REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

GENERAL ASSEMBLY

DECISION

Application No: 2013/409

Date of Judgment: 25/6/2014

GENERAL ASSEMBLY

JUDGMENT

President : Haşim KILIÇ
Deputy President : Serruh KALELİ
Deputy President : Alparslan ALTAN
Members : Serdar ÖZGÜLDÜR
Osman Alifeyyaz PAKSÜT
Zehra Ayla PERKTAŞ
Recep KÖMÜRCÜ
Burhan ÜSTÜN
Engin YILDIRIM
Nuri NECİPOĞLU
Hicabi DURSUN
CelalMümtaz AKINCI
Erdal TERCAN
Muammer TOPAL
Zühtü ARSLAN

M. Emin KUZ

Hasan Tahsin GÖKCAN

Rapporteur : Yunus HEPER

Applicant : Abdullah ÖCALAN

Counsel : Att. Cengiz YÜREKLİ

Att. Mazlum DİNÇ

Att. Rezan SARICA

I. SUBJECT OF APPLICATON

1. The applicant alleged that articles 25, 26, 90 and 141 of the Constitution had been violated as a result of the court decision to seize his book which was being printed and the dismissal of the objection against this decision.

II. APPLICATION PROCESS

2. The application was lodged on 7/1/2013 via the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10. The deficiencies detected as a result of the preliminary administrative examination of the petitions and their annexes were made to be completed and it was determined that no deficiency preventing their submission to the Commission existed.

3. It was decided on 22/4/2013 by the Third Commission of the Second Section that the admissibility examination be carried out by the Section, that the file be sent to the Section as per paragraph (3) of article 33 of the Internal Regulation of the Constitutional Court.

4. Pursuant to the interim decision of the Second Section dated 20/5/2013, it was decided as per subparagraphs (b) of paragraph (1) of article 28 of the Internal Regulation of the Constitutional Court that the examination on admissibility and merits be conducted jointly and that a copy be sent to the Ministry of Justice for its opinion.

5. The opinion document by the Ministry of Justice dated 18/7/2013 was notified to the applicant on 29/7/2013, the applicant submitted his opinion to the Constitutional Court on 12/8/2013 within the due period.

III. FACTS AND CASES

A. Facts

6. The relevant facts in the application petition and the opinion by the Ministry are summarized as follows:

7. An investigation was launched by the Chief Public Prosecutor's Office of Istanbul (Its Section Tasked with LFAT Article 10) regarding the publishing coordinator, editor and the individual responsible for the preparation for the publishing of the book entitled *"the Kurdistan Revolution Manifesto, Kurdish Problem and Democratic Nation Solution (Defense of Kurds in the Grip of Cultural Genocide)"* (hereafter referred to as "the book") belonging to the applicant with the claim that the declaration by and the propaganda of the PKK terrorist organization were made in the book.

8. Within the framework of the mentioned investigation, as per the written search warrant of the Chief Public Prosecutor's Office of Bakırköy dated 17/09/2012, 3000 forms pertaining to the book, 7 bound books, 1 unbound book and 20 book covers were confiscated during the search conducted at the workplace belonging to SM Printing House. The action of seizure was approved by the decision of the 6th Criminal Court of Peace of Bakırköy dated 18/09/2012 and numbered Opn. 2012/1737.

9. In the statement made by the executives of SM Printing House, it was declared that 1,500,000 forms pertaining to the book in question had been sent by the company named Gün Printing Press to the workplace, that these forms had been sent to the mentioned printing house after having been transformed into books, that the forms and books confiscated at the workplace are the remaining products after the binding processes and that they were being kept at the workplace pending delivery to the customer.

10. Upon this, it was decided with the decision of the 3rd Criminal Court of Peace of Küçükçekmece dated 17/09/2012 and numbered 2012/930 that a search be conducted at the workplace belonging to Gün Printing Press and that the evidence of the crime be confiscated. In the confiscation conducted here, 504 copies of the book in question were confiscated. It was stated by the executives of Gün Printing Press that 40,000 copies of the book had been printed and that all of them had been delivered to the executives of the publishing house.

11. Officials of the General Directorate of Security went to the address of Ararat Publishing House, which had published the book that is the subject of the application, located in Diyarbakır but it was determined that the mentioned publishing house was not found at this address.

12. Within the framework of the investigation, it was requested from the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10 that the book in question be confiscated and seized with the correspondence of the Chief Public Prosecutor's Office of Istanbul dated 19/09/2012 and numbered Inv. 2012/1937 by stating that the propaganda of the PKK terrorist organization was made in the entirety of the August 2012 edition of the book.

13. With its decision dated 21/9/2012 and numbered 2012/156, the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10 decided on the acceptance of the request and the confiscation of the book belonging to the applicant as per paragraph 2 of article 25 of the Press Law dated 9/6/2004 and numbered 5187.

14. The court based the justification of the seizure decision on the fact that the author of the book in question is Abdullah Öcalan who is convicted of the crime of founding and leading an armed terrorist organization, that a region encompassing territories of Irak, Iran and Turkey was separated and highlighted with writings on the cover of the book and that the propaganda of the PKK armed terrorist organization was made in pages 173, 178, 276, 278, 284, 304, 307, 312, 324, 327, 359, 391, 408, 412 and following pages.

15. The objection remedy was resorted against the mentioned seizure decision with the petition submitted by the counsels of the applicant to the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10 on 27/10/2012; it was stated that crimes committed via printed works would occur at the time of publication as per article 11 of the Law numbered 5178 but that all the books were seized by the relevant authorities without waiting for its distribution, it was requested that the seizure decision be lifted and that the seized works be returned.

16. The objection of the applicant was rejected *"with the legal remedy of objection being available"* with the decision of the Judge's Office No. 3 of Istanbul Tasked with LFAT Article 10 dated 9/10/2012 and numbered Miscellaneous Action 2012/173 due to the quality and nature of the crime, the presence of phenomena attesting to strong suspicion of crime, the existing situation of evidence and the lack of a change in the reasons for seizure. The mentioned decision was notified to the counsels of the applicant on 6/11/2012.

17. The counsels of the applicant objected this time on 8/11/2012 to the mentioned decision of the Judge's Office No. 3 of Istanbul Tasked with LFAT Article 10 and the objection was rejected with the decision of the Judge's Office No. 3 of Istanbul Tasked with LFAT Article 10 dated 16/11/2012 and numbered Miscellaneous Action 2012/271. The mentioned decision was notified to the counsels of the applicant on 7/11/2012 and the remedies were thus exhausted.

18. As per the seizure decision of the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10, a search was conducted at an address serving as a textiles workplace. In the search conducted, 635 copies of the book in question were seized. The manager of the workplace declared in his statement that he was not aware of the books in question and that he did not know how they had ended up there. 632 of the 635 seized books were destroyed.

19. With the rejection of venue decision of the Chief Public Prosecutor's Office of Istanbul (its Section Tasked with LFAT Article 10) dated 21/01/2013 and numbered Inv. 2012/1937, Decision 2013/8, the file was sent to the Chief Public Prosecutor's Office of Diyarbakır due to the fact that SM Printing House, where the book had been printed, had printed the book in the name of Ararat Publishing House.

20. The Chief Public Prosecutor's Office of Diyarbakır delivered a counter decision of rejection of venue on 18/2/2013 by referring to the necessity of conducting the investigation concerning the book in question in Istanbul and sent the file to the Assize Court of Malatya for the resolution of the dispute of venue.

21. The Assize Court of Malatya decided that the investigation concerning the book in question should be conducted by the Chief Public Prosecutor's Office of Diyarbakır through its decision dated 27/2/2013.

22. As per the decision of the Chief Public Prosecutor's Office of Diyarbakır dated 19/03/2013 and numbered Inv. 2013/728 and article 26 of the Law numbered 5187, it was decided that there was no ground for prosecution regarding the suspects who were the publishing coordinator, editor and the individual responsible for preparation for publishing of the book due to the fact that although a period of 6 months is stipulated for filing a case in the crimes committed through the press, no case was filed within this period.

23. The book in question was confiscated as per paragraph two of article 25 of the Press Law numbered 5187 since it was considered that the expressions contained within it are related to the crimes stipulated in paragraphs two and five of article 7 of the Law on Fight Against Terrorism dated 12/4/1991 and 3713.

24. On the other hand, no condition as regards to the period for the investigations to be carried out as per the Law numbered 3713 was envisaged. However, neither the applicant nor the Ministry of Justice reported that an investigation or a criminal case had been initiated against the applicant for having written the book.

B. The Book Which is the Subject of the Application

25. In August 2012, Ararat Publishing House published a book written by the applicant entitled *"the Kurdistan Revolution Manifesto, Kurdish Problem and Democratic Nation Solution (Defense of Kurds in the Grip of Cultural Genocide)"*. The book is composed of seven chapters except for the prologue, conclusion, epilogue and annexes and a total of 606 pages, it does not contain a list of references or bibliography.

26. The book represents the final volume of the five-volume series which the applicant had prepared for the *"The Manifesto of Democratic Civilization "* which he authored after his placement in prison. According to the information contained within the book, the five-volume series was prepared for the case at the European Court of Human Rights (ECHR) which was filed after the retrial of the applicant had been rejected. According to the headings listed under the contents section, the author dwelled upon the following subjects: The conceptual and institutional framework; the Kurdish reality; the Kurdish problem and the Kurdish movement in the age of capitalism; the PKK movement and the revolutionary people's war; crisis in scientific socialism, the great conspiracy and the transformation of PKK; PKK, KCK and the democratic nation; the Middle-Eastern crisis and the solution of democratic modernity.

27. Although it was stated in the seizure decision of the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10 that the propaganda of the PKK terrorist organization was made in pages 173, 178, 276, 278, 284, 304, 307, 312, 324, 327, 359, 391, 408, 412 and following pages, the relevant paragraphs on these pages were not indicated. The following paragraphs in relation to the PKK terrorist organization are found on the mentioned pages of the book:

> *" In this process, not only was the dissolution of the Kurdish reality as an entity halted but significant ground was also covered in the path towards freedom especially through a resistance process which was kicked off with the Move of August 15th and went through very rough terrain under the leadership of the PKK from the very beginning. In the special war conducted with the substantial support (in exchange for submission to the global financial system in economic terms, providing full support* for *their regional policies, g*ranting *approval on the military front to the use of Turkey division of gladio, NATO's secret army) of foreign hegemonic forces (notably the USA, the UK and Germany), except for a bunch of traitors and collaborators, the Kurds were left alone and isolated in their war of existence and freedom... "* (page 173)
>
> *"…an attempt was made to terminate Kurdishness not only as a freedom movement, but also in its actual existence (even as an ontological entity as seen with the language ban). Despite its numerous shortcomings and mistakes, the Freedom movement developed under the leadership of the PKK against this unprecedented movement of slaughter did not only ascertain the Kurdish cultural existence but it also elevated it to an important phase as a freed entity. Developments in this direction also cast their influence on other parts of Kurdistan; in Southern Kurdistan it led to a political formation with a dominant nation-statist aspect, whereas it ended in the great awakening of the people, their participation in the Freedom movement and improvements they made in their democratic autonomies in Eastern and Southwestern Kurdistan."* (page 178)
>
> *"...During the times when we were a group, we could only call ourselves the revolutionaries of Kurdistan. We only dared* to *give ourselves a real name five years after having come into existence as a group. When the journey which started on the banks of Ankara's Çubuk Dam during the Newroz of 1973 and continued in majnunesque fashion ended up in the name of PKK in Fis village of Diyarbakır, we were to consider ourselves to have saved our honor. Could there be a greater objective than that? After all, the modern organization of the modern class had been established."* (page 276)

" I was meticulous, we were meticulous in remaining loyal to the scientific socialism line of Marxism when we embarked upon the construction of the PKK. If it had not been for real socialism, they may never have been a group like *the PKK. However, this reality does not prove that the PKK was* totally *a real socialist grouping in its infancy. Even though it's heavily influenced by it, not all of its reality can be explained with real socialism... If we are now in the process of taking a look back and reinterpreting the PKK , we owe it to the philosophical transformation which does not absolutize the separation between the subject and the object, and also pay*s *attention not to absolutize itself either... Reinterpreting the PKK within this framework, determining which global conditions and elements of material culture it relied on in the early 1970s, which main forms of consciousness, organization and action as well as which spiritual culture it took as the basis will serve to correctly identify the PKK movement as much as it will further elucidate its role in our day."* (page 278)

" The main problem with the PKK's formation is the fact that it has remained ambiguous when it comes to the nation-statist ideology. Especially Stalin's theses about the national problem were influential in this matter. At its root, Stalin considers the national problem as a problem of founding a state. This approach of his has influenced the whole socialist system and liberation movements. The reduction of this right also acknowledged by Lenin to founding a state as the right of nations to self determination, has been the root cause of all communist and socialist parties falling into ideological ambiguity. The model embraced by the PKK in solving the Kurdish problem, which was its main claim in its creation*, was the model of founding a state brought forward by Stalin and also approved by Lenin…"* (page 284)

" The fact that the conception of the PKK took place in Ankara is a typical reflection of the colonial policy. There have been numerous similar examples in the context of the relationship between the colony and the metropolis throughout the world. I tried to indicate that the inception out of Ankara was painstaking…" (page 304)

"…Indeed, during the inception period of the PKK, means of self defense were used without hesitation. The PKK had to organize itself as a sort of militia power. Otherwise, it would not have survived even *a day."* (page 307)

"…Counter-revolutionary elements and groups which had been dissolved in Kurdistan, the collaborating class tendencies and personalities that were behind them were being resurrected in the ranks of the PKK and seeking their revenge from free Kurdishness…" (page 312)

" One of the most important consequences of the revolutionary people's war led by the PKK was the fact that it led to the reality of the democratic nation. In fact, the reality of democratic nation was not clearly and explicitly determined and programmed in the ideological organization of the PKK. The concept of a nation in mastery of its ideology is the real socialist version of the nation-state…" (page 324)

" The struggle undertaken by the PKK during its ideological group stage against the dominant and oppressed nation-statisms, continues in the form of a struggle for the democratic nation against both nation-statisms, based on the experience of the revolutionary people's war …" (page 327)

" [In 1992] The old diseases were gaining hold and continuing in the ranks of the revolutionary struggle led by the PKK. Additional elements had been added to these diseases…." (page 359)

"The exposure of the crisis in scientific socialism through the inner dissolution in the Soviet Union and the Great Gladio Conspiracy of 1998 forced the PKK into a *fundamental transformation. The ambiguity during the ideological group phase, the fact that the state*

problem had not been resolved, the failure to overcome the internal and external conspiracies that had been revealed in the experience of the revolutionary people's war led the PKK into a lengthy vicious circle, repeating itself, inching closer and closer towards a bottleneck and dissolution…" (page 391)

"*Whether they stem from the old civilization and the capitalist modernity or from the life with a free identity, what has been experienced are problems which* are *different and more comprehensive tha*n *the old problems. Therefore, the methods and tools for their solution will also be different. Neither could it be like the Kurd or Kurdistan of yesteryear, no*r *could a struggle like the 'nationalitarians', the PKK, the HRK and the ERNK of the past could be undertaken. The enemy was no longer the old enemy either. Although distrusted, although shy, it had undergone a transformation which could accept the Kurd and Kurdistan and did not reject the free Kurdish identity all together. It is clear that all these historical and societal transformations ask for a new definition of Kurdishness and of the PKK, that they highlight the need for new system concepts and institutions. We will try to develop a new definition of the PKK and of Kurdishness as well as new system concepts and institutions on this basis ."* (page 407-408)

28. On the pages 173, 178, 276, 278, 284, 304, 307, 312, 324, 327, 359, 391, 408 taken as the basis by the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10 for its seizure decision, the organizational and ideological transformations experienced by the PKK terrorist organization since its foundation are generally dealt with from the author's own perspective.

29. On the other hand, it is advocated in the introduction part of the book that getting stuck with nationalistic or statist solutions to, in the words of the author, the *"Kurdish problem"* deepens the deadlock, that this kind of an imposition cannot go beyond repeating the deadlock in the Palestine-Israel problem, that the Middle East will remain as the field of interest of hegemonic powers for another century unless the statist mentality is left behind and democratic tools of politics are put in place in the upcoming period; that the key role in the solution of the problems in the Middle East lie in *"the experience of democratic solution in Kurdistan"*. According to the author, "*…the common historical fate experienced by the Turks, the Arabs and the Persians, which are the main neighboring nations of the region, as well as the more inner elements of Armenians, Assyrians and the Turkmen makes it possible for the democratic solution in Kurdistan to be disseminated across all of them via a domino effect.*" (Page 24)

30. In the first chapter of the book, the concepts of culture, civilization, hegemony, power, class, nation, colonialism, assimilation and genocide, state under the circumstances of capitalist modernity, society, democracy and socialism are tried to be interpreted and defined by the author.

31. In the second chapter of the book, the historical formation of *"the Kurdish reality"* is attempted to be explained from the author's perspective. In this chapter, the historical process from the emergence of the first man to our current day in the region called *"Kurdistan"* is analyzed. Within this framework, the subjects of *"the Kurdish existence and the Islamic tradition"*, *"the Islamic culture and the Arab-Kurdish-Turkish relations"*, *"the Armenian-Assyrian-Jewish interaction within the Kurdish reality"* are examined; the theses that the Middle Eastern culture has been subdued under the hegemony of capitalist modernization, that the power and the society have been separated from each other in the Middle East are tackled. It is also alleged in this chapter that *"Kurdistan"* has been the homeland of the Kurds since *"the proto-Kurds"*, that the Republican ideology, defined by the author as *"fascism of the white Turks"*, has tried to dissolve *"the Kurdish reality"*. In the

remaining part of the chapter, explanations regarding the transformations experienced by the Kurds in a part of Syria defined as *"Southern Kurdistan"* and a part of Iran defined as *"Eastern Kurdistan"* as well as the social, economic and cultural aspect of "the Kurdish identity" are covered.

32. In the third chapter of the book, the focus is put on the evolutions undergone by *"the Kurdish problem"* in history up to our day and *"the Kurdish movements"* seen in history from the author's perspective, in the fourth chapter the focus is on *"the PKK movement"*. In the fourth chapter, the applicant qualifies the actions carried out by the PKK terrorist organization until today as *"a revolutionary people's war"* and the ideology embraced by the PKK since the 1970s, which is the period of its foundation, is explained with a leftist language. The ideological transformations experienced by the PKK, its relations with other leftist organizations in Turkey, the military coup d'etat of 12th September and the developments in the following period are explained. In this chapter, the actions of the PKK are qualified as *"a revolutionary people's war"*; it is alleged that the forces of Gladio, the NATO and the USA are behind the security operations executed against the PKK. In this chapter, the clashes between the PKK and the security forces in the period after 12th September are depicted as *"a story of heroism"*.

33. The fifth chapter of the book begins with the subheading of *"the crisis in scientific socialism"*. In this chapter, the fact that Abdullah Öcalan was forced out of Syria, captured and brought to Turkey is qualified as an international conspiracy; it is advocated that those who organized the conspiracy aim the continuation of the deadlock between the Kurds and the Turks. It is alleged that the *"solution"* opportunities which emerged in the aftermath of Abdullah Öcalan's imprisonment were eliminated by the same forces.

34. In the sixth chapter of the book, the year 2003 and onwards is qualified as *"the new period"* and the ideological transformation seen within the PKK in this period is explained. In this chapter, it is alleged that the peaceful resolution of the Kurdish problem could be achieved with *"the right to become a democratic nation"*, that however, due to *"the genocidal war conducted by the nation states which share Kurdistan"* they are not favorable to a democratic solution, it is advocated that, in the light of the experience of the past thirty years, the most successful solution without feeling the need for Kurdish nation-statism and turning the dominant nation states into federation-type structures is the right to become a democratic nation.

35. In the seventh chapter of the book, the headings of *"the construction of the Republic of Turkey"*, *"Arab nation states and the construction of Israel"*, *"Iranian shia nation statism and its role in the Middle East"*, *"the dissolution of nation states in Iraq, Afghanistan and Pakistan and the structural impasse of capitalist modernity"*, *"the nation state balance in the Middle East and the Kurdish problem"*, *"modernity wars in the Middle East and their potential consequences"*, *"the fate of capitalist modernity in the Middle East"*, *"the democratic modernity solution in the Middle Eastern crisis"* and *"the mentality revolution in the Middle East"* are included.

36. In the conclusion part of the book, it is alleged that the United Nations, the European Union or other regional unions are unable to find a solution to any global or regional problem; that a union of democratic nations, and not the unions based on the nation state, will be able to find a solution for the problems in the new period.

C. Relevant Law

37. Article 25 of the Law numbered 5187 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, may seize a maximum of three copies of all kinds of printed works as evidentiary material for the investigation.

On the condition that the investigation has been initiated, the entirety of printed works may be seized with the decision of the judge as regards the crimes stipulated in the Law on the *Crimes Committed Against Atatürk dated 25.7.1951 and numbered 5816, the revolution laws contained within article 174 of the Constitution,* paragraph *two of article 146,* paragraphs *one and four of article 153, article 155,* paragraphs *one and two of article 311,* paragraphs *two and four of article 312, article 312/a of the Turkish Criminal Code and* paragraphs *two and five of article 7 of the Law on the Fight Against Terrorism dated 12.4.1991 and numbered 3713.*

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 may be prohibited with a decision of the criminal judge of peace 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 is sufficient. This decision is submitted to the approval of the judge within twenty-four hours* at the latest. *In the even*t *that it is not approved by the judge within forty-eight hours, the decision of the Chief Public Prosecutor's Office remains 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.*

38. Paragraph (1) of article 131 of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271 with the side heading of *"Return of confiscated items"*is as follows:

"(1) In the event that there is no need for safeguarding of the seized item in terms of the *investigation and prosecution or it is understood that it cannot be subjected to* the *confiscation, ex officio return or return of the seized item that belongs to the suspect, accused or third parties upon request shall be decided by the Public prosecutor, judge or court. Decisions on overruling the motion may be opposed."*

39. Paragraph (1) of article 132 of the Law numbered 5271 with the side heading of *"Preservation or disposal of confiscated items"* is as follows:

"(1) In the the presence of the danger of incurring damage or significant loss in the value of the seized item, it may be disposed before finalization of the verdict.

(2) The decision of disposal shall be issued *by the judge at the investigation stage, by the court at the prosecution stage.*

(3) Before the decision is issued, *firstly the suspect, accused or other concerned people who own the property shall be heard; the decision of disposal shall be notified to them.*

(4) The necessary measures for preservation of the seized property's value and for it not to incur damages shall be taken.

(5) The seized property may be delivered to the suspect, accused or another person to be preserved on condition of taking the measures pertaining to the maintenance and supervision thereof and of immediately returning it when requested by the Chief Public Prosecutor's Office *at the investigation stage, by the court at the prosecution stage. Said release may be subjected to the condition of showing a guarantee.*

(6) The seized property may, in the event that it is no longer needed to be kept as evidence, be delivered to the concerned in return for the *immediate payment of its current value. In this case, the paid current value shall constitute the subject of the decision of confiscation."*

40. Subparagraph (j) of paragraph (1) of article 141 of the Law numbered 5271 with the side heading of *"Compensation request"* is as follows:

"*Persons whose property or other assets have been seized although the conditions thereof are not present or for whose property or other assets the measures necessary for protection have not been taken or whose property or other assets have been used out of purpose or have not been returned on time,*

…

May claim all kinds of material and spiritual damages from the State."

IV. EXAMINATION AND JUSTIFICATION

41. The individual application of the applicant dated 7/1/2013 and numbered 2013/409 was examined during the session held by the court on 25/6/2014 and the following are ordered and adjudged:

A. Claims of the applicant

42. The applicant indicated that there had been an intervention in his freedom of thought and opinion due to the fact that his book which was in the process of being printed was seized, that he sent the book in question to the ECHR, that he exercised his constitutional right by publishing this book. The applicant stated that article 25 of the Law numbered 5187 which formed the basis for the seizure decision was in violation of article 10 of the European Convention on Human Rights (ECHR), that as per article 90 of the Constitution the provisions of the ECHR should supersede in this kind of a situation, that the decision of the judge's office regarding the seizure was devoid of justification and he alleged that articles 25, 26, 90 and 141 of the Constitution were violated.

B. Evaluation

1. In Terms of Admissibility

43. No assessment was made in the Ministry's opinion as to the admissibility of the individual application.

44. Paragraph (5) of article 47 of the Law on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 with the side heading of *"Individual application procedure"* is as follows:

"*The individual application should be made within thirty days starting from the exhaustion of legal remedies; from the date when the violation is known if no remedies are envisaged…"*

45. The decision of the judge's office which is the subject of the application was notified to the counsels of the applicant on 7/12/2012, the final day of the 30 day individual application period coincided with 6/1/2013 which was an official holiday. There is no special provision as regards the periods whose last day coincides with the official holidays in the Law numbered 6216.

46. However, paragraph (7) of article 49 of the Law numbered 6216 is as follows:

"*In the examination of individual applications, in circumstances where this Law and* the *Internal Regulation do not contain any provisions, the provisions of* the *relevant procedural laws which are suitable* for *the nature of the individual application* shall apply*."*

47. As per the mentioned provision of the Law, the matter needs to be resolved within the framework of the provisions contained within the relevant procedural laws.

48. Paragraph (1) of article 93 of the Code of Civil Procedure dated 12/1/2011 and numbered 6100 with the side heading of *"Effect of holidays"*is as follows:

"*… If the final day of the period coincides with a day of* the *official holiday, the period* shall expire *at the end of* the *working hours of the first working day following the holiday."*

49. Paragraph (4) of article 39 of the Law numbered 5271 with the side heading of *"Calculation of periods"* is as follows:

"*If the final day coincides with a holiday, it shall lapse on the following day of the holiday."*

50. Paragraph (2) of article 8 of the Code of Administrative Procedure dated 6/1/1982 and numbered 2577 with the side heading of *"General principles as regards periods"*is as follows:

"*…So much so that,* if *the last day of the period coincides with a holiday, then the period shall be extended until the end of the working day after the holiday."*

51. As demonstrated, the main procedural laws contain the rule that the periods whose last day coincides with an official holiday will be extended until the end of the first working day following the official holiday. There is no reason which requires this rule not to be applied with a view to the periods pertaining to the individual application. Within this framework, it must be accepted that the application period of the applicant whose last day coincided with an official holiday was extended until 7/1/2013 which was the first working day following the official holiday and that the application made as of this date was made within its due period.

52. It must be decided that the application, which is not clearly devoid of justification and where no other reason is deemed to exist to require a decision on its inadmissibility, is admissible

2. Examination on Merits

53. The applicant claimed that articles 25 and 26 of the Constitution which guarantee the freedom of thought and opinion and the freedom of expression and dissemination of thought had been violated due to the seizure of the book which is the subject of the application; moreover that the intervention which is the subject of the complaint had the objective of blocking the access of the Turkish public opinion to information and science due to the fact that the printing and reading by the society of the work that is the subject of the application and other works of the similar content are among the requirements of a democratic society.

54. In the opinion of the Ministry, it was stated that 40,000 copies of the book in question had been printed, that however 1139 of these copies had been seized, that on the other hand a decision was delivered to the effect that there were no grounds for prosecution

regarding the investigation file which contained the seizure decision which had served as the basis for the confiscation action.

55. In the opinion of the Ministry, it was stated that the freedom of expression formed one of the pillars of a democratic society in the context of article 10 of the ECHR; that the freedom of expression applies not only for information and thoughts which are considered to be in favor, harmless or trivial, but also for information and thoughts which are aggressive, shocking or disturbing for the state or a part of the society. Within this framework, it was stated that whether there had been an intervention regarding the freedom of expression should be considered on the basis of whether the intervention that had taken place was envisaged by the law, whether the intervention was based on the legitimate objectives and whether the intervention was necessary in a democratic society.

56. In the opinion of the Ministry, it was noted that article 25 of the Constitution guaranteed the freedom to have thoughts, that article 26 guaranteed the freedom to express thoughts, that in articles 28, 29 and 30 of the Constitution additional guarantees pertaining to the freedom of the press were provided, that when the limitation provisions contained within the Constitution are taken in conjunction with article 13 of the Constitution; the interventions to be made in the freedom of the press should occur within a narrow area.

57. Moreover, it was indicated in the opinion of the Ministry that the elements of crime contained within the Law Concerning Amendments Made in Various Laws Within the Context of Human Rights and Freedom of Expression dated 11 April 2013 and numbered 6459 and paragraph two of article 6 of the Law on the Fight Against Terrorism dated 12/04/1991 and numbered 3713 had been redefined; that the printing and publishing of the declarations and statements which contain force, violence or threats or which praise these methods or which encourage the use of these methods are accepted as crimes and certain judgments of the ECtHR regarding article 10 of the ECHR were reminded.

58. The applicant reiterated his statements in his application petition against the Ministry's opinion on the merits of the application, and also alleged that the Ministry's defense to the effect that only 1139 copies of the book in question had been seized did not rely on precise information, that the distribution of the book became impossible after the decision of seizure and prohibition, that for this reason a total damage more substantial than the number of confiscated books occurred; that instead of preservation of the copies of the book their destruction without waiting for the judicial process had led to a violation of rights.

59. 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."*

60. Article 25 of the Constitution with the side heading of *"Freedom of thought and conviction"* is as follows:

"Everyone has the freedom of thought and conviction.

No one can be forced to reveal their thoughts and convictions for any reason and purpose; no one can be condemned and blamed for their thoughts and opinions."

61. 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 also covers the liberty of receiving or giving information or ideas without the intervention of official authorities. The provision of this paragraph does not prevent the subjection of dissemination by radio, television, cinema or other means to a system of permission.

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 on the use of means to disseminate information and thoughts are not deemed to be a restriction of expression and dissemination of thoughts on the condition that such provisions do not prevent the dissemination of information and thoughts.

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

62. Article 28 of the Constitution with the side heading of *"Freedom of the press"* is as follows:

"The press is free; it cannot be censored. The establishment of a printing house cannot be subjected to a condition of getting permission and depositing a financial guarantee.

(Abolished paragraph two: 3.10.2001-4709/10 art.)

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.

Anyone who writes any type of news or articles which threaten the internal or external security of the State, the indivisible integrity of the State with its territory and nation, which tend to encourage offending, riot or insurgence or which have any relation to secret information belonging to the State, or has them printed, or anyone who prints or gives to someone else such news or articles for the same purpose will be responsible as per the provisions of the law regarding these offences. As a precaution, distribution may be prevented by the decision of a judge; in the case when a delay is prejudicial, by the authority expressly authorized by law. The authority preventing distribution notifies this decision to a judge having jurisdiction within twenty four hours at the latest. If the judge having jurisdiction does not approve this decision within forty eight hours at the latest, the order to prevent distribution is deemed null and void.

In order to duly perform the duty of hearing cases, within the limits to be specified in law, reserving the decisions made by the judge, no prohibition can be placed on the broadcasting of events.

Periodicals and non-periodicals may be confiscated by the decision of a judge in cases when the investigation or prosecution of the offences indicated by law has started; and by the order of the authority expressly authorized by law in cases when a delay is prejudicial in terms of the protection of the indivisible integrity of the State with its territory and nation, of national security, public order, public morality and of the prevention of offending. The authority making the decision for confiscation notifies this decision to a judge having jurisdiction within twenty four hours at the latest; if the judge having jurisdiction does not approve this decision within forty eight hours at the latest, the decision for confiscation is deemed null and void.

General provisions apply to the capture and seizure of periodicals and non-periodicals due to the investigation or prosecution of an offence.

Periodicals published in Turkey may be temporarily suspended with a court verdict in cases when they are convicted due to content that is violating the indivisible integrity of the State with its territory and nation, the fundamental principles of the Republic, national security and public morality. All types of publications which explicitly have the characteristics of being the continuation of a suspended periodical is prohibited; these are confiscated through the decision of a judge."

63. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant, it appraises the legal definition of the facts and cases itself. The *"freedom of thought and conviction"* is regulated in Article 25, and the *"freedom of expression and dissemination of thought"* is regulated in Article 26 of the Constitution. The Constitution has made a distinction between having a thought and expressing a thought. Indeed, it is stated in the justification of Article 25 that, *"With this article, this freedom is separated from the 'Freedom of expression'. Even if in reality these two freedoms are interconnected; they are different from each other in terms of their qualities and consequences."*.

64. The Constitutional Court has also made a distinction between the freedom of thought and conviction and the freedom of expression and dissemination of thought. Although these two freedoms were regulated within the same article during the period of the Constitution of 1961, the Court has separated the right to have a thought from the right to express and disseminate a thought (CC, M.1963/16, D.1963/83, D.D. 8/4/1963).

65. Article 10 of the ECHR contains a right *"to hold opinions"* within the framework of the freedom of expression. The freedom to hold opinions is the ability of an individual to have an idea without any fear or concern, without the interference of public authorities and without any restrictions and to act in line with these ideas. The ECtHR also indicated that the freedom to hold an opinion, which does not fall under the scope of the expression and dissemination of opinions, was under the protection of article 10 of the ECHR. (See *Vogt v. Germany*, App. No: 17851/91, 26/9/1995, § 54, 61)

66. The matter in the concrete fact which is the subject of the application regards the confiscation and seizure of a book authored by the applicant, the decision of confiscation and seizure was delivered not because the applicant had thought and conviction but because he had expressed and disseminated his thoughts. Therefore, since the examination of the application under article 25 of the Constitution is not possible under the present circumstances, it must be examined under article 26 of the Constitution which regulates the *"Freedom of expression and dissemination of thought"*.

67. 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 the constitutional protection.

68. More detailed regulations regarding the freedom of the press are contained within the Constitution. The main regulation in the field of the freedom of the press is found under article 28 of the Constitution. In addition to article 28 of the Constitution, article 29 refers to the right to publish periodicals and non-periodicals and article 30 refers to the protection of press equipment. The right to use means of mass communication other than the press owned by public entities is regulated under article 31 of the Constitution. Moreover, the expressions contained within the provisions of the Constitution regulating the freedom of the press such as [those who...] *"write"*, *"print"*, *"give to someone else"*, *"preventing the distribution"*, *"confiscation"*, *"periodical publication"* and *"non-periodical publication"* may only be used for means of mass communication such as *"newspapers"*, *"books"* and *"journals"* which can be printed and propagated. Therefore, according to the Constitution, the press is one of the means of mass communication; however, it is separated from other means of mass communication and specially protected.

69. After it is indicated under article 28 of the Constitution that the press is free and that it cannot be censured, the confiscation of periodical and non-periodical publications is regulated under paragraph seven and the capture and seizure of periodical and non-periodical publications is regulated under paragraph eight. Therefore, the individual applications regarding the confiscation, capture and seizure of the printed publications must be examined under article 28 of the Constitution.

70. The freedom of expression and dissemination of thought and the freedom of the press, which are not absolute rights but rights which can be limited, are subject to the limitation regime of the fundamental rights and freedoms contained within the Constitution. Reasons for limitation are included under paragraph two of article 26 regarding the freedom of expression and dissemination of thought and paragraph four and the following paragraphs of article 28 regarding the freedom of the press. However, it is also clear that there must be a limit to the restrictions regarding these freedoms. 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 oversight concerning the limitations brought to the freedom of expression and dissemination of thought and the freedom of the press should be conducted within the framework of the criteria contained under article 13 of the Constitution and within the scope of articles 26 and 28 of the Constitution.

71. The application was lodged due to the confiscation and seizure of a book authored by the applicant. Moreover, although the applicant alleged that article 90 of the Constitution had been violated due to the fact that paragraph two of article 25 of the Law numbered 5187 which was implemented in the facts was in violation of article 10 of the ECHR, the gist of these claims concerns the matter that the mentioned confiscation and seizure decision had violated the freedom of expression and dissemination of thought and the freedom of the press. Due to the fact that the Constitutional Court is not bound by the legal qualification of the facts made by the applicant, the entirety of the applicant's claims will be examined within the framework of the freedom of expression and dissemination of thought and the freedom of the press.

a. Examination in Terms of Articles 26 and 28 of the Constitution

72. The freedom of expression and dissemination of thought refers to people's 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.

73. The freedom of expression and dissemination of thought directly impacts a significant part of the other rights and freedoms enshrined in the Constitution. Indeed, the press, which is the main means of dissemination of thought through the press and publications in the form of newspapers, journals and books, is one of the ways of exercising the freedom of expression and dissemination of thought. The freedom of the press is guaranteed not as a separate article in the ECHR but under article 10 which regards the freedom of expression. Article 10 of the ECHR guarantees not only the contents of thoughts and convictions but also their means of transmission. On the other hand, the freedom of the press is specially regulated under articles 28-32 of the Constitution.

74. 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 which 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.

75. In a democratic system, the practices and actions of the state should be under the supervision of the press and also the public opinion as much as the judicial and administrative officials. The written, audio and visual press guarantees the healthy functioning of the democracy and the self-fulfillment of individuals by meticulously inspecting the political decisions, acts and negligences of the organs which exercise public authority and facilitating the participation of citizens into the decision making processes (for judgments of the ECtHR in the same vein see *Lingens v. Austria*, App. No:9815/82, 8/7/1986, § 41; *Özgür radio-Ses Radio Television Production and Promotion Corp. v. Turkey*, App. No: 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30/3/2006 § 78; *Erdoğdu and İnce v. Turkey*, App. No: 25067/94, 25068/94, 8/7/1999, § 48). For this reason, the freedom of the press is a vital freedom which applies to everyone. (see CC, M.1997/19, D.1997/66, D.D. 23/10/1997)

76. 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 mission, it needs to act with a sense of responsibility as much as it should be free. It is stipulated under paragraph four of article 28 of the Constitution that the provisions of articles 26 and 27 will apply in the limitation of the freedom of the press. Thus, the freedom of the press has been subjected to the limitation regime contained within article 26, which acts as the main provision regarding the freedom of expression and dissemination of thought, and article 27 regarding the artistic and academic expressions. Other limitations regarding the freedom of the press are contained within paragraph 5 and the following paragraphs of article 28. Despite the fact that the press needs to abide by the limitations introduced in order to prevent threats against the internal or external security of the State, the indivisible integrity of the State with its territory and nation, encouraging offending, riot or insurgence stipulated under articles 26, 27 and 28 of the Constitution, it also has the right to provide information in

political matters. On the other hand, the people also have the right to obtain this kind of information. The freedom of the press constitutes one of the best means of transmitting various political opinions and attitudes to the public opinion and forming a conviction regarding these (for judgments of the ECHR in the same vein see *Lingens v. Austria*, § 41-42; *Erdoğdu and İnce v. Turkey*, § 48).

77. In the light of the principles explained above, first whether an intervention exists or not and then whether the intervention relies on valid ground will be evaluated in assessing whether the freedom of expression and dissemination of thought and, within this scope, the freedom of the press were violated or not in the incident which is the subject of the application.

i. Concerning the Existence of the Intervention

78. Due to the fact that no declaration was made by the competent authorities as to the printing of the book, how many copies had been printed and how many had been distributed could not be determined. However, 3,000 forms and 1,139 bound copies of the book which is the subject of the application were seized and 632 of the seized books were destroyed with the decision of the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10. The distribution of the book became impossible after the confiscation and seizure decision. The Chief Public Prosecutor's Office of Diyarbakır decided that there was no ground for prosecution regarding the publishing coordinator, editor and the individual responsible for the preparation for the publishing of the book due to the fact that no case was filed within the 6 month period for filing cases in the crimes committed through the press (see § 7, 22).

79. It is clear that an intervention was made in the applicant's freedom of expression and dissemination of thought as a result of the confiscation, seizure and destruction acts regarding the book in question. On the other hand, just like the free printing of thoughts and information without being subject to the prior control is part of the freedom of the press, the free distribution of printed works is also an inseparable part of the same freedom. Therefore, an intervention was made in the applicant's freedom of expression and dissemination of thought and, within this scope, the freedom of the press through the prohibition of the distribution of the printed work, which is the subject of the application, and its confiscation. Moreover, no objection was submitted by the Ministry of Justice to the Constitutional Court regarding the existence of the intervention.

ii. Concerning the Intervention Resting on Valid Ground

80. The interventions mentioned above will constitute a violation of articles 13, 26 and 28 of the Constitution unless they rest on one or more of the valid grounds stipulated under paragraph two of article 26 and paragraph seven of article 28 of the Constitution and they fulfill the conditions stipulated under article 13 of the Constitution. For this reason, whether the limitation is in line with the conditions of bearing no prejudice to the essence, being indicated under the relevant article of the Constitution, being envisaged by law, 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 envisaged under article 13 of the Constitution or not needs to be determined.

1. Lawfulness of the Intervention

81. They did not make a claim regarding the existence of a contrariness against the condition of the intervention being made with *"the law"* contained within article 13, paragraph five of article 26 and paragraph seven of article 28 of the Constitution. As a result of the evaluations which were made, it was concluded that the criterion of *"lawfulness"* under Article 25 of the Law numbered 5187 with the side heading of *"Seizure, prohibition of distribution and sale"* was met.

2. Legitimate Purpose

82. The applicant alleged that the objective of the intervention which is the subject of the complaint was to prevent the access of the public opinion of Turkey to information and science.

83. In the opinion of the Ministry of Justice, it was stated that the measure which had been taken against the applicant had been taken based on article 25 of the Law numbered 5187.

84. In order for an intervention made in the freedom of expression and dissemination of thought to be legitimate, it needs to be aimed at the objectives of protecting national security, public order, public security, 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 stipulated under paragraph two of article 26 of the Constitution. In addition, in order for an intervention in the freedom of the press by means of confiscation and seizure of printed works to be legitimate, it needs to be aimed at the objectives of protection of the indivisible integrity of the State with its territory and nation, of national security, public order, public morality and of the prevention of offending stipulated under paragraph seven of article 28.

85. The decision of confiscation and seizure of the book which is the subject of the application was delivered on the grounds that the author of the book in question is Abdullah Öcalan who is convicted of the crime of founding and leading an armed terrorist organization, that a region encompassing territories of Iraq, Iran and Turkey was separated and highlighted with writings on the cover of the book and that the propaganda of the PKK armed terrorist organization was made in certain sections (see § 27) of the book (see § 12-14). It was concluded that the decision of confiscation and seizure in question served as an extension of the objectives and activities determined by the State within the scope of the fight against the activities of the PKK terrorist organization.

86. The PKK, whose name in English is the Kurdistan Workers' Party, is an illegal armed terrorist organization. The PKK also used the names of KADEK, whose name in English is the Kurdistan Freedom and Democracy Congress, and Kongra-Gel, whose name in English is the People's Congress. The Kurdistan Communities Union abbreviated as KCK, which is referred to in the book in question, is the higher structure of the PKK (see pages 405-426 and 452-459 of the book); whereas the People's Defense Forces abbreviated as HPG is the armed wing of the PKK (see pages 485-488 of the book).

87. Not only is the PKK accepted as an armed terrorist organization by the Turkish judicial power, but it is also included under the name of *"PKK/KONGRA-GEL"* in the list of *"the principal terrorist organizations which currently pursue their activities in Turkey"* published by the Turkish National Police. The PKK has been accepted by the European

Union as a terrorist organization since the Council Common Position of the Council of Europe dated 27 December 2001 on the Application of Specific Measures to Combat Armed Terrorism Moreover, the PKK is also included in the list of terrorist organizations of the United States of America (USA) and accepted as a terrorist organization by numerous countries of the region such as Syria, Iraq and Iran and the international organizations such as the United Nations and NATO. In addition, the PKK is also included in the list of drug traffickers of the USA.

88. It was concluded that the decision to seize the book which is the subject of the application was part of the efforts towards national security, public order, public security, preventing offending and punishing offenders within the scope of the fight against the activities of the PKK terrorist organization and that this bears a legitimate purpose within the scope of paragraph two of article 26 of the Constitution regarding the freedom of expression and dissemination of thought and paragraph 7 of article 28 regarding the freedom of the press.

3. Necessity and Proportionality in a Democratic Society

89. The applicant stated that the printing and reading by the society of the work which is the subject of the application and similar works is among the requirements of a democratic society due to the fact that Turkey is a cosmopolitan and multi-cultural country where many peoples such as the Turks, Armenians, Circassians, Kurds and Arabs live. The applicant alleged that the Kurdish problem in Turkey was discussed by the authorities and all parts of the society, that in a period where certain extreme thoughts which used to be considered as having the potential to cause disturbance in the society could be voiced everyday, the intervention made in the freedom of expression by means of confiscating a work on the Kurdish problem was against the requirements of a democratic society.

90. It was stated in the Ministry's opinion that in the event that an intervention aimed at the freedom of expression existed, whether *"relevant and sufficient justifications"* which would justify the measures taken were brought forward and whether *"there existed a reasonable balance between the objective and means of limitation"* needed to be evaluated with a view to the requirements of a democratic society.

91. The freedom of expression and dissemination of thought and the freedom of the press may be subject to certain limitations since they are not absolute. An evaluation needs to be conducted concerning the matter of whether the limitations listed under paragraph two of article 26 of the Constitution regarding the freedom of expression and dissemination of thought and under paragraph two of article 26 and paragraphs four and onwards of article 28 regarding the freedom of the press (see § 85) are in harmony with the requirements of a democratic societal order and the principle of proportionality guaranteed under article 13 of the Constitution or not.

92. 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 limitation of rights and freedoms; that is, the limit of limitation, is envisaged under paragraph two of the article. In other words, the limitations to be brought as regards the rights and freedoms or the limiting measures to be envisaged 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 dated 3/10/2001 and numbered 4709 that *"Article 13 of the Constitution is*

re-regulated in line with the principles contained within the European Convention on Human Rights".

93. 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 ECHR which contain the *"requirements of a democratic societal order"*. Therefore, the criterion of democratic society should be interpreted on the basis of pluralism, tolerance and open mindedness (for judgments of the ECtHR in the same vein see *Handyside v. United Kingdom*, App. No: 5493/72, 7/12/1976, § 49; *Başkaya and Okçuoğlu v. Turkey*, App. No: 23536/94, 24408/94, 8/7/1999, § 61).

94. Indeed, as per the established case law of the Constitutional Court, *"Democracies are regimes in which the fundamental rights and freedoms are ensured and guaranteed in the broadest manner. The limitations which bear prejudice against the essence of the fundamental rights and freedoms and render them completely non-exercisable cannot be considered to be in harmony with the requirements of a democratic societal order.* For this reason, *the fundamental rights and freedoms may be limited exceptionally and only without prejudice to their essence to the extent that it is compulsory for the continuation of the democratic societal order and only with law."* (CC, M.2006/142, D.2008/148, D.D. 24/9/2008). In other words, if the limitation which is introduced halts or renders extreme difficulty in the exercise of the right and freedom by bearing prejudice against its essence, renders it ineffective or if the balance between the means and objective of the limitation is disrupted in violation of the principle of proportionality, it will be against the democratic societal order (See CC, M.2009/59, D.2011/69, D.D. 28/4/2011; CC, M.2006/142, D.2008/148, D.D. 17/4/2008).

95. Hence, the freedom of expression and dissemination of thought and, within this scope, the freedom of the press, which constitute one of the main pillars of the society, applies not only for "thoughts" which are considered to be in favor, harmless or not worth attention, but also for news and thoughts which are against the State or a part of the society, which is shocking for them or which disturbs them. Because these are the requirements of pluralism, tolerance and open mindedness (see *Handyside v. United Kingdom*, § 49).

96. Another guarantee which will intervene in all kinds of limitations to be introduced as regards the 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 the applications regarding the limitation of the 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. Indeed, the Constitutional Court drew attention to this relationship between necessity and proportionality in its previous decisions and decided thata reasonable relationship and balance between the objective and the means was needed by stating that *"[Each limitation aimed at the fundamental rights and freedoms] needs to be examined to see whether it is of the necessary quality for the democratic societal order, in other words, whether it fulfills the objective of public interest which is sought while serving as a proportionate limitation allowing for the least amount of intervention in the fundamental rights..."* (CC, M.2007/4, D.2007/81, D.D. 18/10/2007).

97. According to the decisions of the Constitutional Court, proportionality reflects the relationship between the objectives and means of limiting the fundamental rights and

freedoms. The inspection for proportionality is the inspection of the means selected based on the sought objective in order to reach this objective. For this reason, in the interventions introduced in the field of the freedom of expression and dissemination of thought and the freedom of the press, whether or not the intervention selected in order to reach the targeted objective is suitable, necessary and proportionate needs to be evaluated (App. No: 2012/1051, 20/2/2014, § 84).

98. In this context, the main axis for the evaluations to be carried out with regard to the facts which are the subject of the application will be whether the courts of instance which caused the intervention could convincingly put forward or not whether the justifications they relied on in their decisions are in line with the principles of *"necessity in a democratic society"* and *"proportionality"* with a view to the freedom of expression and dissemination of thought and, within this scope, the freedom of the press (for judgments of the ECtHR in the same vein see *Gözel and Özer v. Turkey,* App. No: 43453/04, 31098/05, 6/7/2010 § 51; *Gündüz v. Türkiye*, App. No: 35071/97, 4/12/2003 § 46). Therefore, in the event that it is accepted that the balance between the freedom of expression and dissemination of thought and the freedom of the press which were intervened in as a result of the measure for the confiscation of the book in question and the public interest in the confiscation of the book is proportionate, it might be concluded that the justifications regarding the confiscation of the book were convincing, in other words, relevant and sufficient (App. No: 2012/1051, 20/2/2014, § 87).

99. In the evaluations to be carried out, it should also be taken into consideration that the subjects covered in the book in question are related to the societal matters which concern a part of the society. Within the scope of articles 26 and 28 of the Constitution, it should be pointed out that the authorities exercising public power have a very narrow margin of discretion in the limitation of political discourses regarding public interest or discussions concerning societal problems (for an opinion in the same vein see *Başkaya and Okçuoğlu v. Türkiye*, § 62). On the other hand, although no limitation has been introduced as regards the freedom of expression and dissemination of thought, and within this scope, the freedom of the press with regard to the content, in areas such as racism, hate speech, war propaganda, encouraging violence and incitation, calls to riot or justifying terrorist acts, which are the borderlands of these freedoms, the State authorities dispose of a larger discretion in their interventions (for judgments of the ECtHR in the same vein see *Gözel and Özer v. Türkiye*, § 56; *Gündüz v. Türkiye*, § 40). Therefore, it should be first evaluated to see whether the propaganda of the PKK terrorist organization is made in the book in question as described in the justification for the confiscation and seizure decision of the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10.

100. In the individual applications regarding the freedom of expression and dissemination of thought and the freedom of the press, *examining expressions by tearing them apart from their contexts* may lead to erroneous results in the application of the principles contained within articles 13, 26 and 28 of the Constitution and in carrying out an acceptable evaluation of the obtained findings. Within this framework, the fact that, for instance, the expression of a thought constitutes a threat for *"national security"* when torn apart from its context, does not in and of itself justify an intervention targeting this expression. Therefore, in the concrete application; the expressions related to the PKK terrorist organization and the context in which these are expressed, the identity of the author of the book, the time of its composition, its purpose, its potential impacts as described in the seizure decision of the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10 and the entirety of the remaining expressions in the book should be considered and evaluated as a whole. Indeed,

the ECtHR has always stressed in its established case law that in order to determine whether expressions or texts regarding expressions of thought encourage violence when considered in their entirety, it would be appropriate to take into consideration the terms used and the contexts in which these were written. (*ÖzgürGündem v. Turkey*, App. No: 23144/93, 16/3/2000 § 63; *Sürek v. Turkey*, App. No: 24762/94, 8/7/1999 § 12, 58)

101. The seizure decision refers to the justification that the author of the book is *"Abdullah Öcalan who is convicted of the crime of founding and leading an armed terrorist organization"*. The court of first instance evaluated the identity of the author of the book within the scope of the fight against terrorism and delivered the confiscation and seizure decision. Just like it cannot be justified to intervene in somebody's freedom of expression and dissemination of thought solely based on their identity, the mere fact that a member or leader of a banned organization expresses his/her thoughts and opinions does not justify an intervention in the freedom of expression and dissemination of thought either. Since this kind of an evaluation would prevent certain individuals and groups from benefiting from the rights enshrined under article 26 of the Constitution, it cannot be accepted in terms of the exercise of constitutional rights (for judgments of the ECtHR in the same vein see *Gözel and Özer v. Turkey*, § 52; *İmza v. Turkey*, App. No: 24748/03, 20/1/2009 § 25; *Sürek and Özdemir v. Turkey*, App. No: 23927/94, 24277/94, 8/7/1999 § 61). Moreover, the author of the book which is the subject of the application is one of the founders and the leader of the PKK terrorist organization and one of the key players in the grave acts of violence and the loss of life and assets seen in a part of Turkey. On the other hand, the thoughts contained within the book are primarily addressed to the members of this terrorist organization. For this reason, the identities of the author of the book and the individuals he addresses as well as the thoughts and convictions expressed in the book need to be considered as a whole in the evaluation of the book, attention should be paid to the content of the thoughts in question and the context in which they are expressed.

102. The seizure decision also refers to the justification that *"a region encompassing territories of Iraq, Iran and Turkey was separated and highlighted with writings"* on the cover of the book in question. The applicant alleged that the region depicted on the cover of the book defined the *"Kurdistan"* geography where the Kurds live, that events and phenomena occurring in this geography or directly or indirectly impacting this geography were indicated in the writings found on the picture; that the depicted borders were not political but cultural and geographical borders; that moreover; the region defined as *"Kurdistan"* in the content of the book was a cultural geography. The depiction of a geographical region where a certain group of people live alone cannot be qualified as the declaration of an expression targeting the integrity of the country where that region is located. However, the meaning of qualifying or depicting a part of the territory of Turkey as *"Kurdistan"* can only be determined through a joint evaluation of the expressions used in the book and the special circumstances under which the book was published.

103. The book which is the subject of the application alleges that the Turkish State aims to dissolve Kurdishness as an entity via its political, military, cultural and ideological policies and defines the conflict between the PKK terrorist organization and the security forces as a "war of freedom" (see § 27). In the sections which served as the basis for the seizure decision and were considered as the PKK propaganda (see § 27), it is claimed that the PKK fighting against notably the Turkish Armed Forces, but also against the international powers such as the United States of America, Germany and NATO, that the PKK has halted the dissolution of the *"Kurdish reality"* with its acts and that the *"Kurdish reality"* has achieved significant gains in the path towards freedom. A first hand account of the

ideological and organizational transformations experienced by the PKK since its foundation is delivered, the reasons of these changes and transformations and the social, economic and ideological changes that occurred in the society as a result of the acts of the PKK are analyzed not only in the sections which were indicated in the seizure decision but throughout the book as a whole.

104. Even though the applicant uses strong expressions which can be interpreted as trying to justify the acts carried out by the PKK terrorist organization since its foundation by utilizing a Marxist rhetoric, he also states that the Kurdish problem is complicated and that it is clear that *"... all these historical and societal transformations ask for a new definition of Kurdishness and of the PKK, that they highlight the need for the new system concepts and institutions"*, that on this basis it tries to *"... develop a new definition of the PKK and of Kurdishness as well as the new system concepts and institutions"* (see § 27). In the expressions in question, which served as the basis for the seizure decision, the socio-economic transformations in Turkey and the countries of the region and the official policies implemented in the southeast of Turkey are analyzed by making the Kurdish problem the focal point from the historical and sociological perspective; the psychology of the impelling forces behind the opposition to state policies are tackled. Throughout the entire book, it is advocated that getting stuck with nationalistic or statist solutions to the Kurdish problem deepens the deadlock; that this kind of an imposition cannot go beyond repeating the deadlock in the Palestine-Israel problem, that the Middle East will remain as the field of interest of hegemonic powers for another century unless the statist mentality is left behind and democratic means of politics are put in place in the upcoming period; that the key role in the solution of the problems in the Middle East lies in *"the experience of democratic solution in Kurdistan"*; that the Turks, Arabs, Persians, Armenians, Assyrians and the Turkmen who are neighbors in the region share a common historical fate, that there is a possibility that *"the democratic solution in Kurdistan"* may be disseminated across the whole Middle East *"via a domino effect"*.

105. The applicant reflects historical events from his own perspective, harshly criticizes Turkey's Kurdish policy and especially its activities in the southeast, depicts a bad picture regarding the State of the Republic of Turkey and especially its security forces. Nevertheless, the applicant demands the recognition of, in his own words, the *"Kurdish reality"* and the use of peaceful means for the solution of the Kurdish problem instead of resorting to the armed methods. Whether the certain sections of the book in question contain *"calls to violence"*, *"calls to armed riot"* and *"calls to armed insurgency"* or not and whether the expressions in these sections *"are of the nature to cause an increase in violence by instilling a deep and unreasonable hatred or not"* (*Sürek v. Turkey,* App. No: 26682/95, 8/7/1999 § 62) need to be evaluated along with the thoughts contained within the book and explained above.

106. The right of the public to obtain information regarding the evaluation of the situation concerning societal problems in Turkey and in the region with an opposition perspective with a view to the freedom of the press should also be taken into account. While evaluating whether the thoughts contained within the book indeed encourage hate and violence or not, it should also be taken into consideration that the means used is a book which is aimed at the indoctrination of the *"changing"* ideology of the PKK terrorist organization, which addresses a narrower portion of the society in comparison to means of mass

communication (for judgments of the ECtHR in the same vein see *Alınak v. Turkey*, App. No: 40287/98, 29/3/2005, § 41).

107. Although some of the thoughts which served as the justification for the confiscation of the book are unacceptable for the large majority of the society and the state officials, the thoughts contained within the book as a whole are based on, in the words of the applicant, the recognition of the Kurdish reality and the utilization of peaceful methods for the solution of the Kurdish problem instead of resorting to the armed methods. The applicant alleged that the objective of the picture found on the cover of the book was not to demonstrate a new political border, that it designated the geography where the subjects dealt with in the book took place; that the political, societal and economic transformations in this geography could be undertaken via democratic procedures. The applicant, whose influence over the PKK terrorist organization continues, mainly advocates that the means of democratic solution need to be given a chance. Therefore, the expressions contained within the book to the effect that *"an eventual period of war may be initiated"* in the event that the democratic solution does not materialize, when considered jointly with the context in which the book was authored, do not mean that the applicant encouraged violence and made a call for the conduct of terrorist acts. It was considered that these words of the applicant qualified as a prediction to the effect that the violence in South Eastern Anatolia could be reignited in the event that the democratic solution did not materialize.

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 the armed clashes with the security forces have been absent for some time; 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 discretion in the limitation of political discourses regarding public interest such as the matters explained by the applicant in the book or the discussions concerning societal 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 intervention in the applicant's freedom of expression and dissemination of thought and, within this scope, the freedom of the press for the reasons which served as the justification for the seizure of the book which is the subject of the application was not necessary and proportionate in a democratic society.

109. According to paragraph two of article 25 of the Law numbered 5187 which served as the basis for the seizure and confiscation decision, the entirety of the printed works may only be confiscated with the decision of the judge on the condition that an investigation or prosecution has been initiated as regards the crimes stipulated in the Law on the Crimes Committed Against Atatürk dated 25.7.1951 and numbered 5816, the revolution laws contained within article 174 of the Constitution, paragraph two of article 146, paragraphs one and four of article 153, article 155, paragraphs one and two of article 311, paragraphs two and four of article 312, article 312/a of the Turkish Criminal Code and paragraphs two and five of article 7 of the Law on the Fight Against Terrorism dated 12.4.1991 and numbered 3713. However, not only was there no investigation or prosecution regarding the applicant as regards the book which is the subject of the application (see § 24), but the investigation conducted concerning the publishing coordinator, editor and the individual responsible for

preparation for publishing of the book regarding the crimes listed under paragraph two of article 25 of the Law numbered 5187 also ended in a decision of no grounds for prosecution.

110. Even though the investigation initiated regarding the publishing coordinator, editor and the individual responsible for preparation for publishing of the book ended in a decision of no grounds for prosecution, searches were conducted in certain special venues for the confiscation of the book, the copies which were found were seized and a part of the confiscated books were destroyed.

111. The applicant alleged that the fact that the copies of the book were destroyed without waiting for the completion of the judicial process instead of being preserved also caused a violation of rights. As per the imperative provision of paragraph eight of article 28 of the Constitution, the general provisions shall apply in the seizure and confiscation of the periodicals or non-periodicals for the purposes of a criminal investigation. According to article 132 of the Law numbered 5271, an item which has been seized can only be disposed of before the finalization of the judgment with the decision of a judge. According to the documents submitted within the application file, no finalized court decision exists concerning the destruction of the books. Under subparagraph (j) of paragraph (1) of article 141 of the Law numbered 5271, it is regulated that the individuals whose items or other assets have been decided to be seized but regarding the preservation of whose items the necessary measures have not been taken may claim their all sorts of damages from the State by way of filing an action for material and moral compensation. On the other hand, the nature and severity of the measure which was applied should also be taken into account in evaluating whether the intervention was proportionate or not.

112. When the aforementioned matters were taken into consideration, it was concluded that the confiscation of the books in question and the destruction of a part of the confiscated books without abiding by the procedure envisaged in the law based on the decision of seizure which had the quality of a protection measure was disproportionate in relation to the targeted objectives and that, within this scope, it was not in line with the principle of necessity and proportionality in a democratic society. For these reasons, it should be decided that the applicant's rights of freedom of expression and dissemination of thought and the freedom of the press guaranteed by articles 26 and 28 of the Constitution were violated.

B. Examination in Terms of Article 36 of the Constitution

113. The applicant alleged that article 141 of the Constitution was violated since the decision of seizure of the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10 and the decisions of the Judge's Office No. 3 of Istanbul Tasked with LFAT Article 10 rejecting the objections were devoid of the justification.

114. It was stated in the Ministry's opinion that whether *"relevant and sufficient justifications"* which would justify the measures taken which constituted an intervention in the book authored by the applicant were brought forward and whether *"there existed a reasonable balance between the objective and means of limitation"* needed to be evaluated with a view to the requirements of a democratic society.

115.Paragraph 3 of article 141 of the Constitution with the side heading of *"Publicity of hearings and the need for verdicts to be justified"* is as follows:

"All types of verdicts of all courts are written together with their justification."

116. Under paragraph one of article 36 of the Constitution, the right of everyone to be able to apply to judicial organs as plaintiffs and defendants and, as a natural consequence of this, their right to claim, defense and fair trial are guaranteed. Beyond having the quality of a fundamental right per se, the freedom of seeking rights guaranteed by the article is one of the most effective guarantees which enable the due enjoyment of other fundamental rights and freedoms and their safeguarding. Therefore, it is clear that article 141 which stipulates the necessity of the decisions of all sorts of courts to be written together with their justifications needs to be observed in determining the scope of the freedom to seek rights (App. No: 2013/307, 16/5/2013, § 30).

117.The courts and judicial instances providing sufficient justification in the decisions they deliver constitutes one of the factors which enable the sound fulfillment of justice. As indicated in the justification for article 141 of the Constitution, the sufficiently clear demonstration of the basis a decision relies on is important in terms of ensuring the inspection for compliance with the equity in the applications to the legal remedies. Another basis for the liability to deliver reasoned decisions is the importance of the parties knowing whether their claims have been examined according to the rules in terms of ensuring confidence in courts in a democratic society.

118.The scope of the duty to provide justification varies depending on the nature of the decision and the scope of this duty can be determined via evaluation of the circumstances surrounding the concrete incident. Even though paragraph four of article 141 of the Constitution renders the courts liable to provide justifications for the decisions they deliver, this liability cannot be understood to mean that it is necessary to provide a detailed response to all claims (for judgments of the ECtHR in the same vein see *Garcia Ruiz v. Spain*, App. No: 30544/96, 21/1/1999, § 26).

119.The right to a reasoned decision is applicable both for the decisions of the courts of first instance and the courts of objection and appeal. However, it is not compulsory for the justifications of the decisions of the appeal and objection instances, which are higher courts, to be detailed. It is sufficient for the appeal and objection authority to be of the same opinion as the decision of the court which conducted the trial and to reflect this into its own decision either by using the same justification or through a simple reference. The important matter at this point is that the appeal and objection authority shows in one way or another that it has examined the main elements brought forward in the objection, that it has approved or reversed the decision of the court of instance after the examination (App. No: 2013/3351, § 50, 18/9/2013).

120.In the seizure decision of the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10, the court based the the seizure decision on three separate justifications; that the author of the book in question is Abdullah Öcalan who is convicted of the crime of founding and leading an armed terrorist organization, that a region encompassing territories of Iraq, Iran and Turkey was separated and highlighted with writings on the cover of the book and that the propaganda of the PKK armed terrorist organization was made in pages 173, 178, 276, 278, 284, 304, 307, 312, 324, 327, 359, 391, 408, 412 and following pages (see § 14). The Judge's Office No. 3 of Istanbul Tasked with LFAT Article 10 which is the objection authority rejected the objection with general expressions such as "*the nature and quality of the crime*", "*the existence of phenomena indicating a strong suspicion of crime*", "*the existing evidence situation*" without providing any concrete justification (see § 16, 17).

121.The decision to seize the book which is the subject of the application has the quality of a protection measure. When evaluating whether the justification of the decision of

confiscation was sufficient or not, it should also be taken into account that the protection measures which are resorted to in order to ascertain the material fact and to ensure the applicability of the decisions delivered in the end are temporary. Even though the presence of more substantial and convincing justifications is desirable in this case, it cannot be claimed that there is not sufficient justification in the justifications brought forward in the confiscation decision of the judge's office of first instance and the decision of the objection authority adopting the justifications of the judge's office of first instance.

122.Due to the reasons explained, when considered as a whole, it was concluded that article 36 of the Constitution was not violated in terms of the right to a reasoned decision.

3. In Terms of Article 50 of the Law Numbered 6216

123.Under paragraph (1) of article 50 of the Law numbered 6216, it is indicated that in the event that a violation decision is delivered at the end of the examination on merits, the necessary actions to remove the violation and its consequences are taken; however; it is adjudged that a review for legitimacy cannot be conducted and that a decision with the quality of administrative act and action cannot be delivered.

124.A copy of the decision should be sent to the relevant Chief Public Prosecutor's Office for the return to their owners of all of the copies of the book, which is the subject of the application, indicated in the application petition and the opinion of the Ministry to have been confiscated and seized and the forms pertaining to the book upon their request on the condition that the provisions of the regulatory legislation regarding the printing and distribution of periodical publications remain reserved.

125.The applicant requested the compensation of the material and moral damages he incurred in the application petition; with the petition dated 13/02/2013 he stated that he waived his claim of material and moral compensation. Therefore, there is no need to deliver a decision regarding this matter.

126.It should be decided that the total trial expense incurred by the applicant of 1,698.35 TL, consisting of 198.35 TL for fees and 1,500.00 TL for counsel's fee, as determined as per the documents in the file be paid to the applicant.

V. JUDGMENT

In the light of the reasons explained, it was decided on 25/6/2014;

A. **UNANIMOUSLY** that the application is ADMISSIBLE,

B. **BY MAJORITY OF VOTES** and the dissenting votes of Osman Alifeyyaz PAKSÜT, Zehra Ayla PERKTAŞ and Burhan ÜSTÜN that the right of freedom of expression and dissemination of thought and within this scope the freedom of the press guaranteed by articles 26 and 28 of the Constitution WERE VIOLATED.

C. **UNANIMOUSLY** that article 36 of the Constitution WAS NOT VIOLATED,

D. that the total trial expense incurred by the applicant of 1.698,35 TL, consisting of 198,35 TL for fees and 1.500,00 TL for counsel's fee, be PAID TO THE APPLICANT,

E. that the payment be made within four months starting from the application of the applicant to the Ministry of Finance following the notification of the decision; that the legal

interest be applied for the period which elapses from the end of this period to the date of payment in the event that there is a delay in the payment.

F. that the file be sent to the relevant Chief Public Prosecutor's Office in order to remove the violation and its consequences.

President Haşim KILIÇ	Deputy President Serruh KALELİ	Deputy President Alparslan ALTAN
Member Serdar ÖZGÜLDÜR	Member Osman Alifeyyaz PAKSÜT	Member Zehra Ayla PERKTAŞ
Member Recep KÖMÜRCÜ	Member Burhan ÜSTÜN	Member Engin YILDIRIM
Member Nuri NECİPOĞLU	Member Hicabi DURSUN	Member CelalMümtaz AKINCI
Member Erdal TERCAN	Member Muammer TOPAL	Member Zühtü ARSLAN
Member M. Emin KUZ		Member Hasan Tahsin GÖKCAN

JUSTIFICATION OF DISSENTING VOTE

1. In his book which consists of 7 chapters and was the subject of the violation decision, the applicant advocates especially in chapter 6 in summary that it is necessary to grant the right of the Kurds to become a democratic nation in order to establish the peaceful solution which could not be realized due to *"the genocidal war conducted by the nation states which share Kurdistan"*, that the existing situation cannot be sustained for much longer, states that "*either the two parties will enter into a peace and democratic solution process the main principles of which they agree upon, or a new and final phase of war, which will be the way beyond the thirty years of war and very intensive, will be experienced*", outlines, as a continuation of his analysis, the strategy for how the impending war will be conducted and states the duties to be fulfilled by the PKK and the KCK in order to ***"conduct and improve the war which will potentially be executed simultaneously by tens of thousands of people day and night, in summer and in winter, in the villages and in the cities, in the mountains and in the plains"***. According to the applicant, in the event that the democratic solution path does not materialize, the PKK needs to conduct its activities "*on the scale of a real people's war*" and "*from then onwards, everything will come to meaning and have the right to exist either within an honorable peace and democratic solution or in relation to a total and final war*".

2. It is understood that the applicant's book, which was confiscated, has the objective, as per some of its sections, of determining the new political-military strategy of the thirty-year-old separatist terrorist movement, leading the public masses and armed militants, **preparing** for, in his own words, **a new war*"which will be way beyond the thirty years of war and very intensive"***. Even though the author of the book does not seem particularly to prefer war, he states that it should be kept as a real and serious option until he fulfills his objectives.

3. In all documents of international law and notably the Charter of the United Nations, the resolution of conflicts by the use of force is prohibited, it is indicated that states cannot use force or resort to the threat of using force against the sovereignty and territorial integrity of each other. According to international law, it is similarly prohibited for "*non-state actors*" defined as elements which are not states but claim to represent the interests of a people beyond the identity of a terrorist organization to resort to force and violence. Terrorism is categorically rejected by the entirety of the international community, it is accepted as the "*plague of our age*" which needs to be condemned regardless of its cause, justifications and the perpetrator or the victim. Terrorism has also been accepted as a crime against humanity. In its judgment *HerriBatasuna and Batasuna v. Spain*, the European Court of Human Rights did not find a violation of the Convention in the dissolution of the mentioned political party by evaluating jointly the serious and repeated acts and conduct amounting to reconciling with terrorism and the phenomenon of the lack of condemnation against terrorism. In the decision of the Constitutional Court numbered M:2007/1, D:2009/4 (Dissolution of Political Party), a similar conclusion was made by examining the matter extensively with a view to **the** political parties and the freedom of expression. Therefore, even if it were to be accepted for a moment that the book was authored to defend the rightful claims of a people beyond a terrorist organization, the evaluation to be made as regards the threat of violence contained within the book will not change.

4. Even though the applicant does not consider the political and/or armed struggle he defends to be within the scope of terrorism and his expressions regarding the PKK remain at the level of praise (*revolutionary people's war, story of heroism*), he considers resorting to violence as a concrete and serious option as regards the "*the Kurdish problem*" of which he claims to be an advocate, he even goes further by determining a strategy in this matter and giving "*preparation for war*" instructions to the concerned. The fact that this strategy is

serious was proven with a rehearsal of what is written in the book through such actions as cutting off roads, setting up check points, firing on security forces, setting fire to construction machinery, forcing or deceiving minors into joining the organization which were experienced in recent months

5. When considered as a whole and in the light of concrete facts and cases as per both the international law and human rights standards and our Constitution and positive law, it is clear that **the book** which glorifies violence, recommends the use of violence and force as a means of politics and seeking rights, **threatens to use violence and terrorism in the pursuit of political goals cannot be considered within the scope of the freedom of thought**.

6. On the other hand, the applicant alleged that the fact that the book was destroyed without waiting for the completion of the judicial process also caused a violation of rights. According to paragraph eight of article 28 of the Constitution, general provisions shall apply in the seizure and confiscation of the periodicals or non-periodicals for the purposes of a criminal investigation, according to article 132 of the Code of Criminal Procedure (CCP) numbered 5271, an item which has been seized can only be disposed of before the finalization of the judgment with the decision of a judge. According to the the application file, no finalized court decision exists concerning the destruction of the books. On the other hand, as per subparagraph (j) of paragraph (1) of article 141 of the CCP, it is clear that in circumstances where a decision to seize items or other assets has been delivered but the necessary measures regarding the preservation of items have not been taken, the concerned may claim their all sorts of damages from the State by way of filing **an action for material and moral compensation**. Therefore, it cannot be suggested that the conditions required to make an individual application to the Constitutional Court have been met.

7. For these reasons, it is understood that the intervention which consisted of the confiscation of the books in question based on the decision of seizure which had the quality of a protection measure was in line with the principle of necessity and proportionality in a democratic society with a view to the targeted objectives

8. It should be decided that the application is inadmissible, in the event that it is admitted, it should be decided that the applicant's rights of freedom of expression and dissemination of thought and the freedom of the press guaranteed by articles 26 and 28 of the Constitution were not violated.

Member
Osman Alifeyyaz PAKSÜT

JUSTIFICATION OF DISSENTING VOTE

1. The applicant alleged that the fact that the copies of the book were destroyed without waiting for the completion of the judicial process instead of being preserved caused a violation of right.

2. As per the imperative provision of paragraph eight of article 28 of the Constitution, the general provisions shall apply in the seizure and confiscation of the periodicals or non-periodicals for the purposes of a criminal investigation. According to the documents

submitted within the application file, no finalized court decision exists concerning the destruction of the books. On the other hand, it should be taken into consideration that as per subparagraph (j) of paragraph (1) of article 141 of the Law numbered 5271, individuals whose items or other assets have been decided to be seized but regarding the preservation of whose items the necessary measures have not been taken may claim their all sorts of damages from the State by way of filing an action for material and moral compensation.

3. When the aforementioned matters were taken into consideration, it was concluded that the intervention which consisted of the confiscation of the books in question based on the decision of seizure which had the quality of a protection measure was proportionate as regards the targeted objectives and thus in line with the principle of necessity and proportionality in a democratic society.

4. For these reasons, we do not agree with the majority opinion with the belief that the applicant's rights of freedom of expression and dissemination of thought and the freedom of the press guaranteed by articles 26 and 28 of the Constitution were not violated.

Member Zehra Ayla PERKTAŞ	Member Burhan ÜSTÜN

DIFFERENT JUSTIFICATION

1. It was concluded that the 'legitimate purpose' criterion of the inspection for lawfulness was met due to the fact that the limitation was set by the distinguished majority of the Constitutional Court within the fight against the PKK terrorist organization, that however, the right to a reasoned decision was not violated when the justification for the confiscation decision was taken into account, that however, it could not be suggested that the thoughts contained within the book, although of the quality to not be welcomed by a part of the society,

praise violence and that therefore a violation of right occurred due to the fact that the criterion of "necessity and proportionality in a democratic society" was not fulfilled in the incident. Since, according to my opinion, the legal reasons which led to a violation of the right to the freedom of expression and the freedom of the press were different, while participating in the outcome of the decision, it was felt necessary to write a different justification.

2. The right of everyone to express and disseminate thoughts is guaranteed under article 26 of the Constitution and it is stated that this right may only be limited with the purposes stipulated under paragraph 2. It is indicated similarly under article 10 of the ECHR that "every individual has the freedom of expression and dissemination", that however, this freedom may be limited "through measures which are necessary in a democratic society" with legitimate purposes. The reasons of 'protection of national security and territorial integrity' and 'the prevention of crime' are listed among the reasons for limitation. The exercise of the freedom of expression also requires the protection of the means of expressing thoughts. Indeed, the freedom of the press is guaranteed under article 28 of the Constitution with the heading of "freedom of the press", however, it is indicated under paragraph eight that; "the general provisions are applied in the seizure and confiscation of periodicals or non-periodicals due to the fact that they constitute a crime or for the purposes of a criminal prosecution". In line with these Constitutional regulations and the provisions of the Convention, the criminal norms as regards the freedom of expression and the limitation concerning the means of expressing thoughts are limited with the relevant special laws in our judicial system.

3. Regarding the book which the applicant wanted to have published, an investigation was launched by the Chief Public Prosecutor's Office of Istanbul as regards the publishing coordinator, editor and the individual responsible for preparation for publishing of the book with the claim that the propaganda of the terrorist organization was made and within this framework, certain book forms and printed copies were seized as a result of the searches which were conducted at the SM Printing House with the order of the prosecutor's office and at Gün Printing Press with the decision of the 3rd Criminal Court of Peace of Küçükçekmece dated 17.9.2012 and numbered 930. The decision of seizure of the prosecutor's office was approved by the decision of the 6th Criminal Court of Peace of Bakırköy dated 18.9.2012 and numbered Opn. 1737. Moreover, it was decided upon the request of the Chief Public Prosecutor's Office of Istanbul and with the decision dated 21.9.2012 and numbered 156 of the Judge's Office No. 2 of Istanbul Tasked with LFAT Article 10 to seize the book with the justification that the propaganda of the PKK terrorist organization was made in the book, the objection made against this decision was rejected with the decision dated 9.10.2012 and numbered 173 of the Judge's Office No. 3 of Istanbul Tasked with LFAT Article 10.

4. The provisions of law which served as the basis for the decision of seizure need to be scrutinized in order to be able to evaluate the legal process which took place as regards the book of the applicant.

5. Article 7/2 of the Law on the Fight Against Terrorism numbered 3713 which was in force at the time of the seizure decision is as follows: (Amended paragraph: 30/07/2003 - L.N. 4963 /30. art.) "*Those* ***who aid the members of the organization*** *established as per the above* paragraph *or* ***engage in propaganda so as to encourage resorting to violence or other methods of terror*** *are sentenced in addition to* an imprisonment of *one to five years and a heavy fine of five hundred million liras to a billion liras, even if their actions constitute another crime."*

6. Article 25/2 of the Press Law numbered 5187: "*On the condition that the investigation has been initiated,* ***the entirety of printed works may be seized with the decision***

of the judge *as regards the crimes stipulated in the Law on* the *Crimes Committed Against Atatürk dated 25/07/1951 and numbered 5816, the revolution laws contained within article 174 of the Constitution,* paragraph *two of article 146,* paragraphs *one and four of article 153, article 155,* paragraphs *one and two of article 311,* paragraphs *two and four of article 312, article 312/a of the Turkish Criminal Code and* paragraphs***two and five of article 7 of the Law on the Fight Against Terrorism*** *dated 12/04/1991 and numbered 3713."*

7. As per the above provisions regarding the limitation of the freedom of expression and the freedom of press, two separate methods are envisaged in the special regulation separated from the general provisions of the CCP for the seizure of a printed work. As per article 25/1 of the Press Law, the Public prosecutor, or in circumstances where delay would be inconvenient, law enforcement agencies, may seize a maximum of three copies of all kinds of printed works as evidentiary material for the investigation. On the other hand, two conditions are sought under paragraph two of the same article for the seizure of the entirety of the printed work. The first is the obligation that the crime which is the subject of the investigation must be a crime indicated under paragraph two, the second is the obligation that this decision must be delivered by a judge. With regard to these legal provisions, the seizure of 3000 forms and 8 books at the SM Printing House as per the written search warrant of the Chief Public Prosecutor's Office of Bakırköy dated 17.9.2012 was unlawful. The fact that the seizure decision was later approved by the judge does not eliminate this unlawfulness.

8. Moreover, the criminal investigation which served as the basis for the seizure decision was not regarding the author of the book but against the publishing coordinator, editor and the individual responsible for preparation for publishing of the book. However, although no case was filed and a decision of no ground for prosecution was delivered due to the fact that the foreclosure period indicated under article 26 of the Press Law had elapsed, the decision to destroy the books instead of terminating the seizure action was unlawful. Thus, it is understood that the criterion of lawfulness was not fulfilled in the inspection for violation of right.

9. On the other hand, in the justification of the distinguished majority, while the right to a reasoned decision within the scope of article 36 of the Constitution was examined, it was considered that the justification of the seizure decision of the judge's office no. 2 of Istanbul delivered on the grounds that the propaganda of the PKK terrorist organization was made based on the references to the certain pages of the book and the evaluation of the expressions of thought in some paragraphs was sufficient. Although the protection measures are temporary, due to their effect of limiting individual freedoms, the justification for the relevant decision should at least sufficiently evaluate the concrete incident and when read, create the idea that resorting to this measure was objectively compulsory. In terms of its sufficiency, the legal connection which the justification establishes with the incident that is the subject of the evaluation, and not its length or shortness, should be the measure. Even if the outcome of the protection measure is right in terms of that incident, in the event that the justification is not sufficient, it should be considered that article 36 is violated. Although lengthy evaluations are made in the justification in question, the paragraphs of the book which formed the basis for the evaluation can, in essence, be considered within the scope of the freedom of expression. On the other hand, the expressions contained between the pages 420-422 of the book which are to the effect that unless the targeted objectives are accomplished, 'armed resistance will be a liability for the Kurdish people and the organization', are of the quality to show that the author still adopts and recommends the method of violence and terror and conducts the propaganda of the organization. Nevertheless, due to the fact that the justification for the search and seizure decision was free from explaining the criterion of the limitation "being

compulsory with a view to a democratic society", it should be considered that the right to a reasoned decision was violated.

10. When inspecting the claims of violation of the freedom of expression, the ECtHR requires the investigation whether the expressed thoughts incite to violence or uprising or whether they contain hate speech or not. Additionally, when the expressions of thought are evaluated, the prevailing circumstances should also be observed. (see the judgments Sürek v. Turkey, Gerger v. Turkey, Aktan v. Turkey)

11. In the justification adopted by the distinguished majority, it is suggested that the thoughts expressed in the book give, in the words of the author, a first hand account of the historical process which has elapsed since the establishment of the PKK terrorist organization until today, explain the Kurdish reality within the framework of his opinions and suggest peaceful methods for the Kurdish problem. However, in most paragraphs of the book, it is seen in fact that there is an effort to legitimize the method and actions of the PKK terrorist organization. Similarly, it is indicated that unless the target-oriented democratic struggle yields results, armed resistance will become a 'liability' for the people and the organization (see Book, p. 421). The expressions in question are not predictions for the future. It is clear that the expressions amount to a call and encouragement to violence and uprising. The individual who expresses these words is not just anyone but the leader of the armed terrorist organization which executed the actions which resulted in the deaths of tens of thousands of people in the country. The proximity of the danger that these expressions, which are geared towards the organization whose acts still continue although reduced in the past year and its sympathizers may earn new members to the organization, lead at any moment to a new act of terror or uprising or result in an increase of these acts is clear beyond any need for explanation. The fact that these kinds of expressions are limited to a few pages does not reduce the danger. For the reasons explained, I am unable to participate in this section of the justification of the majority which regards this matter.

12. As a result, as explained above, I do not agree with certain legal reasons and sections of the justification adopted by the majority, however, I participate in the outcome of the decision with the belief that there was a violation of right due to the fact that the element of lawfulness was not met in the actions of the seizure, confiscation and destruction of the applicant's book and that the right to a reasoned decision was violated.

Member
Hasan Tahsin GÖKCAN