REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

PLENARY ASSEMBLY

JUDGMENT

KAMURAN REŞİT BEKİR APPLICATION

(Application No: 2013/3614)

Date of Judgment: 8/4/2015

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PLENARY ASSEMBLY

JUDGMENT

President	: Zühtü ARSLAN
Vice-President	: Serruh KALELİ
Vice-President	: Alparslan ALTAN
Judges	: Serdar ÖZGÜLDÜR
	Osman Alifeyyaz PAKSÜT
	Recep KÖMÜRCÜ
	Burhan ÜSTÜN
	Engin YILDIRIM
	Nuri NECİPOĞLU
	Hicabi DURSUN
	Erdal TERCAN
	Muammer TOPAL
	M. Emin KUZ
	Hasan Tahsin GÖKCAN
	Kadir ÖZKAYA
Rapporteur	: Murat ŞEN
Applicant	: Kamuran Reşit BEKİR (A citizen of Syrian Arab Republic)

I. SUBJECT OF APPLICATION

1. The applicant alleged that his freedom of expression was violated as some pages of Azadiya Welat Newspaper (Newspaper) sent to him were removed by the penitentiary institution in which he was a convict and his access to the newspaper was prevented. The applicant filed a request for damages.

II. APPLICATION PROCESS

2. The application was lodged through the Office of the Chief Public Prosecutor of Ankara on 20/5/2013 and the subsequent dates. 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 by the First Commission of the Second Section on 19/9/2013 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

4. In its interim judgment of 24/3/2014, the Second Section ruled on the acceptance of the applicant's request for legal aid.

5. It was decided on 31/3/2014 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.

6. The facts which are the subject matter of the application were notified to the Ministry of Justice on 1/4/2014. The Ministry of Justice submitted its opinion to the Constitutional Court on 30/5/2014 at the end of the additional period that was granted.

7. The opinion submitted by the Ministry of Justice to the Constitutional Court was notified to the applicant on 6/6/2014. The applicant submitted his counter-opinions to the Constitutional Court on 20/6/2014.

8. Since it was deemed necessary during the meeting held by the Second Section on 22/1/2015 that the application be ruled upon by the Plenary Assembly (the Plenary) due to the nature of the application, it was ruled that the application be referred to the Plenary in order to be deliberated on as per Article 28(3) of the Internal Regulation of the Constitutional Court.

9. It was ruled that the applications No. 2013/3295, 2013/3599, 2013/3615, 2013/3639, 2013/3647, 2013/4225, 2013/4226, 2013/4227, 2013/4228, 2013/4229, 2013/4230, 2013/4322, 2013/4323, 2013/5299, 2013/5300, 2013/5355, 2013/5361, 2013/5886, 2013/5892, 2013/5893, 2013/5990, 2013/6210, 2013/6211, 2013/6212, 2013/6213, 2013/6214, 2013/6215, 2013/6814, 2013/6890, 2013/7009, 2013/7316, 2013/7337, 2013/7338, 2013/7339, 2013/7573, 2013/7642, 2013/7645, 2013/7646, 2013/7647, 2013/7677, 2013/7678, 2013/7824, 2013/7894, 2013/7895, 2013/8448, 2013/8498, 2013/8556, 2013/8697, 2013/8816, 2013/8817, 2013/9394, 2013/9396, 2013/9397, 2013/9398, 2013/9399, 2014/20, 2014/21, 2014/22, 2014/23, 2014/585, 2014/709, 2014/711, 2014/712, 2014/713, 2014/714, 2014/803, 2014/806, 2014/807, 2014/808, 2014/809, 2014/810, 2014/2402, 2014/2866, 2014/2869, 2014/3161, 2014/3166, 2014/3167, 2014/3168, 2014/3169, 2014/3737, 2014/3740, 2014/3742, 2014/3745, 2014/3746 be joined with the application No. 2013/3614 as they were the same in terms of the applicant and subject and that the examination be conducted based on this file.

III. THE FACTS

A. The Circumstances of the Case

10. The relevant circumstances as determined from the application petition, the annexes thereof and the content of the file which is the subject matter of the application are summarized as follows:

11. The applicant was a convict at the 2nd F Type High Security Closed Penitentiary Institution of Ankara at the dates of application.

12. The Customs Directorate of Diyarbakır considered that 17 publications might be banned during the control of the parcels coming from abroad and sent the publications to the Office of the Chief Public Prosecutor of Diyarbakır.

13. The Office of the Chief Public Prosecutor determined that there was a decision of confiscation and prohibition on 14 out of the 17 books and decided to send the three books on

which there was no decision to the Office of the Public Prosecutor that was assigned in accordance with Article 10 of the Anti-Terror Law No. 3713 of 12/4/1991 (Law No. 3713).

14. As a result of the examination conducted by the Office of the Public Prosecutor (assigned with Article 10 of Law No. 3713) on two separate books authored by Abdullah Öcalan, leader of the PKK terrorist organization, named "*Kürt Sorunu ve Demokratik Ulus Çözümü (*Kurdish Problem and Democratic Nation Solution*) (Kültürel Soykırım Kıskacında Kürtleri Savunmak-Beşinci Kitap) (*Defense of Kurds in the Grip of Cultural Genocide-the Fifth Book)" (book) and "*İlk Konuşmalar (*Initial Speeches*) (Belgeler zafer kazanan tarzın özdilidir) (*Documents are the main language of the style that wins a victory*)*", it was considered that in the books the propaganda of the KCK/PKK terrorist organization was continuously made, that the terrorist organization and the actions made by the members of the terrorist organization were praised, that the required future direction of the KCK/PKK terrorist organization was specified in the books and thus, the books contravened with Article 7 of the Law No. 3713 and Article 25 of the Press Law No. 5187 of 9/6/2004 and requested for a decision on the seizure and confiscation of both books.

15. The 3rd Judge's Office of Diyarbakır (assigned with Article 10 of Law No. 3713) ruled on the seizure and confiscation of the mentioned books on the grounds in the same vein with the evaluation of the Office of the Public Prosecutor through its decision No. 2012/102 Misc. Works of 4/10/2012.

16. Following the said decision of the Judge's Office, the documents were sent to the Office of the Public Prosecutor and an investigation was initiated with the Investigation No. 2012/3121.

17. At the end of the investigation, the Office of the Public Prosecutor, by its decision of 29/11/2012, rendered decision of non-prosecution on the ground that there was no evidence against the defense that the books came from abroad and the person who published the books could not be determined, that the person to whom the books were sent had no information about the incident. With the decision, the Office of the Chief Public Prosecutor requested from the 2nd Judge's Office of Diyarbakır (assigned with Article 10 of Law No. 3713) the confiscation of the books.

18. The Judge's Office decided on the confiscation of the books through its decision No. 2012/290 Misc. Works of 30/11/2012. The books were burned and destroyed on 11/3/2014.

19. As regards the individual application lodged against the decision of seizure and confiscation of the book named "*The Kurdistan Revolution Manifesto, Kurdish Problem and Democratic Nation Solution (Defense of Kurds in the Grip of Cultural Genocide)*" out of the mentioned books through the decision of the 2nd Judge's Office of Istanbul (No. 2012/156 on 21/9/2012), the Constitutional Court ruled that the freedom of expression defined in Article 26 of the Constitution was violated (the judgment No. 2013/409 of 25/6/2014). Thereupon, the Office of the 2ndMagistrate of Diyarbakır ruled on the revocation of the decision of the 3rd Judge's Office of Diyarbakır on seizure and confiscation of 4/10/2012 (the decision No. 2014/467 Misc. Works of 2/9/2014).

20. During the mentioned process, it was stated in the article titled "*manifestoya şoreşe*" (revolution manifesto) in the issue of the Newspaper dated 12/11/2012 that Abdullah Öcalan prepared a defense composed of five volumes under the name "manifest of democratic society" and that a section from the fifth volume would be published as a column each week.

21. In a total of eighty five (85) issues of the newspaper which are the subject matter of individual applications and were sent to the applicant (see § 9) (1-21-28-29 March 2013, 11-12-18-19-23-25-26 April 2013, 2-3-10-16-17-23-24-30 May 2013, 6-7-13-14-20-21-27-28 June 2013, 4-5-11-18-25-26 July 2013, 1-2-9-16-22-29-30 August 2013, 5-6-13-19-20-26-27 September 2013, 3-4-10-11-17-18-24-25 October 2013, 1-7-8-14-15-21-27-28-29 November 2013, 3-4-5-6-10-11-12-13-17-19-20-24-25-27 December 2013, 3-7-8-9-10-16-17 January 2014), some parts of the book which was ruled to be seized and confiscated through the decision of the 3rd Judge's Office of Diyarbakır dated 4/10/2012 were published.

22. The Education Board of the 2nd F Type High Security Closed Penitentiary Institution of Ankara (Education Board) did not approve the delivery to the applicant of the relevant pages of the Newspaper on which the parts of the mentioned book were published. The relevant parts of the decisions are as follows:

> "*... as a result of the examination of the newspaper sent to the convicts/detainees whose names are given below, it was not deemed appropriate to give the newspapers in question to those whose names are given as the following matters were determined with regard thereto.*
>
> *Name of the Publication: Azadiya Welat newspaper (…(Issue:(…)*
>
> *Recipient:(...) KAMURAN REŞİT BEKİR, (...)*
>
> *Reason for Non-delivery:*
>
> *(...)From the translation of the sworn translator of the issue of Azadiye Welat dated 26 November 2012, it was stated in the article titled* "*revolution manifesto*" *on the second page of the above mentioned newspaper that Abdullah Öcalan prepared a defense composed of five volumes under the name* "*manifest of democratic society*"*,(...) that Azadiya Welat would publish a section from the fifth volume as a column each week.*
>
> *In the translation of the newspaper (...) dated (...) as submitted to our Education Board; it was stated that a full page article titled* "*the fifth defense - Abdullah Öcalan's democratic revolution solution*" *was published on the sixth page of the newspaper.*
>
> *As the 3rd Judge's Office of Diyarbakır ruled a decision on* "*Seizure and Confiscation*" *No. 2012/102 Misc. Works of 4.10.2012 as regards the book named* "*Kurdish Problem and Democratic Nation Solution - Defense of Kurds in the Grip of Cultural Genocide- the Fifth book*"*,*
>
> *It was unanimously decided that if the detained/convicted owner of the relevant newspaper requests so through his petition, pages (...) thereof be removed and the newspaper given to him as such, that if he does not have any request, the newspaper be stored in the warehouse of the library, that it be notified that the decision could be objected to before the Office of the Judge of Execution of Sincan within 15 days following the date of notification in accordance with Article 62/3 of the Law No. 5275 and Article 87/3 of the Regulation. (...)*"

23. The decisions of the Education Board of the Penitentiary Institution ruled upon as stated above were separately notified to the applicant and the applicant separately complained about the decisions before the Office of the Judge of Execution of Sincan. The Judge's Office which examined the complaints ruled on the dismissal of the complaints of the applicant through its decisions with various dates and numbers. The relevant parts of the judgments are as follows:

> ")...*)*
>
> *The following provision is stipulated in Article 62/1 of the Law No. 5275:* "*A convict shall have the right to make use of periodicals and non-periodicals by paying their prices on the condition that they are not banned by courts." According to this regulation in the law, in*

order for a convict to make use of the publications that are sent to him/her, the publication must not be banned by courts. It is understood that the article which is the subject matter of the decision of the Education Board has been taken from a banned book and given the regulation in the Law, there is no contrariety to law in the decision of the Education Board. For this reason, it was necessary to rule on the dismissal of the complaint."

24. The applicant resorted to the remedy of objecting separately to the decisions of dismissal of the Judge's Office. The 2nd Assize Court of Sincan which examined the objection separately ruled on the dismissal of the objections of the applicant on the ground that the decisions of the Office of the Judge of Execution ")*...) comply with procedure and law (...)*". These decisions were separately notified to the applicant.

25. The applicant lodged an individual application within due time.

B. Relevant Law

26. Article 25 of the Press Law No. 5187 of 9/6/2004 with the side heading of *"Seizure, prohibition of distribution and sale"* is as follows:

"*The Public prosecutor, or in circumstances where delay would be inconvenient, law enforcement agencies, can seize a maximum of three copies of all kinds of printed works as evidentiary material for the investigation.*

On the condition that an investigation has been initiated, the entirety of printed works can be seized with the decision of the judge as regards the crimes stipulated in the Law on Crimes Committed Against Atatürk No. 5816 of 25.7.1951, the revolution laws contained within Article 174 of the Constitution, Article 146(2), Article 153(1, 4), Article 155, Article 311(1, 2), Article 312(2, 4), Article 312/a of the Turkish Criminal Code and Article 7(2, 5) of the Anti-Terror Law No. 3713 of 12.4.1991.

Regardless of their language, in the event that there is strong evidence to the effect that periodicals or non-periodicals and newspapers printed outside Turkey contain the crimes stipulated under paragraph two, their distribution and sale in Turkey can be prohibited with a decision of the Magistrate upon the request of the Chief Public Prosecutor's Office. In circumstances where delay would be inconvenient, the decision of the Chief Public Prosecutor's office shall be sufficient. This decision shall be submitted to the approval of the judge within twenty-four hours at the latest. In the event that it is not approved by the judge within forty-eight hours, the decision of the Chief Public Prosecutor's Office shall remain null and void.

Those who intentionally distribute or sell the publications or newspapers which have been prohibited as per the above paragraph are responsible for the crimes committed through these publications just like the author of the work."

27. Article 62 of the Law on the Execution of Sentences and Security Measures No. 5275 of 13/12/2004 titled "*Right to make use of periodicals or non-periodicals*" is as follows:

"*(1) A convict shall have the right to make use of periodicals and non-periodicals by paying their prices on the condition that they are not banned by courts.*

(2) The newspapers, books and printed publications issued by public institutions, universities, professional organizations with the quality of a public institution and, on the condition that they are not banned by courts, by the foundations to which tax exemption is granted by the Council of Ministers and the societies that work for public interest shall be given to convicts free of charge and freely. The textbooks of the convicts who continue to have education and training cannot be subjected to control.

(3) No publication which covers any news, article, photo and comments that jeopardize the security of the institution or are obscene can be given to a convict."

28. Article 43(1)(ı) of the Regulation on the Administration of Penitentiary Institutions and Execution of Sentences and Security Measures which entered into force upon publication in the Official Gazette No. 26131 of 6/4/2006 with the heading of ''*Duties and authorities of the Education Board*" is as follows:

"*(1) The Education board shall be assigned and authorized to perform the actions listed below;*

…

(I) To decide whether or not any publication that is sent to the institution covers any news, article, photo and comments that jeopardize the security of the institution or are obscene,

…"

29. Article 11 of the Directive on the Library and Bookcase of Penitentiary Institutions which entered into force upon the approval of the Minister of Justice dated 12/7/2005 titled "*The publications which will not be admitted to the institution*" is as follows:

"*No publication which a) is banned by courts,*

b) is determined to cover any news, article, photo and comments that jeopardize the security of the institution or are obscene, even if not banned by courts,

can be admitted to the institution."

IV. ASSESSMENT AND GROUNDS

30. The individual application of the applicant (App.No. 2013/3614 of 20/5/2013) was examined during the session held by the Court on 8/4/2015 and the following were ordered and adjudged:

A. The Applicant's Allegations

31. The applicant alleged that the Newspaper was the only newspaper which was published in Kurdish in Turkey, that his mother tongue was also Kurdish, that the thoughts and writings of Abdullah Öcalan were also covered in the newspapers that are published in Turkish apart from the mentioned newspaper, that moreover, there was no decision of seizure or confiscation about the newspaper, that however, his access to the newspaper was prevented and that his freedom of information and freedom of expression defined in Articles 25 and 26 of the Constitution were violated and filed a request for damages.

B. Assessment

32. The Constitutional Court is not bound by the legal qualification of the incidents by the applicant but it appraises the legal definition of the incidents and facts itself. In the present case that is the subject matter of the application, a section from the book of Abdullah Öcalan published in the newspaper of which the applicant was a subscriber was prevented from being given to him and the complaint which he filed on this matter remained inconclusive.

33. The media 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 "*by speech, in writing or in pictures or through other media''* and with the expression "*other media*", it is demonstrated that all kinds of means of expression are under constitutional protection (*Emin Aydın*, App. No: 2013/2602, 23/1/2014, § 43).

34. The freedom of expression refers to a person's ability to have free access to news and information, other people's opinions, not to be condemned due to the opinions and convictions they have acquired and to freely express, explain, defend, transmit to others and disseminate these either alone or with others (*Emin Aydın*, § 40).

35. There is no doubt or dispute as to the effect that the freedom of access to information and opinions falls within the norm field of the freedom of expression. In this context, although there are more detailed regulations in the Constitution with regard to the freedom of expression, it is considered under the current condition that it will be appropriate to examine the application within the scope of Article 26 of the Constitution which is the main regulation as regards the freedom of expression and in which it is clearly stipulated in the text of the article that the freedom of the expression and dissemination of thoughts also covers the freedom of receiving news or opinion.

1. Admissibility

36. As a result of the examination of the application, since it was understood that the claims on freedom of expression were not manifestly ill-founded and there was no other reason to require a decision on their inadmissibility, it needs to be decided that the application is admissible.

2. Merits

37. The applicant alleged that the decision of the Education Board on the removal from the newspapers of some parts of the book (§ 14), which was ruled to be seized and confiscated through the decision of the 3rd Judge's Office of Diyarbakır of 4/10/2012, upon the publication in the Newspaper of which he was a subscriber of the parts, which were the subject matter of the decision of confiscation, violated Articles 25 and 26 of the Constitution which guaranteed his freedom of thought and opinion and freedom of the expression and dissemination of thoughts. Moreover, he asserted that the prevention of the newspapers from being given to the convicts by the Education Board although there was no decision of confiscation thereon constituted an interference with his right to receive news.

38. In the opinion of the Ministry, it was specified that the freedom of expression had two stages in the context of Article 10 of the European Convention on Human Rights (Convention), that the first of these was to create convictions and to have information and to have access to the information within this scope and that the second of these was the freedom of expressing by any means the conviction created in the person within the information obtained thereby.

39. On the other hand, the Ministry stated that the application needed to be examined on the basis of whether or not there was an interference with the freedom of expression, the interference made was prescribed by law, it depended on legitimate purposes and it was necessary in a democratic society. Moreover, referring to some judgments of the European Court of Human Rights (ECtHR), it stated that rules could be imposed in a more stringent way in prisons as it was very important to establish order and discipline. Besides, it specified

that a restriction to be imposed on access to publications in prisons would comply with Article 10 of the Convention unless it was in such a way to cover all publications.

40. The applicant reiterated his statements in the application petition against the Ministry's opinion on the merits of the application, and also alleged that the judgments of the ECtHR to which the Ministry referred were not relevant to his situation, that the decision of confiscation was only for certain pages, that the Education Board and the Office of the Judge of Execution removed some parts of the newspapers which are not banned without making any examination and in an *in globo* manner and caused the violation of the freedom of expression.

41. 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 his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the freedom of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing.*
>
> *The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.*
>
> *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 provided that the transmission of information and thoughts is not prevented.*
>
> *The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law*."

42. Article 10 of Convention is as follows:

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

43. As a rule, convicts and detainees have all fundamental rights and freedoms which remain within the scope of the common field of the Constitution and the Convention (see *Hirst v. the United Kingdom (No. 2),* App. No. 74025/01, 6/10/2005, § 69). In this context, the freedom of expression of convicts and detainees is also under protection within the scope of the Constitution and Convention (see *Yankov v. Bulgaria,* App. No. 39084/97, 11/12/2003; *T. v. the United Kingdom,* App. No. 8231/78, 12/10/1983). The access of convicts and detainees

to periodicals or non-periodicals remains within the norm field of the freedom of expression as a concrete reflection of the freedom of access to information and opinions.

44. On the other hand, in the event that there are acceptable requirements towards the protection of security and order in the prisons such as the prevention of crime and the establishment of discipline as an inevitable consequence of being in the prison, a restriction may be imposed on the rights of prisoners. However, even in this situation, any restriction on the rights of convicts and detainees should be reasonable and proportionate (see ibid. *Silver and Others v. the United Kingdom*, App. No: 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 23/3/1983, §§ 99-105). However, the administration has a broader margin of appreciation in terms of the prevention of crime and the establishment of order and discipline in the prison as regards a restriction to be imposed on the freedom of expression of convicts and detainees.

45. According to the ECtHR, the freedom of expression is one of indispensable pillars of a democratic society and one of the basic conditions for the progress of the society and the development of individuals. The Court stated that, in this context, the freedom of expression was applicable not only to "*information*" or "*ideas*" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to the information and ideas that offend, shock or disturb the State or any section of the society and that pluralism, tolerance and broadmindedness which comprise the indispensable conditions of a democratic society required this (*Handyside v. the United Kingdom*, App. No: 5493/72, 24/9/1976, § 49).

46. On the other hand, in accordance with the exceptions stipulated in Article 26(2) of the Constitution, the freedom of expression is not an absolute right. Although it can be restricted, given the importance of the freedom of expression for democratic societies it is necessary to interpret restrictions in a narrower way and the necessity of a restriction should be convincing and reasonable (see *Yankov v. Bulgaria*, § 129). In this context, it is also clear that there must be a limit to the restrictions aimed at the freedom of expression. The criteria under Article 13 of the Constitution must be taken into consideration as regards the restriction of fundamental rights and freedoms. For this reason, the review of the restrictions imposed on the freedom of expression should be conducted within the framework of the criteria stipulated in Article 13 of the Constitution and within the scope of Article 26 thereof (*Abdullah Öcalan* [GA], App. No: 2013/409, 25/6/2014, § 70).

47. In Article 63(1, 3) of the Law No. 5275, it is stated that the periodicals or non-periodicals which are not banned by courts can be given to convicts and detainees in return for their fees and that no publication which covers any news, article, photo and comments that jeopardize the security of the institution or are obscene can be given to convicts and detainees. Therefore, the first thing to do by a prison administration as regards the examination of the publications to be given to convicts and detainees is to ascertain whether or not the publication is banned through any court decision. If it is not banned, it will be examined whether or not it will jeopardize the security of the institution or is obscene. The main purpose of not giving banned publications to convicts and detainees is the fact that the periodicals or non-periodicals which are considered to be banned outside the prison need to be banned in the prison *a fortiori* and that therefore, it is not deemed necessary to evaluate whether a publication banned by the education board of the prison poses a danger for the security of the institution or it is obscene. However, the introduction of publications which are not banned outside the prison can be prevented within the framework of the legitimate aims as regards the security of the institution and not being obscene.

48. In the incident which is the subject matter of the application, the Education Board issued decisions at different dates as regards the removal of some parts of a book, which was previously the subject matter of the decision of seizure and confiscation of the 3rd Judge's Office of Diyarbakır, from the newspaper on the ground that these parts of the book were published in many issues of the Newspaper (see 22). The objections filed against the decisions were dismissed by the Office of the Judge of Execution on the ground that they were banned by referring to the decision of the mentioned Judge's Office. In the decisions of the Office of the Judge of Execution, the decision was established only on the basis of the decision of prohibition as regards the book without making any evaluation with regard to the pages that constituted the basis for the decision of seizure and confiscation.

49. In the present case, the failure of the applicant to have access to the newspaper of which he was a subscriber essentially results from the decisions of the Education Board and the Office of the Judge of Execution. In addition, the decision of prohibition of the 3rd Judge's Office of Diyarbakır constituted the basis for the decision of the Office of the Judge of Execution although it did not directly bear any consequence in the access of the applicant to the newspaper. Therefore, the decisions of the Education Board and the Office of the Judge of Execution and the decision of the 3rd Judge's Office of Diyarbakır should be evaluated together and as a whole.

50. In the light of the principles specified above, it was evaluated firstly whether an interference existed and then whether it depended on valid reasons in the assessment of whether the freedom of access to information and opinion was violated in the incident which is the subject matter of the application.

i. Whether there is any Interference

51. The applicant stated that some parts of the Newspaper of which he was a subscriber were removed through the decision of the Education Board in the prison where he was a convict, that they were prevented from being given to him and that the complaints he filed with regard to this remained inconclusive.

52. It is clear that an interference was made with the applicant's freedom of access to information and opinion as some parts of the relevant newspaper were not given to the applicant. However, the main basis of this interference is the decision of confiscation and seizure of the 3rd Judge's Office of Diyarbakır that constituted the basis for the decisions of the Education Board and the Office of the Judge of Execution of Sincan. In accordance with Article 62 of the Law No. 5275, the education board of a penitentiary institution cannot give to the convicts and detainees the periodicals and non-periodicals on which a decision of prohibition has existed. Within this framework, the education board and the office of the judge of execution which will subsequently examine the decision of the board are responsible for ascertaining whether a decision of prohibition has existed on a periodical or non-periodical. When they ascertain that there is a court decision as regards the prohibition, they are legally responsible for preventing the introduction of the banned publication. Therefore, it is not possible to evaluate the decision of confiscation independently from the decisions of the education board of the penitentiary institution and the decisions of the office of the judge of execution.

53. As no separate evaluation was made by the education board on whether the book of Abdullah Öcalan posed any danger in terms of the security and discipline of the prison and the introduction of some parts of the Newspaper was restricted only in line with the decision

of confiscation in the present case, it should be accepted that the interference in the freedom of expression occurred with the implementation of the decisions of the Education Board and the Office of the Judge of Execution of Sincan and the 3rd Judge's Office of Diyarbakır as a whole.

ii. Rightfulness of the Interference

54. The aforementioned interference will constitute a violation of Article 26 of the Constitution unless it rests on one or more of the valid reasons stipulated in Article 26(2) of the Constitution and fulfills the conditions stipulated in Article 13 of the Constitution. As a result, it is necessary to determine whether the restriction is in line with the conditions of bearing no prejudice to the essence, being indicated under the relevant article of the Constitution, 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 prescribed in Article 13 of the Constitution.

a. Lawfulness of the Interference

55. No claim was made as to the effect that there was a contrariety with the condition of making the interference with "*the law*" contained within Article 13 and Article 26(4) of the Constitution. As a result of the evaluations that were made, it was concluded that it fulfilled the criterion of "*lawfulness*" as contained within Article 62 of the Law No. 5275 (§ 24).

b. Legitimate Aim

56. In order for an interference made with the freedom of access to information and opinions to be legitimate, it needs to be aimed at the objectives of protecting national security, public order, public security, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a State secret, protecting the reputation or rights and private and family lives of others or protecting professional secrets as prescribed by law or ensuring the proper functioning of the judiciary stipulated under Article 26(2) of the Constitution (*Abdullah Öcalan*, § 84).

57. In the incident which is the subject matter of the application, as the applicant was a convict, the legitimate aims stipulated in the aforementioned paragraph should be evaluated in terms of the conditions of the prison itself. Within this framework, the main legitimate aim of restricting the rights and freedoms of convicts and detainees at penitentiary institutions in terms of the decisions of prohibition of the Education Board is ensuring security and discipline in the prison on the basis of the general objective of public order and the prevention of crimes. It was concluded that the non-delivery of some parts of the Newspaper to the applicant was made for the purposes of ensuring order and security in the prison and the prevention of crime and that it had a legitimate aim within the scope of Article 26(2) of the Constitution on the freedom of access to information and opinion.

c. Necessity and Proportionality in a Democratic Society

58. The applicant stated that the Newspaper was the only newspaper which was published in Kurdish in Turkey, that his mother tongue was also Kurdish, that the thoughts and writings of Abdullah Öcalan were also covered in the newspapers that are published in Turkish apart from the mentioned newspaper, that moreover, there was no decision of seizure

or confiscation about the newspaper, that however, his access to the newspaper was prevented and that the decision of prohibition was made in an *in globo* manner.

59. As the freedom of access to information and opinions which is within the norm field of the freedom of expression is not an absolute right, it may be subject to some restrictions. However, these restrictions need to comply with with the requirements of a democratic social order and the principles of proportionality which are guaranteed under Article 13 of the Constitution (§ 41).

60. It is stated in the justification for the first version of Article 13 of the Constitution that "*The proportion which needs to be observed in the restriction of rights and freedoms; that is, the limit of restriction, is prescribed under paragraph two of the article. In other words, the restrictions to be imposed on rights and freedoms or the restrictive measures to be prescribed in relation to these should not be against the understanding of a democratic regime; they should be reconcilable with the widely accepted understanding of a democratic regime*". It is stated in the justification for the amendment made in the Constitution with Article 2 of the Law Concerning the Amendment of Some Articles of the Constitution of the Republic of Turkey No. 4709 of 3/10/2001 that "*Article 13 of the Constitution is re-regulated in line with the principles contained within the European Convention on Human Rights*" (*Abdullah Öcalan*, § 92).

61. The democracy stipulated by the Constitution of 1982 needs to be interpreted with a modern and libertarian understanding. The criterion of "*democratic society*" clearly reflects the parallelism between Article 13 of the Constitution and Articles 9, 10 and 11 of the Convention which contain the criterion of the "*requirements of a democratic social order*". Therefore, the criterion of democratic society should be interpreted on the basis of pluralism, leniency, broadmindedness and tolerance (*Abdullah Öcalan*, § 93).

62. As a matter of fact, as per the established case-law of the Constitutional Court, democracies are regimes in which fundamental rights and freedoms are granted and guaranteed in the broadest manner. The restrictions which bear prejudice against the essence of fundamental rights and freedoms and render them completely non-exercisable cannot be considered to be in harmony with the requirements of a democratic social order. For this reason, fundamental rights and freedoms may be restricted exceptionally and only without prejudice to their essence to the extent that it is compulsory for the continuation of democratic social order and only by law. In other words, if the restriction which is imposed halts or renders extremely difficult the exercise of a right and freedom by bearing prejudice against its essence, renders it ineffective or if the balance between the means and objective of the restriction is disrupted in violation of the principle of proportionality, it will be against the democratic socital order (*Abdullah Öcalan*, § 94).

63. Another guarantee which will come into play in all kinds of restrictions to be imposed upon rights and freedoms is the "*principle of proportionality*" expressed under Article 13 of the Constitution. This principle is a guarantee which needs to be taken into consideration with priority in applications regarding the restriction of fundamental rights and freedoms. Although the requirements of a democratic societal order and the principle of proportionality are regulated as two separate criteria under Article 13 of the Constitution, there is an inseparable bond between these two criteria. As a matter of fact, the Constitutional Court drew attention to this bond between necessity and proportionality in its previous judgments and ruled that there needed to be a reasonable bond and balance between the objective and the means by stating that "*[Any restriction aimed at fundamental rights and*

freedoms] needs to be examined to see whether or not it is of the necessary quality for the democratic societal order, in other words, whether or not it fulfills the objective of public interest which is sought while serving as a proportionate restriction allowing for the least amount of intervention in fundamental rights..." (*Abdullah Öcalan*, § 95).

64. According to the judgments of the Constitutional Court, proportionality reflects the relation between the aims and means of restricting fundamental rights and freedoms. The review for proportionality is the supervision of the means selected in order to achieve this aim based on the aim to be reached. For this reason, in interferences introduced in the field of the freedom of access to information and opinions, it should be evaluated whether the interference preferred in order to achieve the aim to be reached is sufficient, necessary and proportionate (for a judgment in the same vein, *Sebahat Tuncel*, App. No: 2012/1051, 20/2/2014, § 84).

65. In this context, the main axis for the evaluations to be carried out with regard to the incident which is the subject matter of the application will be whether the courts of instance which caused the interference could convincingly put forward that the justifications they relied on in their judgments are in line with "*necessity in a democratic society*" and "*the principle of proportionality*" with a view to restricting the freedom of the expression and dissemination of thought and, within this context, the freedom of the press (*Abdullah Öcalan*, §98). Therefore, if it is accepted that the balance between the interference made with the freedom of access to information and opinions by way of not giving some parts of the newspaper in question to the applicant and the legitimate aim to be achieved through this interference is proportionate, it can be concluded that the justifications in relation to the non-delivery of some parts of the newspaper were convincing and, in other words, relevant and sufficient. However, in the evaluation to be made, it needs to be considered that the margin of appreciation of the state should be interpreted in a broader manner in terms of the prevention of crime and ensuring the security of the institution and prison discipline within the framework of the inevitable conditions of the prison.

66. It is clear that the reference to be taken by the administration as regards the periodicals or non-periodicals to be given to convicts and detainees in the prison is the prevention of crime and ensuring security and discipline at the prison within the framework of jeopardizing the security of the institution and the publications that cover any obscene news, articles, photos and comments as stipulated in Article 62 of the Law No. 5275. In this context, it should be accepted that the margin of appreciation of the prison administration is broad and the restrictions to be imposed on the freedom of access to information and opinions for these legitimate purposes need to be interpreted in a broader manner. The main purpose of an absolute restriction prescribed by law in terms of banned publications is similarly to prevent crimes and to ensure security and discipline in the prison. However, with regard to the evaluation to be made even in this case, the interference in the freedom of expression should be evaluated as a whole by considering that it resulted from the junction of the decisions of the Education Board and the Office of the Judge of Execution.

67. It is important to inspect the periodicals and non-periodicals to be given to convicts and detainees in terms of ensuring order, security and discipline in prisons. This matter is much more important especially in the F type high security penitentiary institutions in which the applicant was also kept and convict and detainees are placed depending on the nature of the crime they commit. In the incident which is the subject matter of the application, the Education Board can evaluate whether the introduction through a newspaper of some parts of a book authored by the leader of the PKK terrorist organization would pose a risk in terms

of security and discipline by considering that the applicant was convicted because of the crimes that he committed as a member of the terrorist organization. As a matter of fact, it can also identify the measures to be taken and the restrictions to be imposed as per Article 62 of the Law No. 5275 within the scope of this risk. However, even in this case, justifications of the interference to be made with the right should be put forth in a relevant and sufficient manner.

68. On the other hand, the only justification put forth in the decisions of the Education Board of the 2nd F Type High Security Closed Penitentiary Institution of Ankara and the decisions of the Office of the Judge of Execution of Sincan while ruling on the removal of the pages of the Newspaper that included some parts of the banned book is the decision of confiscation of the 3rd Judge's Office of Diyarbakır as regards the removed parts. The Office of the Judge of Execution did not subject the pages that were removed from the newspaper to any evaluation in terms of the prevention of crimes and ensuring security and discipline in the prison apart from the decision of prohibition and deemed it sufficient that the removed parts were made up of the pages of a book ruled to be confiscated for not giving them to the applicant.

69. In the present case, while dismissing the objection against the decision of the removal of some pages of the relevant newspaper, the Office of the Judge of Execution of Sincan showed as justification the decision of prohibition of the 3rd Judge's Office of Diyarbakır. In the decision of the 3rd Judge's Office of Diyarbakır of 4/10/2012 which is an element of the interference accepted as a whole, a decision of confiscation and seizure was delivered on the ground that the propaganda of the KCK/PKK terrorist organization was made, that the terrorist organization and the actions made by the members of the terrorist organization were praised and that the required future direction of the KCK/PKK terrorist organization was specified in some pages of the book authored by Abdullah Öcalan (§§ 13-14).

70. The book which is the subject matter of the mentioned decision of confiscation of the 3rd Judge's Office of Diyarbakır has been the subject of a different decision of confiscation and seizure through the decision of 21/9/2012 of the 2nd Judge's Office of Istanbul and, in this context, to another individual application before the Constitutional Court (§ 19). The Plenary of the Constitutional Court made an evaluation of the book in its judgment of 25/6/2014 and ruled that the decision of confiscation of the 2nd Judge's Office of Istanbul violated the freedom of expression prescribed in Article 26 of the Constitution. Paragraph 108 of the judgment in relation to this is as follows:

> "*108. When the book was examined as a whole, it was not considered that it praised violence; that it incited and encouraged individuals to adopt terrorist methods, in other words, to resort to violence, hatred, seeking revenge or to armed resistance "in the upcoming period" according to the applicant's conceptualization. On the contrary, the applicant analyzes the Kurdish issue from his own perspective in an environment where armed clashes with the security forces have been absent for some time; and he demands an end to the armed conflict and a consensus regarding the democratic solution. It should be pointed out that the authorities exercising public power have a very narrow margin of appreciation in the restriction of political discourses regarding public interest such as the matters explained by the applicant in the book or discussions concerning social problems. Thoughts which are not pleasant for the public authorities or a part of the society cannot be restricted unless they encourage violence, justify terrorist acts and support the formation of the feeling of hatred (see § 105). Therefore, it was concluded that the interference in the applicant's freedom of the*

expression and dissemination of thought and, within this scope, the freedom of the press for the reasons which served as the justification for the confiscation of the book which is the subject of the application was not necessary and proportionate in a democratic society."

71. Thereupon, the Office of the 2nd Criminal Judge of Peace of Diyarbakır which was competent to examine the decision of prohibition of 4/10/2012 of the 3rd Judge's Office of Diyarbakır, through its judgment of 2/9/2014, revoked the decision of confiscation and seizure of the book by showing as justification the violation judgment of the Constitutional Court. Therefore, even if the violation judgment of the Constitutional Court was delivered because of another decision of confiscation, both the Constitutional Court examined the relevant book and the decision of confiscation was revoked and the Office of the 2nd Magistrate participated in the violation judgment delivered by the Constitutional Court for the same book in another individual application.

72. In this context, it was considered through the judgment of the Constitutional Court of 25/6/2014 that the interference with regard to the confiscation and seizure of the book named "*The Kurdistan Revolution Manifesto, Kurdish Problem and Democratic Nation Solution (Defense of Kurds in the Grip of Cultural Genocide)*" authored by Abdullah Öcalan through the decision of the 2nd Judge's Office of Istanbul was not necessary and proportionate in a democratic society and it was ruled that Article 26 of the Constitution was violated. Upon the mentioned judgment of violation of the Constitutional Court, it was understood by the Office of the 2nd Magistrate of Diyarbakır that the interference with regard to the book named "*Kurdish Problem and Democratic Nation Solution (Defense of Kurds in the Grip of Cultural Genocide-the Fifth Book*)" whose content was the same was not rightful and the decision of prohibition was revoked. By considering that a judgment of violation was previously delivered by the Constitutional Court with regards to the relevant book and the unjust interference was accepted by the 2nd Magistrate of Diyarbakır, it was put forth that the interference made as a whole through the decisions of the Education Board and the Office of the Judge of Execution of Sincan and the 3rd Judge's Office of Diyarbakır was not rightful in the incident which is the subject matter of the application.

73. On the other hand, in the decisions of the Education Board and the Office of the Judge of Execution, no evaluation was made what kind of a risk the parts of the banned book published in the Newspaper posed in terms of the security, discipline and order of the prison with regard to the convict apart from the decision of confiscation.

74. In the evaluation of the interference made in the freedom of expression through the decision of the Education Board and the Office of the Judge of Execution of Sincan on the prevention of some pages of the Newspaper from being given to the applicant on the ground that they belonged to a banned book together with the decision of confiscation of the 3rd Judge's Office of Diyarbakır, by considering that the Constitutional Court ruled by its judgment of 25/6/2014 that the interference made in the mentioned book was not necessary and proportionate in a democratic society, it was concluded that the interference made in the applicant's freedom of expression by removing some parts of the Newspaper and not giving them to him was not necessary and proportionate in a democratic society.

75. Due to the reasons explained, it is necessary to conclude that the applicant's freedom of access to information and opinions within the framework of the freedom of expression as prescribed in Article 26 of the Constitution was violated as some pages of the Newspaper were removed and not given to him based on the decision of dismissal of the

Office of the Judge of Execution of Sincan. Osman Alifeyyaz PAKSÜT has dissented from thisopinion.

3. Article 50 of the Law No. 6216

76. While the applicant did not file any request for damages in many of the joined applications, he filed a request for damages in some applications, for pecuniary damages in some of them and for pecuniary and non-pecuniary damages in some of them. However, the applicant did not specify any amount with regard to his requests.. On the other hand, the matter of counsel's fee was not evaluated by considering that the applicant did not submit any relevant power of attorney and there was no action made by his counsel in the application files although he stated in the application form that he had a counsel.

77. 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 holding a 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, a compensation may be adjudged in favor of the applicant or the remedy of filing a case before general courts can 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 that the Constitutional Court has explained in its judgment of violation and the consequences thereof.*"

78. The applicant did not submit to the Constitutional Court any document in relation to the material damages he claimed to have incurred. In order for the Constitutional Court to be able to rule on pecuniary damages, a causality relation between the material damages which the applicants claim to have incurred and the request for damages needs to be established. Therefore, the request for pecuniary damages by the applicant who did not submit any document to the Constitutional Court be dismissed.

79. In return for the non-pecuniary damages of the applicant, which cannot be redressed only with the determination of violation because of the restriction of his freedom of access to information and opinions, it should be ruled that TRY 1,000.00 be paid to the applicant.

80. In accordance with Article 50(3) of the Law No. 6216, a copy of the judgment should be sent to the applicant and the Ministry of Justice for information.

V. JUDGMENT

Due to the reasons explained, it was held on 8/4/2015

A. UNANIMOUSLY that the applicant's allegation as to the effect that his freedom of access to information and opinions guaranteed in Article 26 of the Constitution was violated is **ADMISSIBLE,**

B. BY MAJORITY OF VOTES and with the dissenting opinion of Osman Alifeyyaz PAKSÜT that the freedom of access to information and opinions guaranteed in Article 26 of the Constitution was **VIOLATED,**

C. UNANIMOUSLY that non-pecuniary **DAMAGES** of exact amount of TRY 1,000.00 be **PAID** to the applicant and that the applicant's other claims for damages be **REJECTED,**

D. UNANIMOUSLY that the trial expenses be charged on the Treasury**,**

E. UNANIMOUSLY 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 duration ends, to the date of payment**,**

F. UNANIMOUSLY that a copy of the judgment be sent to the applicant and the Ministry of Justice in accordance with Article 50(3) of the Law No. 6216.

DISSENTING OPINION

1. The application is related to the allegation of the violation of the freedom of expression resulting from not giving to the applicant present in the penal institution a total of eighty five issues of the newspaper named "*Azadiya Welat*" published between March 2013 and January 2014 as they contained some parts from the book of Abdullah Öcalan named"*The Kurdistan Revolution Manifesto, Kurdish Problem and Democratic Nation Solution (Defense of Kurds in the Grip of Cultural Genocide*".

2. The reasons why I did not agree with the judgment of the Distinguished Plenary Assembly as regards Abdullah Öcalan file with the application number of 2013/409 were explained in my letter of dissenting opinion and my opinion as to the effect that the mentioned book cannot be considered to be within the scope of the freedom of expression as it encourages the preparation of a regional and very bloody war has not changed.

3. The decisions of the Education Board and the Office of the Judge of Execution of Sincan are relevant to the period during which the decision of the confiscation of the book of the 3rd Judge's Office of Diyarbakır was valid. For this reason, while the aforementioned authorities do not need to put forth justifications in addition to the decision of the 3rd Judge's Office of Diyarbakır while intervening in the newspaper that contains parts of the book, they do not have any duty and competence such as evaluating the risks of the book again and rendering a different decision on this matter, either.

4. Given the fact that the applicant present in the penitentiary institution will take action in line with the same objective in the event that the scenario specified in the book takes place, it cannot be stated that the interference made was disproportionate in the face of the dimensions of the potential danger to be caused by the reading of the newspaper that contains it in a free manner in the prison.

Due to the aforementioned reasons, I do not agree with the majority of the Plenary Assembly.

Judge
Osman Alifeyyaz PAKSÜT