



REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

DECISION

APPLICATION OF ADNAN OKTAR (2)

(Application Number: 2013/514)

Date of Decision: 2/10/2013

FIRST SECTION

DECISION

President : Serruh KALELİ
Members : Zehra Ayla PERKTAŞ
Hicabi DURSUN
Erdal TERCAN
Zühtü ARSLAN
Rapporteur : Serhat ALTINKÖK
Applicant : Adnan OKTAR
Counsel : Att. Ceyhun GÖKDOĞAN

I. SUBJECT OF APPLICATION

1. The applicant has alleged that the fact that upon the complaint he has lodged to the Office of the Chief Public Prosecutor with the claim that an offense of libel aimed at his person was committed via the website named as "*www.facebook.com*", a decision to the effect that there were "*no grounds for prosecution*" was given violates the Preamble and articles 10, 17 and 36 of the Constitution.

II. APPLICATION PROCESS

2. The application was lodged on 4/1/2013 via the 4th Assize Court of Istanbul. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided on 11/6/2013 by the Second Commission of the First Section that the admissibility examination be carried out by the Section, that the file be sent to the Section as per clause (3) of article 33 of the Internal Regulation of the Constitutional Court.

III. FACTS AND CASES

A. Facts

4. The relevant facts contained within the application are summarized as follows:

5. The applicant has filed a criminal complaint to the Office of the Chief Public Prosecutor of Kadıköy on the date of 14/9/2012 with the claims that the person he purports to be named "A. U." swore at him via the website "*www.facebook.com*", that this person has 49 followers in the mentioned website and these persons are aware of the insult that was aimed at him, and this constitutes an explicit assault on his personal rights, his honor and his dignity.

6. With its decision dated 20/9/2012 and numbered decision D.2012/14900, the Office of the Chief Public Prosecutor of Kadıköy has ruled that there were no grounds for prosecution with the justification "*no proof was obtained as regards the fact that the suspect made his insult by targeting the complainant or referring specifically to the complainant*".

7. The applicant objected to the decision of the Office of the Chief Public Prosecutor of Kadıköy regarding no grounds for prosecution, the objection was rejected with the decision dated 5/11/2012 and numbered Miscellaneous Action 2012/1897 of the 2nd Assize Court of Üsküdar.

8. The decision of dismissal of the 2nd Assize Court of Üsküdar was notified to the applicant on 5/12/2012.

B. Relevant Law

9. Paragraph (1) of the article 171 of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271 is as follows:

"The Public prosecutor shall decide that there are no grounds for prosecution in the event that evidence to constitute sufficient suspicion for filing a public action has not been gathered at the end of the investigation stage or that there are no means of prosecution. Said decision shall be notified to the person damaged by the crime and the suspect whose statement is taken previously or who is interrogated previously. The right, period and authority of objection shall be shown in the decision.

10. Paragraph (3) of article 173 of the Code of Criminal Procedure numbered 5271 is as follows:

"If the court considers the extension of investigation necessary to make its decision, it may, by way of clearly stating said matter, appoint the criminal judge of peace of that locality; if sufficient grounds for filing a public action are not present, it shall deny the motion with justification; it shall convict the opposing party to the expenses and send the file to the Public prosecutor. The Public prosecutor shall notify the opposing party and the suspect of the decision."

IV. EXAMINATION AND JUSTIFICATION

11. The individual application of the applicant dated 4/1/2013 and numbered 2013/514 was examined during the session held by the court on 2/10/2013 and the following were ordered and adjudged:

A. Claims of the Applicant

12. The applicant has asserted that the Preamble and articles 10, 17 and 36 of the Constitution were violated by claiming that an effective investigation was not conducted by the Office of the Chief Public Prosecutor upon the complaint he has lodged with the claim that an offense of libel was committed against his person via the website "*www.facebook.com*"; that a decision was given to the effect that no grounds for prosecution were present; that 49 persons are aware of the insult that was aimed at him, and that this constitutes an explicit assault on his personal rights, his honor and his dignity.

B. Evaluation

1. In Terms of Article 36 of the Constitution

13. The applicant has alleged that the fact that as a result of the investigation launched upon the complaint he has lodged a decision to the effect that there were no grounds for prosecution was given, violates the freedom to claim rights (right to a fair trial) regulated in article 36 of the Constitution.

14. Paragraph three of article 148 of the Constitution is as follows:

“Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public force. ...”

15. Paragraph (1) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/3/2011 and numbered 6216 with the side heading of “*Right to individual application*” is as follows:

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

16. Paragraph (1) of article 46 of the Law numbered 6216 with the side heading “*Those who have the right of individual application*” is as follows:

“The individual application may only be lodged by those a current and personal right of whom is directly affected due to the act, action or negligence that is claimed to result in the violation.”

17. According to the provisions of the Constitution and Code that are cited, in order for the merits of an individual application that is lodged at the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public force, must fall within the scope of the European Convention on Human Rights (“ECHR”) and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to decide on the admissibility of an application which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (App. No: 2012/1049, 26/3/2013, § 18).

18. Paragraph one of article 36 of the Constitution with the side heading “*Freedom to claim rights*” is as follows:

“Everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a fair trial before judicial bodies through the use of legitimate ways and means.”

19. Article 6 of the ECHR with the side heading of “*Right to a fair trial*” is as follows:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

20. In paragraph one of article 36 of the Constitution, it is stated that everyone has the right to make claims and defend themselves either as plaintiff or defendant and the right to a

fair trial before judicial bodies through the use of legitimate ways and means. Since the scope of the right to a fair trial is not regulated within the Constitution, the scope and content of this right needs to be determined within the framework of article 6 of the Convention with the side heading "*Right to a fair trial*" (App. No: 2012/13, 2/7/2013, § 38).

21. It is stipulated in article 6 of the Convention which regulates the right to a fair trial that rights and principles in relation to a fair trial are valid during the conclusion of the merits of "*disputes related to civil rights and obligations*" and a "*basis of incrimination*" and the scope of the right is limited to these issues. From this expression, it is understood that, in order to lodge an individual application on the ground that the freedom to claim rights has been violated, it is necessary that the applicant be a party to a dispute in relation to his/her civil rights and obligations or that a decision has been issued on a basis of incrimination towards the applicant (App. No: 2012/917, 16/4/2013, § 21).

22. According to the case laws of the European Court of Human Rights ("ECtHR"), persons possessing the titles of victim, damaged by crime, complainant or party who demand third persons be charged or sentenced in a criminal case are excluded from the field of protection of article 6 of the Convention. The exceptions to this rule are circumstances where a system that allows for a civil right demand in the criminal case is adopted or where the decision adjudged as a result of the criminal case is effective or binding with regard to the civil case (*Perez v. France*, 47287/99, 12/2/2004, § 70).

23. With the coming into force of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271, the possibility of making a claim of personal right in the criminal procedure was abolished. Therefore, the applicant has no possibility to propound his civil rights in the process of criminal procedure. Moreover, in the material incident, the effects of the decision on no grounds for prosecution are limited to the process of criminal procedure and have no binding effect in terms of civil courts.

24. The applicant has filed a criminal complaint with the aim to ensure the indictment of a third person whom he considers to have committed a crime, and his request is limited to the penalization of the third person. In case the applicant thinks that an intervention to his civil rights exists due to the act of the third person and requests that his damage in relation thereto be indemnified, he has the opportunity to file a case before civil courts.

25. As a result, the subject of the claim of violation of the applicant which is based on article 36 of the Constitution falls out of the field of protection of the fundamental rights and freedoms which are guaranteed by the Constitution and fall within the scope of the ECHR.

26. Due to the reasons explained, it must be decided that the application is inadmissible by reason of "lack of venue in terms of subject", without it being examined in terms of other conditions of admissibility.

2. In Terms of Article 17 of the Constitution

27. The applicant asserted that the decision of no grounds for prosecution ruled on by the Office of the Chief Public Prosecutor in relation to the insults aimed at him violates the right to protection of the material and spiritual existence guaranteed in article 17 of the Constitution.

28. Article 17 of the Constitution is as follows:

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

29. The purpose of the aforementioned article is, in essence, the prevention of arbitrary interventions which can be made by the State against the material and spiritual existence of individuals. Furthermore, the state also has a positive liability in the form of protecting and respecting the material and spiritual existence of individuals in an effective way against physical and sexual attacks towards bodily and spiritual integrity, medical interventions and the attacks which affect honor and reputation.

30. The honor and reputation of an individual is included within the scope of "*spiritual existence*" which is stipulated in article 17 of the Constitution. The state is obliged not to intervene in honor and reputation which are a part of the spiritual existence of an individual and to prevent the attacks of third parties. The intervention of third parties in honor and reputation can also be made through visual and audio publications as well as many possibilities. Even if a person is criticized within the framework of a public debate through visual and audio publication, the honor and reputation of that person should be considered as a part of his/her spiritual integrity (For a decision of the ECtHR in the same vein, see: *Pfeifer v. Austria*, 12556/03, 15/11/2007, § 35).

31. Within the framework of its positive liabilities in relation to the protection of material and spiritual existence of individuals, the state needs to strike a balance between the right to protection of honor and reputation and the right of the other party to exercise the freedom of expression which is enshrined in the Constitution (For a decision of the ECtHR in the same vein, see: *Von Hannover v. Almany* (no.2) [BD], 40660/08 and 60641/08, 7/2/2012, § 99).

32. The positive liability of the State within the framework of establishing effective mechanisms against the interventions of third parties on the material and spiritual existence of individuals shall not necessarily entail the performance of a criminal investigation and prosecution. It is also possible to protect an individual against the unjust interventions of third parties through civil procedure. As a matter of fact, both criminal and legal protection have been envisaged in our country for the interventions which are made by third parties in honor and reputation. Insult is considered as a crime in terms of criminal law, as an unjust act in terms of private law and can be subjected to an action for compensation. Therefore, it is also possible for the individual to ensure a relief through a civil case with the claim that an intervention has been made by third parties in his/her honor and reputation.

33. According to paragraph three of Article 148 of the Constitution and paragraph (2) of Article 45 of the Code numbered 6216, in order for an individual application to be lodged before the Constitutional Court, all administrative and judicial remedies which are prescribed in law for the act, action or negligence that forms the basis of the violation claim need to be exhausted. The fact that only the criminal procedure has been resorted to with regard to the interventions which are made by third parties in honor and reputation does not mean that the condition of exhausting all remedies which is a requirement for lodging an individual application to the Constitutional Court has been fulfilled.

34. Indeed, European decision making bodies also have many decisions concerning the elimination of the libelous discourses aimed at the honor and reputation of the individual within the framework of the positive liabilities of the State.

35. The Parliamentary Assembly of the Council of Europe ("the Assembly") has given numerous recommendations to the effect that oral or written defamations be decriminalized as a crime that requires imprisonment by drawing attention to the fact that the laws that are in force in some of the member states of the Council of Europe ("the Council") stipulate the penalty of imprisonment for slander and libel. In line with this decision of the Assembly, there is a general consensus between the member states of the Council on the subject of introducing various regulations to decriminalize written or oral defamations or to commute the punishments envisaged in the codes for these kinds of libels (For recommendations of the Assembly on the subject, see: Parliamentary Assembly, *Towards decriminalisation of defamation*, Resolution 1577, 04/10/2007, §§ 11, 13, 17; Parliamentary Assembly, *Towards decriminalisation of defamation*, Resolution 1814, 04/10/2007, § 1; Parliamentary Assembly, *Respect for media freedom*, Recommendation 1897, 27/1/2010, § 11).

36. In many of its decisions, the ECtHR as well underlines that the Contracting States should decriminalize defamation within the shortest possible time by referring to the recommendations of the Assembly regarding the decriminalization of defamation (*Šabanović v. Serbia and Montenegro*, 5995/06, 31/5/2011, § 43; *Niskasaari v. Finland*, 37520/07, 6/7/2010, § 77).

37. In the material incident, the applicant has filed a criminal complaint before the Office of the Chief Public Prosecutor with the claim that an offense of libel aimed at his person was committed through the website "*www.facebook.com*" and that this libel constitutes an explicit assault on his personal rights, his honor and his dignity. The prosecution, regarding the demand of the applicant, has ruled that there were no grounds for prosecution with the justification that no evidence could be gathered as regards the fact that the suspect made his insult by aiming at the complainant and referring to the complainant personally.

38. In order for an individual application to be lodged to the Constitutional Court, all administrative and judicial remedies envisaged for the act or action that is claimed to have caused a violation need to be exhausted. As the individual application is a remedy to claim rights with a secondary quality, what is essential is that rights and freedoms are respected by public authorities and that, in case of a possible violation, this is redressed through ordinary administrative and/or judicial remedies. For this reason, the remedy of individual application can only be resorted to in cases where a violation cannot be removed although the ordinary remedies prescribed in law have been exhausted (App. No: 2012/338, 2/7/2013, § 28).

39. However, in addition to being accessible, the application remedies that need to be exhausted also need to have the capacity of compensation and offer a reasonable chance of redressing the complaints of the applicant when exhausted. Therefore, including these remedies in the legislation is not sufficient per se, it should also be demonstrated that they are effective in implementation or at least it should not be proven that they are not effective (App. No: 2012/338, 2/7/2013, § 29).

40. The applicant has lodged a criminal complaint with the sole intent of initiating a criminal prosecution due to the insult made against his person but has not filed a civil case whatsoever. The remedy of criminal case resorted to by the applicant regarding his claims is not the only remedy that is accessible, possessing the ability of compensation and giving a reasonable chance of success in removing the complaints of the applicant. It is also possible for the applicant to propound his complaints before courts of instance by filing a civil case with regard to the impact of the insult on private life and to receive compensation concerning these claims.

41. Due to the reasons explained, as it is understood that an individual application was lodged before the exhaustion of the remedy of filing a civil case regarding the claims of the applicant, it should be decided that this part of the application is inadmissible due to the reason that *"application remedies have not been exhausted"*.

3. In Terms of Article 10 of the Constitution

42. The applicant has claimed that *"the principle of equality before law"* regulated in article 10 of the Constitution was violated.

43. Article 10 of the Constitution with the side heading of *"Equality before law"* is as follows:

"Everyone is equal before law without being subject to any discrimination based on language, race, colour, gender, political opinion, philosophical belief, religion, sect or similar grounds.

...

The State organs and administrative authorities must act in compliance with the principle of equality before law in all their proceedings."

44. It is not possible to evaluate the claims of the applicant as to effect that the principle of equality regulated in article 10 of the Constitution has been violated in an abstract manner given the expressions in the aforementioned articles and it is absolutely necessary to discuss them in connection with other fundamental rights and freedoms stipulated within the scope of the Constitution and the ECHR. (App. No: 2012/1049, 26/3/2013, § 33).

45. The claim of the applicant as to the effect that the principle of equality is violated should be handled within the context of and in connection with the right to protection of the material and spiritual existence of the person. Therefore, the principle of equality in terms of the right to protection of the material and spiritual existence of the person possesses no function of protection with an independent quality and is among the rights with a complementary nature that secure the enjoyment and protection of this right and the remedies (App. No: 2012/1049, 26/3/2013, § 34).

46. In order to discuss whether or not the prohibition of discrimination is violated, with regard to the claim of violation, it is necessary to demonstrate on which fundamental right and freedom and on which basis the person has been subjected to discrimination. In the material incident, the applicant expressed that he was subjected to discrimination by mentioning that a criminal file was lodged in some similar incidents; however, he made no statements regarding on which basis he was discriminated. In order for a claim of discrimination to be taken seriously, the applicant needs to put forth through reasonable evidence that there is a difference between the treatment applied to other persons who are in a similar situation with him/her and the treatment applied to him/her and that this difference is based on a basis of a discriminatory reason such as race, color, gender, religion, language and so on without any legitimate basis. In the material incident, as well as not being able to prove that the incidents he has mentioned and his own situation are the same, the applicant also made no statements regarding on which basis he was subjected to discrimination.

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47. For the explained reasons, as the applicant has not brought forward any evidence to prove his claims of violation, it must be decided that this part of the application is inadmissible due to the fact that it is "*clearly devoid of basis*".

V. JUDGMENT

A. It was decided on the date of 2/10/2013 **UNANIMOUSLY** due to the reasons that;

1. The claims to the effect that article 36 of the Constitution is violated "*lack venue in terms of subject*",

2. Regarding the claims to the effect that article 17 of the Constitution is violated, "*remedies are not exhausted*",

3. The claims to the effect that article 10 of the Constitution is violated are "*clearly devoid of basis*",

the application is **INADMISSIBLE**,

B. That the trial expenses be charged on the applicant.

President
Serruh KALELİ

Member
Zehra Ayla PERKTAŞ

Member
Hicabi DURSUN

Member
Erdal TERCAN

Member
Zühtü ARSLAN