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

FOURTH SECTION

CASE OF ERDOĞDU v. TURKEY

(Application no. 25723/94)

JUDGMENT

STRASBOURG

15 June 2000

In the case of Erdoğdu v. Turkey,

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

Mr A. PASTOR RIDRUEJO, *President*,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mrs S. BOTOUCHAROVA, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 25 May 2000,

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

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the European Commission of Human Rights ("the Commission") on 3 June 1999.

2. The case originated in an application (no. 25723/94) against the Republic of Turkey lodged with the Commission under former Article 25 by Mr Ümit Erdoğdu ("the applicant"), who is a Turkish national, on 4 November 1994.

Relying on Articles 7, 9 and 10 of the Convention, the applicant complained of his conviction by a National Security Court on account of an article published in the bi-monthly periodical of which he was the editor.

3. The Commission declared the application admissible on 23 January 1998. In its report of 1 March 1999 (former Article 31 of the Convention)[1], in which it considered that the complaint, based on an infringement of the right to freedom of thought, should be examined under Article 10 of the Convention, it concluded, by twenty-five votes to one, that there had been an infringement of that Article and expressed the unanimous opinion that there had not been an infringement of Article 7.

4. Before the Court, the applicant was represented by Ms O.E. Ataman, a member of the Istanbul Bar.

5. On 7 July 1999 a panel of the Grand Chamber determined that the case should be decided by one of the Sections of the Court (Rule 100 § 1 of the Rules of Court). The President of the Court assigned the case to the Fourth Section. Subsequently Mr R. Türmen, the judge elected in respect of

1. *Note by the Registry*: The Commission's report is obtainable from the Registry.

Turkey, withdrew (Rule 28). The Turkish Government ("the Government") accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. On 4 October 1999 the Registrar received the memorial of the applicant, whom the President of the Chamber had given leave to use the Turkish language in the proceedings before the Court (Rule 34 § 3). On 14 December 1999, within the time-limit as extended by the President, the Government filed their memorial, to which the applicant replied on 13 January 2000.

7. After consulting the parties, the Chamber decided that it was not necessary to hold a hearing (Rule 59 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. At the material time Mr Ümit Erdoğdu, a journalist and writer, born in 1970, was the editor of the bi-monthly periodical *İşçilerin Sesi* ("The Workers' Voice"), which appears in Istanbul. In issue no. 40 of 2 October 1992, the periodical published an article written by a reader and entitled "*Kürt Sorunu Türk Sorunudur*" ("the Kurdish problem is a Turkish problem").

9. On 29 December 1992 the public prosecutor ("the prosecutor") at the Istanbul National Security Court ("the National Security Court") instituted criminal proceedings against A.E.A. and the applicant in their respective capacities as publisher and editor of the periodical.

The prosecutor noted that, in the article in question, "acts of separatist terrorism perpetrated in the south-east of the country were described as Kurdish National Resistance; part of the country, [thus] of the State of the Republic of Turkey, was called Kurdistan [and] an appeal was made for support for acts described as being of National Resistance". He charged the defendants with disseminating propaganda, through the medium of a periodical, against the territorial integrity of the State and the indivisible unity of the Turkish nation, contrary to section 8, paragraphs 1 and 2, of the Prevention of Terrorism Act (Law no. 3713) (see paragraph 21 below).

10. Having regard to the context from which the public prosecutor appears to have drawn his grounds for pressing charges (see paragraph 9 above and paragraph 12 below), the relevant passages of the article in question can be summarised as follows:

> "... The confrontations between Turks and Kurds in the various provinces are seen as foreseeable incidents; moreover, they are sometimes provoked by the security

forces, sometimes by fascist civilians and from time to time by the 'fundamentalists'. Consequently, the policy of favouring 'a military solution', which until now was implemented by means of a dirty war against [the guerrillas] has taken on a new dimension and has begun to be coupled with a destructive social policy leading to ethnic conflict in all regions of Turkey. It is very clear from this that the Kurdish problem is a general problem for Turkish society and not a problem experienced in Kurdistan and confined to within Kurdistan's borders ... Today, the Kurdish problem is a Middle Eastern problem ... The Republic of Turkey ["RT"], which is confronted with a Kurdish national movement within its own borders, clings firmly onto [the branch] of the 'Kurdish problem' and, in doing so, is rapidly sucked into the complex developments in the Middle East ... Will the daily repositioning of the pawns in the Middle East, the changes of alliance and the long-term imperialist plans ensure the success of those policies of the RT? Besides that, ... will the proportions reached by the Kurdish national movement allow it to be destroyed as a result of suffocation by a series of massacres? Clearly, nobody today can foresee answers to these questions ... Given the proposals for a 'political solution', expressed recently by the various spokespersons of the sovereign powers, the latter do not appear to have renounced the 'military solution'. Since the 'political solution' referred to is merely a sham political solution which denies the people of Kurdistan their free will ... In addition to that, the 'referendum' discussions, which have also been on the agenda for some time, are engaged in by the sovereign classes not in such a way as to achieve a solution to the problem, but to push it into a dead end. The envisaged 'referendum' does not in any way take as its basis the self-determination of the people of Kurdistan, but, on the contrary, outlines a 'solution' which is likely to unleash a rise in hostilities between the peoples ... Many of those on the left in Turkey have confined their perspective to preventing State terror and violations of human rights in Kurdistan, whereas another section are attempting to find their *raison d'être* in the shadow of the Kurdish national movement with a point of view which is far from likely to offer a democratic solution for all. It is clear that neither of those approaches can provide society with a credible means of solving the Kurdish problem. The revolutionary democratic powers must offer society as a whole a programme setting out the path necessary to achieve a democratic and liberal solution to the Kurdish problem. In order to make such a solution acceptable to the many different sectors of society, it is also necessary to implement an appropriate practice. Otherwise, the RT's warring policies will reach a point at which they can only engender circumstances condemning the whole country to chauvinism, State terror and darkness. Since the Kurdish problem is also a Turkish problem ... Moreover, in the ranks of the National Resistance Movement in Kurdistan, the current war is generally perceived as an 'international war'. Irrespective of what has been said in official declarations, the policy of favouring a military solution resembles, in practice, open warfare against the Kurdish people ... The sovereign powers, in their deliberate distortion [of things], make every effort to present this war as that of the Turks against the Kurds. And, alas!, the fact that the Turkish people have adopted a passive attitude towards the Kurdish problem renders that distortion credible. To perceive the war in Kurdistan as an 'international war' reinforces, among Turkish workers, chauvinistic and exclusive tendencies against the Kurds, while among the Kurdish youth in the West the same social atmosphere very spontaneously sparks off feelings of hostility towards Turkish society ... In actual fact, if one were to react in accordance with the requirements of an 'international war', what would affect Kurdish and Turkish workers would not be an 'international war', but a generalised social collapse. Faced with this increasingly marked tendency, even the leader of the Kurdish National Resistance Movement is failing to show himself to be sufficiently sensitive and prefers to keep silent. Clearly, such a dispute will benefit neither the Turkish people nor the Kurdish people. A dispute of this kind will merely be a

> confrontation between fundamentalists, lacking in any revolutionary dynamic, and will make the Turkish and Kurdish people vulnerable to attacks by the sovereign classes and imperialists. In order to curb this negative tendency, there is surely nothing more foolish than to suggest that the Kurdish people give up national resistance. On the contrary, defeating Kurdish national resistance will not in any way serve to eliminate the ethnic tensions beginning to appear in the West and will only set off a trend towards the establishment of lasting hostilities between the peoples. If there really is something to be achieved, it must be achieved in the West within the Turkish population. The only key to resolving the problem is for the Turkish people to perceive Kurdish national resistance as part of their [own] struggle for freedom and democracy ... activities designed to establish fraternity between peoples in the West constitute, in themselves, one of the most important means of the struggle against the current bonds of sovereignty ... The revolutionary movement in the West should henceforth 'intervene' in the Kurdish problem."

11. At a hearing on 19 April 1993 in the National Security Court, the applicant denied the charges against him. He submitted, among other things, that the article in question had been written by a reader residing in Germany, Y.A., and that he had published it because he had considered that it did not contain anything justifying censorship or anything revealing any criminal intention. The applicant argued that the article, considered as a whole, intended only to put forward the different approaches to the Kurdish problem, with the aim of suggesting democratic solutions to it.

12. On 20 December 1993 the National Security Court found the applicant and A.E.A. guilty of the offence as charged. It also ordered the copies of the issue of the review in which the impugned article had been published to be seized.

In its judgment, considering that it was not necessary to reproduce the passages judged to be in breach of the law, the National Security Court agreed with the prosecutor that the article in question referred to a part of Turkish territory which it called Kurdistan and condoned acts of violence by the PKK (Workers' Party of Kurdistan), which it portrayed as a national resistance movement against the State. Considering that the expressions and phrases used by Y.A., the author of the impugned article, undoubtedly showed an intention to transgress section 8 of Law no. 3713, the court concluded that, in publishing the article, the applicant and his co-defendant should be deemed to have knowingly conveyed propaganda designed to obtain support for the aim of destroying the territorial integrity of Turkey and the unity of the Turkish nation.

The National Security Court accordingly sentenced Mr Erdoğdu, in his capacity as editor, to six months' imprisonment and a fine of 50,000,000 Turkish liras (TRL).

13. The applicant appealed to the Court of Cassation. In a judgment of 4 May 1994, delivered after holding a hearing, the court dismissed his appeal, upholding the National Security Court's assessment of the evidence and its reasons for dismissing Mr Erdoğdu's defence.

14. On 10 January 1995 the applicant began paying the fine, which had been divided into monthly instalments of TRL 1,750,000.

15. On 30 October 1995, before the custodial sentence imposed on the applicant was enforced, Law no. 4126 came into force amending, *inter alia*, section 8 of Law no. 3713 (see paragraph 22 below). It modified the *mens rea* laid down by the former text of section 8 as to the commission of the act of propaganda in question. It also imposed a lighter custodial sentence for that offence, but increased the fines. In a transitional provision, Law no. 4126 also provided for an *ex officio* re-examination of earlier convictions imposed under section 8 (see paragraph 23 below).

16. Mr Erdoğdu applied to the National Security Court for a re-examination of his case on the merits. In his pleadings, his lawyer submitted:

> "As you know, section 8 of the Prevention of Terrorism Act has been amended by Law no. 4126 ... However, since the words 'irrespective of the methods used and the intention' ... have been repealed, the *mens rea* of the offence has been completely done away with, so as to fully alter the nature of the offence. The court is therefore legally obliged ... to set aside on grounds of nullity the sentence imposed on our client ... under former section 8 ... there will have to be a re-trial on the basis of the new definition of the offence."

He continued as follows:

> "Freedom of opinion must allow individuals unrestricted access to ideas and knowledge, to not be criticised for the opinions and convictions they hold, to express them freely, either alone or with others, through various media, such as speech, the press, drawings, cinema, theatre, etc., [and] to defend them, disseminate them to others and broadcast them. ... To put acts of terrorism and concepts of expression and statement of opinions in the same category is to restrict 'the free circulation of ideas' and the right and freedom 'of people to inform themselves'. ... What has been punished in our case is merely the 'risk of legitimising the ideas and acts of the PKK'. No one is obliged to think in accordance with official points of view and to produce ideas which conform to them. An idea which conflicts with the concept of nation cannot be considered as 'propaganda destroying the unity of the country or that of the nation'. Furthermore, criticisms of leaders for their acts contrary to democracy and freedoms resulting from erroneous policies or proposing solutions are not acts destructive of national unity ... Proposing economic, cultural and social solutions ... and a discussion of those solutions is a natural *sequitur* of the most basic right of persons to think and express their opinions ... Article 10 of the European Convention on Human Rights expresses that fact by stipulating that the public has a right to receive and impart information. Free political debate constitutes the essence of the concept of a democratic society fully implementing the Convention. A balance has to be struck between the aims of ensuring the national security and integrity of the country and the benefit brought by the free debate of political issues. The important role of the freedom of expression in a democratic society and above all the publication by the press of information and ideas of public interest can only be secured by means of a pluralistic society underwritten by the State. The least satisfactory method of achieving this is by a State monopoly imposing a maximum restriction on the freedom of speech."

17. In its judgment of 18 April 1996, the wording of which turned out to be based on the judgment of 20 December 1993 (see paragraph 12 above), the National Security Court finally sentenced Mr Erdoğdu to a fine of TRL 50,900,000, which it decided to defer in accordance with section 6 of Law no. 647 (see paragraph 25 below). The court stipulated that a new judgment had thus been delivered, and ordered that execution of the previous sentence be stopped.

18. On 24 April 1996 the applicant appealed to the Court of Cassation. In his notice of appeal, in which he reserved the right to enlarge on his submissions after service of the finalised judgement, the applicant complained that the National Security Court's judgment "was contrary to the principles both of domestic law and of international law and had been delivered without any examination of the defence" submitted in the instant case.

19. While those proceedings were still pending, Law no. 4304 was promulgated on 4 August 1997. That Law provided for the deferment of judgment and of execution of sentence in respect of offences committed by editors before 12 July 1997 (see paragraph 24 below).

Having regard to that new Law, on 17 November 1997 the Court of Cassation set the judgment aside and remitted the case to the lower court.

20. Lastly, in a judgment of 10 December 1997, the National Security Court decided, pursuant to section 1(3) of Law no. 4304, to defer judgment against Mr Erdoğdu, but to proceed to delivery if, within three years from the date of deferment, Mr Erdoğdu was convicted of an intentional offence in his capacity as editor, and, lastly, that the criminal proceedings against him would be discontinued if no similar conviction was made before the expiry of that three-year period.

II. RELEVANT DOMESTIC LAW

A. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)[1]

21. Before Law no. 4126 of 27 October 1995 came into force, section 8 of Law no. 3713 provided:

Section 8[2]

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity

1. This Law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as acts "of terrorism" or acts "perpetrated for the purposes of terrorism" and to which it applies.
2. As modified by a judgment of the Constitutional Court on 31 March 1992.

of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras.

Where the act of propaganda, deemed to be an offence for the purposes of the above paragraph, is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment."

22. Since being amended by Law no. 4126, that section reads as follows:

Section 8

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a re-offender may not be commuted to a fine.

Where the act of propaganda, deemed to be an offence for the purposes of the first paragraph, is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

Where the act of propaganda, deemed to be an offence for the purposes of the first paragraph, is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras ...

..."

B. Law no. 4126 of 27 October 1995

23. The following amendment was made to Law no. 3713 following the enactment of Law no. 4126:

Transitional provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment ... to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections ... and 6[1] of Law no. 647 of 13 July 1965."

C. Law no. 4304 of 14 August 1997 on the deferment of judgment and of execution of sentences in respect of offences committed by editors before 12 July 1997

24. The following provisions are applicable to sentences in respect of offences under the Press Act:

Section 1

"The execution of sentences passed on those who were convicted under section 16 of the Press Act (Law no. 5680) or other laws as editors for offences committed before 12 July 1997 shall be deferred.

The provision in the first paragraph shall also apply to editors who are already serving their sentences.

The institution of criminal proceedings or delivery of final judgments shall be deferred where no proceedings against the editor have yet been brought, or where a preliminary investigation has been commenced but criminal proceedings have not been instituted, or where the final judicial investigation has been commenced but judgment has not yet been delivered, or where the judgment has still not become final."

Section 2

"If an editor who has benefited under the provisions of the first paragraph of section 1 is convicted as an editor for committing an intentional offence within three years of the date of deferment, he must serve the entirety of the suspended sentence.

...

Where there has been a deferment, criminal proceedings shall be instituted or judgment delivered if an editor is convicted as such for committing an intentional offence within three years of the date of deferment.

Any conviction as an editor for an offence committed before 12 July 1997 shall be deemed a nullity if the aforesaid period of three years expires without any further conviction for an intentional offence. Similarly, if no criminal proceedings have been

1. This provision concerns reprieves (see paragraph 25 below).

instituted, it shall no longer be possible to bring any, and, if any have been instituted, they shall be discontinued."

D. The Execution of Sentences Act (Law no. 647 of 13 July 1965)

25. The relevant parts of section 6 of the Execution of Sentences Act 1965 provide:

Section 6(1)

"Where a person is ... sentenced to a fine ... and/or up to one year's imprisonment ... for an offence which he has committed, execution of the sentence shall be deferred if the court considers that, having regard to his criminal record and [his] tendency to break the law, such deferment will suffice to deter him from reoffending."

E. Article 322 of the Code of Criminal Procedure

26. Paragraphs 5 and 6 of Article 322 of the Code of Criminal Procedure govern applications for rectification of judgment:

"5. Applications for rectification of a judgment of the Criminal Divisions or of the Court of Cassation sitting as a full criminal court shall be admissible only where a ground relied on in the notice ... of appeal ... and/or errors or omissions affecting the judgment on the merits have not been taken into account by the Court of Cassation ...

6. The Principal Public Prosecutor alone shall have power to request rectification of a judgment. ..."

The Principal Public Prosecutor can use the remedy in question either of his own motion or at the request of the public prosecutor at the court of first instance and/or the party adversely affected by the Court of Cassation's judgment.

THE LAW

I. SCOPE OF THE ISSUES BEFORE THE COURT

27. In his application to the Commission, Mr Erdoğdu submitted, *inter alia*, that his conviction amounted to a violation of Articles 7 and 9 of the Convention (see paragraph 2 above). Before the Court, however, he made no reference to Article 9 and referred only once to Article 7, and then in support of his principal complaint based on Article 10. In the circumstances, he cannot be considered to have maintained either of those complaints before the Court, which can see no reason to examine them of its own

motion (see, *mutatis mutandis*, *Öztürk v. Turkey* [GC], no. 22479/93, § 40, ECHR 1999-VI).

The Court's examination will accordingly be confined to the complaint under Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

28. The applicant requested the Court to hold that his conviction under section 8 of Law no. 3713 had violated Article 10 of the Convention, which provides:

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

29. The Government, for their part, requested the Court to declare the application inadmissible on the ground that domestic remedies had not been exhausted and, in the alternative, to find that Mr Erdoğdu's conviction did not reveal any violation of Article 10 of the Convention.

A. The Government's preliminary objection

30. The Government argued, on two grounds, that domestic remedies had not been exhausted.

1. Failure to apply to the Principal Public Prosecutor at the Court of Cassation

31. The Government submitted that the applicant had failed to apply to the Principal Public Prosecutor at the Court of Cassation under Article 322 § 5 of the Code of Criminal Procedure (see paragraph 13 above) to request rectification of the Court of Cassation's judgment of 4 May 1994 (see paragraph 26 above).

32. The Court notes at the outset that, in their written observations of 28 August 1995 on the admissibility of the application, the Government had indeed referred to that remedy without, however, submitting that it had not been used.

Be that as it may, even supposing that they were not to be estopped from relying on that ground of their objection, the Court considers it baseless for the following reasons.

33. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaint and offered reasonable prospects of success (see *V. v. the United Kingdom* [GC], no. 24888/94, § 57, ECHR 1999-IX).

34. In that connection, it points out that an application for rectification of a judgment as provided for in Turkish law is a special remedy against decisions of the Court of Cassation by which that court can be requested to review its own judgments where it is alleged that it has failed to rule on a ground which had been submitted to it and/or an error of law by the trial court which is likely to be decisive for the outcome of the trial.

Under Article 322 of the Code of Criminal Procedure, only the Principal Public Prosecutor can use that remedy, either of his own motion or at the request of the convicted person. It is not therefore a domestic remedy directly accessible to persons triable in the courts (see the Çıraklar v. Turkey judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VII, pp. 3070-71, §§ 29-32, and also *Kucherenko v. Ukraine* (dec.), no. 41974/98, 4 May 1999, unreported).

It follows that in the present case the applicant was not required, under Article 35 of the Convention, to lodge an application with the Principal Public Prosecutor in order to exhaust domestic remedies.

Consequently, that ground of the objection cannot be upheld.

2. Failure to rely on the provisions of the Convention

35. As they had before the Commission, the Government also maintained that Mr Erdoğdu had not at any stage in the proceedings in the national courts relied – even in substance – on the provisions of the Convention and/or the rights and freedoms on which he had relied before the Commission and on which he now relied before the Court. The Court could not therefore deal with the instant case if it were to be consistent with its conclusions in the Ahmet Sadık v. Greece judgment of 15 November 1996 (*Reports* 1996-V).

36. The applicant replied that, in his notice of appeal lodged in order to have his case re-examined on the merits (see paragraph 16 above), his lawyer had expressly referred to a contradiction between the charge laid against him and the exercise of the freedoms of expression and information.

37. The Commission had dismissed that objection at the admissibility stage on the ground, *inter alia*, that the Government had not provided it with any example of a case in which a conviction under section 8 of Law no. 3713 had been set aside following the submission of a ground of appeal based on Article 10 of the Convention and/or equivalent provisions of domestic law.

38. The Court reiterates that the rule of exhaustion set forth in Article 35 § 1 of the Convention must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that the complaints intended to be made subsequently in Strasbourg should have been raised, "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law", before the national authorities (see, among other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I, and *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI).

39. In the present case the Court is prepared to admit that during the initial phase of his trial (see paragraphs 11-13 above), Mr Erdoğdu merely defended himself against the charge of disseminating propaganda harmful to the State, contrary to section 8 of Law no. 3713, putting forward arguments which did not relate to the freedom of expression.

The Court observes, however, that in his application for a re-examination of the merits of his client's case, Mr Erdoğdu's lawyer criticised the conviction in question, not only from the point of view of domestic law, but also of Article 10 of the Convention. In doing so, he referred, moreover, to several principles established by relevant judgments of the Court, from which he even quoted long passages (see paragraph 16 above).

40. Thus, contrary to its findings in the case of Ahmet Sadık (judgment cited above, p. 1654, §§ 31-33), the Court cannot hold that in the instant case the Turkish courts – when requested to re-examine Mr Erdoğdu's case under Law no. 4126 (see paragraphs 15-18 and 23 above) – did not benefit from the opportunity which the exhaustion of domestic remedies rule precisely affords to the Contracting States, namely to prevent or redress the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, the judgments referred to in paragraph 38 above).

It follows that this ground of the objection cannot be upheld either.

41. In conclusion, the Court dismisses the Government's preliminary objection.

B. The merits of the complaint

1. Existence of an interference

42. The Court notes that it is clear, and this has not been disputed, that there has been an "interference" with the applicant's exercise of his freedom of expression on account of his conviction.

2. Justification of the interference

43. The above-mentioned interference infringed Article 10 unless it satisfied the requirements of paragraph 2 of that provision. It thus remains to be determined whether the interference was "prescribed by law", pursued one or more legitimate aims as defined in that paragraph and was "necessary in a democratic society" to achieve them.

(a) "Prescribed by law"

44. The applicant submitted, in substance, that section 8 of the Prevention of Terrorism Act (Law no. 3713) did not satisfy this requirement. In his submission, by failing to define with sufficient clarity the constituent elements of the offence defined as such, that section conferred a wide margin of appreciation on the National Security Courts, which, in practice, used it to muzzle the press and suppress the dissemination of opinions and thoughts which they considered to deviate from "official ideology". The applicant adduced his own conviction as proof of his submissions, arguing that the reason given for his conviction was a so-called "risk of legitimising the acts and beliefs of the PKK", without any evidence being adduced as to how the impugned article could generate violence and/or was likely to effectively harm the "unity of the country".

45. The Government did not comment on this point.

46. The Commission, for its part, considered that section 8 of Law no. 3713 provided a sufficient basis for the applicant's conviction.

47. The Court reiterates that it has already examined, from the standpoint of Articles 7 and 10 § 2 of the Convention, the issue of "legality" and "foreseeability" of a conviction imposed under section 8 of Law no. 3713 and held that it satisfied the requirements set forth in the two provisions of the Convention referred to above (*Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, §§ 40, 43 and 49, ECHR 1999-IV; for the general principles on the subject see, *inter alia*, *Öztürk* cited above, §§ 54-55, and *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII).

In the instant case the Court does not see any particular reason to depart from that finding and considers, like the Commission, that since the applicant's conviction was based on section 8 of Law no. 3713, the resulting

interference with his right to freedom of expression can be considered to be "prescribed by law".

(b) Legitimate aim

48. The applicant has not specifically disputed this aim.

49. In the Commission's view, with which the Government agreed, Mr Erdoğdu's conviction was part of the authorities' efforts to combat terrorist activities and to maintain national security and public safety, which are legitimate aims under Article 10 § 2 of the Convention.

50. Having regard to the sensitivity of the fight against terrorism and to the need for the authorities to be alert to acts capable of fuelling additional violence and to the grounds set out in the judgments of the National Security Court of 20 December 1993 and 18 April 1996 (see paragraphs 12 and 17 above), the Court considers that the interference in question pursued an aim which was compatible with Article 10 § 2: the prevention of disorder or crime.

(c) "Necessary in a democratic society"

51. The remaining issue before the Court is whether Mr Erdoğdu's conviction was "necessary in a democratic society" to achieve that aim.

In that connection the Court reiterates first of all the fundamental principles underlying its case-law on the subject (see, among other authorities, *Fressoz and Roire* cited above, § 45; *Öztürk* cited above, § 64; *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII; and the most recent authority, *News Verlags GmbH & CoKG v. Austria*, no. 31457/96, § 52, ECHR 2000-I).

(i) General principles

52. 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 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

In a case concerning the press, such as this one, any restriction on the exercise of the freedom of expression calls for an examination taking into account the essential role of the press in ensuring the proper functioning of political democracy. While the press must not overstep the boundaries set, *inter alia*, for the protection of vital interests of the State such as the prevention of disorder or crime, it is nevertheless incumbent on the press, in accordance with its duties and responsibilities, to impart information and ideas on all matters of public interest, in particular political questions,

including divisive ones (see also *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 59, ECHR 1999-IV, and *Sürek v. Turkey (no. 3)* [GC], no. 24735/94, § 38, 8 July 1999, unreported). Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. In that connection, press freedom also covers possible recourse to a degree of exaggeration, or even provocation.

53. The adjective "necessary", within the meaning of Article 10 § 2, implies a "pressing social need". In general, the "need" for an interference with the exercise of the freedom of expression must be convincingly established. Admittedly, it is first of all for the national authorities to assess whether there is such a need capable of justifying that interference and, to that end, they enjoy a certain margin of appreciation. However, the margin of appreciation is coupled with supervision by the Court both of the law and the decisions applying the law and, particularly where the press is concerned, it is circumscribed by the interests of a democratic society in ensuring and maintaining journalistic freedom.

When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to check, in the final instance, whether their decisions, thus "the restriction" or "the penalty" constituting the interference, can be reconciled with the freedom of expression guaranteed by Article 10.

(ii) Application of the above principles to the present case

(α) Submissions to the Court

54. The Commission observed, *inter alia*, that the impugned article tended to analyse the Kurdish question from a Marxist standpoint. Criticising the Turkish State for having engaged in a war against the Kurds, the article accused particularly the dominant classes of society of artificially maintaining a conflict between the Kurds and other Turkish citizens. That, according to the Commission, was why the article appealed to the Turkish people, including Turks living abroad, to join the Kurdish people's struggle for liberation and democracy. Reiterating that people who express an opinion in public on sensitive political issues should guard against condoning "unlawful political violence", the Commission considered, however, that in the case in question the author had expressed himself in relatively moderate terms, without associating himself with the use of violence in the context of Kurdish separatism. It concluded, accordingly, that the applicant's conviction amounted to a form of censorship which was not permissible under Article 10 § 2 of the Convention.

55. The Government first criticised the Commission for failing to perceive the hidden aim of the impugned article and to take account of the

background against which it had been written at the material time. Referring to the Court's conclusions in *Sürek (no. 3)* cited above, they drew attention to the fact that the article had been published on 2 October 1992, during a period in which acts of violence by the PKK had been raging in south-east Turkey. From 1984 to May 1996 that conflict had claimed the lives of 4,036 civilians and 3,884 members of the security forces, and more than 10,000 people had been left injured. In 1999 the number of victims of clashes in the region had amounted to some 30,000.

56. In that connection, the Government questioned how the Commission could have been satisfied that the article in question did not incite to violence without even having studied on the spot the reaction of citizens to comments such as those made by Y.A.; in their opinion, that merely illustrated the lengths to which it had gone to attribute a peaceful dimension to a text which could hardly be described as such. When Y.A. asserted that "the Republic of Turkey, which is confronted with a Kurdish national movement within its own borders, clings firmly onto [the branch] of the 'Kurdish problem' and, in doing so, is rapidly sucked into the complex developments in the Middle East", he explicitly compared the armed actions of the PKK to a Kurdish liberation movement. Similarly, where he contended that "there is surely nothing more foolish than to suggest that the Kurdish people give up national resistance", he elevated such violence to the level of national resistance of an ethnic sector of the Turkish population; even the comment "the confrontations between Turks and Kurds in the various provinces are seen as foreseeable incidents" is too allusive, and therefore provocative, given that in Turkey the only confrontations are between the PKK terrorists and the security forces, and not between society's various groups. The Government also questioned whether the assertion that "the same social atmosphere very spontaneously sparks off feelings of hostility towards Turkish society" was not likely to aggravate the situation in other parts of the country and increase the violence there.

The Government also pointed out that in the text in question the word "war" occurred eighteen times, the expression "armed conflict" four times, the word "massacre" six times, the words "violence" and "fascist" twice and the word "carnage" once. They referred to *Sürek (no. 1)* cited above to assert that such language amounted to "... an appeal for bloody revenge by [stirring up] base emotions and [hardening] already embedded prejudices which have manifested themselves in deadly violence", was "capable of inciting to further violence in the region by instilling a deep-seated and irrational hatred" and was of a kind to incite people, particularly young people, to join the PKK ranks despite their better judgment.

57. In short, the Government considered that the impugned article did not propose a peaceful solution, but was limited to advocating the methods of the PKK in terms of an illusory and imaginary national movement. The

Commission was therefore wrong to construe the applicant's conviction as "censorship".

In that connection, they referred to a document entitled "*Doğu Raporu*" (Report on the East) and prepared by eminent academics at the request of the Union of Chambers and Stock Exchanges of Turkey. That report was entirely devoted to an analysis of the problems in the east of the country on the basis of which it made suggestions, such as the establishment of a Kurdish Federation or the proclamation of Kurdish as a second official language. Notwithstanding the conflict between such suggestions and State policy in the field, no proceedings had been instituted against the authors of that report. That went to show that in Turkey anyone making an objective contribution to the political debate which did not incite to violence was not liable to be punished.

58. The Government submitted, further, that the interference in question had been proportionate for the purposes of Article 10 § 2 because judgment against the applicant had ultimately been deferred. The interference could be deemed to have met a pressing social need and, consequently, to have been necessary in a democratic society.

59. The applicant, for his part, who agreed in the main with the Commission's conclusions, submitted, in particular, that he had published the impugned article on account of his own democratic convictions, satisfied as he was, moreover, that the article merely expressed objective opinions on the possible solutions to the Kurdish problem, without in any way intending to condone PKK separatism. In associating those opinions with terrorist crime, the National Security Court had not only hindered the free discussion of such issues and criticism of the official ideology, but had also flouted the principal function of the press, namely to communicate to the public information which, since it was a subject of current affairs, they were entitled to receive.

In the applicant's submission, the aim of section of 8 of Law no. 3713 was not to penalise "the commendation of acts of terrorist organisations", but "thinking" itself. On that point he considered that neither the amendment introduced by Law no. 4126, nor the adoption of Law no. 4304 of 12 July 1997, had eradicated the concept of criminal thinking from the Turkish landscape, and, as far as he personally was concerned, he emphasised the fact that the deferment of judgment in accordance with Law no. 4304 carried the threat of a conviction if he reoffended within three years from the date on which judgment was deferred.

(β) The Court's assessment

60. The Court must consider the impugned "interference" in the light of the case as a whole, including the contents of the article in question and the background against which it was published, in order to determine whether it was "proportionate to the legitimate aims pursued" and whether the reasons

adduced by the national authorities to justify it are "relevant and sufficient" (see, among other authorities, *Fressoz and Roire* cited above, ibid.).

61. In the instant case the applicant was penalised for disseminating separatist propaganda through the medium of the bi-monthly periodical, *İşçilerin Sesi*, in which he had published an article sent in by a reader, Y.A. The Court observes that, in his article, Y.A. attempts to give an explanation for the developments in south-east Turkey and expresses his point of view on the repercussions both inside and outside the country. In Y.A.'s view, the circumstances "inciting to ethnic conflict" had sown the idea in people's minds that the conflict in the south-east was an "international war" pitting Turks against Kurds. On the basis of that finding, he draws the reader's attention to the awakening "of chauvinistic and exclusive tendencies" among "Turkish workers" and "hostile sentiments towards Turkish society" among "the Kurdish youth in the West". Deploring the fact that the so-called official initiatives for finding a "political solution" acknowledge neither the right to "self-determination of the people of Kurdistan," nor the "free will" of those people, Y.A. condemns the "military solution" adopted by the State, which consists in perpetrating "a dirty war against guerrillas," or even "an open war against the Kurdish people".

Although Y.A. identifies a "Kurdish National Movement", a "national resistance in Kurdistan", his main argument appears to be, however, that "the Kurdish problem is a general problem of Turkish society" to which the solution would be for "the Turkish people to perceive Kurdish national resistance as part of their [own] struggle for freedom and democracy". Thus, given the inappropriateness of the solutions proposed by left-wing circles in Turkey, he arrives at the conclusion that "the revolutionary movement in the West should henceforth 'intervene' in the Kurdish problem".

In the Court's view, it is clear that the article in question is written in the form of a political speech, both in its content and the terms used.

62. Having regard to those considerations, the Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest. Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the relevant State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks.

Admittedly, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression (see, among many other authorities, *Öztürk* cited above, § 66). The Court also acknowledges that in situations of conflict and tension particular caution is called for on the part of the national authorities when consideration is being given to the publication of opinions which advocate recourse to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence (see, *mutatis mutandis*, *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 63, 8 July 1999, unreported).

63. In that connection, the Court notes at the outset that the article in question was published against the background of the situation prevailing in south-east Anatolia and the Kurdish problem, which have been arousing major controversies for years. The Court also acknowledges that the article in question does not amount to a "neutral" analysis of that situation and/or that problem: through his article, Y.A. intended, albeit indirectly, to stigmatise both the dominant political ideology of the State and the conduct of the Turkish authorities in the area.

64. The Istanbul National Security Court held, twice, that the impugned article contained comments which were harmful to the territorial integrity of the State because it referred to a part of the country as though it "belonged to Kurdistan," advocated the dismantling of the nation and glorified the acts of the PKK as a national resistance movement (see paragraphs 12 and 17 above). As the Court has already found: "... although these are no doubt relevant considerations, they cannot of their own be deemed sufficient to regard the interference as necessary within the meaning of Article 10 § 2" (see, *mutatis mutandis*, *Sürek (no. 3)* cited above, § 40).

65. Since the above-mentioned judgments do not provide any other element requiring consideration (see paragraph 12 above), it remains for the Court to study attentively the passages of the impugned article which the Government have highlighted and the terms of which they disapprove. In the Government's submission, those passages should lead the Court to concede – as it did in the *Sürek (no. 1)* case – that the author of the article "associated himself with the use of separatist violence" by the PKK and that in publishing it Mr Erdoğdu disseminated propaganda for that violence to the detriment of the State.

66. In that connection, the Court observes first of all that the four sentences to which the Government referred in their memorial (see paragraph 56 above) amount to personal and subjective findings which can, at the very most, be considered to reflect Y.A.'s strong opposition to the official policy implemented in the South East. When these passages are examined in context and in relation to the arguments drawn from them by the author, it does not in any way appear that he associated himself with the

PKK or that he called for the use of violence with a view to serving that organisation. With regard to that organisation, the Court notes two passages in which Y.A. appears to be referring to the PKK: "... in the ranks of the national resistance movement in Kurdistan, the current war is generally perceived as an 'international war' ... Faced with this increasingly marked tendency, even the leader of the Kurdish National Resistance Movement is failing to show himself to be sufficiently sensitive and prefers to keep silent"; however, the Court notes that, before making those assertions, Y.A. predicts that "if one were to react in accordance with the requirements of an 'international war', what would affect Kurdish and Turkish workers would be ... a general social collapse" and that he subsequently clearly indicates his disagreement with the mentality thus described: "Clearly, such a dispute will benefit neither the Turkish people nor the Kurdish people." The Court interprets all the foregoing comments only as criticism levelled at the PKK.

67. That being so, the Court notes, as the Government pointed out, the use in the article of words such as "war", "conflict", "armed conflict", "massacre", "violence" and "fascist". It observes that the first three terms – apart from the two places in which they refer to the Gulf War – refer to the confrontations relating to the fight against terrorism and the consequent social unrest; the word "fascist" refers to civilians or fundamentalist powers; the term "massacre" is used to stigmatise the domestic policies of the Turkish authorities, and lastly, the word "violence" appears in its usual meaning.

While the Court is prepared to admit that the use of such terms confers a certain virulence on the political criticism expressed by the author, it considers, however, that the impugned article can be clearly distinguished, in respect of the tone used, from the articles examined in the case of *Sürek (no. 1)*, since, in the instant case, the Court does not find anything which can be construed "as an appeal for bloody revenge" and/or to communicate to the reader "the message that recourse to violence is a necessary and justified measure of self-defence" in the face of the Turkish State (see the judgment cited above, §§ 11 and 62).

68. Neither does the Court agree with the Commission's interpretation to the effect that the article appeals to the Turkish people, including Turks living abroad, to join the Kurdish people's struggle for liberation and democracy. It notes that, in this context, the only relevant passages appear to be the following: "The only key to resolving the problem is for the Turkish people to perceive Kurdish national resistance as part of their [own] struggle for freedom and democracy ... activities designed to establish fraternity between peoples in the West constitute, in themselves, one of the most important means of the struggle against the current bonds of sovereignty ... The revolutionary movement in the West should henceforth 'intervene' in the Kurdish problem." Those arguments, far from supporting an interpretation of the kind made by the Commission, constitute, in the

Court's view, the very essence of the solution recommended by the author to the issues which he considers (see paragraph 61 above).

69. Admittedly, as the Government have maintained, the Court cannot exclude the possibility that such an article might conceal objectives and intentions which are at variance with the ones it proclaims; the Court is also aware, naturally, of the authorities' preoccupations with regard to the fight against terrorism and acknowledges that it was for the domestic courts to determine whether the applicant had published the impugned article with a reprehensible aim (see, *mutatis mutandis*, *Öztürk* cited above, §§ 68-69). However, as there is no evidence of any concrete action which belies it, the Court sees no reason to doubt the sincerity of the aim pursued by Mr Erdoğdu in publishing the article by Y.A. (see paragraphs 11 and 59 above).

Nor is the Court convinced by the argument that the publication could in the long term result in consequences which would be very harmful in terms of the prevention of disorder and crime in Turkey or that young people would be incited by the publication "to join the ranks of the PKK against their better judgment", as the Government maintain. Contrary to its findings in the case of *Sürek (no. 3)*, to which the Government referred, the Court does not perceive anything in the article which would allow it to conclude that Mr Erdoğdu had in any way been responsible for the increase of security problems in south-east Anatolia or elsewhere in the country (see, *mutatis mutandis*, the judgment cited above, § 40).

70. In short, the Court concludes that the opinions expressed in the article, however categorical or acerbic they may be, could not be said to incite to violence; nor could they be construed as liable to do so.

71. Where a publication cannot be categorised as inciting to violence, Contracting States cannot with reference to the prevention of disorder or crime restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media (see *Sürek and Özdemir* cited above, ibid.; see paragraphs 51 and 61 above).

It thus appears that, in concluding that the applicant had provided the author of the article in question with a medium for stirring up violence and hatred, the national authorities failed to have sufficient regard to the freedom of the press and to the public's right to be informed of a different perspective on the Kurdish problem, irrespective of how unpalatable that perspective may be for them (see, among other authorities, *Başkaya and Okçuoğlu* cited above, § 65). The Government have failed to prove to the Court that there was an overriding requirement which made the interference with the exercise of Mr Erdoğdu's journalistic freedom compatible with Article 10 of the Convention.

72. For the rest, the Court is not convinced by the Government's submission that judgment against the applicant was ultimately deferred by the National Security Court (see paragraph 58 above). The Court

acknowledges that the moderateness of measures amounting to an interference is a factor to be taken into consideration in assessing the proportionateness of such measures to the aim they pursue. However, a decision or measure favourable to an applicant is not sufficient in principle to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, *Öztürk* cited above, § 73).

In the instant case, the Court notes that the applicant only stood to benefit from deferment of the judgment if for three years from the date of the measure being granted he did not commit any other intentional offence in his capacity as editor (see paragraphs 20 and 24 above); otherwise, Mr Erdoğdu was liable, at the very least, to be tried and, in all probability, to be sentenced to a fine (see paragraph 17 above) in addition to the one he had had to pay previously (see paragraphs 12 and 14 above). In the Court's opinion, that condition amounts to a prohibition which had the effect of censoring the applicant's very profession and was unreasonable in scope since the measure compelled Mr Erdoğdu to refrain from publishing anything likely to be considered to be contrary to the interests of the State. Since there is no certainty in this area, the restriction indirectly imposed on the applicant substantially reduced his ability to put forward in public views on, among other things, the Kurdish problem, which have their place in a public debate. As the Court has already stressed (see paragraph 52 above), it would be excessive to limit in that way freedom of journalistic expression to generally accepted ideas that are favourably received or regarded as inoffensive or as a matter of indifference (see also, *mutatis mutandis*, the Hertel v. Switzerland judgment of 25 August 1998, *Reports* 1998-VI, pp. 2331-32, § 50).

73. Having regard to the foregoing, the measure in question cannot be construed as "necessary in a democratic society". The Court therefore concludes that there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. The applicant claimed compensation for both the pecuniary and non-pecuniary damage which he alleged that he had sustained, and reimbursement of the costs and expenses incurred in the proceedings before the Strasbourg institutions. He relied on Article 41 of the Convention, which 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. Pecuniary damage

75. The applicant explained that his trial had resulted in the interruption of his university studies and delayed by one year and four months his entry into professional life. For fear of being imprisoned at any time on account of the conviction pronounced on 4 May 1994, he had, he alleged, been unable to resume his electronic engineering degree until October 1995, following the entry into force of Law no. 4126, but had nonetheless continued to pay his university fees during that time. In support of those claims, he produced, among other things, copies of two salary slips showing his gross salary as an engineer for March 1997 (62,737,010 Turkish liras (TRL)) and September 1998 (TRL 205,548,490). He also produced copies of receipts for his university fees in a total sum of TRL 9,241,000. He further considered himself entitled to claim reimbursement of TRL 50,000,000 which he had paid by way of a fine and default interest.

Overall, he claimed an aggregate sum of 20,000 French francs (FRF) in respect of pecuniary damage.

76. The Government replied that the claim was inflated and requested the Court not to allow the applicant's claims. They drew attention first to the fact that since the applicant had enrolled at the Engineering Faculty in 1987, he should have finished his degree in 1991, or at the latest in 1992. At that time, however, he had appeared to prefer earning his living as an editor to concentrating on his studies. Additionally, the applicant had made a mistake in the calculation of his alleged loss of earnings. Lastly, as far as the fine was concerned, the Government submitted that a capital sum of TRL 50,000,000, even if invested on the stock market, did not in any circumstances justify the amount claimed by the applicant.

77. The Court cannot allow the applicant's claims relating to loss of earnings and expenses incurred as a result of the interruption of his university degree, for want of a sufficient causal link between the infringement of his right to freedom of expression and the loss alleged.

However, the Court notes that the fine imposed on the applicant by the judgment of 20 December 1993 (see paragraph 12 above) was a direct consequence of the infringement of Article 10 of the Convention. It is therefore fitting to order that the applicant be fully reimbursed in the sum he has paid. Although the applicant has produced receipts for only ten monthly instalments, that is TRL 17,500,000, the Court considers that it can base its calculation on the sum of TRL 50,000,000 since the Government have not referred to any failure to make payment. In conclusion, ruling on an equitable basis and on all the information before it, particularly the

exchange rates in force at the time of payment of each of the TRL 1,750,000 monthly instalments, the Court awards the applicant FRF 6,000 for pecuniary damage.

B. Non-pecuniary damage

78. The applicant also claimed FRF 20,000 for non-pecuniary damage. He stressed that during his trial he had been branded a "terrorist" and that his relations with his family and his circle of friends had considerably deteriorated as a result. Besides that, his conviction had forced him to quit his post as editor and, consequently, to take on temporary jobs in order to support his family, with his wife's help. The circumstances had also aroused feelings of insecurity and anxiety in him on account of the risk of permanently losing his student status pursuant to the rules of procedure governing institutions of tertiary education, which provide that students shall be stripped of their student status if convicted of an offence against the State. In addition to that, his conviction had resulted, albeit temporarily, in the loss of certain public-law rights, such as obtaining a passport; again on account of his criminal record, when he had tried to have his identity card renewed, he had been kept in police custody for no reason for more than six hours.

79. The Government disputed, first of all, the allegation that Mr Erdoğdu had been taken into police custody unjustifiably and asserted that in the case in question it had merely been a security measure taken by the local police with a view to satisfying themselves that no arrest warrant had been issued against him. Reiterating that the applicant had ultimately benefited from a deferment of judgment, the Government considered the claim to be inflated and contended that the Court should avoid awarding compensation which would amount to unjust enrichment.

80. The Court considers that the applicant can be deemed to have suffered a certain feeling of helplessness in the circumstances of the case. Ruling on an equitable basis, as required by Article 41 of the Convention, it finds the claim relating to non-pecuniary damage reasonable and considers it appropriate to award the applicant the entire sum.

C. Costs and expenses

81. The applicant also requested reimbursement of his costs and expenses, plus value-added tax, which he broke down as follows:

(i) TRL 250,000,000 for the cost of translating correspondence with the Commission;

(ii) 5,000 United States dollars for the fees of Ms Ersoy Ataman, the lawyer instructed to represent him before the Court (a copy of the instructions produced).

82. The Government, for their part, submitted that costs under this head should be calculated according to the minimum fees charged by the Istanbul Bar, and argued that, having regard to the fee scales in force for the period from 1 July to 31 December 1999, the Court should not award more than TRL 625,000,000.

83. Ruling on an equitable basis under this head as well and in accordance with the criteria laid down in its case-law (see, among other authorities, *Nilsen and Johnsen* cited above, § 62), the Court awards the applicant FRF 20,000, together with any sum due in value-added tax.

D. Default interest

84. The Court considers it appropriate to provide that default interest should be payable at the rate of 2.74% per annum since the sums are awarded in French francs.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following sums to be converted into Turkish liras at the rate applicable at the date of settlement:
      (i) FRF 6,000 (six thousand French francs) for pecuniary damage;
      (ii) FRF 20,000 (twenty thousand French francs) for non-pecuniary damage;
      (iii) FRF 20,000 (twenty thousand French francs) for costs and expenses together with any sum due in value-added tax;
   (b) that simple interest at an annual rate of 2.74% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the claim for just satisfaction.

Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 June 2000.

Vincent BERGER Registrar	Antonio PASTOR RIDRUEJO President

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

A.P.R.
V.B.

CONCURRING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

In the present case I voted with the majority. However, I cannot but entertain doubts on a number of points as to the application of this provision to cases such as the one that concerns us here. Let me explain. According to the Court "... the opinions expressed in the article, however categorical or acerbic they may be, could not be said to incite to violence; nor could they be construed as liable to do so" (see paragraph 70 of the judgment). The Court therefore found that there had been a violation of Article 10 of the Convention.

Both that analysis and the resulting conclusion are, admittedly, accurate from the "case-law" point of view. That said, are they also "politically" accurate, having regard to the policy of protecting human rights considered as a whole? I doubt it.

In my view, a "written text" should be analysed not in isolation from the material circumstances surrounding it, that is to say, in the abstract, but in the context of the factual realities of the background against which it is written.

Violence, deadly hatred, danger threatening public order and national security, and separatism never appear overnight. First the groundwork is laid and then, when this has been achieved, action is taken. It is from that very moment that all sorts of misfortunes, which should have been prevented, begin to take root, like a deadly cancer: when it manifests itself, it is – alas! – too late to hope for any sort of a cure. Once violence exists, we never know how and at what price we can rid ourselves of it.

The recent history of Europe during the period between the two wars is full of stark examples of what I have just described. Did it not all start with an allegedly anodyne "political" or "religious" speech given in the name of freedom of opinion or of conscience, and end up with bloody acts of violence? Did today's terrorist acts, whether inspired by allegedly religious or political fanaticism, not all begin in that way?

I wonder whether, despite the clear message contained in Article 17 of the Convention, it is permissible to open up the way to violence or to let freedom perish in the name of freedom. Is the flagrant misuse of a right now going to be protected by law?