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

CASE OF POLAT v. TURKEY

(Application no. 23500/94)

JUDGMENT

STRASBOURG

8 July 1999

In the case of Polat 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. 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 5 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. 23500/94) against the Republic of Turkey

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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.

lodged with the Commission under former Article 25 by a Turkish national, Mr Edip Polat, on 18 November 1993.

The Commission's request referred to former Articles 44 and 48 (a) of the Convention and to Rule 32 § 2 of the former Rules of Court A[1]. 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 and Article 1 of Protocol No. 1.

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

3. As President of the Chamber originally 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 counsel and the Delegate of the Commission on the organisation of the written procedure (former Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the memorials of the Government and the applicant on 13 and 24 July 1998 respectively. Subsequently, on 7 and 22 September respectively, the Government sent documents intended to be appended to their memorial and the applicant filed an additional document concerning his claim for just satisfaction (Article 41 of the Convention and Rule 60 of the new Rules of Court)

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. On 22 October 1998 Mr Wildhaber had decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24146/94); 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

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

(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 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. Baka, Mr R. Maruste, and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

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

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

6. At the invitation of the Court (Rule 99 § 1), the Commission delegated one of its members, Mr H. Danelius, to participate in the proceedings before the Grand Chamber.

7. In accordance with the President's decision, a hearing took place in public in the Human Rights building, Strasbourg, on 5 March 1999, the case being heard simultaneously with the case of Karataş v. Turkey.

There appeared before the Court:

(a) *for the Government*
Mr D. TEZCAN,
Mr ÖZMEN, *Co-Agents,*
Mr B. ÇALIŞKAN,
Miss G. AKYÜZ,
Miss A. GÜNYAKTI,
Mr F. POLAT,
Miss A. EMÜLER,
Mrs I. BATMAZ KEREMOĞLU,
Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

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

(c) *for the applicant*
Mr K. BAYRAKTAR, of the Ankara Bar, *Counsel*;

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

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Mr Edip Polat, a Turkish national born in 1962, is a writer and lives in Diyarbakır.

9. In May 1991 he published in Ankara a book entitled "We made each dawn a Newroz[1]" (*Nevrozladık Şafakları*). In an epic style he related historical episodes marked by Kurdish rebel movements in Turkey and gave an account, with his own comments, of facts relating in particular to the life of prisoners in Diyarbakır Prison and the ill-treatment they had allegedly been subjected to.

10. The book was republished in November 1991. On 31 December, on an application by the public prosecutor at the Ankara National Security Court ("the National Security Court"), the Ankara Court of First Instance ordered the seizure of the copies published as an interim measure in the context of a criminal investigation opened in respect of Mr Polat.

11. In an indictment of 22 April 1992 the public prosecutor accused the applicant, *inter alia*, of disseminating propaganda against the territorial integrity of the State and the indivisible unity of the nation, within the meaning of section 8(1) of the Prevention of Terrorism Act (Law no. 3713 – see paragraph 19 below). According to the public prosecutor, Mr Polat's book was inspired by hatred of the Turkish State and lauded Kurdish separatism. In reaching that conclusion, he noted that both the "separatist bandits" of the PKK and the rebel troops of Sheik Said[2] were described in the book as "Kurdish patriots" and that the regime at the time which had put down the insurrection of 1925 had been called a "fundamentalist dictatorship of the bourgeoisie" and was alleged to have implemented an

1. "Newroz" (or Noruz) is the name given in the Middle East to the traditional New-Year festivities, which coincide with the arrival of spring. In the Kurdish tradition *Newroz* is celebrated on 22 March, the anniversary of the "liberation" of the Kurdish people, the day on which the mythical hero Kawa is said to have defeated the tyrant King Dehhak.

2. A Kurdish leader who in 1925 raised troops from the Kurdish population to rebel against the authority of the government of the recently founded Republic. Both the movement and the suppression of it were violent.

expansionist policy which had led to infringement of the Kurds' fundamental rights and annexation of their territory.

He also accused the applicant of contravening section 6(1) of Law no. 3713 by divulging the identity of the staff of Diyarbakır Prison – who, he submitted, having been presented as torturers, ran the risk of reprisals – and the forensic pathologists, whose signatures appeared on the death certificates reproduced in the book.

In support of his submissions, the public prosecutor quoted extracts[1] from the book, whose confiscation he also sought.

12. Before the National Security Court the applicant denied the charges against him. He expressed astonishment that he was being prosecuted on account of the republication of his book, six months after it had first appeared, and submitted in particular that he could not be held responsible for either the terms used in the preface – signed "Pélesor" – or the quotations incorporated in the text[2]. For the rest, he contended that he had done no more than comment on the problems of the population of Kurdish origin on the basis of an account of actual events, which had, moreover, been discussed in the media and commented on by various politicians. He argued that the extracts quoted in the prosecution submissions had to be read in the context of the book as a whole; in that connection, he maintained that the use of a novelistic style meant that the book could not be seen as revealing an ideological or propagandist intention. It should be possible for everything in Turkey to be discussed and interpretation of history could not constitute an offence. In any event, it was not credible that a mere publication or the few quoted sentences could threaten the indivisibility of the State or influence readers' minds to such a point that the unity of the Turkish nation would be impaired.

Mr Polat likewise denied that he had denounced civil servants with the aim of turning them into targets.

13. On 23 December 1992 the National Security Court found the applicant guilty of disseminating separatist propaganda within the meaning of Law no. 3713.

In its judgment it considered separately the content of each of the six parts of the book alleged to be in breach of the law and in particular quoted substantial passages from the first two parts, including the following:

> "[First part]
>
> In spring 1925 you were not even a seed. Your parents had no '*Hélin*'[3]. Other parents had a *Hélin*, while your grandfather had himself witnessed the destruction of

1. These extracts, which were in large part also quoted by the National Security Court, are reproduced in italics in paragraph 13 below.
2. In the extracts reproduced in paragraph 13 below the quotations are placed between inverted commas.
3. Kurdish word meaning "nest" or "home" also used as a forename.

other *Hélins*. Without suspecting that one day his granddaughter might be given the name *Hélin*, how many times did he see other *Hélins* running away or falling in a heap at the bayonet's point?

That is why, 55 years later, while you are living through the reality of Diyarbakır today, you must also learn the history of what your forefathers lived through in the spring of 1925. So when people tell you 'The history of our people is one of tyranny and torture' you will know what they are talking about. Is there not a saying which goes 'He who is ignorant of the past cannot understand the present'? ...

On 13 February 1925 the village of Piran[1] was raided ... after a warrant had been issued for the arrest of ten Kurdish patriots. These patriots, preferring to fight rather than surrender to the gendarmes, shouldered their rifles and began a guerrilla campaign in the mountains. The events you are witnessing all these years later began with that clash. "On 13 February 1925 in the village of Piran ... ten of Sheikh Said's men, who were wanted for 'banditry', refused to surrender to the gendarmes and fought back with weapons in hand; this sparked off an uprising. For three weeks the insurgents dominated the situation"[2]. This uprising, which had begun with ten people, turned into a serious, large-scale insurrection ... and spread throughout the region. Scarcely five years after the proclamation of the Republic through the Turkish national democratic revolution – which has remained uncompleted - ... it was impossible for the new administration, which had taken over from the Ottoman administration, to resolve the Kurdish problem as it had not been able to bring about the necessary democratic transformations... But at the time of the revolution the Kurds had been promised that their rights would be recognised and by that means had been dragged into the war against the imperialist occupation. *Following the establishment of the Turkish National Assembly the Kurds waited two years for the promises made about the resolution of the Kurdish problem to be honoured. That period of silent waiting was brought to an end by the above-mentioned uprising led by SAİD-İ PALOYİ[3]. After the proclamation of the Republic, as the government had not satisfied the Kurds' expectations ... the accumulated anger reached new heights and it was precisely this period of "angry" waiting which fuelled the insurrection. "By 7 March the forces of Sheikh Said had surrounded Diyarbakır. In the meantime they had dispersed several army regiments and captured the centre of Elazığ and the district of Palo"[4]. The insurrection, which was spreading, did not perhaps succeed in drawing in all Kurds on account of its clan-based organisation, but it did manage to mobilise a large part [of the population] of Diyarbakır.*

When we look at Turkey as it was during the years of rebellion we see that the new State was not yet stable... There was an attempt to implement an expansionist policy which involved ignoring the rights of the Kurds and denying the existence of their territory, which the government wanted to annex...

There was no doubt that the insurrection of Said-i Paloyi, begun in those circumstances, would be bloodily repressed by the fundamentalist dictatorship of the

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1. Village in the district of Dicle in the province of Diyarbakır. At the time referred to it was attached to the district of Ergani.
2. Quotation from the book of Mete Tunçay, "The establishment of the single-party regime in the Republic of Turkey (1923-31)" (*T. C.'de Tek Parti Yönetiminin kurulması (1923-31)*), pp. 127-137.
3. Sheik Said, from the district of Palo.
4. Quotation from the previously cited book.

bourgeoisie. This first event formed part of the reality of Diyarbakır; it lasted three months. The insurrection, which had found some support around Diyarbakır and in the villages and districts of Elazığ, had finally reached the centre of Diyarbakır...

The old people still alive today who witnessed this event say that after the insurrection was put down about forty people were tried by Independence Courts Martial (*İstiklâl Mahkemeleri*) and executed. Mr Mazhar Müfit, the president of the court martial which convicted and ordered the execution of a number of eminent Kurds, including Said-i Paloyi, spoke as follows after pronouncing sentence: 'You have all pursued a specific objective, namely establishment of an independent Kurdistan, and in order to bring that about some of you abused one group of the population for your own shameful interests, while others among you allowed yourselves to be guided by your political ambitions and to be influenced by provocations which originated abroad.'[1] ...

It was not on the manes of the horses of the fallen that the killers wiped their sabres clean. Those who climbed the scaffold kicked away the chairs under their feet themselves; the others were killed by cannonballs fired from the walls. When the streets of *Amed*[2] were awash with blood the walls were tinted ash-grey. That is how the townspeople came to wear the armband with the three black dots![3] When you were not even a droplet of life, when we did not even know whether you would be born in a prison cell as a Kurdish girl, that is when the seed of the hatred [which was to explode] fifty-five years later was sown…[4]

[Second part]

They forbade us to call you '*Hélin*'. They insisted that we call you '*Meral*'. On your birth certificate they ordered us to write '*Meral*'. Like the name of your country, your first name was proscribed…

It was at that time that the commando raids on the villages of the province of Diyarbakır began. Thousands of villagers were crushed under the soldiers' rifle butts. The men of the villages were exhibited stark naked to their wives, daughters and daughters-in-law. During operations conducted under the pretext of searching for weapons, dozens of villagers were beaten to death. … The age-old hatred grew deeper. The official files contained reports about how the people of the region had rebelled against tyranny. Everything that had happened before was known about. Besides, isn't there a saying 'Crush the serpent's head while it is still small'? However, the 'serpent' had grown and begun to bite. There had to be an explanation of the secret of this seedling, because the more it was cut back the more it budded. Battle was engaged between the 'irreconcilable opposites…' In 1925 the fighting, which had until then been rather clan-based, reached a higher level. Like those in the 'opposite camp', who had put their organisation in order, the revolutionary fighters on their side amalgamated the national struggle with the struggle between [social] classes. Breaking out from the regional and clan context, the Kurdish problem moved on towards a common front with class war. Socialism became the problem of the Kurds and the Kurdish question that of the socialists…"[5]

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1. Quotation from the book of Metin Toker, "Sheikh Said and his rebellion" (*Şeyh Said ve isyanı*), p. 131.
2. Former name of the province of Diyarbakır.
3. No doubt symbolising blindness.
4. Extract from the first part, entitled "The Forty on the scaffold", pp. 13-18.

The National Security Court, after rehearsing the historical facts that had led to the events referred to by Mr Polat, ruled that he had given an inexact version of them. It emphasised that the Turkish State was a single entity, that its territory formed a whole and that all its nationals, without exception, were "patriots". It went on to say that it was unacceptable to describe as patriots insurgents who had caused the death of thousands of troops; it was not true that within Turkey there was a "Kurdish territory" or a "Turkish territory"; it flew in the face of the facts to give the name "Kurdistan" to a region where citizens of various origins lived; and that by going so far as to say that the State of the Republic of Turkey was expansionist and colonialist Mr Polat had supported the assertion that there were two nations – the Kurdish nation, whose history had allegedly been marked by tyranny and torture, and the Turks, who were enslavers. In the court's view such assertions were unacceptable because they encouraged separatism and the dismemberment of the nation.

On the subject of the second part of the book, the court observed: "Even the opening phrase – 'Like the name of your country, your first name was proscribed' – suggested separatism." It ruled that by discussing the prohibition of the forename "Hélin" the author had intended to allude to the ban on the name "Kurdistan". Mr Polat had tried to conceal in that way his real intention, which had been to assert the existence of a separate country within the territory of the Turkish State.

The court said that during the periods when democracy had been suspended and the army was in power there had been restrictions on certain rights and freedoms and undesirable incidents – such as gathering villagers together with a view to collecting hidden weapons – had taken place. While it was conceivable that from time to time it had been necessary to use force against people who refused to hand over their weapons, it was unacceptable for Mr Polat to present such incidents as acts of torture which had exclusively affected the peasants of Diyarbakır, thus insinuating that one group of Turkish citizens were victims of discriminatory treatment. In fact, it was Mr Polat's very approach which constituted discrimination based on region of origin and ethnic considerations.

As for the other parts of the book, the National Security Court held:

> "[In the third part] ... the allegations – which the author attempts to back up by giving the names of prison staff – that ... repression has become the destiny of the Kurdish people and that people of Kurdish origin have been imprisoned and tortured to death on account of their struggle for independence ... are not credible and merely take advantage of people's feelings... Remarks like those to the effect that the

5. Extract from the second part, entitled "The passion of *Amed* is reined in", pp. 19-24.

consciousness of nationhood has been strengthened by the inhuman treatment of the Kurdish people and that the national struggle is a noble one ... amount to nothing more than separatist propaganda...

[In the fourth part] it is stated that in the prisons female prisoners ... were woken up in the middle of the night and falsely told that there was a fire, but that their fear suddenly transformed itself into a marriage ceremony and they then began to shout out cries of joy (*tilili*). The memory of persons who had committed suicide on the evening of 18 May is evoked in such a way as to exploit people's feelings. In describing as heroic certain acts inspired by a primitive oriental mentality, in choosing to see a simple cry as a marriage ceremony and in presenting suicides as heroic acts the intention can only be to bolster [Kurdish] nationalist sentiment... It is obvious that conditions in prison are not ideal ... however, by using demagogic language the defendant misrepresented those conditions to a considerable extent, as if they were being used to repress the sacred and noble rebellion of the Kurdish people subjected to tyranny and torture. Such assertions amount to separatist propaganda...

[In the fifth part] the defendant ... discusses certain traditions and customs to which Turks and Kurds attach importance or a symbolic value... He relates, among others, the following anecdote: 'According to legend, during Dersim's rebellion government soldiers burned a village. While the village was on fire a child of eight to ten years of age who had escaped from the flames ran up and threw himself into the arms of the soldiers standing round the fire. When he suddenly caught sight of the earth-coloured uniforms, ... the child preferred to throw himself into the flames than to stay where he was, so he ran back to where he had come from and jumped into the fire. The Kurds have never throughout history been able to establish a lasting State and their quest for freedom has transformed itself in their hearts into glowing embers. That is why the fire of Newroz is in fact the fire of their desire for freedom...'[1] Kurdish society is based on a population which has existed for thousands of years. In the course of history it remained under the influence of a number of religions, languages and cultures. Every society goes through certain phases and when it moves from one to another some of its customs and traditions live on... That is perfectly natural. However, ... the defendant likens the fires lit in the mountains during the Newroz celebrations to the fire of freedom in people's hearts... Whereas, in Turkish society too there are events at which fires are lit... That does not mean that the Turkish people or the Kurdish people intoxicate themselves with the fire of freedom. To claim that the Kurds are not free is to attribute to them a demand ... for freedom. But what would follow freedom for the Kurds is division of the territory and the nation. It is precisely that outcome which the author implicitly advocates and seeks. ... As for the legend related by the defendant ..., it constitutes clear and conclusive proof of hostility towards the Turks...

[In the sixth part] the defendant speaks of prisons and the resistance movements inside them. We will not examine each of these movements: a full account of them has already been given in the bulletins and statements put out by the PKK! ... Among the ... prisoners there are also members of the PKK's central committee and other leading members. We know that when the prosecutors of the Military Legal Service drew up the indictments calling for ... application of the death penalty a movement of panic sprang up, and that to calm the situation down the PKK militants, in order to arouse so-called resistance movements, used people they had conditioned by saying to them:

1. Quotation from the book.

> 'Behold the fascist Turkish Republic which oppresses you; you are treated like soldiers, they wake you up at the same time as them, they make you take part in sport and they force you to go to sleep at fixed times'. Moreover, with regard to M.D. - who, according to the defendant, committed suicide – even his friends in prison confirmed that he had killed himself after a period of depression. Furthermore, did not one Ş.R.G. decide to commit suicide in Diyarbakır Prison when suffering from depression? He dressed himself in thick clothes, stuffed them with cotton soaked in eau-de-Cologne and then set fire to them with a match. When his clothes began to burn his skin he started to shout out and call to the other prisoners for help... When they had saved him he told those around him how much he regretted what he had done and that he realised how stupid he had been. In fact, suicides in prisons are committed ... as a result of depression originating in a ... feeling of guilt about offences committed. ... Misrepresenting all these facts, the defendant portrays PKK members as innocent freedom fighters and their resistance as legitimate and just, thus making manifest his criminal intent."

In short, according to the National Security Court, it was "clearly and incontestably established" that Mr Polat had disseminated propaganda against the territorial integrity of the Republic of Turkey and the indivisible unity of the nation, which justified sentencing him, pursuant to section 8(1) of Law no. 3713, to two years' imprisonment and a fine of 50 million Turkish liras (TRL). It held, however, that although the facts of the case also constituted an offence under section 6(1) of Law no. 3713, it was not necessary, regard being had to Article 79 of the Criminal Code (see paragraph 18 below), to pronounce sentence separately in respect of that offence.

In adition, the National Security Court ordered the confiscation of all the editions of the book.

14. The applicant appealed to the Court of Cassation. In his statement of the grounds of appeal he submitted that his intention had never been to work towards separatist ends but to set out his thoughts – in a critical spirit - about real events relating to the Kurdish question. He contended that the possibility of conducting such an exercise was an indispensable precondition for democracy and freedom of thought.

He further asserted that the judges at first instance had wrongly based their judgment on their own interpretation of historical events or their own perception of what was allegedly implicit. He argued that the National Security Court had been inconsistent in accepting on the one hand that there was such a thing as "Kurdish society" while denying on the other the possibility that this society might have its own patriotic feelings, epics, legends and demands for freedom. In any event, such questions were matters for sociologists or historians not judges. The National Security Court's approach had therefore been more political than legal and was bound to have led to an unfair judgment.

15. After a hearing, the Court of Cassation dismissed Mr Polat's appeal by a judgment of 27 May 1993, holding that the assessment of the evidence by the first-instance court had been consistent with the reasons it had given for rejecting the applicant's defence.

16. In July 1993 Mr Polat was imprisoned. On his release in January 1995 he paid the fine of TRL 50,000,000 that had been imposed on him.

17. On 30 October 1995 Law no. 4126 of 27 October 1995 came into force. This reduced the terms of imprisonment prescribed by section 8 of Law no. 3713, but increased the fines it laid down (see paragraph 19 below).

In a temporary provision relating to section 2, Law no. 4126 also made provision for automatic re-examination of sentences pronounced in judgments rendered pursuant to section 8 of Law no. 3713 (see paragraph 20 below). In accordance with that provision, the National Security Court re-examined the merits of the applicant's case. By a judgment of 14 December 1995 – the text of which reproduced to a considerable extent the wording of the judgment of 23 December 1992 (see paragraph 13 above) – it finally sentenced Mr Polat to pay an additional fine of TRL 50,000,000 and confirmed the order for the confiscation of his book.

On appeal by the applicant, the Court of Cassation upheld that decision by a judgment of 6 May 1997.

On 3 August 1998 Mr Polat, complying with an order to pay that had been served on him, paid the additional fine.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The criminal law

1. The Criminal Code

18. The relevant provisions of the Criminal Code are worded as follows:

Article 2 § 2

"Where the legislative provisions in force at the time when a crime is committed are different from those of a later law, the provisions most favourable to the offender shall be applied."

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 commits an act which contravenes more than one provision of the law shall be punished pursuant to the article, of those relevant, that lays down the heaviest penalty."

2. The Prevention of Terrorism Act (Law no. 3713)

19. Law no. 3713 of 12 April 1991, on the prevention of acts of terrorism, was amended by Law no. 4126 of 27 October 1995, which came into force on 30 October 1995 (see paragraph 20 below). The relevant sub-sections of sections 6 and 8 provide:

Section 6(1)

"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."

Former section 8(1)

"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."

New section 8(1)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a reoffender may not be commuted to a fine."

3. Law no. 4126 of 27 October 1995 amending Law no. 3713

20. Among the amendments it makes to section 8 of Law no. 3713 with regard to minimum and maximum sentences (see paragraph 19 above), the Law of 27 October 1995 contains a "temporary provision relating to section 2" worded as follows:

"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 and 6 of Law no. 647 of 13 July 1965.

4. The Execution of Sentence Act (Law no. 647 of 13 July 1965)

21. The relevant parts of section 5 of the Execution of Sentence Act (Law no. 647) read as follows:

"The term 'fine' shall mean payment to the Treasury of a sum fixed within the statutory limits.

…

If, after service of the order to pay, the convicted person does not pay the fine within the time-limit, he shall be committed to prison for a term of one day for every ten thousand Turkish liras owed, by a decision of the public prosecutor.

…

The sentence of imprisonment thus substituted for the fine may not exceed three years…"

5. The Code of Criminal Procedure

22. The relevant provisions of the Code of Criminal Procedure concerning the admissible grounds for appeals on points of law against judgments at first instance are worded as follows:

Article 307

"An appeal on points of law may not concern any issue other than the lawfulness of the impugned judgment.

Non-application or erroneous application of a legal rule shall constitute unlawfulness."

Article 308

"Unlawfulness is deemed to be manifest in the following cases:

1- where the court is not established in accordance with the law;

2- where one of the judges who have taken the decision was barred by statute from participating;

…"

B. Criminal case-law submitted by the Government

23. The Government supplied copies of six decisions given by the prosecutor attached to the Istanbul National Security Court withdrawing charges against persons suspected of inciting people to hatred or hostility, especially on religious grounds (Article 312 of the Criminal Code) and of five others withdrawing charges against persons suspected of disseminating separatist propaganda against the indivisible unity of the State (section 8 of the Prevention of Terrorism Act (Law no.3713)). In three of these cases where the offences had been committed by means of publications, the prosecutor based his decision on the fact that there was no evidence of some of the constituent elements of the offence.

Furthermore, the Government submitted a number of decisions of the National Security Courts as examples of cases in which defendants accused of the the above-mentioned offences had been found not guilty. These were the judgments of 19 November (no. 1996/428) and 27 December 1996 (no. 1996/519); 6 March (no. 1997/33), 3 June (no. 1997/102), 17 October (no. 1997/527), 24 October (no. 1997/541) and 23 December 1997 (no. 1997/606); and 21 January (no. 1998/8), 3 February (no. 1998/14), 19 March (no. 1998/56), 21 April (no. 1998/ 87) and 17 June 1998 (no. 1998/133). In the judgments against the authors of works dealing with the Kurdish problem, the National Security Courts reached their decisions on account of the absence of "propaganda", a constituent element of the offence.

PROCEEDINGS BEFORE THE COMMISSION

24. Mr Polat applied to the Commission on 18 November 1993. He alleged that his conviction on account of the publication of his book constituted a violation of Article 9 of the Convention. In addition, he complained that confiscation of the copies of the book breached Article 1 of Protocol No. 1.

25. On 24 June 1996 the Commission declared the application (no. 23500/94) admissible. In its report of 11 December 1997 (former Article 31 of the Convention), it expressed the opinion by thirty-one votes to one that there had been a violation of Article 10 – examined together with Article 9 – and that no separate issue arose under Article 1 of Protocol No. 1 (unanimously). The full text of the Commission's opinion and of the partly dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

1. *Note by the Registrar*. For practical reasons this annex will appear only with the 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.

FINAL SUBMISSIONS TO THE COURT

26. In his memorial the applicant asked the Court to hold that there had been violations of Articles 10 and 6 § 1 of the Convention and complained, in substance, of a violation of Article 7. He also requested the Court to award him just satisfaction under Article 41 and to order the respondent State to declare his conviction null and void and return the confiscated books to him.

27. In their memorial the Government asked the Court to dismiss Mr Polat's application. In support of their arguments they also submitted extracts from daily newspapers published during 1991 containing reports on various events that had occurred in south-east Turkey and information about the social and political impact of those incidents inside Turkey.

AS TO THE LAW

I. SCOPE OF THE CASE

28. Before the Court the applicant alleged, *inter alia*, violations of Article 6 § 1 and, in substance, Article 7 of the Convention. The Court notes, however, that as Mr Polat did not raise these complaints at the stage when the Commission was examining the admissibility of the application (see paragraph 24 above) it cannot entertain them (see, *mutatis mutandis*, the Findlay v. the United Kingdom judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 277, § 63).

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

29. In his application Mr Polat submitted that his conviction pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) had breached Article 9 of the Convention. At the hearing before the Court, however, he did not object to the suggestion that the Court should consider this complaint, as the Commission had done (see paragraph 25 above), from the standpoint of Article 10 of the Convention alone. The Court observes in that connection that since it is master of the characterisation to be given in law to the facts of a case, it does not consider itself bound by the characterisation given by applicants, governments or the Commission (see the Guerra and Others v. Italy judgment of 19 February 1998, *Reports* 1998-I, p. 223, § 44).

Article 10 of the Convention 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. The Government's preliminary objection

30. As they had done before the Commission, the Government raised a preliminary objection in two limbs on the ground of failure to exhaust domestic remedies. They asserted that the applicant had not tried to exercise any remedy against the decision by the Ankara Court of First Instance to order the seizure of the book as an interim measure (see paragraph 10 above). Secondly, Mr Polat had not at any stage of the proceedings before the Turkish courts relied on the Convention provisions he was now invoking in Strasbourg.

31. Like the applicant and the Commission, the Court notes, with regard to the first limb of the objection, that an appeal against the interim seizure ordered by the Ankara Court of First Instance would not have had any effect on the events which formed the interference complained of by the applicant, namely his conviction by the Ankara State Security Court and confiscation of his book. Consequently, such an appeal cannot be regarded as "adequate" and "effective" (see, *mutatis mutandis*, the Gautrin and Others v. France judgment of 20 May 1998, *Reports* 1998-III, p. 1023, § 38).

With regard to the complaints raised by the applicant before the Turkish courts, the Court reiterates that the requirement of exhaustion of domestic remedies is satisfied where an applicant has raised before the national authorities, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law, the complaints he intends to make subsequently in Strasbourg (see the Fressoz and Roire v. France judgment of 21 January 1999, p. .., § 37). Like the Commission, the Court notes that before the National Security Court and the Court of Cassation the applicant clearly complained of a restriction of his freedom of expression (see paragraphs 12 and 14 above).

The Government's preliminary objection must therefore be dismissed.

B. The merits of the complaint

32. Those appearing before the Court agreed that the applicant's conviction amounted to an interference with the exercise of his freedom of expression. Such interference breaches Article 10 unless it satisfies the requirements of the second paragraph of Article 10. The Court must therefore determine whether it was "prescribed by law", was directed towards one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve the aims concerned.

1. "Prescribed by law"

33. The applicant submitted that application of section 8 of Law no. 3713, which had formed the basis for his conviction, gave rise to different results for different defendants, because its interpretation varied from one person to another and from one judge to another, which made its effects unforeseeable.

34. The Government submitted that by amending the relevant wording of section 8 Law no. 4126 had clarified the constituent elements of the offence contemplated in the provision concerned, which had thus been made sufficiently explicit, and the applicant had benefited from the amendment because his case was re-examined following the entry into force of Law no. 4126 (see paragraphs 17 and 20 above).

35. At the hearing before the Court, the Delegate of the Commission submitted that the wording of section 8 was rather vague and that it might be questioned whether it satisfied the requirements of clarity and foreseeability inherent in the term "law". Noting, however, that the Commission had taken the view that section 8 provided a sufficient legal basis for the applicant's conviction, he concluded that the interference was "prescribed by law".

36. The Court takes note of the Delegate's concern about the vague wording of section 8 of Law no. 3713. However, like the Commission, it finds that since the applicant's conviction was based on section 8 of the Prevention of Terrorism Act (Law no. 3713) the resulting interference with his right to freedom of expression may be regarded as "prescribed by law".

2. Legitimate aim

37. The applicant did not express an opinion on this point.

38. The Government submitted that the aim of the interference in issue had been not only to maintain "national security" and prevent "[public] disorder", as the Commission had found, but also to preserve "territorial integrity" and "national unity".

39. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2539, § 10) and to the need for the

authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicant can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicant

40. The applicant submitted that freedom of expression was incompatible with imposition by a country's courts of a certain way of interpreting history, but that one of the main reasons why he had been convicted was that his book did not reflect the official reading of history.

Secondly, there was nothing separatist about the mere fact that he had spoken of Kurdistan in the book. In a number of countries in various parts of the world regions were named after the population who lived there, while remaining an integral part of the national territory.

Nor was it separatism to criticise the torture and tyranny endemic in Turkish prisons, particularly Diyarbakır Prison. By punishing the authors of such criticism the Turkish courts were in reality trying to conceal the facts revealed therein.

In short, the mere fact of referring to the existence of the Kurdish people in Turkey, defending their language and culture and reporting the torture and tyranny they had to endure amounted in the eyes of the authorities to separatism. In Turkey asserting that PKK militants had been executed after their arrest was tantamount to "encouraging PKK terror", while opposition to the "dirty war" was a crime which meant "support for the PKK".

(ii) The Government

41. The Government emphasised in the first place that the Turkish authorities were better placed than the Court to assess the necessity of interference with exercise by Turkish citizens of their freedom of expression. They alone had a detailed knowledge of the facts. In the present case, the 1925 revolt eulogised in the book had been at the origin of the separatist and terrorist movement which had remained a threat until the present day and had already cost the lives of thousands of people. By describing separatists as "heroes" and "Kurdish patriots", for example, the author had kept that threat alive. In its judgment the Court should be guided by, among other decisions, the Zana v. Turkey judgment of 25 November 1997 (*Reports* 1997-VII, at p. 2533) and the decision given by the Commission on 12 October 1978 in the Arrowsmith v. the United Kingdom case (application no. 7050/75, DR 19, pp. 5 et seq.).

Article 10 left Contracting States a particularly broad margin of appreciation in cases where their territorial integrity was threatened by terrorism. What is more, when confronted with the situation in Turkey – where the PKK systematically carried out massacres of women, children, schoolteachers and conscripts – the Turkish authorities had a duty to prohibit all separatist propaganda, which could only incite violence and hostility between society's various component groups and thus endanger human rights and democracy.

(iii) The Commission

42. The Commission adverted to the "duties and responsibilities" mentioned in the second paragraph of Article 10, which made it important for people expressing an opinion in public on sensitive political issues to ensure that they did not condone "unlawful political violence". Freedom of expression nevertheless included the right to engage in open discussion of difficult problems like those with which Turkey was confronted with a view to analysing, for example, the underlying causes of the situation or to expressing opinions on possible solutions.

The Commission noted that the applicant's book contained quotations from texts criticising the development of Ottoman "colonialism and "feudalism" and attempted to give a historical explanation for the resurgence of violence in recent years, particularly in the Diyarbakır region. The applicant had expressed his views on the Kurdish question in relatively moderate terms and had not endorsed the use of violence as part of the Kurdish separatist struggle. The applicant's conviction therefore constituted a form of censorship which was incompatible with the requirements of Article 10.

(b) The Court's assessment

43. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, its Zana v. Turkey judgment (previously cited, p. 2547-48, § 51), and its Fressoz and Roire v. France judgment (previously cited, p. .., § 45).

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

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

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

44. The book in issue comments on certain episodes in Turkish history in the light of the uprising started in 1925, in the village of Piran, by Sheikh Said and his men. It also describes and comments on certain facts relating to the life of prisoners in Diyarbakır Prison and the ill-treatment allegedly meted out to them. The author criticises the bloody repression of the uprising and states his opinion that this was an expression by the "fundamentalist dictatorship of the bourgeoisie" of its "disregard for the rights of the Kurds" and its "denial of the existence of their territory".

The Ankara National Security Court criticised the applicant for presenting an inexact version of the events related and thus implicitly supporting Kurdish nationalism, separatism and the dismemberment of the nation (see paragraph 13 above).

It is obvious that this was not a "neutral" description of historical facts and that through his book the applicant intended to criticise the action of the Turkish authorities in the south-east of the country and to encourage the population concerned to oppose it.

45. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 58). Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54). Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

46. The Court further reiterates that it will take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism (see the above-mentioned Incal judgment, p. 1568, § 58). On that point, it takes note of the Turkish authorities' concern about the dissemination of views which they consider might exacerbate the serious disturbances that have been going on in Turkey for some fifteen years (see paragraph 39 above).

47. The Court observes, however, that the applicant is a private individual and that he made his views public by means of a literary work rather than through the mass media, a fact which limited their potential impact on "national security", public "order" and "territorial integrity" to a substantial degree. The Court notes in addition that, although certain passages in the book criticise the attitude of the Turkish authorities and give the narrative a hostile tone, they do not constitute an incitement to violence, armed resistance or an uprising; in the Court's view this is a factor which it is essential to take into consideration, especially as the events related happened at a period which is already relatively distant in time.

48. Furthermore, the Court is struck by the severity of the penalty imposed on the applicant – particularly the fact that he was sentenced to two years' imprisonment – and the persistence of the proceedings against him. It observes that after he had served his prison sentence the applicant was ordered to pay an additional fine following the entry into force of Law no. 4126 (see paragraph 20 above).

The Court notes in that connection that the nature and severity of the penalties imposed are also factors to be taken into account when assessing whether the interference was proportionate to the aims it pursued.

49. In conclusion, Mr Polat'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.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

50. In his application to the Commission Mr Polat also alleged a violation of Article 1 of Protocol No. 1. However, he did not maintain this complaint during the proceedings before the Court, which sees no reason to examine it of its own motion (see, *mutatis mutandis*, the Incal judgment cited above, p. 1574, § 75).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. The applicant claimed 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 decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

52. For pecuniary damage the applicant claimed 10,489 American dollars (USD), broken down as follows: USD 1,415 for the two fines (two times TRL 50,000,000, converted at the rate applicable on the date of payment), USD 1,478 (that is TRL 60,000,000) for loss of earnings during his imprisonment, USD 6,336 for losses sustained on account of the confiscation of the book (publication costs and loss of profits) and USD 1,260 for loss of profits due to the impossibility of republishing the book.

53. The Government asserted that Mr Polat had not supplied any documentary evidence of the loss of profits he had alleged.

54. The Delegate of the Commission did not express an opinion on the question.

55. The Court finds that the fines imposed on the applicant were a direct consequence of the violation of Article 10 it has found. On the other hand, the Court considers that a causal connection between the violation and the other heads of pecuniary damage alleged by the applicant has not been sufficiently established. In particular, the Court is not in possession of any reliable information about the amount of the profits allegedly lost by Mr Polat.

Consequently, the Court awards the applicant USD 1,415 for pecuniary damage.

B. Non-pecuniary damage

56. Mr Polat sought payment of USD 18,940 (TRL 5,000,000,000) for non-pecuniary damage.

57. The Government asked the Court to hold that a finding that there had been a violation would constitute sufficient just satisfaction.

58. The Delegate of the Commission did not express an opinion on the question.

59. The Court considers that the applicant must have suffered distress on account of the facts of the case. Ruling on an equitable basis, it awards him compensation in the sum of FRF 40,000 under that head.

C. Costs and expenses

60. The applicant claimed USD 2,261 (TRL 24,000,000) for his costs and expenses, supplying various documents in support of his claims.

61. The Government found these sums excessive. They submitted in particular that the documentary evidence supplied by the applicant did not accurately reflect his claims and that the fees requested exceeded the rates normally applied in Turkey in similar cases.

62. On the basis of the information in its possession, the Court considers it reasonable to award the applicant FRF 20,000, less the FRF 10,446.45 paid by the Council of Europe in legal aid.

D. Default interest

63. The Court deems it appropriate to make provision for the payment of default interest at the rate of 5% per annum for the sum awarded in American dollars and 3.47% per annum for the sums awarded in French francs.

E. Other claims

64. The applicant also requested the Court to order the respondent State to declare his conviction null and void and return the confiscated books to him.

65. Neither the Government nor the Delegate of the Commission expressed an opinion on this point.

66. The Court notes that the Convention does not empower it to accede to such a request. It reiterates that it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to a violation (see, *mutatis mutandis*, the Yağcı and Sargın v. Turkey judgment of 8 June 1995, Series A no. 319-A, p. 24, § 81).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds* that it is not required to examine of its own motion the complaint of a violation of Article 1 of Protocol No. 1;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:
      (i) 1,415 (one thousand four hundred and fifteen) American dollars for pecuniary damage;
      (ii) 40,000 (forty thousand) French francs for non-pecuniary damage;
      (iii) 20,000 (twenty thousand) French francs for costs and expenses, less 10,446 (ten thousand four hundred and forty-six) French francs and 45 (forty-five) centimes;
   (b) that simple interest shall be payable on these sums, from the expiry of the above-mentioned three months until settlement, at the following rates:
      (i) 5% per annum for the sums awarded in American dollars;
      (ii) 3.47% per annum for the sums awarded in French francs;
5. *Dismisses* the remainder of the claim 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.

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

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

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

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

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicant's freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom-of-expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicant supported or instigated the use of violence, then his conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

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

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

The guarantee of freedom of expression does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such 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].

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

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[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.

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.