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

FIRST SECTION

CASE OF GÜNDÜZ v. TURKEY

(Application no. 35071/97)

JUDGMENT

STRASBOURG

4 December 2003

FINAL

14/06/2004

In the case of Gündüz v. Turkey,

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

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr G. BONELLO,
Mr R. TÜRMEN,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY, *judges*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 13 November 2003,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 35071/97) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Müslüm Gündüz ("the applicant"), on 21 January 1997.

2. The applicant, who was granted legal aid, was represented before the Court by Mr A. Çiftçi, a lawyer practising in Ankara. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The object of the application 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.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. In a decision of 29 March 2001, the Chamber declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1941. He is a retired labourer.

A. The television programme in issue

10. On 12 June 1995 the applicant took part in his capacity as the leader of Tarikat Aczmendi (a community describing itself as an Islamic sect) in a television programme, *Ceviz Kabuğu* ("Nutshell"), broadcast live on HBB, an independent channel.

11. It appears from the evidence before the Court that the programme started late in the evening of 12 June and lasted about four hours. Relevant excerpts from the programme are set out below.

> *Hulki Cevizoğlu (presenter – "H.C.")*: "Good evening ... There is a group that is grabbing public attention because of the black robes [*cüppe*] worn by its members, the sticks they carry and their habit of chanting [*zikir*]. How can this group be described – it is called a sect [*tarikat*], but is it really a community or group? We will be discussing the various characteristics of this group – the Aczmendis – with their leader, Mr Müslüm Gündüz, who will be talking to us live. We will also be phoning a number of guests to hear their views. On the subject of the black robes, we'll be talking on the phone to Ms N. Yargıcı, a stylist and expert on black clothing. We'll also be hearing the views of Mr T. Ateş and Mr B. Baykam on Kemalism[1]. As regards Nurculuk[2], we'll be calling one of its most important leaders. The Aczmendi group – or sect – has views on religious matters as well. We'll be discussing those with Mr Y. İşcan, of the Religious Affairs Department. And while we are on the subject, viewers may phone in with questions for the Aczmendis' leader, Mr Gündüz ..."

Ms Yargıcı, a stylist taking part in the programme via a telephone link, asked Mr Gündüz a number of questions about women's clothing. They discussed religious apparel and whether the clothing worn by the sect's members was in keeping with fashion or with Islam.

1. Kemalist thought is inspired by the ideas of Mustafa Kemal Atatürk, the founder of the Republic of Turkey.
2. Nurculuk is an Islamic movement which was founded in the early twentieth century and is widespread in Turkey. The Aczmendi community claims to belong to it.

The presenter then discussed movements claiming to represent Islam and asked the applicant a number of questions on the subject. They also talked about methods of chanting. In this context Mr Gündüz stated:

Mr Gündüz ("M.G."): "Kemalism was born recently. It is a religion – that is, it is the name of a religion that has destroyed Islam and taken its place. Kemalism is a religion and secularism has no religion. Being a democrat also means having no religion ..."

H.C.: "You have already expressed those views on a programme on the Star channel ... We are now going to have Bedri Baykam on the line to see what he thinks about your comments. We are going to ask him, as a proponent of Kemalism, if it can be regarded as a religion."

H.C.: "Do you agree with Mr Gündüz's views on Kemalism? You are one of Turkey's foremost Kemalists."

Bedri Baykam ("B.B."): "I don't know where to begin after so many incorrect statements. For one thing, Kemalism is not a religion and secularism has nothing to do with having no religion. It is completely wrong to maintain that democracy has no religion."

Mr Baykam challenged Mr Gündüz's arguments and explained the concepts of democracy and secularism. He stated:

B.B.: "A sect such as the one you belong to may observe a religion. But concepts such as democracy, philosophy and free thought do not observe a religion, because they are not creatures who can establish a moral relationship with God. In a democracy all people are free to choose their religion and may choose either to adhere to a religion or to call themselves atheists. Those who wish to manifest their religion in accordance with their belief may do so. Moreover, [democracy] encompasses pluralism, liberty, democratic thought and diversity. This means that the people's desire will be fulfilled, because the people may elect party A today and party B tomorrow and then ask for a coalition to be formed the day after tomorrow. All that is dictated by the people. That is why, in a democracy, everything is free, and secularism and democracy are two related concepts. Secularism in no way means having no religion."

M.G.: "Tell me the name of the religion of secularism."

B.B.: "Secularism is freedom of the people and the principle that religious affairs may not interfere with affairs of State."

...

M.G.: "My brother, I say that secularism means having no religion. A democrat is a man with no religion. A Kemalist adheres to the Kemalist religion ..."

B.B.: "[Our ancestors were not without a religion.] True, our ancestors did not allow the establishment of a system based on sharia ... inspired by the Middle Ages, an undemocratic, totalitarian and despotic system that will not hesitate to cause bloodshed where necessary. And you call that 'having no religion' – that's your problem. But in a law-based, democratic, Kemalist and secular State all people are

free to manifest their religion. Behind closed doors, they may practise their religion through chanting, worship or prayer; they may read what they like, the Koran, the Bible or philosophy – that is their choice. So I'm sorry, but your views are demagoguery. Kemalism has no connection with religion. It respects religion; all people are entitled to believe in a religion of their choice."

M.G.: "Yes. But what I am saying is that a person who has no connection with religion has no religion. Isn't that so? ... I'm not insulting anyone. I am just saying that anyone calling himself a democrat, secularist or Kemalist has no religion ... Democracy in Turkey is despotic, merciless and impious [*dinsiz*] ... Because two days ago, six or seven of our friends were taken away while on the sect's premises [*dergah*] ..."

...

M.G.: "This secular democratic system is hypocritical [*ikiyüzlü ve münafık*] ...; it treats some people in one way and others in another way. In other words, we do not share democratic values. I swear that we are not appropriating democracy for ourselves. I am not taking refuge in its shadow. Don't be a hypocrite."

H.C.: "But it is thanks to democracy that you can say all that."

M.G.: "No, not at all. It is not thanks to democracy. We will secure our rights no matter what. What is democracy? It has nothing to do with that."

H.C.: "I repeat that if democracy did not exist, you would not have been able to say all that."

M.G.: "Why would I not have said it? I am saying these words while fully aware that they constitute a crime under the laws of tyranny. Why would I stop speaking? Is there any other way than death?"

The participants then entered into a debate on Islam and democracy.

M.G.: "According to Islam, no distinction can be made between the administration of a State and an individual's beliefs. For example, the running of a province by a governor in accordance with the rules of the Koran is equivalent to a prayer. In other words, manifesting your religion does not only mean joining in prayer or observing Ramadan ... Any assistance from one Muslim to another also amounts to a prayer. OK, we can separate the State and religion, but if [a] person has his wedding night after being married by a council official authorised by the Republic of Turkey, the child born of the union will be a *piç* [bastard]."

H.C.: "Do you mind ..."

M.G.: "That is how Islam sees it. I am not talking about the rules of democracy ..."

B.B.: "... In Turkey people are killed for not observing Ramadan. People are beaten at university. [Mr Gündüz] claims he is innocent, but people like that oppress society because they interfere with the way of life of others. In Turkey people who say they support sharia misuse it for demagogic purposes. As Mr Gündüz said, they want to destroy democracy and set up a regime based on sharia."

M.G.: “Of course, that will happen, that will happen ...”

12. The programme continued, the participants including Mr T. Ateş, a professor, Mr Y. İşcan, a representative of the Religious Affairs Department, and Mr Mehmet Kırkıncı, a prominent figure from Erzurum.

B. The criminal proceedings against the applicant

13. In an indictment preferred on 5 October 1995, the public prosecutor at the Istanbul National Security Court instituted criminal proceedings against the applicant on the ground that he had breached Article 312 §§ 2 and 3 of the Criminal Code by making statements during the television programme that incited the people to hatred and hostility on the basis of a distinction founded on religion.

14. On 1 April 1996 the National Security Court, after ordering an expert opinion, found the applicant guilty as charged and sentenced him to two years' imprisonment and a fine of 600,000 Turkish liras, pursuant to Article 312 §§ 2 and 3 of the Criminal Code.

15. The court held, in particular:

> “The defendant, Müslüm Gündüz, took part in his capacity as the leader of the Aczmendis in a television programme, *Ceviz Kabuğu*, broadcast live on the independent channel HBB. The purpose of the programme was to give a presentation of the community, whose followers had attracted public attention on account of the black robes they wore, the sticks they carried and their manner of chanting. Those taking part included the stylist Neslihan Yargıcı (via a telephone link), the artist Bedri Baykam, the scientist Toktamış Ateş, Mr Yaşar İşcan, an official from the Religious Affairs Department, and a certain Mehmet Kırkıncı, a prominent figure from Erzurum. The programme's introduction, which was chiefly intended to familiarise viewers with the Aczmendi community, focused on the origin of its members' special garments and on their habit of chanting. However, as the programme went on, the debate between Mr Baykam, Mr Ateş and the defendant turned to the concepts of secularism, democracy and Kemalism.
>
> During the debate, in which the participants had the opportunity to discuss the malfunctioning, usefulness and problems of institutions such as secularism and democracy in the context of social harmony, human rights and freedom of expression, the defendant Mr Gündüz made comments and used expressions contrary to that aim in stating (on page 21 of the transcript): 'anyone calling himself a democrat, secularist ... has no religion ... Democracy in Turkey is despotic, merciless and impious [*dinsiz*] ... This secular ... system is hypocritical [*ikiyüzlü ve münafik*] ...; it treats some people in one way and others in another way ... I am saying these words while fully aware that they constitute a crime under the laws of tyranny ... Why would I stop speaking? Is there any other way than death? ...' On page 27 [he states]: 'if [a] person has his wedding night after being married by a council official authorised by the Republic of Turkey, the child born of the union will be a *piç* ...'
>
> [In addition,] Mr Bedri Baykam told Mr Gündüz that the aim of the latter's supporters was to 'destroy democracy and set up a regime based on sharia', and the defendant replied: 'Of course, that will happen, that will happen.' [Furthermore,] the

defendant acknowledged before this Court that he had made those comments, and stated that the regime based on sharia would be established not by duress, force or weapons but by convincing and persuading the people.

Lastly, having regard to the fact that, in the passages quoted above and in his statements taken as a whole, the defendant, in the name of Islam, describes concepts such as democracy, secularism and Kemalism as impious [*dinsiz*], mixes religious and social affairs, and also uses the word 'impious' to describe democracy, the system regarded as the most suited to human nature, adopted by almost all States and supported by the overwhelming majority of the people making up our nation, the Court is satisfied beyond reasonable doubt that the defendant intended openly to incite the people to hatred and hostility on the basis of a distinction founded on religion. Furthermore, seeing that the offence in question was committed by means of mass communication, the defendant should be sentenced in accordance with Article 312 § 2 of the Criminal Code ...”

16. On 15 May 1996 the applicant appealed on points of law to the Court of Cassation. In his notice of appeal, referring to Article 9 of the Convention and Articles 24 (freedom of religion) and 25 (freedom of expression) of the Constitution, he relied on the protection of his right to freedom of religion and freedom of expression.

17. On 25 September 1996 the Court of Cassation upheld the judgment at first instance.

II. RELEVANT DOMESTIC LAW

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

Article 312 §§ 2 and 3

“Non-public incitement to commit an offence

...

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

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

Article 311 § 2

“Public incitement to commit an offence

...

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

19. The relevant part of section 19(1) of the Execution of Sentences Act (Law no. 647 of 13 July 1965) provides:

> “... persons who ... have been ordered to serve a custodial sentence shall be granted automatic parole when they have served half of their sentence, provided they have been of good conduct ...”

20. The solemnisation of marriage is governed by Articles 134 to 144 of the Civil Code. Article 134 provides that marriages are solemnised by a registrar, namely the mayor or an official delegated by the mayor in municipalities and *muhtars* in villages. Article 143 provides that a marriage contracted before a registrar is valid without a religious ceremony having to be conducted.

III. RELEVANT INTERNATIONAL INSTRUMENTS

21. Provisions relating to the prohibition of hate speech and all forms of intolerance and discrimination on grounds such as race, religion and belief are to be found in a number of international instruments, for example: the 1945 United Nations Charter (paragraph 2 of the Preamble, Article 1 § 3, Article 13 § 1 (b), Articles 55 (c) and 76 (c)), the 1948 Universal Declaration of Human Rights (Articles 1, 2 and 7), the 1966 International Covenant on Civil and Political Rights (Article 2 § 1, Article 20 § 2 and Article 26), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (Articles 4 and 5) and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Furthermore, the Vienna Declaration, adopted on 9 October 1993, expressed alarm at the present resurgence of racism, xenophobia and anti-Semitism and the development of a climate of intolerance. Among such instruments, Resolution no. 52/122 on the elimination of all forms of religious intolerance, adopted by the United Nations General Assembly on 12 December 1997, deals more specifically with the issue of religious intolerance.

Instruments dealing more directly with the issue of “hate speech” are: Recommendation No. R (97) 20 on “hate speech”, adopted on 30 October 1997 by the Committee of Ministers of the Council of Europe, and General Policy Recommendation no. 7 of the European Commission against Racism and Intolerance on national legislation to combat racism and racial discrimination.

1. Recommendation No. R (97) 20 on "hate speech"

22. On 30 October 1997 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (97) 20 on "hate speech" and the appendix thereto. The recommendation originated in the Council of Europe's desire to take action against racism and intolerance and, in particular, against all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance. The Committee of Ministers recommended that the member States' governments be guided by certain principles in their action to combat hate speech.

The appendix to the recommendation states that the term "hate speech" is to be "understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance...".

The recommendation lays down guidelines designed to underpin governments' efforts to combat all hate speech, for example the setting up of an effective legal framework consisting of appropriate civil-, criminal- and administrative-law provisions for tackling the phenomenon. It proposes, among other measures, that community-service orders be added to the range of possible penal sanctions and that the possibilities under the civil law be enhanced, for example by awarding compensation to victims of hate speech, affording them the right of reply or ordering retraction. Governments should ensure that within this legal framework any interference by the public authorities with freedom of expression is narrowly circumscribed on the basis of objective criteria and subject to independent judicial control.

2. General Policy Recommendation no. 7 of the European Commission against Racism and Intolerance on national legislation to combat racism and racial discrimination

23. On 13 December 2002 the Council of Europe's European Commission against Racism and Intolerance (ECRI) adopted a recommendation on key components which should feature in the national legislation of member States of the Council of Europe in order for racism and racial discrimination to be combated effectively.

24. The relevant parts of the recommendation read as follows:

"I. Definitions

1. For the purposes of this Recommendation, the following definitions shall apply:

(a) 'racism' shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

(b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(c) 'indirect racial discrimination' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

...

18. The law should penalise the following acts when committed intentionally:

(a) public incitement to violence, hatred or discrimination,

(b) public insults and defamation or

(c) threats

against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

...

23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraphs 18, 19, 20 and 21. The law should also provide for ancillary or alternative sanctions."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicant submitted that his conviction under Article 312 of the Criminal Code had infringed Article 10 of the Convention, which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

26. It was common ground between the parties that the measures giving rise to the instant case had amounted to interference with the applicant's right to freedom of expression. Such interference would constitute a breach of Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 and was "necessary in a democratic society" in order to achieve the aim or aims in question.

A. "Prescribed by law"

27. It was, moreover, undisputed that the interference had been "prescribed by law", the applicant's conviction being based on Article 312 of the Criminal Code.

B. Legitimate aim

28. Nor was it disputed that the interference had pursued legitimate aims, namely the prevention of disorder or crime, the protection of morals and, in particular, the protection of the rights of others.

C. "Necessary in a democratic society"

1. The parties' submissions

29. The Government argued, firstly, that freedom of expression did not entail freedom to proffer insults. The applicant could not lay claim to the protection of freedom of expression when using insulting words such as "*piç*" (bastard). Moreover, his conduct had been punishable by law. They asserted in that connection that Articles 311 and 312 of the Criminal Code punished anyone who openly incited the people to hatred or hostility on the basis of a distinction founded on membership of a religion or denomination.

30. The Government pointed out that during the television broadcast the applicant had expressed his opposition to democracy, yet he was now asserting the right to benefit from its advantages.

31. In the Government's submission, the interference in question should be deemed to have been necessary in a democratic society and to have met a pressing need. The applicant's comments had not merely been offensive or shocking but had also been likely to cause serious harm to morals and to

public order. Through his comments, which ran counter to the moral principles of a very large majority of the population, the applicant had severely jeopardised social stability. Furthermore, his comment that any child born of a marriage celebrated before a mayor was a "*piç*" had touched on a subject of great sensitivity to Turkish public opinion. It had called into question the morality, indeed the legitimacy, of families, accusing them of being immoral and of failing to observe the Islamic faith. The Government also emphasised the impact of such comments, made during a television programme shown across the country.

32. The Government further submitted that the applicant had been convicted not on account of his religion but for spreading hatred based on religious intolerance. On that account, he had also failed to comply with his duties under the second paragraph of Article 10 of the Convention.

33. The applicant contested the Government's arguments. He submitted that he had been taking part in a television debate that had been broadcast late at night and had lasted about four hours. A number of people had taken part in order to ascertain his views and had engaged in debate with him by asking questions or submitting counter-arguments.

34. The applicant maintained that his views, taken as a whole, were protected by freedom of expression. He had given examples and explanations on the basis of his personal beliefs. He had used the word "*piç*", which should be interpreted as "illegitimate child", in response to a question from the programme's presenter. In doing so he had intended to stress that civil marriage was contrary to the Islamic conception of marriage requiring all marriages to be solemnised by a cleric. The word had therefore not been an insult but rather a term commonly used to describe a particular situation from the standpoint of Islam.

35. As to the applicant's statements such as "democracy has no religion", he argued that they should be viewed in their context.

36. The applicant further submitted that there had been no pressing social need for his conviction. Nobody to whom his comments had allegedly referred had instituted court proceedings against him for defamation or insult.

2. The Court's assessment

(a) Relevant principles

37. Freedom of expression constitutes one of the essential foundations of any 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 (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49).

However, as is borne out by the wording itself of Article 10 § 2, whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes "duties and responsibilities". Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs (see, *mutatis mutandis*, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, pp. 18-19, § 49, and *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1956, § 52). Moreover, a certain margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion (see, *mutatis mutandis*, *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133, p. 22, § 35, and, as the most recent authority, *Murphy v. Ireland*, no. 44179/98, §§ 65-69, ECHR 2003-IX).

38. The test of whether the interference complained of was "necessary in a democratic society" requires the Court to determine whether it corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see The Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

39. The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (ibid.).

40. The present case is characterised, in particular, by the fact that the applicant was punished for statements classified by the domestic courts as "hate speech". Having regard to the relevant international instruments (see paragraphs 22-24 above) and to its own case-law, the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all

forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued (with regard to hate speech and the glorification of violence, see, *mutatis mutandis*, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV).

41. Furthermore, as the Court noted in *Jersild v. Denmark* (judgment of 23 September 1994, Series A no. 298, p. 25, § 35), there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.

(b) Application of the above principles in the instant case

42. The Court must consider the impugned "interference" in the light of the case as a whole, including the content of the comments in issue and the context in which they were broadcast, in order to determine whether it was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I). Furthermore, the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference (see *Skałka v. Poland*, no. 43425/98, § 42, 27 May 2003).

43. The Court observes, firstly, that the programme in question was about a sect whose followers had attracted public attention. The applicant, who was regarded as the leader of the sect and whose views were already known to the public, was invited to take part in the programme for a particular purpose, namely to present the sect and its nonconformist views, including the notion that democratic values were incompatible with its conception of Islam. This topic was widely debated in the Turkish media and concerned a matter of general interest, a sphere in which restrictions on freedom of expression are to be strictly construed.

44. The Court further notes that the format of the programme was designed to encourage an exchange of views or even an argument, in such a way that the opinions expressed would counterbalance each other and the debate would hold the viewers' attention. It notes, as the domestic courts did, that in so far as the debate concerned the presentation of a sect and was limited to an exchange of views on the role of religion in a democratic society, it gave the impression of seeking to inform the public about a matter of great interest to Turkish society. It further points out that the applicant's conviction resulted not from his participation in a public discussion, but from comments which the domestic courts regarded as "hate speech" beyond the limits of acceptable criticism (see paragraph 15 above).

45. The main issue is therefore whether the national authorities correctly exercised their discretion in convicting the applicant for having made the statements in question (see, *mutatis mutandis*, *Murphy*, cited above, § 72).

46. In order to assess whether the "necessity" of the restriction on the applicant's freedom of expression has been established convincingly, the Court must examine the issue essentially from the standpoint of the reasoning adopted by the national courts. In this connection, the Court notes that the Turkish courts' conclusions related solely to the fact that the applicant had described contemporary secular institutions as "impious", had vehemently criticised concepts such as secularism and democracy and had openly campaigned for sharia (see paragraph 15 above).

47. The Turkish courts examined certain statements made by the applicant before reaching the conclusion that he was not entitled to the protection of freedom of expression. For the purposes of the instant case, the Court will divide the statements into three passages.

48. The first passage is the following:

> "... anyone calling himself a democrat [or] secularist ... has no religion ... Democracy in Turkey is despotic, merciless and impious [*dinsiz*] ...
>
> This secular ... system is hypocritical [*ikiyüzlü ve münafik*] ... it treats some people in one way and others in another way ...
>
> I am making these comments while fully aware that they represent a crime against the laws of tyranny. Why would I stop speaking? Is there any other way than death?"

In the Court's view, such comments demonstrate an intransigent attitude towards and profound dissatisfaction with contemporary institutions in Turkey, such as the principle of secularism and democracy. Seen in their context, however, they cannot be construed as a call to violence or as hate speech based on religious intolerance.

49. The second passage is the following:

> "... if [a] person has his wedding night after being married by a council official authorised by the Republic of Turkey, the child born of the union will be a *piç* ..."

In Turkish, "*piç*" is a pejorative term referring to children born outside marriage and/or born of adultery and is used in everyday language as an insult designed to cause offence.

Admittedly, the Court cannot overlook the fact that the Turkish people, being deeply attached to a secular way of life of which civil marriage is a part, may legitimately feel that they have been attacked in an unwarranted and offensive manner. It points out, however, that the applicant's statements were made orally during a live television broadcast, so that he had no possibility of reformulating, refining or retracting them before they were made public (see *Fuentes Bobo v. Spain*, no. 39293/98, § 46, 29 February 2000). Similarly, the Court observes that the Turkish courts, which are in a better position than an international court to assess the impact of such

comments, did not attach particular importance to that factor. Accordingly, the Court considers that, in balancing the interests of free speech and those of protecting the rights of others under the necessity test in Article 10 § 2 of the Convention, it is appropriate to attach greater weight than the national courts did, in their application of domestic law, to the fact that the applicant was actively participating in a lively public discussion (see, *mutatis mutandis*, *Nilsen and Johnsen*, cited above, § 52).

50. Lastly, the national courts sought to establish whether the applicant was campaigning for sharia. In that connection they held, in particular (see paragraph 15 above):

> "Mr Bedri Baykam told Mr Gündüz that the aim of the latter's supporters was to 'destroy democracy and set up a regime based on sharia', and the defendant replied: 'Of course, that will happen, that will happen.' [Furthermore,] the defendant acknowledged before this Court that he had made those comments, and stated that the regime based on sharia would be established not by duress, force or weapons but by convincing and persuading the people."

The Turkish courts considered that the means by which the applicant intended to set up a regime based on religious rules were not decisive.

51. As regards the relationship between democracy and sharia, the Court reiterates that in *Refah Partisi (the Welfare Party) and Others v. Turkey* ([GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 123, ECHR 2003-II) it noted, among other things, that it was difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia. It considered that sharia, which faithfully reflected the dogmas and divine rules laid down by religion, was stable and invariable and clearly diverged from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervened in all spheres of private and public life in accordance with religious precepts. The Court would point out, however, that *Refah Partisi (the Welfare Party) and Others* concerned the dissolution of a political party whose actions seemed to be aimed at introducing sharia in a State party to the Convention and which at the time of its dissolution had had the real potential to seize political power (ibid., § 108). Such a situation is hardly comparable with the one in issue in the instant case.

Admittedly, there is no doubt that, like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. However, the Court considers that the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as "hate speech". Moreover, the applicant's case should be seen in a very particular context. Firstly, as has already been noted (see paragraph 43 above), the aim of the programme in question was to present the sect of which the applicant was the leader; secondly, the applicant's extremist views were already known and had been

discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.

52. In conclusion, having regard to the circumstances of the case as a whole and notwithstanding the national authorities' margin of appreciation, the Court considers that the interference with the applicant's freedom of expression was not based on sufficient reasons for the purposes of Article 10. This finding makes it unnecessary for the Court to pursue its examination in order to determine whether the two-year prison sentence imposed on the applicant, an extremely harsh penalty even taking account of the possibility of parole afforded by Turkish law, was proportionate to the aim pursued.

53. The applicant's conviction accordingly infringed Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Article 41 of the Convention provides:

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

55. The applicant sought just satisfaction in the amount of 500,000 euros (EUR) for the non-pecuniary and pecuniary damage he had sustained. He did not seek the reimbursement of costs and expenses incurred before the Convention institutions and/or the domestic courts, and this is not a matter which the Court has to examine of its own motion (see *Colacioppo v. Italy*, judgment of 19 February 1991, Series A no. 197-D, p. 52, § 16).

56. The Government submitted that the finding of a violation would constitute sufficient just satisfaction.

57. With regard to pecuniary damage, the Court observes that the applicant has not adduced any evidence of the nature of the loss sustained and, furthermore, that he has not sought reimbursement of the fine imposed on him. No amount can therefore be awarded under that head.

With regard to non-pecuniary damage, the Court points out that it has found that the interference in question was not based on sufficient reasons for the purposes of Article 10 and that the penalty imposed on the applicant was extremely harsh (see paragraph 52 above). Accordingly, making its assessment on an equitable basis, it awards him EUR 5,000 in respect of non-pecuniary damage.

FOR THESE REASONS, THE COURT

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

2. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into Turkish liras at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 4 December 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Deputy Registrar	President

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

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE TÜRMEN

I regret that I am unable to agree with the conclusion reached by the majority, although I have no difficulty in agreeing with their views until paragraph 46 of the judgment.

The applicant, during a highly popular TV programme broadcast live, stated that children born from marriages celebrated according to civil law (that is, not according to religious law) are "*piç*" (bastards). He went on to say: "That is how Islam sees it."

In the Turkish language "*piç*" is a pejorative word meaning illegitimate children. It is a very serious insult.

I agree with the majority view that "the Court cannot overlook the fact that the Turkish population, being deeply attached to a secular way of life of which civil marriage is a part, may legitimately feel that they have been attacked in an unwarranted and offensive manner" (paragraph 49 of the judgment).

The word "*piç*" as used by the applicant is clearly hate speech based on religious intolerance. Hate speech, both at national and international levels, comprises not only racial hatred but also incitement to hatred on religious grounds or other forms of hatred based on intolerance.

Recommendation No. R (97) 20 of the Committee of Ministers on "hate speech" defines hate speech as "covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance". Moreover, the recommendation requests the member States to establish a sound legal framework on hate speech and also asks the national courts to bear in mind that hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the Convention.

The European Commission against Racism and Intolerance, in paragraph 18 of its General Policy Recommendation no. 7, states:

> "The law should penalise the following acts when committed intentionally:
>
> (a) public incitement to violence, hatred or discrimination,
>
> (b) public insults and defamation ...
>
> ...
>
> against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality or national or ethnic origin;"

On the other hand, in national legislation, such as the Danish, French, German and Swiss Criminal Codes, hate speech also covers threats and insults on religious grounds and constitutes a punishable offence.

The applicant was sentenced under Article 312 of the Turkish Criminal Code for incitement to hatred, which is in line with the international texts on hate speech.

In the judgment, the majority do not contest the Turkish courts' decision on this account. There is nothing in the judgment, explicit or implicit, which may warrant the conclusion that the majority refuse to accept that the word "*piç*" is hate speech. On the contrary, the judgment makes extensive reference to international texts on hate speech and in paragraph 40 states: "The present case is characterised, in particular, by the fact that the applicant was punished for statements classified by the domestic courts as 'hate speech'. Having regard to the ... international instruments [on hate speech] and to its own case-law, the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society."

It is also to be noted that while the judgment in paragraph 52 explicitly states that defending sharia does not constitute hate speech, it fails to do the same in connection with the word "*piç*".

If the majority accept or at least do not deny that "*piç*" is hate speech, then according to the Court's case-law such a remark should not have enjoyed the protection of Article 10 (see *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 24-25, § 33).

Hate speech is undeserving of protection. It contributes nothing to a meaningful public debate and therefore there is no reason to think that its regulation in any way harms any of the values which underlie the protection of freedom of expression.

On the other hand, the applicant could have expressed his criticisms on democracy and secularism perfectly well without using the word "*piç*", and thus contributed to free public debate (see *Constantinescu v. Romania*, no. 28871/95, § 74, ECHR 2000-VIII).

The present judgment is incompatible with the established case-law of the Court on a number of other points. In *Otto-Preminger-Institut v. Austria* (judgment of 20 September 1994, Series A no. 295-A, pp. 18-19, § 49) the Court stated:

> "... whoever exercises the rights and freedoms enshrined in the first paragraph of [Article 10] undertakes 'duties and responsibilities'. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."

Furthermore, in the same judgment (pp. 20-21, § 56) the Court concluded:

> "... 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 ..."

In *Müller and Others v. Switzerland* (judgment of 24 May 1988, Series A no. 133), *Otto-Preminger-Institut* (cited above), and *Wingrove v. the United Kingdom* (judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V), the Court emphasised that "it is not possible to find ... a uniform European conception of morals ... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction'..." (see *Müller and Others*, cited above, p. 22, § 35).

Wingrove (cited above, pp. 1957-58, § 58) is even more specific about the State's margin of appreciation with regard to religious sensitivities:

> "... a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion ..."

In all three judgments referred to above, the Court found no violation of Article 10 on the grounds that the religious feelings of believers had been violated in an unwarranted and offensive manner and that the interference of the authorities to ensure religious peace did not constitute a breach of the Convention. In *Otto-Preminger-Institut* and *Wingrove* protection of religious feelings, and in *Müller* protection of the morals of others, outweighed the applicant's interests.

In the present case, it is not the religious feelings of believers but the feelings of a great majority of the Turkish population who choose to lead a secular life that were attacked.

I am concerned that the present judgment may be interpreted by the outside world to mean that the Court does not grant the same degree of protection to secular values as it does to religious values. Such a distinction, intentional or unintentional, is contrary to the letter and spirit of the Convention.

As Judge Pettiti rightly pointed out in his concurring opinion in *Wingrove*, "the rights of others" as mentioned in paragraph 2 of Article 10 cannot be restricted solely to the rights of religious believers. The rights of secular people are also included in this expression.

In the present judgment the majority reached the conclusion that the conviction of the applicant by the Turkish courts infringed Article 10. However, they accepted that:

(a) the word "*piç*" is hate speech and the applicant was convicted for hate speech and not for participating in a public debate (paragraph 44);

(b) Contracting States enjoy a wide margin of appreciation in respect of offensive remarks in moral and especially religious fields (paragraph 37);

(c) the word "*piç*" is an attack on the feelings of secular people in an unwarranted and offensive manner (paragraph 49).

Against all these findings, which might have been a convincing reasoning for finding no violation, the majority reached the conclusion of violation on one single ground: that the Turkish court in its decision of 1 April 1996 had not given enough weight to the word "*piç*". This is simply not correct.

In the reasons for its decision, the court specifically mentions the applicant's statement regarding the children of those who are married by civil law being "*piç*". This sentence is one of the main elements in the decision that led to the applicant's conviction. It is true that the Turkish court also examined other statements by the applicant and came to the conclusion that the applicant's statements in their entirety constituted incitement to hatred.

I agree with this approach, because the applicant was speaking on the programme from the vantage point of a religious authority. He claimed that he was acting with the will of God. He asserted that his strong words against democracy and secularism and his advocacy of a regime based on sharia reflected God's wishes. Therefore, those who did not share his opinions and who defended democracy and secularism were depicted as ungodly. In my opinion, this is a good example of hate speech.

I am not persuaded by the argument in paragraph 49 that because the applicant was participating in a lively debate his remarks about children being "*piç*" were in accordance with Article 10. In a live TV broadcast, the target is the public, rather than other participants. Therefore, the moment the word "*piç*" is pronounced, it reaches the public to whom it would have caused offence (see, *mutatis mutandis*, *Wingrove*, cited above, pp. 1959-60, § 63).

Moreover, the argument that such a declaration was made during a live broadcast, making it impossible for the applicant to reformulate or retract it, is not correct because the interviewer provided him with the opportunity to correct his statement. Instead of doing so, he chose to reinforce it by qualifying it in religious terms.

Lastly, whatever the decision on the merits, when regard is had to all the particular circumstances of the case and to the Court's case-law (see, among many other authorities, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 56, ECHR 1999-VIII; *Skałka v. Poland*, no. 43425/98, § 48, 27 May 2003; and *Thoma v. Luxembourg*, no. 38432/97, § 74, ECHR 2001-III), it is regrettable that the Chamber decided to award the applicant a sum for non-pecuniary damage, whereas it could have taken the view that the finding of a violation constituted in itself sufficient just satisfaction.