



REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

SECTION TWO

DECISION

Application No: 2013/5356

Date of Judgment: 8/5/2014

SECTION TWO

DECISION

President : Alparslan ALTAN
Members : Serdar ÖZGÜLDÜR
Osman Alifeyyaz PAKSÜT
Muammer TOPAL
M. Emin KUZ
Rapporteur :Selami TURABI
Applicant : Sinem HUN

I. SUBJECT OF APPLICATION

1. The applicant filed a request for compensation by asserting that her rights of inviolability and the protection of spiritual existence as defined in article 40 and article 17 of the Constitution were violated due to the failure of the state and judicial authorities to provide an effective protection as regards her damaged rights as a result of a decision being issued by Chief Public Prosecutor's Office of Ankara on no ground for prosecution in the investigation in which she was involved as complainant upon the fact that an internet news site which makes broadcasting at national level published libelous news about her by making hate speeches over sexual orientation.

II. APPLICATION PROCESS

2. The application was lodged on 12/7/2013 via the 2nd Civil Court of First Instance of Ankara. As a result of the preliminary examination of the petition and annexes thereof as conducted in terms of administrative aspects, it was found out that there was no deficiency that would prevent referral thereof to the Commission.

3. It was decided by the First Commission of the Second Section on 5/5/2014 that the examination of admissibility be conducted by the Section and the file be sent to the Section.

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

5. The Ministry of Justice presented its opinion to the Constitutional Court on 22/1/2014.

6. The opinion presented by the Ministry of Justice to the Constitutional Court was notified to the applicant on 23/1/2014. The applicant presented what she had to say to the Constitutional Court within due period.

III. FACTS AND CASES

A. Facts

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

8. The applicant filed a criminal complaint against the officials of Biota Pharmaceuticals and Cosmetics Laboratories and Marka Advertisement company by claiming that the crimes of "*praising the criminal and denigrating a segment of the public*" had been committed as libel speech was made against the identity of woman and hate speech against the Jewish minority in the commercial clip of the shampoo named "*Biomen*" which is known as "*the shampoo commercial featuring Hitler*" in the media.

9. The Chief Public Prosecutor's Office of Bakırköy which examined the complaint had an expert review conducted on the commercial clip by initiating an investigation on the suspects and, as a result of the report, decided that there was no ground for prosecution with the date "2/10/2012" and the number "D.2012/52397" with the justification that there was not sufficient evidence for the filing of a public case as to the effect that the crime of praising the criminal and provoking the people to hatred and animosity or denigrating the people was committed in the commercial clip named Biomen.

10. The applicant filed an objection before the Assize Court of Bakırköy against the issued decision and the examination of the objection is going on as of the date of application. It was stated that an individual application was not lodged as the remedies had not been exhausted in terms of the aforementioned decision yet.

11. While the legal process as regards the decision of the Chief Public Prosecutor's Office of Bakırköy dated 2/10/2012 and numbered D.2012/52397 on no ground for prosecution was continuing, the news titled "*Zionist servants have clung to terror again*" was published on the internet news site named "*www.habervaktim.com*" on 6/11/2012 as regards the decision on no ground for prosecution and the comments on this decision as published on the internet site named "*Hastürktv*".

12. The news titled "*Zionist servants have clung to terror again*" as published on the internet news site "*Habervaktim.com*" is as follows:

"Zionist servants have clung to terror again (06 November 2012 Tuesday 13:49)

Zionist servants have made a scandalous threat against a judgment of non-prosecution being delivered by the Assize Court of Bakırköy as regards the criminal complaint filed in relation to the commercial of the shampoo named Biomen featuring Hitler.

Jews who resorted to jurisdiction by being disturbed about the use of Adolf Hitler in the commercials of the shampoo named Biomen which is produced in Istanbul initiated provocative publications when they could not obtain the decision they expected from the court.

On the site named Hastürktv established by Jews in Turkey, a campaign has been initiated as regards the shooting of commercial clips featuring the videos of the PKK chief Abdullah Öcalan by the firms with Jewish origin against this decision of judiciary.

CRIMINAL COMPLAINT BY THE ATTORNEY OF KAMHI AND DEVIANTS

After the commencement of the commercial featuring Hitler being broadcast on televisions, Sinem Hun who is registered in Ankara Bar Association and also acts as attorney for the former DYP Deputy Jewish businessman Cefi Kamhi and the association of deviants named Kaos GL filed an application to the prosecutor's office by claiming that 'the crime of racism was committed in the commercial'.

The application was concluded last week. The prosecutor's office ruled that the crime of praising "the genocide towards Jews" was not committed in the commercial as regards the claims of "genocide" mentioned in the case petition and that, similarly, there was no situation which would be covered by hate crime. In the decision, the expert report of Prof. Dr. Nilüfer Sezer, who is an Instructor at the Faculty of Communication of Istanbul University was referred and the expressions such as "that the crimes claimed in the petition were not committed, that there was nothing disturbing in the visual in the commercial" were included in the aforementioned report.

A NEW INSTIGATION FROM THE PROVOCATIVE SITE

The site named hasturktv which published the relevant decision of the Prosecutor's Office on its pages started publishing the comments of the readers who are not contented with the decision in the form of a campaign. In many comments made on the site, the opinion as to the effect that it was seen once again that such a decision in Turkey would not be surprising was defended. Moreover, it was emphasized on the site that a retaliation was required to be made against Turkey and in this sense, a commercial clip was asked to be shot for various products by using the videos of the PKK chief Abdullah Öcalan. It was also stated that some Jewish people in Turkey would apply to advertisement agencies in this direction.

LIEBERMAN TACTIC

Previously, it was asserted that the Foreign Minister of Israel Avigdor Lieberman was trying to "punish" Turkey with strict measures as a retaliation against the sanctions of Turkey. It was indicated that "meetings with PKK leaders and cooperation with Armenian lobby in the USA" was among the measures which were formulated by Lieberman.

Habervaktim.com"

13. The relevant sections of the news named "*the decision of the prosecutor on the complaint over the Biomen commercial*" as published in the internet site named "*Hastürktv*" which was shown as the source of the news and of the reader comments made against the news are as follows:

"The decision of the prosecutor on the complaint over the Biomen commercial

You probably remember the Biomen commercial in which Hitler plays the leading role.

The Former Deputy and the Deputy of the European Jewish Parliament Cefi Kamhi carried the Shampoo commercial of Biomen company featuring Hitler upon the legal platform.

The complaint of Kamhi was based on the crime of "defamation of an individual's memory" defined in article 130/1 of the Turkish Criminal Code (TCC); the crime of "praising the crime and the criminal" defined in article 215 of the TCC and the crime of "provoking the people to hatred and animosity or denigrating the people" defined in article 216 of the TCC.

We are publishing the decision of the prosecutor on no ground for prosecution.

(Reader comments)

Rudolf: 27/10/12 17:53

You would not know how fun it would be to immediately include Abdullah Ocalan in the commercial of a vacuum cleaner in ISRAEL; I will offer proposal to advertisement companies. Bring it on..

Alon: 27/10/12 08:01

Indeed, Abdullah Öcalan cannot be a patch on Hitler... You know, in a sausage commercial, it may also be an underwear commercial... I wonder what kind of a reaction it would create to see Öcalan play in such a commercial"

14. The applicant filed a criminal complaint before the Chief Public Prosecutor's Office of Ankara with the claim that she was insulted and people were provoked to hatred and animosity in the news of the internet news site named "*www.habervaktim.com*" dated 6/11/2012 and titled "*Zionist servants have clung to terror again*", as a result of the investigation initiated by the Chief Prosecutor's Office, a decision dated 6/2/2013 and numbered D.2013/339 was delivered on no ground for prosecution.

15. The decision of the Chief Public Prosecutor's Office of Ankara on no ground for prosecution is as follows:

*"In the examination that was conducted; when the article which is the subject matter of the crime and which was presented by the attorney of the complainant as an annex to her complaint petition and the comments made on the news "The decision of the prosecutor on the complaint over the Biomen commercial" dated 26/10/2012 on the site Hastürktv.com as specified in this article are considered together; even if it was claimed that the complainant was insulted and the crime of provoking the people to hatred and animosity was committed in the article titled "Zionist servants have clung to terror again" which is the subject matter of the crime by stating "Sinem Hun who is registered in Ankara Bar Association and also acts as attorney for the association of deviants named Kaos GL filed an application to the prosecutor's office by claiming that 'the crime of racism was committed in the commercial'" by considering that the speech is within the borders of sharp criticism, taking into account the fact that "it is necessary to tolerate ideas which are offending, disturbing or even shocking as well as those which seem to be the most inoffensive and indifferent and are considered as reasonable and acceptable" as specified in the Handside judgment of the ECtHR dated 1976 and considering the statements of the Supreme Court of Appeals as to the effect that "the freedom of expression should apply not only for news and thoughts' which are considered to be in favor or harmless or not worth attention, but also for thoughts which are considered to be unfavorable, are shocking for them and disturb them. These are the requirements of pluralism, tolerance and open-mindedness and without them, there is no democratic society", it was decided that **THERE IS NO GROUND FOR PROSECUTION** on the suspects due to the elements not being created and the article being within the borders of sharp criticism."*

16. The applicant filed an objection before the 1st Assize Court of Sincan against the issued decision, it was decided that the objection be dismissed with the decision of the Court dated 10/5/2013 and numbered Miscellaneous Action 2013/1619.

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

*"It was seen that a decision on no ground for prosecution was delivered at the end of the investigation carried out by the Chief Public Prosecutor's Office of Ankara on the suspects the supervisor of the internet site named *www.habervaktim.com* and M.S. due to the crimes of "Publicly Provoking the People to Hatred and Animosity, Libel" upon the complaint of the complainant.*

In Article 172 of the Code of Criminal Procedure (CCP), the provision "(1) The Public prosecutor shall decide that there is no ground for prosecution in the event that

evidence to constitute sufficient suspicion for filing a public case has not been gathered at the end of the investigation stage or that there is no means of prosecution. (2) Unless new evidence emerges after a decision on no ground for prosecution is delivered, a public case due to the same act cannot be filed." is included and in the event that new evidence emerges, it is evident that a public case can be filed due to the same act.

It was necessary to dismiss the objection as the Decision on No Ground for Prosecution complied with the procedure and code depending on the content of the file and similarly it was understood that the justifications demonstrated while the decision on No Ground for Prosecution was issued complied with the content of the file and that the reasons for objection which were asserted were not appropriate."

18. The decision of dismissal was notified to the applicant on 13/6/2013.

19. The applicant lodged an individual application on 12/7/2013.

B. Relevant Law

20. Paragraphs (1) and (2) of article 125 of the Turkish Criminal Code dated 26/9/2004 and numbered 5237 with the side heading of "*Defamation*" are as follows:

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

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

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

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

22. Article 215 of the Code numbered 5237 with the side heading "*Praising the crime and the criminal*" is as follows:

"(1) A person who publicly praises a committed crime or a person due to the crime s/he has committed shall, in the event that clear and imminent danger arises to the public order due to this reason, be penalized with a prison sentence of up to two years."

23. Paragraphs (1) and (2) of article 216 of the Code numbered 5237 with the side heading of "*Provoking the people to hatred and animosity or denigrating the people*" are as follows:

"(1) A person who publicly provokes one segment of the public of different qualities with regards to social class, race, religion, religious sect or region to hatred and animosity towards another segment shall, in the event that there arise clear and imminent danger to the public safety due to this reason, be penalized with a prison sentence of one to three years.

(2) *A person who publicly degrades a segment of the public based on differences of social class, race, religion, religious sect, gender or region shall be penalized with a prison sentence of six months to one year.*"

IV. EXAMINATION AND JUSTIFICATION

24. The individual application of the applicant dated 12/7/2013 and numbered 2013/5356 was examined during the session held by the court on 8/5/2014 and the following are ordered and adjudged:

A. Claims of the applicant

25. The applicant asserted that her right of privacy of private life which is protected under article 20 of the constitution was violated due to the fact that her "*spiritual existence*" was attacked under articles 17 and 40 of the Constitution and article 8 of the European Convention on Human Rights (*Convention*) as the violation towards her damaged fundamental rights was not eliminated, filed a request for retrial and compensation by stating that she filed a criminal complaint before the Chief Public Prosecutor's Office of Bakırköy due the praising of the criminal, the denigration of the female gender identity and the hate speech against the Jewish majority in commercial clip of the shampoo named "*Biomen*" which took place in the media as "*the shampoo commercial featuring Hitler*" and caused resentment in the society, that a decision on no ground for prosecution was issued as a result of the investigation initiated by the Chief Prosecutor's Office, that she filed an objection against the decision, that the objection had not been concluded yet, but her personal rights were attacked and she was pointed as a target as it was said that "*Sinem Hun who is registered in Ankara Bar Association and also acts as attorney for the association of deviants named Kaos GL filed an application to the prosecutor's office by claiming that 'the crime of racism was committed in the commercial'* in the news dated 6/11/2012 and titled "*Zionist servants have clung to terror again*" of the internet news site named "*Habervaktim.com*" while the examination of the opposition was going on, that upon the news, she filed a criminal complaint with the claim that the crimes of defamation and provoking the people to hatred and animosity or denigrating the people were committed, that however a decision on no ground for prosecution was issued by the Chief Public Prosecutor's Office of Ankara with the justification that the subject was covered by the freedom of expression, that however her spiritual existence, professional honor and personality were insulted and her reputation was damaged as she was called "*the attorney of deviants*", that calling a group "*deviant*" due to its sexual orientation constituted an insult, that the related association was called "*deviant*", that the word "*deviant*" was accepted as an insult and compensation was ruled according to the decision of the 4th Civil Chamber of the Supreme Court of Appeals numbered 2010/7005, that therefore this expression used in the news exceeded the limit of criticism, that the state and judicial bodies were responsible in this sense in accordance with article 40 of the Constitution.

B. Evaluation

26. When the application form and the annexes thereof were evaluated, even if the applicant asserted that the right of privacy of private life which is protected under article 20 of the Constitution was also violated as her "*spiritual existence*" was attacked under article 8 of the Convention in addition to her claims that articles 17 and 40 of the Constitution were violated, it is understood that the concept of spiritual existence and the right of protection of honor and reputation of individuals is protected under article 17 of the Constitution, that for this reason the application is based on the claim that the state and judicial authorities could not provide an effective protection as regards the rights being damaged as a result of her

rights within the scope of inviolability, the protection of material and spiritual existence of the individual were attacked through the press. The Constitutional Court is not bound by the legal qualification of the facts made by the applicant. Therefore, all claims of the applicant were evaluated within the framework of the right of protection of inviolability and material and spiritual existence of the individual as defined in article 17 of the Constitution.

1. In Terms of Admissibility

27. In the opinion of the Ministry as regards the claims of violation of the applicant; it was stated that it would be appropriate if the provisions of the Constitution as regards respect for private life and the freedom of expression and press, articles 8 and 10 of the Convention and the relevant case law of the European Court of Human Rights (ECtHR) were taken into account while evaluating the complaints in terms of admissibility.

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

29. In relation to the complaints of the applicant as to the effect that article 17 of the Constitution was violated as regards her "*spiritual existence*", firstly, it should be examined whether the remedies were exhausted or not.

30. As per the established case law of the Constitutional Court on individual application; 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 is envisaged in our country for the interventions which are made by third parties to honor and reputation. Defamation 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 to ensure a remedy through a civil case with the claim that an intervention has been made by third parties in the honor and reputation of an individual (App. No: 2013/1123, 2/10/2013, § 35).

31. 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, all administrative and judicial remedies which are prescribed in the law for the act, action or negligence that forms the basis of the violation claim need to be exhausted. The fact that only criminal procedure has been resorted 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 (App. No: 2013/1123, 2/10/2013, § 36).

32. However, considering the fact that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society, it may be considered necessary to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance provided that "*formalities*", "*conditions*", "*restrictions*" or "*sanctions*" are proportionate to the legitimate aim pursued (*Gündüz v. Turkey*, App. No: 35071/97, 4/12/2013, § 40). Therefore, in terms of the applications which contain a claim that the insult was made by using hate speech, on the condition that the

specific conditions of the incident which is the subject matter of the application are also taken into account, the fact that only the remedy of criminal procedure remedy was completed without resorting to the remedy of civil procedure before an individual application can be considered as sufficient. As the claim that insult has been made by using hate speech can be in the form of a claim that this speech has been made based on race, origin or color, it can also be made in the form that is based on sexual orientation which is a phenomenon as serious as those which are listed above. As specified in the judgments of the ECtHR, sexual orientation constitutes an intimate aspect of private life of an individual (*Laskey and Others v. The United Kingdom*, App. No: 21627/93; 21628/93; 21974/93, 19/2/1997, § 36).

33. The applicant who exhausted the remedy of criminal procedure in the incident which is the subject of the application claims that denigration and defamation were conducted against her spiritual existence as a result of the use of expressions containing hatred over sexual orientation. When the claims are evaluated as a whole, it is understood that they are not devoid of a basis and need to be examined in terms of merits. For this reason, it should be accepted that the applicant exhausted effective remedies before an individual application in terms of the incident which is the subject of the application.

34. As it is understood that the complaints of the applicant in relation to article 17 of the Constitution are not explicitly devoid of a basis and there is no other reason for admissibility, it needs to be decided that the application is admissible.

2. In Terms of Merits

35. The applicant alleged that the right of inviolability and the protection of material and spiritual existence of the individual as defined in article 17 of the Constitution was violated as a decision on no ground for prosecution was issued in the investigation launched due to an attack being made by an internet news site which makes broadcasting at national level on her honor and reputation through the press.

36. In its opinion on merits, the Ministry of Justice stated that the right of protection of reputation is protected in article 8 of the Convention within the scope of the right of respect for private life, that a reasonable and appropriate balance needed to be established between the right of respect for private life stipulated in article 8 of the Convention and the freedom of expression when a column, article and news which affects the honor and reputation of a person as specified in the judgments of the ECtHR, that the protection of reputation of a person is in essence among the criteria of limitation regulated in paragraph two of article 10 of the Convention, that for this reason the right of respect for honor and reputation also benefits from the guarantee stipulated in article 10 of the Convention although it is indirect.

37. The Ministry stated that not only the situations that emerge as a result of the actions of public authorities, but also the failure of the state to remedy a victimization and to prevent an attack on personal rights within the positive liabilities against the interventions of third parties are also among the violations which can be considered as an intervention in private life. It stated that when examining the necessity of an interference in a democratic society in the interests of the “*protection of the reputation or rights of others*”, it may be required to examine whether the domestic authorities (the freedom of expression and the right to respect for private life) struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, that in such cases the ECtHR considers that the outcome of the application should not vary according to whether it has been lodged with the ECtHR under Article 10 of the Convention by the publisher who has published the offending article or under Article 8 of the Convention by the person who

was the subject of that article, that these rights deserve equal respect, that it stated the factors which it considered while striking a balance between the freedom of expression and the right to respect for private life in its judgment "*Axel Springer AG v. Germany [BD]*" dated 7 February 2012.

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

39. Against the opinion of the Ministry, the applicant stated that she accepted the statement of the Ministry which forms the basis for its opinion letter and which states that it is necessary to carry out an examination as regards the concrete case on whether a fair balance is struck or not between article 8 and article 10 of the Convention, that similarly, the opinion of the Ministry on the determination of whether the statements featuring insult and libel are based on factual claims or value judgments or not is also important for her, that however the Ministry only put forth the criteria, that it did not expressed an opinion in relation to the concrete case, that her being called "*the attorney of deviants*" in the concrete case is a value judgment, that her being the subject of the news is normal due to the fact that she filed a criminal complaint against the commercial of the shampoo named Biomen, that however it is clear that an attempt was made to defame her by calling her "*a Zionist servant*" and "*the attorney of deviants*" when the content of the published news is examined.

40. Furthermore, the applicant stated that the internet news site named "*habervaktim.com*" continuously strikes an attitude which is based on value judgments and makes hate speech against homosexuals, that it targets a part of the society with the motive of hatred due to one of its characteristics, that the state did not carry out an effective investigation due to this hate speech.

41. Paragraph one of Article 17 with the side heading "*Inviolability and material and spiritual existence of the individual*" of the Constitution is as follows:

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

42. 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 (App. No: 2013/1123, 2/10/2013, § 32).

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

44. 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 of protection of honor and reputation of one party and the right of the other party to exercise the freedom of expression which is enshrined in the Constitution (App. No: 2013/1123, 2/10/2013, § 34).

45. In the concrete case, the applicant lodges an individual application with the claim that her personal rights were attacked due to the fact that an internet news site which makes broadcasting at national level published discriminatory and hatred-based news featuring insults on her and that the state left the perpetrators unpunished without carrying out an effective investigation because of her damaged rights. Therefore, while the right of protection of honor and reputation of the applicant is present on one hand, the freedom of expression and the press is present on the other. In cases where these two rights are in conflict with each other, a fair balance should be struck by judicial authorities. As specified in the judgments of the ECtHR, these rights between which there is no hierarchy (see *Timciuc v. Romania* (k.k), App. No. , § 144), as a matter of principle, deserve equal respect (see *Axel Springer AG v. Germany*, [BD], App. No: 39954/08, 7/2/2012, § 87).

46. On the other hand, in cases where these rights are in conflict with each other, the duty of the Constitutional Court as regards the examination of individual applications which are lodged is not to replace other judicial authorities, but to examine whether the decisions that judicial authorities have issued comply with the Constitutional provisions or not by considering the case as a whole. In the concrete case, as the applicant did not complain due to an action of the public force towards her private life, the matter to be examined is whether judicial authorities were successful in striking a fair balance between the right of protection of honor and reputation and the freedom of expression and the press or not within the scope of positive liabilities of article 17.

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

"Everyone has the right to express and disseminate their thoughts and convictions orally, in writing, in pictures or through other means individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. .

The exercise of these freedoms may be restricted for the purposes of national security, public order, public security, protecting the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crimes, punishing criminals, 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 code or duly performing the duty of adjudication.

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

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

48. The relevant sections of article 28 of the Constitution with the side heading of "*Freedom of the press*" are as follows:

"The press is free; it cannot be censored. .

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

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

..."

49. As per the aforementioned regulations, the freedom of expression covers not only the freedom to "*have a thought and conviction*" but also the existing freedom to "*express and disseminate thought and conviction (opinion)*" and the associated freedom to "*receive and give information or opinion*". In this framework, freedom of expression means that individuals can freely access news and information and other's thoughts, that they cannot be condemned for the thoughts and convictions they have and that they can freely express, tell, defend, convey and disseminate to others these through various methods by themselves or together with others (App. No: 2013/2602, 23/1/2014, § 40).

50. The Constitution guarantees not only the thoughts and convictions but also the styles, forms and tools of expression. The means which can be resorted to in the exercise of the freedom of expression and dissemination of thought are listed in article 26 of the Constitution as "*orally, in writing, in pictures or through other means*" and with the expression "*other means*" and it is demonstrated that all kinds of means of expression are under constitutional protection (App. No: 2013/2602, 23/1/2014, § 43).

51. In this context, the freedom of expression is directly related to a significant portion of other rights and freedoms guaranteed by the Constitution. The freedom of the press which guarantees the dissemination of ideas, thoughts and information by means of visual and printed media tools is also one of the tools to be used in the exercise of the freedom of expression and dissemination of thought. The freedom of the press is protected within the scope of Article 10 on the freedom of expression of the European Convention on Human Rights and is also specially regulated in articles 28-32 of the Constitution (App. No: 2013/2602, 23/1/2014, § 44).

52. The freedom of the press ensures that the individual and the society are informed by performing the transmission and circulation of thoughts. The expression of thoughts, including those who oppose the majority, via all sorts of means, garnering supporters to the thoughts which have been explained, fulfilling and convincing into fulfilling the thoughts are among the requirements of the pluralistic democratic order. Therefore, the freedom of expression and dissemination of thought and the freedom of the press are of vital importance for the functioning of democracy. As the freedom of the press is, in a way, the freedom of conveying news and opinions which concern people, it is, in another way, closely related to the right of people to receive this information and opinions (App. No: 2013/2602, 23/1/2014, § 45).

53. In a democratic system, in terms of ensuring that those who possess the public powers exercise their authorities within the limits of the law, the press scrutiny and the public scrutiny play a role just as effective and are equally important as the administrative scrutiny and the judicial scrutiny. Since the functioning of the press which acts as a public observer on behalf of the society is dependent on its being free, the freedom of the press is a freedom which is applicable to and vital for everyone (see App. No: 2013/2602, 23/1/2014, § 46; CC, M.1997/19, D.1997/66, D.D. 23/10/1997), (for the judgments of the ECtHR in the same vein, see *Lingens v. Austria*, App. No: 9815/82, 8/7/1986, § 41; *Özgür radyo – Ses Radyo Televizyon Yapım ve Tanıtım AŞ v. Turkey*, App. No: 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30/3/2006, § 78; *Erdoğan and Ince v. Turkey*, App. No: 25067/94, 25068/94, 8/7/1999, § 48; *Jersild v. Denmark*, App. No: 15890/89, 23/9/1994, § 31).

54. The freedom of the press, which complements and ensures the exercise of the freedom of expression and dissemination of thought, is not absolute and limitless just like the freedom of expression and dissemination of thought. In order for the press to be able to fulfill its social function stated above, it needs to act with a sense of responsibility as much as it should be free. In this context, the press which influences the thoughts and convictions of large masses of people and can set people into motion needs to comply with the press ethical rules, to refrain from attitudes and behaviors that will violate the rights and freedoms of individuals. As a matter of fact, the ECHR emphasizes that the press is obliged to act in accordance with its duties and responsibilities while exercising the freedom of expression, that the restrictions introduced in relation to the "*protection of the honor and rights of others*" should be taken into account as the news published within the scope of these duties and responsibilities has a risk of creating severe effects on the honor and reputation of individuals (see *Observer and Guardian v. the United Kingdom*, App. No: 13585/88, 26/11/1991).

55. In the event that judicial investigations are launched as regards all kinds of offenses of libel which are committed through the press and a punishment restricting freedom is ruled, it should be taken into consideration that this may put pressure on the entire press and dissuade journalists from discussing subjects which concern public opinion, that thus it may turn into a self-censor institution. Therefore, unless there are expressions such as call for violence or hate speech which are aimed at abolishing pluralistic democracy in a democratic society, it is necessary to refrain from ruling a punishment restricting freedom on individuals (App. No: 2013/2602, 23/1/2014, § 79).

56. The criteria which need to be taken into account while examining whether a fair balance has been struck between the right of protection of honor and reputation and the freedom of expression and the press can be matters such as the contribution that the expression have made to a debate of general interest which concerns public opinion, how well known the person concerned is and his/her prior conduct as regards the subject for which a complaint has been filed, the content of the expression, whether the incident which is the subject of the news has been previously covered in the press or not (For the judgments of the ECtHR on this subject, see *Axel Springer AG v. Germany*, [BD], App. No: 39954/08, 7/2/2012; *Von Hannover v. Germany* (no.2) [BD], 40660/08 and 60641/08, 7/2/2012).

57. While general principles are applied to the concrete case; first of all, it is necessary to resolve whether there is hate speech in the expressions used in the news titled "*Zionist servants have clung to terror again*" or not, whether these expressions have the quality of an attack towards the right and reputation or private life of the applicant or not, whether it is

necessary to punish the officials of the press institution due to the aforementioned expressions in a democratic society or not.

58. When the news titled "*Zionist servants have clung to terror again*" as published on the internet news site named "*Habervaktim.com*" is considered as a whole, it is understood that the news was aimed at conveying to public opinion and bringing into question the current and existing information, that the criticism was made over the concept of "*Zionist servants*", that it was clear that the applicant was not targeted with this concept, that unknown people who were present in the reader forum in the internet news site named "*Hastürk.tv*" were intended with this concept, that how these people provided support for terror was covered in the news.

59. The claims of the applicant as to the effect that an attack was carried out towards her honor and reputation as the expression "*the attorney of deviants*" was used for her, that the aforementioned site continuously strikes an attitude which makes hate speech against homosexuals, that it targeted a part of the society with the motive of hatred due to one of its characteristics should be separately examined.

60. When the decision of the Chief Public Prosecutor's Office of Ankara which examined the complaint of the applicant on no ground for prosecution and the reasoned decision of the 1st Assize Court of Sincan are considered; it is understood that the judicial authorities evaluated the content of the news published on the aforementioned news site within the scope of the freedom of expression. On the other hand, it should be stated that the expression "*deviant*" used in the news was directly directed towards the association, that there was no direct relation between the expression of deviant and the applicant, that only the case of the applicant being the attorney of the association and Kamhi was emphasized by stating that "*Sinem Hun who also acts as attorney for Kamhi and the association of deviants*".

61. When the news titled "*Zionist servants have clung to terror again*" as published on the internet news site named "*Habervaktim.com*" is considered as a whole; it is understood that the news is related to a debate which is covered in the press in general and which concerns public opinion, that when its content and form of presentation are taken into consideration, although a specific group in the society and the association is targeted with the expression of "*deviants*", an applicant was not lodged by the targeted association as regards this expression, that there is no evident discretionary mistake or obvious arbitrariness in the evaluation of the judicial authorities as to the effect that the words in the form of "*the attorney of deviants*" towards the applicant who acts as attorney for the associations which is considered as the respondent of this expression did not exceed a certain threshold of defamation and denigration which will require a punishment by criminal procedure, that it does not have the quality of a hate crime or hate speech in terms of the applicant, that there is no social need that requires a sanction be necessarily imposed by criminal procedure against this expression in a democratic society and that it cannot be said that the balance struck by the judicial authorities between the conflicting values is not fair. It cannot be said that the evaluation of the judicial authorities disrupted the balance between the right of respect for the honor and reputation of the applicant and the freedom of expression and the press of the other party against the applicant in an intolerable way.

62. For the explained reasons, it should be decided that the applicant's right of respect for honor and reputation guaranteed by article 17 of the Constitution was not violated. Member Osman Alifeyyaz PAKSÜT disagreed with this opinion.

V. JUDGMENT

In the light of the reasons explained; it is decided on 8/5/2014

A. UNANIMOUSLY that the claims of the applicant as to the effect that her right of protection of honor and reputation was violated within the scope of the right of material and spiritual existence of the individual as stipulated in article 17 of the Constitution are **ADMISSIBLE**,

B. BY MAJORITY OF VOTES and the dissenting vote of Osman Alifeyyaz PAKSÜT that the right of respect for honor and reputation was **NOT VIOLATED** within the scope of the right of material and spiritual existence of the individual as stipulated in article 17 of the Constitution,

C. UNANIMOUSLY that the trial expenses be charged on the applicant,

President
Alparslan ALTAN

Member
Serdar ÖZGÜLDÜR

Member
Osman Alifeyyaz PAKSÜT

Member
Muammer TOPAL

Member
M. Emin KUZ

LETTER OF DISSENTING VOTE

1. The applicant asserted that her rights which are enshrined in articles 17 and 40 of the Constitution were violated due to the failure of the state to provide an effective protection as a result of a decision being issued on no ground for prosecution in the investigation in which she was involved as complainant upon the fact that libelous news was published about her on an internet newspaper which makes broadcasting at national level by making hate speeches over sexual orientation.

2. Although the applicant who is an attorney was not directly targeted by the opinions expressed by the internet newspaper which published the news in the axis of anti-Judaism in essence, she became the target of the aforementioned internet newspaper due to the fact that she filed a complaint with the thought that the use of Hitler in a shampoo commercial constituted a crime of racism.

3. The use of Hitler in a shampoo commercial might not be singlehandedly a crime of racism and filing a complaint due to this may be considered as an overreaction. However, it is also necessary to show respect for the contrary thought. The applicant doubtlessly exercised a legal right of hers with the thought that there was a crime of racism. On the other hand, the internet newspaper has the right to criticize the applicant due to this behavior of hers.

Similarly, it is necessary that this criticism be within the freedom of thought, not turn into an attack or a hate speech. The news which was published in the incident which is the subject of the application was directed towards the aim of denigration and defamation through the characterization of her with "*the attorney of deviants*" over a society named "Kaos GL" for which she acts as attorney and which represents individuals with different sexual orientations beyond the criticism of the applicant. In the incident, the use of this kind of expression cannot be considered to be within the scope of the freedom of thought.

4. Attorneyship is an indispensable element of fair trial and a public duty. The presumption of innocence and the right to a fair trial which are valid for everyone do not allow an attorney to be identified with the identity of the client or to be a target of attacks due to the duty of attorneyship that s/he has assumed. On the other hand, it is known that the perception is not always like this in real life, that no attorney wants to defend those who commit some crimes which cause great resentment in the society, that some cases where even the attorneys who are requested to be assigned as a compulsory defense counsel by a bar association do not accept this duty may occur. For this reason, in a criticism which was made against an attorney by referring to the people and groups that s/he represents, an evaluation cannot be made without taking into account the dominant perceptions and cultural characteristics in the society.

5. There is no hesitation over the fact that the prevention of discrimination, exclusion and hatred which prevail in the society against people with different sexual orientations is among the positive liabilities of the state. Likewise, the European Court of Human Rights has not found any contrariety to the Convention in relation to the fact that the individuals who distributed some leaflets featuring a hate speech against homosexuals at a school were imposed various imprisonments and fines in the case of *Vejdeland v. Sweden (1813/07)*.

6. The criticism of the applicant over the group for which she acts as attorney in accordance with her profession and which needs to be protected by the state cannot be considered as a petty insult for which a remedy can be ensured through a civil case. Yet, in the incident, it is obvious that there was an attempt to denigrate and defame the attorney over the group which she defends and which needs to be protected beyond a petty insult. The insult in the form of "*the attorney of deviants*" not only makes its respondent upset and offends her, but also lends itself to bring about consequences such as her penalizing her due to the attorneyship that she has assumed, intimidating and dissuading her from the duty of defense. For this reason, the statement in the form of "*the attorney of deviants*" is not a criticism which needs to be welcome with tolerance, tolerated for an attorney. This being the case, the applicant has not achieved to ensure a remedy by criminal procedure against the attack towards her personal rights even if she has tried to do so.

7. The launching of a criminal prosecution due to the expressions in the internet newspaper is undoubtedly an intervention in the freedom of expression. It should be evaluated, according to the specific characteristics of each incident, whether an intervention is necessary in a democratic society or not, whether an intervention is proportionate or not, whether the essence of a right is fringed while an intervention is made or not and whether a fair balance is struck between the freedom of expression and the press and the rights and reputation values of others or not in the event that they are in conflict with each other (App. No: 2013/2602).

8. In the incident, the balance which is fair and complies with the requirements of a democratic society between the freedom of expression of the internet newspaper and the personal rights of the applicant who acts as attorney for a group which needs to be taken

under protection by the state against hate speeches in essence has been disrupted against the applicant. Yet, the applicant was the target of libelous expressions not because she defends an ordinary criminal, but because she is the attorney of a group which has been the object of hate crime. The applicant should have been effectively protected by the state against the libelous expressions which she does not have to stand and tolerate.

9. For the explained reasons, it should be decided that the applicant's rights stipulated in articles 17 and 40 of the Constitution were violated.

Member

Osman Alifeyyaz PAKSÜT