



COUNCIL OF EUROPE    CONSEIL DE L'EUROPE

Strasbourg, 4 June 2004

CODEXTER (2004) 19

**COMMITTEE OF EXPERTS ON TERRORISM**  
**(CODEXTER)**

**3rd meeting**  
**Strasbourg, 6-8 July 2004**

**COLLECTION OF RELEVANT CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS  
RELATED TO “APOLOGIE DU TERRORISME” AND “INCITEMENT TO TERRORISM”**

Secretariat memorandum prepared by  
the Directorate General of Legal Affairs



## The European Court of Human Rights' case-law on Article 10 of the European Convention on Human Rights with regard to “*apologie du terrorisme*” and “incitement to terrorism”

### 1. Introduction

Article 10, paragraph 2, of the European Convention on Human Rights (ECHR) subjects the exercise of the freedom of expression 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.”

Therefore, in particular, the European Court of Human Rights' (ECtHR) judgments on the “restrictions (...) necessary in a democratic society” are of importance with regard to “*apologie du terrorisme*” and “incitement to terrorism”.

### 2. The gist of the ECtHR's judgments – general aspects

As the ECtHR stated in its Ceylan<sup>1</sup> judgment of July 1999:

“The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out, for example, in the Zana<sup>2</sup> judgment [...] and in Fressoz and Roire v. France<sup>3</sup> [...].

(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 paragraph 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

1. Paragraph 2, Ceylan v Turkey (Hudoc reference REF00001075; Application number 00023556/94; 08/07/1999). Information about these cases is available at [hudoc.echr.coe.int](http://hudoc.echr.coe.int).

2. Hudoc reference REF00000731; Application number 00018954/91; 25/11/1997.

3. Hudoc reference REF00001923; Application number 00029183/95; 21/01/1999.

This judgment is not concerned with “terrorism” but with freedom of the press in general. In the case at issue, the conviction of a journalist for an article in *le canard enchainé* criticising the high income of businessmen constituted a violation of Article 10 of the Convention.

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."

The same wording occurs in most cases concerned with the freedom of expression and reflects the ECtHR's current interpretation of Article 10 of the ECHR, which stems, *inter alia*, from the following seminal judgments on the validity of restrictions on Article 10 in general:

### 3 Case-law referring to the validity of restrictions on Article 10 in general

#### **Barfod v. Denmark<sup>4</sup>**

The applicant, a Danish national living in Greenland, was convicted for defamation of character on the grounds of having questioned in a newspaper article the ability and power of two lay judges to decide impartially.

In its judgment, the ECHR held that the impugned statement was not a criticism of the reasoning of a judgment, but rather a defamatory accusation against the lay judges personally which was likely to lower them in public esteem and was put forward without any supporting evidence. Thus, the ECtHR reached the conclusion that no breach of Article 10 had been established in the circumstances of the case.

#### **Barthold v. Germany<sup>5</sup>**

The applicant, a veterinarian, gave information to journalists about the refusal of his colleagues to treat animals during the night, thus drawing publicity and business from them to himself. Subsequently he was charged on grounds of unfair competition and was ordered by means of an injunction to cease his contributions to such reports.

In its judgment, the ECtHR held that the injunction complained of was not proportionate to the legitimate aim pursued and, accordingly, was not "necessary in a democratic society" "for the protection of the rights of others". Therefore, the injunction constituted a violation of Article 10.

#### **Handyside v. United Kingdom<sup>6</sup>**

The applicant, the proprietor of a publishing firm, published, among other books, "The Little Red Schoolbook", a book destined for the young people which deals with sex education. Subsequently, a British court issued summonses against the applicant for the offence of having in his possession obscene books for publication for gain and issued a forfeiture order for the destruction of these books by the police.

In its judgment, the ECtHR held that the actions of the British authorities were not disproportionate. Indeed, less restrictive measures such as restricting the sale of the impugned book to adults would scarcely have made any sense. As "The Little Red Schoolbook" was destined above all for the young people, it would thereby have lost the substance of what the applicant considered to be its *raison d'être*. Thus, the ECtHR reached the conclusion that no breach of the requirements of Article 10 had been established in the circumstances of the case.

#### **Lingens v. Austria<sup>7</sup>**

The applicant, an Austrian journalist, was convicted for defamation on grounds of having written an article in which he described the Austrian Chancellor's defence of fellow politicians accused of having committed war crimes in World War II as "basest opportunism", "immoral" and "undignified".

---

4. Hudoc reference REF00000015; Application number 00011508/85; 22/02/1989.

5. Hudoc reference REF00000017; Application number 00008734/79; 25/03/1985.

6. Hudoc reference REF00000084; Application number 00005493/72; 07/12/1976.

7. Hudoc reference REF00000108; Application number 00009815/82; 08/07/1986.

In its judgment, the ECtHR held that the impugned expressions had to be seen against the background of a post-election political controversy in Austria and that the limits of acceptable criticism were accordingly wider as regards a politician as such than as regards a private individual. Thus, the applicant's conviction was disproportionate to the legitimate aim pursued and constituted a breach of Article 10 of the ECHR.

**Müller and others v. Switzerland<sup>8</sup>**

The applicant, a painter, was convicted for "having published obscene material" because he had painted and shown in an exhibition paintings depicting sexual activity. At the same time, the impugned paintings were confiscated.

In its judgment, the ECtHR did not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity". In the circumstances, having regard to the margin of appreciation left to them under Article 10, paragraph 2 the Swiss courts were entitled to consider it "necessary" for the protection of morals to impose a fine on the applicants for publishing obscene material and to confiscate the impugned material. Therefore, the disputed measures did not infringe Article 10 of the ECHR.

**Open Door & Dublin Well Woman v. Ireland<sup>9</sup>**

The applicants, non-profit-making organisations, complained of an injunction imposed on them by the Irish courts to restrain them from providing information to pregnant women concerning abortion facilities outside the jurisdiction of Ireland.

Without calling into question, under the Convention, the regime of protection of unborn life that existed under Irish law, the ECHR recalled that the injunction did not prevent Irish women from having abortions abroad and that the information it sought to restrain was available from other sources. Accordingly, it was not the interpretation of Article 10 but the position in Ireland as regards the implementation of the law that makes possible the continuance of the current level of abortions obtained by Irish women abroad. In the light of the above, the ECtHR concluded that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued. Accordingly there had been a breach of Article 10.

**Otto-Preminger-Institut v. Austria<sup>10</sup>**

The applicant, a non-profit organisation operating a cinema in the Tyrol, was charged, at the request of the local Roman Catholic diocese, with having shown a film disparaging religious doctrines. Subsequently, the seizure and forfeiture of the film was ordered.

In its judgment, the ECtHR held that it could not disregard the fact that the Roman Catholic religion was the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It was in the first place for the national authorities, better placed than the international judge, to assess the need for such a measure in the light of the situation. In all the circumstances of the case, the ECtHR did not consider that the Austrian authorities could be regarded as having overstepped their margin of appreciation in this respect. Thus, neither seizure nor forfeiture of the film constituted a violation of Article 10 of the ECHR.

---

8. Hudoc reference REF00000072; Application number 00010737/84; 25/04/1988.

9. Hudoc reference REF00000374; Application number 00014234/88 and 00014235/88; 29/10/1992.

10. Hudoc reference REF00000482; Application number 00013470/87; 20/09/1994.

### **Sunday Times v. United Kingdom<sup>11</sup>**

The applicant, a newspaper, was convicted for contempt of court on grounds of having, despite a formal warning by the attorney general, intervened massively (“trial by newspaper”) on behalf of one of the parties to a pending legal settlement requiring court approval. However, the ECHR found that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the ECHR. Therefore, the conviction constituted a violation of Article 10 of the ECHR.

## **4 Case-law specifically referring incitement to violence and “*apologie du terrorisme*”**

### **4.1 Synopsis of the case-law**

In its assessment of incriminating statements which national courts have judged as inciting violence, or encouraging, justifying or supporting “terrorism”, the ECtHR takes a number of factors into consideration:

First of all, it considers the potential impact of the statement. Statements made in meetings of a commemorative character (Gerger), literary narratives (Arslan, Polat), poetry (Karatas) or academic essays (Baskaya/Okcuoglu) have less impact than those made through the mass media. Therefore, the limits of permissible criticism in such publications are wider than in the mass media.

Not only the potential impact of the publication but its very nature is of importance as well. In particular, as far as poetry is concerned, the freedom of artistic expression can allow for statements which could, if they were taken literally, be deemed to incite to violence (Karatas). However, the same statements would probably not fall under the scope of Article 10 of the ECHR if their form were not poetic (e.g. colourful metaphors as in Karatas) but journalistic or scientific.

Likewise, the ECtHR holds that, regardless of their form, under Article 10, paragraph 2, of the ECHR there is little scope for restrictions of political speech (Ceylan), unless it contains incitement to violence.

Moreover, the ECtHR considers who is voicing the criticism and against whom this criticism is directed. Therefore, the freedom of expression of political representatives is particularly protected (Castells, Jerusalem), especially if they represent the opposition (Castells), because they defend the interests of their voters.

The limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even to a politician (Arslan, Castells) yet private individuals or associations which enter the arena of public debate lay themselves open to scrutiny (Jerusalem).

In addition, the personal history of persons has to be considered, in order to determine whether their statements may incite violence. Consequently, it can be justified to restrict the freedom of expression of persons under arrest for terrorist acts or membership in terrorist organisations (Hogefeld) and it is legitimate to order the mass media to refrain from publishing and transmitting statements of supporters or members of terrorist groups (Brind).

The context in which the statement is made is also taken into account. Should an incriminating statement coincide with attacks or acts of violence, it is more likely to be regarded as a direct incitement to or justification of these acts (Zana, Özgür Gündem). Moreover, the ECtHR holds that the “duties and responsibilities” of media professionals assume special significance in times of conflict, lest the media becomes a vehicle for the dissemination of violence (Erdoğan and İnce). However, if the ECtHR is “not convinced” that the incriminating statement, although giving moral

---

11. Hudoc reference REF00000169; Application number 00006538/74; 26/04/1979.

support to terrorist movements, could have had any “harmful effect on the prevention of disorder and crime” (Öztürk), then the statement falls under the scope of Article 10 of the ECHR.

The decisive criterion in the ECtHR’s assessment is whether the statement incites people to violence or communicates that violence is a necessary and justified measure (Sürek no. 1, no. 3, Zana). If this is the case, penalties are regarded as a “pressing social need” and are therefore justified under Article 10, paragraph 2, of the ECHR.

In particular, the ECtHR considers as a matter of principle convictions for statements expressing incitement to “hatred, revenge, recrimination or armed resistance” (Sener, *e contrario*), incitement to “violence, armed resistance or an uprising” (Gerger, *e contrario*) and statements “intensifying the armed struggle, glorifying war and espousing the intention to fight to the last drop of blood” (Özgür Gündem) as justified under Article 10 of the ECHR. The same is true for statements advocating recourse to violence, for example “to use knives or bayonets to get rid of political adversaries” (Muslum Gündüz No. 2) and statements denying the Holocaust (Garaudy).

In contrast, statements which are merely hostile in tone, contain separatist propaganda (Okcuoglu, Sener, EKIN), virulent criticism of governmental action or condemn democracy while advocating Islamic sharia (Muslum Gündüz No. 1) but do not incite violence, (Ceylan, Incal) are legitimate under Article 10 of the ECHR.

However, in a judgment dealing with an alleged violation of Article 11 of the ECHR (Refah) the Grand Chamber of the ECtHR held that the Turkish government was justified in dissolving a political party that advocated a long-term policy of setting up a regime based on sharia, because this party did not explicitly exclude recourse to force in order to implement this policy.

Finally, the ECtHR considers the severity of the measures taken in order to determine whether they were reasonably proportionate to the legitimate aims of preventing crime and disorder and could be justified as necessary in a democratic society (Ceylan, Mehdi Zana No. 2, Muslum Gündüz No. 2).

## 4.2. Summaries of the facts of the case-law

### 4.2.1 Violation of the ECHR

#### a. Limited impact of the publication: “books”: literary narratives, poetry, academic essays; speeches in meetings.

##### **Arslan v. Turkey**<sup>12</sup>

The applicant was convicted on grounds of having written and published a literary work, in which he described the Turkish nation as barbarous, maintained that Kurds were the victims of constant oppression, if not genocide, and glorified the acts of insurgents in south-eastern Turkey. According to the ECtHR, it was 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. Furthermore, the undeniable virulence of the style conferred a certain amount of vehemence to this criticism. However, the ECtHR held that the limits of permissible criticism were wider with regard to the government than in relation to a private citizen or even a politician especially if this criticism was voiced in a literary work rather than through the mass media. Moreover, the incriminating narrative, although hostile in tone, did not constitute incitement to violence, armed resistance or an uprising. In conclusion, Mr Arslan’s conviction was disproportionate to the aims pursued and accordingly not “necessary in a democratic society”. There had, therefore, been a violation of Article 10 of the ECHR.

12. Hudoc reference REF00001076; Application number 00023462/94; 08/07/1999.

**Başkaya and Okçuoğlu v. Turkey**<sup>13</sup>

The first applicant was convicted on the grounds of having written a book entitled *Batılılaşma, Çağdaşlaşma, Kalkınma – Paradigmanın İflası/Resmi İdeolojinin Eleştirisine Giriş* (“Westernisation, Modernisation, Development – Collapse of a Paradigm/An Introduction to the Critique of the Official Ideology”) and the second on the grounds of having published it. The impugned book was an academic essay which involved a description of the socio-economic evolution of Turkey since the 1920s and the analysis and criticism of the “official ideology” of the State. According to the ECtHR, the impugned passages contained strongly worded statements that could be seen as an expression of support for Kurdish separatism. However, the author also affirmed the view that the Kurdish problem was complex. Moreover, the ECtHR considered that the views expressed in the book could not be said to incite violence; nor could they be construed as liable to incite violence. Therefore, the applicants’ conviction constituted a violation of Article 10 of the ECHR.

**EKIN Association v. France**<sup>14</sup>

A ban on a book on the Basque-country, which ended with a political article entitled “Euskadi at war, a promise of peace” by the Basque national liberation movement, constituted a violation of Article 10 of the ECHR.

The ECtHR considered that the content of the book, in particular as regards the issues of public safety and public order, did not justify so serious an interference with the applicant association’s freedom of expression as that constituted by the ban imposed by the Minister of the Interior. Ultimately, the ECtHR considered that the ban did not meet a pressing social need and was not proportionate to the legitimate aim pursued.

**Gerger v. Turkey**<sup>15</sup>

The applicant was convicted on grounds of having written a message to be read at a meeting. The ECtHR, however, observed that the fact that the applicant’s message was read out only to a group of people attending a commemorative ceremony, considerably restricted its potential impact on national security. Furthermore, even though it contained words such as “resistance”, “struggle” and “liberation”, it did not constitute an incitement to violence, armed resistance or an uprising. In the ECtHR’s view, this was a factor which it was essential to take into consideration. Therefore, the applicant’s conviction constituted a violation of Article 10 of the ECHR.

**Karatas v. Turkey**<sup>16</sup>

The applicant was convicted on grounds of having published an anthology of poems considering parts of Turkey as “Kurdistan” and glorifying the insurrectionary movements in that region by identifying them with the Kurds’ fight for national independence.

According to the ECtHR, the poems at issue included some particularly aggressive passages directed at the Turkish authorities and called, through the frequent use of pathos and metaphors, for self-sacrifice for “Kurdistan”. Taken literally, these poems might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, the ECtHR nevertheless had to bear in mind that the medium used by the applicant was poetry, a form of artistic expression that only appeals to a minority of readers.

In that connection, the ECtHR observed that Article 10 of the ECHR includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression. As to the tone of the poems in

13. Hudoc reference REF00001081; Application number 00023536/94; 00024408/94; 08/07/1999.

14. Hudoc reference REF00002679; Application number 00039288/98; 17/07/2001.

15. Hudoc reference REF00001077; Application number 00024919/94; 08/07/1999.

16. Hudoc reference REF00001079; Application number 00023168/94; 08/07/1999.

this case – which the ECtHR should not be taken to condone – it was remembered that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. In addition, the ECtHR observed that the poems had an obvious political dimension. Using colourful imagery, they expressed deep-rooted discontent with the lot of the population of Kurdish origin in Turkey.

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

### **Öztürk v. Turkey**<sup>17</sup>

Mr Öztürk, the applicant, published a book which gave an account of the life of İbrahim Kaypakkaya, who had been one of the founder members of the *Türkiye Komünist Partisi – Marksist-Leninist* (Communist Party of Turkey – Marxist-Leninist "the TKP-ML"), an illegal Maoist organisation, in 1973. Subsequently this publication was confiscated by the Turkish authorities and the applicant was charged and convicted for having published it.

In the ECtHR's view, it was obvious that the book did not give a neutral account of the events of İ. Kaypakkaya's life but a politicised version. Through his book the author intended, at least implicitly, to criticise both the Turkish authorities' actions in the repression of extreme left-wing movements and the conduct of those alleged to be responsible for İ. Kaypakkaya's death. Albeit indirectly, the book thus gave moral support to the ideology which he had espoused.

However, the ECtHR was not convinced that the book could have had a harmful effect on the prevention of disorder and crime in Turkey. In fact, the book had been on open sale since 1991 and had not apparently aggravated the "separatist" threat which, according to the Government, existed both before and after Mr Öztürk's conviction. The ECtHR therefore discerned nothing which might justify the finding that Mr Öztürk had any responsibility whatsoever for the problems caused by terrorism in Turkey and considered that use of criminal law against the applicant could not be regarded as justified in the circumstances of the case, which were not comparable to those of the Zana<sup>18</sup> case.

The ECtHR accordingly took the view that it had not been established that at the time when the edition in issue was published there was a "pressing social need" capable of justifying a finding that the interference in question was "proportionate to the legitimate aim pursued". Therefore, the ECtHR concluded that there had been a violation of Article 10 of the ECHR.

### **Polat v. Turkey**<sup>19</sup>

Mr Polat was convicted on the grounds of having written and published a book criticising the Turkish authorities. The ECtHR observed, however, that the applicant was 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 ECtHR noted in addition that, although certain passages in the book criticised the attitude of the Turkish authorities and gave the narrative a hostile tone, they did not constitute incitement to violence, armed resistance or an uprising. In the ECtHR's view, this was an essential factor which should be taken into consideration, especially as the events related happened at a period which was already relatively distant in time

17. Hudoc reference REF00001140; Application number 00022479/93; 28/09/1999.

18. Hudoc reference REF00000731; Application number 00018954/91; 25/11/1997.

19. Hudoc reference REF00001078; Application number 00023500/94; 08/07/1999.

## b. Freedom of expression and elected representatives

### **Castells v. Spain**<sup>20</sup>

Mr Castells, a senator elected on the list of Herri Batasuna, a political movement seeking the independence of the Basque Country, was convicted for having written an article published in a weekly magazine which contained insults directed against the Spanish nation and its institutions. In his trial, he was denied the opportunity to prove the truth of his allegations and his good faith, because it was held that, lacking precision, it was impossible to demonstrate their truth. The ECtHR attached decisive importance to the fact that Mr Castells was a political representative of an opposition party, criticising the government, and to the alleged inadmissibility of evidence on behalf of the applicant, and ruled that in sum there had been a violation of Article 10 of the ECHR.

### **Jerusalem v. Austria**<sup>21</sup>

The applicant is an Austrian citizen. At the relevant time she was a member of the Vienna Municipal Council (*Gemeinderat*), which also acts as the Regional Parliament (*Landtag*). In the course of a session of the Vienna Municipal Council, the applicant, in her function as a member of the Municipal Council, gave a speech in which she denounced two associations co-operating with another political party as a “sect of totalitarian character”. Subsequently, the Austrian courts granted an injunction ordering the applicant not to repeat her statements.

In its assessment of the case, the ECtHR observed that private individuals or associations lay themselves open to scrutiny when they enter the arena of public debate. Moreover, it referred to *Castells v. Spain*<sup>22</sup> and reiterated that interferences with the freedom of expression of an opposition member of parliament, such as the applicant, call for the closest scrutiny on the part of the ECtHR. Concerning the impugned statements in the case, the ECtHR found that, contrary to the view of the Austrian Courts, these statements reflected fair comment on matters of public interest by an elected member of the Municipal Council. Accordingly, the injunction granted by the Austrian courts, which ordered the applicant not to repeat her statements, constituted a breach of Article 10 of the ECHR.

## c. Freedom of expression and terrorists

### **Brind and others v. UK**<sup>23</sup>

The British government ordered the applicants, a television producer and five other broadcast journalists, to refrain at all times from sending any broadcast matter which consisted of or included statements expressing or supporting the views of several terrorist groups.

The European Commission of Human Rights found, in the circumstances of the case and bearing in mind the margin of appreciation permitted to States and the importance of measures to combat terrorism, that it could not be said that this interference with the applicants’ freedom of expression was disproportionate to the aim sought to be pursued. Consequently the application was manifestly ill-founded and therefore inadmissible.

### **Hogefeld v. Germany**<sup>24</sup>

The applicant was a former member of the Red Army Fraction (RAF), a left-wing extremist terrorist movement that had been responsible for numerous attacks on high-ranking personalities in Germany since the early seventies. In 1993, the applicant was arrested and detained on remand. Subsequently, German courts denied the request of a radio journalist to allow an interview with the applicant because such an interview would conflict with the purpose of the detention on remand, since it was to be expected, in respect of a declaration made by the applicant during the trial, that

20. Hudoc reference REF00000357; Application number 00011798/85; 23/04/1992.

21. Hudoc reference REF00002261; Application number 00026958/95; 27/02/2001.

22. Cit. above, note 13.

23. Hudoc reference REF00002346; Application number 00018714/91; 09/05/1994; inadmissible.

24. Hudoc reference REF00005340; Application number 00035402/97; 20/01/2000; inadmissible.

the applicant would explain and advocate ideological positions of the RAF, which would amount to a new act of participation in a terrorist organisation.

The ECtHR noted that in assessing this limitation of the freedom of expression the applicant's personal history had to be considered. As the applicant was most probably one of the main representatives of an organisation which had waged a murderous war against the public order of the Federal Republic of Germany for more than twenty years, the words of the applicant could possibly be understood by supporters as an appeal to continue the activities of the RAF, even if they did not directly incite violence. Consequently, there had been no breach of Article 10 of the ECHR.

#### **d. High potential impact: Articles in mass-media, distribution of leaflets**

##### **Ceylan v. Turkey<sup>25</sup>**

Mr Ceylan's conviction on the grounds of being the author of an article containing virulent criticism of the Turkish authorities' actions, published in a weekly newspaper, constituted a violation of Article 10 of the ECHR. Under Article 10, paragraph 2, there is little scope for restrictions of political speech. Where such remarks incite violence against an individual, a public official etc., the State authorities enjoy a wider margin.

##### **Erdoğan v. Turkey<sup>26</sup>**

Mr Ümit Erdoğan, a journalist and writer, was the editor of the bi-monthly periodical *İşçilerin Sesi* ("The Workers' Voice"), which appears in Istanbul. The periodical published an article written by a reader and entitled "*Kürt Sorunu Türk Sorunudur*" (the Kurdish problem is a Turkish problem). In the ECtHR's view, it was clear that the article in question was written in the form of a political speech, both in its content and the terms used. Mr Erdoğan's conviction for publishing this article therefore constituted a violation of Article 10 of the ECHR.

##### **Erdoğan and İnce v. Turkey<sup>27</sup>**

The first applicant, Mr Ümit Erdoğan, was the responsible editor of the monthly review *Demokrat Muhalefet!* ("Democratic Opposition!"), published in Istanbul. In the January 1992 issue of the review, an interview which the second applicant, Mr Selami İnce, had conducted with a Turkish sociologist, Dr İ.B., was published. Subsequently, the applicants were charged and convicted under the Prevention of Terrorism Act for having disseminated propaganda against the indivisibility of the State by publishing the above interview. According to the ECtHR, the views expressed in the interview could not be read as incitement to violence; nor could they be construed as liable to incite violence.

However, the ECtHR stressed that the "duties and responsibilities" which accompany the exercise of the right to freedom of expression by media professionals assumed special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State, lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. However, where such views cannot be categorised as such, Contracting States cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media. The applicants' conviction therefore constituted a violation of Article 10.

25. Hudoc reference REF00001075; Application number 00023556/94; 08/07/1999.

26. Hudoc reference REF00001543; Application number 00025723/94; 15/06/2000.

27. Hudoc reference REF00001080; Application number 00025067/94; 00025068/94 08/07/1999.

**Incal v. Turkey**<sup>28</sup>

Mr Incal's conviction on grounds of having distributed leaflets containing virulent remarks about the government's policy but no incitement to violence, hostility or hatred constituted a violation of Article 10 of the ECHR.

**Mehdi Zana v. Turkey (No. 2)**<sup>29</sup>

The applicant, a Turkish citizen living in France, was convicted on grounds of disseminating propaganda against the unity and territorial integrity of the Turkish nation. The impugned statements were given in a press conference in the European Parliament and before the European Parliament's Sub-Commission on Human Rights.

The ECtHR observed that the statements were of a political character and reiterated that the authorities of a democratic State had to tolerate criticism, even if it was voiced in a provocative manner. Moreover, the severity of the measures taken by the authorities (a 2-year prison sentence) was in no way proportionate. Therefore, the conviction constituted a violation of Article 10 of the ECHR.

**Muslum Gunduz v. Turkey (No. 1)**<sup>30</sup>

The applicant, who was the leader of *Tarikat Aczmendi*, an Islamist sect according to its own definition, participated in a television discussion. In the course of this discussion, he denounced the political system of Turkey as aiming to destroy Islam and stated that religion and democracy were contradictory concepts. Because of these statements, the applicant was subsequently charged and convicted under the Turkish Penal Code for public incitement to hatred and hostility.

However, according to the ECtHR, the mere fact of defending the sharia, without specific incitement to violence, did not constitute "hate speech". Moreover, the context in which the applicants' statements were delivered had to be considered. The television discussion at issue was a pluralistic debate, in which the applicants' statements were counter-balanced by the interventions of other participants. Therefore, the ECtHR was not convinced that the applicant's conviction was indeed "necessary" in the sense of Article 10, paragraph 2, of the ECHR and accordingly constituted a breach of the freedom of expression.

**Okçuoğlu v. Turkey**<sup>31</sup>

The applicant published an article in a magazine on a round-table debate which he had organised under the chairmanship of Mr M.İ.S. and in which he had taken part. The applicant's comments were recorded in the article, entitled *Kürt Sorununun Dünü ve Bugünü* (The past and present of the Kurdish problem). Subsequently, the applicant was convicted for disseminating propaganda against the "indivisibility of the State".

The ECtHR noted that although some of his remarks painted a negative picture of the population of Turkish origin and some of his comments were hostile in tone, they nevertheless did not amount to incitement to engage in violence, armed resistance, or an uprising. That, in the ECtHR's view, was an essential factor to be taken into consideration. In conclusion, Mr Okçuoğlu's conviction was disproportionate to the aims pursued and accordingly not "necessary in a democratic society". There had, therefore, been a violation of Article 10 of the ECHR.

**Özgür Gündem v Turkey**<sup>32</sup>

*Özgür Gündem* was a daily newspaper, the main office of which was located in Istanbul. It was a Turkish-language publication with an estimated national circulation of up to 45,000 copies. The applicant was convicted on grounds of having published articles reporting statements of the Kurdistan Workers' Party (PKK).

28. Hudoc reference REF00000920; Application number; 00022678/93; 09/06/1998.

29. Hudoc reference REF00004993; Application number 00026982/95; 06/04/2004.

30. Hudoc reference REF00004803; Application number; 00035071/97; 04/12/2003.

31. Hudoc reference REF00001082; Application number 00024246/94; 08/07/1999.

32. Hudoc reference REF00001396; Application number 00023144/93; 16/03/2000.

Three of these articles advocated intensifying the armed struggle, glorified war and espoused the intention to fight to the last drop of blood. The ECtHR agreed that, in the context of the conflict in the south-east of Turkey, these articles could reasonably be regarded as encouraging the use of violence (see, for example, *Sürek (no. 1)*). Given the relatively light penalties imposed also, the ECtHR found that the measures complained of were reasonably proportionate to the legitimate aims of preventing crime and disorder and could be justified as necessary in a democratic society within the meaning of the second paragraph of Article 10. However, having considered the whole issue and not only these three articles, the ECtHR decided that the measures taken by the Turkish authorities on the whole constituted a violation of Article 10 of the ECHR.

### **Sener v. Turkey**<sup>33</sup>

Charges were brought under the Prevention of Terrorism Act against the author of an article containing separatist propaganda. The subsequent conviction constituted a violation of Article 10 of the ECHR, because the article taken as a whole did not glorify violence. Nor did it incite people to hatred, revenge, recrimination or armed resistance.

### **Sürek and Özdemir v. Turkey**<sup>34</sup>

Mr Sürek was the major shareholder in a Turkish company which owns a weekly review entitled *Haberde Yorumda Gerçek* (The Truth of News and Comments), published in Istanbul. The second applicant, Mr Yücel Özdemir was the editor-in-chief of the review. In this review, an interview with a leader of the PKK, an illegal organisation, was published in two parts. The applicants were convicted for publishing declarations of terrorist organisations and disseminating separatist propaganda through the medium of the review. This was found to constitute a violation of their rights under Article 10 of the ECHR.

## **4.2.2 No violation of the ECHR**

### **a. Limited impact of the publication:**

#### **Garaudy v. France**<sup>35</sup>

The applicant was convicted on grounds of having published through non-commercial outlets a book denying crimes against humanity, publishing racially defamatory statements and inciting to racial or religious hatred or violence. In this book, the applicant denied, *inter alia*, the nature of the “final solution” and disputed the number of Jewish victims of the Holocaust.

According to the ECtHR, the applicant’s complaint was manifestly ill-founded. Indeed, the ECtHR considered that, having regard to the content of the applicant’s work, the grounds on which the domestic courts convicted him of publishing racially defamatory statements and inciting to racial hatred were relevant and sufficient, and the interference was “necessary in a democratic society” within the meaning of Article 10, paragraph 2, of the ECHR.

### **b. High potential impact: Articles in the mass-media**

#### **Gündüz v. Turkey (No. 2)**<sup>36</sup>

A report published in a weekly periodical was dedicated to the applicant, the leader of *Tarikat Aczmendi*, an Islamist sect according to its own definition. In this report, several of the applicant’s statements were quoted in which he advocated that Muslims should resort to violence. In particular, he encouraged Muslims in general “to use knives or bayonets to get rid of political adversaries”. Because of these statements, the applicant was convicted on the grounds of having publicly incited crime.

33. Hudoc reference REF00001709; Application number 00026680/95; 18/07/2000.

34. Hudoc reference REF00001083; Application number 00023927/94; 00024277/94; 08/07/1999.

35. Hudoc reference REF00025262; Application number 00065831/01; 24/06/2003; inadmissible.

36. Hudoc reference REF00022193; Application number 00059745/00; 13/11/2003; inadmissible.

The ECtHR observed that such statements could indeed be considered as hate speech, justification of violence and incitement to violence and that they were by no means compatible with the spirit of the ECHR. Although the ECtHR recognized the severity of the sanction of four years' imprisonment, it held nevertheless that dissuasive sanctions could be necessary when statements violated the fundamental principles of pluralist democracy. Therefore, the conviction of the applicant was justified under Article 10, paragraph 2, of the ECHR.

### **Sürek v. Turkey (No. 1)**<sup>37</sup>

Two readers' letters were published in a review, of which the applicant was a major shareholder. Due to their content, the applicant was charged and convicted for disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people.

The ECtHR held that the impugned letters contained words which were aimed at the destruction of the territorial integrity of the Turkish State by describing areas of south-eastern Turkey as an independent State, "Kurdistan", and the PKK as a national liberation movement. In the view of the ECtHR, the impugned letters amounted to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which had manifested themselves in deadly violence. Indeed, the message communicated to the reader was that recourse to violence was a necessary and justified measure of self-defence in the face of the aggressor.

In view of the above considerations, the ECtHR concluded that the penalty imposed on the applicant as the owner of the review could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the authorities for the applicant's conviction were "relevant and sufficient". Therefore, there was no violation of Article 10.

### **Sürek v. Turkey (No. 3)**<sup>38</sup>

An article was published in a review, of which the applicant was a major shareholder. This article proclaimed "war directed against the forces of the Republic of Turkey", and asserted that "[w]e want to wage a total liberation struggle". It was clear that the impugned article associated itself with the PKK and expressed a call for the use of armed force as a means to achieve the national independence of Kurdistan. Therefore, the article incited violence.

The ECtHR concluded that the penalty imposed on the applicants could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the authorities for the applicant's conviction were "relevant and sufficient". Therefore, it did not constitute a violation of Article 10.

### **Zana v. Turkey**<sup>39</sup>

The applicant was convicted after having given a statement in an interview published in major national daily newspapers in which he described the PKK as a "national liberation movement". This statement coincided with murderous attacks carried out by the PKK on civilians in the south-east of Turkey and had to be regarded as likely to exacerbate an already explosive situation in that region. Therefore, the penalty imposed upon the applicant could reasonably be regarded as answering a pressing social need, since the reasons adduced by the national authorities were relevant and sufficient. On these grounds, the penalty did not constitute a violation of Article 10.

## **c. A special case: objectives of political parties and democracy**

### **Refah partisi (The Welfare Party) and others v. Turkey**<sup>40</sup>

37. Hudoc reference REF00001084; Application number 00026682/95; 08/07/1999.

38. Hudoc reference REF00001087; Application number 00024735/94; 08/07/1999.

39. Hudoc reference REF00000731; Application number 00018954/91; 25/11/1997.

40. Hudoc reference REF00004090; Application number 00041340/98; 00041342/98; 00041343/98; 00041344/98; 13/02/2003. Although this case deals with Article 11, it provides nevertheless insights into the validity of restrictions of political/religious doctrines incompatible with democracy.

The Refah Party was dissolved by the Turkish government on the grounds that it was a “centre” (*mihrak*) of activities contrary to the principles of secularism.

According to the Grand Chamber of the ECtHR, acts and speeches of Refah’s representatives revealed Refah’s long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the fact that these plans were incompatible with the concept of a “democratic society” and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the constitutional court, even in the context of the restricted margin of appreciation left to Contracting States, could reasonably be considered to have met a “pressing social need”. Accordingly, there had been no violation of Article 11 of the ECHR.