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

CASE OF SÜREK v. TURKEY (No. 3)

(Application no. 24735/94)

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. 3),

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

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

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

Having deliberated in private on 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 Convention[3], by the European Commission of Human Rights ("the Commission") on 17 March 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no.24735/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Kamil Tekin Sürek, on 18 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 A[1], 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 16 September and 14 October 1998 respectively. On 29 September 1998 the Government filed with the Registry additional information in support of their memorial. On 26 February 1999 the applicant filed further details of his claim for just satisfaction and on 1 March the Government filed their observations on his claim.

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 (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24246/94); Gerger v. Turkey (no. 24919/94); Erdoğdu and İnce v. Turkey (nos. 25067/94 and 25068/94); Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek v. Turkey no. 1 (no. 26682/95); Sürek and Özdemir v. Turkey

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

(nos. 23927/94 and 24277/94); Sürek v. Turkey no. 2 (no. 24122/94) and Sürek v. Turkey no. 4 (no. 24762/94).

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

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case 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 S. 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 submitted his observations by way of a memorial.

7. In accordance with the President's decision, a 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 no. 4 v. Turkey. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr D. TEZCAN, *Agent*,
Mrs D. AKCAY, *Co-Agent*,
Mr B. ÇALIŞKAN,
Miss G. AKYÜZ,
Miss A. GÜNYAKTI,
Mr F. POLAT,
Miss A. EMÜLER,
Mrs I. BATMAZ KEREMOĞLU,
Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

(b) *for the applicant*
Mr H. KAPLAN, IstanbulBar, *Advocate*.

The Court heard addresses by Mr Tezcan and Mr Kaplan.

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 news commentary

10. In issue No. 42 of the review, dated 9 January 1993, a news commentary entitled "In Botan the poor peasants are expropriating the landlords!" was published.

The relevant parts of this news commentary read:

> "...
>
> 'The waves of the earthquake centred on Botan have reached all of Kurdistan. The national liberation struggle, growing like the ripples caused by a stone cast into a pool of water, has already gone past Botan in waves, currently embracing 50 districts in 8 provinces in the active front of armed struggle.'
>
> PKK [Kurdistan Workers' Party] sources briefly describe the extent of the national struggle in Kurdistan as follows: the said 8 provinces (together with their districts) are Hakkari, Şırnak, Siirt, Mardin, Batman, Urfa and Diyarbakır; while the provinces of Van, Malatya, Bitlis, Muş and Gaziantep and their districts are described as being partially involved in the war.
>
> The popular movements in the Botan area, where approximately 4.5 to 5 million Kurds live, which have developed with the rise of the national liberation movement, have made rapid strides in the years 1990-92. The political point reached in the area is that the State has almost become inoperative. ...

The domain vacated by the State in the political sense has since been occupied by the PKK in the rural areas and H.E.P. organisations in the cities. ...

Land cannot be redistributed before it is transferred to the free will of the Kurdish people, because it is inconceivable to distribute land that bears the seal of the Republic of Turkey. ...

Today, our struggle is an external war directed against the forces of the Republic of Turkey. ...

We want to wage a total liberation struggle. ...”

11. On 10 January 1993 the Istanbul National Security Court (*İstanbul Devlet Güvenlik Mahkemesi*) ordered the seizure of this edition of the review on the ground that, allegedly, it disseminated propaganda against the indivisibility of the State.

C. The charges against the applicant

12. In an indictment dated 28 January 1993, the Public Prosecutor at the Istanbul National Security Court charged the applicant, being the owner of the review, with disseminating propaganda against the indivisibility of the State. The charges were brought under section 8 of the Prevention of Terrorism Act 1991 (-“the 1991 Act”; see paragraph 16 below) on account of the publication of the above news commentary, which concerned, *inter alia*, the activities of the PKK.

D. The applicant’s conviction

13. In the proceedings before the National Security Court, the applicant denied the charges. He pleaded that the commentary on which the charges were based in fact criticised the activities of the PKK. He invoked Article 10 of the Convention and referred to the case-law of the Commission and the Court. He stated that pluralism of opinions, including those opinions which shock or offend, is essential in a democratic society. He argued that the provisions of section 8 of the 1991 Act restrict the right to freedom of expression in contravention of the Turkish Constitution and the criteria laid down by the case-law of the Commission and the Court.

14. In a judgment dated 27 September 1993, the National Security Court found the applicant guilty of making propaganda against the indivisibility of the State. The applicant was first sentenced to a fine of 100,000,000 Turkish liras (TRL). Thereupon the Court, considering the good conduct of the applicant during the trial, reduced the fine to TRL 83,333,333.

The National Security Court, considering those parts of the news commentary cited at paragraph 10 above in the light of the article as a

whole, observed that it referred to certain parts of Turkey as “Kurdistan”. Moreover, in the words of the Court, it described the acts of the “PKK terrorist organisation” as a national liberation struggle, which amounted to propaganda aimed at undermining the indivisibility of the State.

E. The applicant’s appeal against conviction and subsequent proceedings

15. The applicant appealed. He, *inter alia*, reiterated the defence he had relied on before the National Security Court. On 18 February 1994 the Court of Cassation dismissed the appeal, upholding the cogency of the National Security Court’s assessment of evidence.

II. RELEVANT DOMESTIC LAW

A. Criminal law

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

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

Section 3

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

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

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

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

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

[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 purpose of terrorism” (sections 3 and 4) and to which it applies. The Government have submitted case-law concerning the application of section 8, details of which may be found in § 29 of the Sürek v. Turkey (no. 1) judgment, which was delivered on the same date as the present judgment.

Section 8

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

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

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

[1] The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992, published in the Official Gazette on 27 January 1993, and went out of force on 27 July 1993.

months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras…

…"

Section 13

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

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

Section 13

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

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

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

B. The National Security Courts

18. The relevant provisions of domestic law governing the organisation and procedure of the National Security Court are quoted in paragraphs 32-36 of the Sürek v. Turkey (no. 1) judgment, which is being delivered on the same date as the present judgment.

PROCEEDINGS BEFORE THE COMMISSION

19. Mr Kamil Tekin Sürek applied to the Commission on 18 July 1994. He complained 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.

20. The Commission declared the application (no. 24735/94) admissible on 2 September 1996, with the exception of the applicant's Article 6 § 1 complaint relating to the length of the criminal proceedings in his case. In its report of 13 January 1998 (former Article 31), it expressed the opinion

that there had been no violation of Article 10 of the Convention (31 votes to 1) but that there had been a violation of Article 6 § 1 (31 votes to 1). The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

21. 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 invited the Court to reject the applicant's complaints.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

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

23. 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 agreed with the Government on this point.

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

A. Existence of an interference

24. 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

25. The 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"

26. It was not disputed in the present case that the interference had a legal basis in section 8 of the 1991 Act and was "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

27. 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

28. The applicant did not dispute that the interference pursued a legitimate aim under the second paragraph of Article 8 of the Convention.

29. The Government submitted that the applicant's conviction had been imposed in the interests of national unity and security, territorial integrity and for the prevention of disorder or crime.

30. The Commission considered that the applicant's conviction for dissemination of separatist propaganda was part of the authorities' efforts of the authorities to combat illegal terrorist activities and to maintain national security and public safety.

31. 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

32. The applicant complained that, although he was the owner of the review with no editorial responsibility for its content, he had nonetheless been punished for the dissemination of terrorist propaganda under section 8 of the 1991 Act. He submitted that the impugned statements had formed part of an objective news report aimed at providing the public with information on land reform and unemployment in south-eastern Turkey, giving both the Government's and the PKK's point of view, without expressing any support for terrorist activities. Neither the review nor the applicant himself had any links with the PKK.

(ii) The Government

33. The Government maintained that the news commentary in question had presented the activities of the PKK, an illegal terrorist organisation, as acts of national liberation.

In their submission, separatist propaganda inevitably incites to violence and provokes hostility among the various groups in Turkish society, thus endangering human rights and democracy. As the owner of the review the applicant had participated in the dissemination of separatist propaganda by publishing an article which, by attempting in a veiled but nonetheless obvious manner to vindicate a terrorist organisation, threatened fundamental interests of the national community such as territorial integrity, national unity and security and the prevention of disorder and crime.

34. In the Government's view the measures taken against the applicant were within the authorities' margin of appreciation in relation to the type of activity which endangers the vital interests of the State and the taking of these measure in the instant case found its justification under paragraph 2 of Article 10.

(iii) The Commission

35. The Commission observed that the commentary had contained statements which, when read in the context of the article as a whole, were

capable of creating among readers the impression that the author of the commentary was encouraging, or even calling for, continued armed action against the Turkish State and was thus supporting violence for separatist purposes. The Commission considered that the authorities of the respondent State had been entitled to take the view that the publication of the news commentary was harmful to national security and public safety. As the owner of the review, the applicant assumed duties and responsibilities with respect to its publication. Having regard to the State's margin of appreciation, the applicant's conviction and sentence could be considered in the circumstances a proportionate response to a pressing social need to maintain national security and public safety. The Commission concluded that there had been no violation of Article 10 in the circumstances of the case.

(b) The Court's assessment

36. 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.

37. The Court further 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). Moreover, 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. Furthermore, 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 June1998, Reports-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.

38. 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 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 crime or disorder, 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).

39. The Court will have particular regard to the words used in the article and to the context in which it was 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).

40. The article at issue referred to parts of the Turkish territory as "Kurdistan" and to the existence of a national liberation struggle. In the Court's view, although these are no doubt relevant considerations, they cannot of their own be deemed sufficient to regard the interference as necessary within the meaning of Article 10 § 2.

On the other hand, while describing the struggle as a "war directed against the forces of the Republic of Turkey", the article asserts that "[w]e want to wage a total liberation struggle". Thus, it is clear that the impugned article associated itself with the PKK and expressed a call for the use of armed force as a means to achieve national independence of Kurdistan.

It is further to be noted that the article was published in the context of the security situation in south-east Turkey, 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). In such a context the content of the article must be seen as capable of inciting to further violence in the region. Indeed the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor. It is in this perspective that the Court finds that that reasons adduced by the respondent State for the applicant's conviction are both relevant and sufficient to ground an interference with the applicant's right to freedom of expression. The Court reiterates that the mere fact that "information" or "ideas" offend, shock or disturb does not suffice to justify that interference (see paragraph 36 above). What is in issue in the instant case, however, is incitement to violence.

41. While it is true that the applicant did not personally associate himself with the views contained in the news commentary, he nevertheless provided its writer with an outlet for stirring up violence. The Court does not accept his argument that he should be exonerated from any criminal liability for the content of the article on account of the fact that he only has a commercial and not an editorial relationship with the review. He was an owner and as such had the power to shape the editorial direction of the review. For that reason, he was vicariously subject to the "duties and responsibilities" which the review's editorial and journalist staff undertake in the collection and

dissemination of information to the public and which assume an even greater importance in situations of conflict and tension.

42. In view of the above considerations the Court concludes that the penalty imposed on the applicant as the owner of the review could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the authorities for the applicant's conviction are "relevant and sufficient".

43. For these reasons and having regard to the margin of appreciation which national authorities have in such a case, the Court considers that the interference at issue was proportionate to the legitimate aims pursued. There has consequently been no breach of Article 10 of the Convention in the circumstances of this case.

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

A. The Government's preliminary objection

44. In their memorial to the Court the Government maintained that the applicant, not having raised before the domestic courts his complaint that his case had not been heard by an independent and impartial tribunal, had failed to exhaust domestic remedies as required by Article 35 of the Convention.

45. The Court reiterates that it takes cognisance of preliminary objections in so far as the State in question has already raised them, at least in substance and with sufficient clarity, before the Commission, in principle at the stage of the initial examination of admissibility (see, for instance, the Aytekin v. Turkey judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, p. § 77). However, it does not appear from the observations submitted by the Government to the Commission on 31 July 1995 (at the admissibility stage) or their supplementary observations submitted on 4 March 1997 (at the merits stage) that they objected, on the ground of non-exhaustion, to the admissibility of the above-mentioned complaint. Accordingly, they are estopped from raising their preliminary objection.

B. The merits of the applicant's complaint

46. The applicant complained 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 National Security Court which tried and convicted him. In so far as is relevant Article 6 § 1 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..."

47. The Government contested this allegation whereas the Commission accepted it.

48. 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.

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

49. 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 section 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 18 above). Secondly, the assessment reports referred to by the applicant related only to conduct of a military judge's non-judicial duties. Military judges had access to their assessment reports and were able to challenge their content before the Military Supreme Administrative Court (*ibidem*). When acting in a judicial capacity a military judge was assessed in exactly the same manner as a civilian judge.

50. 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 authorities nor the public authorities which had appointed him to the court

had any interest in the proceedings or in the outcome of case. The Istanbul National Security Court's judgment was later upheld on appeal by the Court of Cassation, a court whose independence and impartiality have not been impugned (see paragraphs 12-14 above).

51. 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.

52. 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.

53. The Court recalls than in its Incal v. Turkey judgment of 9 June 1998 (Reports 1998-IV, p. 1504) and in its Çiraklar 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 certain guarantees of independence and impartiality (see the above-mentioned Incal judgment, p. 1571, § 65). On the other hand, the Court found that some aspects of these judges' status made their independence and impartiality questionable (*ibidem*, § 68): for example, the fact that they are servicemen who still belong to the army, which in turn takes its orders from the executive; or that they remain subject to military discipline and decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraph 18 above).

54. 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 IstanbulNational 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 Çiraklar 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 Çiraklar, 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 18 above). On that account he could legitimately fear that the IstanbulNational 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*).

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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 provides:

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

A. Pecuniary damage

57. The applicant claimed the sum of 100,000 French Francs (FRF) by way of compensation for the fine imposed on him and paid (see paragraph 14 above). The amount claimed included interest accrued, took account of the high rate of inflation in the respondent State and was calculated on the basis of an exchange rate from 1993.

58. The Government maintained that the sum claimed by the applicant was exorbitant having regard to the fact that the applicant was only fined 83,333,333 Turkish liras and he was allowed to pay the fine in monthly instalments. The Government also pointed out that the applicant had not provided any details to substantiate the amount claimed for his alleged out-of-pocket expenses.

59. The Delegate of the Commission did not comment.

60. The Court would observe that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been, irrespective of its own finding that the respondent State is not in breach of Article 10 on account of the applicant's conviction and sentence. It considers that in the circumstances the applicant's claim should be disallowed.

B. Non-pecuniary damage

61. The applicant claimed that as a lawyer his career had been blighted on account of the fact that he has a conviction recorded against him for an offence of terrorism. He requested the Court to award him the sum of FRF 80,000 by way of compensation for moral damage.

62. The Government argued that if the Court were minded to find a violation in this case that finding would constitute in itself sufficient just satisfaction under this head.

63. The Delegate of the Commission did not comment on this limb of the applicant's claim either.

64. The Court recalls that it has found that there has been no violation of Article 10 on the facts of this case. It considers that a finding of a violation of Article 6 § 1 constitutes in itself sufficient just satisfaction for the applicant's alleged non-pecuniary damage.

C. Costs and expenses

65. The applicant claimed the legal costs and expenses (translation, postal, communications and travel expenditure) which he incurred in the proceeding before the domestic courts and the Convention institutions. He assessed these at FRF 50,000. As to the proceedings before the Commission and Court the applicant stated that his lawyer's fees were based on the Turkish Bar Association's minimum rate scales. The applicant added that the total amount claimed took account of the high level of inflation in Turkey and was based on current exchanges rate.

66. 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.

67. The Delegate of the Commission did not comment.

68. The Court notes that it has found a breach only in respect of Article 6 § 1 of the Convention. It further 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 Nikolova v. Bulgaria judgment of 25 March 1999, Reports 1999-, p. …, § 79), the Court awards the applicant the overall sum of FRF 15,000.

D. Default interest

69. 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 ten votes to seven that there has been no violation of Article 10 of the Convention;

2. *Dismisses* unanimously the Government's preliminary objection concerning the exhaustion of domestic remedies;

3. *Holds* by sixteen votes to one that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds* by sixteen votes to one that the finding of a violation of Article 6 § 1 of the Convention constitutes in itself just satisfaction for the non-pecuniary damage alleged by the applicant;

5. *Holds* unanimously
   (a) that the respondent State is to pay the applicant in respect of costs and expenses, within three months, the sum of 15,000 (fifteen thousand) French francs, to be converted into Turkish liras at the rate applicable on the date of settlement;
   (b) that simple interest at an annual rate of 3.47 % shall be payable on the above sum from the expiry of the above-mentioned three months until settlement;

6. *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) partly dissenting opinion of Mrs Palm;
(b) partly dissenting opinion of Mr Bonello;
(c) joint partly dissenting opinion of Mrs Tulkens, Mr Casadevall and Ms Greve;
(d) partly dissenting opinion of Mr Fischbach;
(e) partly dissenting opinion of Mr Maruste;
(f) partly dissenting opinion of Mr Gölcüklü.

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

DECLARATION OF 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.

PARTLY DISSENTING OPINION OF JUDGE PALM

I share the Court's decision that there has been a violation of Article 6 § 1. However, I am unable to share its conclusion that there has been no violation of Article 10 in this case for reasons which are, in substance, the same as those set out in my dissent in the case of Sürek v. Turkey no. 1.

PARTLY DISSENTING OPINION OF JUDGE BONELLO

I voted to find a violation of Article 10, as 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 action[2]. It is a question of proximity and degree[3].

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of

[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 action[1].

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]

Moreover, I did not support the majority in its ruling that the finding of a violation of Article 6 §1 of the Convention constitutes in itself just satisfaction for the non-pecuniary damage alleged by the applicant. I believe that such non-redress is inadequate in any court of justice and is negated by the clear wording of the Convention, as explained in detail in my partly dissenting opinion annexed to the judgment of Aquilina v. Malta of 29 April 1999.

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[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.

JOINT PARTLY DISSENTING OPINION OF JUDGES TULKENS, CASADEVALL AND GREVE

(*Provisional translation*)

We voted with the majority in favour of finding a violation of Article 6 § 1.

However, for substantially the same reasons as those set out in our partly dissenting opinion annexed to the Sürek no. 1 judgment adopted today, we disagree with the majority's view that there has been no violation of Article 10.

PARTLY DISSENTING OPINION OF JUDGE FISCHBACH

(*Provisional translation*)

Having voted with the majority in favour of finding a violation of Article 6 § 1, I regret that I am unable to agree with the reasoning that led it to conclude that there has been no violation of Article 10.

Obviously, I agree with the Court’s case-law affording the national authorities a wider margin of appreciation when considering whether there is a need for interference in the exercise of freedom of expression in cases concerning comments inciting people to use violence against an individual, a State representative or a sector of the population.

I consider, however, that the need for interference in freedom of expression can be justified only in circumstances that are clear and, in any event, sufficiently unambiguous and where the medium of expression used covers an audience wide enough to give rise to the fear that remarks of a violent nature will trigger serious and unforeseeable consequences for national security and democratic order.

That would be the case notably when the situation is exacerbated by violent remarks that could be construed as inciting hatred or violence following particular events or other tragic incidents (see the Zana judgment, §§ 59-60).

As that did not occur here, I am unable to agree with the majority when it refers in general terms to the difficult situation obtaining in south-east Turkey since 1985.

I consider that on the facts the interference in the freedom of expression was not the most appropriate means of reacting to the comments which, as violent and acerbic as they may have been, ultimately did no more than to document the concerns of a minority opposed to the policies of the national authorities.

For those reasons I find that there has been a violation of Article 10 in the present case.

PARTLY DISSENTING OPINION OF JUDGE MARUSTE

I regret that I disagree with the majority, finding no violation of Article 10 for two main reasons.

Firstly, I consider that freedom of expression is above all a personal right. The applicant was the owner (the major shareholder) of the review with no editorial responsibility for its content. Nonetheless he was punished by a criminal court on account of the publication of the news commentary. I am convinced that the applicant was not exercising his own freedom of expression when the review owned by him published a news commentary, readers' letters etc. It seems to me that an owner can not be responsible for the exercise of freedom of expression by others, especially by people other than the editorial staff. This conclusion flows directly from the very idea of freedom of expression and the task of the press in a democratic society - which is to impart and disseminate information, including information which offends, shocks or disturbs or which forms a part of public debate capable of furthering progress in human and public affairs of general concern.

An owner may be considered responsible for misuse of freedom of expression if he or she personally writes something not in conformity with the requirements of Article 10 or intervenes in the editing or takes any special relevant steps (giving orders etc) to give special emphasis to the contributions - letters, commentaries and ideas expressed by others (for example by putting them on the cover page or printing them in bold, in a frame etc). But in the instant case we have no information that the applicant intervened or took any steps to give to the contribution and its message any special meaning or weight. The review did what the media have to do in a democratic society - namely reflect the opinions of the members of the society. It is incumbent on the press to impart information and ideas on political issues, including divisive ones.

In conclusion, I consider that the owner acted in accordance with the requirements of the Convention and that the interpretation of the existence of a causal link between the owner's conduct and his criminal responsibility from the standpoint of the Convention requirements is too weak.

Secondly, even if the responsibility of the owner in the given case is presumed, I find that the reaction from the State was disproportionate and unnecessary in a democratic society. I am convinced that the public, politicians and the government are entitled to know what their fellow citizens are thinking and calling for. Even if the opinions expressed are

disturbing, shocking or divisive. The opposite would mean that the owner should act as a censor, which would be further removed from the basic ideas and rules of democracy. Finally, I share the opinion of those colleagues who consider that the danger flowing from the speech must be deemed clear and present. This was not the case here.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Provisional translation*)

To my great regret, I do not agree with the view of the majority of the Court 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. In that connection, I refer to the dissenting opinion which I expressed jointly with those eminent judges Mr Thor Vilhjálmsson, 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 firmly 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.