



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

THIRD SECTION

CASE OF ŞENER v. TURKEY

(Application no. 26680/95)

JUDGMENT

STRASBOURG

18 July 2000

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In the case of Şener v. Turkey,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr P. KÜRIS,
Mrs F. TULKENS,
Mrs H.S. GREVE,
Mr K. TRAJA, *judges*,
Mr F. GÖLCÜKLÜ, *ad hoc judge*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 27 June 2000,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case was transmitted to the Court by the European Commission of Human Rights (“the Commission”) on 11 September 1999. It originated in an application (no. 26680/95) against the Republic of Turkey lodged with the Commission under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Ms Pelin Şener (“the applicant”), on 7 March 1995.

2. Before the Court the applicant was represented by Mr Kamil Tekin Sürek, a lawyer practising in Istanbul (Turkey). The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. The Commission’s request to the Court referred to former Articles 47 and 48 of the Convention. It sought the determination of the applicant’s various complaints:

- under Article 10 of the Convention that her conviction constituted an unjustified interference with her right to freedom of expression;
- under Article 18 of the Convention that the restrictions which were applied to the exercise of this right were inconsistent with the legitimate aims prescribed in Article 10 § 2 of the Convention; and
- under Article 6 § 1 of the Convention that the Istanbul State Security Court which dealt with her case was not an independent and impartial tribunal.

4. The application was allocated to the Third Section (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted in accordance with Rule 26 § 1 of the Rules of Court. Mr Rıza Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The

Government accordingly appointed Mr Feyyaz Gölcüklü to sit as an *ad hoc* judge, the judge elected in respect of Turkey, to sit in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

5. Having consulted the parties, the Court decided that there was no need to hold a hearing. The parties each filed memorials.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The article in the weekly review *Haberde Yorumda Gerçek*

6. At the material time, the applicant was the owner and editor of a weekly review entitled *Haberde Yorumda Gerçek* (The Truth of News and Comments), published in Istanbul.

7. On 5 September 1993 the Istanbul State Security Court ordered the seizure of the twenty-third edition of the review, dated 4 September 1993, on the ground that an article therein entitled *Aydın İtirafı* contained separatist propaganda. The article read:

“Bir ulusun toptan yok edilmesini izliyoruz. Bir soykırım izliyoruz ki, bugüne kadar başka örneği görülmemiş desek yanlış olmaz.

Bir kirli savaşın dışlileri arasında inim inim inliyoruz. Savaşa karşı çıkmak gerektiğini bildiğimiz halde öfkemizi haykırmak, kirli savaş dışlilerini parçalamak yerine inim inim inliyoruz. Ağıt yakıyoruz sadece. Ölüme övgü dizmeye çalışıyoruz ölüm sessizliğinde. Havanın esintisinden, yaprak hıştırtısından odalarımıza korku taşıyor. Yürekllerimiz hop oturup hop kalkıyor. Ölüm korkusunda ölüme övgüler dizerken devlete teslim oluyoruz.

Klima esintisinde sıcak çaylarımızı yudumlarken yürüttüğümüz hararetli tartışmalarımızda, kavgacı kesiliyoruz birden. Ulusların kaderlerini tayin hakkı diyoruz. Bu hakkın kullanılması önünde hiçbir engelin olmaması gerektiğinden söz ediyoruz. Kürt realitesinin tanınmasının önemli bir adım olduğunu açıklamaya çalışıyoruz. Ortadoğu’da savaşın nedeni Amerikan emperyalizmidir. Ve biz savaşa karşı çıkmanın insanlığın bir gereği olduğunu düşünüyoruz. Namaz dağları, Tendürek ve Nurhak ve daha niceleri bombalanıyor bu sırada. Kürdistan alev alev yanıyor. Soykırım bütün hızıyla sürüyor. Renkli ekranlardan Bosna’da yaşanan vahşeti izliyoruz.

Öfkeleniyoruz birden. İnsan hakları savunucusu kesiliyoruz. Kimyasal silahlar kullanılıyor Nurhak dağlarında. “Taş üstünde taş bırakmayacağız” diyor askeri yetkili. Bir ulusu toptan yoketme isteklerindeki kararlılık çınlıyor kulaklarımızda. “Yalnız Güneydoğu’da değil batıda da operasyonların sürdürüleceğini, teröristlere yardımcı olanların haklarından gelineceğini” ekliyor konuşmasına ve tabii basın kulağını

çekmeyi de ihmal etmiyor. İşte burada, bir kirli savaşın söylemlerimizdeki yenilgiye mahkum akıbetini, savaşa karşı çıkmanın tek ama tek yolunun haklı savaşın yürütülmesi gerektiği doğrusunu unutuyoruz. Unutmak istiyoruz. Tendürek'e düşen bomba, yüreğimizde patlıyor. "Yazık" diyor içimizden biri. "Bunca kanın dökülmesi niye? Kürt ve Türk ulusları kardeş değil mi?" diye ekleyerek başlıyor bilinen konuşmasına.

Hep bu konuşmayı bekliyormuşuz da, birbirimizden haberimiz yokmuş meğer. Her birimiz ayrı ayrı ve sanki farklı şeyler söylüyormuşuz gibi korkularımızı açığa vuruyoruz. Askeri yetkilinin hizmetinde kusur etmemeye itina gösteriyoruz. Türk şovenizminin asla onaylanmadığını ama, Kürt şovenizminin de onaylanamayacağını anlatıyoruz hep bir ağızdan. Ezilen ulusun şovenizminin olmayacağını bile bile lades yapmaya çalışıyoruz. Kürt meselesinin çözümünde barışçıl yolların denenmesi gerektiğini vaaz ediyor, çözümün ne olabileceğini tartışıyoruz, büyük pişkinlikle.

Gazetelerimizin sayfalarını Sündüz yaylasını basan "teröristlerin", kadınları, çocukları nasıl öldürdüklerini anlatan düzmece haberlerle dolduruyoruz. Basına verilen brifingden kamuoyunun bilgisi olmadığı bilgisizliğiyle köşe yazılarımızda Kürt ve Türk vatandaşların yüzyıllar boyunca kardeşçe bir arada yaşadığını, oysa "teröristlerin" emellerinin bu kardeşliği yıkmak olduğunu anlatıyoruz demokratça! Ve kara çalışıyoruz özgürlük yürüyüşüne geçen Kürt köylüsünün tavrına.

Biz aydın insanlarız. Demokratiği elden bırakmayız. Ama yalandan kim ölmüş? Devlete hizmeti de esas alırız. İnsanları aptal biliriz. Onca yıl mürekkep yalamışlığımız bizi onlardan farklı kılar.

Bu bir itiraftır.

Biz aptalız."

<translation>

"We are watching the wholesale extermination of a nation. We are watching a genocide on such a scale that it is not a mistake to call it unprecedented.

We are groaning between the cogwheels of a dirty war. We know we should take a stand against the war, but instead of shouting out our anger and smashing the cogwheels, we are groaning. We only wail. We try to praise death in the deathly silence. Fear seeps into our rooms from the whisper of the breeze and the rustle of leaves. Our hearts jump in our throats. We surrender to the State while we praise death in fear of death.

We suddenly become quarrelsome during our feverish discussions and while sipping our hot tea in the cool breeze of the air conditioner. We talk about the right to self-determination of nations. We are saying that there should be no impediment to the exercise of this right. We try to explain that recognition of Kurdish reality is an important step. The reason for war in the middle-east is American imperialism and we think that to stand up against this war is a requirement for being a human being. The Namaz mountains, the Tendürek, the Nurhak and many others are being bombed at this moment. Kurdistan is blazing. The genocide pounds on. We watch the terror in Bosnia on our colour TV screens.

Suddenly we are full of anger. We become human rights advocates. Chemical weapons are being used on the Nurhak mountains. ‘We will not leave a stone standing’ says a military authority. Their determination to exterminate a whole nation echoes in our ears. ‘Operations will be conducted not only in the south-east but also in the west. We’ll deal with the people who help the terrorists’ he adds, and of course makes sure to tip off the press. Here we forget that in our own words a dirty war can only end in defeat. We [also] forget the axiom that the only way to oppose a war is to wage a just war. We want to forget it. The bomb falling on Tendürek explodes in our hearts. ‘What a pity’ says one of us. ‘Why shed so much blood? Aren’t Kurdish and Turkish nations brothers?’ And he begins his usual speech.

We seem to have been waiting for that speech all the time, but we were not aware of one another. We each confess our fears as if we are saying different things. We take great care to serve the army officer faultlessly. We chorus that we have never approved of Turkish chauvinism but cannot approve of Kurdish chauvinism either. We turn a blind eye to the fact that an oppressed nation cannot be chauvinistic. We brazenly preach the necessity of trying peaceful methods to resolve the Kurdish problem and discuss what the solution might be.

We fill the pages of our newspapers with bogus news of the terrorists’ raid on the Sündüz plateau and details of how they killed women and children. Oblivious of the fact that the public at large knows nothing of the briefing given to the press, we democratically explain in our newspaper columns that Kurdish and Turkish citizens have lived together in brotherhood for centuries and that the terrorists’ aim is to undermine that brotherhood. And we denigrate the attitude of the Kurdish peasants who started a freedom march.

We are intellectuals. We shall not give up the democrat’s way of life. But who ever died of a lie? We also make it our rule to serve the State. We consider people stupid. Our many years of ink-licking make us different from them.

This is a confession.

We are stupid.”

B. The proceedings against the applicant

1. The charges against the applicant

8. In an indictment dated 29 September 1993 the Public Prosecutor at the Istanbul State Security (*İstanbul Devlet Güvenlik Mahkemesi*) charged the applicant with having disseminated propaganda against the indivisibility of the State by publishing the above article. The charges were brought under section 8 of the Prevention of Terrorism Act 1991 (hereinafter “the 1991 Act”, see paragraph 18 below).

2. *The proceedings before the Istanbul State Security Court*

9. In the proceedings before the State Security Court, the applicant denied the charges. She pleaded that the article did not contain separatist propaganda. She alleged that the institution of criminal proceedings against her, as the owner and the responsible editor, was aimed at punishing the review since no investigation was opened against the author of the impugned article whose picture appeared above it. The applicant referred to Article 10 of the Convention on Human Rights and argued that section 8 of the 1991 Act restricted her right to freedom of expression in contravention of both the Turkish Constitution and the Convention.

3. *The applicant's conviction*

10. In a judgment dated 5 July 1994 the Istanbul State Security Court, composed of three judges including a military judge, found the applicant guilty of an offence under section 8 § 1 of the 1991 Act. The court sentenced the applicant to six months' imprisonment and a fine of 50,000,000 Turkish liras ("TRL"), to be paid in ten monthly instalments. It also ordered confiscation of the offending publication.

11. In its reasoning, the court held that the impugned article had referred to a certain part of Turkish territory as "Kurdistan", had asserted that people living there were Kurdish citizens, that the Kurdish nation wanted to be exterminated, that genocide had taken place, that the territory defined as "Kurdistan" had been bombed and burned and that chemical weapons had been used. On these grounds, the court found that the article, as a whole, disseminated propaganda against the indivisibility of the State.

4. *The applicant's appeal*

12. The applicant appealed against her conviction. On 30 November 1994 the Court of Cassation dismissed her appeal. It upheld the Istanbul State Security Court's assessment of the evidence and its reasons for rejecting the applicant's defence. On 2 January 1995 the judgment was served on the applicant.

5. *Further developments*

13. Following the amendments made by Law no. 4126 of 27 October 1995 to the 1991 Act (see paragraph 19 below); the Istanbul State Security Court *ex officio* re-examined the applicant's case. On 8 March 1996 the court imposed the same sentence on the applicant. The applicant appealed.

14. On 10 June 1997 the Court of Cassation quashed the judgment of 8 March 1996 on the ground that the Istanbul State Security Court had not commuted the applicant's sentence of imprisonment to a fine.

15. On 25 September 1997 the Istanbul State Security Court decided to defer the imposition of a final sentence pursuant to section 1 of

Law no. 4304 of 14 July 1997. The court held, under section 2 of the same law, that the criminal proceedings against the applicant would be suspended and a final sentence imposed should the applicant be convicted of a further intentional offence in her capacity as an editor within three years of this decision.

6. The author's conviction

16. On 17 November 1995 the Istanbul State Security Court also found the author of the impugned article, Erhan Altun, guilty of an offence under section 8 § 1 of the 1991 Act. It sentenced him to 1 year, 1 month and 10 days' imprisonment and a fine of 111,111,110 TRL. However, the court suspended the author's sentence taking into account his good conduct in the past, the likelihood that he would not commit any further offence and the fact that he was not a recidivist.

II. RELEVANT DOMESTIC LAW

17. A full description of the relevant domestic law may be found in the *Süreş (No. 1) v. Turkey* judgment ([GC], no. 26682/95, §§ 23-36, ECHR 1999-IV).

A. Prevention of terrorism legislation

18. Section 8 of the Prevention of Terrorism Act 1991 (Law no. 3713 of 12 April 1991) creates the offence of undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation through written and spoken propaganda, meetings, assemblies and demonstrations, irrespective of the methods used and the intention. Any person who engages in such an activity may be sentenced to imprisonment or a fine, which for a press editor nowadays may be up to 2 years' imprisonment and a fine of up to three hundred million Turkish lira.

19. Law no. 4126 of 27 October 1995 amended the Prevention of Terrorism Act 1991 to require the re-examination of the cases of persons convicted under the aforementioned Section 8 with a view to imposing substitute penalties or measures to imprisonment. Editors who had been convicted before 12 July 1997 of a Section 8 offence were later entitled to a suspended sentence for up to three years, provided that no further offences were committed, pursuant to Law no. 4304 of 14 August 1997.

B. The State Security Courts

20. Article 138 of the Constitution requires all judges to perform their duties independently. State Security Courts were established by Article 143

of the Constitution to try offences “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.”

21. According to Sections 5 and 6 of Law no. 2845 on the creation and rules of procedure of the State Security Court, such courts shall be composed of a president, two other regular members and two substitute members, appointed for four-year renewable periods. At the material time, one regular member and one substitute were military judges of the first rank.

22. Appeals lie to the Court of Cassation against State Security Court decisions.

23. The careers of military judges, according to Section 7 of the Military Legal Service Act (Law no. 357), depend on assessments by the Minister of State in the Ministry of Defence, or the Minister of Defence. Section 8 of that Act provides that military judges are to 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... .” It is an offence under Article 112 of the Military Code for a public official to attempt to influence the performance by a military judge in the exercise of his judicial functions. Military judges are subject to officer salary scales and discipline by the Minister of Defence (Sections 18 and 29). Career disputes concerning military judges are ultimately determined by the Supreme Military Administrative Court (Section 22 of Law no. 1602 of 4 July 1972 on the Supreme Military Administrative Court).

24. Amendments made by Law no. 4388 of 18 June 1999 and Law no. 4390 of 22 June 1999 removed military judges from the bench of the State Security Courts.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicant alleged that the authorities had unjustifiably interfered with her right to freedom of expression guaranteed by 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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

26. 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. However, the Commission accepted the applicant’s allegation.

A. Existence of an interference

27. The Court notes that it is clear and undisputed that there has been an interference with the applicant’s right to freedom of expression on account of her conviction and sentence under section 8 of the Prevention of Terrorism Act 1991 (the “1991 Act”).

B. Justification of the interference

28. This interference would contravene Article 10 of the Convention unless it was “prescribed by law”, pursued 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”

29. The applicant did not comment on whether this requirement had been respected.

30. The Government maintained that the measures taken against the applicant were based on section 8 of the 1991 Act.

31. The Commission agreed with the Government and found that the interference was prescribed by law.

32. The Court, like the Commission, finds that since the applicant’s conviction was based on section 8 of the 1991 Act the resultant interference with her freedom of expression could be regarded as “prescribed by law”, all the more as the applicant has not disputed this (see, in this connection, *Sürek (No. 1) v. Turkey* [GC], no. 26682/95, § 48, ECHR 1999-IV).

2. *Legitimate aim*

33. The applicant did not express a view on this point.

34. The Government contended that the aim of the interference in issue had been to maintain “national security” and “public safety”. The Commission accepted this view.

35. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey (see the above-mentioned *Süreş (No.1) v. Turkey* judgment, § 52) 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 public safety. 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 relied on the use of violence.

3. *“Necessary in a democratic society”*

(a) **Arguments of the parties**

(i) *The applicant*

36. The applicant pleaded that she should not have been punished for an article which she had not written. She further contended that the impugned article praised democracy and human rights and suggested that intellectuals should be more courageous in defending the latter. She maintained that the article did not advocate recourse to terrorism and violence but, on the contrary, it criticised the waging of terrorism against people. In the applicant’s submission the measures taken against her amounted to an unjustified and disproportionate interference with her Article 10 right.

(ii) *The Government*

37. The Government asserted that the applicant disseminated separatist propaganda since the article in issue encouraged terrorist violence against the State. In support of their assertion the Government highlighted certain extracts from the article and contended that the phrase, “we forget the axiom that the only way to oppose a war is to wage a just war” was a clear incitement and encouragement to violence. In the Government’s submission, the author criticised intellectuals for defining “innocent Kurdish peasants” as “terrorists” and denigrating their march to freedom.

In the Government’s opinion, the message which the article conveyed was that the only means for resolving the Kurdish problem was the maintenance of terrorist activities against the State, and that intellectuals should give the necessary support to such activities. The Government

argued that, in the context of a virulent terrorism campaign, the applicant should have refrained from disseminating propaganda aimed at supporting terrorist violence. They further submitted that the applicant had rightly been convicted under section 8 of the 1991 Act and that the measures taken against her properly fell within the authorities' margin of appreciation in this area. The interference was accordingly justified under Article 10 § 2 of the Convention.

The Government finally pointed out that the imposition of the final sentence on the applicant had been suspended, following the enactment of Law no. 4304 of 14 August 1997, which aimed at providing for more lenient sanctions for offences committed through the medium of the press.

(iii) The Commission

38. The Commission noted that the incriminated publication was an article by an intellectual whose statements contained sharp criticism of the policy and action of Turkey with regard to its population of Kurdish origin. The author expressed his view on the Kurdish question and did not associate himself with the use of violence in the context of the Kurdish separatist movement. In the Commission's view, the measures taken against the applicant amounted to a kind of censorship, which was likely to discourage others from publishing similar opinions in the future. On this basis, the Commission found that there had been a violation of Article 10 of the Convention.

(b) The Court's assessment

39. The Court recalls that in its *Zana v. Turkey* judgment of 25 November 1997 (*Reports of Judgments and Decisions* 1997-VII, pp. 2547-48, § 51) and the above-mentioned *Sürek (No.1) v. Turkey* judgment (cited above, § 58), it summarised the basic principles established in its case-law concerning Article 10 of the Convention:

(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”.

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 (see the *Ceylan v. Turkey* judgment [GC], no. 23556/94, § 49, ECHR 1999-IV). 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.

40. The Court further observes that in the above-mentioned *Sürek (No. 1) v. Turkey* judgment (§ 61) it reiterated 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. 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 a 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 *İncal v. Turkey* judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54). Finally, where such remarks incite people to violence, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

41. Since the applicant was convicted of disseminating separatist propaganda through the review of which she was the editor, 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 the above-mentioned *Sürek (No. 1)* judgment, § 59). While the press must not overstep the bounds set, *inter alia*, for the protection of vital State interests, 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).

42. 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 which contain incitement 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 so categorised, 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 (see the *Erdoğan and İnce v. Turkey* [GC], no. 25067/94, § 54, ECHR 1999-IV).

43. The Court takes into account, furthermore, the background to cases submitted to it, particularly problems linked to the prevention of terrorism (see *Karataş v. Turkey* [GC], no. 23168/94, § 51, ECHR 1999-IV). On that point, it takes note of the Turkish authorities’ concern about the dissemination of views which they consider might exacerbate the serious disturbances that have been going on in Turkey for some fifteen years.

44. The Court notes that the applicant’s review published an article which had been written by an intellectual who had expressed his views on the Kurdish problem. The impugned article contained a sharp criticism of the Government’s policy and of the action of their security forces with regard to the population of Kurdish origin. While alleging that intellectuals and the Turkish press are denigrating the “Kurdish peasants’ freedom march”, the author criticised their overall view of the Kurdish problem. The author further suggested that the Kurdish reality should be recognised and peaceful methods tried in order to resolve the Kurdish problem instead of having recourse to military action. He regretted the shedding of blood in the course of armed conflict between Kurds and Turks, since he considered them brother nations. He also expressed his disapproval of all types of chauvinism, including Turkish and Kurdish forms.

45. The Court notes in addition that, although certain phrases seem aggressive in tone, such as the one highlighted by the Government, the article taken as a whole does not glorify violence. Nor does it incite people to hatred, revenge, recrimination or armed resistance. On the contrary, the article is an intellectual analysis of the Kurdish problem which calls for an

end to the armed conflict. In the Court's view these are the essential factors which should be considered (see the *Ceylan v. Turkey* judgment, cited above, § 36).

Furthermore, the Court observes that the applicant was convicted by the Istanbul State Security Court not for incitement to violence, but for disseminating separatist propaganda by referring to a particular region of Turkey as "Kurdistan" and alleging that the population of Kurdish origin living in that region was subjected to oppression. In this regard, the Court considers that the domestic authorities in the instant case failed to give sufficient weight 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 above, the views expressed in the incriminated article cannot be read as an incitement to violence, nor could they be construed as liable to incite violence. That being so, the reasons given by the Istanbul State Security Court for convicting the applicant, although relevant, cannot be considered sufficient to justify the interference with her right to freedom of expression.

46. The Court also observes that, notwithstanding the fact that the imposition of a final sentence on the applicant was suspended, she was nevertheless faced with the threat of a heavy penalty (see the *Erdoğan and İnce v. Turkey* judgment, cited above, § 53). For the Court, a decision or measure favourable to an applicant is not sufficient in principle to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see the *Öztürk v. Turkey* judgment [GC], no. 22479/93, § 73, ECHR 1999-VI).

In the instant case, however, the Istanbul State Security Court suspended the imposition of a final sentence on the applicant on condition that she did not commit any further offence as an editor within three years of its decision (see paragraph 15 above). If the applicant fails to comply with that condition, she will automatically be sentenced for the original offence. In other words, the decision in question did not remove her status as a "victim". On the contrary, the conditional suspended sentence had the effect of restricting the applicant's work as an editor and reducing her ability to offer the public views which have their place in a public debate whose existence cannot be denied (see, *Erdoğan v. Turkey*, no. 25723/94, § 72, to be published in ECHR 2000; see also, *mutatis mutandis*, the Hertel v. Switzerland judgment of 25 August 1998, *Reports* 1998-VI, p. 2331, § 50).

47. Having regard to the above considerations, the applicant's conviction was disproportionate to the aims pursued and, accordingly, not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.

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

48. The applicant complained that the presence of a military judge on the bench of the Istanbul State Security Court which tried and convicted her meant that she was denied a fair hearing, in breach of Article 6 § 1 of the Convention, the relevant part of which provides:

“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...”

49. The Government contested that allegation whereas the Commission accepted it.

50. In the applicant’s submission, under the rules applicable at the time, the military judges appointed to the State Security Courts, such as the Istanbul State Security Court, were dependent on the Executive and the army as regards their appointment and careers. Such ties 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.

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

51. The Government replied that the rules then in force governing the appointment of military judges to the State Security Courts and the guarantees which they enjoyed 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 23 above). Secondly, the career assessments of military judges relate only to their 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 23 above). When acting in a judicial capacity, a military judge is assessed in exactly the same manner as a civilian judge.

52. The Government added that the fact that a military judge had sat in the State Security Court had not impaired the fairness of the applicant’s trial. 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.

The Government also impressed upon the Court the need to have particular regard to the security context in which the decision to establish State 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.

53. The Government further submitted that, by Law no. 4388 of 18 June 1999 and Law no. 4390 of 22 June 1999, amendments had been made to remove military judges from the bench of the State Security Courts with a view to complying with the requirements of the Convention. The Government stated that State Security Courts are currently composed of civilian judges only.

54. The Commission concluded that the Istanbul State Security Court could not be regarded as an independent and impartial tribunal for the purposes of Article 6 § 1 of the Convention. The Commission referred in this respect to the *İncal v. Turkey* judgment of 9 June 1998 (*Reports* 1998-IV) and the reasons supporting that judgment.

55. The Court takes note of the changes made to the State Security Court system by virtue of Law no. 4388 of 18 June 1999 and Law no. 4390 of 22 June 1999. However, for the purposes of the instant case it must confine its consideration to the legislation then in force and to the composition of the Istanbul State Security Court which tried and convicted the applicant.

56. The Court reiterates that in its above-mentioned *İncal v. Turkey* judgment of 9 June 1998 (p. 1547) and in its *Çıraklar v. Turkey* judgment of 28 October 1998 (*Reports* 1998-VII, p. 3071), it had to address arguments similar to those raised by the Government in the instant case. In those judgments the Court noted, on the one hand, that the status of military judges sitting as members of State Security Courts did provide some guarantees of independence and impartiality (see the above-mentioned *İncal* 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 paragraph 23 above). The applicant mentioned some of these shortcomings in her observations.

57. As in its *İncal* judgment, the Court considers that its task is not to determine *in abstracto* the necessity for the establishment of State Security Courts in the light of the justifications advanced by the Government. Its task is to ascertain whether the manner in which the Istanbul State Security Court functioned at the material time infringed the applicant's right to a fair

hearing, in particular whether, viewed objectively, she had a legitimate reason to fear that the court which tried her lacked independence and impartiality (see the above-mentioned Incal judgment, p. 1572, § 70, and the above-mentioned Çıraklar judgment, p. 3072, § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of MM. Incal and Çıraklar, both of whom, like the present applicant, were civilians. It is understandable that the applicant - prosecuted in a State Security Court for disseminating propaganda aimed at undermining the national security of the State and public safety - should have been apprehensive about being tried by a bench which included a regular army officer and member of the Military Legal Service. On that account she could legitimately fear that the Istanbul State 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*).

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

III. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

59. The applicant alleged that the restrictions on her right to freedom of expression, applied pursuant to section 8 of the Prevention of Terrorism Act 1991, were inconsistent with the legitimate aims set out in Article 10 § 2 and were thus contrary to Article 18 of the Convention, which provides:

“The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

60. The Government did not address these allegations in their memorial.

61. The Commission found that the restrictions which were applied to the applicant's right to freedom of expression were consistent with the legitimate aims contained in Article 10 § 2 of the Convention. Accordingly, there had been no violation of Article 18.

62. For its part, the Court does not see any reason for departing from the opinion of the Commission. It considers, therefore, that there has been no violation of Article 18 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. The applicant sought just satisfaction under Article 41 of the Convention, which 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. Damage

64. The applicant did not seek reparation for pecuniary damage but claimed FRF 30,000 in respect of non-pecuniary damage. She alleged that she had to leave her country for Germany on account of the criminal proceedings against her, and was forced to live there as a refugee.

65. The Government did not comment on the applicant’s claim.

66. The Court considers that the applicant must have suffered a certain amount of distress, having regard to the circumstances of her prosecution, trial and conviction. Deciding on an equitable basis, it awards her the sum of FRF 30,000 which she claimed.

B. Costs and expenses

67. The applicant also claimed the sum of FRF 20,000 for her costs and expenses, comprising of FRF 5,000 for translations, postage fees and stationery, and FRF 15,000 for her lawyer’s fees. She did not supply any particulars in support of her claims.

68. The Government expressed no opinion on the claim.

69. In view of the lack of substantiation of the claim, offset by the fact that the applicant clearly incurred some expenses, the Court considers it reasonable to award the applicant FRF 10,000 by way of reimbursement of her costs and expenses.

C. Default interest

70. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 2.74 % per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by 6 votes to one that there has been a violation of Article 10 of the Convention;
2. *Holds* by 6 votes to one that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 18 of the Convention;
4. *Holds* by 6 votes to one
 - (a) that the respondent State is to pay the applicant, within three months, the following amounts:
 - (i) 30,000 (thirty thousand) French francs for non-pecuniary damage;
 - (ii) 10,000 (ten thousand) French francs for costs and expenses;
 - (b) that simple interest at an annual rate of 2.74 % shall be payable 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 notified in writing on 18 July 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Gölcüklü is annexed to this judgment.

J.-P.C.
S.D.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

For the reasons set out below, I cannot agree with the majority in the present case.

1. As regards Article 10, I wish in the first place to make a very important observation which affects the whole reasoning of the majority, namely that the translation into English of the offending article leaves a great deal to be desired. I note, moreover, that there are two different versions – one in the Commission’s report (paragraph 20), the other in the Court’s judgment (paragraph 7) – and that neither version reflects the author’s thoughts accurately and faithfully. That being so, how could the Court reach a sound conclusion?

2. Taken as a whole, the article set out, in very poor-quality Turkish, its author’s opinion about the solution of the Kurdish problem, in the context of the policy being implemented at that time by the Government, the facts of the situation and the views of the media. The author criticised the attitude and conduct of those Kurdish intellectuals who had advocated and continued to advocate a peaceful solution to the problem, holding them up to ridicule through the use of cynical language. Taking the view that this was deceitful and mendacious, he called on them to support the creation of an independent Kurdish State and to do what was necessary to bring it into existence, that is to go to war, or in other words support the struggle of the PKK terrorists.

In my opinion, that constituted manifest incitement to violence in the climate of virulent terrorism which infects south-east Turkey.

3. Admittedly, in the judgment convicting the applicant the Istanbul State Security Court spoke only of separatist action and propaganda, without mentioning the concept of “incitement to violence” (see paragraph 45 of the judgment). In his article the author defined and set out his ultimate aim – the creation of a Kurdish State. He went on to criticise the peaceful road and advocated struggle in the form of terrorist activity. That is nothing less than incitement to violence. In the author’s view, violence therefore became a necessary element, indispensable for and indissociable from separatist activity and policy.

4. At a stretch, the opinion expressed in the article could be considered a borderline case. But if so, I consider that the assessment of the national authorities, who, as the court has frequently said, are in direct contact with the actual situation in the country, must carry more weight than that of an international court, since they must be left a fairly wide margin of appreciation.

5. Lastly, is it relevant to speak of settled case-law which must be followed when it is a matter of the freedom of opinion and expression? To my mind, since every opinion expressed is unique, both in its content and in

its form and style, it is more appropriate to take account of all its specific features in the course of an examination from the standpoint of Article 10 § 2 of the Convention.

6. As regards violation of Article 6 § 1, although the problem raised was solved recently following a change in the composition of the State Security Court, the Court confined its assessment to the situation obtaining at the material time (see paragraph 55 of the judgment). On that point, I would refer to the dissenting opinion I expressed, together with seven eminent judges of the Court, in the *Incal v. Turkey* case (judgment of 9 June 1998), and the one I expressed in the *Okçuoğlu v. Turkey* case (judgment of 8 July 1999). I would merely like to emphasise that in the present case the majority's conclusion stems from an incorrect and unjustified extension of the "theory of appearances", as was already the position in the *Incal* case.

7. In conclusion, I do not find in the present case any violation imputable to the respondent State.