Instance of Çine 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  
Serruh KALELİ

Member  
Mehmet ERTEN

Member  
Zehra Ayla PERKTAŞ

Application Number : 2013/2602  
Date of Decision: 23/1/2014

**Member**  
**Burhan ÜSTÜN**

**Member**  
**Nuri NECİPOĞLU**