

Violation of a Constitutional Right on the Internet: Protecting the Right to Privacy

Authors: Gönenç Gürkaynak Esq. and İlay Yılmaz, ELIG, Attorneys-at-Law

The Turkish Constitutional Court recently decided that the right to privacy can be violated on the Internet. The court's decision numbered 2014/16701 ("Decision") was delivered on October 13, 2016 and concerned a military officer's dismissal from the Turkish Armed Forces ("TAF"). The ground of the dismissal was that the officer's private life is not suitable for TAF's ethical code of conduct and this information was provided from the images which were broadcasted on the Internet. The officer ("applicant") individually applied to the Turkish Constitutional Court claiming that the principle of proportionality was not considered in the dismissal and his right to privacy was violated since the evidence is obtained unlawfully.

In 2010, an inquiry was established about the applicant in the TAF after images of him and a woman were published on the electronic environment. The contents about the applicant on the Internet were seen as unethical, embarrassing and shameful by the military authorities. As part of the inquiry, the applicant was questioned about the details of his private life without being adequately informed of his rights and the inquiry concluded with his dismissal from the TAF. The applicant brought a claim to the High Military Administrative Court ("Court") against the Ministry of Defense and argued that the dismissal decision was unlawful as it was based on his private life and did not take into account his successful career records. His claim was rejected by the Court and the Court's decision stated that through the broadcast of the images on the Internet his private life was publicized and it was understood that he was not fit to perform a military role. One of the dissenting judges stated that images published on the Internet cannot be considered as legal evidence on their own, and another judge stated that the statements given by the applicant during the examination were regarding his private life and since the statements have not been accompanied with other concrete evidence his dismissal was unlawful.

The applicant individually applied to the Constitutional Court on October 23, 2014. The court evaluated his claim that Article 20 of the Turkish Constitution which regulates the right to

privacy was violated. The court defined right to privacy comprehensively and stated that right to privacy includes individual independency and the right to pursue a private life as one desires and without any interventions from the outside world. The court also referred to the definition of right to privacy under the European Convention on Human Rights and *Ozpinar v. Turkey* case where the European Court of Human Rights decided that if a person's behavior and attitude is considered as a reason for dismissal, it will be deemed a violation of one's right to privacy.

This decision is touching upon crucial discussions on the right to privacy as well as setting an example of a constitutional right being violated on the Internet. After establishing that there is an intervention to the complainant's private life, the court moves on to discuss whether the intervention constitutes a violation or not. This discussion sheds light on a very important aspect of the right to privacy which is its scope and limitations. Article 13 of the Turkish Constitution states that the fundamental rights and freedoms can be limited, without affecting their core, only based on specific reasons stated in the Turkish Constitution, in accordance with the Turkish Constitution and the necessities arising from the democratic societal order, and in a proportionate way. The court states in Paragraph 53 that the intervention in the case can be said to have the legitimate purpose of implementing discipline in the military and ensuring fulfillment of public service work properly. On the other hand, when evaluating the measure taken by TAF which is dismissing the complainant, on the ground of necessity and proportionality, the Constitutional Court stated that the limitations on the right to privacy require imperative circumstances. The reasoning of the complainant's dismissal decision does not display clearly the impact of the complainant's sexual life on the military, and his career as a soldier. Therefore, it cannot be concluded that the dismissal decision was taken as a last measure upon imperative circumstances. In light of this evaluation, the Court decided that the intervention constituted a violation.

The Decision and the discussion regarding the limitations on the right to privacy raise an important question that is very relevant to Internet law. The availability of information has significantly increased with the Internet. The case is an example of details of a person's private life being exposed on the digital platform and this example is becoming more and more common. Therefore, the question on the limits of the right to privacy is becoming

increasingly important. Where the line should be drawn? Can the right to privacy of certain people be limited to a further extent than some others? What are the overriding factors, if there are any?

The upcoming section of this article will be dedicated to listing two circumstances in which the right to privacy can be limited. First of all, if the person concerned is a public or a political figure, the scope of his or her right to privacy might be argued to be narrower. The Constitutional Court stated in the case of June 30, 2014 with application number 2013/5574 that while a person not known publicly has the right to protection of his or her personal reputation and the right to request a special protection, people who are publicly known do not have the right to request a protection on that level. For example, while information about an ordinary citizen's personal life will be considered to fall within the scope of his or her private life, a public or a political figure's personal life might be of relevance to the general public.

Another circumstance in which the extent of private life can be limited may be when there is a greater public interest. This circumstance arises when details of a person's private life are newsworthy and exposed through the news. For example, when activities that a political figure undertakes outside of his or her official capacity has an impact on the general public, the details become newsworthy and therefore, moves outside the scope of his or her private life. There is a Supreme Court decision numbered 1991/4-628 on the matter stating that when the right to be informed and criticize is in conflict with personal rights, the public benefit prevails. Therefore it is understood that when there is public benefit in learning the details of a person's private life, the scope of that person's private life can be narrowed without affecting its core.

To conclude, the Decision is an important one for a number of reasons. The right to privacy has long been established in Turkish law, but this case extends the scope of the right to the digital environment. The decision might be a precedent for when a violation of a constitutional right through the Internet comes into question. The Decision also touches upon a very crucial aspect of the right to privacy. Like many of the other rights and freedoms, the right to privacy is not unlimited. The Constitutional Court evaluates the intervention in the case at hand from this perspective, and goes through a checklist before deciding whether the

ELİG

Attorneys at Law

intervention constitutes a violation or not. This checklist includes but not limited to necessity and proportionality. The discussion upon the limits of private life, as explained, needs many aspects to be evaluated, especially when it comes to protecting private life in the Internet realm. Therefore, this Decision is not only very crucial for the constitutional right to privacy but also to Internet law.

Article contact: Gönenç Gürkaynak, Esq.

Email: gonenc.gurkaynak@elig.com

(First published in Mondaq on January 6, 2017)