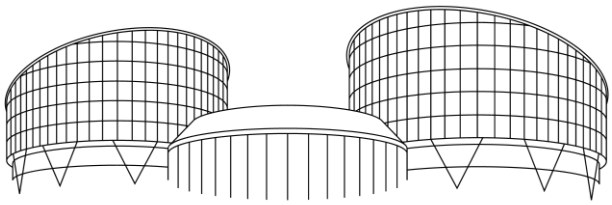

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

**CASE OF MURAT VURAL v. TURKEY**

*(Application no. 9540/07)*

JUDGMENT

STRASBOURG

21 October 2014

**FINAL**

21/01/2015

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Murat Vural v. Turkey,**

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

Guido Raimondi, *President,*
Işıl Karakaş,
András Sajó,
Nebojša Vučinić,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 16 September 2014,

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

# PROCEDURE

1. The case originated in an application (no. 9540/07) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Murat Vural ("the applicant"), on 16 February 2007.

2. The applicant was represented by Mr Hacı Ali Özhan, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that his imprisonment on account of having expressed his opinions, and his inability to vote as a convicted prisoner, had been in breach of his rights guaranteed by Article 10 of the Convention and Article 3 of Protocol No. 1.

4. On 20 September 2010 the application was communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1975 and lives in Ankara.

6. The facts of the case, as submitted by the parties and as they appear from the documents submitted by them, may be summarised as follows.

7. In the early hours of 28 April 2005 the applicant went to a primary school in the town of Sincan and poured paint on a statue of Atatürk[1] which was situated in the school's garden. On the evening of the same day, he poured paint on a statue of Atatürk in the garden of another primary school.

8. On 6 May 2005 he did the same thing in the same two primary schools.

9. On 8 July 2005 the applicant poured paint on a statue of Atatürk in Sincan town centre.

10. On 12 September 2005 the applicant went to the same statue in Sincan town centre equipped with a tin of paint, paint thinner and a ladder. As he was about to open the tin of paint he was arrested by police officers and taken to a police station where he was questioned. In a statement taken from him on the same day the applicant was reported as having told the police officers that he had carried out the above-mentioned actions because he resented Atatürk and had expressed his resentment by pouring paint on the statues.

11. On the same day the applicant was brought before a prosecutor and then a judge, who ordered his detention on remand pending the opening of criminal proceedings against him. In his statement to the prosecutor the applicant maintained that he had carried out his actions to express his "lack of affection" for Atatürk.

12. In his indictment of 15 September 2005, lodged with the Sincan Criminal Court of First Instance (hereinafter "the trial court"), the Sincan prosecutor charged the applicant with the offence of contravening the Law on Offences Committed Against Atatürk (Law no. 5816; see "Relevant Domestic Law and Practice" below).

13. In the course of the trial the applicant admitted that he had poured paint on the statues. He told the trial court that he had completed his university studies and qualified as a teacher. However, he had been unemployed for a long time because his application to work as a teacher had not been accepted by the Ministry of Education. He had carried out his offences in order to protest against the Ministry's decision.

14. On 10 October 2005 the trial court found the applicant guilty as charged. Having regard to the fact that the offence was committed in a public place and on a number of occasions, the trial court sentenced him to three years' imprisonment instead of the minimum term of imprisonment applicable under Law no. 5816, which is one year. The fact that the offence had been committed in a public place also led the trial court to increase the sentence by half in accordance with section 2 of Law no. 5816. The trial court also considered that the applicant had committed the offence on five

1. Mustafa Kemal Atatürk is the founder and the first President of the Republic of Turkey.

separate occasions, and decided to multiply the sentence by five. The applicant was thus sentenced to a total prison term of twenty-two years and six months for his above-mentioned actions.

15. The applicant appealed. In his appeal he argued that, according to the provisions of the Criminal Code, only one sentence should have been imposed on him because, regardless of the fact that he had poured paint on the statues on five occasions, he had in fact only committed one offence and not multiple offences. In support of his argument, he submitted that his five actions had been carried out within a short span of time.

16. The applicant also pointed out that, instead of imposing on him the minimum one-year prison sentence provided for in Law no. 5816 in respect of each offence, the trial court had handed down a three-year sentence because it had had regard to the number of times he had poured paint on the statues. The trial court had then gone on to rely on the frequency of his actions when multiplying the sentence by five.

17. The applicant also challenged the trial court's reliance on section 2 of Law no. 5816 when increasing his sentence by half because the offence had been committed in a public place. He drew the Court of Cassation's attention to the fact that, by their nature, statues are placed in public places.

18. The applicant added that he had carried out his actions in order to express his "lack of affection" for Atatürk. As such, he had remained within the boundaries of his right to freedom of expression, which was guaranteed by Article 10 of the Convention. Thus, although it would have been reasonable to prosecute and punish him for damaging property, he had in fact been punished for expressing his opinions.

19. On 6 April 2006 the Court of Cassation rejected the applicant's argument that he had been expressing his opinion, but quashed the trial court's judgment on the ground of, *inter alia*, that court's failure to give adequate consideration to the possibility that the five separate incidents could form only one offence and not multiple offences. The Court of Cassation considered that the applicant had carried out his actions in order to protest against the Ministry of Education's decision not to appoint him as a teacher. The case file was sent back to the trial court.

20. In its decision of 5 July 2006 the trial court agreed with the Court of Cassation's conclusion, and held that the applicant's actions had amounted to a single offence and not five offences. However, having regard, *inter alia*, to the "contradictory reasons" put forward by the applicant as justification for his actions, as well as "the effects of his actions on the public", the trial court concluded that the applicant's actions had amounted to "insults", and deemed it fit to sentence him to five years' imprisonment, which is the maximum allowed under Law no. 5816. The sentence was then increased by half because the acts had been committed in a public place. Furthermore, pursuant to Article 43 of the Criminal Code (see "Relevant Domestic Law and Practice" below), the sentence was further increased by three quarters.

The applicant was thus sentenced to a total of thirteen years, one month and fifteen days' imprisonment.

21. Furthermore, in its decision the trial court set out the restrictions under section 53 of the Criminal Code which were to be placed on the applicant on account of his conviction. Accordingly, until the execution of his sentence, the applicant was banned from, among other things, voting and taking part in elections, as well as from running associations, parties, trade unions and cooperatives (see "Relevant Domestic Law and Practice").

22. The applicant appealed and repeated his arguments under various provisions of the Convention. He maintained, in particular, that he had carried out his actions in order to express his "lack of affection" for Atatürk and had thus exercised his freedom of expression guaranteed in Article 10 of the Convention.

23. The appeal was dismissed by the Court of Cassation on 5 February 2007. No mention was made in the Court of Cassation's decision of the arguments raised by the applicant about his freedom of expression.

24. According to a document drawn up by the prosecutor on 16 April 2007 setting out the details of the applicant's prison sentence, the date of the applicant's release from prison was set as 22 October 2018, with a possibility of release on 7 June 2014 for good behaviour.

25. In the meantime, on 1 June 2005 the Law on the Execution of Prison Sentences and Other Security Measures (Law no. 5275) entered into force. This law sets out the circumstances in which prisoners can benefit from early release.

26. On 15 May 2007 the prosecutor responsible for the prison the applicant was serving his sentence in wrote to the trial court and asked for guidance in calculating the date of the applicant's possible early release. The prosecutor stated that, for offences committed before 1 June 2005, Law no. 647 was applicable and, for offences committed after that date, the new Law no. 5275 would be applicable. The applicant had carried out his actions both before and after that date.

27. On 16 May 2007 the trial court considered that the critical date was the date of the commission of the final act and thus the new law was applicable.

28. The applicant lodged an objection against that decision and argued that most of his actions had been carried out before 1 June 2005 and that therefore, when calculating his prison sentence, the old law should be taken into account. If his prison sentence were calculated in accordance with the new law, he would spend four more years in prison. That objection was rejected by the trial court on 18 June 2007 and the date of the applicant's possible release from prison was calculated in accordance with the document drawn up by the prosecutor on 16 April 2007 (see paragraph 24 above).

29. A request made by the applicant to the Ministry of Justice for his conviction to be quashed and another request to the Court of Cassation to rectify the judgment were rejected on 28 September 2007 and 28 December 2007 respectively.

30. On 11 June 2013 the applicant was released conditionally.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

31. The Law on Offences Committed Against Atatürk (Law no. 5816, entry into force 31 July 1951) provides as follows:

> "Section 1: Anyone who publicly insults the memory of Atatürk or swears at him shall be liable to imprisonment for a term of between one and three years.
>
> Anyone who demolishes, breaks, ruins or dirties a sculpture, statue, monument or the mausoleum of Atatürk, shall be liable to imprisonment for a term of between one and five years.
>
> Anyone who incites another to commit any of the above-mentioned offences shall be liable to the same punishment as the person committing the offence.
>
> Section 2: In cases where the offences mentioned in section 1 of this Law are committed by two or more persons, committed in public places or committed through the media the prison term shall be increased by half.
>
> If force is used in the commission of the offences mentioned in the second paragraph of section 1 of this Law, or an attempt is made to do so, the prison term shall be doubled.
>
> Section 3: The offences mentioned in this Law shall be prosecuted by public prosecutors of their own motion.
>
> Section 4: This Law shall enter into force on the date of its publication.
>
> Section 5: The Justice Minister shall oversee the enforcement of this Law."

32. Section 43 of the Criminal Code (Law no. 5237 of 2004), in so far as relevant, provides as follows:

> "(1) In circumstances where, in the course of the execution of a decision to commit a particular offence, an offence is committed against a person more than once and at different times, only one punishment shall be imposed [on the offender]. However, the punishment shall then be increased by between a quarter and three quarters ..."
>
> ..."

33. The relevant provisions of section 53 of the Criminal Code (Law no. 5237 of 2004) provide as follows:

> "(1) As the statutory consequence of imposition of a prison sentence for an offence committed intentionally, the [convicted] person shall be deprived of the following [rights]:
>
> a) Undertaking of permanent or temporary public duties, including membership of the Turkish National Assembly and all civil service and other duties which are offered through election or appointment by the State, city councils, town councils, village councils, or organisations controlled or supervised by them;

b) Voting, standing for election and enjoying all other political rights;

c) Exercising custodial rights as a parent; performing duties as a guardian or a trustee;

d) Chairing or auditing foundations, associations, unions, companies, cooperatives and political parties;

e) Carrying out a self-employed profession which is subject to regulation by public organisations or by chambers of commerce which have public status.

(2) The person cannot enjoy the [above-mentioned] rights until the prison term to which he or she has been sentenced as a consequence of the commission of the offence has been served.

(3) The provisions above which relate to the exercise of custodial rights as a parent and duties as a guardian or a trustee shall not be applicable to a convicted person whose prison sentence is suspended or who is conditionally released from prison. A decision may [also] be taken not to apply subsection 1 (e) above to a convict whose prison sentence is suspended.

(4) Sub-section 1 above shall not be applicable a person whose short-term prison sentence is suspended or to persons who were under the age of eighteen at the time of the commission of the offence.

(5) Where the person is sentenced for an offence committed by abusing one of the rights and powers mentioned in sub-section 1 above, a further prohibition of the enjoyment of the same right shall be imposed for a period equal to between a half and the whole length of the prison sentence ...

..."

34. For more information concerning the legislation applicable to the issue of voting in Turkey, see *Söyler v. Turkey* (no. 29411/07, §§ 12-19, 17 September 2013).

### III. RELEVANT INTERNATIONAL MATERIALS

35. A description of the relevant international materials and comparative law on the issue of voting can be found in *Scoppola v. Italy (no. 3)* [GC] (no. 126/05, §§ 40-60, 22 May 2012).

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLES 10, 17 AND 18 OF THE CONVENTION

36. Relying on Article 10 of the Convention, the applicant complained that he had been punished for having expressed his opinions. He added that the punishment imposed on him had been excessive, disproportionate to the

offence in question, and incompatible with Articles 17 and 18 of the Convention.

37. The Government contested the applicant's arguments.

38. The Court deems it appropriate to examine the complaint solely from the standpoint of Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

## A. Admissibility

39. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### *1. Applicability of Article 10 of the Convention and the existence of an interference*

40. The applicant argued that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology[2], and to criticising the Kemalist ideology itself.

41. The Government considered that defiling Atatürk's statues was considered to be an act of vandalism with the element of insulting Atatürk's memory. By virtue of the nation's deep sense of respect and adoration for Atatürk, his memory was protected by law.

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2. Kemalist ideology is the political ideology of Mustafa Kemal Atatürk, and is based on six main pillars of ideology; republicanism, nationalism, populism, secularism, statism and revolutionism.

42. In the opinion of the Government, it was not the expression of views that was punishable under the Law on Offences Committed Against Atatürk, but, rather, insulting Atatürk's memory or vandalising his statues. That law did not prevent individuals from criticising the personality or ideas of Atatürk or Kemalist policies. Vandalising Atatürk's statues was not a legitimate way of expressing views under Article 10 of the Convention.

43. Having regard to its intensity, the applicant's aggression against the statues had been qualified as vandalism and vandalism was a violent way of expressing hatred. Although the applicant had the right to express and disseminate his thoughts and opinions through speech, writing, pictures and other media without recourse to violence, he had chosen not to do so. Instead, in order to justify his acts of vandalism the applicant had sought legal protection before the national courts by invoking his right to freedom of expression. In the opinion of the Government, the applicant's unlawful actions had fallen outside the scope of freedom of expression guaranteed by Article 10 of the Convention.

44. The Court reiterates that Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204). Indeed, a review of the Court's case-law shows that Article 10 of the Convention has been held to be applicable not only to the more common forms of expression such as speeches and written texts, but also to other and less obvious media through which people sometimes choose to convey their opinions, messages, ideas and criticisms.

45. For example, Article 10 of the Convention was held to include freedom of artistic expression – notably within the scope of freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence there is an obligation on the State not to encroach unduly on the author's freedom of expression (see *Müller and Others v. Switzerland*, 24 May 1988, §§ 27 and 33, Series A no. 133). It is noteworthy that in reaching that conclusion the Court noted that Article 10 of the Convention does not specify that freedom of artistic expression comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression (*ibid.*, § 27).

46. The wearing or displaying of symbols has also been held to fall within the spectrum of forms of "expression" within the meaning of Article 10 of the Convention. For example, in its judgment in the case of *Vajnai v. Hungary* the Court accepted that the wearing of a red star in public as a symbol of the international workers' movement must be regarded as a way of expressing political views and that the display of such vestimentary symbols fell within the ambit of Article 10 of the Convention

(no. 33629/06, §§ 6 and 47, ECHR 2008; see also *Fratanoló v. Hungary*, no. 29459/10, § 24, 3 November 2011). Similarly, the Court held that the display of a symbol associated with a political movement or entity, like that of a flag, was capable of expressing identification with ideas or representing them and fell within the ambit of expression protected by Article 10 of the Convention (see *Fáber v. Hungary*, no. 40721/08, § 36, 24 July 2012).

47. The Court has held that opinions, as well as being capable of being expressed through the media of artistic work and the wearing or displaying of symbols as set out above, can also be expressed through conduct. For example, in its judgment in the case of *Steel and Others v. the United Kingdom* (23 September 1998, §§ 90 and 92, *Reports of Judgments and Decisions* 1998-VII) the Court held that taking part in a protest against a grouse shoot, during which attempts were made to obstruct and distract those taking part in the shoot, and breaking into a motorway construction site and climbing trees which were to be felled and onto some of the stationary machinery which was to be used in the construction, constituted expressions of opinion within the meaning of Article 10 of the Convention even though they had taken the form of physically impeding certain activities. In doing so it rejected the respondent Government's argument that the protest activities of the applicants had not been peaceful and that Article 10 of the Convention had thus not been applicable.

48. Similarly, in *Hashman and Harrup v. the United Kingdom* ([GC], no. 25594/94, § 28, ECHR 1999-VIII) holding a protest during which a fox hunt was disrupted by blowing a hunting horn and by engaging in hallooing was held to constitute an expression of opinion within the meaning of Article 10 of the Convention.

49. Referring to the above-mentioned judgments in the cases of *Steel and Others* and *Hashman and Harrup*, the Court reaffirmed in its decision in the case of *Lucas v. the United Kingdom* ((dec). no. 39013/02, 18 March 2003) that protests can constitute expressions of opinion within the meaning of Article 10 of the Convention. This case concerned an applicant who was arrested, detained and subsequently convicted of the offence of breach of the peace for having sat in a public road leading to a naval base in order to protest against the decision of the British Government to retain nuclear submarines.

50. In a similar vein, in its judgment in the case of *Tatár and Fáber v. Hungary* the Court considered that the public display for a short while of several items of clothing representing the "dirty laundry of the nation" amounted to a form of political expression. The Court referred to the applicants' actions as an "expressive interaction", and in rejecting the Government's argument that the impugned event had in fact constituted an assembly and thereby required scrutiny under Article 11 of the Convention, it held that the event had "constituted predominantly an expression" and had

thus fallen within the scope of Article 10 of the Convention (no. 26005/08 and 26160/08, §§ 29, 36 and 40, 12 June 2012).

51. The scope of "expression" was once again the subject matter of the Court's examination in the case of *Christian Democratic People's Party v. Moldova (no. 2)* which concerned a political party which had been prevented from holding a protest demonstration in a square because the Municipal Council had considered that during the meeting there would be calls to a war of aggression, ethnic hatred and public violence. The applicant Party's objection was rejected by the Court of Appeal, which held that the Municipal Council's decision had been justified because the leaflets disseminated by the applicant political party had contained such slogans as "Down with Voronin's totalitarian regime" and "Down with Putin's occupation regime". The Court of Appeal also recalled that during a previous demonstration organised by the applicant political party to protest against the presence of the Russian military in Transdniestria, the protesters had burned a picture of the President of the Russian Federation and a Russian flag. In its judgment the Court held that the applicant party's slogans, even if they had been accompanied by the burning of flags and pictures, were a form of expressing an opinion in respect of an issue of major public interest, namely the presence of Russian troops on the territory of Moldova (no. 25196/04, §§ 9 and 27, 2 February 2010).

52. The examples referred to above show that all means of expression are included in the ambit of Article 10 of the Convention. The Court has repeatedly stressed that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see, *inter alia*, *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V). In the same vein, it considers that an assessment of whether an impugned conduct falls within the scope of Article 10 of the Convention should not be restrictive, but inclusive.

53. Moreover, the Court has held in cases concerning freedom of the press that it is neither for the Court nor for the national courts to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists because, as stated above (see paragraph 44 above), Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see, *inter alia*, *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298). The Court considers that the same can be said for any individual who may wish to convey his or her opinion by using non-verbal and symbolic means of expression, and it thus rejects the Government's argument that "[a]lthough the applicant had the right to express and disseminate his thoughts and opinions through speech, writing, pictures and other mediums without recourse to violence, he had chosen not to do so" (see paragraph 43 above).

54. In light of its case-law the Court considers that, in deciding whether a certain act or conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question. The Court notes that the applicant was convicted for having poured paint on statues of Atatürk, which, from an objective point of view, may be seen as an expressive act. Furthermore, the Court notes that in the course of the criminal proceedings against him the applicant very clearly informed the national authorities that he had intended to express his "lack of affection" for Atatürk (see paragraphs 11, 18 and 22 above), and subsequently maintained before the Court that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology and the Kemalist ideology itself (see paragraph 40 above).

55. In this connection, regard must be had to the fact that, contrary to what was submitted by the Government, the applicant was not found guilty of vandalism, but of having insulted the memory of Atatürk (see paragraph 20 above). In fact, the national courts accepted that the applicant had carried out his actions in order to protest against the Ministry of Education's decision not to appoint him as a teacher (see paragraph 19 above).

56. In light of the foregoing the Court concludes that through his actions the applicant exercised his right to freedom of expression within the meaning of Article 10 of the Convention and that that provision is thus applicable in the present case. It also finds that the applicant's conviction, the imposition on him of a prison sentence and his disenfranchisement as a result of that conviction constituted an interference with his rights enshrined in Article 10 § 1 of the Convention.

*2. Compliance with Article 10 of the Convention*

57. The applicant complained that his actions had been severely and disproportionately penalised and his right to freedom of expression had thus been breached.

58. The Government, beyond disputing the applicability of Article 10 of the Convention, did not seek to argue that the interference had been justified within the meaning of Article 10 of the Convention.

59. Interference with an applicant's rights enshrined in Article 10 § 1 of the Convention will be found to constitute a breach of Article 10 of the Convention unless it was "prescribed by law", pursued one or more legitimate aim or aims as defined in paragraph 2 and was "necessary in a democratic society" to attain them.

60. The Court observes that the restriction on the applicant's freedom of expression was based on the Law on Offences against Atatürk. As can be seen from its relevant provisions (see paragraph 31 above), it is sufficiently clear and meets the requirements of foreseeability. The Court is therefore satisfied that the interference was prescribed by law. Moreover, it considers that it can be seen as having pursued the legitimate aim of protecting the reputation or rights of others (see *Odabaşı and Koçak v. Turkey*, no. 50959/99, § 18, 21 February 2006; see also *Dilipak and Karakaya v. Turkey*, nos. 7942/05 and 24838/05, §§ 117, 130-131, 4 March 2014). It therefore remains to be determined whether the interference complained of was "necessary in a democratic society".

61. The Court reiterates that its supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every individual. Subject to paragraph 2 of Article 10 of the Convention, 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24).

62. This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued (*ibid.*). As set forth in Article 10 of the Convention, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, *inter alia*, *Zana v. Turkey*, 25 November 1997, § 51, *Reports* 1997-VII).

63. The Court has frequently held that "necessary" implies the existence of a "pressing social need" and that the Contracting States have a certain margin of appreciation in assessing whether such a need exists, but that this goes hand in hand with a European supervision (*ibid.*).

64. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, *inter alia*, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). In this connection, the Court reiterates that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference (see, *inter alia*, *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 66, ECHR 1999-IV).

65. The Court is aware that Atatürk, founder of the Republic of Turkey, is an iconic figure in modern Turkey (*Odabaşı and Koçak*, cited above, § 23), and considers that the Parliament chose to criminalise certain conduct which it must have considered would be insulting to Atatürk's memory and damaging to the sentiments of Turkish society.

66. Nevertheless, the Court is struck by the extreme severity of the penalty foreseen in domestic law and imposed on the applicant, that is over thirteen years of imprisonment. It also notes that as a result of that conviction the applicant has been unable to vote for over eleven years. In principle, the Court considers that peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence (see, *mutatis mutandis*, *Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, § 43, 17 May 2011). While in the present case, the applicant's acts involved a physical attack on property, the Court does not consider that the acts were of a gravity justifying a custodial sentence as provided for by the Law on Offences against Atatürk.

67. Thus, having regard to the extreme harshness of the punishment imposed on the applicant, the Court deems it unnecessary to examine whether the reasons adduced for convicting and sentencing the applicant were sufficient to justify the interference with his right to freedom of expression (see *Başkaya and Okçuoğlu*, cited above, § 65). Nor does it deem it necessary to examine whether the applicant's expression of his resentment towards the figure of Atatürk or his criticism of Kemalist ideology amounted to an "insult", or whether the domestic authorities had any regard to the applicant's freedom of expression, which he had brought to their attention on a number of occasions (see paragraphs 18 and 20 above). It considers that no reasoning can be sufficient to justify the imposition of such a severe punishment for the actions in question.

68. In the light of the foregoing, the Court concludes that the penalties imposed on the applicant were grossly disproportionate to the legitimate aim pursued and were therefore not "necessary in a democratic society". There has accordingly been a violation of Article 10 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION

69. Relying on Article 3 of Protocol No. 1 to the Convention the applicant complained about the ban which had been imposed on him by the domestic courts and which prevents him from voting. Article 3 of Protocol No. 1 to the Convention reads as follows:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

70. The Government contested that argument.

### A. Admissibility

71. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### B. Merits

72. The applicant complained that his conviction had not only resulted in his imprisonment, but had also prevented him from, *inter alia*, voting.

73. The Government acknowledged that Article 3 of Protocol No. 1 guaranteed individual rights, including the right to vote and to stand for election, and did not contest that the applicant's right to vote had been restricted in the present case.

74. The Government referred to the Explanatory Report of the Criminal Code where the rationale behind section 53 of the Criminal Code is set out (see *Söyler*, cited above, § 17), and submitted that the legitimate aim of the restriction was the applicant's rehabilitation. They maintained that the restriction on the right to vote in Turkey was not a "blanket ban" because the applicable legislation limited the scope of the restriction in accordance with the nature of the offence. Referring to the judgment in the case of *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX), the Government argued that, unlike the situation in the United Kingdom, the Turkish legislation restricting the right to vote was only applicable to persons who had committed offences intentionally. In the United Kingdom the legislation was applicable to all convicted prisoners detained in prisons, irrespective of the length of their sentence, the nature or gravity of the offence, and their individual circumstances.

75. In Turkey the constitutional provisions concerning the issue of prisoners' voting rights had undergone two amendments in 1995 and 2001. In 1995 the Constitution had been amended to exclude remand prisoners from the scope of the restriction because disenfranchising a person detained in prison pending the outcome of criminal proceedings against him was considered incompatible with the principle of presumption of innocence. In the 2001 amendment, persons convicted of offences committed involuntarily had been excluded from the restrictions on voting. As it stood today, the national legislation was applicable only in respect of offences committed intentionally. In the opinion of the Government, offences committed intentionally were "stronger" in nature as they included the element of "intention".

76. The Court points out that the rights guaranteed by Article 3 of Protocol No. 1 to the Convention are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law; a general, automatic and indiscriminate restriction on the right to vote applied to all convicted prisoners serving sentences is incompatible with that Article (see *Hirst (no. 2)* [GC], cited above, §§ 58 and 82). These principles were subsequently reaffirmed by the Grand Chamber in the case of *Scoppola (no. 3)* (cited above, §§ 82-84, 96, 99 and 101-102). The Court also reiterates that Article 3 of Protocol No. 1 applies only to the election of the "legislature" (see *Paksas v. Lithuania* [GC], no. 34932/04, § 71, ECHR 2011 (extracts)).

77. The Court observes that the applicant's conviction became final on 5 February 2007 and he was released from prison on licence on 11 June 2013. During that time he was not allowed to vote. Furthermore, in accordance with the applicable legislation, his disenfranchisement did not end when he was conditionally released from prison on 11 June 2013, but will continue until the date initially foreseen for his release, 22 October 2018 (see paragraph 24 above). Thus, between 5 February 2007 and 22 October 2018, that is, for a period of over eleven years, the applicant has been and will be unable to vote. The Court observes that two parliamentary elections were already held between 5 February 2007 and the date of the examination by the Court - on 22 July 2007 and 12 June 2011 - and the applicant was unable to vote in either of them.

78. In light of the above, the Court concludes that the applicant was directly affected by the measure foreseen in the national legislation which has already prevented him from voting on two occasions in the parliamentary elections.

79. The Court has already found it established that in Turkey disenfranchisement is an automatic consequence derived from the statute and that it is indiscriminate in its application in that it does not take into account the nature or gravity of the offence, the length of the prison sentence – leaving aside suspended sentences shorter than one year (see paragraph 33 above) – or the individual circumstances of those convicted. It has noted moreover that the Turkish legislation contains no express provisions categorising or specifying offences for which disenfranchisement is foreseen and that the automatic and indiscriminate application of this harsh measure in Turkey regarding a vitally important Convention right does not fall within any acceptable margin of appreciation (see *Söyler*, cited above, §§ 36-47).

80. Nothing in the present case allows the Court to reach a different conclusion. In the light of the above, the Court concludes that there has been a violation of Article 3 of Protocol No. 1 to the Convention on account of the applicant's disenfranchisement.

## III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

81. The applicant complained that, by imposing on him the maximum prison sentence applicable under domestic law and calculating his prison sentence on the basis of a new law (Law no. 5275), his rights under Articles 5, 6 and 7 of the Convention had been breached. The applicant further complained that Law no. 5816 was incompatible with Article 14 of the Convention because it gives the judge too wide a discretion to choose a prison sentence of between one year and five years. As a result, different courts handed down different sentences for the same offence. Finally, relying on Article 11 of the Convention, the applicant complained about the ban which was imposed on him by the domestic courts and which prevented him not only from voting and taking part in elections, but also from running associations, parties, trade unions and cooperatives.

82. Having regard to its conclusions under Article 10 of the Convention and Article 3 of Protocol No. 1 (see paragraphs 68 and 80 above), the Court considers it unnecessary to examine the admissibility and merits of these complaints.

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. 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."

### A. Damage

84. The applicant claimed 60,000 euros (EUR) in respect of pecuniary damage and EUR 65,000 in respect of non-pecuniary damage. In calculating his claim for pecuniary damage the applicant relied on the minimum wage and multiplied it by the total number of months he was sentenced to serve in prison.

85. The Government argued that the applicant's claims were excessive and unsupported by evidence.

86. Having regard to the applicant's failure to submit to the Court any documents showing his employment status, income and loss of income, the Court rejects the applicant's claim for pecuniary damage. On the other hand, it awards the applicant EUR 26,000 in respect of non-pecuniary damage.

### B. Costs and expenses

87. The applicant also claimed EUR 50,000 for the costs and expenses incurred before the domestic courts and the Court.

88. The Government considered the claim for costs and expenses to be unsupported by any documentation.

89. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant has not shown that he has actually incurred the costs claimed. In particular, he failed to submit documentary evidence, such as a contract, a fee agreement or a breakdown of the hours spent by his lawyer on the case. Accordingly, the Court makes no award in respect of the fees of his lawyer.

### C. Default interest

90. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, admissible the complaints under Article 10 of the Convention and Article 3 of Protocol No. 1 to the Convention;

2. *Holds*, unanimously, that there has been a violation of Article 10 of the Convention;

3. *Holds*, unanimously, that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

4. *Holds*, unanimously, that there is no need to examine the admissibility and merits of the complaints under Articles 5, 6, 7, 11 and 14 of the Convention;

5. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 26,000 (twenty-six thousand euros), in respect of non-pecuniary damage, plus any tax that may be

chargeable, to be converted into the currency of the respondent State 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;

6. *Dismisses*, by six votes to one, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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|---|---|
| Stanley Naismith | Guido Raimondi |
| Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sajó and joint separate opinion of Judges Nebojša Vučinić and Egidijus Kūris are annexed to this judgment.

G.R.A.
S.H.N.

# PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SAJÓ

**I.**

The applicant Murat Vural was convicted for pouring paint on a statue of Kemal Atatürk. He was sentenced to serve the statutory maximum of five years for the insult. The punishment was increased to a total of thirteen years, one month and fifteen days' imprisonment.

I fully agree with my colleagues that Article 10 of the European Convention of Human Rights was violated in this case. The reason given in the judgment is that, in the absence of violence, the impugned act is of insufficient gravity to justify the extreme harshness of the punishment. I agree that such punishment is *per se* unacceptable but, in my view, this limited consideration that concentrates on the extreme harshness of the punishment does not provide adequate protection for the freedom of expression. This shortcoming forces me to discuss the methodology that was applied in the case. It was the straightjacket of a "standard" proportionality analysis that hampered the full protection of free speech that is envisioned in the Convention.

A three-step "standard" proportionality analysis (the interference is prescribed by law, serves a legitimate aim, and is "proportionate to the legitimate aims pursued") is the hallmark of this Court's judgments in Article 8-11 cases[1].

I have reservations as to the use of that methodology in the present case, where the matter was decided on the grounds of the disproportionality of the punishment. I also find the "standard" proportionality approach inappropriate in all cases where a freedom is unconditionally restricted by legislation.

First, it is not clear what makes the punishment disproportionate. My gut feeling indicates that the sanction is disproportionate, but in regard to what and in which sense? Would a one-year mandatory sentence be proportionate? Is it really a matter of proportionality which concerns us? Second, by grounding the finding of a violation in the severity of the punishment, the Court diverts attention from the more fundamental issue, namely the permissibility of sanctioning an "insult to memory" at all. The present case concerns the Article 10 rights of the applicant, therefore the

1. In other contexts the Court uses a category-based approach. This is the approach in Article 3 cases, and to some extent even in the context of freedom of expression under Article 17, as certain categories of expression are deemed not worthy of protection because they are abusive, therefore belonging to a category that is impermissible and not protected.

Court should have considered the effect of the interference on the applicant's freedom of expression.

***Proportionality of the punishment***

What are the problems with a finding of a violation based on the excessive nature of the punishment? First, this Court, of all courts, cannot rely on a crude sense of justice (though all judicial decisions rendered in disregard of the sense of justice are open to criticism). This Court is concerned with the legitimacy of restrictions on human rights under the Convention and not with the appropriateness of sanctions measured on some mysterious scale. The Convention contains no prohibition on unusual punishment and we are not called upon to evaluate sentencing.

When judges and laymen talk about disproportionate punishment, they often compare the punishment imposed for a given crime with the punishment of another crime, or with the punishment of another person for a similar, comparable crime, or even with the moral seriousness of the crime in relation to the punishment[2].

In the present case there is no specific reason given as to *why* the punishment is grossly disproportionate. Where judicial intuition determines that a matter does not deserve further clarification, those who are not privy to the intuition remain puzzled. Would one year be acceptable, for example, because the statue had to be cleaned or repaired? The Court does not even provide a comparable reference, a *tertium comparationis*; for example, the fact that thirteen years is a sentence that is ordinarily imposed on murderers. Under that reasoning, the present conviction treats the attack on memory as if were an attack on human life, thus attributing equal weight to life and to the honouring of a deceased person's memory (where the comparator is harm to individuals or harm to the community).

Because the dictates of the sense of justice are satisfied and the talismanic word "disproportionate" is used, the judgment of the Court looks satisfactory. It is not. I share the feelings of my colleagues as to the gross inappropriateness of the sentence, but in an Article 10 case this is not the gist of the rights protection: the Court should look into the necessity of the interference in the light of its impact on the expression concerned.

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2. In *Buitoni v Fonds d'Orientation* [1979] ECR 677, the European Court of Justice found a penalty for failing to report the use of a licence disproportionate because the penalty was the same as for the actual use of the licence. In *Buitoni* it was intuitively accepted that not reporting a crime and committing that crime could not be the same and did not deserve the same treatment. This is so obvious that it needs no further explanation.
I follow here Bernhard Schlink, *Proportionality (1)* and Aharon Barak, *Proportionality (2)* in M. Rosenfeld and A. Sajó: *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press 2012.

***The substantive issue: punishing specific content***

The text of the Convention requires the Government to prove that an interference was necessary in a democratic society, and it is in the context of such necessity that the question of proportionality arises. The real issue in this case is not that an excessively severe punishment was imposed for an expressive act that did not cause serious damage, but that a whole class of expression (insults to Atatürk's memory) and related expressive acts are considered to be a crime *for their content*. The law that was applied singles out very specific content: all speech (including expressive action, as in the present case) that publicly insults the memory of Atatürk is punishable. The issue is not the protection of all public statues where harm to the statue has been caused by an expressive action. The issue, which is buried under the outrage of the excessive sentence, is the *singling out of specific speech content for punishment*. Law no. 5816 provides first and foremost that any "disrespect for Atatürk's memory" is to be punished by a prison sentence of between one and three years, the use of paint on a monument ("dirtying of a statue") raising the sentence to five years; the applicant was then given an *additional* eight years of punishment *for the aggravating circumstances*.

Of course, eight *additional* years for degrading a statue is excessive in view of the degree of harm caused by the act, but this Court is "only" called upon to see whether a limitation of freedom of expression is necessary in a democratic society.

I would argue that the problem can be better decided using a category-based analysis of the legislation, and even by an enhanced proportionality analysis of the means/end relationship of the legislation and the objective value of the intended aim, as is carried out, for example, in Canada and Germany. These approaches are superior to the Court's "standard", often narrowly case-related analysis because they are more convincing and, above all, offer a better, broader, and more equivalent protection to free speech against governmental abuse.

The legislature's predominant concerns in Law no. 5816 are with the content of the speech as opposed to its secondary effects; it expresses the legislature's disagreement with the message the act conveys. In the category-based approach of the United States First Amendment law, known as the "categorical approach"[3], this is plainly unconstitutional. So what is wrong with content discrimination? It is wrong because the Government disregard content-neutrality without compelling reasons. The requirement of content neutrality follows from the assumption that content-based restrictions ("content-discrimination") target specific messages, thus

3. See *Texas v. Johnson*, 491 U.S. 397 (1989). For the advantages of the categorical approach see below.

resulting in thought control, and "[such a restriction] raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.[4]"

***The shortcomings of the "standard" proportionality approach***

The judgment operates within the straightjacket of the proportionality analysis; it is for this reason that the Court fails to make explicit the underlying ("structural") problem of Law no. 5816. I am aware of the advantages of the three mechanical prongs of the "standard" proportionality analysis. They offer considerable legal certainty; the approach also offers the advantages of economies of scale. This kind of manufacturing certainty is understandably attractive where a court has thousands of cases and where a court is called upon to give advice to judges reading our judgments in forty-seven different member States.

However, even within the proportionality analysis there are other methods, slightly more complex in nature than the three-pronged approach used by the Court. One may add other levels of scrutiny.

Among others, when determining a measure's quality as a means to reach a (legitimate) end, the search must begin at the abstract level of the legislation. This search is particularly demanding (and therefore efficient) if and when a court enters into a substantive analysis of the veracity of the allegation that a regulatory measure actually serves a purported end. Moreover, the importance of the end itself may be subject to judicial analysis. Using this approach in the Articles 8-11 context, the Court would have to review how important and genuine the references are to one or another aim recognised in the Convention as a ground for restricting a Convention right. Is the end genuine? Or instead, is it a bluff couched in terms of public interest that pretends to be beyond the reach of judicial scrutiny in the name of democratic legitimation of the legislature?

Moreover, is the chosen means narrowly tailored? Is it not the case that the criminal provision is over-broad, even considering the need for sensitivity protection?

Where, as in the present case, the argument is made that the sensitivities and deep feelings of a population are to be protected, a court could and should take a long look at the relationship of this allegation to the "rights of others". To accept that all interests "amount to rights of others" and claim that all these alleged rights are of equal weight to that of Convention human rights is extremely dangerous for human rights: not all rights are created as equal. Is there a right to have one's feelings and deeply held convictions left

4. *Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

undisturbed? Are feelings to be protected from potential inconvenience as a matter of right? Further, even assuming that all alleged interests constitute rights (a position that I find untenable), is this alleged right *per se* sufficient to justify certain forms of Convention-rights restriction (especially blanket bans, which used to be highly suspect even for the Court, at least until very recently, in the freedom of expression context)? This same analysis may also be appropriate when addressing the specific circumstances of the case at a later stage of the analysis; something that is often done in the form of balancing, as if Convention rights and other interests were of equal importance!

It may well be that certain measures simply do not serve the purported end or at least that they are not the least restrictive possible. One should ask the question: is mandatory imprisonment the only available means to protect political memory?

Of course, even if in the abstract the rights-restrictive means are acceptable and rationally connected to the legitimate and genuine end, their application in the specific context (the conduct of the applicant) may be disproportionate, because there are *lesser rights-restrictive means* to achieve the end in the circumstances of the case. In other instances it can be said (sometimes using the language of balancing) that the restriction on a right as a means to an end is excessive because it undermines the very right which one values more than the end. It should be added, in this logic, that Convention human rights are of a specific value (being singled out as superior values in an international convention).

Going beyond the above-mentioned, more demanding forms of scrutiny within the proportionality methodology, freedom of expression cases are sometimes (even regularly in the United States) resolved using a *categorical* approach[5]. In principle, such an approach guarantees freedom of expression unequivocally and with more certainty than a case-by-case analysis, where the metrics of proportionality and balancing are not spelled out. The uncertainty that is inherent in the case-based proportionality analysis invites authorities to attempt to impose further restrictions. More importantly, it discourages speakers.

A court of human rights must go to the heart of this matter. In Turkey it is possible to imprison someone for an offence against the memory of Atatürk. I have no doubts that the Turkish nation has strong feelings of respect towards the founder of the modern Turkish State, and it is within the constitutional powers of the Turkish nation to express such feelings. I have full respect for these sentiments, but equally strong reservations as to the

5. A categorical approach is used against applicants, but not against States, in the Article 17 context (see *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX).

legal enforcement of sensitivities in matters of speech[6]. I understand that the form of the expression is problematic here but, as the judgment demonstrates, it falls within expressive conduct; the pouring of paint is a form of expression, disputable though it may be[7]. Destruction caused to a statue or other piece of art is an ordinary crime; to destroy Michelangelo's "Pieta" would indeed be a serious crime. But in the present case it was the expressed content that was the ground for the conviction: the object of the crime is clearly "the memory of Atatürk" and not the alleged vandalism, which of course might otherwise be subject to criminal sanctions. Moreover, I can envision the need for such a dramatic form of expression of political discontent in certain circumstances, a matter that did not have to be addressed in the present case. The Turkish courts never entered into a discussion of the appropriateness of the expressive act. In any event, all forms of expression of dislike of Atatürk and his memory, all the underlying discontent with the political system created by Atatürk and based on his political vision, are prohibited: this is the primary and fundamental issue.

I can envision situations where punishment for a similar offence is appropriate or even necessary in a democratic society, where insult to memory amounts to a call to violence or hatred against identifiable individuals, but that element is not required by the present law and no such danger is present in this case. It is the mere fact of the insult that is criminalised.

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6. The Court accepted in *Otto-Preminger-Institut v. Austria* (20 September 1994, Series A no. 295-A) that protection against indignation caused by "offensive" speech was a legitimate aim within the concept of the rights of others, at least where the right was freedom of religion. *A, B and C v. Ireland* ([GC], no. 25579/05, § 232, ECHR 2010) goes beyond a Convention-right-related concern. Here it was not popular religious sensitivity that was to be protected and considered by the Court in a balancing exercise. The Court said that where the case raised sensitive moral or ethical issues, the margin of appreciation would be wider (but compared to what?), so the Court was technically not even compelled to go into genuine balancing (which it did anyway, in an Article 8 context). The Court concluded that "profound moral values" of the majority entered into the realm of legitimate aims of rights limitation, namely "protection of morals", hence the matter was to be treated under the necessity test. Both judgments resulted in strong dissents and criticism. Under this logic, if applied to freedom of expression, the argument might go like this: the "deep sense of respect and adoration" amounts to a profound moral value; therefore – as is common in the context of disparagement of national symbols – national unity or respect for the nation as such are foundational for public morals. History shows the speech-restrictive consequences of such authority-respecting (if not outright authoritarian) approaches.

7. I am not denying that the use of such a form of expression, although it clearly falls within the ambit of Article 10, may not be necessary in a democratic society in given circumstances. Furthermore, there are other legitimate aims that could make such a restriction proportionate. But the present law simply precludes such analysis. (For a similar problem see *Vajnai v. Hungary*, no. 33629/06, ECHR 2008.)

The limited analysis, resulting from the standard proportionality test, precludes the consideration of the law's impact on all speech acts. It is for this reason that the Court did not have the opportunity to look into the real problem. However, the Convention and even our own methodology calls us to consider the impact of the restriction on freedom of expression. "It is recalled that there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest.[8]" The Court has always accepted that "there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest.[9]" The expressive act of the applicant, being political speech, should have triggered strict scrutiny, and the Government certainly failed to provide justification based on compelling reasons why they had to criminalise insults to memory. Given that the law is content-discriminatory, we do not have to look into the effects of a content-neutral law such as the criminalisation of the destruction of statues.

Where disrespect for the memory of a political figure is punished, this has a chilling effect on all speakers. The State has not shown any compelling interest for this restriction. I cannot see the reasonable purpose of such a measure in a democratic society, given that no democratic society can exist without free expression on political matters[10]. Even assuming that the deep feelings of the Turkish people will be hurt at the sight of the paint on the statue or on hearing disrespectful words, I cannot see how this can be a sufficient justification in a democratic society, where even disturbing political opinions are to be accepted.

This fundamental consideration is grievously absent in Turkish law when the mandatory sanction is one year in prison, let alone the thirteen years imposed on applicant. A law which enables, and even mandates, such interference is incompatible with the necessities of a democratic society. This Court should not shy away from considering the impermissibility of

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8. See *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports of Judgments and Decisions* 1996-V.

9. See *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV.

10. The best part of this Court's Article 10 jurisprudence requires that a demanding scrutiny be applied to political speech, precisely because of the crucial importance of such expression for a democratic society. (See *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999-IV, *Öztürk v. Turkey* [GC], no. 22479/93, § 66, ECHR 1999-V, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 92, ECHR 2009; citing: *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103; *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Wingrove*, cited above, § 58; and *Monnat v. Switzerland*, no. 73604/01, § 58, ECHR 2006-X). The present case is about political speech. Under this traditional approach of proportionality the measure is disproportionate not for the severity of the conviction but because of the insufficiency of the reasons justifying the interference.

the alleged purpose of legislation that seemingly fits into one of the (over) broad categories of permissible restriction ("rights of others")[11].

Given the chilling effect of the sanction in Law no. 5816, I would have used a categorical approach: the criminal law is never appropriate as a means to protect other people's political sensitivity, where the disrespect caused to a political figure does not amount to an actual (true) threat or call to violence. Such laws are simply not necessary in a democratic society (outside emergencies), being contrary to the fundamental assumptions of such a society based on free debate and exchange of ideas. The mere existence of content-prohibiting laws endangers and sometimes kills freedom of thought. It is fundamental for a democratic society that its citizens be treated as adults who accept, or learn to tolerate, even speech that they find offensive. This is the price to be paid for a free and democratic society.

A rather similar speech-protective result could have been achieved even within an enhanced proportionality analysis: the end, namely the protection of the alleged right of others, is such that it does not necessitate a prison sentence – not just in the present circumstances of a thirteen-year term, but also in general. In a proportionality analysis that looks first at the very law that is the source of an interference, one looks at the law as a means chosen and at the end served (the protection of alleged feelings). The means are excessive here in the light of the end, among other things because the end itself is problematic; the end in itself is simply not worth the inevitable sacrifice of freedom of expression resulting from the means chosen, but also from any less radical means. Alternatively, the present end is not legitimate; or, to the extent it might be legitimate for some, the means chosen are certainly not the least restrictive possible.

Following the "standard" methodology I have signed on to many judgments where the severity of punishment was held to be an important or the decisive element of the disproportionality finding. The underlying message in those cases was clear: it is inappropriate in a democratic and free society at the level of civility and "civilisation" that Europe hopes to have

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11. To consider legislation as being compatible *in abstracto* with the grounds for restriction enumerated in paragraph 2 of Article 10 has in principle been recognised by the Court. This is how Sir Nicolas Bratza summarised the Court's position: "Where, however, as here, the interference springs directly from a statutory provision which prohibits or restricts the exercise of the Convention right, the Court's approach has tended to be different. In such a case, the Court's focus is not on the circumstances of the individual applicant, although he must be affected by the legislation in order to claim to be a victim of its application; it is, instead, primarily on the question whether the legislature itself acted within its margin of appreciation and satisfied the requirements of necessity and proportionality when imposing the prohibition or restriction in question." (Concurring opinion of Judge Bratza in *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013).

achieved to use sanctions, especially criminal sanctions, for thought crime (and criminal sanctions in cases of reputational harm)[12]. But in those cases the Court did not find it appropriate to make express statements in this sense, probably as a result of its putative role related to Article 27 § 1 and Article 34 of the Convention, although pursuant to Article 19 the Court is called upon to ensure the observance of the engagements undertaken by the Parties; "engagements" that are of a general and structural nature. The Law at issue constitutes a blanket ban on the expression of specific political content for the sake of public sensitivities elevated to the status of a "right". In view of these engagements, content discrimination for the sake of the protection of the memory of a national hero by criminal law is incompatible with the Convention. In the present circumstances of extreme harshness, which will inevitably be repeated, this has to be made clear.

**II.**

The present judgment provides just satisfaction for the non-pecuniary damage suffered by the applicant. This is proportionate in the sense that it falls within the range of satisfaction provided in other similarly grave freedom of expression and disenfranchisement cases. (One may have doubts that such an amount is equitable in view of the seven years of unmerited suffering in prison). I accept that the amount follows our practice. But with all due respect, I cannot agree with my colleagues as regards pecuniary (material) damage, even if denial of an award on this ground is not uncommon in comparable cases. The applicant certainly suffered material damage (loss of income) because of his incarceration: there is a causal link with a loss of income. This loss is hard to quantify, but technical difficulties of calculation cannot negate the existence of a loss: the applicant was a qualified teacher, albeit unemployed before his conviction, who would have earned a living like any average person in his situation, had he not been incarcerated in violation of the Convention. The loss is thus quantifiable, either on the basis of the average income of a teacher in his position, or at least with regard to the minimum income of an employed person (using the unfair assumption that he could not have found a position in education). Moreover, because of the conviction, he will not be able to work again as a civil servant (it is even unlikely that, having been released on licence, he will find a position as a teacher in private education). To determine the loss

12. After all, this is the unequivocal message of those judgments which state that even a sanction of one euro (i.e. any sanction) might be disproportionate (see *Eon v. France*, no. 26118/10, 14 March 2013, and *Colombani and Others v. France*, no. 51279/99, ECHR 2002-V). For the *per se* inappropriateness of criminal sanctions for certain categories of expression, see, for example, *Lehideux and Isorni v. France*, 23 September 1998, § 57, *Reports* 1998-VII.

of future income is not rocket science and courts do use estimates in such circumstances, taking life expectancy into consideration. I have had the opportunity to express my reservations regarding the Court's parsimonious approach in matters of pecuniary damage, concerned as it is with the risk of "speculative" awards. The "gross injustice" suffered by the applicant in the present case forces me to reach the sad conclusion that the Court has departed from those standards of remedy that national courts and international law find to be a matter of course; and a matter of reason[13].

Finally, the Court should have applied the Gençel[14] clause: the case should be reopened and the continuing effects of the applicant's conviction, in particular his release on licence, must be remedied.

13. For a criticism of departure from international law in the property context see *Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, 22 December 2009, dissenting opinion of Judge Spielmann: "Through its judgment in this case the Court has departed from its settled case-law, a case-law that, moreover, is in conformity with the principles of international law on reparation, ... I refer to the principle of *restitutio in integrum*. This principle enshrines the obligation on a State that is guilty of a violation to make reparation for the consequences of the violation found." I voiced my discontent as regards a similarly parsimonious denial of just satisfaction in *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, 13 November 2008 (dissenting opinion of Judge Sajó).

14. *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003.

# JOINT CONCURRING OPINION OF JUDGES VUČINIĆ AND KŪRIS

It is more than obvious that the situation examined in this case discloses certain fundamental issues related to the limits of freedom of expression and especially to their impact on the persons concerned. Like Judge Sajó, we also regret that these issues have been evaded in the judgment. Our approach to these issues in great part, but by no means in full, corresponds to that which is advanced in Judge Sajó's separate opinion.