

**REPUBLIC OF TURKEY**  
**CONSTITUTIONAL COURT**

**PLENARY ASSEMBLY**

**JUDGMENT**

**ALİ RIZA ÜÇER APPLICATION**

(Application Number: 2013/8598)

Date of Judgment: 2/7/2015

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## PLENARY ASSEMBLY

### JUDGMENT

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<b>Applicant</b>	: Ali Rıza ÜÇER
<b>Representative</b>	: Att. Erkin GÖÇMEN

#### I. SUBJECT-MATTER OF THE APPLICATION

1. This application concerns the applicant's allegation that his right to freedom of expression was violated as compensation was awarded against him in the action brought with the allegation that the applicant's expressions used in the reports drawn up by him concerning

tap water of Ankara had constituted defamation against the Mayor of the Ankara Metropolitan Municipality.

## **II. APPLICATION PROCESS**

2. The individual application was directly lodged with the Constitutional Court on 27 November 2013. Upon the preliminary examination of the petitions and annexes thereto under administrative aspect, the deficiencies found were ensured to be completed, and it has been found established that there was no deficiency which would prevent its referral to the Commission.

3. On 31 December 2015, the First Commission of the Second Section decided that the examination on the admissibility be made by the Section, and therefore the case-file be referred to the Section.

4. At the session held on 5 February 2015, the President of the Section decided that the examination on the admissibility and merits be made concurrently and that one copy of the application be submitted to the Ministry of Justice (“the Ministry”) for receiving its observations.

5. The facts of the application were notified to the Ministry on 5 February 2015. The written observations of the Ministry were submitted to the Constitutional Court on 23 March 2015.

6. The Ministry’s observations were served on the applicant on 3 April 2015. The applicant submitted his counter-statements to the Constitutional Court on 17 April 2015.

7. As, at the meeting of the Section held on 25 June 2015, it was found necessary that the application, by its very nature, must be concluded by the Plenary Assembly, the application was referred to the Plenary Assembly for being examined pursuant to Article 28 § 3 of the Internal Regulations of the Court.

## **III. THE FACTS**

### **A. The Circumstances of the Case**

8. The applicant is a radiation oncologist and serves as the Secretary General of the Medical Institution Association.

9. In June 2008, a debate concerning the arsenic level of tap water of the province of Ankara emerged among the public, and the applicant, together with another specialist, issued three separate press statements on the website of the association of which he was a member.

10. In the impugned press statement of 2 June 2008, the following expressions are included:

*“Melih Gökçek, who is the Mayor of the Ankara Metropolitan Municipality, indicated during the press conference held by him at the Press Centre of the Metropolitan Municipality on 28 May that they surprised the opposing party spreading rumours that the water supplied from the Kızılırmak river was not fit to drink and expressed that those residing in Ankara had been drinking Kızılırmak water for 21 days; and that he wished the residents would have a nice drink. Mr. Gökçek also added “if they had announced that the Kızılırmak water would be delivered, certain non-governmental organizations would have made a fuss. If they had informed the public of the day when the Kızılırmak water would be delivered, they would have made a big thing of it. On 3 August, I gave the example of news reported by the Ankara Chamber of Medical Doctors. When the water was cut, they announced that there would be diarrhoea cases. I told that there would be agitations on the day when the Kızılırmak water was provided for those residing in Ankara. The residents of Ankara have been drinking the Kızılırmak water for 21 days. Nobody has noticed it. There was no increase in diarrhoea cases. Upon my speech, certain chambers would start to cry out. The water provided by the Municipality is quite healthy. It has been thereby revealed that the fuss made is ideologic”.*

*Mr. Gökçek handled the matter with a quietly superficial manner by means of restricting the quality of tap water only with diarrhoea cases suffered by those drinking municipal water. Diarrhoea cases likely to develop depending on the existence of pathogenic microorganisms within tap water are a result through which quality of tap water may be tested easily and early. However, no matter how poor the water quality is, these pathogenic microorganisms may be eliminated through simple disinfection actions such as chlorination, and thereby those drinking this water are prevented from suffering from diarrhoea cases. In other words, the fact that those drinking this water do not suffer from diarrhoea cases does not mean that this tap water is proper in terms of health. The essential parameter for the quality of tap water*

*in respect of human health is chemical contamination which is toxic in nature and which could not be easily eliminated through simple treatment methods. Effect of such chemical contaminations emerges among the communities drinking this tap water many years later such as the increase in chronic diseases notably cancer. According to Mr. Gökçek's explanation, Kızılırmak water has been provided for those living in Ankara since 7 May through the Kesikköprü project. In this respect, there are remarkable issues in the "Water Test Report" issued by the Treatment Facilities Department of the Directorate General of the Ankara Water and Sewerage Administration ("the ASKI") on 13 May 2008, namely 6 days after the provision of the Kızılırmak water to Ankara. Therefore, the analysis of 13 May must be discussed delicately. According to the ASKI's analysis, Sample no. 1 is Untreated Raw Water and Sample no. 2 is Treated Water obtained from the Ivedik Water Outlet.*

*In the world, the primary toxic substance in tap water which most leads to problem is arsenic due to its detrimental effect on human health notably its cancerogenic effect. High levels of arsenic in tap water may lead to bladder, lung, skin, kidney and liver cancer. Moreover, it may cause serious damage in central nervous system and peripheral nervous system, heart, blood vessel, and skin. According to the World Health Organization ("the WHO), the Turkish Standards Institute (TS 266) and the Regulation concerning Water Intended for Human Consumption, maximum arsenic level per 1 litre water is 10 micrograms. It is specified in a report issued with respect to the Raw Water Analysis made in the ASKI Ivedik Water Treatment Facilities before the Kızılırmak water was brought that the arsenic level is lower than 10 micrograms. However, this report does not point out how much unit the arsenic level in the former water of Ankara is lower than 10 micrograms.*

*In the above-mentioned analysis of 13 May made in respect of the ASKI Kızılırmak water, arsenic level in the Untreated Raw Water Sample no. 1 is reported to be 12.1 microgram litres. However, arsenic level in the Treated Water in the Ivedik Water Outlet (Sample No. 2) is reported to be under 1 microgram. Last night (on 1 June), Mr. Melih Gökçek disclosed the arsenic level of Raw Water sample as 13.7 micrograms in the analysis made on 27 May. It must be clarified how arsenic levels were reduced to such lower levels through conventional treatment methods.*

*Depending on the arsenic concentration in tap water, the risk of increase in the bladder and lung cancer cases per 10 thousand population is as follows:*

<i>Tap water Arsenic Concent.</i>	<i>Bladder Cancer</i>		<i>Lung Cancer</i>	
	<i>Woman</i>	<i>Man</i>	<i>Woman</i>	<i>Man</i>
<i>3</i>	<i>4</i>	<i>7</i>	<i>5</i>	<i>4</i>
<i>5</i>	<i>6</i>	<i>11</i>	<i>9</i>	<i>7</i>
<i>10</i>	<i>12</i>	<i>23</i>	<i>18</i>	<i>14</i>
<i>20</i>	<i>24</i>	<i>45</i>	<i>36</i>	<i>27</i>

*Risk ratio pertaining to leading of arsenic ratio in tap water to cancer is as follows:*

<i>Arsenic Level in Tap Water (in parts per billion, or ppb)</i>	<i>Approximate Total Cancer Risk (in consumption of 2 litres per day)</i>
<i>0.5 ppb</i>	<i>1 in 10,000</i>
<i>1 ppb</i>	<i>1 in 5,000</i>
<i>3 ppb</i>	<i>1 in 1,667</i>
<i>4 ppb</i>	<i>1 in 1,250</i>
<i>5 ppb</i>	<i>1 in 1,000</i>
<i>10 ppb</i>	<i>1 in 500</i>
<i>20 ppb</i>	<i>1 in 250</i>
<i>25 ppb</i>	<i>1 in 200</i>
<i>50 ppb</i>	<i>1 in 100</i>

*As is seen in the chart above, even low levels of arsenic such as 1 ppb or 5 ppb in tap water lead to a total cancer risk at the rates of one per five thousand and one per ten thousand, respectively. Let's deal with the cancer risk likely to occur if tap water in Ankara contains 3 micrograms arsenic in average, according to the data provided by the **NAS**. If we assume that range of woman and man is equal, new bladder cancer cases will occur, only depending on such level of arsenic concentration, in 850 out of the women residing in Ankara and 1500 out of men residing in Ankara throughout their lives (a total of 2350 new bladder cancer cases). Once again, in case of arsenic concentration of 3 micrograms in average, 1050 women and 850 men residing in Ankara would expose to new lung cancer case (a total of 1900 new lung cancer cases). In such a case, in case of arsenic density of 3 micrograms in average in tap water, this would lead to 4250 persons residing in Ankara to suffer from*

*bladder and lung cancers. Lung and bladder cancer cases occurring in the arsenic level of 5 micrograms and 10 micrograms are at much high levels. This issue is therefore highly sensitive and not in the nature which would be slid over through mediatic shows.*

*According to data provided by the ASKI, arsenic level in the Raw Water Sample no. 1, which was subject to analysis, is 12.7 micrograms/litres. The answer to be given to the question that how arsenic level in the Treated Water in the Ivedik Water Outlet no. 2 (Sample No. 2) could drop below 1 microgram is of great importance in the light of the scientific data cited above.*

*Another heavy metal which is of importance in the toxicology assessment of the Kızılırmak water is cadmium. However, the ASKI Kızılırmak Water Analysis does not include the values pertaining to the cadmium measurement. Why was not cadmium analysis performed?*

*The Kızılırmak River is also contaminated with agricultural pesticide throughout the State route of 1150 kilometres. Why was not an analysis pertaining to pesticide-based toxins carried out?*

*In the Kızılırmak water, level of sulphate was found to be higher than maximum values in the analyses carried out by both the State Hydraulic Works and the Middle East Technical University (“the METU”). Recommended level of sulphate in one litre of water is 25 milligrams, and the limit level is 250 milligrams. The average level of sulphate measured by the DSI in 2005 of the Kızılırmak water (Kesikköprü Dam Water Outlet Station) is 330.5 milligrams / litres. The level of sulphate measured by the METU in 2007 at the same point is 506 milligrams / litres. In the water analysis made by the ASKI in respect of the Sample No. 1 (Untreated Raw Water) on 13 May, level of sulphate is 50 milligrams / litres. This level is reported as 68 milligrams / litres in Sample No. 2 (Treated Water in the Ivedik Water Outlet). What is the reason for the significance difference between the results of the ASKI’s sulphate analysis and the results of analyses performed by both the DSI and the METU? May non-mixing (non-blending) nature of the Kızılırmak water with the other water and seasonal conditions justify such a big difference? How would you find a solution to this problem as you do not have the opportunity to reach the current mixing level during the summer which would be a dry period?*

*What is the evidence proving the reliability of the results obtained by the ASKI Water Analysis laboratories? Are there any international reference laboratories which have accredited the ASKI laboratories on the basis of each substance?*

*In provinces which are on the route of the Kızılırmak river, except for the province of Kayseri, there are no waste water treatment facility. Sewerages get mixed with the Kızılırmak river. No matter how successful the treatment process is, this situation is a significant psychological factor which would prevent those residing in Ankara from consuming its water. As a matter of fact, in the province of Kırıkkale, the Kızılırmak water is firstly mixed with well water and then delivered to the city as tap water. However, the people living in Kırıkkale do not consume this water as it is of poor quality. Likewise, this would rapidly lead to a boom in the consumption of dispenser size water and water in other forms, and a significant annual growth exceeding 1 quadrillion liras (1 billion Turkish Liras) would take place in water markets. In an atmosphere where water market has swiftly come under the domination of transnational companies as in other sectors, local collaborators of these companies would get their shares from the distribution of unearned income.”*

11. The press statement in question was published on the same date via the web-site of the Medical Institution Association. At the subsequent dates, it was reported as news through certain press and media organs. On 26 June 2008, the plaintiff who was the Mayor of the Ankara Metropolitan Municipality brought an action for compensation against the applicant by maintaining that certain expressions in the press statement amounted to a defamation against him.

12. The plaintiff asserted that the impugned press statement was published by four national newspapers in different issues of June 2008; and that the applicant's and his friend's allegations that the Kızılırmak water included arsenic and arsenic led to bladder, lung, skin, kidney and liver cancers appeared on some other media organs; and that the news reported were lack of scientific basis. The plaintiff alleged that the allegations included in this press statement amounted to an aspersion, which caused an attack towards his personal rights; that this press statement went beyond the limits of criticism and aimed at causing panic among the public. He also maintained that the tap water of Ankara was clean and international criteria were complied with. He noted that according to the analysis results obtained, it was found established that there was no problem in the tap water of Ankara. The plaintiff claimed non-pecuniary compensation by maintaining that his reputation was tarnished due to the impugned press statement and that he felt upset due to these expressions.

13. By its decision dated 31 October 2013, the 10<sup>th</sup> Chamber of the Ankara Magistrate's Court in Civil Matters partially acknowledged the action and ordered that an

amount of 750,00 Turkish Liras (“TRY”) be paid to the plaintiff by the applicant and the other defendants as non-pecuniary compensation. Reasoning of this decision is as follows:

*“It is maintained in the press statement in question that the plaintiff, Mr. İbrahim Melih Gökçek, who is the Mayor of the Metropolitan Municipality, has caused those residing in Ankara to consume unhealthy water; and that those residing in Ankara would face with the risk of suffering from bladder and lung cancers due to the consumption of this water. It is also explicitly indicated in this press statement that this water includes toxic chemical substances. Those issuing this press statement thereby influenced the public. They informed the public through this press statement without any scientific data enclosed therewith, brought the Mayor of the Ankara Metropolitan Municipality under suspicion and humiliated the plaintiff before the public by alleging that he caused the public to drink such tap water which would affect the public’s safety in the above-mentioned manner. The press and the individuals are entitled to criticize the public officials. However, in exercising this right, those concerned must not exceed the limits of criticism, go beyond offensive statements which could be tolerated and make expressions which amount to value judgments humiliating, insulting the public officials and inciting to violence. It must be especially taken into consideration whether the expression uttered was infringing the individual’s mission values and whether it was uttered for defaming the victim. Accordingly, although the defendants noted that they had emphasized that the Kızılırmak water was harmful to the public health on the basis of the data they had obtained, the plaintiff asserted on the basis of the data obtained by him that there was no problem in respect of health. In other words, the risk posed by the Kızılırmak water in respect of human health is certain for neither the parties nor the science world. In this respect, the fact that the defendants uttered these expressions for the purpose of defaming the plaintiff before the public by means of going beyond the limits of criticism in evaluating the service provided by the plaintiff affected him, who felt distress due to this incident, and created an atmosphere which may lead the public to make wrong assessments. For the reasons given above, it has been found necessary to award the below-cited amount of non-pecuniary compensation against the defendants who used certain expressions by means of exceeding the limits of criticism”.*

14. This decision, which is final with respect to the amount awarded, was rendered in the presence of the applicant’s lawyer at the hearing of 31 October 2013.

15. On 27 November 2013, the applicant lodged an individual application with the Constitutional Court.

## **B. Relevant Law**

16. 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 liable to indemnify this damage.”*

#### **IV. ASSESSMENT AND GROUNDS**

17. At the meeting held on 2 July 2015, the applicant’s individual application which was dated 27 November 2013 and numbered 2013/8598 was examined, and the Constitutional Court accordingly concluded the followings.

##### **A. The Applicant’s Allegations**

18. The applicant maintained that the press statement of 2 June 2008 constituted the subject-matter of this application; that in this press statement, information was given about the effect of arsenic substance on human health and explanations of the plaintiff, who was the Mayor of the Ankara Metropolitan Municipality, were criticized; that this press statement was reported as news in certain press and media organs; that this press statement was prepared completely on the basis of scientific data; that the link between arsenic and cancer was dealt with by relying on reliable sources; and that it was considered that such a risk existed in tap water of the province of Ankara.

19. The applicant alleged that there was no attack towards the plaintiffs’ personal rights in the impugned press statement; that he was asked certain questions to be answered; that although it was prepared by referring to scientific data, the first instance court did not take into consideration this fact; and that the first instance court failed to order even performance of an expert examination in respect of the allegations included in the press statement. Maintaining that disclosing the qualifications of the Kızılırmak water brought to the province of Ankara to the public by relying on scientific data was not unlawful in any aspects and that considering otherwise would be in breach of the freedom of expression, the applicant alleged that there was a violation of the freedom of expression and the right to a fair trial set out in Articles 26 and 36 of the Constitution. The application requested the Constitutional Court to find the violation in question and ordered retrial in respect of him.

## **B. Assessment**

### **1. Admissibility**

20. 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.

21. Although the applicant maintained that his being ordered to pay compensation due to the press statement issued by him was in breach of the right to a fair trial protected under Article 36 of the Constitution, this complaint concerns the decision ordering him to pay compensation due to the press statement, and the Constitutional Court has therefore found appropriate to examine this complaint within the meaning of Article 26 of the Constitution.

22. The applicant's complaints 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**

23. The applicant maintained that his being ordered to pay compensation for disclosing the report prepared on the basis of scientific data to the public violated his freedom of expression set out in Article 26 of the Constitution. As to the applicant's allegations, the Ministry noted in its observations that the applicant's complaints must be examined within the framework of the freedom of expression and dissemination of thought enshrined in Article 26 of the Constitution. The applicant reiterated his statements included in his application petition in reply to the Ministry's observations on the merits of this application.

24. 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".*

25. 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.”*

26. 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).

27. 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 be reprimanded on account of his thoughts and convictions, to freely express, explain, assert, convey to others and disseminate these thoughts and convictions, alone or together with others, through various means (see *Emin Aydın*, cited-above, § 40). In this respect, ensuring social and political pluralism depends on expression of all kinds of thoughts in a peaceful and free manner (see *Emin Aydın*, cited-above, § 41).

28. The freedom of expression ensures 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 expressed, materialization of thoughts and convincing others to materialize any thought are the requirements of the pluralist democratic society. Accordingly, the freedom of expression is of vital importance for the functioning of democracy (see *Bekir Coşkun* [Plenary Assembly], no: 2014/12151, 4 June 2016, § 34).

29. 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 of political, artistic, academic or commercial nature. Classification of a thought which is expressed and disseminated as “*worthwhile or not worthwhile*” or “*useful or not useful*” for individuals and the public contains subjective elements. Given this consideration, the endeavour to determine the scope of the freedom of expression may lead to the restriction of this freedom in an arbitrary manner. The freedom of expression also encompasses the freedom to express and disseminate thoughts considered to be “*not worthwhile*” or “*not useful*” in respect of the others.

30. The freedom of expression, a right which may be restricted, is subject to the restriction regime applied to the fundamental rights and freedoms set out in the Constitution. The grounds for a restriction likely to be imposed on the freedom of expression are specified in Article 26 § 2 of the Constitution. However, 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 by taking into consideration the other detailed articles concerning the freedom of expression.

31. This application was lodged on the ground that the applicant was ordered to pay an amount of TRY 750.00 to the plaintiff as it was found established that the former insulted the latter in the press statement which had been firstly published on a web-site and subsequently on certain national newspapers and which had been written by the applicant. The first matter that must be resolved in the present incident is to establish whether the court’s awarding compensation against the applicant constituted an interference with the freedom of

expression. At the subsequent stages, it would be discussed whether the interference found established to exist was in breach of the freedom of expression.

**a. Existence of Interference**

32. The applicant was ordered to pay compensation to the plaintiff due to his press statement. In that case, the court's decision in question constituted an interference with the applicant's freedom of expression.

**b. Whether the Interference Constitutes a Violation**

33. 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 Constitution. Therefore, it must be established whether the restriction imposed complies with the conditions set out in Article 13 of the Constitution; namely not infringing upon the very essence of the right, depending on the grounds specified in the relevant article of the Constitution, being prescribed by law and not being in contravention of the wording and spirit of the Constitution, requirements of the democratic social order and the secular Republic and the principle of proportionality.

**i. Lawfulness**

34. The applicant did not raise an allegation that there was a breach of the provision envisaging that the interference must be made "*by law*" set out in Articles 13 and 26 § 5 of the Constitution. At the end of the assessments made, it has been concluded that Article 49 of the Code no. 6098 fulfils the criterion of "*being prescribed by law*".

**ii. Legitimate Aim**

35. It has been concluded that the court's decision ordering the applicant to pay compensation to the plaintiff for insulting him 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**

36. 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 ordering the applicant to pay

compensation on account of the expressions and allegations included in the impugned press statement.

37. 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 party 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).

38. 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 subject these acts to sanctions unless necessary within the scope of negative obligation whereas these authorities 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).

39. 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. In applications similar to the present incident, the conclusion to be reached at the end of the examination of the application does not vary, in principle, by the fact that either the application is lodged by the person uttering the expression in dispute by relying on Article 26 of the Constitution or by the person who is the addressee of this expression by relying on Article 17 § 1 of the Constitution. Otherwise, there may occur contradictory results in similar incidents and thereby in striking a balance between the rights protected in the above-cited articles of the Constitution. The judicial authorities must strike a proper balance, between the rights enshrined in these two articles, in accordance with the criteria set out in Article 13 of the Constitution and in the Constitutional Court's case-law concerning the implementation of this article (see *Bekir Coşkun*, cited-above, § 47).

40. In striking such a balance, very essence of the right must not be infringed upon within the scope of Article 13 of the Constitution, the requirements of a democratic society must be taken into consideration and a balance must be struck between the aim and means of restriction (see *Nilgün Halloran*, cited-above, § 43).

41. 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 infringing upon 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 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).

42. Accordingly, it is beyond doubt that freedom of expression, which constitutes one of the essential foundations of a democratic society, is applicable not only to expressions 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).

43. Another safeguard which would be applicable to all kinds of restrictions to be imposed 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).

44. According to the Constitutional Court’s judgments, the proportionality reflects the relation between the aims and means of restriction of the fundamental rights and freedoms. The review of proportionality is the examination of the means chosen for attaining the aim

pursued on the basis of this aim. Therefore, in interferences imposed on the sphere of the freedom of expression, it must be assessed whether the interference chosen for attaining the targeted aim is practicable, necessary and proportionate (see *Bekir Coşkun*, cited-above, § 54).

45. In this respect, it must be discussed whether the judicial or administrative interference with the freedom of expression meets a pressing social need. The centreline of the assessments to be made in respect of the impugned incident is to whether the grounds on which the inferior courts 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 (see *Bekir Coşkun*, cited-above, § 56).

46. In the light of the above-mentioned assessments, in awarding compensation or imposing a penalty for the expression and dissemination of thoughts, the courts must indicate, by relying on concrete facts, the existence of an interest which is far outweighing 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).

47. 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 at whom these expressions were targeted 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.

48. Therefore, the grounds of the interference with the freedom of expression must be plausible, in other words, be relevant and sufficient so that awarding compensation against the applicant due to his criticisms, as a oncologist and a medical doctor who was a member of the Medical Institution Association, towards the policies adopted by the plaintiff, who is a politician and the Mayor of the Ankara Metropolitan Municipality, would be considered as proportionate.

49. On the other hand, dealing with, merely and alone, the decisions rendered by the inferior courts cannot suffice in the examination of individual applications. The allegations maintained and the words uttered by the applicant in his press statement must be assessed

within the entirety of the incident without extracting the words uttered from the entire speech and the context in which they were uttered (see *Nilgün Halloran*, cited-above, § 52).

50. During the days when the impugned press statement was issued, the ASKI had been conducting activities for utilization of the Kızılırmak water as tap water in the province of Ankara due to a number of problems experienced in the provision of tap water in Ankara. On the other hand, there had been debates in the public concerning the quality of the Kızılırmak water, and a great number of news and articles had been published via many press and media organs. It has been accordingly comprehended that the impugned press statement was written within the scope of the debates in the press and media organs and in the public at the dates when the above-mentioned incidents took place.

51. In the press statement in question, the plaintiff's explanations in reply to the debates concerning the tap water were dealt with. In the press statement, it is reminded that the plaintiff maintained that those residing in Ankara had been drinking the Kızılırmak water for 21 days; however, there was no increase in the diarrhoea cases; and that the ongoing debates about this water merely amounted to defamation. In the press statement, it is asserted that there is no direct link between the diarrhoea cases and the quality of water; that no matter how poor the water quality is, the diarrhoea cases may be avoided through certain disinfection methods; and that however, chemical contamination in toxic nature cannot be eliminated through any treatment method, and various chronic diseases notably cancer would increase after many years. After the water analysis performed by the ASKI is mentioned of in the press statement, it is maintained that there are certain discrepancies therein. It is alleged that it is not possible to reduce the arsenic level of untreated raw water subsequent to treatment process, and it is accordingly asserted that the report issued by the ASKI is disputable. In the press statement, the links between the arsenic level of water and the cancer cases are indicated by referring to data published by certain international institutions and there are certain assessments concerning the number of cancer cases to be suffered by those residing in Ankara in the subsequent period due to the arsenic level of the Kızılırmak water.

52. In this press statement, it is asserted that toxins derived from agricultural pesticide and sewerage water are mixing in the river which is 1.150 kilometres in length; however, any toxicity analysis and cadmium and sulphate analyses have not been performed. In the press statement, the discrepancies between the analyses performed by the Middle East Technical University and the State Hydraulic Affairs and the analyses performed by the ASKI were

listed, and the authorities are invited to have an analysis performed by reliable and independent laboratories. In the final part of the report, the applicant alleges that those residing in Ankara do not trust the municipal water; that it is therefore predicted that value of the tap water market would exceed one billion Turkish liras in the forthcoming period; and that the water market would gradually enter into the domination of transnational companies.

53. In its decision, the 10<sup>th</sup> Chamber of the Ankara Magistrate's Court in Civil Matters dealing with the action for compensation brought against the applicant acknowledged that the public was misled without the existence of any scientific data; and that the plaintiff was humiliated before the public by alleging that the plaintiff had the public consume tap water likely to have effects on public health. The court noted that quality of the Kızılırmak water was definite for neither the parties nor "*the science world*" whereas it acknowledged that the applicant had defamed "*the service rendered by the plaintiff*" beyond the limits of criticism.

54. The freedom of expression mainly aims at securing the freedom of criticism, and the severe expressions used in the course of expression or dissemination of the opinions must be deemed natural. On the other hand, it must be taken into account that the freedom to discuss the matters which are of particular concern to the public, as in the instant case, is "the basic principle of all democratic systems". Article 26 § 2 of the Constitution prescribes certain restrictions, which are very limited in numbers, for the expressions which are a concern to the public.

55. The applicant and another oncology specialist criticize, on behalf of the Medical Institution Association, the discrepancies among the reports issued concerning the tap water of Ankara and non-performance of certain analysis required to be conducted in this regard. They also draw the attention to the chronic diseases likely to occur in Ankara. The applicant's criticisms addressed to the activities performed by the Ankara Metropolitan Municipality and remarks of the plaintiff who is a mayor. The Mayors must tolerate the severest criticism directed towards them by virtue of the public power vested in them. A sound democracy requires the supervision of a body exercising public power not only through judicial authorities but also by the non-governmental organizations, the media and the press or other actors of the political sphere such as political parties (see *Castells v. Spain*, no. 11798/85, 23 April 1992, § 46).

56. 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 the other politicians, and he must consequently display a greater degree of tolerance (for a similar judgment, see *Lingens*, cited-above § 42).

57. In the present case, the applicant, who is a medical doctor, shared his doubts concerning the quality of the Kızılırmak water with the public through the press statement he made. The applicant's allegations relied on the reports issued by certain institutions, and it was questioned how the levels of hazardous substances, which were very low compared to the reports submitted by the applicant, had been reduced. The plaintiff raised an objection to the accuracy of the reports relied on by the applicant. In this respect, the applicant may be asked to submit the reports he relied on or it may be ordered that an expert report be issued on this matter.

58. Notwithstanding, the essence of the first instance decision relies on the assumption that the applicant's allegations were not sufficiently precise rather than on their accuracy. In other words, the first instance court – according to its own point of view – sought for scientific certainty for the applicant's ability to question, as a scientist, the accuracy of the reports on tap water which was declared by the municipality to the public by relying on other reports prepared by certain institutions.

59. Seeking for scientific certainty as a criterion for being involved in a public debate which is, beyond any doubt, a concern to the public interest would render the applicant's involvement in the public debate impossible and also precludes mentioning of an open society. The justification asserted for the interferences with the discussion of public concerns, with the thought that there is no scientific certainty in this respect, cannot be considered to be relevant and sufficient.

60. Finally, it must be also kept in mind that such kinds of sanctions may render public debates difficult and result in chilling effect on individuals. In the present application, the applicant was ordered to pay compensation at an amount of TRY 750.00. The anxiety of being subject to a sanction even if a light one, which is experienced by those who have involved in the public debates, results in a chilling effect on them. Therefore, these

individuals under such an effect may abstain from disclosing and disseminating their opinions in future.

61. As in the instant case, it is beyond any doubt that the disclosure of the information on matters which are of a particular concern to the public pursues public interest. Moreover, the margin of criticism directed towards the bodies exercising public power and the politicians is wider than that of the private persons and it has been therefore held that the interference with the applicant's freedom of expression was not necessary in a democratic society.

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

### **3. Article 50 of the Law no. 6216**

63. 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.

64. The Constitutional Court has accordingly held that a copy of this judgment be **SENT** to the 10<sup>th</sup> Chamber of the Ankara Magistrate's Court in Civil Matters **for a RETRIAL** in order to eliminate the violation found and its consequences pursuant to Article 50 §§ 1 and 2 of the Law no. 6216.

65. As the applicant has requested that the counsel's fee and the court expenses be indemnified, it has been concluded that a total amount of TRY 1,698.35 which consists of the application fee of TRY 198.35 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 court expense.

## **V. JUDGMENT**

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

**A.** The applicant's allegations that there was a breach of freedom of expression be **DECLARED ADMISSIBLE;**

Application Number : 2013/8598  
Date of Judgment : 2/7/2015

**B.** The freedom of expression guaranteed in Article 26 of the Constitution was **VIOLATED**;

**C.** A copy of this judgment be **SENT** to the 10<sup>th</sup> Chamber of the Ankara Magistrate's Court in Civil Matters **for a RETRIAL** in order to eliminate the violation found and consequences thereof pursuant to Article 50 §§ 1 and 2 of the Law no. 6216;

**D.** The court expense of TRY 1,698.35 consisting of the fee of TRY 198.35 and the counsel's fee of TRY 1,500.00 be **REIMBURSED TO THE APPLICANT**;

**E.** 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.