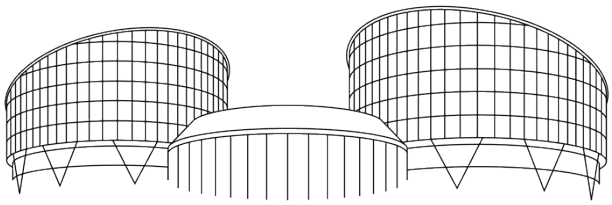

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ŞÜKRAN AYDIN AND OTHERS v. TURKEY

(Applications nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09)

This version was rectified on 23 January 2013
under Rule 81 of the Rules of Court

JUDGMENT

STRASBOURG

22 January 2013

FINAL

27/05/2013

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

In the case of Şükran Aydın and Others v. Turkey,

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

Guido Raimondi, *President*,
Danutė Jočienė,
Peer Lorenzen,
Dragoljub Popović,
Işıl Karakaş,
Paulo Pinto de Albuquerque,
Helen Keller, *judges*,
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 4 December 2012,

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

PROCEDURE

1. The case originated in five applications (nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09) 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 five Turkish nationals, Ms Şükran Aydın, Ms Ayşe Gökkan, Mr Ayhan Erkmen, Mr Orhan Miroğlu and Mr Mesut Beştaş[1] ("the applicants"), on 28 November 2006, 28 May 2007, 6 October 2008, 5 November 2008 and 10 February 2009 respectively.

2. The applicants were represented by Mr M.A. Altunkalem, a lawyer practising in Diyarbakır (the first applicant), Ms R. Doğan Yıldız and Mr Y. Aydın, lawyers practising in Istanbul (the second applicant), Mr O. Gündoğdu, a lawyer practising in Kars (the third applicant), Mr C. Kayhan, a lawyer practising in Ankara (the fourth applicant) and Ms M.D. Beştaş[2] and Mr E. Ürküt, lawyers practising in Diyarbakır (the fifth applicant). 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).

1. Rectified on 23 January 2013. The applicant's name, which read "Mesut Bektaş", was changed.
2. The name of the applicant's representative, which read "M.D. Bektaş", was changed.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1957, 1965, 1973, 1952 and 1966 and live in Diyarbakır, Şanlıurfa, Kars, Ankara and Diyarbakır respectively.

A. Application no. 49197/06

5. At the time of the events the applicant, Ms Şükran Aydın, was the mayor of Bismil and was standing for election in the parliamentary elections of 3 November 2002 as a candidate for the People's Democratic Party (DEHAP) in the province of Diyarbakır.

6. On 2 January 2003 criminal proceedings were initiated against the applicant before the Lice Criminal Court of First Instance for conduct contrary to Law no. 298 on the fundamental provisions governing elections and voter registration (*Seçimlerin Temel Hükümleri ve Seçmen Kütükleri Hakkında Kanun*), on the ground that on 26 October 2002 she had campaigned for election in Kurdish.

7. In the course of the trial the applicant submitted that she had addressed the crowd partly in Kurdish because the population was Kurdish and she had taken into consideration the fact that there were many elderly people and women in the crowd who would not understand Turkish.

8. On 26 January 2005 the Lice Criminal Court of First Instance, having examined the evidence in the case file including the verbatim transcript of a video recording, found that the applicant had campaigned for election in Kurdish on 26 October 2002, in breach of section 58 of Law no. 298. In accordance with section 151(2) of Law no. 298, the court sentenced the applicant to six months' imprisonment and to a heavy fine. Taking into account the applicant's good behaviour during the trial, the circumstances of the case and her personality, the court first reduced the sentence, then commuted the prison sentence to a fine and finally ordered that payment of the fine be suspended as the applicant had no criminal record and the judge was satisfied that she would not reoffend.

9. On 11 May 2006 the Court of Cassation altered the amount of the fine and upheld the judgment of the first-instance court. The decision was returned to the registry of the first-instance court on 13 June 2006.

B. Application no. 23196/07

10. At the time of the events the applicant, Ms Ayşe Gökkan, was standing for election in the parliamentary elections of 3 November 2002 as a

candidate for the People's Democratic Party (DEHAP) in the province of Şanlıurfa.

11. On 6 November 2002 criminal proceedings were initiated against the applicant before the Viranşehir Criminal Court of First Instance for conduct contrary to Law no. 298 on the fundamental provisions governing elections and voter registration, on the ground that on 27 October 2002 she had campaigned for election in Kurdish.

12. In the course of the trial the applicant maintained that she had spoken in Kurdish because she was addressing a crowd of Kurdish women who did not understand Turkish.

13. On 15 December 2005 the Viranşehir Criminal Court of First Instance, having examined the evidence in the case file including the verbatim transcript of a video recording, found that the applicant had campaigned for election in Kurdish on 27 October 2002, in breach of section 58 of Law no. 298. In accordance with section 151 of Law no. 298, the court sentenced the applicant to six months' imprisonment and to a heavy fine. Taking into account the circumstances of the case and the applicant's personality, the court commuted the prison sentence to a fine and subsequently ordered that payment of the fine be suspended as the applicant had no criminal record and the judge was satisfied that she would not reoffend.

14. On 29 November 2006 the Court of Cassation declined to examine the applicant's appeal on the ground that it was not written in Turkish. The court altered the amount of the fine and upheld the judgment of the first-instance court.

C. Application no. 50242/08

15. On 1 November 2007 criminal proceedings were initiated against the applicant, Mr Ayhan Erkmen, who was mayor of Dağpınar, before the Digor Criminal Court of First Instance for conduct contrary to Law no. 298 on the fundamental provisions governing elections and voter registration, on the ground that on 18 July 2007 he had given a speech in Kurdish during a rally organised by Mr Alınak, who was standing for election in the parliamentary elections as an independent candidate in the province of Kars.

16. In the course of the trial the applicant maintained that he had spoken in Kurdish so that the crowd, many of whom did not understand Turkish, could understand him better. On 24 March 2008 the Digor Magistrates' Court, having examined the evidence in the case file including the verbatim transcript of a video recording, found that the applicant had spoken in Kurdish during an election rally on 18 July 2007, in breach of section 58 of Law no. 298. In accordance with section 151 of Law no. 298, the court sentenced the applicant to six months' imprisonment. Taking into account the applicant's good behaviour during the trial, the circumstances of the

case and his personality, the court first reduced the sentence to five months and finally decided to suspend pronouncement of the judgment (*hükmün açıklanmasının geriye bırakılması*) for five years under Article 231 of the Code of Criminal Procedure.

17. On 20 May 2008 the Digor Criminal Court of First Instance dismissed an objection lodged by the applicant against the above-mentioned decision.

D. Application no. 60912/08

18. Criminal proceedings were initiated against the applicant, Mr Orhan Miroğlu, who had stood for election in the parliamentary elections as an independent candidate in the province of Mersin, for conduct contrary to Law no. 298 on the fundamental provisions governing elections and voter registration, on the ground that on 27 June 2007 he had campaigned for election in Kurdish.

19. In the course of the trial the applicant maintained that he had spoken in Turkish but that, since there were people in Mersin who spoke Kurdish, he might have greeted them in Kurdish.

20. On 3 April 2008 the Mersin Magistrates' Court, having examined the evidence in the case file including the verbatim transcript of a video recording, found that the applicant had spoken partly in Kurdish during an election rally on 27 June 2007, in breach of section 58 of Law no. 298. In accordance with section 151 of Law no. 298 the court sentenced the applicant to six months' imprisonment. Taking into account the applicant's good behaviour during the trial, the circumstances of the case and his personality, the court decided to suspend pronouncement of the judgment for five years under Article 231 of the Code of Criminal Procedure.

21. On 7 July 2008 the Mersin Criminal Court of First Instance dismissed an objection lodged by the applicant against the above-mentioned decision.

E. Application no. 14871/09

22. On 16 June 2004 criminal proceedings were initiated against the applicant, Mr Mesut Beştaş[1], who had stood for election in the municipal elections of 28 March 2004 as a candidate for the Social Democratic People's Party (SHP) in the province of Siirt, for conduct contrary to Law no. 298 laying down the fundamental provisions governing elections and voter registration, on the ground that on 20 March 2004 he had campaigned for election in Kurdish.

1. The applicant's name, which read "Mesut Bektaş", was changed.

23. In the course of the trial the applicant maintained that nothing in the speeches he had given could be construed as constituting an offence and that it was not illegal to speak in Kurdish.

24. On 10 May 2005 the Siirt Criminal Court of First Instance, having examined the evidence in the case file including the verbatim transcript of a video recording, found that the applicant had spoken in Kurdish during an election rally on 20 March 2004, in breach of section 58 of Law no. 298. In accordance with section 151 of Law no. 298 the court sentenced the applicant to six months' imprisonment and to a heavy fine. Taking into account the applicant's good behaviour during the trial, the circumstances of the case and his personality, the court first reduced the sentence and then commuted the prison sentence to a fine. At the request of the principal public prosecutor's office, the Siirt Criminal Court of First Instance re-examined the applicant's conviction and sentence on 18 October 2005 and sentenced him to an administrative fine. This decision was quashed by the Court of Cassation on 11 October 2006.

25. On 6 April 2007 the Siirt Criminal Court of First Instance found the applicant guilty as charged. In accordance with section 151 of Law no. 298 the court sentenced the applicant to six months' imprisonment and to a heavy fine. It later commuted the applicant's prison sentence to a fine. This decision was quashed by the Court of Cassation on 8 April 2008.

26. On 27 October 2008 the Siirt Criminal Court of First Instance decided to suspend pronouncement of the judgment against the applicant for five years under Article 231 of the Code of Criminal Procedure. On 18 December 2008 the Siirt Assize Court dismissed an objection lodged by the applicant against the above-mentioned decision.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. At the time of the events the relevant parts of Law no. 298 read as follows:

Section 58

"... it shall be forbidden to use any language or script other than Turkish in campaigning for election on radio or television or by other means."

Section 151(2)

"... persons acting in breach of the prohibitions specified in sections 58 ... shall be liable to a prison term ranging from six months to one year and to payment of a fine of between one million and five million liras."

28. By Law no. 5980 of 8 April 2010 the relevant part of section 58 was amended to read as follows:

"... During election campaigns political parties and candidates shall primarily use Turkish."

III. RELEVANT INTERNATIONAL MATERIALS

29. Article 27 of the International Covenant on Civil and Political Rights reads, in so far as relevant, as follows:

"In those States in which ethnic ... or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group ... to use their own language."

30. Article 2 of the United Nations Declaration of 12 December 1992 on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities stipulates, *inter alia*, as follows:

"1. Persons belonging to national or ethnic ... and linguistic minorities ... have the right to ... use their own language, in private and in public, freely and without interference or any form of discrimination.

2. Persons belonging to minorities have the right to participate effectively in ... public life."

31. Article 5 of the UNESCO Universal Declaration on Cultural Diversity of 2 November 2001 reads:

"All persons have ... the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue..."

32. The principle that no prohibition should be imposed on the use of minority languages during election campaigns is set forth in the Recommendations of the second session of the Forum on Minority Issues, entitled "Minorities and Effective Political Participation", held in November 2009 within the United Nations. Point 19 of the Recommendations reads as follows

"19. There should be no prohibition or unreasonable restriction placed on the use of any minority language during election campaigns, although language use should naturally be determined by assessing how the broadest constituencies possible may be reached. As far as possible, electoral authorities should provide voting information in both the official language and those minority languages used by voters in the areas where they are concentrated."

33. The Framework Convention for the Protection of National Minorities contains several provisions of relevance:

Article 9

"1. The Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. ...

...”

Article 10

“1. The Parties undertake to recognise that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing.

...”

Article 15

“The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.”

34. On 27 February 2008 the Advisory Committee on the Framework Convention for the Protection of National Minorities, in its commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, expressed the following opinion regarding the use of minority languages in election campaigns:

“77. State Parties should ensure that parties representing or including persons belonging to national minorities have adequate opportunities in election campaigning. This may imply the display of electoral advertising in minority languages. The authorities should also consider providing opportunities for the use of minority languages in public service television and radio programmes devoted to election campaigns and on ballot slips and other electoral material in areas inhabited by persons belonging to national minorities traditionally or in substantive numbers.”

35. Point *5.d* of Recommendation 273 (2009) of the Congress of Local and Regional Authorities of the Council of Europe, entitled “Equal access to local and regional elections”, reads as follows:

“[*Recommends that the Committee of Ministers urge the governments of member states:*] to invite local and regional authorities to ensure the availability of electoral material in a regional or minority language and to give the right to candidates from minority groups to use their mother tongue in the pre-electoral campaign in order to guarantee equal access to local and regional elections to members of a minority group;”

IV. RELEVANT COMPARATIVE MATERIAL

36. On the basis of the material available to the Court in 2010 in respect of twenty-two Contracting States (Albania, Azerbaijan, Belgium, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, “the former Yugoslav Republic of Macedonia”, Ukraine and the United

Kingdom), it appears that the use of minority languages by candidates speaking during public election meetings is not subject to criminal sanctions in any of the countries concerned.

THE LAW

I. JOINDER OF THE APPLICATIONS

37. The Court notes that all the applicants complained of their conviction and sentencing under sections 58 and 151 of Law no. 298 for having spoken Kurdish during an election campaign. Having regard to the similarity of the applicants' grievances, the Court is of the view that, in the interests of the proper administration of justice, the applications should be joined in accordance with Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLES 6, 9, 10 AND 11 OF THE CONVENTION AND ARTICLE 3 OF PROTOCOL No. 1

38. The applicants complained that their conviction and sentencing simply for speaking Kurdish during an election campaign had been in breach of their rights under the Convention. In that connection some of the applicants made lengthy submissions regarding the incompatibility of the domestic law with international human rights law, including the Convention. Under this head they relied on the right to a fair trial (Article 6 – only the fifth applicant), freedom of thought (Article 9 – only the first applicant), freedom of expression (Article 10 – all the applicants), freedom of assembly (Article 11 – only the second and fifth applicants) and the right to free elections (Article 3 of Protocol No. 1 – the second, third and fifth applicants).

39. The Court considers that the applicants' complaints fall to be examined under Article 10 of the Convention alone. Article 10, in so far as relevant, reads:

> "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, ...for the prevention of disorder or crime ...."

A. Admissibility

40. 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. The parties' submissions

41. The Government maintained that there had been no interference with the exercise of the applicants' right to freedom of expression. They submitted, however, that even if the Court were to consider that there had been such interference, it had been in accordance with the second paragraph of Article 10. In that connection the Government submitted that the interference with the applicants' freedom of expression had been based on sections 58 and 151 of Law no. 298 and that it had pursued the legitimate aim of protecting public order. As to whether the interference in question had been necessary in a democratic society, the Government, quoting various passages from the Court's case-law on Article 10, submitted that the domestic courts had examined the cases carefully and that their findings had been relevant and sufficient. It considered that the domestic courts' decisions in the instant cases fell within the State's margin of appreciation.

42. The Government also informed the Court of the recent amendment to section 58 of Law no. 298 (see paragraph 28 above) and submitted that, accordingly, the use of languages other than Turkish during election campaigning no longer constituted an offence.

43. The applicants maintained their allegations. In particular, some of the applicants emphasised that they had been convicted and sentenced simply because they had spoken in their mother tongue and not because of the content of their speeches, and that the domestic law at the time of the events had been incompatible with international human rights law, including the Convention. The recent amendment to the law was mentioned by some of the applicants, who considered it as evidence that the impugned law had not pursued a legitimate aim.

2. The Court's assessment

(a) Existence of interference

44. The Court observes that criminal proceedings were initiated against the applicants for having spoken in Kurdish during an election campaign. They were convicted. Execution of the sentences of Ms Şükran Aydın and

Ms Ayşe Gökkan was suspended. In respect of the three other applicants, Mr Ayhan Erkmen, Mr Orhan Miroğlu and Mr Mesut Beştaş[1], the domestic courts decided to suspend pronouncement of the judgments against them for five years. In view of the above, the Court considers that the prohibition contained in section 58 of Law no. 298 at the material time amounted to interference with the right to freedom of expression such that it directly affected the applicants.

45. Such interference will contravene Article 10 of the Convention unless it is "prescribed by law", pursues one or more of the legitimate aims prescribed by paragraph 2 of Article 10, and is "necessary in a democratic society" for achieving such aim or aims.

(b) Prescribed by law

46. The Court considers that the interference was prescribed by law, namely by section 58 of Law no. 298.

(c) Legitimate aim

47. The Court, owing to the absence of any detailed reasoning on the part of the Government, is not entirely convinced that the measures taken against the applicants in accordance with section 58 of Law no. 298 can be said to have been in pursuance of the aim referred to by the Government, namely the prevention of disorder. However, the Court does not consider it necessary to determine this question because, in any event, the key issue to be examined is whether the interference was "necessary in a democratic society" (see, for example, *Açık and Others v. Turkey*, no. 31451/03, § 42, 13 January 2009).

(d) Necessary in a democratic society

48. The test of "necessity 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 the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII).

49. However, 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

1. The applicant's name, which read "Mesut Bektaş", was changed.

appreciation (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). 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" (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). 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, among many other authorities, *Zana v. Turkey*, 25 November 1997, § 51, *Reports of Judgments and Decisions* 1997-VII).

50. At the outset, the Court reiterates that with the exception of the specific rights stated in Articles 5 § 2 (the right of persons to be informed promptly, in a language which they understand, of the reasons for their arrest) and 6 § 3 (a) and (e) (the right of persons to be informed promptly, in a language which they understand, of the nature and cause of the accusation against them and the right to have the assistance of an interpreter if they cannot understand or speak the language used in court), the Convention does not *per se* guarantee the right to use a particular language in communications with public authorities or the right to receive information in a language of one's choice (see *Mentzen v. Latvia* (dec.), no. 71074/01, ECHR 2004-XII, and *Kozlovs v. Latvia* (dec.), no. 50835/99, 10 January 2002). In that connection it also emphasises that the Convention does not guarantee the right to use a particular language in communications with public authorities for electoral purposes (see *Fryske Nasjonale Partij and Others v the Netherlands,* no. 11100/84, Commission decision of 12 December 1985, and *Association "Andecha Astur" v. Spain*, no. 34184/96, Commission decision of 7 July 1997). The Court further reaffirms that matters such as the choice of a parliamentary assembly's working language fall outside the scope of Article 10 (see, for example, *Birk-Levy v. France* (dec.), no. 39426/06, 21 September 2010).

51. Moreover, the Court further stresses that as Contracting States' linguistic policies are influenced by a multitude of factors of a historical, linguistic, religious and cultural nature, it is extremely difficult, if not impossible, to find a common denominator. Therefore, it considers that the margin of appreciation which the State authorities enjoy in this sphere is particularly wide (see, *mutatis mutandis*, *Mentzen*, cited above; *Bulgakov v. Ukraine*, no. 59894/00, §§ 43-44, 11 September 2007; and *Baylac-Ferrer and Suarez v. France* (dec.), no. 27977/04, 25 September 2008).

52. Turning to the facts of the present case, the Court finds that it is distinguishable from the cases cited above because it does not concern the use of an unofficial language in the context of communications with public authorities or before official institutions. Rather, the case concerns a linguistic restriction imposed on persons in their relations with other private

individuals, albeit in the context of public meetings during election campaigns. In that connection the Court reiterates that Article 10 encompasses the freedom to receive and impart information and ideas in any language that allows persons to participate in the public exchange of all varieties of cultural, political and social information and ideas (see *Eğitim ve Bilim Emekçileri sendikası v. Turkey*, no. 20641/05, § 71, 25 September 2012); in such contexts, language as a medium of expression undoubtedly deserves protection under Article 10.

53. In the instant case, the Court considers that the main issue before it is not whether a State should allow the use of any language other than the official language or languages during election campaigns in general but rather whether, where a restriction on such use exists, its scope and the manner in which it is applied are compatible with Article 10 standards. In that connection the Court observes that section 58 of Law no. 298 at the material time contained a blanket prohibition on the use of any language other than Turkish (the official language) in election campaigning. Breaches of this provision entailed criminal sanctions ranging from six months to one year and payment of a fine under section 151 of the same Law.

54. The Court observes that, contrary to the Government's submissions, the absolute nature of the ban in question deprived the domestic courts of their power to exercise proper judicial scrutiny. This is manifested clearly by the fact that the domestic courts' examination of the cases did not go beyond checking the transcripts of video or other recordings of the election meetings in order to ascertain whether or not the applicants had spoken some Kurdish during the election rallies. It must therefore establish the necessity of the interference in the present case by examining whether the ban on the use of unofficial languages in campaigning for election, contained in section 58 of Law no. 298 as it stood at the material time, was necessary in a democratic society.

55. The Court accepts that, in principle, States are entitled to regulate the use of languages by candidates and other persons during election campaigns and, if need be, to impose certain reasonable restrictions. However, a regulatory framework consisting of a total prohibition on the use of unofficial languages coupled with criminal sanctions cannot be held to be compatible with the essential values of a democratic society, which include freedom of expression as guaranteed by Article 10 of the Convention. In that connection the Court stresses that the language used by the applicants in the instant case, namely Kurdish, constituted their own mother tongue as well as the mother tongue of the population which they were addressing. Some of the applicants, in their submissions to the domestic courts, referred to the fact that many people in the crowd, notably the elderly and women, did not understand Turkish, the official language of the State. These facts are not disputed by the Government. Having regard to the specific context of elections and to the fact that free elections are inconceivable without the

free circulation of political opinions and information (see, for example, *Communist Party of Russia and Others v. Russia*, no. 29400/05, § 79, 19 June 2012), the Court considers that the right to impart one's political views and ideas and the right of others to receive them would be meaningless if the possibility of using a language that could properly convey those views and ideas were diminished owing to the threat of criminal sanctions. In that connection the Court notes that, according to the material available to it, Turkey stood apart from all of the twenty-two Contracting States surveyed (see paragraph 36 above) in making the use of minority languages by candidates speaking during public election meetings subject to criminal penalties at the relevant time. It welcomes in that regard the fact that the impugned legislation has now been amended (see paragraph 28 above).

56. In these circumstances and notwithstanding the national authorities' margin of appreciation, the Court finds that the ban in question did not meet a pressing social need and was not proportionate to the legitimate aim adduced by the Government in their observations. The Court therefore concludes that the interference with the applicants' freedom of expression arising from the ban laid down in section 58 of Law no. 298 as it stood at the material time cannot be regarded as "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

57. The first, second and fifth applicants and, in substance, the fourth applicant further alleged that their conviction and sentencing simply for speaking Kurdish during an election campaign had also violated their right to freedom from discrimination under Article 14 of the Convention, which, in so far as relevant, reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... language, religion ... association with a national minority."

58. The Court decided to raise this issue of its own motion in respect of the third applicant.

59. The Government argued that the relevant provisions of Law no. 298 were applicable to everyone without discrimination and that the measure imposed on the applicants did not therefore amount to a form of "discrimination" contrary to the Convention.

60. The applicants maintained their allegations. In that connection the first, second and fifth applicants claimed that the legal provision in question had applied only to Kurds and to the Kurdish language. The second and fifth applicants alleged that no one speaking another language, for example English, would have been prosecuted. The fifth applicant also maintained

that the Prime Minister had been allowed to speak in Kurdish at public meetings without being subject to prosecution.

61. The Court notes that this complaint is linked to that examined above and must therefore likewise be declared admissible.

62. In view of its finding of a violation of Article 10 of the Convention (see paragraph 56 above), the Court considers that it is not necessary to rule on the applicants' complaints under Article 14 of the Convention taken in conjunction with Article 10.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

63. Some of the applicants made additional complaints. The second applicant argued under Article 6 of the Convention that she had been denied a fair hearing on account of the fact that her appeal, submitted in Kurdish, had not been examined by the Court of Cassation because it had not been submitted in Turkish (the official language of Turkey). The third applicant complained, relying on Article 11 of the Convention, about the taping of the rally of 18 July 2007 by gendarmes, claiming that this had had a negative impact on him, on the other speakers and on the participants and had deterred others from participating in the rally. The fourth applicant submitted under Article 13 of the Convention that there had been no effective remedy in domestic law by which he could challenge his conviction, owing to the lack of any possibility of appeal to the Court of Cassation.

64. The Court finds, in the light of all the material in its possession, that the applicants' complaints in this regard do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the applications must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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

66. The first applicant, Ms Aydın, claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

67. The second applicant, Ms Gökhan, claimed pecuniary damage, the amount of which she left to the discretion of the Court. She further claimed EUR 10,000 in respect of non-pecuniary damage.

68. The third applicant, Mr Erkmen, claimed a total of EUR 45,000 in respect of non-pecuniary damage for the alleged violation of his rights under Articles 10 and 11 of the Convention and Article 3 of Protocol No. 1.

69. The fourth applicant, Mr Miroğlu, claimed EUR 10,000 in respect of non-pecuniary damage.

70. The fifth applicant, Mr Beştaş[1], claimed pecuniary damage, the amount of which he left to the discretion of the Court. He further claimed 50,000 Turkish liras (TRY) (approximately EUR 25,226) in respect of non-pecuniary damage.

71. The Government contested the above amounts.

72. The Court observes that the second and fifth applicants did not submit any evidence enabling the Court to assess and calculate the alleged pecuniary damage caused by the violation found in the instant case; it therefore rejects their claims under this head.

73. The Court considers that the applicants suffered non-pecuniary damage as a result of the interference with their freedom of expression arising from the ban laid down in section 58 of Law no. 298, which was incompatible with Convention principles. The damage cannot be sufficiently compensated for by the finding of a violation. Taking into account the circumstances of the case and having regard to its case-law, the Court awards each applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

74. The first applicant claimed EUR 3,000 in respect of costs and expenses incurred in the domestic proceedings and EUR 3,635 for those incurred before the Court. In support of her claims the applicant submitted a schedule of costs prepared by her lawyer and the Diyarbakır Bar Association's list of recommended minimum fees.

75. The second applicant, relying on the Istanbul Bar Association's list of recommended minimum fees, claimed EUR 5,000 in respect of costs and expenses incurred before the Court.

76. The third applicant claimed TRY 9,600 (approximately EUR 4,872) in respect of costs and expenses incurred before the Court. In support of his claims the applicant submitted a schedule of costs prepared by his lawyer and the Kars Bar Association's list of recommended minimum fees. He further submitted invoices relating to translation costs.

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1. The applicant's name, which read "Bektaş", was changed.

77. The fourth applicant claimed EUR 10,000 in respect of costs and expenses incurred in the domestic proceedings and EUR 8,000 for those incurred before the Court. In support of his claims the applicant relied on the Ankara Bar Association's list of recommended minimum fees.

78. The fifth applicant claimed TRY 9,000 (approximately EUR 4,500) in respect of costs and expenses incurred before the Court. In support of his claims the applicant submitted a schedule of costs prepared by his lawyer and the Diyarbakır Bar Association's list of recommended minimum fees.

79. The Government contested the above amounts.

80. 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 were actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the following sums: EUR 1,500 each to Ms Gökkan and Mr Miroğlu, EUR 2,000 each to Ms Aydın and Mr Beştaş[1], and EUR 3,000 to Mr Erkmen.

81. Finally, the Court considers unsubstantiated and therefore rejects the first and fourth applicants' claims regarding the costs and expenses incurred before the domestic courts.

C. Default interest

82. The Court considers it appropriate that the default interest 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. *Decides* unanimously to join the applications;

2. *Declares* unanimously the complaints concerning alleged interference with the applicants' freedom of expression and freedom from discrimination admissible and the remainder of the complaints inadmissible;

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

1. The applicant's name, which read "Bektaş", was changed.

4. *Holds* by six votes to one that there is no need to examine the complaint under Article 14 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 10,000 (ten thousand euros) to each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,500 (one thousand five hundred euros) each to Ms Gökkan and Mr Miroğlu, EUR 2,000 (two thousand euros) each to Ms Aydın and Mr Beştaş[1] and EUR 3,000 (three thousand euros) to Mr Erkmen, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 22 January 2013, 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 separate opinion of Judge Keller is annexed to this judgment.

G.R.A.
S.H.N

1. The applicant's name, which read "Bektaş", was changed.

PARTLY DISSENTING OPINION OF JUDGE KELLER

1. The majority of the Court rightly held that Article 10 had been violated. Section 58 of Law no. 298 *per se* violates the right to freedom of expression. I could not agree more with this finding, as making it a criminal offence to use a language other than Turkish in campaigning for election contravenes the very essence of Article 10.

2. In the light of this finding, the majority took the view that there was no need to examine the complaint under Article 14 (in conjunction with Article 10). To my regret, I am unable to follow the opinion of the majority in this respect.

3. I certainly understand that, in some cases, the Court may wish to limit the scope of a ruling for reasons of procedural economy. However, in the instant case this approach appears to be unduly reductive. The use of language in all areas of life constitutes a core human rights issue. Particularly in minority situations, the use of language is a highly sensitive matter. It is therefore vital that the Court take a thorough look at these issues.

4. In *Dudgeon v. the United Kingdom,* the Court found that a complaint against the prohibition of homosexual acts under Article 14 "amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 8". It therefore concluded that "there is no call to rule on the merits of a particular issue which is part of and absorbed by a wider issue" and that "there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons who are subject to lesser limitations on the same right. This being so, it cannot be said that a clear inequality of treatment remains a fundamental aspect of the case"[1]. This approach from 1981 is out of date nowadays[2]. If a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case, the Court has to consider the issue under Article 14 as well[3]. The complaint under Article 14 in conjunction with another Convention right is an autonomous one[4] to which the Court must give autonomous meaning.

5. In my view, the discrimination regarding the use of a particular language is a fundamental aspect in this case: the applicants formulated an arguable claim of indirect discrimination (see paragraphs 6 et seq. below),

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1. *Dudgeon v. the United Kingdom*, 22 October 1981, § 69, Series A, no. 45.
2. See, for example, *Kurić and Others v. Slovenia* ([GC], no. 26828/06, ECHR 2012): "Having regard to the importance of the discrimination issue in the present case, the Grand Chamber considers, unlike the Chamber, that the applicants' complaint under Article 14 of the Convention should be examined."
3. *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 133, ECHR 2010.
4. *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV.

the Government failed to respond to that claim (see paragraphs 10 and 11 below) and therefore the Government bear the burden of proof (see paragraph 12 below).

II. Arguable claim and prima facie evidence

6. The applicants argued, *inter alia*, that section 58 of Law no. 298 applied only to Kurds and to the Kurdish language and that persons were not prosecuted for using any other language (see paragraph 60 of the judgment). This is a serious allegation, one which was communicated to the Turkish Government.

7. It is true that the applicants did not provide any statistical data regarding the discriminatory application or effect of section 58 of Law no. 298. However, while the Court has previously held that statistical data may underpin a claim under Article 14, it has also found that such data are not strictly necessary in order to establish an arguable claim[1].

8. The mere fact that the applicants were all Kurdish, were living in different cities and were all prosecuted for using of the Kurdish language is a very strong indication of the existence of indirect discrimination.

9. Moreover, according to the Court's case-law, it is not for the applicant but rather for the Government to gather the relevant materials when these lie wholly or in large part within the exclusive knowledge of the authorities[2]. The applicants in the case at hand could only have gathered the relevant data by requesting them from the public prosecutors' offices and courts in Turkey. They would have depended completely on the goodwill of the national authorities. In such a situation, the principle *affirmanti incumbit probatio* cannot be applied rigorously.

1. *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 188, ECHR 2007-IV.
2. *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII; *D.H. and Others,* cited above, § 179; *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; and *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 183, ECHR 2009.

III. Shifting of the burden of proof

10. Once applicants alleging indirect discrimination establish a prima facie case thereof, this creates a rebuttable presumption that the effect of a practice is discriminatory, and the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory[1].

11. In the case at hand, the Government's answer was confined to stating that the law was applicable to all persons without discrimination on the basis of race, colour, sex, political opinion, religion or philosophical belief. According to the Turkish Government, the applicants' ethnic origin was not taken into account by the domestic courts in adjudicating the matter.

12. This, however, is not the point. The applicants claim *indirect* discrimination on the basis of a law which was worded in ethnically neutral terms but applied in a discriminatory way. Moreover, the Government fail to cite even a single case in which individuals were prosecuted for using a language other than Kurdish.

13. Therefore, I am of the opinion that the Court should have examined the issue under Article 14. After having assessed all the relevant elements and drawing inferences from the Government's failure to put forward any arguments showing that the impugned law was applied in a non-discriminatory manner, the Court should have come to the conclusion that there had been a violation of Article 10 taken together with Article 14 of the Convention.

1. *D.H. and Others*, cited above, § 189.