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

FOURTH SECTION

CASE OF *ÖZGÜR GÜNDEM* v. TURKEY

(Application no. 23144/93)

JUDGMENT

STRASBOURG

16 March 2000

In the case of *Özgür Gündem* v. Turkey,

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

Mr M. PELLONPÄÄ, *President*,
Mr G. RESS,
Mr A. PASTOR RIDRUEJO,
Mr L. CAFLISCH,
Mr J. MAKARCZYK,
Mr V. BUTKEVYCH, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 10 November 1999 and 3 February 2000,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 March 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 23144/93) against the Republic of Turkey lodged with the Commission under former Article 25 by three Turkish nationals, Gurbetelli Ersöz, Fahri Ferda Çetin and Yaşar Kaya, and by Ülkem Basın ve Yayıncılık Sanayı Ticaret Ltd, a company having its head office in Istanbul, on 9 December 1993. The first two applicants were, respectively, the editor-in-chief and the assistant editor-in-chief of the newspaper *Özgür Gündem* of which the third and fourth applicants were the owners. The Commission later decided not to pursue the examination of the application in so far as it concerned the first applicant, since she had died in 1997.

The application concerned the applicants' allegations that there had been a concerted and deliberate assault on their freedom of expression through a campaign of targeting journalists and others involved in *Özgür Gündem*. The applicants relied on Articles 10 and 14 of the Convention and on Article 1 of Protocol No. 1.

The Commission declared the application admissible on 20 October 1995. In its report of 29 October 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 10 (unanimously), that there had been no violation of Article 14 (fifteen votes to two) and that it was not necessary to examine separately

whether there had been a violation of Article 1 of Protocol No. 1 (unanimously)[1].

2. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with the provisions of Article 5 § 4 thereof read in conjunction with Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 31 March 1999 that the case would be examined by a Chamber constituted within one of the Sections of the Court.

3. In accordance with Rule 52 § 1, the President of the Court, Mr L. Wildhaber, assigned the case to the Fourth Section. The Chamber constituted within that Section included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr M. Pellonpää, President of the Section (Rule 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr G. Ress, Mr A. Pastor Ridruejo, Mr L. Caflisch, Mr J. Makarczyk and Mrs N. Vajić (Rule 26 § 1 (b)).

4. On 1 June 1999 Mr Türmen withdrew from sitting in the Chamber (Rule 28). The Turkish Government ("the Government") accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. On 13 July 1999 the Chamber decided to hold a hearing.

6. Pursuant to Rule 59 § 3 the President of the Chamber invited the parties to submit memorials on the issues raised in the application. The Registrar received the applicants' and Government's memorials on 5 and 20 October 1999 respectively.

7. In accordance with the Chamber's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 10 November 1999.

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN, *Co-Agent*,
Mr F. POLAT,
Mr F. ÇALIŞKAN,
Ms M. GÜLSEN,
Mr E. GENEL,
Mr F. GÜNEY,
Mr C. AYDIN, *Advisers*;

(b) *for the applicants*
Mr W. BOWRING, *Counsel*,
Mr K. YILDIZ, *Adviser*.

1. *Note by the Registry*. The report is obtainable from the Registry.

The Court heard addresses by Mr Bowring and Mr Özmen.

8. On 3 February 2000 Mrs Vajić, who was unable to take part in the further consideration of the case, was replaced by Mr V. Butkevych (Rule 26 § 1 (c)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. *Özgür Gündem* was a daily newspaper the main office of which was located in Istanbul. It was a Turkish-language publication with an estimated national circulation of up to 45,000 copies and a further unspecified international circulation. It incorporated its predecessor, the weekly publication *Yeni Ülke*, which was published between 1990 and 1992. *Özgür Gündem* was published from 30 May 1992 until April 1994. It was succeeded by another newspaper, *Özgür Ülke*.

10. The case concerns the allegations of the applicants that *Özgür Gündem* was the subject of serious attacks and harassment which forced its eventual closure and for which the Turkish authorities are directly or indirectly responsible.

A. Incidents of violence and threats against *Özgür Gündem* and persons associated with it

11. The applicants made detailed submissions to the Commission, listing the attacks made on journalists, distributors and others associated with the newspaper (see paragraphs 32-34 of the Commission's report). The Government, in their submissions to the Commission, denied that some of these attacks occurred (see paragraphs 43-62 of the Commission's report). In their submissions to the Court, neither party has made any comment on the Commission's findings in this respect (see paragraphs 141-42 of the Commission's report).

12. The following incidents are not contested.

Seven persons connected with *Özgür Gündem* were killed in circumstances originally regarded as killings by "unknown perpetrators": (1) Yahya Orhan, a journalist shot dead on 31 July 1992; (2) Hüseyin Deniz, a staff member of *Özgür Gündem*, shot dead on 8 August 1992; (3) Musa Anter, a regular columnist for *Özgür Gündem*, shot dead on 20 September 1992; (4) Hafız Akdemir, a staff member of *Özgür Gündem*, shot dead on 8 June 1992; (5) Kemal Kılıç, the Şanlıurfa representative of *Özgür*

Gündem, shot dead on 18 February 1993 (application no. 22492/93 lodged by Cemil Kılıç concerning alleged State responsibility for this killing is pending before the Court – see the Commission's report of 23 October 1998); (6) Cengiz Altun, a reporter for *Yeni Ülke*, shot dead on 24 February 1992; (7) Ferhat Tepe, the Bitlis correspondent for *Özgür Gündem*, abducted on 28 July 1993 and found dead on 4 August 1993.

The following attacks occurred: (1) on 16 November 1992 an arson attack on the news-stand of Kadir Saka in Diyarbakır; (2) an armed attack on Eşref Yaşa, also a newsagent, on 15 January 1993 in Diyarbakır; (3) an armed attack on the newsagent Haşim Yaşa on 15 June 1993 in Diyarbakır (this incident and that concerning the attack on Eşref Yaşa were the subject of an application under the Convention – see the Yaşa v. Turkey judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI); (4) on 26 September 1993 Mehmet Balamir, a newspaper boy, was attacked with a knife in Diyarbakır as he was selling *Özgür Gündem*; (5) in 1993, in Ergani, boys selling the newspaper were attacked by a person with a knife; (6) an arson attack on a newsagent's in Mazidagı; (7) in Bingöl, on 17 November 1992 the car of a newsagent was destroyed by fire; (8) in Yüksekova, in October 1993, a bomb explosion damaged a newsagent's; (9) a bomb exploded at the Istanbul office of the newspaper's successor *Özgür Ülke* on 2 December 1994, killing one employee and injuring eighteen others.

13. The applicants listed a large number of other incidents (arson attacks, attacks and threats on newsagents, distributors and newspaper boys) which the Government stated either did not occur or concerning which they stated that they had received no information or complaint (see paragraphs 32-34 and 43-62 of the Commission's report). They also referred to the disappearance of the journalist Aysel Malkaç on 7 August 1993 and to the detention and ill-treatment of many journalists, one of whom, Salih Tekin, was found, upon his application to Strasbourg, to have been subjected to inhuman and degrading treatment while in custody (see paragraph 37 of the Commission's report and the Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1517-18, §§ 53-54).

14. The applicants, and others acting on behalf of the newspaper and its employees, addressed numerous petitions to the authorities concerning the threats and attacks which they claimed had occurred. These are listed in the Commission's report (paragraph 35) and include letters from the applicant Yaşar Kaya to the governor of the state of emergency region, the Minister of the Interior, the Prime Minister and Deputy Prime Minister, informing them of the attacks and requesting investigations to be opened and measures of protection to be taken. There was no reply to the vast majority of these letters.

15. Written complaints were made by persons from the newspaper about specific attacks, incidents and threats concerning which the Government stated that they had received no information or complaint, including the

attacks on children distributing the newspaper in Diyarbakır during 1993, the death of newsagent Zülküf Akkaya in Diyarbakır on 27 September 1993 and attacks on distributors by persons with meat axes, also in Diyarbakır, in September 1993 (see paragraph 35 (s) of the Commission's report). A written request for protective measures made on 24 December 1992 to the governor of Şanlıurfa on behalf of the persons involved in the newspaper in Şanlıurfa was refused shortly before the journalist Kemal Kılıç was shot dead on 18 February 1993 (see paragraph 35 (l) of the Commission's report).

16. Following a request for security measures received by the Diyarbakır police on 2 December 1993, police escorted employees of the two companies dealing with the distribution of newspapers from the border of the province of Şanlıurfa to the distribution stores. Measures were also taken with respect to deliveries of the newspaper from the stores to newsagents. The Government submitted to the Commission that no other requests for protection were received. Following the explosion at the *Özgür Ülke* office on 2 December 1994 and a request from the owner, security measures, including patrolling, were taken by the authorities.

B. The search-and-arrest operation at the *Özgür Gündem* premises in Istanbul

17. On 10 December 1993 the police conducted a search of the *Özgür Gündem* office in Istanbul. During the operation, they took into custody those present in the building (107 persons, including the applicants Gurbetelli Ersöz and Fahri Ferda Çetin) and seized all the documents and archives.

18. Two search-and-seizure documents dated 10 December 1993 record that the police found two guns, ammunition, two sleeping bags and twenty-five gas masks. In a further search-and-seizure document dated 10 December 1993, it is stated that the following items had been found: photographs (described as kept in envelopes with a label "PKK Terrorist Organisation"), a tax receipt stamped with the name ERNK (a wing of the Workers' Party of Kurdistan (PKK)) for 400,000,000 Turkish liras (TRL), found in the desk of the applicant Yaşar Kaya, and numerous printed and hand-written documents, including an article on Abdullah Öcalan. A document dated 24 December 1993, signed by a public prosecutor at the Istanbul National Security Court, listed the following material as having been seized: in a sealed envelope the military identification of Muzaffer Ulutaş killed in Şırnak in March 1993, in a sealed box 1,350 injection kits, one typewriter, one video-cassette and one audio-cassette, and forty books found at the house of the applicant Fahri Ferda Çetin. As a result of these measures, the publication of the newspaper was disrupted for two days.

19. In an indictment dated 5 April 1994, charges were brought against the editor Gurbetelli Ersöz, Fahri Ferda Çetin, Yaşar Kaya, the manager Ali Rıza Halis and six others, alleging that they were members of the PKK, had assisted the PKK and made propaganda in its favour. The Government have stated that Gurbetelli Ersöz and Ali Rıza Halis were convicted of aiding and abetting the PKK, by judgment of the Istanbul National Security Court no. 5 on 12 December 1996. Gurbetelli Ersöz had previously been convicted of involvement with the PKK in or about the end of December 1990 and had been released from prison in 1992.

C. Prosecutions concerning issues of *Özgür Gündem*

20. Numerous prosecutions were brought against the newspaper (including the relevant editor, the applicant Yaşar Kaya as the owner and publisher, and the authors of the impugned articles), alleging that offences had been committed by the publication of various articles. The prosecutions resulted in many convictions, carrying sentences imposing fines and prison terms and orders of confiscation of issues of the newspaper and orders of closure of the newspaper for periods of three days to a month.

The prosecutions were brought under provisions rendering it an offence, *inter alia*, to publish material insulting or vilifying the Turkish nation, the Republic or specific State officers or authorities, material provoking feelings of hatred and enmity on grounds of race, region of origin or class, and materials constituting separatist propaganda, disclosing the names of officials involved in fighting terrorism or reporting the declarations of terrorist organisations (see "Relevant domestic law" below).

21. On 3 July 1993 *Özgür Gündem* published a press release announcing that the newspaper was charged with offences which, cumulatively, were punishable by fines totalling TRL 8,617,441,000 and prison terms ranging from 155 years and 9 months to 493 years and 4 months.

22. During one period of sixty-eight days in 1993, forty-one issues of the newspaper were ordered to be seized. In twenty cases, closure orders were issued, three for a period of one month, fifteen for a period of fifteen days and two for ten days.

23. The applicants have further stated, and this was not contested by the Government, that there have been prosecutions in respect of 486 out of 580 issues of the newspaper and that, pursuant to convictions by the domestic courts, the applicant Yaşar Kaya has been fined up to TRL 35 billion, while journalists and editors together have had imposed sentences totalling 147 years' imprisonment and fines reaching TRL 21 billion.

D. Material before the Commission

1. Domestic court proceedings

24. Both parties provided the Commission with copies of judgments and decisions by the courts relating to the proceedings brought in respect of the newspaper. These involve 112 prosecutions brought between 1992 and 1994. Details of the articles in issue and the judgments given in twenty-one cases are summarised in the Commission's report (paragraphs 161-237).

2. The Susurluk report

25. The applicants provided the Commission with a copy of the so-called "Susurluk report"[1], produced at the request of the Prime Minister by Mr Kutlu Savaş, Vice-President of the Board of Inspectors within the Prime Minister's Office. After receiving the report in January 1998, the Prime Minister made it available to the public, although eleven pages and certain annexes were withheld.

26. The introduction states that the report was not based on a judicial investigation and did not constitute a formal investigative report. It was intended for information purposes and purported to do no more than describe certain events which had occurred mainly in south-east Turkey and which tended to confirm the existence of unlawful dealings between political figures, government institutions and clandestine groups.

27. The report analyses a series of events, such as murders carried out under orders, the killings of well-known figures or supporters of the Kurds and deliberate acts by a group of "informants" supposedly serving the State, and concludes that there is a connection between the fight to eradicate terrorism in the region and the underground relations that have been formed as a result, particularly in the drug-trafficking sphere. The passages from the report that concern certain matters affecting radical periodicals distributed in the region are reproduced below.

> "... In his confession to the Diyarbakır Crime Squad, ... Mr G. ... had stated that Ahmet Demir[2] [p. 35] would say from time to time that he had planned and procured the murder of Behçet Cantürk[3] and other partisans from the mafia and the PKK who

1. Susurluk was the scene of a road accident in November 1996 involving a car in which a member of parliament, a former deputy director of the Istanbul security services, a notorious far-right extremist, a drug trafficker wanted by Interpol and his girlfriend had been travelling. The latter three were killed. The fact that they had all been travelling in the same car had so shocked public opinion that it had been necessary to start more than sixteen judicial investigations at different levels and a parliamentary inquiry.

2. One of the pseudonyms of a former member of the PKK turned informant who was known by the code name "Green" and had supplied information to several State authorities since 1973.

had been killed in the same way ... The murder of ... Musa Anter[1] had also been planned and carried out by A. Demir [p. 37].

...

Summary information on the antecedents of Behçet Cantürk, who was of Armenian origin, are set out below [p. 72].

...

As of 1992 he was one of the financiers of the newspaper *Özgür Gündem*. ... Although it was obvious who Cantürk was and what he did, the State was unable to cope with him. Because legal remedies were inadequate *Özgür Gündem* was blown up with plastic explosives and when Cantürk started to set up a new undertaking, when he was expected to submit to the State, the Turkish Security Organisation decided that he should be killed and that decision was carried out [p. 73].

...

All the relevant State bodies were aware of these activities and operations. ... When the characteristics of the individuals killed in the operations in question are examined, the difference between those Kurdish supporters who were killed in the region in which a state of emergency had been declared and those who were not lay in the financial strength the latter presented in economic terms. ... The sole disagreement we have with what was done relates to the form of the procedure and its results. It has been established that there was regret at the murder of Musa Anter, even among those who approved of all the incidents. It is said that Musa Anter was not involved in any armed action, that he was more concerned with the philosophy of the matter and that the effect created by his murder exceeded his own real influence and that the decision to murder him was a mistake. (Information about these people is to be found in Appendix 9[2]). Other journalists have also been murdered [p. 74][3].”

28. The report concludes with numerous recommendations, such as improving coordination and communication between the different branches of the security, police and intelligence departments; identifying and dismissing security-force personnel implicated in illegal activities; limiting the use of “confessors”[4]; reducing the number of village guards; terminating the use of the Special Operations Bureau outside the south-east region and incorporating it into the police outside that area; opening investigations into

1. An infamous drug trafficker strongly suspected of supporting the PKK and one of the principal sources of finance for *Özgür Gündem*.
2. Mr Anter, a pro-Kurdish political figure, was one of the founding members of the People’s Labour Party (HEP), director of the Kurdish Institute in Istanbul, a writer and leader writer for, *inter alia*, the weekly review *Yeni Ülke* and the daily newspaper *Özgür Gündem*. He was killed in Diyarbakır on 30 September 1992. Responsibility for the murder was claimed by an unknown clandestine group named “*Boz-Ok*”.
3. The appendix is missing from the report.
4. The page following this last sentence is also missing from the report.
4. Persons who cooperate with the authorities after confessing to having been involved in the PKK.

various incidents; taking steps to suppress gang and drug-smuggling activities; and recommending that the results of the Grand National Assembly Susurluk inquiry be forwarded to the appropriate authorities for the relevant proceedings to be undertaken.

II. RELEVANT DOMESTIC LAW

A. The Criminal Code

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

Article 36 § 1

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

Article 79

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

Article 159 § 1

"Whoever overtly insults or vilifies the Turkish nation, the Republic, the Grand National Assembly, or the moral personality of the Government, the ministries or the military or security forces of the State or the moral personality of the judicial authorities shall be punished by a term of imprisonment of one to six years."

Article 311 § 2

"Where incitement to commit an offence is done by means of mass communication, of whatever type – whether by tape recordings, gramophone records, newspapers, press publications or other published material – by the circulation or distribution of printed papers or by the placing of placards or posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled ..."

Article 312

"A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months' and two years' imprisonment and a heavy fine of from six thousand to thirty thousand Turkish liras.

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years' imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one-third to one-half.

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 § 2."

30. The conviction of a person under Article 312 § 2 entails further consequences, particularly with regard to the exercise of certain activities governed by special legislation. For example, persons convicted of an offence under that Article may not found associations (Law no. 2908, section 4(2)(b)) or trade unions, nor may they be members of the executive committee of a trade union (Law no. 2929, section 5). They are also forbidden to found or join political parties (Law no. 2820, section 11(5)) and may not stand for election to Parliament (Law no. 2839, section 11(f 3)).

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

31. The relevant provision of the Press Act 1950 reads 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."

C. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)

32. This law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as "acts of terrorism" or "acts perpetrated for the purposes of terrorism" (sections 3 and 4) and to which it applies. The relevant provisions of the Prevention of Terrorism Act 1991 read as follows:

Section 6

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

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

...

Where the offences contemplated in the above paragraphs are committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, or from the sales of the previous issue if the periodical appears monthly or less frequently, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[1]. However, the fine may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher."

Section 8

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

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

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

1-2. The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and ceased to be in force on 27 July 1993.

of from one hundred million to three hundred million Turkish liras. The penalty imposed on a reoffender may not be commuted to a fine.

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

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

..."

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

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

Transitional provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment ... to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections 4[1] and 6[2] of Law no. 647 of 13 July 1965."

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

THE LAW

I. STANDING OF GURBETELLI ERSÖZ

34. The Court recalls that this application was lodged by four applicants, the first of which was Gurbetelli Ersöz, formerly the editor of *Özgür Gündem*. In its report of 29 October 1998, the Commission decided not to pursue its examination of the case in so far as it concerned Gurbetelli Ersöz as she had died in autumn 1997 and no information had been received that any heir or close relative wished to pursue her complaints.

35. The parties have made no submissions on this aspect of the case.

36. The Court considers, in accordance with Article 37 § 1 (c) of the Convention, that it is no longer justified to continue the examination of the application in so far as it concerns Gurbetelli Ersöz. Accordingly, this part of the case shall be struck out of the list.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

37. The applicants complained that the newspaper *Özgür Gündem* was forced to cease publication due to the campaign of attacks on journalists and others associated with the newspaper and due to the legal steps taken against the newspaper and its staff, invoking 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."

A. Concerning the alleged attacks on the newspaper and persons associated with it

38. The applicants claimed that the Turkish authorities had, directly or indirectly, sought to hinder, prevent and render impossible the production of *Özgür Gündem* by the encouragement of or acquiescence in unlawful killings and forced disappearances, by harassment and intimidation of

journalists and distributors, and by failure to provide any or any adequate protection for journalists and distributors when their lives were clearly in danger and despite requests for such protection.

The applicants relied on the findings in the Commission's report that there was a disturbing pattern of attacks on persons concerned with *Özgür Gündem* and that the authorities, through their failure to take measures of protection and to conduct adequate investigations in relation to the apparent pattern of attacks on *Özgür Gündem* and persons connected with it, did not comply with their positive obligation to secure to the applicants their right to freedom of expression guaranteed under Article 10 of the Convention.

39. The Government emphasised that *Özgür Gündem* was the instrument of the terrorist organisation PKK and espoused the aim of that organisation to destroy the territorial integrity of Turkey by violent means. They disputed that any reliance could be placed on previous judgments of the Court or on the Susurluk report in deducing that there was any official complicity in any alleged attacks. In particular, the Susurluk report was not a judicial document and had no probative value.

The Government submitted that the Commission based its findings on general presumptions unsupported by any evidence and that the applicants had not substantiated their claims of a failure to protect the lives and physical integrity of persons attached to *Özgür Gündem*. Nor had they substantiated that the persons attacked were related to the newspaper. They disputed that any positive obligation extends to the protection and promotion of the propaganda instrument of a terrorist organisation but asserted that, in any event, necessary measures were taken in response to individual complaints, investigations being carried out by public prosecutors as required.

40. The Court observes that the Government have disputed the Commission's findings concerning the pattern of attacks in general terms without specifying which are, or in what way they are, inaccurate. It notes that the Government deny specifically that any weight can be given to the Susurluk report and its description of acquiescence and connivance by State authorities in unlawful activities, some of which targeted *Özgür Gündem* and journalists, of whom Musa Anter is specifically named.

In its judgment in the Yaşa case (Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, pp. 2437-38, §§ 95-96), in which it was alleged that the security forces had connived in an attack on Eşref Yaşa and his uncle who were both involved in the sale and distribution of *Özgür Gündem* in Diyarbakır, the Court found that the Susurluk report did not provide a basis for enabling the perpetrators of the attack on Eşref Yaşa and his uncle to be identified. It did find that the report gave rise to serious concerns and that it was not disputed in the Yaşa case that there had been a number of serious attacks on journalists, newspaper kiosks and distributors of *Özgür Gündem*. Furthermore, while the Susurluk report indeed may not

be relied on for establishing to the required standard of proof that State officials were implicated in any particular incident, the Court considers that the report, which was drawn up at the request of the Prime Minister and which he decided should be made public, must be regarded as a serious attempt to provide information on and analyse problems associated with the fight against terrorism from a general perspective and to recommend preventive and investigative measures. On that basis, the report can be relied on as providing factual substantiation of the fears expressed by the applicants from 1992 onwards that the newspaper and persons associated with it were at risk from unlawful violence.

41. Having regard to the parties' submissions and the findings of the Commission in its report, the Court is satisfied that from 1992 to 1994 there were numerous incidents of violence, including killings, assaults and arson attacks, involving the newspaper and journalists, distributors and other persons associated with it. The concerns of the newspaper and its fears that it was the victim of a concerted campaign tolerated, if not approved, by State officials, were brought to the attention of the authorities (see paragraphs 14-15 above). It does not appear, however, that any measures were taken to investigate this allegation. Nor did the authorities respond by any protective measures, save in two instances (see paragraph 16 above).

42. The Court has long held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. It has found that such obligations may arise under Article 8 (see, amongst others, the Gaskin v. the United Kingdom judgment of 7 July 1989, Series A no. 160, pp. 17-20, §§ 42-49) and Article 11 (see the Plattform "Ärzte für das Leben" v. Austria judgment of 21 June 1988, Series A no. 139, p. 12, § 32). Obligations to take steps to undertake effective investigations have also been found to accrue in the context of Article 2 (see, for example, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161) and Article 3 (see the Assenov and Others v. Bulgaria judgment of 28 October 1998, *Reports* 1998-VIII, p. 3290, § 102), while a positive obligation to take steps to protect life may also exist under Article 2 (see the Osman v. the United Kingdom judgment of 28 October 1998, *Reports* 1998-VIII, pp. 3159-61, §§ 115-17).

43. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals (see *mutatis mutandis*, the X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, p. 11, § 23). In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general

interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, among other authorities, the Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, p. 15, § 37, and the Osman v. the United Kingdom judgment cited above, pp. 3159-60, § 116).

44. In the present case, the authorities were aware that *Özgür Gündem*, and persons associated with it, had been subject to a series of violent acts and that the applicants feared that they were being targeted deliberately in efforts to prevent the publication and distribution of the newspaper. However, the vast majority of the petitions and requests for protection submitted by the newspaper or its staff remained unanswered. The Government have only been able to identify one protective measure concerning the distribution of the newspaper which was taken while the newspaper was still in existence. The steps taken after the bomb attack at the Istanbul office in December 1994 concerned the newspaper's successor. The Court finds, having regard to the seriousness of the attacks and their widespread nature, that the Government cannot rely on the investigations ordered by individual public prosecutors into specific incidents. It is not convinced by the Government's contention that these investigations provided adequate or effective responses to the applicants' allegations that the attacks were part of a concerted campaign which was supported, or tolerated, by the authorities.

45. The Court has noted the Government's submissions concerning its strongly held conviction that *Özgür Gündem* and its staff supported the PKK and acted as its propaganda tool. This does not, even if true, provide a justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence.

46. The Court concludes that the Government have failed, in the circumstances, to comply with their positive obligation to protect *Özgür Gündem* in the exercise of its freedom of expression.

B. Concerning the police operation at the *Özgür Gündem* premises in Istanbul on 10 December 1993

47. The applicants relied on the findings in the Commission's report that the search-and-arrest operation conducted on the premises of *Özgür Gündem* in Istanbul, during which all the employees were detained and the archives, library and administrative documents seized, disclosed an interference with the newspaper's freedom of expression for which there

was no convincing justification. In their submissions to the Commission, they stated that there were innocent explanations for the allegedly incriminating material found on the premises (see paragraph 36 (i) of the Commission's report).

48. The Government pointed to the materials seized during the search, including injection kits, gas masks, an ERNK receipt and the identity card of a dead soldier, which, they submitted, were indisputable proof of the links between the newspaper and the PKK. They referred to the conviction on 12 December 1996 of the editor Gurbetelli Ersöz and manager Ali Rıza Halis for aiding the PKK. They also asserted that, of the 107 persons apprehended at the Istanbul office, 40 could claim no connection with the newspaper, which gave additional grounds for suspicions of complicity with the terrorist organisation.

49. The Court finds that the operation, which resulted in newspaper production being disrupted for two days, constituted a serious interference with the applicants' freedom of expression. It accepts that the operation was conducted according to a procedure "prescribed by law" for the purpose of preventing crime and disorder within the meaning of the second paragraph of Article 10. It does not, however, find that a measure of such dimension was proportionate to this aim. No justification has been provided for the seizure of the newspaper's archives, documentation and library. Nor has the Court received an explanation for the fact that every person found on the newspaper's premises had been taken into custody, including the cook, cleaner and heating engineer. The presence of forty persons who were not employed by the newspaper is not, in itself, evidence of any sinister purpose or of the commission of any offence.

50. As stated in the Commission's report, the necessity for any restriction in the exercise of freedom of expression must be convincingly established (see, among other authorities, the Otto-Preminger-Institut v. Austria judgment of 20 September 1994, Series A no. 295-A, p. 19, § 50). The Court concludes that the search operation, as conducted by the authorities, has not been shown to be necessary, in a democratic society, for the implementation of any legitimate aim.

C. Concerning the legal measures taken in respect of issues of the newspaper

1. The applicants

51. The applicants claimed that the Government had also sought to hinder, prevent and render impossible the production and distribution of *Özgür Gündem* by means of unjustified legal proceedings. They adopted the findings in the Commission's report that many of the prosecutions brought against the newspaper in respect of the contents of articles and news reports

were unjustified and disproportionate in their effects. They submitted that the Commission had analysed thoroughly a representative sample of prosecutions in the light of the principles established by the Court and had found that most of the impugned articles contained no incitement to violence or comments likely to exacerbate the situation which could have justified the measures imposed.

2. The Government

52. The Government submitted that the Commission was selective in the manner in which it examined domestic court decisions concerning the *Özgür Gündem* publications. It was furthermore simplistic, in their view, to consider that only words directly and expressly inciting to violence might justifiably be prohibited, an approach which the Commission had taken in examining the articles. Implied, covert and veiled messages could equally have a negative impact. The Government argued that the correct test was to examine the actual danger caused by the publication. They also contended that the intention of the newspaper, namely, that of acting as a tool of propaganda for the PKK and of supporting its aim of endangering the territorial integrity of Turkey, was crucial in this assessment. It is for the domestic authorities who are in contact with the vital forces of their countries to determine whether safety or security is threatened and the Contracting State must enjoy a wide margin of appreciation in any supervision carried out by Strasbourg.

3. The Commission

53. In its report, the Commission examined twenty-one court decisions concerning prosecutions in respect of thirty-two articles and news reports. These prosecutions related to various offences: insulting the State and the military authorities (Article 159 of the Criminal Code), provoking racial and regional hostility (Article 312 of the Criminal Code), reporting statements of the PKK (section 6 of the Prevention of Terrorism Act 1991), identifying officials appointed to fight terrorism (section 6 of the 1991 Act), and publishing separatist propaganda (section 8 of the 1991 Act). The prosecutions resulted in convictions involving prison terms, fines and closure of the newspaper. The Commission found that the criminal convictions and the imposition of sentences could be justified only in respect of three issues. Its summaries of the articles and court decisions are contained in its report (paragraphs 160-237).

4. The Court's assessment

54. The Court, firstly, sees no reason for criticising the approach adopted by the Commission which consisted in selecting domestic decisions for examination. The Commission reviewed the material and information

provided by the parties, including the convictions and acquittals involved. Given the number of prosecutions and decisions, a detailed analysis of all cases would have been impracticable. The Commission identified decisions reflecting the different criminal offences at stake in the domestic cases. The articles examined varied in subject matter and form and included news reports on different subjects, interviews, a book review and a cartoon. The Government have not provided any reason for holding that this selection was biased, unrepresentative or otherwise gave a distorted picture; nor did they identify any court decisions or articles which should have been examined instead.

55. The Court therefore accepts the approach taken by the Commission and will examine whether, in the cases which the latter included in its report, the measures imposed disclose any violation of Article 10 of the Convention.

56. It finds first that, prima facie, these measures constituted an interference with the freedom of expression within the meaning of the first paragraph of Article 10 and fall to be justified in terms of the second paragraph. While the applicants submit, in their memorial, that the provisions of the Prevention of Terrorism Act 1991 (see paragraphs 32-33 above) are so vague and potentially all-inclusive as to violate the letter and spirit of Article 10, they have not provided any precise argument as to why the measures in question should not be considered as "prescribed by law".

The Court recalls that it has already considered this point in previous judgments (see, for example, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, §§ 45-46, ECHR 1999-IV and twelve other freedom of expression cases concerning Turkey) and found that measures imposed pursuant to the 1991 Act could be regarded as "prescribed by law". The applicants have provided no basis on which to alter this conclusion. As in those other judgments, the Court therefore finds that the measures taken can be said to have pursued the legitimate aims of protecting national security and territorial integrity and of preventing crime and disorder (see, for example*, Sürek (no. 1)* cited above, § 52).

57. The Court shall now examine whether these measures were "necessary in a democratic society" for achieving such aims in the light of the principles established in its case-law (see, among recent authorities, the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, pp. 2547-48, § 51, and *Sürek (no. 1)* cited above, § 58). These may be summarised as follows:

(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 extends 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 that margin 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 the freedom of expression 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 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.

58. As these cases also concern measures against newspaper publications, they must equally be seen in the light of the essential role played by the press for ensuring the proper functioning of democracy (see, among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A no. 103, p. 26, § 41, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). While the press must not overstep the bounds set, *inter alia*, for the protection of the vital interests of the State, such as the protection of 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 convey information and ideas on political issues, even divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the Lingens judgment cited above, p. 26, §§ 41-42).

(a) Prosecutions concerning the offence of insulting the State and the military authorities (Article 159 of the Criminal Code)

59. The Commission examined in this context three articles concerning the alleged destruction of houses in Lice by the security forces, which led to the imposition of a prison sentence of ten months and a fifteen-day closure order, and a cartoon depicting the Turkish Republic as a figure labelled

"*kahpe*"[1], which entailed the imposition of a fine, a ten-month prison term and a fifteen-day closure order (see paragraphs 161-66 of the Commission's report).

60. The Court reiterates that the dominant position enjoyed by the State authorities makes it necessary for them to display restraint in resorting to criminal proceedings. The authorities of a democratic State must tolerate criticism, even if it may be regarded as provocative or insulting. The Court notes, in respect of the articles concerning the destruction in Lice, that allegations of security-force involvement were circulating widely and indeed are the subject of proceedings in Strasbourg (see, for example, the case of Ayder and Others v. Turkey, now pending before the Court, application no. 23656/94, Commission's report of 21 October 1999, unpublished). The Commission also found that the terms of the article were factual in content and emotional, but not offensive, in tone. In respect of the cartoon, it notes that the domestic court rejected the claim that it was intended as a joke and found that it disclosed "the concentrated nature of the intention to insult". The Court does not find any convincing reason, however, for penalising any of these publications as described above. It agrees with the Commission's findings that the measures taken were not "necessary in a democratic society" for the pursuit of any legitimate aim.

(b) Prosecutions concerning the offence of provoking racial and regional hostility (Article 312 of the Criminal Code)

61. The case examined under this heading concerned an article describing alleged attacks by security forces on villages in the south-east and attacks made by terrorists, including the killing of an imam (see paragraphs 167-69 of the Commission's report). The domestic court, which imposed a fine and sixteen months' imprisonment on the author and issued a one-month closure order, referred to the manner in which the article was written, the reason why it was written and the social context, without offering any explanation. The Court notes that it did not rely on any alleged inaccuracy in the article. The Commission found that the article was factual and of public interest and that it contained no element of incitement to violence or overt support for the use of violence by the PKK. The Court does not find relevant and sufficient reasons for imposing criminal convictions and penalties in respect of this article and agrees with the Commission that the interference was not justified under Article 10 § 2 of the Convention.

1. This word conveys a range of meanings, including "prostitute", "tricky", "deceitful".

(c) Prosecutions for reporting statements of the PKK (section 6 of the 1991 Act)

62. The Commission reviewed seven court decisions concerning convictions which were imposed in respect of eight articles, and which involved fines and the confiscation of several issues of the newspaper. The articles included reports of declarations of PKK-related organisations (for example, ARGK), statements, a speech and an interview with Abdullah Öcalan, the PKK leader, a statement by the European representative of the PKK, an interview with Osman Öcalan, a PKK commander, a statement by the *Dev-Sol*[1] European office, and an interview with Cemil Bayık, a PKK commander (see paragraphs 174-95 of the Commission's report).

63. The Court recalls that the fact that interviews or statements were given by a member of a proscribed organisation cannot in itself justify an interference with the newspaper's freedom of expression. Nor can the fact that the interviews or statements contain views strongly disparaging of government policy. Regard must be had instead to the words used and the context in which they were published, with a view to determining whether the texts taken as a whole can be considered as inciting to violence (see, for example, *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 61, 8 July 1999, unreported).

64. The Court agrees with the Commission that four of the eight articles cannot be regarded as inciting to violence, in view of their content, tone and context. In particular, it finds that the statement of the *Dev-Sol* office in Europe, which recounts alleged police ill-treatment of persons at a Turkish funeral in Germany, did not contain any material relevant to public-order concerns in Turkey.

65. Three articles were found by the Commission to contain passages which advocated intensifying the armed struggle, glorified war and espoused the intention to fight to the last drop of blood. The Court agrees that, in the context of the conflict in the south-east, these could reasonably be regarded as encouraging the use of violence (see, for example, *Sürek (no. 1)* cited above, §§ 61-62). Given also the relatively light penalties imposed, the Court finds that the measures complained of were reasonably proportionate to the legitimate aims of preventing crime and disorder and could be justified as necessary in a democratic society within the meaning of the second paragraph of Article 10.

1. "*Dev-Sol*" (Revolutionary Left) is the name commonly used to refer to the extreme left-wing armed movement "*Türkiye Halk Kurtuluş Partisi/Cephesi-Devrimci Sol*".

(d) Prosecutions for identifying officials participating in the fight against terrorism (section 6 of the 1991 Act)

66. Five court decisions concerning six articles are listed under this heading. Penalties included fines, the confiscation of issues and, in one instance, a fifteen-day closure order (see paragraphs 199-215 of the Commission's report).

67. The Court observes that the convictions and sentences had been imposed because the articles had identified by name certain officials in connection with alleged misconduct, namely, the death of the son of a DEP (Democratic Party) candidate during detention, the allegation of official acquiescence in the killing of Musa Anter, the forcible evacuation of villages, the intimidation of villagers, the bombing of Şırnak and the revenge killing of two persons after a PKK raid on a gendarmerie headquarters. However, it is significant that in two of the articles the officials named were not in fact alleged to be responsible for the misconduct but merely implicated in the surrounding events. In particular, concerning the death during detention, the Şırnak security director was cited as having previously reassured the family that the man would be released safely and the Şırnak chief public prosecutor was reported as being unavailable for comment. While three village guards were named in the article concerning the revenge killing, it was alleged that the gendarmes had killed the two people.

68. It is true that the other three articles alleged serious misconduct by the officials named and were capable of exposing them to public contempt. However, as for the other articles, the truth of their content was apparently not a factor taken into account and, if true, the matters described were of public interest. Nor was it taken into account that the names of the officials and their role in fighting terrorism were already in the public domain. Thus, the governor of the sate of emergency region who was named in one article was a public figure in the region, while the gendarmerie commanders and village guards named in the other articles would have been well known in their districts. The interest in protecting their identity was substantially diminished, therefore, and the potential damage which the restriction aimed at preventing was minimal. To the extent, therefore, that the authorities had relevant reasons to impose criminal sanctions, these could not be regarded as sufficient to justify the restrictions placed on the newspaper's freedom of expression (see, for example, *Sürek v. Turkey (no. 2)* [GC], no. 24122/94, §§ 37-42, 8 July 1999, unreported). Accordingly, these measures could not be justified in terms of Article 10 § 2 of the Convention.

(e) Prosecutions for statements constituting separatist propaganda (section 8 of the 1991 Act)

69. Under this heading, the Commission identified six court decisions concerning twelve articles. The penalties imposed upon conviction included

prison terms of twenty months and two years, fines, confiscation of issues and, in one instance, a one-month closure order (see paragraphs 218-317 of the Commission's report).

70. The Court observes that the articles in question included reports on economic or social matters (for example, a dam project, public health), commentaries on historical developments in the south-eastern region, a declaration condemning torture and massacres in Turkey and calling for a democratic solution, and accounts of alleged destruction of villages in the south-east. The Court notes that the use of the term "Kurdistan" in a context which implies that it should be, or is, separate from the territory of Turkey, and the claims by persons to exercise authority on behalf of that entity, may be highly provocative to the authorities. However, the public has the right to be informed of different perspectives on the situation in south-east Turkey, irrespective of how unpalatable those perspectives appear to the authorities. The Court is not convinced that, even against the background of serious disturbances in the region, expressions which appear to support the idea of a separate Kurdish entity must be regarded as inevitably exacerbating the situation. While several of the articles were highly critical of the authorities and attributed unlawful conduct to the security forces, sometimes in colourful and derogatory terms, the Court nonetheless finds that they cannot be reasonably regarded as advocating or inciting the use of violence. Having regard to the severity of the penalties, it concludes that the restrictions imposed on the newspaper's freedom of expression disclosed in these cases were disproportionate to the aim pursued and cannot be justified as "necessary in a democratic society".

D. Conclusion

71. The Court concludes that the respondent State has failed to take adequate protective and investigative measures to protect *Özgür Gündem*'s exercise of its freedom of expression and that it has imposed measures on the newspaper, through the search-and-arrest operation of 10 December 1993 and through numerous prosecutions and convictions in respect of issues of the newspaper, which were disproportionate and unjustified in the pursuit of any legitimate aim. As a result of these cumulative factors, the newspaper ceased publication. Accordingly, there has been a breach of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

72. The applicants claimed that the measures imposed on *Özgür Gündem* disclosed discrimination, invoking Article 14 of the Convention which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

73. The applicants asked the Court to reconsider the opinion, expressed in the Commission's report, that their complaints of discrimination were unsubstantiated. They submitted that the finding of a violation of Article 10 supported the conclusion that they had suffered discrimination on the grounds of their national origin and association with a national minority. They argued that any expression of Kurdish identity was treated by the authorities as advocacy of separatism and PKK propaganda. In the absence of any justification for the restrictive measures imposed with regard to most of the articles examined by the Commission, these measures could only be explained by prohibited discrimination.

74. The Government submitted that the applicants' claims of discrimination were unsubstantiated.

75. The Court recalls that it has found a violation of Article 10 of the Convention. However, in reaching the conclusion that the measures imposed in respect of twenty-nine articles and news reports were not necessary in a democratic society, it was satisfied that they pursued the legitimate aims of protecting national security and territorial integrity or that of the prevention of crime or disorder. There is no reason to believe that the restrictions on freedom of expression which resulted can be attributed to a difference of treatment based on the applicants' national origin or to association with a national minority. Accordingly, the Court concludes that there has been no breach of Article 14 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. The applicants claimed compensation for pecuniary and non-pecuniary damage as well as the 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

77. The applicant company, Ülkem Basın ve Yayıncılık Sanayı Ticaret Ltd, claimed that it had suffered pecuniary loss through the prosecution and seizure of its daily production. Prior to the actions of the authorities, the newspaper was selling about 45,000 copies per day. Circulation fell as a

result of the violations to around 30,000 and then ceased altogether. The newspaper was sold for 10,000 Turkish liras (TRL). They therefore held that it would be reasonable to claim the equivalent of one year's production of the newspaper, namely TRL 110,000 million.

The applicant company also claimed that it was required to pay lawyers' fees, the costs of medical treatment and other expenses such as travel and communications incurred in respect of attacks on and arrest and trial of correspondents, distributors and other workers. It was estimated that these expenses amounted to TRL 1,000 million. The applicant company also paid all the expenses in respect of the seventeen editors who were remanded in custody, including lawyers' fees totalling TRL 20,000 million. Furthermore, on 10 December 1993, the newspaper's offices in Istanbul, Diyarbakır, Batman, Elâzığ, Van, İzmir, Agri, Antalya and Tatvan were raided and searched and archives and documents seized. None of these documents were returned. The value of the documents and archives was about TRL 10,000 million. The claims totalled TRL 141,000 million.

The applicant company stated that it was unable to supply documentary evidence in respect of the pecuniary loss as all the documents and records of the newspaper, which had been retained by its successor *Özgür Ülke*, were destroyed in the bombing of the building in December 1994.

78. The Government stated that no compensation was payable as there had been no violation of the Convention. However, even assuming a violation, the amounts claimed by the applicants were excessive, inflated and unacceptable.

79. The Court observes that the applicant company is unable to produce any documentary support of its claims for pecuniary loss. Nor has it attempted to specify as far as possible the basis of claims for legal fees and medical and other expenses. The Court is not satisfied that there is a direct causal link between the finding of a failure to protect or investigate and the claimed pecuniary losses in respect of medical and other expenses. It also notes that the company's claims relate to the legal measures taken against the newspaper as a whole, irrespective of whether the measure has been found to be justified or not. Further, additional claims are made for the seizure of archives and documents in a number of offices, although the applicant company's substantive complaints concerned its headquarters in Istanbul.

80. Nonetheless, the Court accepts that some pecuniary loss must have flowed from the breaches identified, both in relation to the search and seizure of archives and documents at the Istanbul office and to the unjustified restrictions disclosed by the prosecutions and convictions identified in this judgment. It has also found that the cumulative effects of the breaches resulted in the newspaper ceasing publication. Making an assessment on an equitable basis, the Court awards the applicant company TRL 9,000 million.

B. Non-pecuniary damage

81. The applicant Fahri Ferda Çetin claimed 30,000 pounds sterling (GBP) for acute distress, anxiety and mental suffering. He alleged that during his detention for thirteen days he was tortured, and that on release he was forced to flee Turkey, leaving his wife and children behind.

82. The applicant Yaşar Kaya also claims GBP 30,000. He stated that the Istanbul National Security Court no. 5 imposed terms of imprisonment on him for the articles published by him in the newspaper. He too was forced to flee abroad, leaving his wife and children in Turkey, and so also underwent acute distress, anxiety and mental suffering.

83. The Government stated that the amounts claimed were inflated and, if granted, would amount to unjust enrichment.

84. The Court recalls that it has made no findings under the Convention regarding Fahri Ferda Çetin's detention or the periods of imprisonment imposed on Yaşar Kaya. It does not doubt, however, that these applicants suffered considerable anxiety and stress in respect of the breaches established by the Court. Having regard to other awards made in cases against Turkey (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, § 50, ECHR 1999-IV, and *Arslan v. Turkey* [GC], no. 23462/94, § 61, 8 July 1999, unreported) and ruling on an equitable basis, it awards the applicants GBP 5,000 each.

C. Costs and expenses

85. The applicants claimed legal fees and expenses for Mr Osman Ergin, who acted for the newspaper in domestic proceedings, but they have not supplied any details. Similarly, they have not provided details of claims for fees and expenses of the Turkish lawyers assisting them. They claimed GPB 5,390 (less 5,595 French francs (FRF) received in legal aid from the Council of Europe) for fees, expenses and costs incurred by their United Kingdom lawyers and GBP 7,500 in fees, GBP 1,710 in administrative costs, GBP 12,125 in translation costs and GBP 1,650 in travel expenses incurred by the Kurdish Human Rights Project (KHRP) in assisting with the application. In respect of the hearing before the Court, the applicants claimed GBP 1,450 in fees and GBP 46 in administrative costs (less FRF 3,600 received in legal aid) for their United Kingdom lawyers and also, in respect of the costs and fees of the KHRP for the hearing, GBP 2,490 for fees, costs and expenses.

86. The Government submitted that these claims were excessive, and that incidental expenses, such as those claimed by the KHRP, should not be accepted as this would inflate the award into unjust enrichment.

87. The Court is not satisfied that all the amounts claimed in respect of the KHRP may be regarded as necessarily incurred, save in regard to the

translation costs. Taking into account awards made in other cases, and making an equitable assessment, the Court awards GBP 16,000, less the FRF 9,195 received by way of legal aid from the Council of Europe.

D. Default interest

88. The Court deems it appropriate to adopt the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment, which, according to the information available to it, is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Decides* unanimously to strike the case out of the list in so far as it concerns Gurbetelli Ersöz;

2. *Holds* unanimously that there has been a violation of Article 10 of the Convention;

3. *Holds* unanimously that there has been no violation of Article 14 of the Convention;

4. *Holds* by six votes to one:
   (a) that the respondent State is to pay, within three months:
   (i) to the applicant company TRL 9,000,000,000 (nine thousand million Turkish liras);
   (ii) to Fahri Ferda Çetin and Yaşar Kaya for non-pecuniary damage GBP 5,000 (five thousand pounds sterling) each to be converted into Turkish liras at the rate applicable at the date of delivery of this judgment;
   (iii) to the applicants for costs and expenses GBP 16,000 (sixteen thousand pounds sterling) less FRF 9,195 (nine thousand one hundred and ninety five French francs) to be converted into pounds sterling at the rate applicable at the date of delivery of this judgment;
   (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 March 2000.

Vincent BERGER
Registrar

Matti PELLONPÄÄ
President

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

M.P.
V.B.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

To my great regret, I am unable to share the conclusion reached by the majority regarding the application of Article 41 in this case. Allow me to explain.

1. The applicant company alleged that it had sustained substantial pecuniary damage as a result of being subjected to prosecution, the seizure of its possessions and other measures. In support of its claims, it has alleged only hypothetical, illusory and imaginary facts, without providing any evidence. In short, it was speculating and, furthermore, certain matters relied on bore no relation whatsoever to the truth. I shall refer to only one of the allegations, so that it can be seen in the light of a finding of the European Commission of Human Rights based on its own investigation in a previous case. Thus, according to the applicant company, prior to the actions of the authorities, the newspaper *Özgür Gündem* was selling 45,000 copies per day. That figure fell to 30,000 and the newspaper disappeared permanently as a result of those actions (see paragraph 77 of the judgment). That account is shown to be untrue by the Commission. The Commission stated in its report of 23 October 1998 in the case of Kılıç v. Turkey (application no. 22492/93, § 176): "*Özgür Gündem* was a daily newspaper ... with a national circulation of some *thousand* copies ... In or about April 1994, *Özgür Gündem* ceased publication and was succeeded by another newspaper, *Özgür Ülke* ..." The difference between the alleged figure and the Commission's figure is striking. In addition, *Özgür Gündem* disappeared only in theory, since it was replaced by *Özgür Ülke*. That clearly shows the fanciful and speculative nature of the claim for pecuniary damage in the instant case.

2. Under its settled case-law, the European Court of Human Rights will award compensation for pecuniary damage only if the claims have been duly established and there is an immediate and direct causal link between the facts and the alleged damage. That rule is illustrated in the following examples taken from judgments in cases against Turkey also concerning Article 10 of the Convention.

> "81. With regard to pecuniary damage, the Delegate of the Commission suggested that the Court should consider the question of the application of Article 50 in the light of the hypothetical character of the amount claimed. He left the question of non-pecuniary damage to the Court's discretion. Lastly, with regard to the sum claimed for costs and expenses, he mentioned the problem raised by the lack of supporting documents.

82. On the question of pecuniary damage, the Court considers in the first place that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been. It further notes that there is insufficient proof of a causal connection between the breach of Article 10 it has found and the loss of professional and commercial income alleged by the applicant. Moreover, the applicant's claims in respect of pecuniary damage are not supported by any evidence whatsoever. The Court can therefore not allow them." (Incal v. Turkey judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1575)

"47. The applicant sought 262,000 French francs (FRF) for pecuniary damage and FRF 500,000 for non-pecuniary damage.

48. The Government invited the Court to dismiss that claim.

49. As Mr Çıraklar did not specify the nature of the pecuniary damage of which he complained, the Court cannot but dismiss the relevant claim. As to the alleged non-pecuniary damage, it is sufficiently compensated by the finding of a violation of Article 6 § 1." (Çıraklar v. Turkey judgment of 28 October 1998, *Reports* 1998-VII, p. 3074)

"66. The Delegate of the Commission submitted that the applicants' presentation – which was very general and hypothetical – was insufficient to allow their claims under Article 50 to be upheld.

67. The Court notes that the applicants have not furnished any evidence in support of their claims for substantial sums in respect of pecuniary damage and costs and expenses. Consequently, it cannot uphold those claims (see, *mutatis mutandis*, the Pressos Compania Naviera S.A. and Others v. Belgium judgment of 3 July 1997 (*Article 50*), *Reports* 1997-IV, p. 1299, § 24). It notes, however, that the applicants received FRF 57,187 in legal aid paid by the Council of Europe." (Socialist Party and Others v. Turkey judgment of 25 May 1998, *Reports* 1998-III, p. 1261)

"57. The Government replied that there was no causal connection between the alleged violation of the Convention and the pecuniary damage complained of. In any event, Mr Arslan had not furnished evidence of the income he had referred to.

58. The Court finds that there is not sufficient evidence of a causal connection between the violation of Article 10 it has found and the loss of earnings alleged by the applicant. Moreover, no documentary evidence has been submitted in support of the applicant's claims in respect of pecuniary damage. The Court cannot therefore allow them." (*Arslan v. Turkey* [GC], no. 23462/94, 8 July 1999, unreported)

"66. The Government contended that Mr Karataş had not proved his loss of earnings.

67. The Delegate of the Commission expressed no view on this point.

68. The Court finds that there is insufficient proof of a causal link between the violation and the applicant's alleged loss of earnings. In particular, it has no reliable information on Mr Karataş's salary. Consequently, it cannot make an award under this head (see Rule 60 § 2 of the Rules of Court)." (*Karataş v. Turkey* [GC], no. 23168/94, ECHR 1999-IV)

"53. The Delegate of the Commission considered that there was no reason for the Court to reach a different conclusion from that reached in the cases of the United Communist Party and the Socialist Party cited above.

54. The Court notes that the applicant party has not furnished any evidence in support of its claim. Consequently, it is unable to accept it (Rule 60 § 2 of the Rules of Court; see, *mutatis mutandis*, the Socialist Party and Others v. Turkey judgment cited above, p. 1261, § 67)." (*Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, ECHR 1999-VIII)