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

CASE OF CEYLAN v. TURKEY

(Application no. 23556/94)

JUDGMENT

STRASBOURG

8 July 1999

In the case of Ceylan v. Turkey,

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

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

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

Having deliberated in private on 1 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. 23556/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Münir Ceylan, on 10 February 1994.

Notes by the Registry

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

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

The Commission's request referred to former Articles 44 and 48 and to. the declaration whereby Turkey recognised the compulsory jurisdiction of the Court. 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 Article 10 of the Convention, taken either alone or together with Article 14.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of 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 (former Rule 30). The lawyer was given leave by the President of the Court at the time, Mr R. Bernhardt, to use the Turkish language in the written procedure (former Rule 27 § 3).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the 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 applicant's memorial on 15 July 1998 and the Government's memorial on 31 July 1998. On 7 September 1998 the Government filed documents to be appended to their memorial and on 25 February 1999 they filed observations on the applicant's claims for just satisfaction.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The President of the Court, Mr L. Wildhaber, decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); 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 and Özdemir v. Turkey (nos. 23927/94 and 24277/94); Sürek v. Turkey (no. 1) (no. 26682/95); Sürek v. Turkey (no. 2) (no. 24122/94); Sürek v. Turkey (no. 3) (no. 24735/94); and Sürek v. Turkey (no. 4) (no. 24762/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr Wildhaber, the

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.

President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

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

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

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

7. In accordance with the decision of the President, who had also given the applicant's counsel leave to address the Court in Turkish (Rule 34 § 3), a hearing took place in public in the Human Rights Building, Strasbourg, on 1 March 1999, the case being heard simultaneously with those of Arslan v. Turkey and Sürek v. Turkey.

There appeared before the Court:

(a) *for the Government*

Mr D. TEZCAN,
Mr M. ÖZMEN, *Co-Agents*,
Mr B. ÇALIŞKAN,
Ms G. AKYÜZ,
Ms A. GÜNYAKTI,
Mr F. POLAT,
Ms A. EMÜLER,
Mrs I. BATMAZ KEREMOĞLU,
Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

(b) *for the applicant*

Mr H. KAPLAN, of the Istanbul Bar, *Counsel*;

(c) *for the Commission*
Mr H. DANELIUS, *Delegate*.

The Court heard addresses by Mr Danelius, Mr Kaplan, Mr Tezcan and Mr Özmen.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The article in the weekly newspaper *Yeni Ülke*

8. The applicant, who was at the time the president of the petroleum workers' union (*Petrol-İş Sendikası*), wrote an article entitled "The time has come for the workers to speak out – tomorrow it will be too late" ("*Söz işçinin*, *yarın çok geç olacaktır*") in the 21-28 July 1991 issue of *Yeni Ülke* ("New Land"), a weekly newspaper published in Istanbul. The article read:

> "The steadily intensifying State terrorism in eastern and south-eastern Anatolia is nothing other than a perfect reflection of the imperialist-controlled policies being applied to the Kurdish people on the international plane.
>
> In order to destroy the Kurdish movement in Iraq, US imperialism first stirred up the Kurds against Saddam's regime and then set that regime on them, having left it strong enough to crush their movement.
>
> As a result, the whole world has been confronted with the heartbreaking sight of tens of thousands of Kurds dying of hunger, exposure and epidemics, tens of thousands more wiped out by the Iraqi army and hundreds of thousands forced to leave their homes and their country.
>
> After shedding crocodile tears over these scenes, which they themselves had created, the imperialists are now sitting back with their arms folded, for the whole world to see, as genocide in Turkey continues to intensify.
>
> The constant increase in the south-east in the numbers of persons executed without trial, of mass arrests and of persons disappearing while in detention, particularly since the passing of the new Prevention of Terrorism Act, is a harbinger of difficult times ahead.
>
> The recent murder in police custody of the president of the Diyarbakır branch of the HEP [People's Labour Party], probably by anti-guerrilla forces, and the further killings (three according to the police, ten according to local people) at his funeral (the

police opened fire on the crowd, injuring hundreds, and took over a thousand people into custody) are the latest examples of State terrorism.

Anyone who examines the Prevention of Terrorism Act closely can easily see that it is aimed at crushing not only the struggle of the Kurdish people, but the struggle of the whole working class and proletariat for subsistence, for freedom and for democracy.

Consequently, not only the Kurdish people but the whole of our proletariat must stand up against these laws and the 'State terrorism' currently being practised.

From the trade-union point of view, too, the problem is too important and too vital to be dealt with simply in a few interviews and declarations.

The political authorities and the forces of monopolistic capital use a few vague concepts to enable every action to be presented as a terrorist offence and every organisation as a terrorist group. When they feel the time is right, they will not hesitate to turn that weapon against the working class.

As we have always said, the Turkish working class and its economic and democratic organisations must bring not only their economic, but also their political and democratic demands to the fore and play an effective role in this struggle.

Despite all the hurdles erected by the law, we must unite in action with the democratic mass organisations, political parties and every individual or body with which it is possible to work; we must oppose the bloody massacres and State terrorism, using all our powers of organisation and coordination.

If we fail to do so, the circles of monopolistic capital, which, under imperialist orders, aim to gag and suffocate the Kurdish people, will inevitably turn on the working class and proletariat.

In saying 'tomorrow it will be too late', we are calling on all our people and all the forces of democracy to take an active part in this struggle."

B. The proceedings against the applicant

1. The charges against the applicant

9. On 16 September 1991, the public prosecutor at the Istanbul National Security Court (*İstanbul Devlet Güvenlik Mahkemesi*) indicted the applicant on charges of non-public incitement to hatred and hostility contrary to Article 312 §§ 1 and 2 of the Turkish Criminal Code (see paragraphs 15-16 below).

2. The proceedings in the Istanbul National Security Court

10. In the proceedings in the Istanbul National Security Court, the applicant denied the charges. He submitted that the article was about human rights violations in the south-east of Turkey and maintained that he had not

intended to promote separatism or to sow discord or strife amongst the population. According to him, in a democratic society, any subject should be able to be discussed without restriction. He also argued that it was his responsibility as a trade-union leader to express his opinion on the problem of democracy in south-east Turkey.

11. In a judgment of 3 May 1993, the National Security Court found the applicant guilty of an offence under Article 312 §§ 2 and 3 of the Turkish Criminal Code and sentenced him to one year and eight months' imprisonment, plus a fine of 100,000 Turkish liras.

The court held that in his article the applicant had alleged that the Kurdish people were being oppressed, massacred and silenced in Turkey. In particular, the court interpreted parts of the fourth and thirteenth sentences of the article as meaning, respectively, that "... genocide [was] being carried out against the Kurds in Turkey ..." and that an attempt was being made to "... gag and suffocate the Kurdish people".

It reached the conclusion that the applicant had incited the population to hatred and hostility by making distinctions based on ethnic or regional origin or social class.

3. The Court of Cassation proceedings

12. The applicant appealed to the Court of Cassation, contesting, *inter alia*, the National Security Court's interpretation of his article and arguing that it should have obtained an expert opinion as to its meaning. He also submitted that he should have been given only a suspended sentence.

13. On 14 December 1993 the Court of Cassation dismissed the appeal, upholding the National Security Court's assessment of the evidence and its reasons for rejecting the applicant's defence.

14. The applicant served his sentence in full. As a consequence of his conviction, he also lost his office as president of the petrol workers' union as well as certain political and civil rights (see paragraph 17 below).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

15. Article 312 of the Criminal Code provides:

> "Non-public incitement to commit an offence
>
> 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."

16. Article 311 § 2 of the Criminal Code provides:

"Public incitement to commit an offence

...

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 …"

17. The conviction of a person pursuant to 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(f3)).

B. Criminal case-law submitted by the Government

18. The Government supplied copies of six decisions given by the prosecutor attached to the Istanbul National Security Court withdrawing charges. One of the cases concerned a person suspected of non-public incitement, contrary to Article 312 of the Criminal Code, to hatred or hostility based in particular on a distinction between religions. The other five concerned persons suspected of making separatist propaganda aimed at undermining the indivisible unity of the State contrary to section 8 of the Prevention of Terrorism Act (Law no. 3713). In three of those cases, in which the offences had been committed by means of publications, one of the reasons given for the prosecutor's decision was that some of the elements of the offence could not be made out.

Furthermore, the Government submitted a number of National Security Court judgments as examples of cases in which defendants accused of the offences referred to above had been found not guilty. The judgments in question are: for 1996, no. 428 of 19 November and no. 519 of

27 December; for 1997, no. 33 of 6 March, no. 102 of 3 June, no. 527 of 17 October, no. 541 of 24 October and no. 606 of 23 December; and for 1998, no. 8 of 21 January, no. 14 of 3 February, no. 56 of 19 March, no. 87 of 21 April and no. 133 of 17 June. The judgments acquitting authors of works dealing with the Kurdish problem were based, *inter alia*, on the absence of "propaganda", one element of the offence.

PROCEEDINGS BEFORE THE COMMISSION

19. Mr Ceylan applied to the Commission on 10 February 1994. He alleged that his conviction amounted to a breach of Articles 9 and 10 of the Convention, which guarantee the right to freedom of thought and of expression. He also claimed to have been discriminated against on the grounds of his political opinions, contrary to Article 14 read in conjunction with Article 10.

20. The Commission declared the application (no. 23556/94) admissible on 15 April 1996. In its report of 11 December 1997 (former Article 31 of the Convention), it examined the first complaint under Article 10 alone. It expressed the opinion that there had been a violation of that provision and that no separate issue arose under it read in conjunction with Article 14 (thirty votes to two). Extracts from the Commission's opinion and the dissenting opinion contained in the report are reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

21. In his memorial, the applicant requested the Court to find that there had been a violation of Articles 6 § 1, 9, 10 and 14 of the Convention and to award him certain sums under Article 41.

22. The Government for their part asked the Court to

> "find that there has been no violation of the Convention Articles relied on by the applicant and to dismiss the application accordingly".

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

THE LAW

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

23. In his application, Mr Ceylan submitted that his conviction under Article 312 of the Turkish Criminal Code had infringed Articles 9 and 10 of the Convention. At the hearing before the Court, however, he did not object to his complaint being examined under Article 10 alone, as the Government and the Commission had proposed (see, among other authorities, the Incal v. Turkey judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1569, § 60). Article 10 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."

24. Those appearing before the Court agreed that the applicant's conviction as a result of the publication of his article "The time has come for the workers to speak out – tomorrow it will be too late" amounted to an "interference" with the exercise of his right to freedom of expression. Such an interference is in breach of Article 10 unless it satisfies the requirements laid down in paragraph 2 of that provision. The Court must therefore determine whether it was "prescribed by law", was motivated by one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" for achieving such aim or aims.

1. "Prescribed by law"

25. It was not disputed that the applicant's conviction was based on Article 312 §§ 2 and 3 of the Turkish Criminal Code and it must therefore be regarded as "prescribed by law" for the purposes of the second paragraph of Article 10.

2. Legitimate aim

26. The applicant did not make any submissions on this point.

27. The Government maintained that the aim of the interference in question had been not only to maintain "national security" and "prevent

disorder" (as the Commission had found), but also to preserve "territorial integrity".

28. Article 312 of the Criminal Code makes it a punishable offence to incite others to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions. It provides that the penalty shall be increased where such incitement endangers public safety (see paragraph 15 above).

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 Court accepts that the applicant's conviction can be said to have been in furtherance of the aims cited by the Government. This is certainly true where, as in south-east Turkey at the time of the circumstances of this case, there was a separatist movement having recourse to methods relying on the use of violence.

3. *"Necessary in a democratic society"*

(a) Arguments of those appearing before the Court

(i) The applicant

29. The applicant stated that his article did not contain any call for violence, did not refer to any illegal organisation and did not promote secessionism. According to him, the Turkish authorities abused Article 312 of the Criminal Code, which was in itself already contrary to the freedoms of thought and expression.

(ii) The Government

30. The Government submitted that offences similar to that set out in Article 312 of the Turkish Criminal Code were to be found in the legislation of other member States of the Council of Europe, citing, by way of example, Article 130 of the German Criminal Code. They argued that such provisions helped to preserve those States as democracies. Lastly, they submitted that it was not for the Strasbourg institutions to substitute their view for that of the Turkish courts as to whether there had been a "danger" capable of justifying the application of Article 312.

(iii) The Commission

31. The Commission recalled the reference to "duties and responsibilities" in Article 10 § 2, inferring this to mean that it was important for persons expressing themselves in public on sensitive political issues to take care not to condone "unlawful political violence". Freedom of expression did, however, comprise the right to engage in open discussion of

difficult problems such as those facing Turkey, in order – for example – to analyse the root causes of a situation or to express opinions on possible solutions.

The Commission noted that the article had aimed to provide a political explanation for the recrudescence of violence over the previous few years, and that, in it, the applicant had expressed his ideas in relatively moderate terms, not associating himself with recourse to violence or inciting the population to use illegal means. In its view, the applicant's conviction constituted a form of censorship which was incompatible with the requirements of Article 10.

(b) The Court's assessment

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

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

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

33. The article in issue took the form of a political speech, both in its content and in the kind of terms employed.

Using words with Marxist connotations, the applicant offers an explanation of the renewal of violence in eastern and south-eastern Anatolia over the previous few years. The core of his argument appears to be that the Kurdish movement is part of – or at least should be part of – a general struggle for freedom and democracy being waged by "the Turkish working class and its economic and democratic organisations". The article's message is that, "[d]espite all the hurdles erected by the law, we must unite in action with the democratic mass organisations, political parties and every individual or body with which it is possible to work", for the purposes of opposing the "bloody massacres" and "State terrorism", "using all our powers of organisation and coordination".

The style is virulent and the criticism of the Turkish authorities' actions in the relevant part of the country acerbic, as demonstrated by the use of the words "State terrorism" and "genocide" (see paragraph 8 above).

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

35. The Court takes into account the background to cases submitted to it, particularly problems linked to the prevention of terrorism (see the Incal judgment cited above, pp. 1568-69, § 58). It takes note of the Turkish authorities' concern about the dissemination of views which they consider might exacerbate the serious disturbances which have been going on in Turkey for some fifteen years (see paragraph 28 above). In this regard, it should be noted that the article in issue was published shortly after the Gulf

war, at a time when a large number of persons of Kurdish origin, fleeing repression in Iraq, were thronging at the Turkish border.

36. The Court observes, however, that the applicant was writing in his capacity as a trade-union leader, a player on the Turkish political scene, and that the article in question, despite its virulence, does not encourage the use of violence or armed resistance or insurrection. In the Court's view, this is a factor which it is essential to take into consideration.

37. The Court also notes the severity of the penalty imposed on the applicant – one year and eight months' imprisonment plus a fine of 100,000 Turkish liras (see paragraph 11 above). It is mindful, further, of the fact that, as a result of his conviction, the applicant lost his office as president of the petroleum workers' union as well as a number of political and civil rights (see paragraphs 14 and 17 above).

In this connection, the Court points out that the nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference.

38. In conclusion, Mr Ceylan's conviction was disproportionate to the aims pursued and accordingly not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 10

39. The applicant submitted that he had been prosecuted on account of his article merely because it was the work of a person of Kurdish origin and concerned the Kurdish question. He argued that he was therefore a victim of discrimination contrary to Article 14 of the Convention read in conjunction with Article 10. Article 14 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."

40. The Government did not submit any arguments on this issue.

41. The Commission expressed the opinion that no separate issue arose under Article 14 read in conjunction with Article 10.

42. Having regard to its conclusion that there has been a violation of Article 10 taken alone (see paragraph 38 above), the Court does not consider it necessary to examine the complaint under Article 14.

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

43. Before the Court, the applicant also complained that Article 6 § 1 of the Convention had been violated (see paragraph 21 above). The Court finds however that, since Mr Ceylan did not take the opportunity to raise this issue when the Commission was examining the admissibility of his application, he is now estopped from doing so.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. The applicant sought just satisfaction under Article 41 of the Convention, which provides:

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

A. Damage

1. *Pecuniary damage*

45. The applicant claimed the sum of 850,000 French francs (FRF) by way of compensation for pecuniary damage comprising loss of earnings as a result of his imprisonment and his legal costs and disbursements in the domestic proceedings. In support of his claims he provided a certificate signed by the General Secretary of the *Petrol-İş* trade union showing that his gross annual salary had been FRF 189,927.25 in 1994 and FRF 145,500.36 in 1998.

46. The Government argued that there was no causal relationship between the alleged violation of the Convention and the pecuniary damage claimed. In any event, they submitted, Mr Ceylan had not substantiated his alleged earnings and expenses.

47. The Court finds that no causal relationship has been satisfactorily established between the applicant's alleged loss of earnings and the violation of Article 10. Moreover, the loss which the applicant claims to have suffered has not been sufficiently proved. Accordingly, the Court dismisses this part of the claim.

The Court will examine the applicant's claim in respect of the costs and expenses incurred by him in the domestic courts together with those incurred in the proceedings before the Strasbourg institutions.

2. Non-pecuniary damage

48. Mr Ceylan claimed FRF 150,000 in respect of non-pecuniary damage.

49. The Government asked the Court to hold that the finding of violation constituted in itself sufficient just satisfaction.

50. The Court considers that the applicant must have suffered a certain amount of distress in the circumstances of the case. Deciding on an equitable basis, it awards him the sum of FRF 40,000 under this head.

B. Costs and expenses

51. The applicant claimed FRF 120,000 in respect of his legal costs and expenses before the Strasbourg institutions, comprising FRF 45,000 for translation, fax, telephone and stationary expenditure and FRF 75,000 in lawyers' fees. He supplied a number of documents in support of his claims.

52. The Government submitted that the sums claimed were excessive. In particular, they maintained that the receipts furnished by the applicant did not support the precise amounts claimed and that they concerned expenses unrelated to these proceedings. They also argued that the sums claimed in respect of translation costs and legal fees were exaggerated by normal Turkish standards.

53. The Court notes that the applicant's lawyer has been associated with the preparation of other cases before the Court concerning complaints under Article 10 of the Convention 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, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II), the Court awards the applicant a total sum of FRF 15,000.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* by sixteen votes to one that there has been a breach of Article 10 of the Convention;

2. *Holds* unanimously that no separate issue arises under Article 10 of the Convention read in conjunction with Article 14;

3. *Holds* unanimously that the applicant is estopped from bringing a complaint under Article 6 § 1 of the Convention;

4. *Holds* by sixteen votes to one
(a) that the respondent State is to pay the applicant, within three months, the following amounts to be converted into Turkish liras at the rate applicable on the date of settlement:
(i) 40,000 (forty thousand) French francs for non-pecuniary damage;
(ii) 15,000 (fifteen thousand) French francs in respect of costs and expenses;
(b) that simple interest at an annual rate of 3.47% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

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

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

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint concurring opinion of Mrs Palm, Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mrs Greve;
(b) concurring opinion of Mr Bonello;
(c) dissenting opinion of Mr Gölcüklü.

L.W.
P.J.M.

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

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

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

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

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

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the 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 applicants supported or instigated the use of violence, then their conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

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

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

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

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

---

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

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"[1].

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

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

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

The general principles which emerge from the judgment of 25 November 1997 in the case of Zana v. Turkey (*Reports of Judgments and Decisions* 1997-VII) and which I recall in my dissenting opinion annexed to *Gerger v. Turkey* ([GC], no. 24919/94, 8 July 1999) are relevant to, and hold good in, the instant case. To avoid repetition, I refer the reader to paragraphs 1-9 of that dissenting opinion.

The case of Ceylan v. Turkey cannot be distinguished from either the Zana case or the cases of Gerger, Sürek, etc. In his article, the applicant writes of "genocide ... intensify[ing]" in Turkey; of a "constant increase … in the numbers of persons executed without trial, ... and ... disappearing while in detention, particularly since the passing of the new Prevention of Terrorism Act"; of the "murder ... of the president of the Diyarbakır branch of the HEP [People's Labour Party], probably by anti-guerrilla forces" and of the crushing "not only [of] the struggle of the Kurdish people, but the struggle of the whole working class and proletariat ...". "Consequently", says the applicant, "not only the Kurdish people but the whole of our proletariat must stand up against these laws and the State terrorism currently being practised". And in conclusion, the applicant calls on all his fellow citizens and all democratic forces to "take an active part in this struggle" before it is too late. In my view, the quoted passages can in all good faith be construed as an incitement to hatred and extreme violence. Taking into account the margin of appreciation which must be left to the national authorities, I therefore conclude that the interference in issue cannot be described as disproportionate – with the result that it can be regarded as having been necessary in a democratic society.