



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

CASE OF SÜREK v. TURKEY (No. 4)

(application no. 24762/94)

JUDGMENT

STRASBOURG

8 July 1999

This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of Sürek v. Turkey no. 4,

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. 11¹, and the relevant provisions of the Rules of Court², 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 3 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 Convention³ by the European Commission of Human Rights (“the Commission”) on 27 April 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 24762/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Kamil Tekin Sürek, on 27 July 1994.

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court entered 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.

The Commission's request referred to former Articles 44 and 48 of the Convention 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 case disclosed a breach by the respondent State of its obligations under Articles 6 § 1 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the former Rules of Court A¹, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). Mr R. Bernhardt, President of the Court at the time, subsequently authorised the applicant's lawyer to use the Turkish language in the written procedure (Rule 27 § 3). At a later stage, Mr L. Wildhaber, President of the new Court, authorised the applicant's lawyer to use the Turkish language in the oral proceedings (Rule 36 § 5).

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 applicant's lawyer 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 applicant's memorials on 23 September and 13 October 1998 respectively. On 29 September 1998 the Government filed with the Registry additional information in support of their memorial and on 14 October 1998 the applicant filed details of his claims for just satisfaction. On 26 February 1999 the applicant filed further details of his claims for just satisfaction. On 1 March 1999 the Government filed their observations in reply to the applicant's claims for just satisfaction.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. On 22 October 1998 Mr Wildhaber had 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* (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); *Erdoğan and İnce v. Turkey* (nos. 25067/94 and 25068/94);

Note by the Registry

1. 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 thereafter only to cases concerning States not bound by that Protocol.

Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek v. Turkey no. 1 (no. 26682/95); Sürek and Özdemir v. Turkey (nos. 23927/94 and 24277/94); Sürek v. Turkey no. 2 (no. 24122/94) and Sürek v. Turkey no. 3 (no. 24735/94).

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 (Rules 24 § 3 and 100 § 4).

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case having regard to the decision of the Grand Chamber in the case of Oğur v. Turkey taken in accordance with Rule 28 § 4. 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 replaced Mrs Botoucharova who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

6. Pursuant to the invitation of the Court (Rule 99), the Commission delegated one of its members, Mr D. Šváby, to take part in the consideration of the case before the Grand Chamber. The Commission subsequently informed the Registry that the Commission would not be represented at the oral hearing. On 16 February 1999 the Delegate filed his written pleadings on the case with the Registry.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 3 March 1999, the case being heard simultaneously with the case of Sürek v. Turkey no 3. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr D. TEZCAN,

Mrs D. AKÇAY,

Mr B. ÇALIŞKAN,

Ms G. AKYÜZ,

Mr F. POLAT,

Ms A. EMÜLER,

*Agent,
Co-Agent,*

Advisers;

(b) *for the applicant*

Mr S. MUTLU, of the Istanbul Bar,

Lawyer.

The Court heard addresses by Mr Mutlu and Mr Tezcan.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant

8. The applicant is a Turkish citizen who was born in 1957 and lives in Istanbul.

9. At the material time, the applicant was the major shareholder in *Deniz Basın Yayın Sanayi ve Ticaret Organizasyon*, a Turkish limited liability company which owns a weekly review entitled *Haberde Yorumda Gerçek* (The Truth of News and Comments), published in Istanbul.

B. The impugned publications

10. In issue no. 51 of the review, dated 13 March 1993, a news commentary entitled “*Kawa*¹ and *Dehak*² Once Again” was published. The article analysed possible events, which could occur during the upcoming celebrations of *Newroz*³.

11. A translation of the relevant parts of the news commentary is as follows:

“... It’s *Newroz* week in Kurdistan. The biggest confrontation between the demands of the Kurdish people and intolerance in the face of the expression of these demands occurs during these days. The tradition of rebellion is awakened. *Dehak* and *Kawa* are once again invested with flesh and bones. It is time to settle accounts. There is nothing vague about *Kawa*. All the mountains, all the cities are full of *Kawa*. There are millions of them. All right, who, then, is *Dehak*? Who is the candidate for representing *Dehak* in our day? Is it Demirel? Is it Güreş? The regional Governor? Or the new commander İlter? This time round, is *Dehak* represented by every counter-insurgency

1. *Kawa*: legendary Kurdish hero who led a peasants’ uprising against King *Dehak*.

2. King *Dehak*: legendary Middle-Eastern king supposed to have lived in the 6th century B.C.

3. *Newroz* (or *Noruz*) is the name of the celebrations for greeting spring and new year in Kurdish and Iranian tradition.

chief, indeed, every counter-insurgency operative, every special team member, every police commissioner or superintendent officer? Has *Dehak* become anonymous too? Be it as it may, but *Dehak* and *Kawa* will settle their accounts once again. ...

Last year, a revolutionary publication described the days preceding *Newroz* as follows:

‘Nowadays over 200 thousand soldiers massed into Kurdistan. Tanks and weapons are sent over. Bombs are raining on Kurdish villages and mountains. The Chief of the General Staff has inspected the preparations for the offensive. Instructions are being issued to provincial and district governors, special team leaders, police chiefs and military officials. The Head of MIT intelligence agency talks of the prospect of much blood being shed. Members of Parliament are organising information-gathering trips in order to take the pulse of the people.’ ...

Unlike previous years, the PKK-leaning Kurdistan National Assembly (KUM) is also expected to take on a role during *Newroz* this year. ...

On the other hand emergency measures are being implemented in large cities outside Kurdistan where there are concentrations of Kurdish people. It is highly likely that there will be large demonstrations in the Kurdish quarters there.”

12. In the same issue and within the context of the above news commentary, an interview was also published by the Kurdish News Agency with a representative of the National Liberation Front of Kurdistan (“the ERNK”), the political wing of the Kurdistan Workers’ Party (“the PKK”). Both organisations are illegal under Turkish law.

13. A translation of the relevant part of the interview is as follows:

“... We wish to emphasise this finding, indeed, we feel that it ought to be underlined. And we call on all European countries. We are open to any humanitarian, political solution, including the calls for an armistice. The PKK movement and its struggle are absolutely not terrorist movements. This misapprehension must be abandoned – it must definitely be abandoned – and a move must be made towards co-operation and support. The real terrorist is the Republic of Turkey. We believe that attitudes on this matter will be much clarified this year, that very positive dialogues will develop and that the Republic of Turkey will be gradually further isolated.”

C. The measures taken by the authorities

1. The seizure of the review

14. On 14 March 1993 the Istanbul National Security Court (*İstanbul Devlet Güvenlik Mahkemesi*) ordered the seizure of all copies of issue no. 51 of the review, since it allegedly disseminated separatist propaganda.

2. The charges against the applicant

15. In an indictment dated 22 April 1993, the Public Prosecutor at the Istanbul National Security Court, on account of the publication of the above news commentary, charged the applicant in his capacity as the owner of the review with disseminating propaganda against the indivisibility of the State. He was also charged with publishing the declaration of the ERNK (see paragraph 12 above). The charges were brought under sections 8 and 6 of the Prevention of Terrorism Act 1991 (hereinafter “the 1991 Act”: see paragraphs 24 and 25 below), respectively.

3. The proceedings before the Istanbul National Security Court

16. In the proceedings before the Istanbul National Security Court, the applicant denied the charges. He pleaded that the incriminated news commentary did not fall within the scope of section 8 of the 1991 Act. He maintained that arguing and commenting on possible activities in which the PKK might engage during the *Newroz* celebrations could not be regarded as publishing a declaration of a terrorist organisation within the meaning of section 6 of the 1991 Act. As regards his freedom of expression, the applicant referred to Article 10 of the Convention and the case-law of the Commission and the Court. He stated that pluralism of opinion was essential in a democratic society including opinions which shock or offend. He argued that the provisions of sections 6 and 8 of the 1991 Act restricted freedom of expression in contravention of the Turkish Constitution and the criteria laid down in the case-law of the Commission and the Court.

4. The applicant's conviction

17. In a judgment dated 27 September 1993, the Istanbul National Security Court found the applicant guilty of an offence under section 8 § 2 of the 1991 Act. The court first sentenced the applicant to a fine of 100,000,000 Turkish liras. However, having regard to the applicant's good conduct during the trial, it reduced the fine to 83,333,333 Turkish liras.

18. In its reasoning, the court held that the incriminated news commentary contravened section 8 of the 1991 Act. The court concluded that it referred to a certain part of the Turkish territory as “Kurdistan” as well as a certain section of the population as “Kurds”, and amounted to propaganda against the indivisibility of the Turkish State.

The court further observed that the review had also published the declaration of an illegal terrorist organisation in which the Republic of Turkey was referred to as a terrorist State. However, it considered that the declaration constituted part of the incriminated news commentary. Having regard to the provisions of Article 79 of the Turkish Criminal Code, the court found no grounds for a separate conviction under section 6 of the 1991 Act.

5. *The applicant's appeal*

19. The applicant appealed against his conviction to the Court of Cassation. He relied on the defence grounds which he had invoked at his trial before the National Security Court.

20. On 8 February 1994 the Court of Cassation dismissed the applicant's appeal, upholding the National Security Court's reasoning and its assessment of the evidence.

On 29 November 1995 the applicant paid the last instalment of the fine imposed on him.

6. *Further developments*

21. Following the amendments made by Law No. 4126 of 27 October 1995 to the 1991 Act (see paragraphs 24 and 25 below), the Istanbul National Security Court *ex officio* re-examined the applicant's case.

On 22 April 1996 the court ruled that these amendments did not affect the applicant's case as his sentence had already been executed.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. **The criminal law**

1. *The Criminal Code (Law no. 765)*

22. The relevant provisions of the Criminal Code read as follows:

Article 36 § 1

"In the event of conviction, the court shall order the seizure and confiscation of any object which has been used for the commission or preparation of the crime or offence..."

Article 79

"A person who infringes various provisions of this Code by a single act, shall be punished under the provision which prescribes the heaviest punishment."

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

23. 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.”

3. *The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)*¹

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

Section 6

“It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person’s ... identity is divulged provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.

It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to print or publish declarations or leaflets emanating from terrorist organisations.

...

Where the offences contemplated in the above paragraphs are 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 sales of the previous issue if the periodical appears monthly or less frequently, *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 may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher.”

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

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.

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*¹. 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."

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...

..."

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

25. The following amendments were made to the Prevention of Terrorism Act 1991 after the enactment of Law 4126 of 27 October 1995:

1. 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.

Temporary 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 4¹ and 6² of Law no. 647 of 13 July 1965.”

5. *The Code of Criminal Procedure (Law no. 1412)*

26. 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 unlawfulness³.”

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 law cases submitted by the Government

27. 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 23 above). In the majority of

1. This provision concerns substitute penalties and measures which may be ordered in connection with offences attracting a prison sentence.

2. This provision concerns reprieves.

3. 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.

cases where offences had been committed by means of publications the reasons given for the prosecutor's decisions 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.

28. 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 (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 1998 (no. 1998/87) and 17 June 1998 (no. 1998/133).

29. 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 scientific, historical and/or objective nature of the words used.

C. The National Security Courts¹

1. The Constitution

30. The constitutional provisions governing judicial organisation of the National Security Courts are worded as follows:

1. The National Security Courts were created by Law no. 1773 of 11 July 1973, in accordance with Article 136 of the 1961 Constitution. That law was annulled by the Constitutional Court on 15 June 1976. The courts in question were later reintroduced into the Turkish judicial system by the 1982 Constitution. The relevant part of the statement of reasons contains the following passage:

"There may be acts affecting the existence and stability of a State such that when they are committed, special jurisdiction is required in order to give judgment expeditiously and appropriately. For such cases it is necessary to set up National Security Courts. According to a principle inherent in our Constitution, it is forbidden to create a special court to give judgment on a specific act after it has been committed. For that reason the National Security Courts have been provided for in our Constitution to try cases involving the above-mentioned offences. Given that the special provisions laying down their powers have been enacted in advance and that the courts have been created before the commission of any offence ..., they may not be described as courts set up to deal with this or that offence after the commission of such an offence."

Article 138 §§ 1 and 2

“In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, ... or ... person may give orders or instructions to courts or judges in the exercise of their judicial powers, or send them circulars or make recommendations or suggestions to them.”

Article 139 § 1

“Judges ... shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution...”

Article 143 §§ 1-5

“National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State’s internal or external security.

National Security Courts shall be composed of a president, two other regular members, two substitute members, a prosecutor and a sufficient number of assistant prosecutors.

The president, one of the regular members, one of the substitutes and the prosecutor, shall be appointed from among judges and public prosecutors of the first rank, according to procedures laid down in special legislation; one regular member and one substitute shall be appointed from among military judges of the first rank and the assistant prosecutors from among public prosecutors and military judges.

Presidents, regular members and substitute members ... of National Security Courts shall be appointed for a renewable period of four years.

Appeal against decisions of National Security Courts shall lie to the Court of Cassation.

...”

Article 145 § 4

“Military legal proceedings

“The personal rights and obligations of military judges ... shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve in the performance of their non-judicial duties shall also be regulated by law...”

2. *Law no. 2845 on the creation and rules of procedure of the National Security Courts*¹

31. Based on Article 143 of the Constitution, the relevant provisions of Law no. 2845 on the National Security Courts, provide as follows:

Section 1

“In the capitals of the provinces of ... National Security Courts shall be established to try persons accused of offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free, democratic system of government and offences directly affecting the State’s internal or external security.”

Section 3

“The National Security Courts shall be composed of a president, two other regular members and two substitute members.”

Section 5

“The president of a National Security Court, one of the [two] regular members and one of the [two] substitutes ... shall be civilian ... judges, the other members, whether regular or substitute, military judges of the first rank...”

Section 6(2) and (6)

“The appointment of military judges to sit as regular members and substitutes shall be carried out according to the procedure laid down for that purpose in the Military Legal Service Act.

Except as provided in the present Law or other legislation, the president and the regular or substitute members of the National Security Courts ... may not be appointed to another post or place, without their consent, within four years...

...

If, after an investigation concerning the president or a regular or substitute member of a National Security Court conducted according to the legislation concerning them, competent committees or authorities decide to change the duty station of the person concerned, the duty station of that judge or the duties themselves ... may be changed in accordance with the procedure laid down in that legislation.”

1. These provisions are based on Article 143 of the Constitution, to the application of which they refer.

Section 9(1)(a)

“National Security Courts shall have jurisdiction to try persons charged with

(a) the offences contemplated in Article 312 § 2 ... of the Turkish Criminal Code
...,

...

(d) offences having a connection with the events which made it necessary to declare a state of emergency, in regions where a state of emergency has been declared in accordance with Article 120 of the Constitution,

(e) offences committed against the Republic, whose constituent qualities are enunciated in the Constitution, against the indivisible unity of the State – meaning both the national territory and its people – or against the free, democratic system of government and offences directly affecting the State’s internal or external security.

...”

Section 27(1)

“The Court of Cassation shall hear appeals against the judgments of the National Security Courts.”

Section 34(1) and (2)

“The rules governing the rights and obligations of ... military judges appointed to the National Security Courts and their supervision ..., the institution of disciplinary proceedings against them, the imposition of disciplinary penalties on them and the investigation and prosecution of any offences they may commit in the performance of their duties ... shall be as laid down in the relevant provisions of the laws governing their profession...”

The observations of the Court of Cassation on military judges, the assessment reports on them drawn up by Ministry of Justice assessors ... and the files on any investigations conducted in respect of them ... shall be transmitted to the Ministry of Justice.”

Section 38

“A National Security Court may be transformed into a Martial Law Court, under the conditions set forth below, where a state of emergency has been declared in all or part of the territory in respect of which the National Security Court concerned has jurisdiction, provided that within that territory there is more than one National Security Court...”

3. *The Military Legal Service Act (Law no. 357)*

32. The relevant provisions of the Military Legal Service Act are worded as follows:

Additional section 7

“The aptitude of military judges ... appointed as regular or substitute members of the National Security Courts that is required for promotion or advancement in salary step, rank or seniority shall be determined on the basis of assessment reports drawn up according to the procedure laid down below, subject to the provisions of the present Law and the Turkish Armed Forces Personnel Act (Law no. 926).

(a) The first superior competent to carry out assessment and draw up assessment reports for military judges, whether regular or substitute members ... shall be the Minister of State in the Ministry of Defence, followed by the Minister of Defence.

...”

Additional section 8

“Members ... of the National Security Courts belonging to the Military Legal Service ... shall be appointed by a committee composed of the personnel director and the legal adviser of the General Staff, the personnel director and the legal adviser attached to the staff of the arm in which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defence...”

Section 16(1) and (3)

“Military judges ... shall be appointed by a decree issued jointly by the Minister of Defence and the Prime Minister and submitted to the President of the Republic for approval, in accordance with the provisions on the appointment and transfer of members of the armed forces...

...

The procedure for appointment as a military judge shall take into account the opinion of the Court of Cassation, the reports by Ministry of Justice assessors and the assessment reports drawn up by the superiors...”

Section 18(1)

“The rules governing the salary scales, salary increases and various personal rights of military judges ... shall be as laid down in the provisions relating to officers.”

Section 29

“The Minister of Defence may apply to military judges, after considering their defence submissions, the following disciplinary sanctions:

A. A warning, which consists in giving the person concerned notice in writing that he must exercise more care in the performance of his duties.

...

B. A reprimand, which consists in giving the person concerned notice in writing that a particular act or a particular attitude has been found to be blameworthy.

...

The said sanctions shall be final, mentioned in the assessment record of the person concerned and entered in his personal file...”

Section 38

“When military judges ... sit in court they shall wear the special dress of their civilian counterparts...”

4. *Article 112 of the Military Code (of 22 May 1930)*

33. Article 112 of the Military Criminal Code of 22 May 1930 provides:

“It shall be an offence, punishable by up to five years’ imprisonment, to abuse one’s authority as a civil servant in order to influence the military courts.”

5. *Law no. 1602 of 4 July 1972 on the Supreme Military Administrative Court*

34. Under section 22, the First Division of the Supreme Military Administrative Court has jurisdiction to hear applications for judicial review and claims for damages based on disputes relating to the personal status of officers, particularly those concerning their professional advancement.

PROCEEDINGS BEFORE THE COMMISSION

35. Mr Kamil Tekin Sürek applied to the Commission on 27 July 1994. He argued that his conviction and sentence constituted an unjustified interference with his right to freedom of expression as guaranteed by Article 10 of the Convention and that his case had not been heard by an independent and impartial tribunal, in breach of Article 6 § 1 of the

Convention. He also maintained that the criminal proceedings against him had not been concluded within a reasonable time, which gave rise to a separate violation of Article 6 § 1.

36. The Commission declared the application (no. 24762/94) admissible on 2 September 1996, with the exception of the Article 6 § 1 complaint relating to the length of the criminal proceedings brought against the applicant. In its report of 13 January 1998 (former Article 31), it expressed the opinion that there had been a violation of Article 10 of the Convention (30 votes to 2) as well as a violation of Article 6 § 1 (31 votes to 1). The full text of the Commission's opinion and the separate opinions contained in the report are reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

37. The applicant requested the Court to find the respondent State in breach of its obligations under Articles 6 § 1 and 10 of the Convention and to award him just satisfaction under Article 41.

The Government for their part requested the Court to reject the applicant's allegations.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. The applicant alleged that the authorities had unjustifiably interfered with his right to freedom of expression guaranteed under Article 10 of the Convention, 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

1. *Note by the Registry.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1999), but a copy of the Commission's report is obtainable from the Registry.

rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

39. The Government maintained that the interference with the applicant’s 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 applicant’s allegations.

A. Existence of an interference

40. The Court notes that it is clear, and this has not been disputed, that there has been an interference with the applicant’s right to freedom of expression on account of his conviction and sentence under section 8 of the Prevention of Terrorism Act 1991 (“the 1991 Act”).

B. Justification of the interference

41. 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”

42. The applicant did not comment on whether there had been compliance with this requirement.

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

44. The Commission accepted the Government’s view and concluded that the interference was prescribed by law.

45. The Court, like the Commission, accepts that since the applicant’s conviction was based on section 8 of the 1991 Act, the resultant interference with his right to freedom of expression could be regarded as “prescribed by law”, all the more so given that the applicant has not specifically disputed this.

2. Legitimate aim

46. The applicant did not make any submissions on this issue, other than disputing generally the lawfulness of the interference with his right to freedom of expression.

47. The Government reiterated that the measures taken against the applicant were based on section 8 of the 1991 Act. That provision was aimed at protecting interests such as territorial integrity, national unity, national security and the prevention of crime and disorder.

48. The Commission for its part concluded that the applicant's conviction was 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.

49. 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* 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 applicant 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 applicant*

50. The applicant stressed that neither he nor the review had any links with the PKK. He contended that the impugned publications did not praise that organisation or comment favourably on it. They were written and published with complete objectivity in accordance with the principles of objective journalism. The subject of the news commentary in question was the approaching feast of *Newroz*, which had been celebrated for thousands of years in the Middle-East and had given rise to bloody incidents in recent years in Turkey.

The applicant further pleaded that as the owner of the review he had no editorial responsibility for its content and on that account he should not have been convicted and fined heavily. He maintained that the measures taken against him amounted to a disproportionate interference with his rights under Article 10.

(ii) *The Government*

51. The Government replied that the applicant was found guilty of disseminating separatist propaganda given that the impugned publications encouraged violence against the State and overtly promoted the cause of a terrorist organisation. In support of their argument the Government highlighted several extracts from the incriminated texts which, in their view, openly encouraged violence, provoked hostility and hatred among the

different groups in Turkish society, depicted Turkey as an “enemy” and a “terrorist State” and presented the terrorism of the PKK as heroic and justified.

52. Having regard to the PKK’s history of terrorism, the Government argued that the applicant had been rightly convicted under section 8 of the 1991 Act and that the measures taken against him 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

53. While acknowledging that some of the statements in the incriminated articles were highly polemical, the Commission was nevertheless of the view that there were no passages in the texts which could be held to have encouraged or incited to further violence. Even taking into account the margin of appreciation of the national authorities in this context, the Commission found that the applicant’s conviction and sentence could not be considered in the circumstances a proportionate response to a pressing social need to maintain national security and public safety. The measures taken by the authorities amounted to a kind of censure, which was likely to discourage the applicant or others from publishing views on the situation in south-east Turkey in the future. The Commission concluded that there had been a violation of Article 10 in the circumstances of the case.

(b) The Court’s assessment

54. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, its *Zana v. Turkey* judgment (cited above, pp. 2547-48, § 51), and in its *Fressoz and Roire v. France* judgment of 21 January 1999 (*Reports* 1999-..., p. ..., § 45).

(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.

55. Since the applicant was convicted of disseminating separatist propaganda through the medium of the review of which he was the owner, the impugned interference must accordingly also be seen in the context of the essential role of the press in ensuring the proper functioning of political democracy (see among many other authorities, the *Lingens v. Austria* judgment of 8 July 1986, Series A, no.103, p. 26, § 41; and the above-mentioned *Fressoz and Roire* judgment, p. ..., § 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 above-mentioned *Lingens* judgment, p. 26, §§ 41-42).

56. The Court notes that the Istanbul National Security Court found that the charge against the applicant under section 8 of the 1991 Act was proven (see paragraphs 17 and 18 above). The court held that the impugned news commentary contained words which were aimed at the destruction of the territorial integrity of the Turkish State by describing areas of south-east Turkey as an independent State – “Kurdistan”, and by referring to a part of the Turkish population as “Kurds”. The court further observed that, as a part of the news commentary, the review had published the declaration of an illegal terrorist organisation in which the Republic of Turkey was referred to as a “terrorist State” (see paragraph 18 above).

57. In assessing the necessity of the interference in the light of the principles set out above (see paragraphs 54 and 55 above) the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest

(see the *Wingrove v. the United Kingdom* judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 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, p. 1567, § 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.

58. The Court will have particular regard to the words used in the articles and to the context in which they were published. In this latter respect it will take into account the background to cases submitted to it, particularly the problems linked to the prevention of terrorism (see the above-mentioned *Incal v. Turkey* judgment, p. 1568, § 58).

It notes in the first place that the incriminated news commentary can be interpreted as describing an awakening of Kurdish sentiment, mainly by way of romanticising the Kurdish cause and drawing on the names of legendary figures of the past. Admittedly, the text states that “it is time to settle accounts”. However, in the Court’s view this reference must be seen in the context of the overall literary and metaphorical tone of the article and not as an appeal to violence. It is true also that the impugned interview (see paragraph 13 above) contained hard-hitting criticism of the Turkish authorities such as the statement that “the real terrorist is the Republic of Turkey”. For the Court, however, this is more a reflection of the hardened attitude of one side to the conflict, rather than a call to violence. In fact, the declaration in the same paragraph that the ERNK (see paragraph 12 above) was “open to any humanitarian, political solution, including the calls for an armistice” can even be considered conciliatory in tone. On the whole, the content of the articles cannot be construed as being capable of inciting to further violence. The Court is of course mindful 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 above-mentioned Zana judgment, 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 articles 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 applicant (see paragraph 18 above), although relevant, cannot be considered sufficient to justify the interference with his right to freedom of expression.

59. The Court also observes that Mr Sürek was ordered to pay a substantial fine (see paragraph 17 above). Furthermore, the copies of the review in which the impugned publications appeared were seized by the authorities (see paragraph 14 above). The Court notes in this connection that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference.

60. 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 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.

61. Having regard to the above considerations, the Court concludes that the conviction and sentencing of the applicant 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.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

62. The applicant submitted that he had been denied a fair hearing in breach of the Article 6 § 1 of the Convention on account of the presence of a military judge on the bench of the Istanbul National Security Court which tried and convicted him. Article 6 § 1 provides as relevant:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law...”

63. The Government raised an objection to the admissibility of this complaint and contended in the alternative that there had been no breach of Article 6 § 1. The Commission agreed with the applicant’s allegation.

A. The Government’s preliminary objection – non-exhaustion of domestic remedies

64. The Government maintained that the applicant at no stage of the domestic proceedings claimed that his trial was unfair on account of the participation of a military judge in the proceedings. For this reason the applicant’s complaint should be rejected for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. They relied on the Court’s *Sadık v. Greece* judgment of 15 November 1996 in support of their contention (*Reports* 1996-V, p. 1638).

65. The Court observes that the Government did not raise this objection before the Commission, when the admissibility of the application was being considered. Their observations on this issue related solely to the fact that the applicant had not disputed the independence and impartiality of the Court of Cassation. The applicant’s complaint on the other hand is that the Istanbul National Security Court lacked these very qualities. The Government are therefore estopped from raising their objection at this stage of the proceedings (see, among other authorities, the above-mentioned *Zana v. Turkey* judgment, p. 2546, § 44; and the *Nikolova v. Bulgaria* judgment of 25 March 1999, *Reports* 1999, p. ..., § 44).

B. Merits

66. In the applicant’s submission, the military judges appointed to the National Security Courts such as the Istanbul National Security Court were dependent on the executive, being appointed by the joint decree of the Minister of Defence and the Prime Minister, subject to the approval of the President of the Republic. He pointed to the fact that their professional assessment and promotion as well as their security of tenure were within the control of the executive branch and in turn the army. The ties which bound them to the executive and to the army made it impossible for military judges to discharge their functions on the bench in an independent and impartial manner. The applicant further stressed that the independence and impartiality of military judges and hence of the courts on which they sat were compromised since these judges were unable to take a position which might be contradictory to the views of their commanding officers.

67. The applicant stated that these considerations impaired the independence and impartiality of the Istanbul National Security Court and prevented him from receiving a fair trial, in violation of Article 6 § 1.

68. The Government replied that the rules governing the appointment of military judges to the National Security Courts and the guarantees which they enjoy in the performance of their judicial functions on the bench were such as to ensure that these courts fully complied with the requirements of independence and impartiality within the meaning of Article 6 § 1. The Government disputed the applicant's argument that military judges were accountable to their superior officers. In the first place, it was an offence under Article 112 of the Military Code for a public official to attempt to influence the performance by a military judge of his judicial functions (see paragraph 33 above). Secondly, the assessment reports referred to by the applicant related only to conduct of a military judge's non-judicial duties. Military judges have access to their assessment reports and are able to challenge their content before the Supreme Military Administrative Court (see paragraph 34 above). When acting in a judicial capacity a military judge is assessed in exactly the same manner as a civilian judge.

69. The Government further averred that the fairness of the applicant's trial had not been prejudiced by reason of the presence of a military judge on the bench. They claimed that neither the military judge's hierarchical superiors nor the public authorities which had appointed him to the court had any interest in the proceedings or in the outcome of the case. Moreover, the applicant's conviction was upheld on appeal by the Court of Cassation, a court whose independence and impartiality have not been impugned by the applicant (see paragraph 20 above).

70. The Government also impressed upon the Court the need to have particular regard to the security context in which the decision to establish National Security Courts was taken pursuant to Article 143 of the Constitution. In view of the experience of the armed forces in the anti-terrorism campaign the authorities had considered it necessary to strengthen these courts by including a military judge in order to provide them with the necessary expertise and knowledge to deal with threats to the security and integrity of the State.

71. The Commission concluded that the Istanbul National Security Court could not be considered an independent and impartial tribunal for the purposes of Article 6 § 1 of the Convention. The Commission referred in this respect to its opinion in the *Incal v. Turkey* case in its Article 31 report adopted on 25 February 1997 and the reasons supporting that opinion.

72. The Court recalls that in its *Incal v. Turkey* judgment of 9 June 1998 (*Reports* 1998-IV, p. 1547) and in its *Çıraklar v. Turkey* judgment of 28 October 1998 (*Reports* 1998-..., p. ...) the Court had to address

arguments similar to those raised by the Government in their pleadings in the instant case. In those judgments the Court noted that the status of military judges sitting as members of National Security Courts did provide some guarantees of independence and impartiality (see the above-mentioned Incal judgment, p. 1571, § 65). On the other hand, the Court found that certain aspects of these judges' status made their independence and impartiality questionable (*ibid.*, § 68): for example, the fact that they are servicemen who still belong to the army, which in turn takes its orders from the executive; the fact that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraphs 32 to 34 above).

73. As in its Incal judgment the Court considers that its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts in the light of the justifications advanced by the Government. Its task is to ascertain whether the manner in which the Istanbul National Security Court functioned infringed Mr Sürek's right to a fair trial, in particular whether, viewed objectively, he had a legitimate reason to fear that the court which tried him lacked independence and impartiality (see the above-mentioned Incal judgment, p. 1572, § 70; and the above-mentioned Çıraklar judgment, p. ..., § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of Mr Incal and Mr Çıraklar, both of whom, like the present applicant, were civilians. It is understandable that the applicant – prosecuted in a National Security Court for disseminating propaganda aimed at undermining the territorial integrity of the State and national unity – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service (see paragraph 32 above). On that account he could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction (see the above-mentioned Incal judgment, p. 1573, § 72 *in fine*).

74. For these reasons the Court finds that there has been a breach of Article 6 § 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. The applicant 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 stipulates in this respect:

“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

76. The applicant claimed the sum of 100,000 French francs (“FRF”) to compensate him for the fine which he had to pay. He stated that the amount which he claimed in French francs was equivalent in today’s terms to the fine imposed in 1993 and took account of the high rate of inflation in the respondent State since that date.

77. The Government maintained that the sum claimed by the applicant was exorbitant having regard to the amount of the fine in question. They added that Mr Sürek was allowed to pay off his fine in monthly instalments.

78. The Court considers that the applicant should be compensated for the fine he had to pay. Deciding on an equitable basis, it awards him the sum of FRF 3,000.

B. Non-pecuniary damage

79. The applicant claimed FRF 80,000 in compensation for moral damage without specifying its nature.

80. The Government contended that the claim 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 applicant that in itself would constitute sufficient just satisfaction.

81. The Court finds that the applicant may be taken to have suffered distress on account of the facts of the case. Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant in compensation the sum of FRF 30,000 under this head.

C. Costs and expenses

82. The applicant claimed reimbursement of his legal costs and expenses, which he assessed at FRF 50,000. He 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 this and three other cases he had lodged with the Convention institutions.

83. The Government stated that the amount claimed was 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 applicant's lawyer who had dealt with it throughout the proceedings in his 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.

84. The Court notes that the applicant's lawyer has been associated with the preparation of other cases before the Court concerning complaints under Articles 6 and 10 of the Convention which are based on similar facts. Deciding on an equitable basis and according to the criteria laid down in its case-law (see, among many other authorities, the above-mentioned *Nikolova v. Bulgaria* judgment, p. ..., § 79), the Court awards the applicant the sum of FRF 15,000.

D. Default interest

85. 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, according to the information available to it, is 3.47 % per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by 16 votes to 1 that there has been a violation of Article 10 of the Convention;
2. *Dismisses* unanimously the Government's preliminary objection under Article 6 § 1 of the Convention;
3. *Holds* by 16 votes to 1 that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds* by 16 votes to 1
 - (a) that the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:
 - (i) 3,000 (three thousand) French francs in respect of pecuniary damage;
 - (ii) 30,000 (thirty thousand) French francs in respect of non-pecuniary damage;

(iii) 15,000 (fifteen thousand) French francs in respect of costs and expenses;

(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* unanimously the remainder of the applicant's 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.

Signed: Luzius WILDHABER
President

Signed: Paul MAHONEY
Deputy Registrar

A declaration by Mr Wildhaber and, 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;
- c) dissenting opinion of Mr Gölcüklü.

Initialled: L. W.
Initialled: P. J. M

DECLARATION BY JUDGE WILDHABER

Although I voted against the finding of a violation of Article 6 § 1 of the Convention in the case of *Incal v. Turkey* of 9 June 1998 (*Reports* 1998-IV, p. 1547), I now consider myself bound to adopt the view of the majority of the Court.

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 as set out in the partly dissenting opinion of Judge Palm in the case of *Sürek v. Turkey* (no.1).

In our opinion the majority assessment of the Article 10 issue in this line of cases against the respondent State 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 applicant's 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 applicant supported or instigated the use of violence, then his 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 action². It is a question of proximity and degree³.

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

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.

the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action¹.

It is not manifest to me that any of the words with which the applicant was 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 the subversion of freedom of expression were it to condone the conviction of the applicant 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”.²

1. *Whitney v. California* 274 U.S. 357 (1927) at 376.

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

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Provisional translation)

To my great regret, I cannot agree with the majority of the Court that there has been a violation of Article 10 of the Convention. In my opinion, there is no valid reason to find that the interference in this case was not necessary in a democratic society and, in particular, not proportionate to the aim of preserving national security and public order.

Nor do I share the majority's view that there has been a violation of Article 6 § 1 in that the National Security Courts are not "independent and impartial tribunals" within the meaning of that provision owing to the presence of a military judge on the bench.

The general principles which emerge from the judgment of 25 November 1995 in the case of *Zana v. Turkey* and which I recall in my dissenting opinion annexed to the *Gerger v. Turkey* judgment (of 8 July 1999) are relevant to, and hold good in, the instant case. To avoid repetition, I refer the reader to paragraphs 1-9 of that dissenting opinion.

The case of *Süreş v. Turkey* (no. 4) is indistinguishable, if not in form, at least in content, from the *Zana* and *Gerger* cases and from the case of and *Süreş* and *Özdemir v. Turkey*. I therefore find that there has been no violation of Article 10 in the present case. The article entitled "Kawa and Dehak once again" contained, *inter alia*, passages such as "[t]he tradition of rebellion is awakened" and "[i]s it time to settle accounts". In addition, the article noted that a year earlier allegations had been published that "[b]ombs are raining on Kurdish villages and mountains", "[t]he Chief of the General Staff has inspected the preparations for the offensive" and "[t]he Head of [the] intelligence agency talks of the prospect of much blood being shed". Further, the article intimated that it was possible that in 1993, "[u]nlike previous years, the PKK-leaning Kurdistan National Assembly (KUM) [wa]s also expected to take on a role during *Newroz*..." (see paragraphs 11 and 13 of the judgment). In my view, the quoted passages can objectively be construed as an incitement to hatred and violence. Taking into account the margin of appreciation which must be left to the national authorities, I therefore conclude that the interference in issue cannot be described as disproportionate – with the result that it can be regarded as having been necessary in a democratic society.

As regards the Court's finding of a violation of Article 6 § 1, I refer to the dissenting opinion which I expressed jointly with those eminent judges Mr Thor Vilhjálmsón, Mr Matscher, Mr Foighel, Sir John Freeland, Mr Lopes Rocha, Mr Wildhaber and Mr Gotchev in the case of *Incal v. Turkey* of 9 June 1998 and to my individual dissenting opinion in the case of *Çıraklar v. Turkey* of 28 October 1998. I remain convinced that the presence of a military judge in a court composed of three judges, two of whom are civil judges, in no way affects the independence and impartiality

of the National Security Courts, which are courts of the non-military (ordinary) judicial order whose decisions are subject to review by the Court of Cassation.

I wish to stress that: (1) the conclusion of the majority results from an unjustified extension to the theory of outward appearances; (2) it does not suffice to say, as the majority do in paragraph 79 of the judgment, that it is “understandable that the applicants ... should be apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service”, and then simply to rely on the Incal precedent (Çıraklar being a mere repetition of what was said in the Incal judgment); and (3) the majority’s opinion is in the abstract and ought therefore, if it was to be justifiable, to have been better supported both factually and legally.