MHB Yıl 15 Sayı 1-2 1995

SADIK AHMET'İN YUNANİSTAN ALEYHİNE YAPTIĞI BAŞVURUYA DAİR İNSAN HAKLARI DİVANI KARARI

European Court of Human Rights

Case of Ahmet Sadık V. Greece
46/1995/552/638
Judgment
Strasbourg 15 November 1996

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SUMMARY[1]

Judgement delivered by a Chamber

Greece- conviction of politician belonging to Muslim community of Western Thrace for disturbing peace during elaction campaign by distributing leaflets referring to that community as "Turkish".

I. Preliminary Observation

Applicant deceased-widow and children have legitimate moral interest in obtaining ruling that his conviction infringed right to freedom of expression relied on before Convention institutions - definite pecuniary interest under Article 50 of the Convention.

Conclusion: applicant's heirs have standing to continue proceedings in his stead (unanimously).

II. Government's Preliminary Objection (non-exhaustion of domestic remedies)

Supervision machinery set up by Convention subsidiary to national human rights protection systems - principle reflected in rule set forth in Article 26 of Convention - reiteration of principles laid down in Court's case-law on question of exhaustion.

In present case applicant did not at any time rely on Article 10 of Convention or arguments to same or like effect based on domestic law, in courts dealing with his case, but merely defended himself against charge of disturbing peace contrary to Article 192 of Criminal Code.

Conclusion objection upheld (six votes to three).

Court's case-law referred to

18.6.1971, De Wilde, OOms and Versyp V. Belgium, 6.11.1980, Guzzardi v. Italy; 6.11.1980, Van obsterwijck v. Belgium, 19.3.1991, Cardot v. France, 23.4.1992, Castells v. Spain, 16.9.1996, Akdivar and Others v. Turkey.

In the case of Ahmet Sadık v. Greece[1]

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the

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1 This summary by the registry does not bind the Court.

Convention") and the relevant provisions of Rules of Court A^2. as a chamber composed of the following judges :

Mr R. Ryssdal, *President*,
Mr N. Valticos,
Mr S.K. Martens,
Mr I. Foighel,
Mr J.M. Morenilla,
Sir John Freeland,
Mr A.B. Baka,
Mr E. Repik,
Mr K. Jungwiert,

and also of Mr H. Petzold, *Registrar*, and Mr. P.J. Mahoney, *Deputy Registrar*,

Having deliberated in private on 30 March, 30 August and 25 October 1996.

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 29 May 1995 and by the Government of the Hellenic Republic ("the Government") on 4 July 1995. Within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 18877/91) against Greece lodged with the Commission under Article 25 by a Greek national, Mr Sadık Ahmet Sadık, on 11 July 1991. The applicant died on 24 July 1995, his wife, Mrs Işık Ahmet and his two children, Mr Levent Ahmet and Miss Funda Ahmet, stated that they wished to continue the proceedings.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Greece recognised the compulsory jurisdiction of the Court (Article 46) the Government's application referred to Articles 44 and 48. The object of the request and 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.

Notes by the Registrar :

1 The case is numbered 46/1995/552/638. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2 Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A. the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included *ex officio* Mr N. Valticos the elected judge of Greek nationality (Article 43 of the Convention) and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On B June 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members namely Mr S.K. Martens Mr I. Foighel, Mr J.M. Morenilla, Mr F. Bigi, Sir John Freeland, Mr B. Repik and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 § 4). Subsequently Mr A.B. Baka, substitute Judge, replaced Mr Bigi, who had died (Rules 21 § 4 and 32 § 1).

On 25 August 1995 the Registrar was informed of the applicant's death and later that his widow and children wanted the proceedings to continue and wished to participate in them retaining the applicant's lawyer as their representative. For practical reasons, Mr Ahmet Sadık will continue to be referred to in this judgment as "the applicant", although Mrs Işık Ahmet and her children are now to be regarded as having this status see the Vocaturo v. Italy judgement of 24 May 1991, Series A no. 206-C, p. 29, § 2).

4. As President of the Chamber (Rule 21 § 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). The applicant's memorial was received at the registry on 10 January 1996 and the Government's on 11 January. On 30 January the Government filed a number of documents, having been given leave to do so by the President on 14 December 1995. On 12 February the Secretary to the Commission informed the Registrar that the Delegate of the Commission did not intend to submit any written observations.

By a letter received on 22 December 1995 *Rights International,* an American non-governmental organisation, sought leave to submit written observations under Rule 37 § 2. On 25 January 1996 the President decided not to give it leave to do so.

On 6 March 1996, after the time-limit for the submission of written observations by those appearing before the Court had expired, the applicant's lawyer filed at the regiatry a report by *Helsinki Watch* published in 1992 following a fact-findings mission carried out by that organisation in Western Thrace. At its preparatory meeting on 27 March 1996 the Court decided to admit this document and the President gave the Government leave to reply, which they did on 30 April 1996.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 March 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court :

(a) *for the Government*

Mr V. Kondolaimos Senior Adviser,
Legal Council of State, *Delegate of the Agent,*

Mr D. Spinelis, Lecturer,
Athene University,

Mrs V. Pelekou, Legal Assistant,
Legal Council of State,

Mrs M. Vondikaki-Telalian, Adviser, Legal Service
of the Ministry of Foreign Affairs, *Counsel,*

(b) *for the Commission*

Mr B. Conforti, *Delegate,*

(c) *for the applicant*

Mr. T. Akıllıoğlu, avukat (lawyer) at the Ankara Bar and University lecturer,
Counsel.

The Court heard addresses by Mr Conforti, Mr Akıllıoğlu, Mr Kondolaimos, Mr Spinelis and Mrs Pelekou. The Government's representative produced certain documents at the hearing, having been invited to do so by the Court.

AS TO THE FACTS

I. The circumstances of the case

6. Mr Ahmet Sadık, a Greek national of the Muslim faith, was born in 1949 and lived in Komotini (Western Thrace). He was a doctor, publisher of the weekly newspaper Güven ("Trust") and a member of the Greek parliament. He died on 24 July 1995 in a road accident near Komotini.

A. The background to the case

7. The applicant was the sole candidate of the political party *Güven* - representing part of the Muslim population of Western Thrace- to win a seat in the parliamentary election of June 1989. As no government emerged from that election a fresh poll was planned for November 1989 in which the applicant intended to stand as a candidate.

8. On various dates between 16 October and 17 November 1989 Mr Ahmet Sadık published in the newspaper Güven and circulated in the region a number of communiqués, including the following.

"TO THE TURCO-MUSLİM ELECTORATE OF THE DEPARTMENT OF RODOPI

In response to the repeated requests of the Turco-Muslim electorates of the department of Rodopi, we, journalist Molla İsmail (of Ropodi), Dr. Sadık Ahmet and theologian İbrahim Şerif, have decided to stand in the general election of 5 November as members of the independent Güven list. The Turkish community of Western Thrace, especially since 1974, has been through some unhappy experiences at the hands of political parties. At the elections of 18 June, in an upsurge of unity, it placed its trust in the independent Güven list. It asserted its identity and took its destiny into its own hands by electing a member of that list to represent it in parliament. For the elections of 5 November it is equally determined to send to parliament a representative who enjoys its trust.

After the historic victory won on 18 June the Turkish electors of the department of Rodopi never again wish to return to the old parties and live once more the days when they were despondent and crushed.

Moreover, we suffer when we observe the manoeuvres of the other parties who, in order to win the precious Turco-Muslim vote in Western Thrace, are playing on the fears of the people in our towns and villages. Some who seem to be of our own kind still dare, under the pretext of defending the rights of the Turco-Muslim community in Western Thrace, to call for the votes of our honest, fair-minded fellow citizens. It is painful to see that these adventurers can still walk abroad among us. The only thing the members of the Turco-Muslim community of Western Thrace want is to live in dignity in the country where they were born and have grown up. No force will halt their just and legitimate struggle.

We place all our trust in God first of all, but also in the honest and conscientious Turco-Muslim electorate, who believe in our cause. The Turkish electrate of the Department of Rodopi, whose motto is "one for all and all for one" will express their trust in Güven on 5 November and 'overcome all their adversaries with honour and respect.

..."

The applicant was convicted of an offence on the basis of the above article, a Greek translation of which was read out at his trial in the Rodopi Criminal Court and in the Patras Court of Appeal (see paragraphs 9, 10 and 15 below :

In another communiqué he wrote :

"YOUNG PEOPLE SHOULDER YOUR RESPONSIBILITIES

ON 5 NOVEMBER THE INNOCENT YOUTH WHO BEEN SUFFERİNG SINCE THE DAY OF THEIR BIRTH IN WESTERN THRACE WILL AT LAST BE ABLE TO SAY 'NO' TO THE POLITICAL PARTIES WHO ARE MAKING THEM LIVE AN INHUMAN LIFE.

YOUNG PEOPLE! UNITY IS STRENGHT! STICK TOGETHER YOUR VOTE IS AS PRECIOUS AS YOUR HONOUR, BE CAREFUL HOW YOU CAST IT!

THE YOUNG TURKS OF WESTERN THRACE, WHOSE SLOGAN IS "WE WANT RIGHTS, NOT CHARITY" ARE GOING TO ENFORCE RESPECT FOR THEIR RIGHTS

YOUNG TURK OF WESTERN THRACE

In this community of 150 thousand Turco-Muslims of Western Thrace the highest duty, one which will fill you with honour and pride, falls to you. The date of the fresh general election, 5 November, is approaching.

For 25 to 30 years you have been affected most by the pressure, discrimination and injustice infliced on the Turkish community of Western Thrace by the leaders who have followed each other at the head of this country.

You have breathed in the fumes of injustice and discrimination since birth.

Your innocent childhood passed by in injustice. You were not able to shout out to the world "I am a Turkish child".

In our world, where education and training are so highly developed, your schooling was cut short. You did not even have a schoolbook when ethnic-Greek children were getting a modern education and taking advantage of the cultural and technological developments of their time. You have the necessary intelligence to become a doctor, a lawyer or an engineer... but this country which you call "my homeland" has shut the door of study in your face.

You have grown up and become an adult in the midst of these injustices by the law of nature. Because no-one could prevent you growing up. Perhaps you are also now married and a father, but you have no home for your dear wife and the children you love. You have just completed your military service but, in this country that you call "my homeland", the right to buy or build a house is denied you.

As your access to higher education was barred, you learned a trade, although this meant putting up with the constant annoying remarks of your "Christian boss" (Çorbacı) down through the years. You became a repairer of engines, exhaust pipes or tyres.. but you still have to fill the pockets of your Christian boss, because you do not have the right to open your own workshop.

When you were born you received your name during the call to prayer; your name appears in the district council's register as Ahmet, Mehmet.... But in your place of work your boss insists on calling you "Taki, Maki, Saki..."

With the enthusiasm of youth you leap on a tractor and work in the fields day and night. you would like to drive past in front of your friends on this tractor, but you can't.

Because you are not even thought worthy of permission to use the tractor. You are almost obliged to work your own land by stealth. After working all year long and saving up a bit of money you would like to go for a trip or to travel abroad. But you're unsasy about going away. You are tormented by doubts. You wonder if you'll lose your nationality when you return or have to surrender your passport when you leave.

YOUNG PEOPLE OF WESTERN THRACE

You young people who came into the world in the midst of all this injustice and for whom a humiliating existence has been mapped out, your day has come!

In the elections of 5 November, teach all those who would lock you into this injustice an unforgettable lesson.

NOBODY DOUBTS THAT YOU WILL GIVE YOUR FULL SUPPORT TO THE INDEPENDENT LIST and in so doing prove that you would rather die than abandon your national and religious roots.

Here and now you must set up CAMPAIGN COMMITTEES in your district or village and make sure that your parents and grandparents are not deceived.

On the day of the elections, up till the time when all the votes have been counted, make sure that all the votes are not wasted by remaining either next to the ballot boxes or outside the polling station. Do not forget for a single second that your vote is as precious as your honour.

THE TURKISH COMMUNITY OF WESTERN THRACE TRUSTS YOU AND IS PROUD OF YOU

LONG LIVE THE TURKISH AND MUSLIM YOUTH OF WESTERN THRACE

9. The applicant was then accused of contravening Articles 162 and 192 of the Criminal Code (see paragraph 20 below). On 16 December 1989 the public prosecutor attached to the Rodopi Criminal Court summoned him to appear in that court on 25 January 1990 to stand trial on the following charges :

"[In the second half of] the month of October 1989, in the town of Komotini,

(1) by false information and defamatory declarations about certain candidates. [Mr. Ahmet Sadık] deceived the electors in order to induce them to change the way they intended to vote; in particular, he wrote and circulated in the town of Komotini and other places in the department of Rodopi a declaration in the Turkish language... in which he asserted that the Muslim electors of the department of Rodopi were living every day - that is in the period preceding the general election of 5 November 1989 - in an anarchic climate (of terror) fostered by the candidates of the other political parties... who were going round the different villages of the department of Rodopi trying to win the votes of the Muslim electors...

(2) at the same time and in the same place he contravened Article 192 of the Criminal Code.. in particular he wrote and circulated the above-mentioned declaration in which there were frequent repetitions of the words "Turk", "Turkish Muslim", "Turkish Muslim minority of Western Thrace" and "Turkish community", used to designate the Muslim minority in Thrace, by describing the Muslim minority as "Turkish" and by calling the Muslims "Turks" rather than "Greeks", he provoked and incited the citizens to sow discord among themselves (particularly on the Muslim side) and between them and the other citizens of Komotini, and thus disturbed the public peace..

Consequently, he has contravened Articles... 162 and 192 of the Criminal Code.

A second summons, of the same date, directed the applicant to appear before the same court on 8 February 1990 to answer the following charge:

"On 17 November 1989 in the town of Komotini and in other places in the department of Rodopi he contravened Article 192 of the Criminal Code... In particular, he published in the newspaper Güven of 17 November 1989 a declaration signed by him (the accused) in which he falsely alleged the existence of discrimination against and oppression of, the Muslims of Thrace by the Greek administrative authorities, and of injustices committed to their detriment. Lastly, by describing the Muslim minority of Thrace as the "Turkish minority" rather than the "Greek minority of Muslim faith", he provoked and incited the citizens, mainly on the Muslim side, to reciprocal discord and thus disturbed the public peace of the citizens of Thrace.

Consequently, he has contravened Articles... and 192 of the Criminal Code.".

B. The proceedings in the Rodopi Criminal Court

10. On 25 January 1990 Mr. Ahmet Sadık and his co-defendant appeared in the Rodopi Criminal Court. While the witnesses were being questioned their lawyers challenged one of the court's judges on account of the animosity he had shown towards the accused and the way he was asking the questions. After deliberating, the court dismissed the challenge, holding that the questions asked by the judge concerned did not go beyond the scope of the bill of indictment and were intended as an objective means of revealing the truth in the case under considaration. The defence lawyers then withdrew from the case and their clients stated that they did not want any other lawyer to be appointed. They conducted their own defence and denied committing the offence charged. In particular, the applicant said that his intention in the articles at issue had only been to condemn the oppression of the Muslim minority by the State and to draw attention to the problems which members of that minority encountered in their dealings with the administrative authorities. He pointed out that the term "Turkish" had been used for a long time not only in the press but also by the administrative and judicial authorities. Lastly, he asserted that the presence of a crowd which had gathered outside the court was not due to the articles in issue but to the fact that the trial was being held and the fact that the Muslims' ethnic identity was still being denied.

11. On 26 January 1990 the court acquitted the applicant and his co-defendant of electoral deception, but found them guilty of disturbing the citizens' peace.

The court found that the accused, as the candidates of an independent party in the elections of 5 November 1989, had jointly written in the Turkish language a declaration whicht they had circulated in the town of Komotini and other places in Rodopi and in which the terms "Turk", "Turkish Muslim", "Turco-Muslim minority of Western Thrace" and "Turkish cummunity" repeatedly appeared. By describing the Greek Muslims of Komotini and the department of Rodopi as Turks rather than Greeks, they had intended, by appealing to the feelings, minds and will of the Greek citizens of the Muslim minority, to instil and implant in their hearts the seeds of discord, hate and hostility towards the Christian Greeks of Komotini and the department of Rodopi, to provoke and incite the citizens of the two communities to commit acts of violence and to sow discord between themselves and thus disturb, as they had moreover succeeded in doing, the public peace and the peaceful and harmonious co-existence that had obtained for centuries between the citizens of the two Greek communities (the Christian and the Muslim).

The court sentenced Mr Ahmet Sadık to eighteen months imprisonment, not commutable into a fine. It held that such a penalty would not be sufficient, in view of the ap-

plicant's character and the circumstances of the case to dissuade him from committing other offences. Furthermore, his refusal to express regret and the way he had persisted during the trial in making separatist speeches showed that he was particularly dangerous. Any appeal he might lodge should therefore not have suspensive effects as it was probable that he would evade justice by absconding to Turkey. Enforcement of the sentence until such time as the appeal court had given judgement would not cause either the applicant or his family excessive and irreparable prejudice.

12. The applicent remained in detention from 26 January to 30 March 1990. His candidacy in the elections of November 1989 was annulled for technical reasons.

C. The incidents of 29 January 1990 in Komotini

13. On 29 January 1990 violence broke out in Komotini, in the course of which many shops were damaged. A Muslim killed a Christian in a hospital in the town.

14. For the Muslim minority of Western Thrace the date was significant as the anniversary of events which had taken place two years before, in 1988. In November 1987 the Court of Cassation had forbidden the minority's youth and primary school teacher associations to describe themselves as "Turkish". The Court of Cassation's judgment brought to a close a series of actions brought in 1984 by the prefects of Rodopi and Kanthi in order to obtain the dissolution of the "Komotini Union of Turkish Youth", the "Turkish Primary Teachers Union of Western Thrace" and the "Xanthi Turkish Union". Accordingly, in January 1988, the Muslim minority of Western Thrace decided to organise a demonstration in front of the prefecture to express their disapproval of the above judgment. Although the demonstration had been banned by the police, it did in the end take place, but matters got out of hand and violent clashes took place in the town of Komotini.

D. The proceedings in the Patras Court of Appeal

15. On 27 January 1990 the applicant appealed against the judgment of the Rodopi Criminal Court. The case was referred to the Patras Court of Appeal for reasons having to do with the maintenance of order and public safety (Articles 136 (c) and 137 § 1 (c) of the Code of Criminal Procedure).

On 30 March 1990 the Patras Court of Appeal upheld the Criminal Court's judgment, giving the following reasons :

> "The following facts have been established by the evidence of the witnesses for the prosecution and the defence examined under oath during the trial before this court and by the documents read out and the arguments put forward by the

accused in his defence. As candidates on an independent list in the general election of 5 November 1989 in Komotini, the accused wrote, between 10 and 20 October 1989, a pamphlet printed in Turkish which they distributed in the town of Komotini and other places in the department of Rodopi and in which the terms "Turks", Turkish Muslims", "Turkish Muslim minority of Western Thrace" and "Turkish community" repeatedly appeared. In this manner the accused deliberately set out to describe as "Turks" the Greek citizens of Muslim faith, although they knew that under the Treaty of Lausanne only a Muslim minority, not a Turkish minority has been recognized in the region of Western Thrace. Nevertheless, by the above-mentioned act, which was an appeal to the feelings, minds and will of the Greek citizes of the Muslim minority, the accused deliberately sought to instil and implant in their hearts the seeds of discord, hate and hostility towards the Christian Greeks who lived in the same region. In this manner they succeeded in provoking and inciting the citizens to mutual discord, a further consequence of which was disturbance of the public peace. All the foregoing has been corroborated by the prosecution witnesses Athanasios Kamarakis. Styilanos Bietsas, Syrmatoula Lantzouraki and Konstantinos Tsetlakas, who, living in Komotini, had direct knowledge of these facts. They stated that, because of the distribution of the pamphlet in question, the public peace among the citizens of the town of Komotini was seriously disturbed, so that in a short space of time acts of violence were committed between Christians and Muslims. The accused's assertion that what they sought to achieve through the pamphlet in question was only to win the support of the electors is not convincing because, if that had been the case, they could have achieved their aim by any other suitable method without referring to Greek Muslims in the pamplet in question as "Turks", even though they knew that a Turkish minority is not recognised in Greek Thrace and that if they attempted to raise such an issue in such a sensitive region, the peace between Christian and Muslim Greeks would certainly be disturbed, which was indeed what actually happened. Consequently, the accused are declared guilty of the above-mentioned offence, as described analytically in the operative provisions of this judgment. Nevertheless, the Court will take into consideration the extenuating circumstance that before committing the offence the accused had always led blameless private, family, professional and social lives."

Lastly, the Court of Appeal reduced Mr Ahmet Sadık's prison sentence to fifteen mohths and commuted it to a fine of GRD 1.000 per day.

16. On 8 April 1990, after his release, the applicant was re-elected to the Greek parliament.

E. The proceedings in the Court of Cassation

17. On 24 October 1990 the applicant appealed on points of law. He maintained that the charges against him were vague and that the courts below should have dismissed the prosecution case. He also alleged that the Patras Court of Appeal had not given sufficient reasons for its decision, as Greek legislation required. In particular, he argued that the Court of Appeal had not made it clear why the use of the noun "Turk" or the adjective "Turkish" was *per se* likely to create a climate of hate or disturb public order. Lastly, he complained that the judgment gave no specifc example of events which had actually occurred towards the end of October 1989 and which could be said to have disturbed public peace.

18. On 15 February 1991 the Court of Cassation dismissed the appeal on the following grounds:

"....

Article 192, which was adopted for the protection of public order and to enable a State based on the rule of law to deal with the kind of tension which the democratic legal order... cannot tolerate, esablishes, as do Articles 190 and 191, the serious offence of "disturbing the citizens' peace". The objective element of this offence - according to the Article mentioned - consists in provoking or inciting the citizens, publicly and in any manner whatsoever (whether orally or in writing), to commit acts of violence or to sow discord among themselves, or aversion and hate, thus disturbing the public peace, that is to say society's confidence in peaceful order.

The subjective element of the offence is the offender's *mens rea*, which means that he must have acted knowingly and with the intent to provoke or incite the citizens to commit acts of violence or to sow discord among themselves, thus disturbing the public peace.

In the instant case... the Patras Court of Appeal.. found ... that the appelants, who were independent candidates in Komotini in the general election of 5 November 1989, had jointly written towards the end of October 1989 a declaration in the Turkish language, which they circulated in the town of Komotini and other places in the department of Rodopi and in which the terms "Turk", "Turkish Muslim", "Turco-Muslim minority of Western Thrace" and "Turkish community" repeatedly appeared. In this manner the appellants had delibarately attempted to describe as "Turks" the Greek Muslims of Southern Rodopi, although they knew that the Treaty of Lausanne recognised only the existence in that region of a Muslim (religious) minority, not a Turkish minority. Nevertheless, the appellants, in appealing to the feelings, minds and will of the

Greek citizens of the Muslim minority, had deliberately set out to instil and implant in their hearts the seeds of discord, hate and hostility towards the Christian Greeks who live in the same region. They had thus succeeded in provoking and sowing discord among the citizens, which disturbed the peace of the citizens of Komotini to such an extent that, in a short space of time, acts of violence were committed between Christians and Muslims in that town. Moreover, they knew that there was no Turkish minority in Western Thrace and that their conduct would disturb the public peace between Christian and Muslim Greeks.

By its reasoning the Court of Appeal can be seen to have setout in the impugned judgment the specific, detailed grounds required by Article 93 § 3 of the Constitution and Article 139 of the Code of Criminal Procedure, since it gave a full and clear account therein, without contradicting itself, of the facts of the case as established at the trial; which constitute the objective and subjective elements of the above-mentioned offence..

More particularly, there is no contradiction between the reasons and the operative provisions... since provoking and sowing discord, thus disturbing the public peace, are sufficient to make out the objective element of the offence for which they were sentenced. Mentioning in the reasons that acts of violence had been committed, while not necessary to support the operative provisions, was not however in contradiction with those provisions, regard being had to the fact that discord is the psychological condition for an act of violence, which is the higher level of discord...

Lastly, the appellants *mens rea* is inherent in the commission of the acts that constitute the offence, which show that thay acted deliberately, knowing that they were disturbing the public peace..."

II. Revelant Domestic Law

A. The Constitution

19. The following provisions of the 1975 Constitution are relevant :

Article 14 § 1

"Every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State".

Article 28 § 1

"The generally acknowledged rules of international law, as well as international

Conventions as of the time they are sanctioned by law and become operative according to the terms threin, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law.

The rules of international law and of international Conventions shall be aplicable to aliens only under the condition of reciprocity."

B. The Criminal Code

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

"Electoral deception
Article 162

It shall be an offence, punishable by up to two years imprisonment and a fine, to deceive an elector through false information or defamatory declarations about an electoral candidate, or by any other means, either in order to prevent him from exercing his right to vote or in order to influence his voting intentions..."

"Disturbing the public peace
Article 189

1. It shall be an offence, punishable by up to two years imprisonment, to participate in a gathering of persons... committing acts of violence against people or property or forcibly entering houses belonging to others, dwellings or other buildings.

2. Incitement to commit the offence or the commission of acts of violence shall be punished by not hess than three mohts imprisonment.

3. These penalties shall be imposed if the conduct concerned is not punished more severely pursuant to another provision."

"Disturbing the citizens' peace
Article 190

It shaal be an offence, punishable by up to two years' imprisonment, to provoke anxiety or terror among the citizens by threatening the commission of criminal offences.

Article 191 § 1

It shall be an offence, punishable by not less than three mohths' imprisonment and a fine, to spread by any means false information or rumours calculated to provoke

anxiety or fear among the citizens or to undermine confidence in the State... or to perturb the country's international relations. If the offence is repeated by way of the press, the offender shall be punished by not less than six months' imprisonment and a fine of not less than two hundred thousand drachmas.

Article 192

It shall be an offence, punishable by up to two years' imprisonment, save where another provision lays down a harsher penalty, to provoke or incite the citizens, publicly and in any manner whatsoever, to commit acts of violence or sow discord among themselves, thus disturbing the public peace."

PROCEEDINGS BEFORE THE COMMISSION

21. Mr Ahmet Sadık applied to the Commission on 11 July 1991. He alleged violations of Article 5 § 5 1, 3 and 4 of the Convention, Article 6 § 1, Article 6 § 1, 2 and 3 taken in conjunction with Article 14, Articles 9, 10, 11 and 14, and Article 3 of Protocol No. 1.

22. On 8 July 1994 the Commission declared the application (No. 18877/91) admissible in so far as it concerned the complaints under Articles 9, 10, 11 and 14 of the Convention, while expressing the opinion that the main issue raised was the question whether there had been a violation of Article 10, and declared the remainder of the application inadmissible. In its report of 4 April 1995 (Article 31), it expressed the unanimous opinion that there had been a violation of Article 10. The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

23. In their memorial the Government argued in conclusion:

"**1.** The petition of the Applicant late Ahmet Sadık based on a complaint concerning the invoked violation of Article 10 is not transferable to his heirs and does not present a general interest; and therefore should be considered and declared inadmissible.

2. Furthermore, on a subsidiary basis, the petition should be declared inadmissible according to Article 26 of the Convention, also because the national remedies have not been exhausted, since the argument that the application of article

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1 Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions - 1996), but a copy of the Commission's report is available from the registry.

192 of the Greek Penal Code in the concrete case constituted a violation of the freedom of expression of the Applicant has not been invoked before the national courts.

3. Finally, also on a subsidiary basis, considering all the relevant circumstances, the conviction of the late Applicant was provided by law, pursuing a legitimate aim, was necessary in a democratic society and proportionate therefore it did not constitute a violation of Article 10 of the Convention.

4. Also on a last subsidiary basis, if the Court would find that Greece is in breach of Article 10, the Greek Government submits that in view of Article 50 of the Convention the only amount which could be claimed by the heirs of the late Applicant would be the proven real and necessary disbursements, which they incurred during the proceedings before the Commission and the Court".

AS TO THE LAW

I. PRELIMINARY OBSERVATION

24. The Government contested the right of the applicant's widow and children to continue before the Court the proceedings he had instituted.

Relying on the Commission's case-law on the question, they submitted that the complaint relating to a violation of Article 10 was so closely and directly bound up with the deceased applicant's person that his heirs could not assert any specific legal interest which would anable them to continue the rodeedings in his stead. Moreover, the applicant's case was an isolated one which raised no question of general interest.

25. The lawyer of the deceased applicant's heirs invoked, in addition to his clients pecuniary interest, their personal interest in continuing the proceedings, if only in order to be informed whether they were 'members of the Greek minority of Muslim faith" or simply "members of the Turkish community".

In addition, he maintained that the interest of the present proceedings went well beyond the individual case of Mr Ahmet Sadık since they concerned the name and cultural identity of an entire minority. In support of that argument he referred to the very terms of the Government's application bringing the case before the Court, in which they had declared : "the case concerns important national issues and also raises complex legal problems, since it affects the Muslim minority in Western Thrace.

26. The Court notes, firstly, that the applicant was convicted by the Greek courts of disturbing, through his writings, the public peace and the peace of the citizens of Western Thrace. Without prejudice to its decision on the objection relating to non-exhaustion of domestic remedies, the Court considers that Mr Ahmet Sadık's widow and

children have a legitimate moral interest in obtaining a ruling that his conviction infringed the right to freedom of expression which he relied on beore the Convention institutions.

Furthermore, it notes that the applicant was sentenced to fifteen months imprisonment, commutable to a fine of GRD 1.000 per day of detention, which sum he paid. Like the Delegate of the Commission, the Court considers that the applicant's heirs also have a definite pecuniary interest under Article 50 of the Convention.

The Court accordingly finds that Mrs Işık Ahmet and her two children, Mr Levent Ahmet and Miss Funda Ahmet, have standing to continue the present proceedings in the applicant's stead.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

27. The Government submitted that Mr Ahmet Sadık had not exhausted domestic remedies, not having raised before the national court's, even in substance, the complaint relating to a violation of Article 10.

They asserted that neither the applicant nor his lawyers had alleged at any stage of the proceedings in the Rodopi Criminal Court and the Patras Court of Appeal - even indirectly or in abstract terms - any infringement whatsoever of the right to freedom of expression. The only reason why, in the Court of Cassation, the applicant had asserted his right to use the term "Turkish" to designate the Muslims of Western Thrace had been to prove that the act he had committed was not sufficient to make out the objective element of the offence defined in Article 192 of the Criminal Code. In addition, the Court of Cassation could not consider of its own motion the possibility of an infrigement of the right to freedom of expression. While it fell to that court to review the constitutionality of a legislative provision *proprio motu*, it could not - in the absence of an express application to this effect by the parties - consider whether the provision concerned had been applied to the facts of the case before it in a manner compatible with the constitution.

28. The applicant acknowledged that he had not explicitly referred to Article 10 of the Convention in the Greek courts, but asserted that in his appeal on points of law he had nevertheless laid stress on the vagueness of the charges preferred against him and the unclear formulation of the reasons for the Court of Appeal's judgment. Even supposing that he had not invoked his right to freedom of expression in substance in the Greek courts, judges were under a duty to determine of their own motion where the dividing line between the right to declare one's ethnic origin and the offence of inciting disorder should be drawn. However, no judicial authority in Greece was disposed to affirm that a

member of the "Turkish minority" enjoyed such a right. Be that as it may, the judge in a criminal case had a duty to take into consideration of his own motion, especially when contemplating imposing a heavy sentence on the defendant, the freedoms guaranteed by the Constitution and the Convention, which in Greece took precedence over legislation.

29. In its decision on the admissibility of the application the Commission dismissed the objection on the ground that the applicant had in substance raised before the Court of Casation a complaint relating to a breach of Article 10. In addition, the Delegate of the Commission argued before the Court that it was sufficient, for the purposes of exhaustion, for the applicant to have challenged the State's actions in the domestic courts and thus afforded them the oppurtunity to put right the alleged violation. Referring to the case-law of the International Court of Justice and the generally recognised rules of international law (Article 36 of the Convention), he maintained that it was not necessary for the domestic remedy to be based on the same ground as the international remedy.

30. The Court does not accept that argument. It reiterates that the supervision machinery set up by the Convention is subsidiary to the national human rights protection systems. That principle is reflected in the rule set forth in Article 26, which dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system" (see the De Wilde, Coms and Versyp v. Belgium judgment of 18 June 1971, Series A no. 12, p. 29, § 50).

In its judgment of 16 September 1996 in the case of Akdivar v. Turkey, the Court emphasised that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it recognised that Article 26 must be applied with some degree of flexibility and without excessive formalism and that it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge decisions already given. It normally requires also that the complaints intended to be made subsquently at Strasbourg should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see the Cardot v. France judgment of 19 March 1991, Series A no. 200, p. 13, § 34).

31. The Court notes that the Convention forms an integral part of the Greek legal system, where it takes precedence over every contrary provision of the law (Article 28 § 1 of the Constitution - see paragraph 19 above). It further notes that Article 10 of the Convention is directly applicable, Mr Ahmet Sadık could therefore have relied on that provision in the Greek courts and complained of a violation threof in his case.

32. At no time, however, did the applicant rely on Article 10 of the Convention, or on arguments to the same or like effect based on domestic law, in the courts dealing with his case.

In that respect there is a clear distinction between the present case and the cases of Castells v. Spain and Guzzardi v. Italy. Mr Castells relied in the Supreme Court and the Constitutional Court on the relevant article of the Spanish Constitution, which guarantees the right to freedom of expression (see the judgment of 23 April 1992, Series A no. 236, p. 20, § 31), and although Mr Guzzardi did not rely in express terms on Article 5 of the Convention he did mention the Convention as a whole in the general context of living conditions on the island where he was required to live under a compulsory residence order (see the judgment of 6 November 1980, Series A no. 39, p. 27, § 72).

33. In both the Rodopi Criminal Court and the Patras Court of Appeal the applicant, who, in his appeal on points of law, put forward arguments which were based solely on domestic law and did not raise the matter of freedom of expression (see paragraph 17 above), meraly defended himself against the charge of disturbing the peace contrary to Article 192 of the Criminal Code.

Even if the Greek courts were able, or even obliged, to examine the case of their own motion under the Convention, this cannot have dispensed the applicant from relying on the Convention in those courts or from advancing arguments to the same or like effect before them, thus drawing their attention to the problem he intended to submit subsequently, if need be to the institutions responsible for European supervision (see the Van Oosterwijck v. Belgium judgment of 6 November 1980, Series A no. 40, p. 19, § 39). That applies where, as here, a charge of disturbing the peace may be challenged - and indeed in the present case was challenged by Mr Ahmet Sadık (see paragraphs 10, 11, 15, 17 and 18 above) - on the basis of arguments which do not raise the matter of freedom of expression.

34. Accordingly, domestic remedies were not exhausted in the instant case.

FOR THESE REASONS THE COURT

1. Holds unanimously that the applicant's heirs have standing to continue the proceedings in the present case in his stead

2. Holds by six votes to three that as domestic remedies have not been exhausted it cannot consider the merits of the case.

Done in English and in French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 November 1996.

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment :

(a) concurring opinion of Mr Valticos,

(b) partly dissenting opinion of Mr Martens, joined by Mr Foighel

(c) partly dissenting opinion of Mr Morenilla.

CONCURRING OPINION OF JUDGE VALTICOS

I consider it needful to sound a warning concerning the scope of the exhaustion-of-domestic-remendies principle, which, under the terms of Article 26 of the Convention, must be construed "according to the generally recognised rules of international law". That means that the condition concerned cannot be minimised as is sometimes envisaged.

Obviously, it has often been pointed out that the Court's case-law has evolved considerably since the Convention came into force.

In the already long period which has elapsed since the Court was set up, ideas and needs in European countries have evolved - indeed in many ways have undergone profound changes - and the Court had a duty to reflect that intellectual and moral evolution, as far as possible. That was all one more necessary - and possible - because the *substantive* provisions of the Convention are often - but not always - drafted in a general way which permits such evolution, sometimes even to a radical degree. There are numerous examples of this and to dwell on the point would be to push against a half-open door.

But there is one important distinction to be made. While this evolution is normal - subject to the necessary precautions being taken - with regard to the Convention's substantive provisions, it can only be exceptional and limited with regard to the procedural provisions such as the fundamental rule of international law that domestic remedies must be exhausted. The Court has already made this rule more flexible by not requiring applicants to invoke an actual provision of the Convention in the domestic courts, only its substance, before a case can validly be referred co the Court. To seek to abolish this condition, or reduce it almost to nothing, with a view to a more complete protection of human rights, would certainly be prompted by a very laudable concern for justice but a very cavalier approach to the rules of international law.

I therefore wish to emphasise the limits it would be dangerous to cross in this respect. The Court's present judgment respects those limits.

PARTLY DISSENTING OPINION OF JUDGE MARTENS, JOINED BY JUDGE FOIGHEL

I. INTRODUCTION

1. One of the essential arguments against the Court's doctrine that it has jurisdiction to examine afresh preliminary objections already rejected by the Commission is that this doctrine has rather anpalatable effects : it makes it possible. after long years of Strasbourg prodeedings. for very important issues to remain undecided[1].

The present case well illustrates that point. It concerns the extent of the rights of ethnic minorities in a democratic society as well as the confines of the right to freedom of expression of campaigning politicians. Thus. the issues at stake were of considerable legal imprortance for the community of the Council of Europe at large. They were. moreover. highly emotional questions for the applicant and his fellow-members of the minority concerned. The Strasbourg proceedings on those issues started in July 1991. Since then the applicant himself has died and now. more than five years after their commencement (and nearly two years after the Commission's report in their favour) the Court of Human Rights drily tells his widow and the children that those issues will not be decided for no other reason than that the applicant's lawyer in the domestic proceedings did not know his job.

2. I have voted for dismissal of the Government's preliminary objection.

My primary argument for so voting was that I maintain, as a matter of principle, that the Court should leave it to the Commission to determine whether such pleas are founded or not. In the alternative I have done so for the reasons explained in paragraphs 4-14 below.

3. Had there been a majority for dismissal of the preliminary objection I would have voted for finding a violation. I think the case of such importance that in paragraphs 16-23 below I will also briefly outline my arguments therefor.

II. EXHAUSTION OF DOMESTIC REMEDIES

A. General considerations

4. In §§ 65-69 of its judgment of 16 September 1996 in the case of Akdivar and Others v. Turkey (*Reports of Judgments and Decisions for 1996....)* the Court has

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1 See § 4.2 of my dissenting opinion in the case of Brozicek v. Italy (Series A no. 167, pp. 23 *et seq.*). My opposition to this doctrine - which has gradually won some support within the Court - was spurned in the Court's judgment of 28 June 1992 in the case of B. V. France (Series A. no. 232-C). The present case has again confirmed my conviction that the doctrine is essentially wrong.

summarised its general doctrine on the rule of exhaustion of domestic remedies referred to in Article 26 of the Convention. Not only summarised, but also refined. Refined in the sense that - in line with international tendencies in this area[2] - it has stressed more explicitly than in previous judgments the importance of making 'due allowance' for the fact that the rule is being applied "in the context of machinery for the protection of human rights". Notably § 68 in fine of the Akdivar judgment shows that the Court has now essentially opted for what my friend Judge Morenilla has aptly called "a flexible *pro victima* interpretation of this Article"[3].

5. Indeed one wonders whether under present-day conditions the rule still quite fits into the system for the protection of human rights as it has developed during the last decades. After all, the rule dates back to the second half of the 19th century, when the individual was not yet recognised as a subject of international law, and its classical function was, then, to protect state sovereignty against excessive encroachment by State-to-State claims on behalf of private individuals whose rights had allegedly been violated.

It would have been consistent with the essential changes which have occurred since then in the legal status of the individual under international law, especially where international law allows a victim of an alleged violation of human rights to seek redress on his own behalf, if in such cases the rule had been abandonned. Yet that has not been done.

It would, therefore, seem to me that the rule is, essentially, a relic of the original reluctance of certain States to set up an international court with the task of ensuring the fulfilment of their engagements under the Convention. In this context I refer to the Court's analysis in its De Wilde, Ooms and Versyp v. Belgium judgment[5]. Present-day conditions, however, have changed also in this respect : all Member States have long since accepted the Court's jurisdiction, and - it may be added - *con amore*, even if, as is only natural, they sometimes resent its decisions. This salutary evolution has greatly enhanced the protection of human rights in Europe.

Against this background I find it open to doubt whether the rule of exhaustion of domestic remedies still quite fits into the system because the rule thwarts the Court's

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2 See Jost Delbruck in : Jekewitz and Others, *Des Menschen Recht zwischen Freiheit und Verantwortung* (Festscherift Josef Partschi, pp. 225 *et seq*.

3 See his dissenting opinion in the case of Cardot v. France (Series A no. 200, p. 241).

4 See the contribution of Delbruck referred to in note 2; see also Gurdip Singh in z.S. Venxataramiah (editor), *Human Rights in the Changing World* (1988), p. 361.

5 See § 50 of its judgment of 18 June 1971 (Series A no. 12, p. 29) where it said that "the rule on the exhaustion of domestic remedies delimits the area within which the Contracting States have agreed to answer for wrongs alleged against them before the Organs of the Convention" and added that "the Court has to ensure the observance of the provisions relating thereto just as of the individual rights and freedoms guaranteed by the Convention and its protocols", thereby suggesting that the defence plea was as important to States as fundamental rights to citizens. In § 3.4 of my dissenting opinion referred to in note 1 I have already critically commented on this passege.

power to do justice in those cases of violation of human rights where the victim has not enjoyed proper legal assistance in the domestic sphere.

6. Admittedly, the Court has sought to minimize this wretched effect of the rule by accepting that its requirments are met where the complaint raised before the Convention organs has been pleaded before the national courts "at least in substance".

That is, however, but a poor palliative. Firstly, because the notion "in substance" is so vague as to leave ample room for differences of opinion, as is illustrated by the Cardot case as well as by the present case. Secondly, because it does not help in those cases where even the most considerate interpretation of the pleadings before the domestic courts does not allow the conclusion that there the applicant has raised "at least in substance" the complaints he now raises before the Convention organs. Yet the Court has adamently refused to go further. It notably has refused to accept that the requirements of the rule must be deemed to be met if (a) applications have been made to the appropriate domestic courts and use has been made of remedies designed to challenge decisions already given and (b) those courts were able, or even obliged, to examine the case of their own motion under the Convention[6].

7. In the Court's previous judgments arguments for this unyielding refusal are conspicuously lacking and even in the present judgment the majority, although challenged, has found nothing better than to repeat the pure *petitio principii* of § 39 of the nearly twenty-year-old Van Oosterwijck v. Belgium judgment[7].

For my part, I have never been able to imagine sound reasons for this Van Oosterwijck doctrine[8]. As I have already indicated in my dissenting opinion in the Cardot case if under domestic law courts are bound to apply the Convention *ex officio*, the applicant by taking his case to the appropriate courts and availing himself of all possible remedies in principle provides those courts with the opportunity which the domestic

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6 See the Cardot v. France judgment of 19 March 1991, Series A no. 200, p. 18, § 34, in combination with its Van Oosterwijk v. Belgium judgment of 6 November 1980, p. 19, § 39. The Commission takes the same view : see its case-law as summariesed by Amerasinghe. *Local Remedies in International Law* (Grotius Publications Limited. Cambridge 1990), p. 178. However, when the national court has considered the case ex officio, the Commission takes the view that the requirements of the rule are met (see its decision of 10 May 1979, Application No. 8130/78, DR 16, pp. 137 et seq.).

7 See § 38 of the Court's judgment.

8 Nor did I find such reasons in the sparse observations of learned authors.
Flauss, who, in RUDH 1993, pp. 529 *et seq*. has written a paper "La condition de l'épuisement des griefs au sens de l'article 26 CEDH les enseignements de l'arret Cardot", merely contends that the interpretation of the rule should not be too favorable to individuals, but utterly fails to explain why an interpretation which prevents a (possible) victim of a violation of fundamental rights being denied justice on no other ground than that he or she is also a victim of his or her domestic counsel's incompetence, is too favourable to the individual. I would rather say that it is too favourable to the State.
Geouffre de la Pradelle v. France judgment of 16 December 1992 merely claims that another interpretation than that of the Court 'aboutirait à vider de sa signification cette condition essentielle de recevabilité".

remedies rule is designed to afford, namely "the opportunity of preventing or putting right the violations alleged"[9].

8. Under these circumstances it is scarcely surprising that learned authors have time and again suggested that the real grounds for such decisions as the Van Oosterwijck and the Cardot judgments are to be sought elsewhere, namely in the Court's wish to avoid a decision on the merits[10]. Similar comments may be expected in the present case. I find that rather unfortunate and an extra argument against the Court's rigid attitude in these metters.

9. For my part I take the view that if under domestic law courts are bound or able to apply the Convention *ex officio*, the applicant by taking his case to the appropriate courts and availing himself of all possible remedies has in principle met the requirements of Article 26. I think that this squares with the rationale of the domestic remedies rule and apart from that I can see various other good reasons for accepting this view, while the only argument that I can see *against* (see paragraph 13 below) can be taken care of otherwise than by following the impugned doctrine.

10. The reasons for the first proposition - which concerns the case where under national law domestic courts are *bound* to apply the Convention *ex officio*- have been stated already in paragraph 7 above.

11. As to the second proposition - which concerns the case where *under national law* domestic courts are able (but not obliged) to apply the Convention *ex officio* - I agree with Ganshof van der Meersch[11], who argued - as long ago as 1966- that the system of the Convention implied that those courts were then under an obligation to apply the Convention *ex officio*.

I recall, firstly, that the Court has consistently stressed - and in § 35 of the present judgment again stresses-*the subsidiary* character of the machinery established by the Convention the task of *securing* the enjoyment of the rights and freedoms it enshrines falls in the first place to the contracting States. Under the fundamental principle of rule of law which Article 6 of the Convention is intended to enshrine it is self-evident that the *domestic courts*[12] of these States are - to the extent of their powers - bound to see to it that this obligation to safeguard human rights is honoured. This is confirmed by the Court's repeatedly drawing attention to the importance of incorporating the Convention into the domestic legal order and of treating its rules as directly applicable, as the Court said in § 66 of its Eckle v. Germany judgment of 15 July 1982 (Series A no. 51, p. 31),

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9 Series A no. 200, p. 22, § 2.

10 See, for example, Flauss in his article referred to in note 6, RUDH 1991, P. 533 *et seq*.

11 See W.J. Ganshof van der Meersch, *Organistations Européennes I* (Editions Sirey, Paris, 1961), pp. 374-375.

12 See instead of all other possible references the Court's Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, pp. 25-26, § 55.

in States where these conditions are fulfilled the subsidiary character of the conventional machinery of protection is 'all the more pronounced', undoubtedly since in such states domestic courts are in the best position to see to it that fundamental rights are secured.

I recall, secondly, that the Court has recently, in § 93 of its (Preliminary Objections) judgment of 23 March 1995 in the case of Loizidou v. Turkey (Series A no. 310, p. 31) stressed "the special character of the Convention as an instrument of European public order (*ordre public*)[13].

It follows that under the Convention the same rule applies as has been accepted by the Court of Justice of the European Communities with respect to Community law1[14], in those cases where domestic courts, under their national law, are in a position to apply the Convention *ex officio*, those courts must do so under the Convention. That is an obvious demand of the effectiveness both of the Convention as a constitutional instrument of European public order *(ordre public)* and of the "national human right systems".

12. I do not suggest that where national courts have neglected their duties in this respect, a complaint under Article 25 should lead to the finding of a violation. What I do suggest, however, is that in a case where an applicant has taken his case to the appropriate domestic courts and where, under domestic law, those courts were - either under their national law or, as indicated in paragraph 11 above, under the Convention - bound to apply the Convention even when the applicant failed to invoke it, in the Strasbourg prodeedings the respondent State should not be permitted to rely on the non-exhaustion of domestic remedies rule. Admittedly, in such cases the applicant's lawyer was in default, but so were the domestic courts and under a true *pro victima* interpretation of Article 26 the latter default should prevail : I do not see why the principle of *nemo auditur propriam turpitudinem allegans* should not apply to States.

13. As I said before, I can see but one objection *against* this liberal, *pro victima* interpretatiton of the rule of non-exhaustion in the context of the protection of human rights. This interpretation might allow an applicant to raise a complaint before the Convention organs which he deliberately omitted to mention before the domestic courts of the respondent State in order to be able to demonstrate in Strasbourg how badly human rights are protected in that State.

One can, of course, not exclude that possibility, especially in politically sensitive areas. However, one may safely assume that, as a rule, not relying on the Convention will not be the result of *dolus malus* but of sheer ignorance on the part of the applicant and of reprehensible incompetence on the part of his domestic lawyers. Moreover, appli-

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13 See also § 75 of that judgment, where the Court even described the Convention as a constitutional instrument of European public order (*ordre public)*".

14 See its judgment of 14 December 1995 in the joint cases C-130/93 and C-431/93, Jurisprudence 1995 I pp. 4705 et seq.

cants too must be presumed to be acting in good faith. The onus of alleging and establishing that the applicant deliberately refrained from relying on the Convention should therefore be on the State invoking the rule in a case where (a) the applicant has taken his case to the appropriate domestic courts, (b) the applicant before those courts has not even in substance relied on the Convention and (c) those courts were, nevertheless, bound to apply the Convention. Unless that onus is discharged in such cases the plea of non-exhaustion should be dismissed.

14. There is one more remark to be made on the onus in the present context. In my opinion the distribution of proof is such that it is for the applicant to satisty the Court that in principle, the domestic courts were in a position to apply the Convention *ex officio*, whilst-once this burden of proof has been discharged - it is incumbent on the Government which nevertheless maintains its objection to establish that, due to the special circumstances obtaining in the concrete case, the domestic courts were not in a position to base their judgement on such *ex officio* application of the Convention.

B. Application to the present case

15. Applying the above general considerations to the case of Ahmet Sadık I note in the first place that the Convention forms an integral part of the Greek legal system, where it takes precedence over every contrary provision of the law[15] and that, moreover, Article 10 is directly applicable under Greek law. Consequently, my starting point is that the Greek Supreme Court, when dealing with the applicant's appeal against his conviction by the Patras Court of Appeal, in principle could and should have applied Article 10- as interpreted in the case- law of the European Court of Human Rights - *ex officio* (See paragraph 11 above).

I note in the second place that, even supposing that the Greek Sureme Court in criminal cases lacks the power to quash on its own motion, this does not necessarily imply that it cannot *ex officio* supplement legal arguments for grievances put forward by the appellant. In this context I recall that the grievances raised by the applicant were very broad: he maintained, *inter alia*, that the prosecution case should have been dismised and that the Patras Court of Appeal had not given sufficient reasons for its decision[16]. It follows from the above that in assessing whether these grievances justified quashing the Court of Appeal's judgment the Supreme Court should not have restricted itself to merely examining the arguments, mainly based on domestic law and practice, put forward by the applicant's lawyer in support of those grievances, but should have examined moreover whether these grievances might justify quashing when based on the argument that taking into account the applicant's rights under Article 10 of the Convention the prosecu-

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15 See § 36 of the Court's judgment. See also : Alkema, Fellekom, Drzemczawski and Schokkenbroek (editors). *The Domestic Implementation of the European Convention on Human Rights in Eastern and Western Europe*, Proceedings of the Seminar held in Leiden, 24-36 October 1991, pp. 26 *et seq*.

16 See § 17 of the Court's judgment.

tion case should have been dismissed or the Patras Court of Appeal should have given better reasons for its decision. Thus supplementing the arguments would have meant, in the light of the case-law of the European Court of Human Rights, that the Greek Supreme Court should also have assessed *ex officio* whether the applicant's conviction and sentence were proportionate. It should have scrutinized the lower judgments in the light of Article 10, that is should have finally examined whether their findings of fact and their reasoning is sufficiently solid to justify convincingly the interference with the aplicant's freedom of expression.

I appreciate that the Greek Supreme Court has competence to deal with questions of law only, but I am not satisfied that - as the government have suggested - the controlling and balancing exercise involved exceeds the powers of a supreme court having competence with regard to questions of law only. Having now served for two decades as a member of such a court myself, I feel confident to say that both that scrutiny and that balancing exercise are, essentially, a strictly legal assessment of the facts established by the lower courts. Thus, the government have failed to prove that the Greek Supreme Court could not do what it should have done (see paragraph 14 above *in fine*).

In sum, the applicant's appeal provided the Supreme Court with the opportunity required under Article 26 of the Convention of putting right a possible violation of Article 10. The Greek Government's exception therefore fails.

III. THE MERITS

16. It is obvious that the applicant's conviction and sentence constituted an interference with his rights under Article 10 § 1 of the Convention and that this interference was justified under § 2 to the extent that it met the requirement implied in the words "prescribed by law" as well as that of serving a legitimate aim within the meaning of this paragraph. The only question to be answered is, therefore, whether the applicant's conviction and sentence were proportionate, whether they were necessary in a democratic society.

17. There is no doubt that use of speech "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action" may be proscribed. The Greek courts held that the applicant had deliberately used such speech in a pamphlet of October 1989 and therefore convicted him[17]. It is of importance to note that this conviction was *exclusively* based on the applicant's repeatedly referring to the Muslim minority in Western Thrace as *"Turkish"*, the remainder of the contents of the pamphlet was not taken into consideration. Thus, what is in issue is only whether, in the relevant circumstances of the case, the mere fact of repeatedly referring to the Muslim minority as "Turkish" justified the applicant's conviction and sentence.

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17 See §§ 10 and 15 of the Court's judgment. The Patras Court of Appeal held *inter alia* that "the accused deliberately sought to instil and implant (...) the seeds of discord, hatred and hostility towards the Christian Greeks who lived in the same region".

18. It is a significant feature of the present case that the impugned terminology was used in the context of a political debate by a politician campaigning for election. Moreover, and above all, it was used by a politician belonging to a specific minority who sought to win votes by stressing his leadership of that minority and by proclaiming his conviction that this minority was to be characterized not only by its religion but also by its ethnic origin, that is by its being Turkish.

19. When criminal provisions purporting to prevent disturbance of public peace are relied on against a politician who is not only an opponent and a critic of the Government but also a member of a minority, the European Court of Human Rights should apply its highest standards of scrutiny in order to ascertain whether these provisions have been abused, as they easily may be and often are.

There is all the more reason for extreme vigilance because the criticism concerned the Government's attitude towards the minority in question and more especially its policy of denying that the minority is not only a religious but also an ethnic one.

In such cases there is no room for relying on the judgments of the national courts nor for a margin of appreciation.

20. Against this background the decisive question is whether the Government have convincingly established, firstly, that the mere fact that the leader of a minority, in a political pamphlet which was evidently exclusively meant for that minority, repeatedly designated that minority as "Turkish" was indeed provocative of discord between majority and minority and of acts of violence between the two groups, and secondly, that this use of the impugned designation was attributable to seditious intention.

21. I have not been satisfied that this question may be answered in the affirmative.

The picture which arises both from some of the statements of the witnesses for the prosecution and from the comments in the Government's memorial - which, incidentally, go much further than those statements - is one of a long-standing tension between majority and minority, a tension for which presumably both sides, but certainly also the Greek authorities bear responsibility. It has not even been made plausible, let alone convincingly established that this tension exclusively or mainly resulted from the mere use of the impugned designation. There is little or no evidence for the Government's thesis on the long-range policy of secession which they see behind the impugned use of the designation "Turkish". Nor is there a scrap of evidence for the assertion that there is a direct or even an indirect causal link between the impugned terminology in the pamphlet of October 1989 and the violence and disorder of 20 January 1990. If the latter incidents are at all attributable to a reaction by the minority to earlier events[18] it would be more plausible to link them to the petty and unwise endeavours of the authorities to suppress the self-designation *"Turkish"*.

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18 In its report refferred to in 5 of the Court's judgment Helsinki Watch suggests that the incidents were rather the work of the majority.

22. In sum, I have not been convinced that the applicant's conviction and sentence were a justifiable response to truly reprehensible use of seditious language. It follows that I have been convinced neither that the applicant's conviction and sentence were necessary in a democratic society.

23. For these reasons I find that there has been a violation.

PARTLY DISSENTING OPINION OF JUDGE MORENILLA

With regret, I part company with the majority as regards its conclusion that the Court cannot deal with the merits of the applicant's complaints on account of his failure to exhaust domestic remedies. I refer once more to my dissenting opinion annexed to the Cardot v. France judgment of 19 March 1991 (Series A no. 200, p. 23), which the majority cite in paragraph 35 *in fine*, where I set out my reasons for opposing a fresh examination by the Court of a plea of inadmissibility that had already been submitted to the Commission and dismissed in the Commission's decision on the admissibility of the application in accordance with Article 27 § 3 of the Convention (paragraph 34 of the judgment).

I consider too that in the present case Mr Ahmet Sadık invoked his right to freedom of expression in substance in the Greek criminal courts on account of the very nature of the offence of disturbing the public peace that he was accused of and for which he was sentenced to eighteen months' imprisonment, in particular for contravening Article 192 of the Criminal Code through the communiqués he had published during the elections as a candidate of the Güven political party representing part of the Muslim population of Western Thrace.

In these accusations and in his conviction the question of the freedom of expression of the candidates for election to the Greek parliament, even if it was not expressly raised, constituted the substance of the impugned criminal offences and the proceedings brought in the Greek criminal courts which were capable of remedying the applicant's complaints. Article 27 of the Convention requires a flexible interpretation without excessive regard for matters of form (see the Guzzardi v. Italy judgment of 6 November 1980, Series A no. 39, p. 26, § 72), a *'pro victima'* approach in favour of admissibility in order to allow the Convention institutions to consider the alleged complaints.

Article 27 of The Convetion requires a flexible interpretation without excessive regard for matters of form (s the Guzzardi v. Italy judgment of 6 November 1980, Series A, No. 39, p. 26, §72), a *provictima* approach in favour of admissibility in order to allow the Convention institutions to consider alleged complaints.

Article 27 of the Convention requires a flexible interpretation without excessive regard for matters of form (see the Guzzardi v. Italy judgment of 6 November 1980, Series A, No 39 p. 26, § 72), a provicting approach in favour of admissibility in order to allow the Convention institutions to consider alleged complaints.