REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

Application Nr: 2013/6154

Date of Judgment: 11/12/2014

FIRST SECTION

JUDGMENT

President	: Serruh KALELİ
Members	: Hicabi DURSUN
	Erdal TERCAN
	Zühtü ARSLAN
	Hasan Tahsin GÖKCAN
Rapporteur	: Yunus HEPER
Applicants	: Fikriye AYTİN
	Ali ŞİMŞEK
	Sevi DEMİR
Counsel	: Att. Reyhan YALÇINDAĞ BAYDEMİR

I. SUBJECT OF APPLICATION

1. The applicants alleged that their freedom of expression and the principle of no punishment without a law ("*nulla poena sine lege*") were violated by indicating that they were punished for making speeches in Kurdish language during a publicity meeting organized by Democratic Society Party(DTP) for the introduction of their candidates before the local elections. The applicants requested the determination of the violation and that a just satisfaction be awarded to compensate the non-pecuniary damages which they incurred.

II. APPLICATION PROCESS

2. The application was lodged on 2/8/2013 via the 8th Criminal Court of First Instance in Diyarbakır. In the result of the preliminary administrative examination of the application, it was determined that there was no deficiency to prevent the submission thereof to the Commission.

3. It was decided by the First Commission of the First Section on 16/1/2014 to refer the file to the Section in order for its admissibility examination to be carried out by the Section.

4. In the session held by the Section on 3/2/2014, it was decided that the examination of admissibility and merits be conducted jointly.

5. The facts and cases which are the subject matter of the application and a copy of the application were notified to the Ministry of Justice. The opinion presented by the Ministry

of Justice to the Constitutional Court on 3/4/2014 was notified to the applicants on 16/4/2014 and the applicants presented no counter opinion to that of Ministry.

III. FACTS AND CASES

A. Facts

6. As expressed in the application form, the annexes thereof and the opinion of the Ministry, the facts are summarized as follows:

7. As of that date, applicant Fikriye Aytin was mayor of Lice District, applicants Ali Şimşek was Provincial Head of DTP in Diyarbakır and applicant Sevi Demir was a member of the DTP Women's Assembly.

8. The applicants made speeches in Kurdish language during a publicity meeting organized by DTP in Lice district on 31/1/2009 for the introduction of their candidates before the local elections held on 29/3/2009.

9. A public case was filed by the Chief Public Prosecutor's Office of Lice regarding the applicants with the indictment dated 10/3/2009. The indictment alleged that the applicants made speeches in Kurdish language during the meeting and requested that the applicants be punished in accordance with Article 117 of Law Nr. 2820 on Political Parties dated 22/4/1983.

10. Article 117 of Law Nr. 2820 was repealed with the decision of Turkish Constitutional Court (Registry Nr. 2011/62, Decision Nr. 2012/2) on 12/1/2012. The decision of the Court for annulment of relevant law was published in the Official Gazette on 5/7/2012 and came into effect on 5/1/2013.

11. With the judgment of the Criminal Court of First Instance of Lice on 29/3/2013, it was decided that the applicants be sentenced to 5 months imprisonment separately on the grounds that they made speeches in Kurdish language during the meeting organized as a part of political party activities and that the announcement of the verdict be deferred.

12. Upon the objection of the applicants, the 3rd Assize Court of Diyarbakır rejected the objections with its judgment dated 30/5/2013 and the judgment became final. The applicants were notified of the final judgment on 3/7/2013.

13. The application to the Constitutional Court was lodged on 2/8/2013.

B. Relevant Law

14. In paragraph (c) of Article 81 of Law Nr. 2820 titled "*Preventing the creation minorities*":

> *"Political parties:*
>
> …
>
> *c) cannot use a language other than Turkish in writing and printing party statute or program, at congresses, at meetings in open air or indoor gatherings; at meetings, and in propaganda, cannot use or distribute placards, pictures, phonograph records, voice and visual tapes, brochures and statements written in a language other than Turkish; cannot remain indifferent to these actions and acts committed by others; however, it is possible to*

translate party statutes and programs into foreign languages other than those forbidden by law."

15. In Article 117 of Law Nr. 2820 titled "*Other illegal acts*", which was repealed by the Constitutional Court,:

"Those who commit acts prohibited under Section 4 of this law", if the relevant act does not require a graver punishment, must be sentenced to imprisonment of minimum 6 months.

16. The relevant part of Turkish Constitutional Court's decision (Registry Nr. 2011/62, Decision Nr. 2012/2) dated 12/1/2012 is as follows:

"The provision of law subject to contention is under the Law on Political Parties and imposes punishment to persons who commit acts prohibited under Section 4 of the Law. This part of the law enumerates a number of prohibitions for the political parties. It can not be said that "under which conditions the acts named under this Section constitute a crime" is clearly foreseeable for real persons. Although these prohibitions directly address the legal entity of political parties, the provision of law subject to contention turned such prohibitions into regulations imposing sanctions to real persons. Besides, these regulations take no account of the gravity of these acts named under relevant section and the title and position of those who commit these acts in the political party. Under these circumstances, this regulation, which poses at punitive threat to a broad mass engaged in political activities, is not sufficiently foreseeable by real persons.

On the other hand, the sphere of political activates has broadened in time through the constitutional and legal amendments and practical experiences. Accordingly, although the provision of law containing this regulation may be deemed "foreseeable" at the time of its enactment, it has been concluded that it lost its foreseeable characteristic completely in the result of the constitutional and legal amendments broadening the freedom of political activity and practices parallel to such amendments."

IV. EXAMINATION AND JUSTIFICATION

17. The individual application of the applicant dated 2/8/2013 and numbered 2013/6154 was examined during the session held by the court on 11/12/2014 and the following are ordered and adjudged:

A. Allegations of the Applicant

18. The applicants alleged that they were punished for making speeches in Kurdish language during a publicity meeting organized by DTP in Lice district on 31/1/2009 for the introduction of their candidates before the local elections held on 29/3/2009 and that their punishment in spite of the annulment of Article 117 of Law Nr. 2820 by the Constitutional Court constitutes violation of their right to a fair trial, freedom of expression and principle of no punishment without a law.

B. Review

1. Admissibility Review

19. In the examination of the application form and its annexes, it is seen that the application is directly related to the allegations on violation of freedom of expression and principle of no punishment without a law. As a matter of fact, the applicants who are members of DTP were punished for making speeches in Kurdish language during the publicity meeting of this political party for introduction of their candidates. Although the

applicants alleged that their punishment for the said acts constitutes a violation of their right to a fair trial, the essence of this claim is related to an intervention to the principle of no punishment without a law. The Constitutional Court is not bound by the applicants' legal definition for the incidents of the case. Therefore, the allegations of the applicants were examined with regards to violation of the principle of no punishment without a law and freedom of expression.

20. In the examination of the application form and its annexes, it is seen that the application is not manifestly ill-founded and no other reason of inadmissibility has been found, the application shall be declared admissible.

2. Review on Merits

a. Allegations for Violation of Freedom of Expression

21. The applicants alleged that their punishment for making speeches in Kurdish language during a political party meeting constitutes a violation of freedom of expression.

22. The Ministry, in its opinion presented to the Court, recalls similar judgments of the Constitutional Court and the ECHR and indicates that the allegations of the applicants must be considered accordingly.

23. Article 13 of the Constitution titled "*Restriction of fundamental rights and freedoms*" is as follows:

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

24. Article 26 of the Constitution titled *"Freedom of expression and dissemination of thought"* is as follows:

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

25. Article 26 of the Constitution defines the means for expression and dissemination of thought as *"speech, in writing or in pictures or through other media"* and the phrase "*through other media*" shows that all means of expression are constitutionally guaranteed (App. Nr: 2013/2602, 23/1/2014, §43). Similarly, Article 10 of the Convention provides guarantees to not only to the contents of the thought and opinion but to the means of communication and dissemination as well.

26. It is beyond any doubt or dispute that the language used for communicating a message is an inseparable element of the freedom of expression. The Constitution contains more detailed regulations on the freedom of expression but, under these circumstances, it has been considered proper to review the application under Article 26 of the Constitution which is the fundamental constitutional regulation on the freedom of expression.

27. The freedom of expression, a right which may be restricted, is also subject to f restriction regime for fundamental rights and freedoms in the Constitution. The second paragraph of Article 26 on freedom of expression defines the purposes of such restriction. The criteria set out in Article 13 of the Constitution must be taken into consideration in restricting the fundamental rights and freedoms. Therefore, the control and review on restrictions to the freedom of expression must be conducted within the frame of criteria in Article 13 of the Constitution and under the scope of Article 26 of the Constitution.

28. 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. Nr: 2013/2602, 23/1/2014, § 40)

29. The freedom of expression 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 is of vital importance for the functioning of democracy (App. Nr: 2013/409, 25/6/2014, § 74)

30. 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 is violated or not in the incident which is the subject of the application.

i. Concerning the Existence of the Intervention

31. The applicants were punished for making speeches in Kurdish language during the election activities of a political party. Moreover, no objection was submitted by the Ministry of Justice to the Constitutional Court regarding the existence of the intervention. Under these circumstances, it should be decided that the applicants' freedom of expression guaranteed by Article 26 of the Constitution were violated.

ii. Concerning the Intervention Resting on Valid Ground

32. The interventions mentioned above will constitute a violation of Article 26 of the Constitution unless they rest on one or more of the valid grounds stipulated under paragraph

two of Article 26 of the Constitution and they fulfill the conditions stipulated under Article 13 of the Constitution. For this reason, whether the restriction is in line with the conditions of not infringing upon 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.

33. Democracies are regimes in which the fundamental rights and freedoms are ensured and guaranteed in the broadest manner. The restrictions which are infringing upon the essence of the fundamental rights and freedoms and render them completely nonexercisable cannot be considered to be in harmony with the requirements of a democratic societal order. Therefore, the fundamental rights and freedoms may be restricted exceptionally and only without infringing upon their essence, to the extent that it is compulsory for the maintenance of the democratic societal order and only with law. Similarly, due to this reason, the criterion for limiting the rights and freedoms by law has an important place in the constitutional law (see CC, Reg. Nr. 2006/142, Dec. Nr. 2008/148, D.D. 24/9/2008; App. Nr. 2014/256 (Plenary) 25/6/2014, § 81).

34. When there is an intervention to a right or freedom, the matter to be primarily determined is whether there is a legal basis of the intervention or, in other words, whether there is a provision of the law that grants authorization for the intervention or not. In order to accept that an intervention made within Article 26 of the Constitution meets the condition of legality, it is compulsory that the intervention has a "legal" basis (for a decision that attracts attention to the condition of legality in another context, see App. Nr: 2013/2178, 19/12/2013, § 36).

35. In accordance with the wording of the Convention and the case law of the ECtHR, the legitimacy of an intervention to be made within Article 9 of the Convention is made conditional on the fact that the said intervention be made in accordance with the "law" (prescribed by law) and when it is determined that the intervention does not have the element of legality, it is concluded that the intervention is in contrary to the relevant article without examining the other guarantee criteria stipulated in paragraph (2) of Article 10 of the Convention(see. *Başkaya and Okçuoğlu/Turkey,* App. Nr: 23536/94, 24408/94, 8/7/1999, § 51)

36. The criteria of *"limiting by law*" or "*the principle of legality*" are included in Article 10 of the Convention that regulates the freedom of expression as a criterion of limitation and guarantee. However, the concept of "*prescribed by law*" stipulated in the Convention is not the exactly same with "*the principle of legality*" stipulated in the Constitution. The ECtHR gives a broader meaning to the concept of "*being prescribed by law*" than the meaning given to the principle of legality in Turkish law.

37. According to Article 87 of the Constitution, "enacting, amending and abolishing laws" is the duty and authority of the Grand National Assembly of Turkey. The law, as a legislative act, is the product of the will of the Grand National Assembly of Turkey, The law is the acts, which are excluded from the “decision of the parliament” and performed by the Grand National Assembly of Turkey, whose authority is granted by the Constitution, by complying with the procedures of lawmaking prescribed in the Constitution. The rule stipulated in Article 7 of the Constitution "The legislative power belongs to the Grand National Assembly of Turkey on behalf of the Turkish Nation. This power cannot be delegated" covers the meanings of the law in material and form without making any

differentiation. The meaning of Article 7 of the Constitution is that the power of lawmaking cannot be delegated to another authority and that, as a natural consequence thereof, a regulation which is to be made with a law according to the Constitution cannot be made by another authority (see. App. Nr: 2014/256 (Plenary), 25/6/2014, § 85).

38. In other words, a subject, which does not have to be certainly regulated by the law according to the Constitution, may be left to the regulatory actions of the administration on the condition that it has a legal basis. However, Article 13 of the Constitution as to the fact that the fundamental rights and freedoms may only be limited by the law does not allow the executive body and the administration to limit a right and freedom through a first-hand regulatory action in the absence of a provision of the law (see. App. Nr: 2014/256 (Plenary), 25/6/2014, § 87).

39. In the field of the fundamental rights and freedoms, the legislative body is obliged to make foreseeable regulations that do not allow for the arbitrariness. Granting a very broad discretionary power that may pave the way for the arbitrary practices to the administration may be in contrary to the Constitution. The formal existence of the laws as regards the limitation of the fundamental rights and freedoms may not be considered to be sufficient; at the same time, the quality of the laws should also be examined. The measures to be taken by the executive body based on the order of the law in a field as regards the fundamental rights and freedoms must have an objective quality and must not grant a broad discretionary power that will pave the way for the arbitrary practices to the administration (see CC, M.1984/14, D.1985/7, DD. 13/6/1985). In the contrary case, a contrariety will also occur with Article 13 of the Constitution as to the fact that the fundamental rights and freedoms may only be limited by law (see. App. Nr: 2014/256 (Plenary), 25/6/2014, § 89).

40. The concrete incident must be reviewed within the framework of the principles explained. The applicants were sentenced to imprisonment for making speeches in Kurdish language during a meeting held as a part of political party activities. However, the court of first instance relied on a provision of law repealed by the Constitutional Court in establishing its judgment and this judgment became final upon the rejection of appeal. Therefore, under these circumstances, it is understood that there is no accessible, foreseeable and precise provision of law to limit the freedom of expression of applicants which also prevents the arbitrary practices of authorities exercising public power and assists the real persons to be conscious of the law in a sense envisaged under Article 13 of the Constitution.

41. As the intervention was determined not to satisfy the criterion of legality(being *prescribed by law*), it was not required to further review whether it meets the other criteria for an intervention to the freedom of expression, i.e. a legitimate purpose within the scope of relevant article of the Constitution, the requirements of the democratic order of the society as envisaged under Article 13 of the Constitution

42. For these reasons, it should be decided that the applicant's rights of freedom of expression guaranteed by article 26 of the Constitution were violated.

b. With regards to the Principle of No Punishment without Law

43. The applicants alleged that their punishment on the basis of a criminal law provision repealed by the Constitutional Court constitutes a violation of the principle of no punishment without law.

44. The Ministry, in its opinion presented to the Court, recalls similar judgments of the Constitutional Court and the European Court of Human Rights (ECtHR).

45. The essence of review on merits is the allegation that the principle of "*no punishment without law*" is violated. The principle of "*no punishment without law*" is basic principle related to the criminal law provisions and the implementation of thereof and it is guaranteed under the Constitution and the Convention.

46. Paragraph three of Article 38 in the Constitution titled "*Principles relating to offences and penalties"* is as follows:

> "*Penalties, and security measures in lieu of penalties, shall be prescribed only by law."*

47. Paragraph (1) of Article 7 in the Convention titled "*No punishment without law"* is as follows:

> *"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."*

48. Various articles of the Constitution relating to the fundamental rights and freedoms separately contains the principle of "being prescribed by law" and, while refinancing the general principles on the limitation of fundamental rights and freedoms as stated under Article 13, it is laid down that the restrictions may be imposed "*only by law*". Article 38 of the Constitution, which regulates the offences and penalties, specifically guarantees the principle of "*no crime and punishment without law*"

49. The principle of "*no crime and punishment without law*" is one of the constituent elements of the state of law. Being a basic guarantee in regulating all rights and freedoms in general sense, the principle of legality bears an exceptional meaning and importance in determining the crimes and punishments. Accordingly, it prevents the arbitrary indictment and punishment of persons for their acts not prohibited or subjected to a sanction by law. It also provides for retrospective implementation of regulations to the advantage of the accused person (App. Nr: 2013/849, 15/4/2014, §32).

50. The arbitrary and for illegal purpose use of public authority and the authority to impose punishment can be prevented by a strict practice of the principle of *no crime and punishment without law*. Accordingly, the legislative, executive and judiciary powers representing the public authority must respect to this principle. The legislative organ must describe the boundaries of the regulations on crimes and punishments clearly; the executive organ must not create an offence or punishment through regulatory transactions without acting on the basis of a power the limits of which is defined by law and the judiciary organ in charge of interpreting the criminal law must not broaden the scope of crimes and punishments prescribed by law through its interpretations. (App. Nr:2013/849, 15/4/2014, §33).

51. Article 38 of the Constitution guarantees the principle of "*no crime without law*" by stating in the first paragraph *"No one shall be punished for any act which does not constitute a criminal offence under the law"* and the principle of "*no punishment without law*" by stating in the third paragraph *"Penalties, and security measures in lieu of penalties, shall be prescribed only by law."* The principle of "*no crime and punishment without law*" envisaged under the Constitution constitutes one of the fundamental principles of criminal law in today's world as an understanding based on human rights and freedoms has become prominent. In addition to Article 28 of the Constitution, the principle regulated under Article 2 of Turkish Penal Code, Law Nr. 5237 dated 26/9/2004 requires that the prohibited acts and the punishments to be imposed for such acts must be prescribed explicitly by law without leaving no room for doubt and that the rule must be clear, intelligible and well defined. This

principle is based on the idea that persons must know the prohibited acts in advance and it aims to guarantee the fundamental rights and freedoms (CC, Reg. Nr.2010/69, D.2011/116, D.D. 7/7/2011; Indv. App: 2013/849, 15/4/2014, §35).

52. In the concrete application, the applicants were sentenced to 5 months imprisonment separately on the grounds that they made speeches in Kurdish language during the meeting organized as a part of political party activities with the judgment of the Criminal Court of First Instance of Lice on 29/3/2013. However, Article 117 of Law Nr. 2820 was repealed with the decision of Turkish Constitutional Court on 12/1/2012. The decision of the Court for annulment of relevant law was published in the Official Gazette on 5/7/2012 and came into effect on 5/1/2013. Consequently, the judgment of the court of first instance was based on a provision of law no longer in effect. This outcome of the proceedings conflicts with the principle of "*no punishment without law*" regulated under third paragraph of Article 38 in the Constitution.

53. For these reasons, it is understood that the punishment of the applicants on the basis of a provision of law no longer in effect constitutes a violation of the principle of "*no punishment without law*"

3. Implementing Article 50 of the Law Number 6216

54. Under paragraph (1) of article 50 of the Law numbered 6216, it is indicated that in the event that a violation judgment is delivered at the result 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.

55. Considering that the freedom of expression of the applicants and the principle of no punishment without law have been violated, it is decided that there is legal interest in holding the retrial of the case relating to the punishment of the applicants. It must be decided that the file be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed.

56. It was concluded that Article 26 and 38 of the Constitution were violated. Each of the applicants requested a just satisfaction be awarded to compensate the pecuniary and non-pecuniary damages which they incurred. The applicants also requested the compensation of their counsel's fee, the application fee and other expenses they have incurred.

57. The Ministry of Justice presented no opinions as to the amounts of just satisfaction requested by the the applicants. As the applicants could not provide any evidences to prove their pecuniary damages, their requests for pecuniary damages shall be rejected.

58. As finding of violation is considered to provide just satisfaction, the requests for pecuniary damages caused by the violation of the freedom of expression and the principle of "no punishment without law" shall be rejected.

59. It should be decided that the total trial expenses jointly incurred by the applicants of 1,698.35 TL, consisting of 198.35 TL for application fee 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 UNANIMOUSLY on 11/12/2014;

A. That the applicants allegations for the violation of their freedom of expression and the principle of "*no punishment without law*" are ADMISSIBLE

B. 1. That the freedom of expression guaranteed under Article 26 of the Constitution IS VIOLATED,

2. That the principle of "*no punishment without law*" guaranteed under Article 38 of the Constitution IS VIOLATED,

C. That a copy of the judgment be sent to the related Court for retrial in order for the violation and the consequences thereof to be removed,

D. That the requests of the applicants for just satisfaction be REJECTED,

E. That the total trial expenses jointly incurred by the applicants of 1,698.35 TL, consisting of 198.35 TL for application fee and 1,500.00 TL for counsel's fee, as determined as per the documents in the file BE PAID TO THE APPLICANTS

F. 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

President	Member	Member
Serruh KALELİ	Hicabi DURSUN	Erdal TERCAN

Member	Member
Zühtü ARSLAN	Hasan Tahsin GÖKCAN