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INFORMATION NOTE ON THE INDIVIDUAL APPLICATION DECISION REGARDING THE VIOLATION OF FREEDOM OF EXPRESSION BY A TRIAL DUE TO PUBLISHING A BOOK

In the İrfan Sancı individual application decision dated 30.03.2022 and numbered 2018/5652, published in the Official Gazette dated 16.08.2022 and numbered 31925, the Constitutional Court made significant determinations on the minors' safety within the framework of freedom of expression, press and art, regarding a book published by the applicant who has been put on trial for the crime of mediating the publication of obscene publications, and the structural problems caused by the Board of Protection of Minors from Obscene Publications.

In short, the decision points out that the applicant should have been subject to lighter measures rather than facing a prison sentence of up to ten years for publishing a work of a world-renowned author in Turkish, which is a heritage of European literature, and that artistic and literary works cannot be evaluated on the basis of purely personal taste and morality.

I. SUMMARY OF FACTS

The applicant is the manager and controlling shareholder of a publishing company. In January 2009, the publishing company printed and published the Turkish translation of a novel of an Italian-born French poet, writer, and art critic. The book was taken under scrutiny by the Istanbul Chief Public Prosecutor's Bureau of Press. In the report prepared as a result of the examination, it was concluded that the book does not have an artistic and literary meaning and that its content is obscene, hurtful to the public's feelings of honor, and abusive to sexual desires. In this respect, public prosecution was brought by the prosecutor's office against the applicant and the translator, on the charge of publishing books with obscene content. However, in one of the reports in the first instance court file, it was stated that the novel is a literary work in terms of both its expressive features and artistic qualities and that it provides protection by showing on the cover that the book contains sexuality. However, the Board of Protection of Minors from Obscene Publications ("**Board**"), as a result of its examination over the book, concluded that *"the immoral sex relations presented in the story, which is based on an environment which is sex-devoted and with mental and psychological problems, contradicts the customs and traditions of Turkish society", "has no place in our sexual culture",* moreover *"the style used in the book is also far from aesthetic structure, contains slang and idiomatic words and idioms aimed at disgust".* Although the court of first instance established acquittals for both defendants, Court of Appeals overturned this decision. As a conclusion of the retrial made by the court upon the reversal of decision, it was decided to postpone the prosecution and to apply the provisions of probation for three years to the applicant. The court of first instance disagreed with the evaluation of the Court of Appeals in its reasoned decision, and stated that *"in order to commit the crime of obscenity through press, as clearly stated in the article and the rationale of the article, it is necessary to either actually use children in the commission of this crime, that is, in the production of products containing obscene images, texts or words, or, to enable children to see, listen or read to such products, the fact that the fictional protagonist of the book in question is a child does not mean that children are actually used, nor does it mean that the book is for children".*

II. ASSESSMENT OF THE CONSTITUTIONAL COURT AND CONCLUSION

The applicant claimed that the book is a literary work, that him being put on trial for publishing this work is against the principle of the rule of law, and therefore, the postponement of the prosecution and

subjecting to a three-year probation, when he should have been acquitted, violates the freedom of expression, science and art, and work.

The Constitutional Court pointed out that the printing and publication of the book should be evaluated within the scope of freedom of expression and its exclusively assured form, which is the freedom of press. Article 26/1 of the Constitution does not restrict the freedom of expression in terms of content; it includes all kinds of expressions such as political, artistic, academic, or commercial thoughts and opinions. (*Engin Poyraz decision § 37, Önder Balıkçı decision § 40*) The Constitutional Court also draws attention to the fact that artistic works often refer to more than one meaning and therefore the message of artistic works cannot be easily identified. In addition, it is unclear on which subject the bureaucrats who prepared the reports of the Board were experts, and it was observed that the people who prepared another report in the first-instance court file were not experts in the field of French language and literature. On the other hand, in the report dated 11.03.2009, which was examined by two academicians from the Department of French Language and Literature, attention was drawn to the evaluation of the novel as a literary work. According to the Constitutional Court, a board, which does not even have experts to evaluate whether a work has an intellectual, social, scientific or aesthetic value, makes a decision of harmful publication about the works included in the scope of Law No. 1117 on the Protection of Minors from Harmful Publications ("**Law No. 1117**") with general and abstract statements, has negative consequences in terms of freedom of expression and press that points to a structural problem. Moreover, the courts have not evaluated the issue of child protection at all. However, Law No. 1117 includes many precautions for the protection of children and these precautions can be applied. Law No. 1117 allows those responsible to take the essential precautions.

Another important point is that the book in the present case is a specific publication targeting a certain part of society. The phrase "Sexual" on the cover of the book provides protection. On the other hand, there are no figures such as pictures or drawings that will disturb people in the book. Considering the author's style of expression, the way the book was published, and its audience, it is highly unlikely that minors will be exposed to the content of the book subject to the application. Board's view that the book is harmful to children should not be accredited. The applicant should have been subject to lighter measures rather than facing a prison sentence of up to ten years for publishing a work of a world-renowned author in Turkish, which is a heritage of European literature. In this context, the Constitutional Court pointed out that the intervention in the present case was not in accordance with the requirements of the democratic social order, made the following determinations in its decision, and ruled that the applicant's freedom of expression was violated:

1. In terms of obscenity, which is a complex and ambiguous phenomenon, assessments should be made by looking at the characteristics of the art field or the work, the context in which the parts that are considered obscene are expressed, the identity of the author, the time of writing, the purpose, the identities of the people to whom one is addressing and their aesthetic understanding, the possible effects of the work and all other expressions in the work as a whole.
2. Examination should not be taken out of context; it should be noted that the book is a fictional novel and has a unique style and Articles 26 and 27 of the Constitution protect not only the content of ideas and information but also the way they are expressed.
3. With obscenity, although the Court of Appeals deems the examination of the Board necessary, there is a grave difference between the task given to the Board to protect children from harmful publications and to determine the measures to be taken, and, the task of determining whether an allegedly obscene work qualifies as a science, art and literary product, which exposes those who create and publish harmful publications to a prison sentence of up to ten years.
4. Interpretations of artistic expressions may differ from person to person. Determining the literary quality of a work is a subject that requires a high level of expertise, special and technical knowledge, and in this context, competence in the field of literature. Artistic and literary works cannot be evaluated on the basis of purely personal taste and morality. Views on the nature of morality do not only change with respect to time and place; it also diversifies depending on the differentiation of cultural, religious,

and philosophical views. Just as a moral code that is far from diversity cannot stand in a society, the European common culture is not homogeneous in terms of moral norms.

5. The mere fact that the protagonist of the book is under the age of eighteen is not sufficient to admit that the issue should be evaluated directly within the scope of the phrase "a person who uses children in the production of products containing obscene images, text or words" set out in Article 226/3 of the Turkish Criminal Code.

6. Whether a work possesses harmful content against children and constitutes an obscenity crime within the sense of Article 226 of the Turkish Criminal Code, are two separate legal phenomena and a determination that it contains harmful content cannot be a basis for directly punishing a person for obscenity.

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Should you have any queries on the above, please do not hesitate to contact us.

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