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

CASE OF ERDOĞDU AND İNCE v. TURKEY

(*Applications nos. 25067/94 and 25068/94*)

JUDGMENT

STRASBOURG

8 July 1999

In the case of Erdoğdu and İnce v. Turkey,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mr P.J. MAHONEY and Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrars*,

Having deliberated in private on 4 March and 16 June 1999,

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

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 17 March 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in two applications (nos. 25067/94 and 25068/94) against the Republic of Turkey lodged with the Commission under former Article 25 by

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Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

two Turkish nationals, Mr Ümit Erdoğdu and Mr Selami İnce, on 20 August 1994.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the cases disclosed a breach by the respondent State of its obligations under Articles 7 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[1], the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (former Rule 30). The lawyers were given leave by the President of the Court at the time, Mr R. Bernhardt, to use the Turkish language in the written procedure (former Rule 27 § 3).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the Government's and the applicants' memorials on 24 and 25 August 1998 respectively. On 29 September 1998 the Government filed with the Registry additional information in support of their memorial and on 30 November 1998 the applicants filed details of their claims for just satisfaction. On 1 December 1998 the second applicant, Mr İnce, filed further details of his claims for just satisfaction. On 26 February 1999 the Government filed their observations in reply to both applicants' claims for just satisfaction.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The President of the Court, Mr L.Wildhaber, decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24246/94); Gerger v. Turkey (no. 24919/94); Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek and Özdemir v. Turkey (nos. 23927/94 and 24277/94); Sürek v. Turkey (no. 1)

1. *Note by the Registry*. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

(no. 26682/95); Sürek v. Turkey (no. 2) (no. 24122/94); Sürek v. Turkey (no. 3) (no. 24735/94); and Sürek v. Turkey (no. 4) (no. 24762/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case in the light of the decision of the Grand Chamber taken in accordance with Rule 28 § 4 in the case of Oğur v. Turkey. On 16 December 1998 the Government notified the Registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

Subsequently Mr K. Traja, substitute judge, replaced Mrs Botoucharova, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

6. At the invitation of the Court (Rule 99), the Commission delegated one of its members, Mr D. Šváby, to take part in the proceedings before the Grand Chamber.

7. In accordance with the decision of the President, who had also given the applicants' lawyers leave to address the Court in Turkish (Rule 34 § 3), a hearing took place in public in the Human Rights Building, Strasbourg, on 1 March 1999, the case being heard simultaneously with that of Gerger v. Turkey. The Court had held a preparatory meeting beforehand and decided to admit the applicants' late appointment of Mr E. Şansal to represent them at the hearing.

There appeared before the Court:

(a) *for the Government*

Mr D. TEZCAN,
Mr M. ÖZMEN, *Co-agents*,
Mr B. ÇALIŞKAN,
Ms G. AKYÜZ,
Ms A. GÜNYAKTI,
Mr F. POLAT,
Ms A. EMÜLER,
Mrs I. BATMAZ KEREMOĞLU,

Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

(b) *for the applicants*
Mr E. ŞANSAL, of the Ankara Bar, *Counsel*;

(c) *for the Commission*
Mr D. ŠVÁBY *Delegate*.

The Court heard addresses by Mr Šváby, Mr Şansal and Mr Tezcan.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants

8. At the material time, the first applicant, Mr Ümit Erdoğdu, was the responsible editor of the monthly review *Demokrat Muhalefet!* ("Democratic Opposition!"), published in Istanbul. In the January 1992 issue of the review, an interview which the second applicant, Mr Selami İnce, had conducted with a Turkish sociologist, Dr İ.B., was published.

B. The impugned publication

9. A translation of the relevant parts of the interview is as follows:

"Q: How and to what extent will Demirel accept the 'Kurdish reality'? Can his understanding of the 'reality' be deemed to represent State policy?

A: … The government is forced to accept certain facts now that there is armed resistance in Kurdistan. ... Violence by the Turkish forces could not stop the escalation and progress of the PKK [Workers' Party of Kurdistan] ...

Q: How will the State shape its new official policy on Kurdistan? Which aspects of the official ideology will be changed and how will they be changed? What effects can this have on the daily lives of the Kurdish people?

A: … In Turkey, the government and the State are two very different things. The State functions through institutions and bodies, members of which are designated by appointment. These institutions and bodies represent the power of the State. The government, i.e. the political power, carries very little weight against the power of the State. That is why governments can be overthrown by the State authority so often.

Official ideology can only be changed in the long term and the forces which are capable of changing it are non-governmental political and social forces and their struggle. The essence of the ideas and action of the PKK, for example, is such as can change the official ideology, reduce the influence of the appointed bodies of Turkey's political scene, and increase the weight of parliaments elected by the people. In my opinion, *de facto*, the influence of the Kurds and, in particular, that of the PKK, will grow further. The influence of the PKK in both the Kurdish and the Turkish societies will spread and deepen. And, as that influence grows, more serious steps will be taken by governments in their policies towards recognising the 'Kurdish reality'. It is evident that the State will try to obstruct the government in that process and will try to distort certain ideas and policies. And it is also manifest that the government will be able to survive so long as it can resist the power of the State and control the appointed institutions and bodies, i.e. so long as it has real power.

These changes will be reflected in the daily lives of the Kurds. Investigations and research will develop in fields such as the Kurdish language, history and folklore. Kurdish culture will be revived. The specificity of a Kurdish society will be emphasised more amongst the Kurdish masses. National awareness and desire for liberation will become stronger and will spread further. The idea and feelings for independence will develop.

Q: It is now observed that Kurds who, until now, would never have said 'I am Kurdish and I am engaging in politics for my present life and for my future' are now clearly beginning 'to get into politics for their own interests' throughout Kurdistan and Turkey. What sort of developments have brought about this situation? Do Kurds need a political subject in the legal sphere? If so, what form should it take?

A: Without any doubt, the most important cause of these developments has been the armed combat which the PKK has been waging for almost eight years. The guerrilla warfare has brought about major social and political changes in traditional Kurdish society. Traditional values are in turmoil. There has been very widespread support amongst the people for Kurdish guerrilla fighters ever since 15 August 1984. National awareness is now growing in Kurdish society and this process is spreading rapidly. And we see that, within this process, the political establishment has been used for Kurdish interests, for the move towards autonomy and independence. Kurds, who have always been engaged in politics for others and in order to serve other nations, are now engaged in politics in order to serve the Kurdish people. Healthy national awareness is now developing in response to Turkish racism and colonialism. It would no doubt be over-simplifying to say that all this began after the onset of Kurdish guerrilla warfare on 15 August. This process has roots that go further back into the past but what has been decisive is the new process launched by the PKK. ... Who is illegal in Kurdistan? The guerrillas or the special team of the Turkish armed forces? ...

Q: What should be done to counteract the wave of chauvinist Turkish nationalism encouraged by the right-wing press and the MCP [Nationalist Workers' Party]? Is there a possibility of a confrontation between the Turkish and Kurdish peoples? How could that be prevented?

A: … Kurds are dying for their nation. What are the Turks dying for? What are they doing in Kurdistan?

Q: It has been under discussion for some time that the PKK hegemony in Kurdistan has reached a stage where one can now talk of a 'double power'. Öcalan has

mentioned in his writings an orientation towards the 'formation of a Government-State' in the Botan-Behdinan region. Are there any signs of what the future interventions of the PKK will be in Kurdistan and in Turkish politics?

A: … The Turkish State has already withdrawn its soldiers and evacuated police stations in some regions such as Botan. ... This could be perceived as the beginning of the formation of a State ..."

C. The measures taken by the authorities

1. The charges against the applicants

10. In an indictment dated 23 March 1992 the public prosecutor at the Istanbul National Security Court (*İstanbul Devlet Güvenlik Mahkemesi*) charged the applicants with having disseminated propaganda against the indivisibility of the State by publishing the above interview. The charges were brought under section 8 of the Prevention of Terrorism Act 1991 (hereinafter "the 1991 Act" – see paragraph 19 below).

2. The proceedings before the National Security Court

11. In the proceedings before the National Security Court, the applicants denied the charges. They pleaded that the incriminated interview was a mere transcript of Dr. İ.B.'s statements. They maintained that the publication of an interview could not constitute an offence and that similar views had been expressed by the highest authorities in Turkey.

3. The applicants' conviction

12. In a judgment dated 12 August 1993 the Istanbul National Security Court found the applicants guilty of offences under section 8 of the 1991 Act. The first applicant was sentenced under the second paragraph of section 8 to five months' imprisonment and a fine of 41,666,666 Turkish liras (TRL). The second applicant was sentenced under the first paragraph of section 8 to one year and eight months' imprisonment and a fine of TRL 41,666,666.

13. In its reasoning, the court relied on certain extracts from the interviewee's statements as published. It held that the following phrases amounted to propaganda against the indivisibility of the State: "... the government is forced to accept certain facts now that there is armed resistance in Kurdistan ..."; "... Violence by the Turkish forces could not stop the escalation and progress of the PKK ..."; "... The essence of the ideas and action of the PKK ... can change the official ideology ..."; "... the influence of the Kurds and, in particular, that of the PKK, will grow further. The influence of the PKK in both the Kurdish and the Turkish societies will spread and deepen ..."; "... National awareness and desire for liberation will

become stronger and will spread further. The idea and feelings for independence will develop ..."; "... the most important cause of these developments has been the armed combat which the PKK has been waging for almost eight years ..."; "... Who is illegal in Kurdistan? The guerrillas or the special team of the Turkish armed forces? ..."; "... Kurds are dying for their nation. What are the Turks dying for? What are they doing in Kurdistan? ..."; "... The Turkish State has already withdrawn its soldiers and evacuated police stations in some regions such as Botan ..."; "... This could be perceived as the beginning of the formation of a State ...".

4. The applicants' appeal

14. The applicants appealed against their conviction. On 1 February 1994 the Court of Cassation dismissed the appeals. It upheld the National Security Court's assessment of the evidence and its reasons for rejecting the applicants' defence. The judgment was served on the applicants on 21 February 1994.

5. Further developments

15. Following the amendments made by Law no. 4126 of 27 October 1995 to the 1991 Act (see paragraphs 19 and 20 below), the Istanbul National Security Court *ex officio* re-examined the applicants' cases.

On 15 December 1995 the court sentenced the first applicant to five months' imprisonment and a fine of TRL 41,666,666 and the second applicant to one year, one month and ten days' imprisonment and a fine of TRL 111,111,110. The court ordered that the execution of the sentences be suspended on probation.

16. The applicants appealed against these sentences. On 7 April 1997 the Court of Cassation quashed the National Security Court's judgment. Concerning Mr Erdoğdu, the Court of Cassation pointed out that he had been prosecuted in his capacity as responsible editor and, therefore, the prison sentence imposed on him should have been converted into a fine in default of which the sentence was unlawful. Concerning Mr İnce, the Court of Cassation found that his lawyer had not been properly notified about the date of the hearing before the National Security Court.

17. On 9 September 1997 the National Security Court held a hearing. Having regard to the provisions of Law no. 4304 which had entered into force on 14 August 1997, the court decided to defer the imposition of a final sentence on Mr Erdoğdu, pursuant to section 1 of that Law. This decision remained subject to the conditions laid down under section 2 (see paragraph 21 below). The court maintained Mr İnce's conviction and the sentence imposed on him, the execution of which was, however, suspended in the light of his good conduct during the trial.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

1. The Press Act (Law no. 5680 of 15 July 1950)

18. The relevant provisions of the Press Act 1950 read as follows:

Section 3

"For the purposes of the present Law, the term 'periodicals' shall mean newspapers, press agency dispatches and any other printed matter published at regular intervals.

'Publication' shall mean the exposure, display, distribution, emission, sale or offer for sale of printed matter on premises to which the public have access where anyone may see it.

An offence shall not be deemed to have been committed through the medium of the press unless publication has taken place, except where the material in itself is unlawful."

2. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)[1]

19. The relevant provisions of the Prevention of Terrorism Act 1991 read as follows:

Section 8

(before amendment by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras.

Where the crime of propaganda contemplated in the above paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[2]. However the fine

1. This law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as "acts of terrorism" or "acts perpetrated for the purposes of terrorism" (sections 3 and 4) and to which it applies.
2. The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and went out of force on 27 July 1993.

may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment."

Section 8

(as amended by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a reoffender may not be commuted to a fine.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras …

…"

Section 13

(before amendment by Law no. 4126 of 27 October 1995)

"The penalties for the offences contemplated in the present Law may not be commuted to a fine or any other measure, nor may they be accompanied by a reprieve."

Section 13

(as amended by Law no. 4126 of 27 October 1995)

"The penalties for the offences contemplated in the present Law may not be commuted to a fine or any other measure, nor may they be accompanied by a reprieve.

However, the provisions of this section shall not apply to convictions pursuant to section 8[1]."

1. See the relevant provision of Law no. 4126, reproduced below.

Section 17

"Persons convicted of the offences contemplated in the present Law who ... have been punished with a custodial sentence shall be granted automatic parole when they have served three-quarters of their sentence, provided they have been of good conduct.

…

The first and second paragraphs of section 19[1] … of the Execution of Sentences Act (Law no. 647) shall not apply to the convicted persons mentioned above."

3. Law no. 4126 of 27 October 1995 amending sections 8 and 13 of Law no. 3713

20. The following amendments were made to the Prevention of Terrorism Act 1991 after the enactment of Law no. 4126 of 27 October 1995:

Transitional provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment ... to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections 4[2] and 6[3] of Law no. 647 of 13 July 1965."

4. Law no. 4304 of 14 August 1997 on the deferment of judgment and of executions of sentences in respect of offences committed by editors before 12 July 1997

21. The following provisions are relevant to sentences in respect of offences under the Press Act:

Section 1

"The execution of sentences passed on those who were convicted under the Press Act (Law no. 5680) or other laws as editors for offences committed before 12 July 1997 shall be deferred.

The provision in the first paragraph shall also apply to editors who are already serving their sentences.

The institution of criminal proceedings or delivery of final judgments shall be deferred where proceedings against the editor have not yet been brought, or where a

1. See paragraph 22 below.
2. This provision concerns substitute penalties and measures which may be ordered in connection with offences attracting a prison sentence.
3. This provision concerns reprieves.

preliminary investigation has been commenced but criminal proceedings have not been instituted, or where the final judicial investigation has been commenced but judgment has not yet been delivered, or where the judgment has still not become final."

Section 2

"If an editor who has benefited under the provisions of the first paragraph of section 1 is convicted as an editor for committing an intentional offence within three years of the date of deferment, he must serve the entirety of the suspended sentence.

…

Where there has been a deferment, criminal proceedings shall be instituted or judgment delivered if an editor is convicted as such for committing an intentional offence within three years of the date of deferment.

Any conviction as an editor for an offence committed before 12 July 1997 shall be deemed a nullity if the aforesaid period of three years expires without any further conviction for an intentional offence. Similarly, if no criminal proceedings have been instituted, it shall no longer be possible to bring any, and, if any have been instituted, they shall be discontinued."

5. The Execution of Sentences Act (Law no. 647 of 13 July 1965)

22. The Execution of Sentences Act provides, *inter alia*:

Section 5

"The term 'fine' shall mean payment to the Treasury of a sum fixed within the statutory limits.

…

If, after service of the order to pay, the convicted person does not pay the fine within the time-limit, he shall be committed to prison for a term of one day for every ten thousand Turkish liras owed, by a decision of the public prosecutor.

…

The sentence of imprisonment thus substituted for the fine may not exceed three years …"

Section 19(1)

"… persons who ... have been ordered to serve a custodial sentence shall be granted automatic parole when they have served half of their sentence, provided they have been of good conduct ..."

6. The Code of Criminal Procedure (Law no. 1412)

23. The Code of Criminal Procedure contains the following provisions:

Article 307

"An appeal on points of law may not concern any issue other than the lawfulness of the impugned judgment.

Non-application or erroneous application of a legal rule shall constitute unlawfulness[1]."

Article 308

"Unlawfulness is deemed to be manifest in the following cases:

1- where the court is not established in accordance with the law;

2- where one of the judges who have taken the decision was barred by statute from participating;

…"

B. Criminal case-law submitted by the Government

24. The Government supplied copies of several decisions given by the prosecutor attached to the Istanbul National Security Court withdrawing charges against persons suspected of inciting people to hatred or hostility, especially on religious grounds (Article 312 of the Criminal Code), or of disseminating separatist propaganda against the indivisible unity of the State (section 8 of Law no. 3713 – see paragraph 19 above). In the majority of cases where offences had been committed by means of publications the reasons given for the prosecutor's decision included such considerations as the fact that the proceedings were time-barred, that some of the constituent elements of the offence could not be made out or that there was insufficient evidence. Other grounds included the fact that the publications in issue had not been distributed, that there had been no unlawful intent, that no offence had been committed or that those responsible could not be identified.

Furthermore, the Government submitted a number of decisions of the National Security Courts as examples of cases in which defendants accused of the above-mentioned offences had been found not guilty. These were the following judgments: 19 November (no. 1996/428) and 27 December 1996 (no. 1996/519); 6 March (no. 1997/33), 3 June (no. 1997/102), 17 October

1. On the question whether the judgment is unlawful, the Court of Cassation is not bound by the arguments submitted to it. Moreover, the term "legal rule" refers to any written source of law, to custom and to principles deduced from the spirit of the law.

(no. 1997/527), 24 October (no. 1997/541) and 23 December 1997 (no. 1997/606); 21 January (no. 1998/8), 3 February (no. 1998/14), 19 March (no. 1998/56), 21 April (no. 1998/87) and 17 June 1998 (no. 1998/133).

25. As regards more particularly proceedings against authors of works dealing with the Kurdish problem, the National Security Courts in these cases reached their decisions on the ground that there had been no dissemination of "propaganda", one of the constituent elements of the offence, or on account of the objective nature of the words used.

PROCEEDINGS BEFORE THE COMMISSION

26. Mr Ümit Erdoğdu, the first applicant, and Mr Selami İnce, the second applicant, applied to the Commission on 20 August 1994. They relied on Articles 9, 10 and 7 of the Convention, arguing that their convictions resulting from the publication of the incriminated interview unjustifiably interfered with their freedom of thought and freedom of expression and, moreover, that they had been convicted for an act which had not constituted a criminal offence under national or international law at the time it had been committed given that the relevant provision of the Prevention of Terrorism Act 1991 was so vague that it had not enabled them to distinguish between permissible and prohibited behaviour.

27. The Commission declared the applications (nos. 25067/94 and 25068/94) admissible on 2 September and 14 October 1996, respectively. On 2 December 1997 the Commission decided to join the applications. In its report of 11 December 1997 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 10 (thirty-one votes to one) and that there had been no violation of Article 7 (unanimously). Extracts from the Commission's opinion and the partly dissenting opinion contained in the report are reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

28. In their memorial the applicants requested the Court to find that the respondent State was in breach of its obligations under Articles 7 and 10 of the Convention and to award them just satisfaction under Article 41.

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1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

The Government for their part submitted that the applicants' complaints should have been declared inadmissible for non-compliance with the six-month rule. In the alternative, they requested the Court to find that there had been no violation of the Articles invoked by the applicants.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

29. The Government maintained that the applications should have been declared inadmissible by the Commission under former Article 26 (now Article 35 § 1) of the Convention for failure to respect the six-month rule. They submitted that the Court of Cassation had examined the applicants' cases on 1 February 1994. The judgment had been made public on 9 February and served on them on 21 February 1994. However, the applications were received by the Commission only on 24 August 1994, that is to say, more than six months after any of these dates.

30. The Court observes that the Court of Cassation's decision was served on the applicants on 21 February 1994 and that the first communication including all relevant details of the applications was made by the applicants in their letter dated 20 August 1994.

Like the Commission, the Court considers that the fact that the applicants' first letter was received by the Commission only four days after the date indicated in the letter does not suggest that the applicants had back-dated that letter. The Court therefore dismisses the Government's preliminary objection.

II. SCOPE OF THE CASE

31. The Court notes that the applicants' lawyer at the hearing asserted that the Istanbul National Security Court which tried and convicted them could not be considered an independent and impartial tribunal and contended that this gave rise to a breach of Article 6 § 1 of the Convention. However, that particular complaint was never raised in the proceedings before the Commission and for that reason it cannot be considered to be within the scope of the case before the Court (see, *mutatis mutandis*, among other authorities, *Janowski v. Poland* [GC], no. 25716/94, § 19, ECHR 1999-I). The Court will therefore confine its examination to the applicants' complaints under Articles 7 and 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLES 9 AND 10 OF THE CONVENTION

32. The applicants alleged that the authorities had unjustifiably interfered with their right to freedom of thought and their right to freedom of expression guaranteed respectively under Articles 9 and 10 of the Convention.

The Court, like the Commission, considers that the facts of the applicants' complaint fall to be examined under Article 10 which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

33. The Government maintained that the interference with the applicants' right to freedom of expression was justified under the provisions of the second paragraph of Article 10. The Commission on the other hand accepted the applicants' allegations.

A. Existence of an interference

34. The Court notes that it is clear, and this has not been disputed, that there has been an interference with the applicants' right to freedom of expression on account of their conviction and sentence under section 8 of the Prevention of Terrorism Act 1991 (the "1991 Act").

B. Justification of the interference

35. The above-mentioned interference contravened Article 10 unless it was "prescribed by law", had one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was "necessary in a democratic society" for achieving such aim or aims. The Court will examine each of these criteria in turn.

1. "Prescribed by law"

36. The applicants did not comment on whether there had been compliance with this requirement (see, however, paragraph 57 below).

37. The Government pointed out that the measures taken against the applicants were based on section 8 of the 1991 Act.

38. The Commission considered that the wording of section 8 of the 1991 Act, as in force when the offence had been committed, had been sufficiently specific to enable the applicants, if necessary after taking legal advice, to regulate their conduct in the matter and that the requirement of foreseeability had thus been met. The Commission found, therefore, that the interference with the applicants' rights laid down in Article 10 had been prescribed by law.

39. The Court, like the Commission, accepts that since the applicants' convictions were based on section 8 of the 1991 Act, the resultant interference with their right to freedom of expression could be regarded as "prescribed by law".

2. Legitimate aim

40. The applicants maintained that the purpose of section 8 of the 1991 Act was to silence all ideas which were incompatible with the official views of the State. For this reason, their conviction could not be said to pursue any legitimate aim. The incriminated interview contained the views of a sociologist and a researcher on the situation of Kurds, and did not incite to violence, include any separatist propaganda or express support for any illegal organisation.

41. The Government reiterated that the prohibition of separatist propaganda under section 8 of the 1991 Act was directed at the protection of the territorial integrity and the national unity of the respondent State and, accordingly, in view of the threat posed by terrorism, at the protection of public order and national security.

42. The Commission for its part concluded that the applicants' convictions were part of the authorities' efforts to combat illegal terrorist activities and to maintain national security and public safety, which are legitimate aims under Article 10 § 2.

43. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2539, § 10) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicants can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime.

This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicants

44. The applicants stressed that their prosecution and conviction constituted unjustified and disproportionate interferences with their right to freedom of expression. In their submission, press organs which communicated ideas contradicting the official position of the authorities in Turkey were accused of disseminating propaganda in favour of terrorist organisations and were punished on the pretext of protecting national security and territorial integrity.

The incriminated interview itself was meant to be part of a file covering a broad spectrum of opinions on the Kurdish question, ranging from those of executives of the parties constituting the governing coalition to those of the military. It contained the opinion of a researcher and sociologist, taking the form of an analysis of the situation of Kurds.

Even the 1995 amendment to the 1991 Act fell short of ending the concept of "criminal thought" in Turkey. This was clearly shown by the fact that the applicants' convictions and sentences, although re-examined, were not annulled.

(ii) The Government

45. The Government replied that the language used in the impugned interview had appealed to the feelings, intellect and will of citizens of Kurdish origin in a call to Kurds to establish a national assembly. It depicted the PKK (Workers' Party of Kurdistan) as a liberation army which would undoubtedly win the armed conflict with the Republic of Turkey.

The interview was published at a time when the PKK, taking advantage of the disarray created by the Gulf war on the Iraqi border, was carrying out attacks everywhere against both military and civilian targets and was massacring dozens of people daily. The interviewee's opinions therefore constituted support for separatist violence. The phrases used in the interview incited readers of Kurdish origin to engage in armed combat against the Turkish State and offered moral support to separatist violence and acts of "national liberation" committed by citizens of Kurdish origin. This was no mere analysis but a definite encouragement for PKK acts and thus a glorification of the Kurdish independence movement.

In a context of virulent terrorism such as perpetrated by the PKK, which systematically engaged in the massacre of women, children, teachers and conscripts, it was not an option but a duty for the Turkish authorities to prohibit any act of disseminating separatist propaganda as such acts were bound to serve as an incitement to violence and enmity among the various

constituent parts of Turkish society and endanger human rights and democratic principles and institutions.

Accordingly, the applicants' prosecution and conviction under section 8 of the 1991 Act were within the authorities' margin of appreciation in this area. The interference was accordingly justified under Article 10 § 2 of the Convention.

(iii) The Commission

46. The Commission considered that the content of the incriminated interview was mainly of an analytical nature. The interviewee expressed his view of the Kurdish question and related matters in moderate terms and he did not associate himself in any manner with the use of violence in the context of the Kurdish separatist struggle. The Commission observed that the applicants had not added any comment to the interview that would have indicated their adherence to the use of violence. In the Commission's view the effect of the measures taken against the applicants was to deter public discussion on important political issues. For these reasons in particular the Commission found that there had been a violation of Article 10 of the Convention.

(b) The Court's assessment

47. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out, for example, in the Zana judgment (cited above, pp. 2547-48, § 51), and in *Fressoz and Roire v. France* ([GC], no. 29183/95, § 45, ECHR 1999-I).

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

48. Since the applicants were convicted of disseminating separatist propaganda through the medium of the review of which they were the editor and a journalist respectively, the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of a political democracy (see, among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, § 41, and *Fressoz and Roire* cited above, § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the Lingens judgment cited above, p. 26, §§ 41-42).

49. The Court notes that the incriminated review published an interview with a Turkish sociologist in which he explained his opinion on potential changes in the Turkish State's attitude to the Kurdish question. In the light of recent developments in south-east Turkey, he predicted a revival of Kurdish culture in the region. The sociologist also presented his views on how the PKK's guerrilla warfare contributed to a transformation of Kurdish society and stated that the withdrawal of Turkish troops and the evacuation of police stations by the Turkish government in some regions could be perceived as the beginning of the formation of a Kurdish State (see paragraph 9 above).

The Istanbul National Security Court found that the charges against both applicants brought under section 8 of the 1991 Act were proved (see paragraphs 12 and 13 above). Relying on various statements made by the interviewee, the court considered that the publication of his opinion amounted to propaganda against the indivisibility of the State. The court made references in particular to the sociologist's views that there was armed resistance in Kurdistan, that violence by the Turkish forces could not stop the PKK's escalation and progress whose ideas and actions were capable of

changing the "official ideology" and whose influence in Kurdish and Turkish society would grow, that Kurds' national awareness and their desire for liberation would become stronger and that the PKK's armed combat had been the most important cause of certain developments including the evacuation of a number of regions by the Turkish government, resulting in the beginning of the formation of a Kurdish State (see paragraph 13 above).

50. In assessing the necessity of the interference in the light of the principles set out above (see paragraphs 47 and 48) the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports* 1996-V, pp. 1957-58, § 58). Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1567-68, § 54). Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

51. The Court will have particular regard to the words used in the interview and to the context in which it was published. In this latter respect the Court takes into account the background to cases submitted to it, particularly the problems linked to the prevention of terrorism (see the Incal judgment cited above, pp. 1568-69, § 58).

It notes that the incriminated publication was an interview with a Turkish sociologist, whose views, as published, appear to have concerned in the first place the process by which the PKK's ideology was taking hold in Turkish society and how the roots of a Kurdish State were being formed. Without expressly advocating the PKK's role in the Kurdish struggle for independence, the interviewee analysed, mainly from a sociological perspective, this situation in the face of the reactions of the Turkish State.

52. For the Court, as for the Commission, the content of the interview is in fact of an analytical nature and the text does not contain any passages which could be described as an incitement to violence. The Court is naturally aware of the concern of the authorities about words or deeds which

have the potential to exacerbate the security situation in the region, where since approximately 1985 serious disturbances have raged between the security forces and the members of the PKK involving a very heavy loss of life and the imposition of emergency rule in much of the region (see the Zana judgment cited above, p. 2539, § 10). However, it would appear to the Court that the domestic authorities in the instant case failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them. As noted previously, the views expressed in the interview cannot be read as an incitement to violence; nor could they be construed as liable to incite to violence. In the Court's view the reasons given by the Istanbul National Security Court for convicting and sentencing the applicants, although relevant, cannot be considered sufficient to justify the interference with their right to freedom of expression (see paragraph 13 above).

53. The Court also observes that, notwithstanding the fact that the imposition of a final sentence on Mr Erdoğdu was deferred and execution of the sentence imposed on Mr İnce was suspended (see paragraph 17 above), both applicants were nevertheless faced with the threat of heavy penalties. The Court notes in this connection that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference.

54. The Court stresses that the "duties and responsibilities" which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.

55. Having regard to the above considerations, the Court concludes that the conviction and sentencing of the applicants were disproportionate to the aims pursued and therefore not "necessary in a democratic society". There has accordingly been a violation of Article 10 of the Convention in the particular circumstances of this case.

IV. ALLEGED VIOLATION OF ARTICLE 7 § 1 OF THE CONVENTION

56. The applicants submitted that their convictions had contravened Article 7 § 1 of the Convention which in its relevant part provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed …"

57. In the applicants' submission, the offences under the 1991 Act must be directly related to terrorism. Accordingly, acts of mere propaganda cannot constitute an offence under section 8 of that Act unless they incite to terrorist acts. Since the incriminated interview could not be considered to have furthered violence, their conviction on that account was not foreseeable. They argued that the concept of the "crime of propaganda" under section 8 of the 1991 Act was not precise enough to enable them to distinguish between permissible and prohibited behaviour.

58. Like the Government, the Commission expressed the view that section 8 of the 1991 Act, as in force at the time when the offence had been committed, had been sufficiently specific to enable the applicants, if necessary after taking legal advice, to regulate their conduct in the matter. For that reason, there had been no infringement of the principle of the statutory nature of offences and penalties, as guaranteed by Article 7.

59. The Court recalls that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term (see the S.W. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-B, p. 42, § 35). In view of its conclusion at paragraph 39 above in respect of the "prescribed by law" requirement under Article 10 § 2, the Court finds that there has been no violation of Article 7 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. The applicants claimed compensation for pecuniary and non-pecuniary damage as well as reimbursement of costs and expenses incurred in the domestic and Convention proceedings. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

61. Mr Erdoğdu claimed the sums of 1,425,000,000 Turkish liras (TRL) and TRL 950,000,000 to compensate him for the delays in the pursuit of his studies and career resulting from his conviction. In addition, he claimed the sums of TRL 41,666,666 by way of compensation for the fine imposed on him and 40,000 German marks in respect of a loan taken to finance his language studies as he was forced into emigration on account of his prosecution in Turkey. Mr İnce claimed the sum of TRL 2,850,000,000 by way of compensation for the loss of his job following his conviction.

62. The Government maintained that the sums claimed by the applicants were exorbitant having regard to the facts that the imposition of a final sentence on Mr Erdoğdu was deferred and Mr İnce's sentence was suspended (see paragraph 17 above).

63. The Delegate of the Commission did not comment on the amounts claimed.

64. The Court notes that the applicants never actually paid any fines. In the absence of any substantiation of the remainder of their claims under this head, the Court dismisses the applicants' claims for pecuniary damage.

B. Non-pecuniary damage

65. The applicants each claimed TRL 10,000,000,000 in compensation for non-pecuniary damage without specifying its nature.

66. The Government contended that the claims should be rejected. In the alternative they argued that should the Court be minded to find a violation of any of the Articles invoked by the applicants that in itself would constitute sufficient just satisfaction.

67. The Delegate of the Commission did not comment on this limb of the applicants' claims either.

68. The Court finds that the applicants may be taken to have suffered a certain amount of distress in the circumstances of the case. Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards each of the applicants in compensation the sum of 30,000 French francs (FRF) under this head.

C. Costs and expenses

69. The applicants claimed reimbursement of their legal costs and expenses. Mr Erdoğdu assessed these at TRL 500,000,000 and Mr İnce at TRL 1,050,000,000. Mr Erdoğdu submitted to the Court in support of his claim the contract which he had drawn up with his lawyer for the payment of legal fees in connection with his legal representation in the Strasbourg proceedings.

70. The Government stated that the amounts claimed were exaggerated in comparison with fees earned by Turkish lawyers in the domestic courts and had not been properly justified. The case was simple and had not required much effort on the part of the applicants' lawyers who had dealt with it throughout the proceedings in their own language. They cautioned against the making of an award which would only constitute a source of unjust enrichment having regard to the socio-economic situation in the respondent State.

71. The Delegate of the Commission did not comment on the sums claimed.

72. The Court notes that in the proceedings before the Commission and in the written procedure before the Court the applicants were represented by Mrs O.E. Ataman and Mr Ş. Sarıhan, respectively. At the hearing before the Court, however, their case was pleaded by Mr Şansal (see paragraph 7 above), who had been associated with the preparation of another case before the Court concerning similar facts and complaints.

The Court also notes that Mr İnce received FRF 7,996 from the Council of Europe by way of legal aid.

Deciding on an equitable basis and according to the criteria laid down in its case-law (see, among many other authorities, *Nikolova v. Bulgaria* [GC], no. 31119/95, § 79, ECHR 1999-II), the Court awards Mr Erdoğdu the sum of FRF 10,000.

As to the costs and expenses incurred by Mr İnce, the Court, applying the same criteria, awards him the sum of FRF 10,000 less the amount already received from the Council of Europe by way of legal aid.

D. Default interest

73. The Court deems it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment, which is 3.47% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection to the admissibility of the case;

2. *Holds* that there has been a violation of Article 10 of the Convention in respect of both applicants;

3. *Holds* that there has been no violation of Article 7 of the Convention in respect of either of the applicants;

4. *Holds*

(a) that the respondent State is to pay the applicants, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:

(i) 30,000 (thirty thousand) French francs to each applicant in respect of non-pecuniary damage;

(ii) 10,000 (ten thousand) French francs to Mr Erdoğdu in respect of costs and expenses;

(iii) 10,000 (ten thousand) French francs to Mr İnce in respect of costs and expenses less 7,996 (seven thousand nine hundred and ninety-six) French francs;

(b) that simple interest at an annual rate of 3.47% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1999.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Mrs Palm, Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mrs Greve;

(b) concurring opinion of Mr Bonello.

L.W.
P.J.M.

JOINT CONCURRING OPINION OF JUDGES PALM, TULKENS, FISCHBACH, CASADEVALL AND GREVE

We share the Court's conclusion that there has been a violation of Article 10 in the present case although we have reached the same result by a route which employs the more contextual approach set out in the partly dissenting opinion of Judge Palm in *Sürek v. Turkey (no. 1)* ([GC], no. 26682/95, ECHR 1999-IV).

In our opinion the majority assessment of the Article 10 issue in this line of cases against Turkey attaches too much weight to the form of words used in the publication and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the language in question may be intemperate or even violent. But in a democracy, as our Court has emphasised, even "fighting" words may be protected by Article 10.

An approach which is more in keeping with the wide protection afforded to political speech in the Court's case-law is to focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case. Other questions must be asked. Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the centre of violence or on its doorstep?

It is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society.

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicants' freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom-of-expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicants supported or instigated the use of violence, then their conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create "a clear and present danger". When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[1]

The guarantee of freedom of expression does not permit a State to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action[2]. It is a question of proximity and degree[3].

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action[4].

It is not manifest to me that any of the words with which the applicants were charged, however pregnant with mortality they may appear to some, had the potential of imminently threatening dire effects on the national order. Nor is it manifest to me that instant suppression of those expressions was indispensable for the salvation of Turkey. They created no peril, let alone a clear and present one. Short of that, the Court would be subsidising

1. Justice Oliver Wendell Holmes in *Abrahams v. United States* 250 U.S. 616 (1919) at 630.
2. *Brandenburg v. Ohio* 395 U.S. 444 (1969) at 447.
3. *Schenck v. United States* 294 U.S. 47 (1919) at 52.
4. *Whitney v. California* 274 U.S. 357 (1927) at 376.

the subversion of freedom of expression were it to condone the convictions of the applicants by the criminal courts.

In summary "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence"[1].

1. Justice Louis D. Brandeis in *Whitney v. California* 274 U.S. 357 (1927) at 377.