COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF ÖZTÜRK v. GERMANY

(Application no. 8544/79)

JUDGMENT

STRASBOURG

21 February 1984

In the Öztürk case,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 48 of the Rules of Court* and composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. R. RYSSDAL,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. E. GARCÍA DE ENTERRÍA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 21 September 1983 and 25 January 1984,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the Government of the Federal Republic of Germany ("the Government") and the European Commission of Human Rights ("the Commission"). The case originated in an application (no. 8544/79) against that State lodged with the Commission on 14 February 1979 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr. Abdulbaki Öztürk.

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* Note by the registry: In the version of the Rules applicable when proceedings were instituted. A revised version of the Rules of Court entered into force on 1 January 1983, but only in respect of cases referred to the Court after that date.

2. The Government's application and the Commission's request were lodged with the registry of the Court within the period of three months laid down by Articles 32 § 1 and 47 (art. 32-1, art. 47) - the application on 13 September and the request on 15 October 1982. The application, which referred to Article 48 (art. 48), invited the Court to hold that there had been no violation. The purpose of the request was to obtain a decision as to whether or not there had been a breach by the respondent State of its obligations under Article 6 § 3 (e) (art. 6-3-e).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. R. Bernhardt, the elected judge of German nationality (Article 43 (art. 43) of the Convention), and Mr. G. Wiarda, the President of the Court (Rule 21 § 3 (b) of the Rules of Court). On 1 October 1982, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. R. Ryssdal, Mr. M. Zekia, Mr. F. Matscher, Mr. J. Pinheiro Farinha and Mr. E. García de Enterría (Article 43 in fine (art. 43) of the Convention and Rule 21 § 4). Subsequently, Mr. Thór Vilhjálmsson and Mr. W. Ganshof van der Meersch, substitute judges, took the place of Mr. Zekia and Mr. Garcia de Enterria, who were prevented from taking part in the consideration of the case (Rules 22 § 1 and 24 § 1).

4. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 § 5), ascertained, through the Deputy Registrar, the views of the Agent of the Government and the Delegates of the Commission regarding the procedure to be followed. On 19 October 1982, he decided that the Agent should have until 31 January 1983 to file a memorial and that the Delegates should be entitled to file a memorial in reply within two months from the date of transmission of the Government's memorial to them by the Registrar.

Following an extension of the first-mentioned time-limit granted to the Government on 18 January 1983, the latter's memorial was received at the registry on 24 February. On 10 March, the Secretary to the Commission informed the Registrar that the Delegates would present their own observations at the hearings.

5. After consulting, through the Deputy Registrar, the Agent of the Government and the Delegates of the Commission, the President directed on 4 May that the oral proceedings should open on 25 May.

6. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Chamber had held a preparatory meeting; it had authorised the Agent and the advocates of the Government and the person assisting the Delegates of the Commission to use the German language (Rule 27 §§ 2 and 3).

There appeared before the Court:

- for the Government

Mrs. I. MAIER, Ministerialdirigentin
at the Federal Ministry of Justice, *Agent*,

Mr. E. GÖHLER, Ministerialrat
at the Federal Ministry of Justice, *Adviser*;
- for the Commission
Mr. S. TRECHSEL,
Mr. G. SPERDUTI, *Delegates*,
Mr. N. WINGERTER, the applicant's lawyer
before the Commission, assisting the Delegates (Rule 29 § 1, second sentence, of the Rules of Court).

The Court heard addresses by Mrs. Maier for the Government and by Mr. Trechsel, Mr. Sperduti and Mr. Wingerter for the Commission, as well as their replies to its questions. The Commission supplied the Registrar with certain documents that the Registrar had requested on the instructions of the President.

7. At the close of deliberations held on 27 May, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court.

Having taken due note of the agreement of the Agent of the Government and the concurring opinion of the Delegates, the Court decided on 21 September that the proceedings should continue without re-opening the oral procedure (Rule 26).

8. On 4 October, the Agent of the Government transmitted to the Registrar two documents and her replies to two questions that Judge Ganshof van der Meersch had put to her at the hearings.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. Mr. Öztürk, a Turkish citizen born in 1934, is resident at Bad Rappenau-Heinsheim in the Federal Republic of Germany.

He arrived in the Federal Republic in 1964 and works in the motor-car industry. After passing the necessary test, he was issued with a German driving licence on 7 May 1969.

In 1978, he estimated his net monthly income at approximately DM 2,000.

10. On 27 January 1978 in Bad Wimfen, the applicant drove his car into another car which was parked, causing about DM 5,000's worth of damage to both vehicles. The owner of the other car reported the accident to the Neckarsulm police.

On arriving at the scene of the accident, the police, by means of a notice written in Turkish, informed the applicant, amongst other things, of his

rights to refuse to make any statement and to consult a lawyer. He availed himself of these rights, and a report (Verkehrs-Ordnungswidrigkeiten-Anzeige) was thereupon transmitted by the police to the Heilbronn administrative authorities (Landratsamt).

11. By decision of 6 April 1978, the Heilbronn administrative authorities imposed on Mr. Öztürk a fine (Bussgeld) of DM 60 for causing a traffic accident by colliding with another vehicle as a result of careless driving ("Ausserachtlassen der erforderlichen Sorgfalt im Strassenverkehr"); in addition he was required to pay DM 13 in respect of fees (Gebühr) and costs (Auslagen).

The decision was based on section 17 of the Regulatory Offences Act of 24 May 1968, in its consolidated version of 1 January 1975 (Gesetz über Ordnungswidrigkeiten - "the 1968/1975 Act"; see paragraph 18 below), on section 24 of the Road Traffic Act (Strassenverkehrsgesetz) and on Regulations 1 § 2 and 49 § 1, no. 1, of the Road Traffic Regulations (Strassenverkehrs-Ordnung). Regulation 1 § 2 reads as follows:

> "Every road-user (Verkehrsteilnehmer) must conduct himself in such a way as to ensure that other persons are not harmed or endangered and are not hindered or inconvenienced more than is unavoidable in the circumstances."

Regulation 49 § 1, no. 1, specifies that anyone who contravenes Regulation 1 § 2 is guilty of a "regulatory offence" (Ordnungswidrigkeit). Under section 24 sub-section 2 of the Road Traffic Act, such an offence gives rise to liability to a fine.

12. On 11 April 1978, the applicant, who was represented by Mr. Wingerter, lodged an objection (Einspruch) against the above-mentioned decision (section 67 of the 1968/1975 Act); he stated that he was not waiving his right to a public hearing before a court (section 72).

The public prosecutor's office (Staatsanwaltschaft) attached to the Heilbronn Regional Court (Landgericht), to which the file had been transmitted on 5 May, indicated six days later that it had no objection to a purely written procedure; it further stated that it would not be attending the hearings (sections 69 and 75).

13. Sitting in public on 3 August 1978, the Heilbronn District Court (Amtsgericht) heard Mr. Öztürk, who was assisted by an interpreter, and then three witnesses. Immediately thereafter, the applicant withdrew his objection. The Heilbronn administrative authorities' decision of 6 April 1978 accordingly became final (rechtskräftig).

14. The District Court directed that the applicant should bear the court costs and his own expenses. On 12 September 1978, the District Court Cashier's Office (Gerichtskasse) fixed the costs to be paid by Mr. Öztürk at DM 184.70, of which DM 63.90 represented interpreter's fees.

15. On 4 October, the applicant entered an appeal (Erinnerung) against the bill of costs with regard to the interpreter's fees. He relied on Article 6 (art. 6) of the Convention and referred to the Commission's report of 18

May 1977 in the case of Luedicke, Belkacem and Koç. At the time, that case was pending before the Court, which delivered its judgment on the merits on 28 November 1978 (Series A no. 29).

The District Court dismissed the appeal on 25 October. It noted that the obligation to bear the interpreter's fees was grounded on Article 464 (a) of the Code of Criminal Procedure (Strafprozessordnung) and section 46 of the 1968/1975 Act (see paragraphs 21 and 35 below). Relying on a 1975 decision by the Cologne Court of Appeal, it held that this obligation was compatible with Article 6 § 3 (e) (art. 6-3-e) of the Convention. According to the District Court, the above-mentioned opinion of the Commission did not alter matters since, unlike a judgment of the Court; it was not binding on the States.

16. According to undisputed evidence adduced by the Government, the court costs, including the interpreter's fees, were paid by an insurance company with which Mr. Öztürk had taken out a policy.

II. THE RELEVANT LEGISLATION

A. The 1968/1975 Act

17. The purpose of the 1968/1975 Act was to remove petty offences from the sphere of the criminal law. Included in this category were contraventions of the Road Traffic Act. Under section 21 of the Road Traffic Act (in its former version), commission of such contraventions had given rise to liability to a fine (Geldstrafe) or imprisonment (Haft). Section 3 no. 6 of the Act of 24 May 1968 (Einführungsgesetz zum Gesetz über Ordnungswidrigkeiten) classified them as "Ordnungswidrigkeiten" and henceforth made them punishable only by fines not considered to be criminal by the legislature (Geldbussen).

The 1968/1975 Act had been foreshadowed in the Federal Republic by two enactments: the Act of 25 March 1952 on "regulatory offences" (Gesetz über Ordnungswidrigkeiten) and, to a certain extent, the Economic Crime Act of 26 July 1949 (Wirtschaftsstrafgesetz).

1. General provisions

18. Section 1 sub-section 1 of the 1968/1975 Act defines a "regulatory offence" (Ordnungswidrigkeit) as an unlawful (rechtswidrig) and reprehensible (vorwerfbar) act, contravening a legal provision which makes the offender liable to a fine (Geldbusse). The fine cannot be less than DM 5 or, as a general rule, more than DM 1,000 (section 17 sub-section 1). The amount of the fine is fixed in each case by reference to the seriousness of the offence, the degree of misconduct attributable to the offender and, save

for minor (geringfügig) offences, the offender's financial circumstances (section 17 sub-section 3).

If the act constitutes both a "regulatory" and a criminal offence, only the criminal law is applicable; however, if no criminal penalty is imposed, the act may be punished as a "regulatory offence" (section 21).

2. The prosecuting authorities

19. Ordnungswidrigkeiten are to be dealt with by the administrative authorities (Verwaltungsbehörde) designated by law, save in so far as the 1968/1975 Act confers the power of prosecution of such offences on the public prosecutor and their judgment and sentencing on the courts (sections 35 and 36). Where an act has come before him as a criminal matter, the public prosecutor may also treat the act as a "regulatory offence" (section 40).

20. The administrative authorities will remit the matter to the public prosecutor if there is reason to suppose that a criminal offence has been committed; he will refer the matter back to them if he does not take proceedings (section 41). In the case of a "regulatory offence" having a close connection with a criminal offence in respect of which the public prosecutor has instituted proceedings, the prosecutor may extend the criminal proceedings to cover the "regulatory offence" as long as the administrative authorities have not fixed any fine (section 42).

The public prosecutor's decision to treat or not to treat an act as a criminal offence is binding on the administrative authorities (section 44).

3. Procedure in general

21. Subject to the exceptions laid down in the 1968/1975 Act, the provisions of the ordinary law governing criminal procedure, and in particular the Code of Criminal Procedure, the Judicature Act (Gerichtsverfassungsgesetz) and the Juvenile Courts Act (Jugendgerichtsgesetz), are applicable by analogy (sinngemäss) to the procedure in respect of "regulatory offences" (section 46 sub-section 1). The prosecuting authorities (see paragraph 19 above) have the same rights and duties as the public prosecutor in a criminal matter unless the 1968/1975 Act itself states otherwise (section 46 sub-section 2). Nevertheless, various measures permissible in criminal matters may not be ordered in respect of "regulatory offences", notably arrest, interim police custody (vorläufige Festnahme) or seizure of mail or telegrams (section 46 sub-section 3). The taking of blood samples and other minor measures, within the meaning of Article 81 (a) § 1 of the Code of Criminal Procedure, remain possible.

22. The prosecution of "regulatory offences" lies within the discretion (pflichtgemässes Ermessen) of the competent authority; so long as the case

is pending before it, the competent authority may terminate the prosecution at any time (section 47 sub-section 1).

Once the case has been brought before a court (see paragraphs 27-28 below), power to decide on a stay of proceedings rests with the court; any such decision requires the agreement of the public prosecutor and is final (section 47 sub-section 2).

23. As regards the judicial stage (if any) of the proceedings (see paragraphs 28-30 below), section 46 sub-section 7 of the 1968/1975 Act attributes jurisdiction in the matter to divisions (Abteilungen) of the District Courts and to chambers (Kammern; Senate) of the Courts of Appeal (Oberlandesgerichte) and of the Federal Court of Justice (Bundesgerichtshof).

4. Preliminary procedure

24. Investigations (Erforschung) into "regulatory offences" are a matter for the police authorities. In this connection, the police authorities enjoy discretionary powers (pflichtgemässes Ermessen); save in so far as the 1968/1975 Act provides otherwise, they have the same rights and duties as in the prosecution of criminal offences (section 53 sub-section 1).

25. Prior to any decision being taken, the person concerned (Betroffener) has to be given the opportunity of commenting, before the competent authorities, on the allegation made against him (section 55).

In the case of a minor (geringfügig) offence, the administrative authorities may give the person concerned a warning (Verwarnung) and impose on him an admonitory fine (Verwarnungsgeld) which, save for any exception laid down under the applicable law, may range from DM 2 to 20 (section 56 sub-section 1). However, sanctions of this kind are possible only if the person concerned consents and pays the fine immediately or within one week (section 56 sub-section 2).

26. If necessary, the administrative authorities will designate an officially appointed lawyer to act for the person concerned in the proceedings before them (section 60).

Measures taken by the administrative authorities during the preliminary procedure can in principle be challenged before the courts (section 62).

5. The administrative decision imposing a fine

27. Save in so far as the 1968/1975 Act provides otherwise - as in the case of the matter being settled by payment of an admonitory fine -, a "regulatory offence" is punishable by an administrative decision imposing a fine (Bussgeldbescheid; section 65).

The person concerned may lodge an objection (Einspruch) within one week (section 67). Unless they withdraw their decision, the administrative authorities will then forward the file to the public prosecutor who will

submit it to the competent District Court (sections 69 sub-section 1 and 68) and thereupon assume the function of prosecuting authority (section 69 sub-section 2).

6. Judicial stage (if any) of the procedure

28. Under section 71, if the District Court finds the objection admissible (section 70) it will, unless the 1968/1975 Act states otherwise, examine the objection in accordance with the provisions applicable to an "Einspruch" against a penal order (Strafbefehl): in principle, it will hold a hearing and deliver a judgment (Urteil) which may impose a heavier sentence (Article 411 of the Code of Criminal Procedure).

However, its ruling may take the form of an order (Beschluss) if the District Court considers that a hearing is not necessary and provided the public prosecutor or the person concerned does not object (section 72 sub-section 1). In that event, it may, inter alia, acquit the person concerned, settle the amount of a fine or terminate the prosecution, but not increase the penalty (section 72 sub-section 2).

29. The person concerned has the option of attending hearings but is not bound to do so unless the District Court so directs (section 73 sub-sections 1 and 2); he may be represented by a lawyer (section 73 sub-section 4).

The public prosecutor's office may attend the hearing; if the District Court considers the presence of an official from that office to be appropriate, it will inform the latter accordingly (section 75 sub-section 1).

The District Court will give the administrative authorities the opportunity to set out the matters which, in their view, are of importance for the decision to be given; they may address the Court at the hearing, if they so wish (section 76 sub-section 1).

30. Subject to certain exceptions, section 79 allows an appeal on points of law (Rechtsbeschwerde) to be brought against a judgment or an order issued pursuant to section 72; save in so far as the 1968/1975 Act states otherwise, in determining the appeal the court concerned will follow, by analogy, the provisions of the Code of Criminal Procedure relating to cassation proceedings (Revision).

7. Administrative procedure and criminal procedure

31. The administrative authorities' classification of an act as a "regulatory offence" is not binding on the court ruling on the objection (Einspruch); however, it can apply the criminal law only if the person concerned has been informed of the change of classification and enabled to prepare his defence (section 81 sub-section 1). Once this condition has been satisfied, either by the court of its own motion or at the public prosecutor's request, the person concerned acquires the formal status of an accused

(Angeklagter, section 81 sub-section 2) and the subsequent proceedings fall outside the scope of the 1968/1975 Act (section 81 sub-section 3).

8. Enforcement of decisions imposing a fine

32. A decision imposing a fine is enforceable once it has become final (sections 89 and 84). Unless the 1968/1975 Act states otherwise, enforcement of a decision taken by the administrative authorities is governed by the Federal Act or the Land Act, as the case may be, on enforcement in administrative matters (Verwaltungs-Vollstreckungsgesetze) (section 90 sub-section 1). When the decision is one taken by a court, certain relevant provisions of, inter alia, the Code of Criminal Procedure are applicable (section 91).

33. If, without having established (dargetan) his inability to pay, the person concerned has not paid the fine in due time, the court may, at the request of the administrative authorities or, where the fine was imposed by a court decision, of its own motion order coercive imprisonment (Erzwingungshaft - section 96 sub-section 1). The resultant detention does not replace payment of the fine in the manner of an Ersatzfreiheitsstrafe under the criminal law, but is intended to compel payment. The period of detention may not exceed six weeks for one fine and three months for several fines (section 96 sub-section 3). Implementation of the detention order is governed, inter alia, by the Code of Criminal Procedure (section 97).

9. Interpretation and other costs

34. As far as the costs of the administrative procedure are concerned, the competent authorities apply by analogy certain provisions of the Code of Criminal Procedure (section 105).

35. Under section 109, the person concerned has to bear the costs of the court proceedings if he withdraws his "Einspruch" or if the competent court rejects it.

The costs in question are made up of the expenses and fees of the Treasury (Article 464 (a) § 1, first sentence, of the Code of Criminal Procedure). These fees and expenses are listed in the Court Costs Act (Gerichtskostengesetz) which in turn refers, inter alia, to the Witnesses and Experts (Expenses) Act (Gesetz über die Entschädigung von Zeugen und Sachverständigen). Section 17 sub-section 2 of the last-mentioned Act provides that "for the purposes of compensation, interpreters shall be treated as experts".

Interpretation costs (Dolmetscherkosten) are thus included in the costs of judicial proceedings. However, as far as criminal proceedings - and criminal proceedings alone - are concerned, the German legislature amended the schedule (Kostenverzeichnis) to the Court Costs Act following

the Luedicke, Belkacem and Koç judgment of 28 November 1978 (see paragraph 15 above; see also Resolution DH (83) 4 of 23 March 1983 of the Committee of Ministers of the Council of Europe). According to no. 1904 in this schedule, henceforth no charge is to be made for "the sums due to interpreters and translators engaged in criminal proceedings in order to translate, for an accused who is deaf or dumb or not conversant with the German language, the statements or documents which the accused needs to understand for his defence" (Act of 18 August 1980).

36. Under the terms of section 109 of the 1968/1975 Act, the question of payment of the costs of the proceedings, including the interpretation costs, only arises once the withdrawal or dismissal of the objection has become final. The person concerned may never be required to make an advance payment in respect of the costs concerned.

B. Road traffic fines

37. The Road Traffic Act, the Road Traffic Regulations and the Road Traffic Licence and Vehicle Conformity Regulations (Strassenverkehrs-Zulassungs-Ordnung) contain lists of "regulatory offences" punishable by fine (section 24 of the Road Traffic Act).

In the case of a "regulatory offence" committed in gross (grob) and persistent (beharrlich) violation of the duties incumbent on a driver, the administrative authorities or, where an objection has been lodged, the court may at the same time disqualify the person concerned from holding a driving licence (Fahrverbot) for a period of one to three months (section 25 of the Road Traffic Act). According to the Government, in 1982 such a measure was taken in 0.5 per cent of cases.

38. The Länder have co-operated together to adopt rules (Verwaltungsvorschriften) establishing a uniform scale of fines (Bussgeldkatalog) for the various road traffic "regulatory offences"; legally, these rules are binding on the administrative authorities empowered to impose fines but not on the courts.

Section 26 (a) of the Road Traffic Act, which was inserted in the Act of 28 December 1982 but which has not yet been implemented, provides that the Minister of Transport shall issue such rules with the agreement of the Bundesrat and in the form of a Decree (Rechtsverordnung).

39. Under section 28 of the Road Traffic Act, a fine imposed for contravention of the road traffic regulations may in some specified cases be entered on a central traffic register (Verkehrszentralregister) if it exceeds a certain level (DM 39 at the time of the facts in issue, DM 79 as from 1 July 1982); on the other hand, no mention of it is included in the judicial criminal records (Bundeszentralregister). The entry must be deleted after a maximum of two years, unless further entries have been made in the meantime (section 29).

Only certain authorities have access to this register, notably for the purposes of a criminal prosecution or a prosecution for a road traffic "regulatory offence" (section 30).

40. According to undisputed evidence supplied by the Government, the 1968/1975 Act in practice plays a particularly important role in the area of road traffic; thus, it was said that 90 per cent of the fines imposed in 1982 concerned road traffic offences.

The Government stated that each year in the Federal Republic of Germany there were 4,700,000 to 5,200,000 decisions imposing a fine (Geldbusse) and 15,500,000 to 16,000,000 warnings accompanied by a fine (Verwarnungsgelder). The statistics of the Länder on Road Traffic Act offences were said to show that in 1982 fines exceeding DM 200 and DM 500 came to 1.5 per cent and 0.1 per cent respectively of the total, as compared with 10.8 per cent for fines of between DM 101 and DM 200, 39.4 per cent for fines of between DM 41 and DM 100 and 48.2 per cent for fines of DM 40 or less.

43.4 per cent of road traffic offences consisted of contraventions of a prohibition on stopping or parking, approximately 17.1 per cent of speeding, 6.5 per cent of non-observance of traffic lights and 5.9 per cent of illegal overtaking. Other offences totalled less than 4 per cent by category. The offences covered by Regulation 1 § 2 of the Road Traffic Regulations, the provision applied in Mr. Öztürk's case (see paragraph 11 above), amounted to approximately 2.8 per cent.

41. Despite the absence of statistics in this connection, the Government estimated that 10 to 13 per cent of the five million or so fines imposed each year concerned foreigners. Of the 4,670,000 foreigners living in the Federal Republic, approximately 2,000,000 possessed a motor vehicle.

PROCEEDINGS BEFORE THE COMMISSION

42. In his application of 14 February 1979 to the Commission (no. 8544/79), Mr. Öztürk complained of the fact that the Heilbronn District Court had ordered him to bear the interpreter's fees; he relied on Article 6 § 3 (e) (art. 6-3-e) of the Convention.

43. The Commission declared the application admissible on 15 December 1981.

In its report of 12 May 1982 (Article 31 (art. 31) of the Convention), the Commission expressed the opinion, by eight votes to four, that there had been a violation of Article 6 § 3 (e) (art. 6-3-e).

The report contains two dissenting opinions.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

44. At the close of the hearings on 25 May 1983, the Government requested the Court "to hold that the Federal Republic of Germany has not violated the Convention".

AS TO THE LAW

45. Under the terms of Article 6 (art. 6) of the Convention:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing by an independent and impartial tribunal ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

In the applicant's submission, the Heilbronn District Court had acted in breach of Article 6 § 3 (e) (art. 6-3-e) in ordering him to pay the costs incurred through recourse to the services of an interpreter at the hearing on 3 August 1978.

I. APPLICABILITY OF ARTICLE 6 § 3 (e) (art. 6-3-e)

46. According to the Government, Article 6 § 3 (e) (art. 6-3-e) is not applicable in the circumstances since Mr. Öztürk was not "charged with a criminal offence". Under the 1968/1975 Act, which "decriminalised" petty offences, notably in the road traffic sphere, the facts alleged against Mr. Öztürk constituted a mere "regulatory offence" (Ordnungswidrigkeit). Such offences were said to be distinguishable from criminal offences not only by the procedure laid down for their prosecution and punishment but also by their juridical characteristics and consequences.

The applicant disputed the correctness of this analysis. Neither was it shared by the Commission, which considered that the offence of which Mr. Öztürk was accused was indeed a "criminal offence" for the purposes of Article 6 (art. 6).

47. According to the French version of Article 6 § 3 (e) (art. 6-3-e), the right guaranteed is applicable only to an "accusé". The corresponding

English expression (person "charged with a criminal offence") and paragraph 1 of Article 6 (art. 6-1) ("criminal charge"/"accusation en matière pénale") - this being the basic text of which paragraphs 2 and 3 (art. 6-2, art. 6-3) represent specific applications (see the Deweer judgment of 27 February 1980, Series A no. 35, p. 30, § 56) - make it quite clear that the "accusation" ("charge") referred to in the French wording of Article 6 § 3 (e) (art. 6-3-e) must concern a "criminal offence" (see, mutatis mutandis, the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, § 30).

Under German law, the misconduct committed by Mr. Öztürk is not treated as a criminal offence (Straftat) but as a "regulatory offence" (Ordnungswidrigkeit). The question arises whether this classification is the determining factor in terms of the Convention.

48. The Court was confronted with a similar issue in the case of Engel and others, which was cited in argument by the representatives. The facts of that case admittedly concerned penalties imposed on conscript servicemen and treated as disciplinary according to Netherlands law. In its judgment delivered on 8 June 1976 in that case, the Court was careful to state that it was confining its attention to the sphere of military service (Series A no. 22, p. 34, § 82). The Court nevertheless considers that the principles set forth in that judgment (ibid., pp. 33-35, §§ 80-82) are also relevant, mutatis mutandis, in the instant case.

49. The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but it does not follow that the classification thus made by the States is decisive for the purposes of the Convention.

By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual (see, mutatis mutandis, the above-mentioned Engel and others judgment, ibid., p. 33, § 80) as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions - which are numerous but of minor importance - of road traffic rules. The Convention is not opposed to the moves towards "decriminalisation" which are taking place - in extremely varied forms - in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7), the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.

50. Having thus reaffirmed the "autonomy" of the notion of "criminal" as conceived of under Article 6 (art. 6), what the Court must determine is whether or not the "regulatory offence" committed by the applicant was a "criminal" one within the meaning of that Article (art. 6). For this purpose, the Court will rely on the criteria adopted in the above-mentioned Engel and others judgment (ibid., pp. 34-35, § 82). The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 (art. 6), to the ordinary meaning of the terms of that Article (art. 6) and to the laws of the Contracting States.

51. Under German law, the facts alleged against Mr. Öztürk - non-observance of Regulation 1 § 2 of the Road Traffic Regulations - amounted to a "regulatory offence" (Regulation 49 § 1, no. 1, of the same Regulations). They did not fall within the ambit of the criminal law, but of section 17 of the Ordnungswidrigkeitengesetz and of section 24 sub-section 2 of the Road Traffic Act (see paragraph 11 above). The 1968/1975 legislation marks an important step in the process of "decriminalisation" of petty offences in the Federal Republic of Germany. Although legal commentators in Germany do not seem unanimous in considering that the law on "regulatory offences" no longer belongs in reality to criminal law, the drafting history of the 1968/1975 Act nonetheless makes it clear that the offences in question have been removed from the criminal law sphere by that Act (see Deutscher Bundestag, Drucksache V/1269 and, inter alia, the judgment of 16 July 1969 by the Constitutional Court, Entscheidungen des Bundesverfassungsgerichts, vol. 27, pp. 18-36).

Whilst the Court thus accepts the Government's arguments on this point, it has nonetheless not lost sight of the fact that no absolute partition separates German criminal law from the law on "regulatory offences", in particular where there exists a close connection between a criminal offence and a "regulatory offence" (see paragraph 20 above). Nor has the Court overlooked that the provisions of the ordinary law governing criminal procedure apply by analogy to "regulatory" proceedings (see paragraph 21 above), notably in relation to the judicial stage, if any, of such proceedings.

52. In any event, the indications furnished by the domestic law of the respondent State have only a relative value. The second criterion stated above - the very nature of the offence, considered also in relation to the nature of the corresponding penalty - represents a factor of appreciation of greater weight.

In the opinion of the Commission - with the exception of five of its members - and of Mr. Öztürk, the offence committed by the latter was criminal in character.

For the Government in contrast, the offence in question was beyond doubt one of those contraventions of minor importance - numbering approximately five million each year in the Federal Republic of Germany - which came within a category of quite a different order from that of criminal offences. The Government's submissions can be summarised as follows. By means of criminal law, society endeavoured to safeguard its very foundations as well as the rights and interests essential for the life of the community. The law on Ordnungswidrigkeiten, on the other hand, sought above all to maintain public order. As a general rule and in any event in the instant case, commission of a "regulatory offence" did not involve a degree of ethical unworthiness such as to merit for its perpetrator the moral value-judgment of reproach (Unwerturteil) that characterised penal punishment (Strafe). The difference between "regulatory offences" and criminal offences found expression both in procedural terms and in relation to the attendant penalties and other legal consequences.

In the first place, so the Government's argument continued, in removing "regulatory offences" from the criminal law the German legislature had introduced a simplified procedure of prosecution and punishment conducted before administrative authorities save in the event of subsequent appeal to a court. Although general laws on criminal procedure were in principle applicable by analogy, the procedure laid down under the 1968/1975 Act was distinguishable in many respects from criminal procedure. For example, prosecution of Ordnungswidrigkeiten fell within the discretionary power of the competent authorities and the 1968/1975 Act greatly limited the possibilities of restricting the personal liberty of the individual at the stage of the preliminary investigations (see paragraphs 21, 22 and 24 above).

In the second place, instead of a penal fine (Geldstrafe) and imprisonment the legislature had substituted a mere "regulatory" fine (Geldbusse - see paragraph 17 above). Imprisonment was not an alternative (Ersatzfreiheitsstrafe) to the latter type of fine as it was to the former and no coercive imprisonment (Erzwingungshaft) could be ordered unless the person concerned had failed to pay the sum due without having established his inability to pay (see paragraph 33 above). Furthermore, a "regulatory offence" was not entered in the judicial criminal records but solely, in certain circumstances, on the central traffic register (see paragraph 39 above).

The reforms accomplished in 1968/1975 thus, so the Government concluded, reflected a concern to "decriminalise" minor offences to the benefit not only of the individual, who would no longer be answerable in criminal terms for his act and who could even avoid all court proceedings, but also of the effective functioning of the courts, henceforth relieved in principle of the task of dealing with the great majority of such offences.

53. The Court does not underestimate the cogency of this argument. The Court recognises that the legislation in question marks an important stage in the history of the reform of German criminal law and that the innovations introduced in 1968/1975 represent more than a simple change of terminology.

Nonetheless, the Court would firstly note that, according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty.

In addition, misconduct of the kind committed by Mr. Öztürk continues to be classified as part of the criminal law in the vast majority of the Contracting States, as it was in the Federal Republic of Germany until the entry into force of the 1968/1975 legislation; in those other States, such misconduct, being regarded as illegal and reprehensible, is punishable by criminal penalties.

Moreover, the changes resulting from the 1968/1975 legislation relate essentially to procedural matters and to the range of sanctions, henceforth limited to Geldbussen. Whilst the latter penalty appears less burdensome in some respects than Geldstrafen, it has nonetheless retained a punitive character, which is the customary distinguishing feature of criminal penalties. The rule of law infringed by the applicant has, for its part, undergone no change of content. It is a rule that is directed, not towards a given group possessing a special status - in the manner, for example, of disciplinary law -, but towards all citizens in their capacity as road-users; it prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive. Indeed, the sanction - and this the Government did not contest - seeks to punish as well as to deter. It matters little whether the legal provision contravened by Mr. Öztürk is aimed at protecting the rights and interests of others or solely at meeting the demands of road traffic. These two ends are not mutually exclusive. Above all, the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 (art. 6) of the Convention, criminal in nature.

The fact that it was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of Article 6 (art. 6). There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness. In this connection, a number of Contracting States still draw a distinction, as did the Federal Republic at the time when the Convention was opened for the signature of the Governments, between the most serious offences (crimes), lesser offences (délits) and petty offences (contraventions), whilst qualifying them all as criminal offences. Furthermore, it would be contrary to the object and purpose of Article 6 (art. 6), which guarantees to

"everyone charged with a criminal offence" the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Article (art. 6) a whole category of offences merely on the ground of regarding them as petty. Nor does the Federal Republic deprive the presumed perpetrators of Ordnungswidrigkeiten of this right since it grants them the faculty - of which the applicant availed himself - of appealing to a court against the administrative decision.

54. As the contravention committed by Mr. Öztürk was criminal for the purposes of Article 6 (art. 6) of the Convention, there is no need to examine it also in the light of the final criterion stated above (at paragraph 50). The relative lack of seriousness of the penalty at stake (see paragraph 18 above) cannot divest an offence of its inherently criminal character.

55. The Government further appeared to consider that the applicant did not have the status of a person "charged with a criminal offence" because the 1968/1975 Act does not provide for any "Beschuldigung" ("charge") and does not employ the terms "Angeschuldigter" ("person charged") or "Angeklagter" ("the accused"). On this point, the Court would simply refer back to its well-established case-law holding that "charge", for the purposes of Article 6 (art. 6), may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", although "it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect" (see, as the most recent authorities, the Foti and others judgment of 10 December 1982, Series A no. 56, p. 18, § 52, and the Corigliano judgment of the same date, Series A no. 57, p. 13, § 34). In the present case, the applicant was "charged" at the latest as from the beginning of April 1978 when the decision of the Heilbronn administrative authorities was communicated to him (see paragraph 11 above).

56. Article 6 § 3 (e) (art. 6-3-e) was thus applicable in the instant case. It in no wise follows from this, the Court would want to make clear, that the very principle of the system adopted in the matter by the German legislature is being put in question. Having regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (art. 6) (see, mutatis mutandis, the above-mentioned Deweer judgment, Series A no. 35, p. 25, § 49, and the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 23, first sub-paragraph).

II. COMPLIANCE WITH ARTICLE 6 § 3 (e) (art. 6-3-e)

57. Invoking the above-cited Luedicke, Belkacem and Koç judgment of 28 November 1978 (see paragraphs 15 and 35 above), the applicant submitted that the decision whereby the Heilbronn District Court had made him bear the costs incurred in having recourse to the services of an interpreter at the hearing on 3 August 1978 was in breach of Article 6 § 3 (e) (art. 6-3-e).

The Commission's opinion was to the same effect. The Government, for their part, maintained that there had been no violation, but concentrated their arguments on the issue of the applicability of Article 6 § 3 (e) (art. 6-3-e), without discussing the manner in which the Court had construed this text in 1978.

58. On the basis of the above-cited judgment, the Court finds that the impugned decision of the Heilbronn District Court violated the Convention: "the right protected by Article 6 § 3 (e) (art. 6-3-e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him the payment of the costs thereby incurred" (Series A no. 29, p. 19, § 46).

III. APPLICATION OF ARTICLE 50 (art. 50)

59. At the hearings on 25 May 1983, counsel for the applicant sought, as just satisfaction for his client, reimbursement of the interpretation costs of DM 63.90 and payment of the lawyer's costs incurred before the Convention institutions; as to the amount of these costs, he stated that he left the matter to the judgment of the Court.

The Agent of the Government did not feel herself bound to give an immediate reply to this claim; she indicated that she would, if need be, agree to a purely written procedure.

60. The Court considers that the question is not yet ready for decision and should therefore be reserved (Rule 50 § 3). The Court delegates to its President power to fix the further procedure.

FOR THESE REASONS, THE COURT

1. Holds, by thirteen votes to five, that Article 6 § 3 (e) (art. 6-3-e) of the Convention was applicable in the instant case;

2. Holds, by twelve votes to six, that there has been breach of the said Article (art. 6-3-e);

3. Holds, unanimously, that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) delegates to the President of the Court power to fix the further procedure.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-first day of February, one thousand nine hundred and eighty-four.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

The separate opinions of the following judges are annexed to the present judgment in accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 50 § 2 of the Rules of Court:

- opinion of Mr. Thór Vilhjálmsson; - opinion of Mrs. D. Bindschedler-Robert; - opinion of Mr. L. Liesch; - opinion of Mr. F. Matscher; - opinion of Mr. J. Pinheiro Farinha; - opinion of Mr. R. Bernhardt.

G. W.
M.-A. E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

As explained in the judgment of the majority of the Court, the traffic offence committed by the applicant Mr. Öztürk would have been treated as a criminal offence in the Federal Republic of Germany before the enactment of the Regulatory Offences Act ("the 1968/1975 Act") which "decriminalised" this as well as many other petty offences. I am of the opinion that, this being so, it is necessary to examine the extent of the changes introduced by the 1968/1975 Act. Should these changes prove to be limited, that would tend to support the conclusion that the applicant was entitled to the protection of the right set out in Article 6 § 3 (e) (art. 6-3-e) of the Convention.

The fine (Geldbusse) imposed on the applicant was decided upon by an administrative authority (Landratsamt). This would not, it seems, have been possible under the former system. The applicant lodged a kind of appeal or objection (Einspruch). This resulted in his case being referred to the District Court (Amtsgericht), the case-file having previously been forwarded to the public prosecutor's office which thereupon assumed the function of prosecuting authority. When the applicant appeared before the District Court, he was assisted by an interpreter.

As far as I can see, both of the institutions that dealt with the applicant's case, namely the public prosecutor's office and the District Court, were the same institutions as would have been competent under the former system, when the case would have been classified as criminal. The procedural rules applied by the District Court were in substance the same as those in force under the old system, although formally speaking they were the rules of criminal procedure applied by analogy.

The foregoing considerations indicate, in my opinion, that the treatment of petty offences under the 1968/1975 Act is not a completely new system of procedure but rather one that is closely related to the former system for criminal cases. This fact in itself constitutes an argument of some weight in favour of the applicability of Article 6 § 3 (e) (art. 6-3-e) of the Convention in the present case and hence of a violation of that provision. Nevertheless, it has to be weighed against other arguments. As to such other arguments, I refer to the dissenting opinion of Judge Bernhardt with which I agree in its essentials. My overall assessment of the relevant arguments leads me to the conclusion that Article 6 § 3 (e) (art. 6-3-e) of the Convention is not applicable in this case and that, accordingly, there was no violation. This view is reflected in my voting.

DISSENTING OPINION OF JUDGE BINDSCHEDLER-ROBERT

(Translation)

In the present case, the Court has rightly recognised that the principles identified in the Engel case (Series A no. 22) regarding disciplinary offences were also applicable to "regulatory" offences. It is indeed for the Court "to satisfy itself that the disciplinary" - in this instance: the "regulatory" - "does not improperly encroach upon the criminal"; in other words, to satisfy itself that the State's classification of the offence as "regulatory" instead of criminal is not inconsistent with Article 6 (art. 6).

I cannot, on the other hand, agree with the Court's analysis of the nature of the offence: the elements it takes into consideration - "the general character of the rule" and "the purpose of the penalty, being both deterrent and punitive" - are too general in themselves. In this way, the Court denies itself the possibility of accepting the very concept of decriminalisation. The Court underestimates, moreover, the real significance of the process of decriminalisation brought about by German law when it in fact, if not in theory, adopts the position that what is involved is a mere change of legal classification, hence a mere change of labels. An examination of the various provisions of the relevant German statutes reveals a radical change in the conditions governing prosecution and sentencing with regard to Ordnungswidrigkeiten; the penalties in particular - for this aspect is bound up with that of the nature of the offence - may be seen to be not only lighter than criminal-law penalties but also different in character.

This leads me to the conclusion that there is nothing improper in designating Ordnungswidrigkeiten as not falling within the criminal sphere and that, consequently, Article 6 (art. 6) is not applicable. Furthermore, I find it reasonable to consider that the highly detailed guarantees afforded by Article 6 (art. 6) were not designed to be applied to petty offences which do not involve the moral condemnation attaching to criminal offences: this is all the more so as in the present circumstances it is clearly in the interests of both the individual himself and the general working of the machinery of justice that such offences should be decriminalised or depenalised.

DISSENTING OPINION OF JUDGE LIESCH

(Translation)

1. "If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6), to satisfy itself that the disciplinary does not improperly encroach upon the criminal" (Engel judgment, Series A no. 22, page 34, § 81).

On the basis of this principle establishing the autonomy of the concept of "criminal", the Court laid down criteria for circumscribing the concept of "criminal", namely the national legal system, the nature of the offence and the degree of severity of the penalty.

2. But, in addition to these factors, it seems necessary to have regard to the question of the interests of society or the need for deterrence.

3. An offence may be defined as an act or omission provided for under the law and punished by it as being contrary to justice and at the same time to the benefit of society.

4. As the injustice or immorality of an act and the interests of society in punishing it are two essential conditions for designating it a criminal offence, it is understandable that the legislature should not prescribe penalties for certain highly immoral acts owing to the lack of any benefit for society in punishing them or that, conversely, prompted by the interests of society, it should penalise certain acts of doubtful immorality.

5. Thus incest, adultery by the husband, suicide or at least attempted suicide, blasphemy and vice (prostitution) are not usually covered by the criminal law. Conversely, certain acts are punished by the criminal law even though they are deemed only slightly immoral or not even immoral at all.

6. By the Act of 2 January 1975 on Ordnungswidrigkeiten, the German legislature, being concerned to humanise the criminal law, deliberately removed certain acts from its ambit so that they should no longer be criminal offences (see sections 21, 40, 41 and 81 of the Act). This was because the plethora of criminal penalties - in the narrow sense of the term - was in danger of making this coercive measure entirely ineffective.

7. In the guise, it is true, of a "criminal" procedure accompanied by suitable safeguards against arbitrariness, the "regulatory offence" (Ordnungswidrigkeit) is, in various fundamental respects, no longer covered by the criminal law.

8. Thus the penalty known as Geldbusse is no longer entered in criminal records; its effect is no longer stigmatic, and it gives rise to no social rejection.

No provision is made for the aggravation of ordinary-law penalties in cases of recidivism.

Imprisonment in the case of failure to pay a "regulatory" fine is not carried out according to the rules of ordinary law. It is not the mandatory substitute for an unpaid fine. Far from having the character of a penalty in the criminal sense, that is to say a measure punishing a criminal act, it is merely coercive without any reprobatory or humiliating effect.

The right to prosecute does not lie with the public prosecutor's office but with the administration acting in accordance with the principle of discretionary prosecution, a principle that does not normally apply under German criminal law (section 47 of the Act).

9. The seriousness of the "offence" is insignificant; the penalty (Gelbusse), unaccompanied by imprisonment and comparable to a mere admonition, still falls short of the penalties prescribed for petty offences under the legislation of some Contracting States. In short, the penalty is not necessary as a means of protecting a system of fundamental values in democratic society.

It therefore seems disproportionate and unnecessary, for the purposes of the Convention, to invoke the concept of "criminal law" in relation to a calling to order which is not regarded by the individual as a measure affecting his freedom, conscience or identity in any of its fundamental attributes.

10. Having regard to the nature of social reactions, the German legislature has thus clearly demarcated the limits to punishment by decriminalising these anti-social or merely deviant types of behaviour.

Far from simply acting according to its own will, the German legislature has not disregarded the margin of appreciation and the degree of necessity attaching to the restrictions which are provided for in principle under the Convention.

Construed in a restrictive sense, Ordnungswidrigkeiten may thus be regarded as having been placed on the fringe of, or even completely excluded from, the scope of Article 6 (art. 6) of the Convention.

11. Despite the significant peculiarities of this legal institution, the Court's judgment seems to reflect a desire to include the "offence" under the heading of "criminal offence" at all costs, with the sole concern of bringing the Convention's procedural guarantees into operation.

The fact that the respondent State grants to "everyone charged with a criminal offence" the right to a fair hearing by a tribunal should not, however, be regarded as indicating that Ordnungswidrigkeiten fall within the ambit of the criminal law.

The juridical characteristics of the criminal law do not derive from the possibility of appealing to a court.

12. An individual right, even one based on a legal rule, is not necessarily an ingredient of fundamental freedoms essential to man for leading the best life possible.

Accordingly, the system for protecting fundamental freedoms is justifiable only if an unequal relationship arises between the holder of a fundamental freedom and the public authorities which necessitates, in the light of sociological factors, the safeguard afforded by the Convention. In the present case, there is no such imbalance.

13. One final remark. In some member States criminal sentences are sometimes replaced by an alternative measure; it may be asked then whether, in relation to the present judgment, that type of "penalty" retains (even so) its punitive character (§ 53 of the judgment) and may still be included in the concept of "criminal offence".

It is considered by some, for instance, that community work is redemption of part of the offender's debt to society rather than a penalty, as such work is regarded as an act of solidarity that is useful to others and quite different from any conventional criminal-law penalty.

In that case, to borrow the Court's arguments, "the rule of law infringed ... [undergoes] no change of content ... it prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive" (§ 53). Article 6 (art. 6) of the Convention should therefore be complied with.

However, these alternative measures often presuppose a decision not to institute formal criminal or judicial proceedings. Even though the offender may be compelled to make amends, none of these alternatives, in general, involves any criminal sentence.

This reasoning is all the more valid when the national court, as may be done in certain member States, defers the passing of sentence. One of the criteria envisaged, the penalty, is lacking.

14. What should be the solution when a member State resorts to a form of procedure which results in a pecuniary penalty being imposed on an offender outside the confines of a court?

No doubt such procedures, just like the analogous one of decriminalising offences so as to rid them of the stigma of a sentence or dejudicalising certain parts of the criminal law, belong to one and the same criminal policy whose aim is precisely to apply types of treatment that fall outside the criminal law and hence go beyond the scope of the Convention.

The decriminalisation of offences therefore reflects, in my view, a humanising trend in the criminal law which, while preserving the Convention's substance, restores it to its original context, without however evading the supervision of the Court (Engel judgment).

15. For these various reasons, I consider that the respondent State, in resorting to the "regulatory" fines procedure, did not violate the provisions of Article 6 (art. 6) of the Convention.

DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

A. Autonomous interpretation

1. I do not believe that the authors of the Convention foresaw, when they drafted Article 6 (art. 6), the problems of interpretation to which this provision would give rise and the developments which it would undergo in the decades ahead. Moreover, when they spoke of "the determination of ... civil rights and obligations or of any criminal charge", they seem to have been thinking only of matters which, on the understanding prevailing at the time, came within the ambit of "civil" - or private - law and "criminal" law, and cognisance of which was in principle conferred on the ordinary courts. In fact, the procedural guarantees included in Article 6 (art. 6) of the Convention are typically those applying in cases which, by reason of their importance for the individual and for society, come before the courts.

2. After an initial period of hesitation, the Convention institutions rightly went beyond the formal concepts of "civil rights" and "criminal charges", opting instead for a more substantive approach. At the same time, they increasingly inclined towards autonomous interpretation of these concepts. It goes without saying that autonomous interpretation is the method best suited to multilateral conventions, and particularly rule-making instruments, such as the European Convention on Human Rights. Nonetheless, reliance on this method of interpretation raises problems of legal hermeneutics which are far more complex than one might at first suppose. These problems above all concern the "value" which should be attributed to the law of the State in question and to the legal systems of the other Contracting Parties in the endeavour to arrive - having regard to the object and purpose of the Convention - at a common understanding underlying the concepts contained in the text.

Thus, to take one example, the present judgment seems to base its interpretation of the concept of "criminal offence" (in which it seeks to include offences which are "regulatory" in the law of the Federal Republic of Germany) on, inter alia, the results of an analysis of the respective laws of the Contracting States (see paragraph 50 in fine). However, a careful examination of comparative law data would show that there does not nowadays exist a "common denominator" in the sense contemplated by the judgment: in the law of the Federal Republic of Germany - the State concerned - "regulatory" offences (Ordnungswidrigkeiten) clearly lie outside the realm of criminal law; the same is true of Austrian law (Verwaltungsstraftaten); and French law, Netherlands law (and possibly the legal systems of other European countries) are preparing to move in the

same direction. In my view, autonomous interpretation would call for comparative studies of a far more detailed nature than those carried out so far by the Convention institutions (I referred briefly to the methodological problem of autonomous interpretation in my separate opinion on the König judgment, Series A no. 22, p. 46; see also Schlosser in Praxis des Internationalen Privat- und Verfahrensrechts 1981, p. 154 f.).

I also wonder whether the purpose and object of the Convention, on which autonomous interpretation is founded, require that the procedural guarantee enshrined in Article 6 § 3 (e) (art. 6-3-e) be respected in cases like the present one (the other guarantees of Article 6 (art. 6) were not at issue), this being the only condition on which this case could legitimately be described as "criminal" in terms of "the object and purpose of the Convention". Here again, the judgment fails to provide convincing arguments in support of its conclusions.

B. The concept of criminal charge and "regulatory" offences

1. Basing itself on the Engel judgment, the present judgment states three criteria for the determination whether an offence is covered by criminal law: the legal system of the State concerned, the nature of the offence and the severity of the penalty which it carries. I approve this approach but cannot, to my regret, entirely agree with the Court's assessment of these criteria.

There has been no dispute before the Convention institutions concerning application of the first criterion; I therefore have nothing to add on this point.

My dissent mainly centres on the way in which the judgment assesses the second criterion and on the fact that the third criterion has not been considered (an omission which concords with the general structure of the judgment).

2. It is always an extremely delicate matter to make any evaluation of a legal institution on the basis of its "nature" and "the ordinary meaning of the terms" used to describe it (notwithstanding that the latter criterion is referred to in Article 31 of the Vienna Convention on the Law of Treaties as one of the primary indications for ascertaining the meaning of an ambiguous expression in an international treaty).

I thus have certain doubts on the validity of some of the arguments which the present judgment uses (see paragraph 53) in trying to explain the criminal character of an offence (the deterrent effect of the penalty which it carries), of a sanction (its punitive character) and of a rule of law (it prescribes conduct of a certain kind and imposes a punitive sanction for non-compliance; in addition, it is directed towards the public at large). However, all of these criteria apply equally well to offences against the proper conduct of legal hearings and to the sanctions which they carry under

the rules of procedure. It would nonetheless seem clear that such offences are not criminal within the meaning of Article 6 (art. 6) of the Convention (see also Europäische Grundrechte-Zeitschrift 1982, p. 159).

These arguments are thus, without more, insufficient to justify the qualification of an offence, of a sanction or of a rule of law as criminal within the meaning of Article 6 (art. 6).

Even if it is necessary, for purposes of autonomous qualification of a concept in an international convention, to depart from the formal qualification given to an institution in the legislation of a given State and to analyse its real nature, this process must never go too far - otherwise there is a danger of arriving at an abstract qualification which may be philosophically valid, but which has no basis in law. In point of fact, the "real nature" of a legal institution is conditioned above all by the legal effects to which it gives rise under the legislation concerned.

However, it is in this very process of analysing the true nature of "regulatory" offences that the judgment fails to take sufficient account of the relevant legislation - in this instance, German legislation - and, in so far as it does take any account, also fails to appreciate its scope correctly.

3. The word "decriminalisation" or "depenalisation" can have several meanings. Here, we are primarily concerned only with the removal of an offence from the criminal sphere and its reclassification in another area of law, in this case administrative law. In this sense, decriminalisation corresponds to a very widespread trend in European legal systems and one which the Council of Europe is itself encouraging. This is not the place to describe this phenomenon fully, nor is such explanation needed to justify this dissenting opinion. I shall merely point out that decriminalisation is something very different from a mere switch of labels. Social changes and new attitudes, as well as technical and economic circumstances, are leading States to reassess the elements which go to make up criminal offences; thus certain comparatively minor offences, which are nowadays very common, have been removed from the criminal sphere and classified as "regulatory" offences. This has important consequences which oblige us, in my view, to conclude that the nature of the offence itself has changed. The moral verdict is no longer the same, in other words, a "regulatory" offence no longer carries the blame which attaches to a crime; the court's decision is not entered in a criminal record; nor do "regulatory" offences carry a more severe penalty in the event of recidivism, this being another feature of criminal law; investigatory measures are also limited - there may, for example, be none of those restrictions on the person's liberty which apply in criminal proceedings (neither police custody, nor detention on remand, nor the interception of communications may be ordered). The sanctions, too, are fundamentally different. There is no imprisonment. Chief among the possible sanctions are a warning (Verwarnung), an admonitory fine (Verwarnungsgeld) and an administrative fine (Geldbusse). The last-named

sanction also differs from the criminal fine (Geldstrafe) in so far as the person concerned, if he can prove his inability to pay, is neither obliged to do so nor imprisoned instead. In the case of road traffic offences, a driving licence may also be suspended or withdrawn, a measure which can, but does not necessarily, constitute a sanction. A further aspect should not be forgotten: while the limitation period for criminal offences ranges from 3 years to 30, it never exceeds 3 years for "regulatory" offences; in practice, it ranges from 6 months to 3 years; in the present case, which concerned a road traffic offence, it was 6 months (essentially along the same lines, see Vogler's well-documented study in Europäische Grundrechte-Zeitschrift 1979, p. 645 ff.).

It cannot be claimed that the above comments refer only to "quantitative" differences in the legal effects of criminal and "regulatory" offences. It is an accepted fact that "quantity" can become "quality", and this is particularly true in the legal sphere.

To sum up: Differences in the conceptions which underlie criminal and "regulatory" offences in the law of the Federal Republic of Germany and, above all, differences in their legal effects (of substance and of procedure) affect their very nature - a point which the judgment does not appear to have properly grasped when it says that the differences in question relate mainly to procedural matters and the range of sanctions (see paragraph 53). If "regulatory" offences follow different procedures and also carry different penalties, this is precisely because their nature differs from that of criminal offences.

The foregoing analysis is by no means invalidated by the fact that there are still certain links between "regulatory" and criminal offences. These links, which are described at length in the judgment, do not affect essentials; in fact, they are chiefly concerned with procedure - in other words, they are concerned with essentially formal aspects which, as the Court has repeatedly ruled, should not determine the way a legal institution's "nature" is to be qualified. Moreover, the subsidiary application by analogy of certain procedural rules (in this instance, as the judgment emphasises, the application of the rules of criminal procedure to "regulatory" offences) is not sufficient in itself to justify conclusions as to the legal nature of a given issue; many examples from comparative law could be cited in support of this. These links are therefore not such as to erase the basic differences which exist in German law between "regulatory" and criminal offences. It follows that, by reason of their nature, "regulatory" offences in general and traffic offences in particular - the latter being the only ones at issue in the present case - should not be regarded as criminal within the meaning of the Convention.

4. The different conclusion which the Court has reached in the judgment regarding the nature of "regulatory" offences makes the third criterion - the severity of the penalties which they carry - irrelevant. It

should, however, be stressed that here too there are major differences between criminal and administrative sanctions (see the preceding paragraph). In the present case of a minor driving offence, the applicant faced an administrative fine of - in theory - up to DM 1,000. In fact, he was fined DM 60 and it is highly unlikely that, in deciding his objection, the District Court could have fined him more than DM 200. All of this is well below the level of severity which rightly led the Court to conclude that certain disciplinary sanctions imposed in the Engel case had been criminal in character.

C. Conclusions

1. The foregoing considerations have led me to conclude that road traffic offences in German law - the only offences sub judice in the present case - remain outside the sphere of criminal charges within the meaning of Article 6 § 1 (art. 6-1) of the Convention.

In my view, there are also no grounds of legal policy which might, through a teleological interpretation of the said provision, militate in favour of a different conclusion in the present case. In fact, I do not believe that the general and abstract provision of free interpretation in the case of an administrative offence of minimal importance to the individual, and regardless of his resources, is a right worthy of protection. Moreover, in making Article 6 (art. 6) applicable to cases of this kind one is also necessarily implying the right to a "judgment ... pronounced publicly". I believe that proper consideration of all the consequences of applying Article 6 (art. 6) to this case should make it plain that the judgment is taking us a long way from what are normally regarded as "human rights and fundamental freedoms", the only ones which the Convention institutions have the duty to safeguard.

2. A different reasoning would seem, however, to underlie the present judgment. Firstly, there is a fear that, by transferring certain offences, even serious offences, from the criminal to the administrative sphere, States might evade the procedural guarantees which the Convention provides for in criminal cases; secondly, there is a concern that certain basic procedural guarantees may also be needed for minor "regulatory" offences.

Although I appreciate the thinking behind this reasoning, I cannot associate myself with it. This fear, apart from being more fanciful than real - in decriminalising certain offences, the States concerned are pursuing aims wholly in accord with the Convention -, is also unfounded. Moreover, the case-law inaugurated by the Engel judgment gives the Convention institutions a sufficiently wide power of control in appropriate instances.

The concern to which I referred has more weight, but it is rooted in the incomplete and defective nature of the procedural guarantees included in the Convention. The situation here is similar to that which prevails in other

areas (administrative-civil cases, disciplinary cases), where the individual undoubtedly needs certain procedural guarantees, but not necessarily all those for which Article 6 (art. 6) provides in civil and criminal cases.

As I have often pointed out, it is up to the States of Europe to provide - through a Protocol to the Convention - adequate procedural guarantees for these cases too, which are also becoming increasingly important in the world of today. Excessively broad interpretation of the concepts of "criminal" and "civil" for the purpose of extending the guarantees included in Article 6 (art. 6) to cases to which they are not intended to apply does not strike me as an appropriate solution.

PARTLY DISSENTING OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

1. I am of the view that the State has the power to transfer certain acts from the criminal sphere to the administrative sphere. It is nevertheless necessary that in the event of dispute by the person concerned, the case should go before a court.

2. Notwithstanding this, in the instant case Mr. Öztürk withdrew his objection and submitted to the "regulatory" fine (see paragraph 13 of the judgment).

The abandonment of the objection lodged and the submission to the "regulatory" fine remove the matter from the ambit of Article 6 (art. 6) and for this reason I reach the conclusion that there was no breach of Article 6 § 3 (e) (art. 6-3-e) of the Convention.

DISSENTING .OPINION OF JUDGE BERNHARDT

The present case, although of minor importance in itself, raises basic questions on the correct interpretation and application of the European Convention on Human Rights. Since I do not share the opinion of the majority of the Court expressed in the present judgment, I feel obliged to explain my views in this dissenting opinion.

It is now settled case-law of the Court that three criteria are or can be of importance if the question arises as to whether a person is "charged with a criminal offence" in the sense of Article 6 § 3 (art. 6-3) of the Convention: the qualification of an act or omission in the legal system of the State concerned, "the nature of the offence" and "the nature and degree of severity of the penalty" (cf. § 50 of the present judgment following the reasoning in the Engel case). I agree with this starting point but I come to different conclusions when applying and evaluating these criteria.

(1) It is beyond dispute that the Regulatory Offences Act of 1968/1975 effected a decriminalisation of various petty offences by taking them out of the criminal code and by creating a system under which they were made punishable by fines imposed by administrative authorities. The administrative decision is final only if the person concerned does not apply to a court; the absolute exclusion of a court decision would be incompatible with the German constitutional system.

Decriminalisation of this kind involves basic assumptions on the proper field of criminal law as well as a good number of practical aspects. One of the basic aims is the improvement of the position of the individual by the elimination of any moral judgment and the drawbacks customarily connected with criminal proceedings. At the same time the criminal courts are no longer overburdened with the handling of a great number - now millions - of minor offences; this is in the interest of the State and society and the effectiveness of the judicial system.

The practical implications and consequences of the new system are described in the present judgment; they need not be repeated here in detail. It is the administrative authority which imposes the fine; only if the offender lodges an appeal, do the courts give the final decision; the courts can cancel the fine, they can impose a lower or - under certain conditions - a higher fine. It is the ordinary criminal court that has jurisdiction (if the offender lodges an appeal) in these petty-offence cases, and they apply by analogy a great part of the Code of Criminal Procedure; this has obviously been provided for practical reasons since no other courts are more competent for judging on the proper sanctions for contraventions. In genuine criminal cases, these same courts can impose sentences of imprisonment, whereas they cannot do this under the Regulatory Offences Act; coercive imprisonment is only possible if the offender neither pays the fine nor establishes his insolvency.

It has never been contested that this system really intends to differentiate between criminal matters and charges, on the one side, and administrative contraventions, on the other. The German system is in conformity with modern trends in a good number of countries; decriminalisation in its various aspects is also one of the topics of discussion in the Council of Europe.

(2) I agree with the present judgment and the settled case-law of this Court that the qualification of certain notions and procedures under national law cannot be the final word. The autonomy of the Convention and its provisions exclude any unilateral qualification which cannot be reviewed. But this does not mean that the national qualification is without any importance. We are here concerned with the difficult and precarious task of drawing the borderline between the qualification by the national legal system and the national margin of appreciation, on the one hand, and the autonomy of the Convention provisions, on the other.

In this connection, it must first be said that the fear that "decriminalisation" in the sense here under discussion could lead to the inapplicability of Article 6 (art. 6) of the Convention in nearly all cases now falling under this provision, is completely unfounded. The sole question is whether certain minor offences can be removed from the proper field of criminal law and criminal charges, and this only subject to the ultimate supervision of the Convention organs.

Also, it cannot be decisive that certain acts or omissions have previously been considered "criminal", especially at the time when the Convention was drafted and came into force. For good reasons the Court has in many cases accepted and practised an evolutive interpretation of the Convention, taking into account developments in society and in public opinion. In the Dudgeon case, the Court held that certain sexual behaviour, formerly punishable under the criminal law in all States, should no longer be treated as criminal and punishable in a given social environment. Social developments and evolving considerations of public policy must be taken into account also in other fields of similar relevance. The Court and the Commission must take due notice of such developments.

Finally, nor can it be decisive that certain acts or omissions are still considered in some States to be criminal, in others not. It is the essence of the "margin of appreciation" and the limited right of unilateral qualification possessed by the States that there exist differences between them which are relevant also for the application of the Convention.

Thus, the real problem in my opinion is whether the "decriminalisation" here under consideration is a legitimate exercise of national determination and whether it is in conformity with the object and purpose of Article 6 (art. 6) of the Convention. My answer is in the affirmative. The reasons for removing some minor offences from the field of criminal law, and for providing special sanctions and procedures for them, can hardly be

considered unfounded or disguised. And can it really be said that the object and purpose of Article 6 (art. 6) of the Convention require the same guarantees (including the free assistance of an interpreter) for small traffic offences and similar petty offences, guarantees which are absolutely necessary in genuine criminal cases? I do not think so.

For these reasons, "the nature of the offence" here in question - the second criterion for the existence of a criminal charge - does not disqualify or supersede the national determination, and it does not justify the conclusion that Article 6 § 3 (e) (art. 6-3-e) of the Convention is applicable and violated.

(3) There can be no doubt that "the degree of severity of the penalty" was minimal in the present case, and it does not detract from the foregoing conclusions.