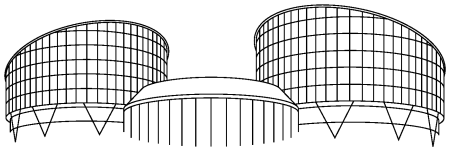

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MUSTAFA ERDOĞAN AND OTHERS v. TURKEY

(Applications nos. 346/04 and 39779/04)

JUDGMENT

STRASBOURG

27 May 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mustafa Erdoğan and Others 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 8 April 2014,

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

PROCEDURE

1. The case originated in two applications (nos. 346/04 and 39779/04) 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 two Turkish nationals**,** Mr Mustafa Erdoğan and Mr Haluk Kürşad Kopuzlu, and a Turkish company, Liberte A. Ş. ("the applicants"), on 15 October 2003 and 16 September 2004 respectively.

2. The applicants were represented by Mr O. K. Cengiz, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. On 4 March 2010 the applications were communicated to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The first and the second applicants were born in 1956 and 1975 respectively.

5. At the time of the events the first applicant Mr Mustafa Erdoğan was a professor of constitutional law at the University of Hacettepe in Ankara. The second applicant Mr Haluk Kürşad Kopuzlu was the editor of the quarterly publication *Liberal Thinking* and the third applicant *Liberte A. Ş.*

was a joint-stock company and the publisher of *Liberal Thinking* (hereinafter: "the publishing company"). Mr Buhay Baytekin, the president of the board of members of Liberte A. Ş. at the material time, applied to the Court on behalf of the publishing company.

6. In 2001 an article entitled 'Turkey's Constitutional Court problem in the light of its decision to dissolve the *Fazilet* [Virtue] Party' written by the first applicant was published in *Liberal Thinking*. It read as follows:

> "The Constitutional Court has finally delivered its judgment on the *Fazilet* Party at the end of a long period, which lasted more than two years, and has dissolved the party on the grounds that it had become 'a hub of activity contrary to [the] principles of secularism'. As a result, the high court has decided that Nazlı Ilıcak and Bekir Sobacı, who were members of parliament at the date of the judgment, [should be] stripped of their parliamentary status and it has prohibited former parliamentarians Merve Kavakçı, Mehmet Sılay and Ramazan Yenidede from participating in political activities for the next five years. Only three members of the Court have dissented and I am of the opinion that their names should be mentioned: Haşim Kılıç, Sacit Adalı and Samia Akbulut.
>
> The judgment of the Constitutional Court has naturally created widespread discontent throughout the country. Apart from a few fanatical individuals in the media who have character deficiencies, everyone who is sensible and whose conscience has not been paralysed has considered the judgment legally wrong and politically inappropriate. Even people whose sensitivities to democratic issues have never been that obvious have criticised the Constitutional Court about this judgment. Nevertheless, it is clear that concerns about the difficulties that the judgment might cause Turkey in its dealings with the Council of Europe and the European Union have played a great role in the emergence of this reaction. Moreover, it is commonly believed that this judgment was not the product of the free will of the Constitutional Court but that it was brought about under pressure [from] and at the suggestion of military circles.
>
> It is certain that the dissolution of the *Fazilet* Party is closely related to the current political situation, the direction of which has been determined by the status quo powers ('the deep State'). However, it seems to me that we cannot be sure whether the Court was put under direct pressure. The first point is important to find out the nature of the present regime in Turkey. From a legal point of view, however, what is more important is how the Constitutional Court gave such a judgment. In other words, the people who should be criticised and who should be held responsible are the eight judges at the Court, all of whom are 'adults' and 'sensible'. The real issue is to examine to what extent the professional backgrounds and intellectual capacities of these individuals are sufficient for such a job and to question whether they had the right to act in accordance with their prejudices. This can be done only through analysing the judgment from a legal point of view. As a matter of fact, the reasons for judgment have not yet been published. But there is nothing wrong in subjecting the judgment to such an analysis in its form as pronounced to the public. Besides, I do not think that the reasons for judgment when they are published in a few weeks' time will invalidate our first analysis. Our observations and information regarding the previous judicial approach of the Court demonstrate that the reasoning in the judgment will be 'prearranged'. In other words, in the established practice of the Court the thing which is termed 'the reasoning' is fabricated and formulated at subsequent stages to justify the predetermined judgment [made] on the basis of prior opinions. Now we can submit our first legally relevant observations and evaluation of this judgment.

1. The Constitutional Court did the right thing by not dissolving the *Fazilet* Party on the grounds that 'it was a continuation of a party'. The Court might have acted in this way for two reasons: firstly, the Court might have maintained the type of interpretation which it adopted in its previous judgments on the meaning of 'being a continuation' of a party. This means that a distinction was made between continuation in the sociological sense and the continuation of a political tradition, and continuation in a technical legal sense among consecutive political parties. This is an extraordinarily appropriate legal understanding. If this is the case, it means that the Constitutional Court considered that the *Fazilet* Party, while continuing the political line represented by *Milli Nizam* (national order) and the *Milli Selamet Party* in the sociological and political sense, was not the continuation of the *Refah* Party with another title.

A second possibility might be the fact that the Constitutional Court adopted the view which is insistently voiced by some constitutional law experts, including the author of this article. According to this view, the Constitution stipulates that 'a party which was dissolved cannot be re-established under another title', but neither the Constitution nor the Law on Political Parties require that the sanction of dissolution be applied to such a party if it has acted contrary to the Constitution. If this was the reason for which the Constitutional Court refused the Chief Public Prosecutor's request to dissolve the *Fazilet* Party on the basis of it being a continuation of the *Refah* Party, this only demonstrates that the court did not, at least, violate the positive law in this respect. This in itself does not deserve praise, since acting to the contrary would have been openly unlawful.

2. On the other hand, the Constitutional Court's decision to dissolve the *Fazilet* Party on the grounds that it had become 'a hub of activity contrary to the principles of secularism' is clearly contrary to the law and has no factual or legal basis. This judgment is faulty on two grounds. Firstly, the activity which is claimed to be 'contrary to secularism' – in fact, it is only comprised of words [and] statements – does not have such characteristics. Most of them concern expressions of concern [about] the social consequences of the lack of freedom created by the prohibition on wearing the headscarf. In other words, these statements have the nature of being demands for freedom voiced by Members of Parliament – mostly from the podium of Parliament. Criticism of a prohibition, especially if it is voiced by members of parliament, cannot be contrary to any democratic and constitutional regime. As long as it is voiced in a peaceful way, a demand for freedom cannot be contrary to the principles of secularism and democracy, even if the right or freedom which constitutes the subject of the demand has not been recognised in positive law. Besides, wearing the headscarf is not prohibited for university students in Turkish law. The prohibition on wearing the headscarf which has been implemented in Turkey in recent years is not a requirement of the current legal order, but it is a result of current power relations. In other words, the existence of this prohibition is a *de facto* and not a *de jure* phenomenon.

Secondly, even if it was against the law for university students to wear the headscarf, this would not make the party whose members are criticising the prohibition and demanding its removal contrary to secularism in a democratic system. Let us leave this fact aside and let us assume that such criticism and such a demand for freedom are contrary to secularism. Even in this case, the fact that some MPs or party members are making such criticism individually does not make the party "a hub" of that activity. In fact, being the "hub" or "focus" of any kind of activity for an organisation means the following: that the activity arose from the centre of that organisation, it is directed, controlled and administered by that centre; and that the

activity is performed intensively, decisively and continuously. The facts in the trial record clearly demonstrate that these criteria did not apply to the legal personality of the *Fazilet* Party. Apart from [the fact that it was] far from being in a position to become the "hub" of the [relevant] activity, the *Fazilet* Party did not become a determined follower of the issue of the headscarf ban in addition to many other issues. In fact, this party has been the most "obedient" party of the system for the last three years and did not hold a clear and decisive view on any major issue, probably because of the fear of being dissolved.

It seems that the Constitutional Court considered Merve Kavakçı's election as an MP for the *Fazilet* Party – she is still an MP – and the support given by the party to her as proof of the claim that the party had become "a hub of activity contrary to the principles of secularism". In other words, according to the Constitutional Court, the election of a citizen who wears a headscarf as an MP and her attempt to take the oath in Parliament while wearing the headscarf are contrary to secularism. This is an unsound understanding for many reasons. First of all, if "national sovereignty" is one of the true – not fake – basic principles of Turkey's constitutional order, no constitutional organ, particularly the Constitutional Court, whose legitimate authority stems from this principle, can impose any restrictions on the nation's right to elect its representatives. Merve Kavakçı was put forward as a candidate by the *Fazilet* Party, but she was elected by the Turkish nation. If the Constitutional Court had found this fact to be contrary to secularism, it would have "annulled" the nation. Secondly, there is no provision in the Constitution stipulating that a person who wears a headscarf cannot be an MP and that she cannot take the oath in Parliament in a headscarf. [Nor does] such a provision exist in Parliament's standing orders. This can be understood from the fact that an initiative was recently launched in Parliament to add such a prohibition to its standing orders. Besides, even if there were such a provision, this would be considered null and void because it would be contrary to the Constitution. In fact, the Turkish Grand National Assembly does not have the right to act [in a way] which would bring about the abolition of the citizens' rights to elect representatives and to be elected as representatives, which are one of [their] basic rights. Actually, since the aim of the standing orders is to ensure the conduct of Parliament's activities in an orderly way, a right cannot be annulled with such a procedural action.

3. This judgment demonstrates that the dominant majority of the Constitutional Court continues to apply its incorrect understanding of what "secularism in a democratic system" is. Unfortunately, the High Court has interpreted secularism in many of its judgments in a totalitarian manner. According to the Court, secularism is not a pro-freedom and pro-peace principle restricting the State, but is a higher principle legitimising the imposition by the State of a certain way of life on citizens. The Constitutional Court considers secularism as the categorical refusal of the demands of religion in the social, public and political arenas. Therefore, it thinks that secularism authorises the State to remove manifestations of religion in society. Moreover, it exalts this principle to the level of being the most important value of the constitutional order. According to this understanding, democracy, the rule of law and human rights are all secondary values, which should [only] be recognised to the degree allowed by secularism.

Here, the more interesting point is that the Constitutional Court insists on continuing the doctrine of "secularism as a project of social engineering", which was developed during the authoritarian (occasionally totalitarian) one-party era, in the democratic-pluralist environment. It also stubbornly ignores the pro-freedom/democratic criticism of this notion. Despite the fact that even the Turkish literature on the subject of "secularism in a democratic system" has expanded to a considerable degree in the last

ten or fifteen years, our judges in the Constitutional Court turn a blind eye to this literature. Furthermore, in this trial at least, our senior judges did not need to undertake additional efforts to obtain new sources and information on this issue. For example, there was detailed information in the defence brief on how secularism is understood and implemented in contemporary democracies, but it seems that the members of the Court did not read these passages or if they did, they ignored it.

In this connection, the two judgments of the Constitutional Court which directly concerned the issue of wearing headscarves and its judgments dissolving the *Refah* Party and the *Fazilet* Party indicate that this matter has become the key focus of secularism. The conclusion which the Court has reached can be formulated as the following: "to demand the freedom of wearing the headscarf means categorically being against secularism – and indirectly against the Constitution." This is a totally wrong idea regardless of the perspective one has: it is anti-democratic, it is anti-freedom, it is contrary to secularism and it is pro-conflict. It is anti-democratic because it restricts in an arbitrary way the field of democratic politics and the sphere of activity of democratic political actors. It is anti-freedom because it is oppressive and imposing. It is contrary to secularism because it oppresses religious choices and creates discrimination on the grounds of religion. Finally, it is pro-conflict because it forces the State to quarrel with society and in this way it allows the State to destroy the social peace and order.

4. The part of this judgment which ends the MP status of some politicians and prohibits them from involvement in further political activities does not contain valid grounds pertaining to the relevant individuals. Specifically, the application of the sanctions against Nazlı Ilıcak on the grounds that she "was one of the people who brought about the dissolution of their party with their activity contrary to secularism" bears no relation to reality and is a ridiculous assertion. The situation is really awkward. A high court imagines that it protects "secularism" by prohibiting a person from being involved in political activities and by ending the MP status of that individual, who meets the criteria of a "contemporary way of life" and "contemporary personal appearances" perfectly. Everybody knows that she has never been in favour of a political regime established on the basis of religion and that she has never made any effort in this direction. This is a typical example of the attitude of the Court demonstrating the absurd results [its] formalist legal reasoning can produce.

5. All these explanations highlight that the statement of the chairman of the Constitutional Court to the effect that "there is nothing we can do, the laws force us to act in this way, if you do not want us to do so, change the laws", has no value from a legal point of view. It is true that the Constitution and the laws in Turkey are not pro-freedom; therefore, it is, of course, necessary to improve the positive law. But the major problem in the judgment which dissolved the *Fazilet* Party is not the unsuitable character of the current law. The problem is that the Constitutional Court interprets the Constitution and the laws which are in force in an authoritarian and narrow-minded way. Let us leave the necessity of the Constitutional Court complying with the provisions of the European Convention on Human Rights and the Strasbourg case-law [to one side]. There are no serious grounds for dissolving the *Fazilet* Party, even on the basis of the Constitution and the Law on Political Parties. But there is no need [to know] the [provisions of those] laws to understand this fact. The notions which are needed are the notion of law, which does not see legitimacy as the same as the law [itself], a considerable amount of knowledge about the technique of interpretation and legal reasoning and sensitivity to freedom and democracy. In other words, our problem is the fact that most of our constitutional law judges do not know the law,

and do not have knowledge of democracy, political and constitutional theory or secularism. Nor do they intend to acquire it.

It is assumed that the pro-freedom and pro-democracy case-law of the European Court of Human Rights is brought about by the strict interpretation of the Convention. The real situation is different from the one which is assumed: when deciding on cases on the basis of the Convention, which does not include the concept of a "political party", the Strasbourg Court concludes them by applying a broad interpretation to the provisions concerning freedom of association and expression in accordance with [general] principles and the universal understanding [of those concepts]. The Turkish constitutional court judges, if they wished to do so and could develop the necessary intellectual skills, could ease the restrictive provisions of positive law in Turkey. So long as they wanted to do so.

Moreover, it is difficult to consider the aforementioned statement of the chairman to be sincere. If the problem is [one of] making changes to the Constitution and the law, the Turkish Grand National Assembly actually enacted a statutory amendment, which defined [what it means] for political parties to become a "hub" in a highly reasonable way and which set criteria to ensure its implementation. Why did the Constitutional Court annul this amendment in accordance with an authoritarian understanding? In this case, the problem is related to the fact that our constitutional court judges have not taken on board freedoms, rather than the assertion that the current laws are unsuitable.

6. This latest judgment of the Constitutional Court has demonstrated another thing: the professional capabilities of most of the court members are insufficient for the job. Moreover, they are not willing to compensate for this insufficiency. They are closed to knowledge, they have no passion for their jobs and they are incapable of becoming open-minded. They try to fulfil the requirements of their vital duty, finding their way out by sticking together, without feeling uneasy about it. It is because of this reason that the obstacle to freedoms in Turkey is not Parliament, which does not change the Constitution and which does not enact the necessary laws. The real obstacle is the Constitutional Court, which does not shy away from being the systematic shredder of freedoms. It is urgently necessary to deal with the issue of membership in the Constitutional Court."

7. It appears that following the publication of the article all members of the Constitutional Court brought separate civil actions against Mr Mustafa Erdoğan, Mr Haluk Kürşad Kopuzlu and the publishing company (hereinafter "the defendants"), seeking damages for the injury they claimed to have sustained as a result of the applicants' serious attack on their honour and integrity through the publication of the above article, which had contained, in their view, defamatory passages.

8. The present applications concern the damages claims brought against the applicants by Ms F.K., Mr Y.A. and Mr M.B., judges and in the case of the last claimant, the president, of the Constitutional Court at the material time.

9. Before the domestic courts the applicants maintained that, while the expressions used in the article had been severe in terms of form and style, they had remained within the limits of the freedom of expression, as they had had a basis in fact. In this connection, the applicants, referring to the case-law of the European Court of Human Rights, asserted that the article in

question had criticised the judgment of the Constitutional Court with respect to its decision to dissolve the *Fazilet* Party, that the acceptable limits of criticism should be more extensive for judges, high level public officials and politicians than others, and that value judgments which were made on the basis of fact were in conformity with the law.

On this latter point, the applicants, relying on the views of various academics, politicians and journalists, underlined that a segment of the public believed – rightly or wrongly – that the judgment of the Constitutional Court had been given under the influence of the military and that there were certain parallels between the outcome of the judgment and the general political situation existing in Turkey at the time. Likewise, again relying on various articles, notably certain statements made by a number of judges sitting on the bench of the higher courts, including the Constitutional Court, the applicants argued that the statements regarding the lack of skill of the judges sitting at the Constitutional Court were not without any factual basis.

The applicants submitted that numerous criticisms had been voiced against the judgment of the Constitutional Court by academics, journalists and politicians, and underlined that the first applicant, who was a professor of constitutional law, had consistently emphasised in his publications that the basic function of constitutional courts – or similar organs – in constitutional democratic systems is to serve as the guarantee of basic rights against arbitrary actions of the State and that high court judges – and indeed judges in general – have to avoid giving judgments corresponding to their ideological opinions and political tendencies.

10. On 28 March 2002 the 17th Chamber of the Ankara Civil Court of First Instance ordered the applicants to pay Ms F.K., jointly, 2,500,000,000 Turkish lira (TRL – approximately 2,000 euros (EUR)) in damages, plus interest at the legal statutory rate running from the date the article in question was published.

11. In its judgment, the court referred to the following passages:

> "...it is commonly believed that this judgment is not the product of the free will of the Constitutional Court but that it was brought about under pressure from and at the suggestion of military circles... it is certain that the dissolution of the *Fazilet* Party is closely related to the current political situation, the direction of which has been determined by the status quo powers ('the deep State'). However, it seems to me that we cannot be sure whether the court was put under direct pressure... From a legal point of view, however, what is more important is how the Constitutional Court gave such a judgment. In other words, the people who should be criticised and who should be held responsible are the eight judges at the court, all of whom are 'adults' and 'sensible'. The real issue is to examine to what extent the professional backgrounds and intellectual capacities of these individuals are sufficient for such a job and to question whether they had the right to act in accordance with their prejudices... In other words, our problem is that most of our constitutional law judges do not know the law and do not have knowledge of democracy, political and constitutional theory and secularism. Nor do they intend to acquire it ... This latest judgment of the

> Constitutional Court has demonstrated another thing: the professional capabilities of most of the court members are insufficient for the job. Moreover, they are not willing to compensate for this insufficiency. They are closed to knowledge, they have no passion for their jobs and they are incapable of becoming open-minded. They try to fulfil the requirements of their vital duty, finding their way out by sticking together, without feeling uneasy about it."

12. The court held that the author, in the above statements, had asserted that the members of the Constitutional Court had rendered their judgment under pressure, that the judges of the court did not know the law, and that their professional knowledge and intellectual capabilities were insufficient. It considered that these expressions constituted defamation of the members of the Constitutional Court, including the claimant, who had rendered the judgment ordering the dissolution of the *Fazilet* Party.

13. On 19 December 2002 the Court of Cassation held a hearing and upheld the judgment of the first-instance court.

14. On 24 March 2003 the Court of Cassation dismissed the defendants' request for rectification of its decision. The defendants were fined in accordance with Article 442 of the Code of Civil Procedure. This decision was served on the applicants' lawyer on 26 April 2003.

15. In the meantime, on 16 July 2002 the 20th Chamber of the Ankara Civil Court of First Instance ordered the applicants to pay Mr Y.A., jointly, TRL 3,000,000,000 (approximately EUR 1,755) in damages plus interest at the legal statutory rate running from the date of the publication of the article.

16. In its decision, the court observed that, when read as a whole, the article, instead of merely criticising the establishment, development, and selection of members of the Constitutional Court or providing a technical criticism of the judgment, had contained severe attacks against the judges themselves and their professional or analytical capabilities. Referring to various passages, notably those mentioned by the 17th Chamber above, the 20th Chamber considered that the author, who had accused the judges of serious misconduct such as receiving instructions, of acting irresponsibly and of not being independent and lacking reasonable logic and conscience, had gone beyond objective and technical criticism of the Constitutional Court and its judgment and that the article had therefore defamed the claimants.

17. On 15 April 2003 the Court of Cassation held a hearing and upheld the judgment of the first-instance court.

18. On 3 July 2003 the Court of Cassation dismissed the defendants' request for rectification of its decision. The defendants were fined in accordance with Article 442 of the Code of Civil Procedure. This decision was served on the applicants' lawyer on 30 July 2003.

19. Likewise, on 12 December 2002 the 9th Chamber of the Ankara Civil Court of First Instance ordered the applicants to pay Mr M.B., jointly, TRL 2,500,000,000 (approximately EUR 1,557) in damages, plus interest at

the legal statutory rate running from the date the article in question was published.

20. In its decision, the court, referring to similar passages to those relied on by the other Chambers, considered that the contents of the article had upset the balance between freedom of expression and the need to protect a person's dignity and honour, and that the author had overstepped the boundaries of acceptable criticism and had used words which constituted defamation.

21. In this connection, the court stated that the aim of press freedom is to provide correct and truthful news regarding issues of public interest, and that the privileges attached to press freedom were not without limits. It noted in that regard that the freedom of the press was limited by the private law rights and obligations established by the relevant provisions of the Code of Obligations and the Civil Code. The court underlined that in its duty to inform, the press was limited in its criticism by the following rules: truthfulness, public interest, topicality and interconnectedness between the thoughts, the subject and the words used.

22. The court opined that in the present case, while the overall content of the author's article had been within the boundaries of criticism, certain remarks contained in the article had gone beyond the limits of acceptable criticism, there had not been harmony between the form and the content, the content had gone beyond the subject of criticism, and words used in the article had constituted defamation of the claimant. It held that the author could have made the same criticism without the use of these words.

23. On 18 November 2003 the Court of Cassation held a hearing and upheld the judgment of the first-instance court.

24. On 29 April 2004 the Court of Cassation dismissed the defendants' request for rectification of its decision. The defendants were fined in accordance with Article 442 of the Code of Civil Procedure. This decision was served on the applicants' lawyer on 7 June 2004.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. A description of the relevant domestic law at the material time can be found in *Sapan v. Turkey*, no. 44102/04, §§ 24-25, 8 June 2010.

THE LAW

I. JOINDER

26. Having regard to the similar subject matter of the applications, the Court finds it appropriate to join them.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

27. The applicants complained that the judgments given in the civil cases against them had breached their right to freedom of expression as provided in Article 10 of the Convention, which, in so far as relevant, 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 [...].
>
> 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 [...] for the protection of the reputation or rights of others [...]"

28. The Government did not submit any observations.

A. Admissibility

29. The Court notes that the above 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

30. The Court considers that the final judgments given in respect of the actions brought by the three members of the Constitutional Court seeking damages for defamation interfered with the applicants' right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

1. Prescribed by law and legitimate aim

31. It finds that the interference in question was prescribed by law, namely Article 24 of the Civil Code and Article 49 of the Code of Obligations, and that it pursued the legitimate aim of protecting the reputation or rights of others, within the meaning of Article 10 § 2.

2. Necessary in a democratic society

32. In the present case what is in issue is whether the interference was "necessary in a democratic society".

(a) General principles

33. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to

paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among others, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V and the references cited therein).

34. The test of "necessary in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, for example, *Tuşalp v. Turkey*, nos. 32131/08 and 41617/08, § 41, 21 February 2012).

35. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the measure taken was "proportionate to the legitimate aims pursued". In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV, and *Mengi v. Turkey*, nos. 13471/05 and 38787/07, § 48, 27 November 2012).

36. In this connection, the Court reiterates that in order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities, in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will

be excessive (see, for example, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 76, ECHR 2004-XI).

37. When called upon to examine the necessity of an interference in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to ascertain whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (see *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011).

38. Where the right to freedom of expression is being balanced against the right to respect for private life, the relevant criteria have been laid down in the Court's case-law as follows: (a) contribution to a debate of general interest; (b) how well known the person concerned is and what the subject of the publication was; (c) prior conduct of the person concerned; (d) method of obtaining the information and its veracity; (e) content, form and consequences of the publication; and (f) severity of the sanction imposed (see *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 89-95, 7 February 2012, and *Ungváry and Irodalom Kft v. Hungary*, no. 64520/10, § 45, 3 December 2013).

(b) Application of these principles to the present case

39. In the instant case, the Court notes that the applicants were ordered to pay damages for defamation on account of the publication of an article written by the first applicant, a constitutional law professor, who criticised a decision of the Constitutional Court to dissolve a political party. In particular, the applicant considered that the conditions for dissolving the party in question on the grounds that it had become a hub of activity contrary to the principles of secularism had not been met and that the interpretation given by the court to the principle of secularism in general and its application in the case under discussion was not in accordance with the contemporary understanding of that notion in a democracy. In this connection, the applicant questioned the professional competence and the impartiality of the majority of judges sitting on the bench of that court.

40. The Court has stated on many occasions that issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10 (see, for example, *Błaja News Sp. z o. o. v. Poland*, no. 59545/10, § 60, 26 November 2013, and *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313). It has also underlined the importance of academic freedom (see, for example, *Sorguç v. Turkey*, no. 17089/03, § 35, 23 June 2009; and *Sapan v. Turkey*, cited above, § 34) and of academic works (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 71, ECHR 2012; and *Hertel*

v. Switzerland, 25 August 1998, § 50, *Reports of Judgments and Decisions* 1998-VI). In this connection, academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction (see Recommendation 1762 (2006) of the Parliamentary Assembly of the Council of Europe). It is therefore consistent with the Court's case-law to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings (see *Aksu v. Turkey* [GC], cited above, § 71). This freedom, however, is not restricted to academic or scientific research, but also extends to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence. This may include an examination of the functioning of public institutions in a given political system, and a criticism thereof.

41. The Court finds that the subject matter of the article in question, written by an academic, concerned an important and topical issue in a democratic society which the public had a legitimate interest in being informed of and therefore that the article in question contributed to a debate of general interest. The article was published in the quarterly publication edited by the second applicant and owned by the publishing company represented by the third applicant. In this connection, it reiterates that questions of public interest reported by the press undoubtedly include those concerning the functioning of the system of justice, an institution that is essential for any democratic society (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I). The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them (see *Prager and Oberschlick*, cited above, § 34).

42. The Court observes that the claimants in the three sets of damages proceedings summarised above were members of the Constitutional Court who had voted in favour of the dissolution of the *Fazilet* Party. Consequently, whilst it cannot be said that they knowingly laid themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions, members of the judiciary acting in an official capacity, as in the present case, may nevertheless be subject to wider limits of acceptable criticism than ordinary citizens (see, for example, *July and SARL Libération v. France*, no. 20893/03, § 74, ECHR 2008 (extracts)). At the same time, however, the Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be

successful in carrying out its duties. It may therefore prove necessary to protect that confidence against destructive attacks which are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying (see *Prager and Oberschlick*, cited above, § 34).

43. The domestic courts considered that certain expressions used in the article constituted defamation of the claimants (see paragraphs 12, 16 and 20 above). In particular, the 20th and the 9th Chambers of the Ankara Civil Court of First Instance considered that the author had overstepped the boundaries of acceptable criticism in the article.

44. The Court has examined the article in question and the reasons given in the domestic courts' decisions to justify the interference with the applicants' right to freedom of expression. It has taken into consideration the applicants' interest in conveying to the public the first applicant's view on a topic of general interest and voicing his criticism, balanced against the claimants' interest as individuals exercising a judicial function in having their reputations protected and being protected against personal insult. In this connection, the Court reaffirms that the courts, as with all other public institutions, are not immune from criticism and scrutiny. In particular, a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention (see *Skałka v. Poland*, no. 43425/98, § 34, 27 May 2003). The Court considers that some of the language and expressions used in the article in question, notably those highlighted by the domestic courts, were harsh and that they could be perceived as offensive. They were, however mostly, value judgments, coloured by the author's own political and legal opinions and perceptions. In this connection, the Court also observes that they were based on the manner in which the Constitutional Court ruled on certain issues and that these rulings, including the dissolution of the *Fazilet* Party, were already subject to virulent public debate, as the applicant sought to demonstrate in the domestic proceedings. They could therefore be considered to have had a sufficient factual basis (see, *a contrario*, *Barfod v. Denmark*, 22 February 1989, § 35, Series A no. 149). In so far as it concerns statements of fact contained in the impugned article, the Court finds that the domestic courts did not attempt to distinguish them from value judgments, nor do they appear to have examined whether the "duties and responsibilities" incumbent on the applicants within the meaning of Article 10 § 2 of the Convention were observed, or to have assessed whether the article was published in good faith.

45. In particular, the Court considers that the domestic courts, in their examination of the cases, omitted to place the impugned remarks within the context in which they were expressed. In this connection, it reiterates that

style constitutes part of the communication as the form of expression and is as such protected together with the content of the expression (see *Uj v. Hungary*, no. 23954/10, § 20, 19 July 2011). Thus, when account is taken of the content of the article as a whole, and the context in which they were expressed, the Court is of the opinion that the impugned strong and harsh remarks contained in the article, set out in general terms, with respect to the judges of the Constitutional Court, cannot be construed as a gratuitous personal attack against the claimants. The Court also takes note that the article in question was published in a quasi-academic quarterly as opposed to a popular newspaper.

46. In the light of the above considerations, and notwithstanding the national authorities' margin of appreciation, the Court considers that the interference with the applicants' freedom of expression was not based on sufficient reasons to show that the interference complained of was necessary in a democratic society for the protection of the reputation and rights of others. This finding makes it unnecessary for the Court to pursue its examination in order to determine whether the amount of damages which the applicants were ordered to pay was proportionate to the aim pursued. It follows that there has been a violation of Article 10 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

47. The applicants further complained under Article 6 of the Convention that the domestic courts had failed to give reasons for their judgments, that they had refused to hear defence witnesses and that they had been denied access to court on account of the imposition of fines at the rectification of judgment stage. They further complained under Article 1 of Protocol No. 1 that the damages awarded to the claimants had been excessive.

48. Having regard to the facts of the case and its finding of a violation of Article 10, the Court considers that it has examined the main legal question raised in the present application. It therefore concludes that it is not necessary to examine the admissibility or the merits of the above-mentioned complaints (see, for example, *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, § 29, 25 June 2013; see also *Sorguç*, cited above, § 44; and *Pakdemirli v. Turkey*, no. 35839/97, § 63, 22 February 2005).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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, costs and expenses

50. The first applicant, Mr Erdoğan, claimed 40,478 euros (EUR) in respect of pecuniary damage. This sum was comprised of the damages he had been ordered to pay in eight sets of legal proceedings and the legal fees he had incurred as a result of those proceedings. He further claimed EUR 10,000 in respect of non-pecuniary damage. Finally, this applicant requested EUR 5,000 in respect of his legal representation before the Court.

51. The Government underlined that the applicants' representative had submitted just satisfaction claims only in respect of the first applicant and that the amounts sought were excessive. In this connection, they noted that the applicant was claiming the reimbursement of the damages he had been ordered to pay in eight separate sets of legal proceedings, although he had lodged an application with the Court only in respect of three sets of proceedings.

52. The Court considers that there is a causal link between the pecuniary damage referred to by the applicant and the violation of the Convention found above only in so far as it concerns the damages claims lodged by Ms F.K., Mr Y.A. and Mr B.M. (see paragraph 8 above). Therefore, the Court finds that the reimbursement by the Government of the damages paid by the applicant in respect of those proceedings, plus the statutory interest applicable under domestic law, running from the date on which the applicant paid the relevant sums, would satisfy his claim in respect of pecuniary damage (see *Mengi*, cited above, § 63).

53. It further considers that the applicant has suffered non-pecuniary damage as a result of the domestic courts' judgments in respect of his article, which were incompatible with Convention principles. This damage cannot be sufficiently compensated for by a finding of a violation. Taking into account the circumstances of the case and having regard to its case-law, the Court awards the applicant EUR 7,500 in respect of non-pecuniary damage.

54. As to costs and expenses, the Court observes that the applicants' representative submitted, in support of the first applicant's claim, receipts corresponding to lawyers' fees in respect of eight sets of legal proceedings, three of which are relevant for the purpose of the present case. It notes, however, that the payments appear to have been made by the publishing

company and not by the first applicant. Furthermore, no document or explanation was provided by the applicants' representative as regards the amount claimed in respect of the costs and expenses incurred before the Court. Accordingly, the Court makes no award under this head.

55. Likewise, the second and the third applicants did not submit a claim for just satisfaction. Therefore, the Court considers that there is no call to award them any sum on that account.

B. Default interest

56. 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, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the complaints under Article 10 of the Convention admissible;

3. *Holds* that there has been a violation of Article 10 of the Convention;

4. *Holds* that there is no need to examine the admissibility and merits of the applicants' complaints under Article 6 of the Convention and Article 1 of Protocol No. 1;

5. *Holds*

(a) that the respondent State is to reimburse to the first applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the damages paid by him with respect to the damages claims lodged by Ms F.K., Mr Y.A. and Mr B.M, plus the statutory interest applicable under domestic law, running from the date of payment, and to pay to the applicant within the same period EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the first applicant's claim for just satisfaction."

Done in English, and notified in writing on 27 May 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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 joint concurring opinion of Judges Sajó, Vučinič and Kūris is annexed to this judgment.

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

JOINT CONCURRING OPINION OF JUDGES SAJÓ, VUČINIČ AND KŪRIS

1. We voted with the majority in finding that there had been a violation of Article 10 of the Convention. To our mind, however, it is important to take into consideration one additional point which has not been made explicit in the reasoning.

2. When it comes to the use of concepts and principles which are not yet clearly spelled out in the Court's case-law, it is imperative to explain the reasons for and scope of those concepts and principles. This is required by the judicial duty to ensure that judgments are convincing and transparent. Without transparency of the underlying considerations, the meaning which is attributed to a concept and the scope of the applicability of a principle run the risk of being seen as arbitrary and do not offer sufficient guidance for the determination of future cases.

3. In paragraph 40 of the judgment, academic freedom has been defined as being "not restricted to academic or scientific research, but also [as] extend[ing] to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence" and as "includ[ing] an examination of the functioning of public institutions in a given political system, and a criticism thereof". One could hardly disagree that academic freedom is not limited to debates in scholarly journals, debates in academic settings and teaching. This freedom is protected under Article 10, which guarantees the freedom of expression in its various manifestations, including "extramural" speech, which embraces not only academics' mutual exchange (in various forms) of opinions on matters of academic interest, but also their addresses to the general public – of which, by the way, academics themselves are also part. (As a broader concept, academic freedom transcends the scope of Article 10 in certain areas, but this dimension is irrelevant to the present case and will not be discussed further here.)

4. The level of protection granted to academic freedom, especially in its "extramural" manifestation, cannot be explained fully (and consequently, in a convincing and transparent way) within the four corners of the assumptions that underlie the Court's case-law concerning freedom of expression. At least as matters currently stand, these assumptions remain at the level of intuitions. The meaning, rationale and scope of academic freedom are not obvious, as the legal concept of that freedom is not settled. Traditionally, academic freedom referred to a crucial element of university autonomy: non-interference by external powers in university teaching. This core academic freedom has increasingly been accepted as including personal freedom of expression, often in the sense of scholars' autonomy. It is in this sense that the maxim of the independence of university teachers and researchers was recognised as a constitutional principle by the French

Constitutional Council (see decision no. 83-165 DC, 20 January 1984, in which it was held that "by their very nature, the functions of teaching and research not only permit but require ... that free expression and personal independence are guaranteed by the provisions applicable to them" and that "the guarantee of [teachers'] independence stems from a fundamental principle recognised by the laws of the Republic"). A similar approach can be found in the constitutional case-law of many other European countries. Also, teachers' freedom of expression is interlinked with the freedom of research. In order to provide for the self-determination necessary for the autonomous advancement of learning, knowledge and science, institutional autonomy is guaranteed under the name of academic freedom. However, although academic freedom refers, first and foremost, to institutional autonomy, it cannot be reduced to its institutional setting, since scholars' institutional autonomy is meaningful only if they enjoy personal freedom of research that entails unimpeded communication of ideas within, but not exclusively within, the scholarly community. This interrelatedness between academic institutional autonomy and personal freedom of scholars is expressed in various instruments including Recommendation CM/Rec(2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy. In this Recommendation, academic freedom and institutional autonomy are characterised as "essential values of higher education" which "serve the common good of democratic societies". It is also emphasised that "academic freedom should guarantee the right of both institutions and individuals to be protected against undue outside interference, by public authorities or others", which is "an essential condition for the search for truth", and that "[u]niversity staff and/or students should be free to teach, learn and research without the fear of disciplinary action, dismissal or any other form of retribution" (see paragraphs 4 and 5 of the Recommendation).

5. Thus, although scholars' personal academic freedom is by all means a manifestation of freedom of expression covered by Article 10, it would make little sense to attempt to justify the specific instance of "extramural" academic speech by a general reference to "the needs of a democratic society", the typical justification accepted for freedom of expression in the Court's case-law. This would be superficial. Convincing justification for impugned "extramural" academic speech can very often be arrived at only if one takes into consideration the need to communicate ideas, which is protected for the sake of the advancement of learning, knowledge and science.

6. There is no Chinese wall between science and a democratic society. On the contrary, there can be no democratic society without free science and free scholars. This interrelationship is particularly strong in the context of social sciences and law, where scholarly discourse informs public discourse on public matters including those directly related to government and

politics. In Recommendation No. R(2000)12 of the Committee of Ministers to member States on the social sciences and the challenge of transition, it is emphasised that "the social sciences play a strategic role in guaranteeing an informed public and in building a society based on democracy" and that "all democracies have a growing need for the social sciences for their economic and social development, to help their institutions to understand and to solve societal problems, to increase the confidence of their citizens in democracy and to enhance the vigour of the democratic process itself, encompassing electoral politics, government, and civil society". As a matter of principle, social and legal scientists' contributions to public discourse and other "extramural" utterances that are based on their research, professional expertise and competence serve the public interest. It is for this reason that social and legal scientists' judgments, those of value no less than those of fact, where these academics freely express their views and opinions on matters belonging to the area of their research, professional expertise and competence, deserve the highest level of protection under Article 10. True, in general, in order to be protected under Article 10, a public comment or utterance on any matter, not only on one of public concern and irrespective of who has pronounced it, does not need to have an "academic element". However, *ceteris paribus*, the presence or absence of an "academic element" in an impugned comment or utterance may be decisive in finding whether a particular "speech" which otherwise would constitute an unlawful infringement of personal rights is protected under Article 10.

7. In this case the Court has been confronted with "extramural speech" by Mr Erdoğan, namely his public comments on a matter of public concern in the area of his professional competence, which is constitutional law. In paragraph 40 of the judgment, the majority have cited *Aksu v. Turkey* ([GC], nos. 4149/04 and 41029/04, § 71, ECHR 2012) in finding that "it is ... consistent with the Court's case-law to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings". This very general principle, which we fully endorse, calls for a tool for its application, that is to say an applicable test by which it could be determined whether academic freedom, and not only freedom of expression as an "umbrella concept", has been impeded. So far, no such test has been applied in the Court's case-law. This case presented an opportunity to fill this gap. Regrettably, this opportunity has not been taken.

8. We submit that in determining whether "speech" has an "academic element" it is necessary to establish: (a) whether the person making the speech can be considered an academic; (b) whether that person's public comments or utterances fall within the sphere of his or her research; and (c) whether that person's statements amount to conclusions or opinions based on his or her professional expertise and competence. These conditions being satisfied, an impugned statement must enjoy the utmost protection under Article 10, as indicated in paragraph 6 above. Where and how (*inter*

alia, in what form of publication or to what audience) the "speech" was given or was otherwise made public is a secondary, auxiliary and often not decisive factor.

9. Turning to the circumstances of this particular case, the reasoning set out in paragraph 45 of the judgment has to be cited, namely that "when account is taken of the content of the article as a whole, and the context and the form in which they were expressed, the Court is of the opinion that the impugned strong and harsh remarks contained in the article, set out in general terms, with respect to the judges of the Constitutional Court, cannot be construed as a gratuitous personal attack against the claimants". In fact, to substantiate this finding only one argument has been explicitly put forward, namely that Mr Erdoğan's "article ... was published in a quasi-academic quarterly as opposed to a popular newspaper". That is clearly not enough and could therefore be misleading. We think that it should also have been explicitly noted that the said "strong and harsh remarks ... with respect to the judges of the Constitutional Court", as value judgments, were part of an explanatory opinion based on the scholarly analysis conducted by a professional academic in the field of constitutional law. This is precisely what can justify their protection under Article 10 in the context in which they were expressed. We do not intend to speculate here whether hypothetical generalised "strong and harsh remarks" of an identical nature but lacking an "academic element" (for example, because they were made by a non-academic commentator) would likewise have been regarded as not constituting "a gratuitous personal attack against the claimants" and would enjoy the same level of protection under Article 10, even if they had been made public in the same or equivalent "quasi-academic" journal.

10. This is by no means to deny the offensive nature of the personal conclusions of Mr Erdoğan's article. Under "ordinary" circumstances such language, especially if read in isolation, should raise serious concerns as being offensive to personal reputation, in particular because it depicts identifiable members of a court on the grounds of their judgment. The Court's case-law has on more than one occasion recognised that "the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence; and it may therefore prove necessary to protect judges from offensive and abusive verbal attacks" (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports of Judgments and Decisions* 1997–I; *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I; and *Ungváry and Irodalom Kft. v. Hungary*, no. 64520/10, § 44, 3 December 2013). However, in the present case the Court has dealt with a situation where a professor of constitutional law had offered a scholarly analysis of a Constitutional Court judgment, a matter clearly within his academic expertise and competence. His professional analysis preceded his opinion on the personalities of certain judges, and the opinion was based on that analysis. Professor Erdoğan, after having

considered alternative explanations for the specific reasoning and conclusions of the Constitutional Court, came to the conclusion that the judgment analysed was unprofessional and that this lack of professionalism originated in the lack of professionalism of the judges of that court. This is an informed opinion – not in the sense that it is factually correct, but in the sense that it is research-and-facts-related. To express such an opinion in that situation was a legitimate thing to do for an academic within the scope of the professional freedom needed in the field of constitutional law, which by its nature plays "a strategic role in guaranteeing an informed public and in building a society based on democracy" (see Recommendation No. R(2000)12, cited above). We find that these considerations were not properly taken into account in the proportionality analysis, when the domestic courts accepted that the protection of the reputation of judges – which is necessary in a democratic society – did not allow a constitutional law professor to express his informed opinion, even if factually incorrect, on the alleged lack of professionalism of the judges of the Constitutional Court.