REPUBLIC OF TURKEY

CONSTITUTIONAL COURT

FIRST SECTION

JUDGMENT

TANSEL ÇÖLAŞAN APPLICATION

(Application Number: 2014/6128)

Date of Judgment: 7/7/2015
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FIRST SECTION

JUDGMENT

President	: Burhan ÜSTÜN
Members	: Hicabi DURSUN
	Erdal TERCAN
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Rapporteur	: Yunus HEPER
Applicant	: Tansel ÇÖLAŞAN
Representative	: Att. Mutluhan KARAGÖZOĞLU
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I. SUBJECT-MATTER OF THE APPLICATION

1. This application concerns the applicant's allegation that her right to freedom of expression was violated as the relevant courts rendered a decision for *"reprimanding the defendant's infringement"* (decision of reprimand) in respect of the applicant at the end of the actions brought against her on account of her alleged infringement of the plaintiffs' personal rights in the course of delivering her speech at a meeting.

II. APPLICATION PROCESS

2. The individual application no. 2014/6128; the individual applications nos. 2014/10098 and 2014/10100; and the individual applications nos. 2014/14415 and 2014/14417 were directly lodged with the Constitutional Court on 6 May 2014, 24 June 2014 and 3 September 2014, respectively. Upon the preliminary examination of the petitions and annexes thereto in administrative aspect, it was decided that there was no deficiency which would prevent its referral to the Commission.

3. The Third Commission of the First Section decided on 15 September 2014 in respect of the application no. 2014/6128; the Second Commission of the Second Section decided on 14 May 2015 in respect of the application no. 2014/10098; the First Commission of the Second Section decided on 5 May 2015 in respect of the application no. 2014/10100;

the Third Commission of the First Section decided on 30 June 2015 in respect of the application no. 2014/14415; and the First Commission of the First Section decided on 30 June 2015 in respect of the application no. 2014/1441that the examination as to the admissibility of these applications be made by the Section. It has been accordingly decided the case-file be referred to the Section.

4. The President of the First Section decided on 10 November 2014 that the examination on the admissibility and merits of the application no. 2014/4128 be made concurrently.

5. The facts giving rise to the application no. 2014/6128 and a copy of this application were notified to the Ministry of Justice for receiving its observations. The observations of the Ministry of Justice dated 9 September 2015 were communicated to the applicant on 20 January 2015. The applicant did not submit any counter-statement to the observations of the Ministry of Justice.

6. As the applications nos. 2014/10098, 2014/10100, 2014/14415 and 2014/14417 were related to similar subject-matters, it was decided that these applications be merged with the application no. 2014/6128 and the examination be made over this case-file.

III. THE FACTS

A. The circumstances of the Case

7. As stated in the application form and annexes thereto, the facts of the case may be summarized as follows:

8. The applicant is the Former Acting President and the Former Chief Public Prosecutor of the Supreme Administrative Court. Following her retirement, she was elected as the Chairman by the General Assembly of the Ataturkist Ideology Association (“Atatürkçü Düşünce Derneği”) (“the AIA”) on 14 June 2010 and is still performing this duty.

9. After the Law amending Article 26 of the Constitution had been ratified by the Grand National Assembly of Turkey, a referendum was decided by the President Abdullah Gül to be held on 10 September 2010 in respect thereof, and the constitutional amendment was adopted at the end of the referendum. By this amendment, certain amendments were made to the issues, which were of a particular concern to the public, notably the structure of the Constitutional Court and the High Council of Judges and Prosecutors. Debates had taken

place for a long time between those who challenged to and those who supported the constitutional amendment.

10. The applicant delivered a speech as the Chairman of the AIA in the panel entitled "*Where is Turkey heading to?*" and held by the Hatay Branch Office of the AIA on 19 September 2010; namely nine days after the referendum.

11. In the course of her speech, the applicant invited the audience to think whether they had duly fulfilled their responsibility of being a member of the Turkish Nation or not. According to the applicant, the question was whether to live in a world where imperialism prevailed by receiving orders or to live in an independent manner. At this point, the applicant invited everyone to reconsider Ataturk and his philosophy. In the applicant's opinion, the founding philosophy of the Republic was democracy. However, nowadays, the democracy imposed upon countries such as Turkey was an eviscerated one. According to the applicant, those who did not know the founding philosophy of Turkey were in power. The applicant then said the following words against which many cases would be subsequently filed:

> *"The solutions are inherent in us; that is to say, in you. In other words, in our votes. If these votes are conscious ones, how nice! However, the unconscious votes; in other words, the votes other than 42%, are negligent, misguided and even traitors. We all know treason. I do not accuse those who have been here for their interests to batten upon us. They serve for their own countries. If ours also serve for their own countries, they do not become co-conspirator under the command of these imperialist powers".*

12. Afterwards, the applicant maintained in her speech that the principles of the Republic were contradicted by way of sometimes separatist acts, land feudalism and sometimes political democratisation; and that those who were anti-revolutionist powers were governing the country due to the stolidity of the individuals. The applicant then attempted to explain the meaning of the founding philosophy in her perspective and argued that Ataturk's principles were prevailing over democracy. The applicant was of the opinion that with the Constitution of 1961, a liberal regime was predominating throughout the country; however, due to the "*coup d'état"* taking place in 1971 and 1982, there was a regress in the country. According to the applicant, Mr. Adnan Menderes was not democratic and was subject to trial for contravening the constitution. The applicant criticising the execution of Adnan Menderes at the end of the trial considered that Mr. Menderes made concession of Ataturk's principles.

The applicant also complained of the fact that many cases had been filed against her due to her thoughts in this regard. She maintained that America introduced "*Pan-Islam*" in the region under the pretext of bringing democracy; and that subsequent to the coup d'état of 1980, *"the reactionary and separatist powers"* were supported in Turkey. She accordingly analysed, in her perspective, the changes taking place in Turkey, notably the judiciary, universities and certain constitutional institutions. The applicant later on evaluated the period subsequent to the foundation of the Justice and Development Party (AK Party) and asserted that there were suspicious relations between America and this party. According to the applicant, the AK Party and the *"Fetullah Gülen's Community"* were placing their own personnel in the positions within the state and judiciary, and cases such as *"Ergenekon"* and *"Balyoz (Sledgehammer)"* resulted from this process. The applicant also mentioned of the referendum recently taking place and maintained that those voting *"no"* casted vote consciously; however, 13 or 14 million persons did not attend voting and they must be educated. The applicant assessed the constitutional rules amended subsequent to the referendum and asserted that in the event that the AK Party was removed from power upon the public voting, *"the Ataturkist"* may provide support for the politicians in the formation of the new Constitution.

13. On 20 September 2010, the applicant subsequently appeared in a program on a national broadcasting channel, namely Habertürk, and used the expressions *"The educated section of the society votes no whereas the uneducated section of the society votes yes".*

14. It appears from the documents submitted by the applicant to the case-file that a total of 58 actions for compensation were brought against her in 16 various provinces due to her speech. By the application date, the first instance courts rendered a dismissal decision in 34 actions. Out of these 34 actions, 20 actions were examined and upheld by the Court of Cassation. Four of the individual applications lodged by the applicant due to the actions brought against her on account of her expressions given above in quotation marks and qualification of those casting *"yes"* vote in the referendum as uneducated section by her were merged with the present application.

The First Action

15. On 24 October 2010, the plaintiffs who were the parliamentarians from the AK Party brought an action for compensation before the 13th Civil Court of General Jurisdiction and maintained that the applicant had insulted those voting "yes" in the referendum and

thereby them. In her defence submissions before the first instance court, the applicant indicated that she had not addressed to the plaintiffs; and that her phrases merely amounted to general explanations made in the course of the evaluation of the referendum results and falling into the limits of criticism. She also pointed out that it was a secret voting process and therefore it was not possible to know whether a person had voted in favour of or against the matter subject to voting; that the plaintiff's vote was under their own initiative and did not concern anyone. Furthermore, she argued that as the plaintiff did not sustain any direct damage, he was not entitled to claim compensation; and that the condition of explicit addressing (*"matufiyet şartı"*) did not appear in respect of the plaintiff.

16. The first instance court partially acknowledged the action by its decision of 20 September 2011 and awarded compensation in favour of the plaintiffs. Upon the appeal, this decision was quashed, with a majority vote, by the judgment of the 4th Civil Chamber of the Court of Cassation dated 12 February 2013 on the ground that the court should have rendered a decision for reprimanding the infringement must be rendered instead of awarding compensation. The justification relied on by the Chamber is as follows:

> *"The plaintiff noted that he was a parliamentarian from the ruling party which submitted the constitutional amendment proposal to the Parliament; that he conducted activities for encouraging the people to vote "yes" during both the enactment process and the subsequent "referendum" stage; that the defendant, who was the Chairman of the Ataturkist Ideology Association, insulted the section of the public voting "yes" like him for being negligent, misguided, traitors and even illiterate in the panel themed "Where is Turkey heading to" and held in Hatay on 18 September 2010 and in the course of the programme namely "It's your turn" which was broadcasted through Habertürk TV on 20 September 2010 and where the words uttered in the panel were discussed. The plaintiff accordingly maintained that there was an attack towards his personal rights and claimed non-pecuniary compensation.*
>
> *The defendant requested the action to be dismissed by maintaining that her words did not direct at the plaintiff; that it was not necessary for her to know whether the plaintiff had casted "yes" vote, and therefore, her words were not addressing to the plaintiff; that her words, which were not insulting in nature, were used for addressing to those except for the ones casting their votes consciously and her aim was to emphasize the fault of those casting their votes unconsciously. She further asserted*

that the limits of criticism were wider for politicians; that her words fell into the scope of the freedom of expression; and that her words did not amount to an insult.

The domestic court acknowledged that the element of explicit addressing existed on the grounds that the political party of which the plaintiff was a member submitted the constitutional amendment proposal to the parliament; that the plaintiff conducted campaigns encouraging people to cast "yes" vote in the enactment process and attended outdoor meetings and delivered speeches through radio and television channels, which clearly indicated that the plaintiff would cast "yes" vote. Accordingly, it acknowledged the action partially by concluding that the phrases of "being negligent, misguided, traitors and even illiterate" used by the defendant exceeded the limits of criticism and were insulting the plaintiff, damaging his personal right and humiliating him before the public.

Non-pecuniary damage is objective impairment sustained to the personal values. For the elimination of the non-pecuniary damage sustained by a person, the judge may award a certain amount of money as non-pecuniary compensation or have recourse to another means for redress instead of compensation under Article 49 § 3 of the Turkish Code of Obligations given the particular circumstances of each incident, the statuses of the offender and the victim and the nature of the impairment sustained to the personal values. Although the other means of redress are listed in this article and accordingly the methods by which the unjust attack would be reprimanded and a decision of reprimand would be rendered and published through the press are mentioned, these methods are not limited and left to the discretion of the judge. In this scope, it is possible to adopt a way of redress such as declaration of excuse and withdrawal of the imputation (see the judgment of the 4th Civil Chamber dated 14 November 1996 and no. 8472/11191). Given the capacities of the parties, nature of the expressions used, the platform where they were used, the group targeted and potential effect thereof and the fact that these expressions did not address to merely the complainant, who was involved in a society, it was concluded that a decision for reprimanding the infringement, which was one of the other sanctions specified in Article 49 § 3 of the Code of Obligations, should have been rendered instead of the sanction of compensation. However, as awarding compensation in the present action was in breach of the procedure and law, the first instance decision was quashed".

17. Upon quashing of the decision, the first instance court acknowledged the action with its decision of 5 November 2013 and rendered a decision of reprimand on the ground that *"the applicant did not directly target at the plaintiffs; however, directed at those encouraging persons to cast "yes" vote or casting "yes" vote in the constitutional referendum; that the element of explicit addressing existed and that the expressions used by the applicant exceeded the limits of criticism"*. Upon the appeal of this decision, it was upheld by the judgment of the 4th Civil Chamber of the Court of Cassation dated 4 March 2014. The upholding judgment was served on the applicant on 7 April 2014.

The Second Action

18. In the action for compensation brought by another plaintiff who was the Acting President of the Commission of Commerce and Industry of the Grand National Assembly of Turkey before the 13th Chamber of the Ankara Civil Court of General Jurisdiction on 18 January 2011, the plaintiff alleged that the applicant had insulted those casting *"yes"* vote in the referendum and therefore himself. The defendant made defence submissions similar to those in the first action. By its decision of 4 January 2012, the first instance partially acknowledged the action and awarded compensation in favour of the plaintiff. Upon the appeal, the first instance decision was quashed, by a majority vote, by the judgment of the 4th Civil Chamber of the Court of Cassation dated 12 February 2013 on the ground that the first instance court should have imposed one of the measures set out in Article 49 of the Code of Obligations – the decision for reprimanding the infringement – instead of awarding compensation on the basis of the same grounds in the first action. Upon the quashing of the decision, the first instance court acknowledged the action by its decision of 5 November 2013 and rendered a decision of reprimand by relying on the same ground in the first action. On 4 June 2014, the upholding judgment was served on the applicant.

The Third Action

19. In the action for compensation brought by another plaintiff who was a parliamentarian from the AK Party before the 1st Chamber of the Ankara Civil Court of General Jurisdiction on 23 November 2010, it was maintained that the applicant had insulted those casting *"yes"* vote in the referendum and therefore them. The defendant made defence submissions similar to those in the first action. By its decision of 21 June 2012, the first instance court dismissed the action by concluding that the applicant had not targeted at the

plaintiff with her words; that paying compensation on account of unfavourable criticisms cannot be accepted in a democratic society; and that besides, it was clear that the applicant's aim fell within the scope of democratic understanding, and the applicant's expressions must be tolerated. Upon the appeal of the decision, it was quashed, by a majority vote, by the judgment of the 4th Civil Chamber of the Court of Cassation dated 12 February 2013 on the ground that the action should have been acknowledged by the first instance court instead of being dismissed. The justification of the quashing judgment is as follows:

> *"It has been inferred from the documents included in the file that the plaintiff is a parliamentarian from the ruling party which submitted the proposal, in which it was offered that the constitutional amendment be subject to referendum, to the parliament, which conducted activities and carried out campaigns for enactment of these amendments at the stage before the commission and plenary assembly for encouraging the people to cast "yes" vote in the "referendum" and which accordingly encouraged the people to cast "yes" vote through outdoor meetings and speeches delivered via radio and television channels.*
>
> *Claiming that the plaintiff is not involved in the section of 58% of the community mentioned in the defendant's speeches and casting "yes" vote is not in accord with the actions performed by the party of which the plaintiff is a member and the capacity of the plaintiff. Accordingly, the first instance court should have acknowledged that the defendant's expressions were addressed to the plaintiff, who was a parliamentarian of the party proposing the constitutional amendment and organizing campaigns for encouraging the individuals to cast "yes" vote for the amendment, and should have dealt with the merits of the action given the fact that these expressions were addressed to also the plaintiff. However, the first instance court instead dismissed the action on the basis of a written justification. Therefore, the first instance decision must be quashed for being contrary to procedure and being unlawful".*

20. Upon the quashing of the decision, the first instance court acknowledged the action by its decision of 10 December 2013 by relying on the grounds similar to those of the first action and accordingly decided that *"the defendant's infringement be reprimanded"*. Upon the appeal process, the first instance decision was upheld by the judgment of the 4th Civil Chamber of the Court of Cassation dated 21 May 2014. The upholding judgment was served on the applicant on 16 June 2014.

The Fourth Action

21. In the action for compensation brought by the plaintiff who was a parliamentarian before the 13th Chamber of the Ankara Civil Court of General Jurisdiction on 8 December 2010, the plaintiff alleged that the applicant had insulted those casting *"yes"* vote in the referendum and therefore him. The defendant made her defence submissions similar to those in the first action. By its decision of 15 November 2011, the first instance court partially acknowledged the action and awarded compensation in favour of the plaintiff. Upon the appeal of the decision, it was quashed by the judgment of the 4th Civil Chamber of the Court of Cassation dated 12 February 2013 as it was held that one of the measures specified in Article 49 of the Code of Obligations should have been imposed instead of compensation on the basis of the grounds of the first action. Upon quashing of the decision, the first instance court acknowledged the action by its decision of 27 February 2014 and gave a decision of reprimand by relying on the same justification with the first action. Following appeal, the decision was upheld by the judgment of the 4th Civil Chamber of the Court of Cassation dated 23 June 2014. The quashing judgment was served on the applicant on 6 August 2014.

The Fifth Action

22. In the action for compensation brought by a plaintiff who was a parliamentarian before the 1st Chamber of the Bursa Civil Court of General Jurisdiction on 29 September 2010, the plaintiff alleged that the applicant had insulted those casting *"yes"* vote in the referendum and therefore him. The defendant made her defence submissions similar to those in the first action. By its decision of 27 July 2011, the first instance court dismissed the action. Following the appeal of the decision, it was quashed by the judgment of the 4th Civil Chamber of the Court of Cassation dated 12 February 2013 on the basis of the same grounds with the third action as it was concluded that one of the measures specified in Article 49 of the Code of Obligations should have been imposed. Upon the quashing judgment, the first instance court acknowledged the action by its decision of 25 July 2013 and gave a decision of reprimand by relying on the same ground with the first action. Following the appeal process, the decision was upheld by the judgment of the 4th Civil Chamber of the Court of Cassation dated 12 June 2014. The quashing judgment was served on the applicant on 6 August 2014.

23. The applicant lodged individual applications before the Constitutional Court on 6 May 2014 for the first action, on 24 June 2014 for the second and third actions, and on 3 September 2014 for the fourth and fifth actions.

B. Relevant Law

24. Article 49 of the Turkish Code of Obligations dated 11 January 2011 and no. 6098 reads as follows:

"Any person causing damage to anyone else due to his faulty and unlawful act is liable to indemnify this damage.

Even if there is no legal provision prohibiting the impairing act, any person intentionally causing damage to anyone else due to his immoral act is also liable to indemnify this damage."

25. Article 50 of the Code no. 6098 reads as follows:

"The aggrieved person is under the burden of proving the damage he has suffered and the fault on the part of the person causing damage.

If it is not possible to determine the exact amount of damage suffered, the judge shall fairly determine the amount of damage by having regard to the ordinary course of life and the measures taken by the aggrieved person."

26. Article 58 of the Code no. 6098 reads as follows:

"Any person suffering from the impairment of his personal right may demand, in return for non-pecuniary damage he has sustained, to be paid with a certain amount of money as non-pecuniary compensation.

The judge may decide on another means of reparation; especially may render a decision of reparation and order publication of this decision instead of awarding compensation or may adjudicate on this means along with the compensation awarded."

IV. ASSESSMENT AND GROUNDS

27. At the meeting held on 7 July 2015, the individual application dated 6 May 2014 and no. 2014/6128 and - lodged by the applicant was examined, and the Constitutional Court accordingly reached the following conclusions.

A. The Applicant's Allegations

28. The applicant maintained that

i. The first instance court gave a decision of reprimand on account of her speech completely falling into the scope of the freedom of expression; and that this decision was contrary to the well-established case-law of the European Court of Human Rights ("the ECtHR");

ii. The impugned expressions did not target at a certain person; that in her expressions used for the assessment of the results of the referendum held in 2010, she criticized those casting *"yes"* vote; that as secret voting procedure was followed during the referendum, she could not know the plaintiff's preference in voting; and that the court's acknowledgment that the element of explicit addressing had appeared was unlawful;

iii. In contrary to the previous established case-law of the Court of Cassation which envisages that the right to obtain non-pecuniary compensation is bestowed to only those who have directly sustained a damage from the impugned act and that those who have been suffering indirectly (*"yansıma yoluyla"*) are not entitled to claim non-pecuniary compensation, the courts' acknowledgement of the plaintiffs' actions brought in the present incident with the allegation that they had indirectly sustained damage - in spite of not being targeted at by the applicant's expressions - was contrary to procedure and unlawful.

iv. Although the dismissal decisions rendered in 20 out of 58 actions brought against her in respect of the same incident had been subject to the examination of the Court of Cassation and had subsequently become final, the decision of reprimand which was given in the impugned actions was upheld, in spite of no change in the laws and relevant case-law, by the same Chamber of the Court of Cassation contrary to its previous judgments rendered in respect of the same incident.

v. The impugned actions were dealt with by the 4th Civil Chamber of the Court of Cassation; and that following a revision in the members of this Chamber, it changed its attitude in the actions examined by it.

Maintaining that there was a breach of the freedom of expression set out in Article 26 of the Constitution, the right to a fair trial defined in Article 36 and the principle of natural judge and the principle of equality which are respectively set out in Articles 37 and 10 of the

same, the applicant requested to be awarded amounts of 14,931.00 Turkish Liras ("TRY") and TRY 15,000.00 as pecuniary and non-pecuniary compensation.

B. Assessment

1. Admissibility

29. The Constitutional Court is not bound by the legal qualification of the incidents by the applicant and makes its own assessment as to the legal characterisation of the facts. The applicant maintained that the 4th Civil Chamber of the Court of Cassation was partial and accordingly alleged that there was a breach of the principle of equality, the right to a fair trial and the principle of natural judge, which are respectively set out in Articles 10, 36 and 37 of the Constitution. The applicant's complaints concern the decision of reprimand given due to her expressions used in her speech, and therefore the Court found appropriate to examine the complaints in question within the meaning of Article 26 of the Constitution.

30. The applicant's complaints that rendering of a decision of reprimand against her due to the expressions used in her speech constituted a breach of her right to freedom of expression are not manifestly ill-founded. As any further ground requiring the declaration of the application inadmissible has not been found, this application must be declared admissible.

2. Merits

31. The applicant maintained that her payment of compensation to the plaintiffs due to her expressions used in her speech delivered during a meeting was in breach of the freedom of expression set out in Article 26 of the Constitution. In the observations submitted by the Ministry in respect of the applicant's allegations, it is specified that the applicant's complaints must be examined within the scope of the freedom of expression guaranteed in Article 26 of the Constitution.

32. Article 13 of the Constitution entitled *"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".*

33. The relevant part of Article 26 of the Constitution entitled *"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*
>
> *...*
>
> *The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."*

34. In Article 26 of the Constitution, the means likely to be used in expressing and disseminating thought are listed as "*by speech, in writing or in pictures or through other media"*. The expression of *"through other media"* indicates that all kinds of expression means are under the constitutional protection (see *Emin Aydın*, no. 2013/2602, 23 January 2014, § 43).

35. Pursuant to these legal arrangements, the freedom of expression encompasses not only *"the freedom of having thought and conviction"* but also *"the freedom to express and disseminate thought and conviction (opinion)"* and in conjunction therewith *"the freedom of receiving and imparting news or opinion"*. In this scope, the freedom of expression amounts to the individual's ability to freely have access to news and information and the others' opinions, not to be exposed to reprimand on account of his thoughts and convictions, to freely express, explain, assert, convey to others and disseminate these thoughts and convictions, on his own or together with others, through various means (see *Emin Aydın*, cited-above, § 40).

36. In this sense, ensuring social and political pluralism depends on expression of all kinds of thoughts in a peaceful and free manner. In the same vein, an individual may realize his unique personality in an environment where he can freely express and discuss his

thoughts. The freedom of expression is a value needed by us in defining, understanding and perceiving ourselves and others and, in this sense, in establishing relations with others (see *Emin Aydın*, cited-above, § 41).

37. Article 26 § 1 of the Constitution does not impose a restriction on the freedom of expression in respect of content. In other words, the freedom of expression which is applicable to both real and legal persons encompasses all kinds of expressions regardless of whether being political, artistic, academic or commercial in nature. Likewise, classifying a thought which is expressed and disseminated as *"worthwhile or not worthwhile"* or *"useful or not useful for the society"* is not a significant criterion for benefiting from this freedom.

38. The freedom of expression ensures the enlightenment of the individual and the society by means of enabling transmission and circulation of thoughts. Expression of thoughts including those which are opposing to the majority through any kinds of means, attracting shareholders for thoughts which have been expressed, materialization of thoughts and convincing others to materialize any thought are the requirements of the pluralist democratic society. Accordingly, the freedom of expression and dissemination of thought is of vital importance for the functioning of democracy (see *Abdullah Öcalan* [Plenary Assembly], no: 2013/409, 25 June 2014, § 74).

39. On the other hand, the freedom of expression is a right which may be restricted and subject to the restriction regime applied to the fundamental rights and freedoms set out in the Constitution. Although the grounds for a restriction likely to be imposed on the freedom of expression are specified in Article 26 § 2 of the Constitution, it is explicit that such restrictions must be limited. The criteria set out in Article 13 of the Constitution must be taken into account in restricting the fundamental rights and freedoms. Therefore, the restrictions imposed on the freedom of expression must be reviewed within the framework of the criteria set out in Article 13 and within the scope of Article 26 of the Constitution (see *Abdullah Öcalan*, cited-above, § 41).

40. This application was lodged on the ground that the court rendered a decision of reprimand by holding that expressions used by the applicant during a meeting caused damaged to the plaintiffs' honour and reputation.

41. The first matter that must be dealt with in the present incident is to ascertain whether rendering of a decision of reprimand against the applicant has constituted an

interference with her freedom of expression. At the subsequent stages, it must be determined whether the interference found established is based on legitimate aims; whether the right in question has been restricted to the extent that would infringe upon the very essence of this right; whether the restriction is necessary in a democratic society; and whether the means used are disproportionate.

a. Existence of Interference

42. A decision of reprimand was rendered by concluding that the expressions used by the applicant at a meeting impaired the plaintiffs' honour and reputation. Even if the applicant did not have to pay compensation to the plaintiffs, the decision for *"reprimanding infringement"* is a means for redress which may be afforded, pursuant to Article 58 of the Code no. 6098, instead of awarding non-pecuniary compensation or along with the non-pecuniary compensation only when it is found established that there has been an impairment of the personal right of the plaintiff. Therefore, *"reprimand of infringement"* by a court decision due to certain political expressions used by the applicant during a meeting constitutes interference with her freedom of expression.

b. Whether the Interference Constitutes a Violation

43. The above-mentioned interference would constitute a breach of Article 26 of the Constitution unless it relies on one or more than one justified reasons set out in Article 26 § 2 of the Constitution and fulfils the conditions stipulated in Article 13 of the Convention. Therefore, it must be established whether the restriction imposed complies with the conditions set out in Article 13 of the Constitution; namely not impairing the very essence of the right, being envisaged in the relevant article of the Constitution, being prescribed by law and not being in contravention of the wording and spirit of the Constitution, the requirements of the democratic social order and the secular Republic and the principle of proportionality.

i. Being Prescribed by Law

44. The applicant did not raise an allegation that there was a breach of the provision *"exercising of these rights shall be prescribed by law"* set out in Article 26 § 5 of the Constitution and the requirement *"being prescribed by law"* specified in Article 13 therein. At the end of the assessments made, it has been concluded that Articles 49, 50 and 58 of the Code no. 6098 fulfil the criterion of *"being prescribed by law"*.

ii. Legitimate Aim

45. It has been concluded that the court's decision for *"reprimanding the applicant's infringement"* is a part of the measures for the protection of the other individuals' reputation or rights and pursues a legitimate aim.

iii. Being Necessary in A Democratic Society and Proportionality

46. Finally, it must be assessed whether a reasonable balance was struck in a democratic society between the applicant's freedom of expression and the protection of other individuals' reputation or rights in rendering a decision for "*reprimanding the applicant's infringement*" on account of the words uttered by her at a meeting.

47. The individual's reputation and dignity are within the scope of the "spiritual entity" which is set out in Article 17 of the Constitution. The state is liable not to arbitrarily interfere with the individual's reputation and dignity as a part of his spiritual entity and to prevent attacks of the third persons. The interference by a third person with the individuals' reputation and dignity may take place, along with several probabilities, also through visual and audial media. Even if an individual has been criticized within the scope of a public debate through visual and audial media, his reputation and dignity must be assessed as a part of his spiritual integrity (see *Nilgün Halloran*, no.: 2012/1184, 16 July 2014, § 41; *Adnan Oktar* (*3),* no.: 2013/1123, 2 October 2013, § 33).

48. The state has positive and negative obligations in the sphere of the freedom of expression. The public authorities must not prohibit expression and dissemination of thoughts and make these acts subject to sanctions unless necessary within the scope of negative obligation whereas they must take measures necessary for real and effective protection of the freedom of expression within the scope of positive obligation (see *Nilgün Halloran*, cited-above, § 43; for a similar judgment of the ECtHR, see *Özgür Gündem v. Turkey*, no.: 23144/93, 16 March 2000, § 43). In our country, the third persons' interference with the other individuals' honour and reputation are envisaged to be under both penal and legal protection (see *Nilgün Halloran*, cited-above, § 42; and *Adnan Oktar (3),* cited-above, § 35).

49. Within the framework of the state's positive obligations concerning the protection of individuals' material and spiritual entity, the state must strike a fair balance between the right to respect for honour and dignity and the other party's freedom to express and disseminate thoughts guaranteed in the Constitution (for a similar judgment of the ECtHR, see

Von Hannover v. Germany (no.2) [GC], no. 40660/08 and 60641/08, 7 February 2012, § 99). In striking such a balance, the requirements of a democratic society must be taken into consideration within the scope of Articles 13 and 26 of the Constitution, a proportionate balance must be struck between the aim and means of restriction, and very essence of the right must not be impaired (see *Nilgün Halloran*, cited-above, § 43).

50. In the established case-law of the Constitutional Court, democracies are accepted to be regimes where the fundamental rights and freedoms are ensured and guaranteed to the largest extent. Restrictions which have impaired the very essence of the fundamental rights and freedoms and entirely rendered them unusable cannot be considered to be in compliance with the requirements of a democratic social order. Therefore, the fundamental rights and freedoms may be restricted only by law, under exceptional circumstances, on condition of not impairing the very essence of these rights and freedoms and to the extent required for maintaining the democratic social order (see the Constitutional Court's judgment no. E.2006/142, K.2008/148 and dated 24 September 2008). In other words, if the restriction imposed ceases the enjoyment of the right and freedom in question or dramatically renders their enjoyment difficult by means of infringing upon the very essence of the right and freedom or impairs the balance between the aim and means of the restriction, which is in breach of the principle of proportionality, this restriction will be against the democratic social order (see the Constitutional Court's judgment no. E.2009/59, K.2011/69 and dated 28 April 2011; and the Constitutional Court's judgment no. E.2006/142, K.2008/148 and dated 17 April 2008).

51. The notion of *"requirements of a democratic social order"* which is envisaged to be respected in respect of the interferences not in breach of the prohibition of impairing the very essence of the right primarily entails that the restriction to be imposed on the freedom of expression must be compulsory or exceptional in nature and must appear to be the last resort likely to be applied or as the last measure likely to be taken. *"Being a requirement of the democratic social order"* means that a restriction serves for the aim of meeting a pressing social need in a democratic society. Accordingly, if the restrictive measure does not meet a social need or is not in the nature of the last resort likely to be applied, it cannot be considered to be a measure which is compatible with the requirements of a democratic social order (for a similar judgment of the ECtHR, see *Handyside v. the United Kingdom*, no.: 5493/72, 7 December 1976, § 48).

52. Then, it would be required to ascertain whether the interference with the freedom of expression has been made due to a pressing social need or not. In this framework, an interference must be proportionate with the legitimate aim pursued, and in the second place, the grounds shown by the public authorities must be related to the incident and sufficient for rendering the interference justified (for a similar assessment in another context, see *Tayfun Cengiz*, no.: 2013/8463, 18 September 2014, § 56).

53. Accordingly, it is beyond doubt that the freedom of expression, which constitutes one of the essential foundations of a democratic society, is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, cited-above, § 49).

54. Another safeguard which must be primarily taken into consideration in the applications concerning imposition of a restriction on the fundamental rights and freedoms is *"the principle of proportionality"* set out in Article 13 of the Constitution. It must be examined whether any restriction imposed on the fundamental rights and freedoms is necessary in a democratic social order; in other words, whether it has attained the public interest pursued and whether it is a proportionate restriction allowing for the least interference with the fundamental rights (see the Constitutional Court's judgment no. E.2007/4, K.2007/81 and dated 18 October 2007).

55. According to the judgments of the Constitutional Court, the proportionality reflects the link between the aims and means of restriction imposed on the fundamental rights and freedoms. The review of proportionality means review, on the basis of the desired aim, of the means selected for attaining this aim. Therefore, in interferences imposed within the sphere of the freedom of expression, it must be assessed whether the means of interference selected for attaining the desired aim is sufficient, necessary and proportionate (see *Abdullah Öcalan,* cited-above, § 97).

56. In this regard, the centreline of the assessments to be made in respect of the impugned incident is to whether the inferior courts could plausibly set forth the grounds on which they relied in their decisions constituting the interference in question were *"necessary*

in a democratic society" and compatible with the *"principle of proportionality"* in respect of the restriction imposed on the freedom of expression.

57. In the light of the above-mentioned assessments, in awarding compensation or imposing a penalty for expression and dissemination of thoughts, the courts must indicate, by relying on concrete facts, the existence of an interest which is far outweighing than and must be protected more than the interest resulting from the enjoyment of the freedom to express and disseminate thoughts (see *Mustafa Ali Balbay*, no.: 2012/1272, 4 December 2013, § 114).

58. As a result, in assessing whether the interference with the applicant's freedom of expression is in breach of Article 26 of the Constitution, an abstract assessment must not be made, and it must be taken into consideration as to whether the type of expressions used by the applicant, its capacity of making contribution to public debates, the nature and scope of the restrictions imposed on the expressions, by whom these expressions were uttered and to whom these expressions were addressed and the gravity of the rights that the public and the other individuals have *vis-à-vis* the expressions uttered were properly assessed or not.

59. Before the impugned speech was delivered, an intensive debate had taken place for a long-time due to the referendum to be held for the constitutional amendment on 12 September 2010. Subsequent to the referendum, debates on the results of this referendum continued as the constitutional amendment was adopted through the referendum. The impugned speech was delivered on 19 September 2010, and the applicant continued disclosing her thoughts about the amendment made to the constitution as a result of the referendum via a TV program broadcasted through a national channel she appeared on 20 October 2010, namely a day later.

60. The applicant asserted that by the constitutional amendment made, it was aimed at abandoning the *"philosophy"* tried to be impressed by Mustafa Kemal Ataturk and that the amendments in question were to the detriment of independence of Turkey and in favour of the interest of imperialism. The applicant stated that *"values of the Republic"* had been forgotten day by day; that those casting *"yes"* vote in the referendum had voted unconsciously; that the society must be educated; that "*except for those voting consciously*, the ones acting unconsciously were *"negligent, misguided and traitors"*; and that if Turks *"served for their own country, they would not be co-conspirator of the imperialist powers"*. The applicant

wished to explain *"the mistake made"* by those casting *"yes"* vote in the referendum from her own perspective.

61. The first instance courts acknowledged the first and second actions for compensation brought against the applicant and awarded compensation against the applicant whereas the third action for compensation was dismissed by the first instance court. However, the decisions were quashed by the Court of Cassation on the ground that a decision for reprimand should have been rendered in respect of the applicant. Thereupon, taking into account the grounds specified in the quashing judgment of the Court of Cassation, the first instance courts acknowledged the actions and decided that the applicant be subject to reprimand. Therefore, in the course of the examination of the applicant's complaint that rendering of a decision of reprimand was in breach of her freedom of expression, the grounds specified in the quashing judgments of the 4th Civil Chamber of the Court of Cassation must be assessed (§§ 15 and 18).

62. On the other hand, dealing with, merely and alone, the decisions rendered by the inferior courts cannot suffice in the examination of individual applications. Primarily, the words uttered by the applicant must be assessed within the entirety of the incident without extracting these words from the entire speech and the context in which they were uttered (see *Nilgün Halloran*, cited-above, § 52).

63. The 4th Civil Chamber of the Court of Cassation concluded that the infringement must be reprimanded given *"titles of the parties, nature of the words uttered, the atmosphere where they were uttered, the mass to whom the speaker addressed and potential effect of these words and the fact that the plaintiff was not individually addressed to during the applicant's speech but referred to as a community"*. According to the applicant, the impugned words were uttered in order to "*emphasize the mistake made by individuals*" for casting a *"yes"* vote. Indeed, the applicant uttered these words in order to draw the attention to the dangerous situation which, in the applicant's opinion, posed a threat to the country and to the regime due to the constitutional amendment.

64. The freedom of expression mainly aims at safeguarding the freedom to criticize, and severe nature of the expressions used in expression and dissemination of thoughts must be taken for granted. Furthermore, having regard to the fact that the freedom of political debate is *"the basic principle of all democratic systems"* (see *Lingens v. Austria*, no.: 9815/82,

8/7/1986, § 41-42), freedom of political expression through which political policies and politicians are criticized and political policies or expressions are discussed in an opposing manner, as in the impugned speeches, must be paid further attention in comparison to the other types of expressions.

65. Article 26 § 2 of the Constitution allows for scarce restriction on political expressions and expressions concerning the public. Arguing for a political debate is a basic element of the democratic society. Therefore, the political expressions must not be subject to restriction unless there are compelling grounds (for a similar judgment of the ECtHR, see *Feldek v. Slovakia*, no.: 29032/95, 12 July 2001, § 83).

66. As indicated on the well-established case-law of the ECtHR, the governments must show tolerance to even the most severe criticisms addressed to them linked to the public power enjoyed by them. A sound democracy entails that the government be subject to scrutiny not only by the legislative organ or judicial bodies but also by the non-governmental organizations, media and press or the other actors taking part in the political sphere such as political parties (for a similar judgment, see *Castells v. Spain*, no.: 11798/85, 23 April 1992, § 46).

67. In the same vein, the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by public and also the other politicians, and he must consequently display a greater degree of tolerance (for a similar judgment, see *Lingens,* cited-above § 42).

68. However, the politicians' liability to display a greater degree of tolerance does not mean that "*the reputation and rights of others*" set out in Article 26 § 2 of the Constitution would not be protected. On the contrary, this provision enables the protection of all individuals. However, in respect of the politicians who are not acting in their private capacity, the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues (for the ECtHR's attitude on the same matter, see *Lingens*, cited-above § 42).

69. In the present incident, the applicant used severe expressions about the amendments making considerable changes in the Constitution as a result of the referendum, and on the other hand, the 4th Civil Chamber of the Court of Cassation decided that the

thoughts delivered and the words uttered by the applicant, as a whole, amounted to an attack towards the honour and dignity of the plaintiffs. It appears that it was possible for the Chamber of the Court of Cassation to accept that the original purpose of the applicant was to humiliate the plaintiffs only when it assigned meanings to these words beyond the ones attributed by the applicant herself; and that the Chamber must not assign meanings, beyond the ones attributed by the applicant, to the words uttered by her.

70. Finally, it is not the Constitutional Court's duty to determine the case-law to be resorted by the inferior courts in cases similar to the present one. Nevertheless, it must be pointed out that tens of actions for compensation were brought against the applicant for the words she had uttered towards those who had casted "yes" vote in the referendum. In the present case, it was decided that the applicant be reprimanded for five times. It must be noted that such sanctions may make the public debates difficult and have chilling effect on individuals. In the event that those participating in public debates have worry for being subject to sanctions even light in nature, this would have an interruptive effect on them.

71. Moreover, the acknowledgement, by the courts, of all actions brought by individuals of a certain section of the society due to expression of thoughts against this section at such an overlapping sphere, where it is extremely difficult to ascertain who the victim is, would also have a chilling effect on the freedom of expression. Under such an influence, the individuals may refrain from expressing and disseminating their thoughts in future.

72. It is beyond any doubt that the applicant's analysis and criticism in her contested speech concerning the referendum held for the constitutional amendment are generally a concern for the public interest; and that the margin of criticism addressed towards the governments and the politicians are wider than that of the other individuals. Therefore, it has been concluded that the interference with the applicant's freedom of expression was not necessary in a democratic society for the protection of "*the other individuals' reputation and rights*".

73. For these reasons, it has been held that the applicant's freedom of expression guaranteed under Article 26 of the Constitution was breached.

Erdal TERCAN expressed his dissenting opinion in this respect.

3. Article 50 of the Law no. 6216

74. Any amount of compensation was not awarded in respect of the applicant. However, as the plaintiffs were represented by a lawyer throughout the proceedings, the applicant paid TRY 10,910.00, TRY 1,800.00 and TRY 5,000.00 respectively in the first, second and third actions as the counsel's fee, the court's expenses and the interest amount.

75. The applicant claimed pecuniary compensation of TRY 14,931.00 which is the total amount of the court expenses and the counsel's fees she had to pay on account of the actions brought against her. The applicant did not request pecuniary compensation in respect of the fourth and fifth actions. The applicant requested the Court to award non-pecuniary compensation a total amount of TRY 25,000.00 – TRY 5,000.00 for each action – in her favour.

76. In Article 50 § 1 of the Law no. 6216, it is specified that at the end of the examination on the merits, if a judgment finding a violation has been rendered, the Constitutional Court shall adjudicate on the steps that must be taken for the elimination of the violation and consequences thereof; that however, legitimacy review cannot be conducted, and decisions in the nature of administrative acts and actions cannot be taken.

77. In the application concerning the violation of the applicant's freedom of expression, it has been held that a net amount of TRY 5,000.00 be paid to the applicant as non-pecuniary compensation due to the non-pecuniary damage which she suffered and which could not be eliminated by means of only finding of a violation.

78. As it appears that the applicant suffered pecuniary damage due to the counsel's fee and the other expenses she had paid to the plaintiffs by virtue of the decisions rendered against her, it has been held that an amount of TRY 14,931.00 be paid to her as pecuniary compensation.

79. As the applicant requested that the counsel's fee and the court expenses incurring before the Constitutional Court be indemnified, it has been concluded that a total amount of TRY 2,530.50 which consists of the application fee of TRY 1,030.50 and the counsel's fee of TRY 1,500.00 and which was paid by the applicant and determined according to the documents in the file be paid to the applicant as the litigation expense.

V. JUDGMENT

For the above-cited reasons, the Constitutional Court has held on 7 July 2015 that

A.

1. **UNANIMOUSLY**, the applicant's allegations that there was a breach of freedom of expression be **DECLARED ADMISSIBLE;**

2. With the dissenting opinion of Erdal TERCAN and **BY A MAJORITY VOTE**, the freedom of expression guaranteed in Article 26 of the Constitution was **VIOLATED**;

3. With the dissenting opinion of Erdal TERCAN and **BY A MAJORITY VOTE**, the applicant's request for retrial be REJECTED for non-existence of any legal interest; and that a total net amount of TRY 19,931.00 – TRY 5,000.00 as non-pecuniary and TRY 14,931.00 as pecuniary compensation – be paid to the applicant;

B. UNANIMOUSLY, the court expense of TRY 2,530.50 consisting of the fee of TRY 1,030.50 and the counsel's fee of TRY 1,500.00 be **REIMBURSED TO THE APPLICANT**

C. UNANIMOUSLY, the payment would be made within four months following the date of application to be made to the Ministry of Finance upon the service of this judgment; and in case of any delay in payment, a statutory interest would be charged for the period from the expiration date of the prescribed period to the payment date.

DISSENTING OPINION

The applicant delivered a speech as the Chairman of the Ataturkist Ideology Association in the panel entitled "*Where is Turkey heading to?*" and held by the Hatay Branch Office of the Association concerning the constitutional amendment of 2010 on 19 September 2010. The following expressions were used concerning those casting yes vote in the referendum:

> *"The solutions are inherent in us; that is to say, in you. In other words, in our votes. If these votes are conscious ones, how nice! However, the unconscious votes; in other words, the votes other than 42%, are negligent, misguided and even traitors. We all know treason. I do not accuse those who have been here for their interests to batten*

upon us. They serve for their own countries. If ours also serve for their own countries, they do not become co-conspirator under the command of these imperialist powers".

A great number of actions were brought against the applicant due to her expressions, and at the end of the proceedings, the first instance courts rendered a decision of reprimand in respect of her. These decisions were upheld by the Court of Cassation following the appeal process.

The majority of the Section reached the conclusion that the applicant's expressions must be considered to fall within the scope of the freedom of expression and accordingly concluded that the applicant's freedom of expression was violated due to the decision of reprimand given in respect of her.

The first and second paragraphs of Article 26 of the Constitution entitled *"freedom of expression and dissemination of thought"* read 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."

As is seen, everyone has, in principle, the right to freedom of expression and dissemination of thought. It is an extremely important right for democracies. This right becomes more of an issue in respect of those who are opponents. However, the freedom of expression is not unlimited in nature and may be subject to restriction under circumstances set out in Article 26 § 2 of the Constitution. In the present incident, the applicant's freedom of expression may be subject to restriction for the purpose of protecting the others' reputation and rights. Nevertheless, in case of such a restriction, the criteria of restriction specified in Article 13 of the Constitution must be complied with.

In my opinion, the applicant went beyond the limits of freedom of expression and criticism due to her expressions used in her speech and explicitly accused those except for the ones casting no vote in the referendum, who constitute the rate of 42%, in other words, those casting yes vote constituting the rate of 58% of being negligent, misguided and even traitors. These words went beyond the limits of criticism and amounted to defamation. Therefore, there was an explicit attack towards the personal rights of the addressees.

The first instance courts and the Court of Cassation found it appropriate to render a decision of reprimand pursuant to Article 58 § 2 of the Code of Obligations due to this attack towards the plaintiffs' personal rights. Given Articles 13 and 26 of the Constitution, this decision is a proportionate sanction. Therefore, this application must be dismissed as there was no violation in the present case.

Moreover, the majority of the Section held that an amount of TRY 5,000 be paid to the applicant as non-pecuniary compensation and an amount of pecuniary compensation corresponding to the court expenses incurring throughout the actions brought against her be awarded. I consider that compensation may be awarded in cases where there is no legal interest in holding a retrial pursuant to Article 50 § 2 of the Law no. 6216. In the present application, even if a judgment finding a violation is rendered, the applicant's legal interest may be realized through retrial. There must be no need for awarding compensation. Excessive number of actions brought against the applicant must not play a decisive role in this respect. Furthermore, nor did the Constitutional Court decide, in its previous judgments finding a violation and rendered within the scope of the freedom of expression, that the court expenses paid by the applicants throughout the previous proceedings be reimbursed to them as pecuniary compensation.

For these reasons, I am unable to agree with the judgment finding a violation rendered by the majority of the Section and with the award of pecuniary compensation for the elimination of the consequences thereof.

Member
Erdal TERCAN