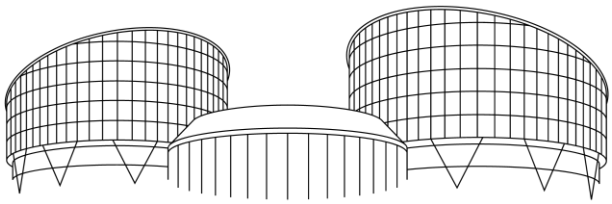

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF AYDIN v. GERMANY

(Application no. 16637/07)

JUDGMENT

STRASBOURG

27 January 2011

FINAL

27/04/2011

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

In the case of Aydin v. Germany**,**

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

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Zdravka Kalaydjieva, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 14 December 2010,

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

PROCEDURE

1. The case originated in an application (no. 16637/07) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Ms Aysel Aydin ("the applicant"), on 16 April 2007.

2. The applicant was represented by Mr S. Hilbrans, a lawyer practising in Berlin. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that her criminal conviction violated her right to freedom of expression.

4. On 30 November 2009 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). Having been informed of the case by a letter of 3 December 2010, the Turkish Government did not express any wish to intervene under Article 36 § 1 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1972 and lives in Wuppertal.

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background to the case

6. On 22 November 1993 the German Interior Ministry issued a decision by which it imposed a ban on the activities of the Workers' Party of Kurdistan ("the PKK"), under Article 18, second sentence, of the Law on Associations (*Vereinsgesetz*, see Relevant domestic law, below).

7. Relevant parts of the decision read as follows:

> "1. The activities pursued by the "Workers' Party of Kurdistan" (PKK)...run contrary to provisions of the criminal law, are directed against the concept of international understanding, endanger inner security and other important interests of the Federal Republic of Germany.
>
> 2. The "Workers' Party of Kurdistan" (PKK)...is not allowed to pursue its activities within the territorial ambit of the Law on Associations."

8. As the PKK as such did not challenge the imposition of the ban before the German courts, the decision became final on 26 March 1994.

9. Following the arrest of its leader, Abdullah Öcalan, in 1999, the PKK's executives changed their strategy and declared an end to the armed battle against Turkish army entities. Following a "peace initiative" declared by the party's seventh congress on 17 January 2000, the PKK did not organise any further demonstrations or violent acts in Germany.

10. In 2001 the PKK's presidential counsel decided to launch a large-scale campaign, during which their supporters should address themselves to the German authorities, should acknowledge their support for the PKK and should demand that the ban on the PKK's activities be lifted.

11. The supporters signed a declaration. The declarations were then collected and handed over in large numbers to parliaments, administrative bodies and courts. The content of the largely identical declarations was as follows:

> "Self declaration (*Selbsterklärung*)
>
> "I also am a follower of the PKK" *("Auch ich bin ein PKK'ler")*
>
> As the Kurdish people has been denied its basic right to life, it has had no choice but to take up arms. After twenty years of war, our national leader, Abdullah Öcalan, has initiated a strategic change. For two years the PKK has been using exclusively political means to fight for a peaceful and democratic solution to the Kurdish question. On the basis of this new strategy the Workers' Party of Kurdistan (PKK) is undergoing a global reformation. Strongly determined to find a solution, it has developed its political activities against all resistance without leaving the framework of legality.
>
> Although the Kurdish question emerged geographically in the Middle East, having regard to its historical, political and international connections it is a European problem waiting for a solution. Europe played a major role in the setting of Middle Eastern boundaries. That is why Europe is now confronted with the task of playing a role in the solution of the problems. Just as it failed to offer a prospect of a solution when our

leader was abducted in the framework of an international conspiracy, Europe fails today to make use of the opportunities offered by the PKK.

While the majority of the European Member States make Turkey's accession to the European Union dependent on the Copenhagen criteria, they deny the national and political status of the Kurds living in Europe. Germany and England, in particular, insist on a policy of bans. With this destructive attitude Europe puts itself within the context of the policy of destruction and negation which is directed against the Kurdish people. Today as in the past Europe continues its negative tradition. This is nothing but a policy of double moral standards.

1. On this basis I, as a member of the Kurdish people, declare that I share the PKK's new policy, which, for two years, has been leading its political fight on a legal basis. I further declare that I belong to the PKK.

2. I challenge the European Member States to apply the same standards to themselves they apply to non-member States. I furthermore request these States to comply themselves with the express criteria for accession to the European Union with regard to the Kurds living in Europe. I therefore demand the full recognition of the rights granted to other peoples for the Kurdish people.

3. I further demand the official recognition of the cultural and political values created by the Kurdish people in the course of their great struggle. In this context I demand respect for my people's national and political identity.

4. I support the line of the PKK's democratic struggle, as has been confirmed by its seventh congress. Having regard to the fact that the PKK has not committed one single violent act for two years, I demand the lifting of all bans which are applied on the PKK.

5. I further declare that the liberty of our leader, Abdullah Öcalan, and the possibility of his political activity are the only guarantee for an enduring solution. I therefore demand: "Freedom for Abdullah Öcalan – Peace in Kurdistan".

I hereby declare that I most severely condemn the prohibition issued against the PKK and the criminal prosecution of PKK membership and of active sympathy for the PKK. I further declare that I do not acknowledge this prohibition and that I assume all responsibility arising therefrom."

2. Criminal proceedings against the applicant

12. With others, the applicant organised and coordinated a collection of signatures of the declaration in Berlin. She also signed a declaration herself. On 16 July 2001 the applicant, with two others, handed two folders containing 467 signed declarations to the Berlin public prosecutor. On 24 September 2001 the applicant handed over one further folder containing declarations. Furthermore, the applicant donated certain sums of money to a sub-organisation of the PKK, which was also subject to the ban.

13. Within the framework of the campaign, more than 4,000 declarations were handed to the authorities in Berlin; approximately 100,000 declarations were submitted to German administration as a whole.

14. On 17 July 2003 the Berlin Regional Court (*Landgericht*) convicted the applicant of contravening a ban imposed on an association's activity (section 20 § 1 no. 4 in conjunction with section 18, second sentence, of the Law on Associations) and sentenced her to 150 daily fines of eight euros each. During the hearing before that court, the applicant submitted a declaration that she had not intended to breach the criminal law, but to express her opinion and to further the understanding between the German and the Kurdish people. The Regional Court considered that the applicant, by signing the declaration, taking part in the campaign and giving donations, had flouted the ban on pursuing the PKK's activities.

15. The Regional Court considered that the declaration's content, seen in the context of the accompanying campaign, was likely to have a positive effect on the association's unlawful activities. The Regional Court considered, in particular, that the declaration "not (to) acknowledge this ban and (to) assume all responsibility arising therefrom" had a twofold effect: Firstly, the applicant expressed her commitment not to abide by the ban in the future and thus to provide the PKK with security for planning further unlawful activities. Secondly, it was likely to strengthen solidarity with other potential supporters.

16. According to the Regional Court, the declaration signed by the applicant was not covered by her right to freedom of expression, as the applicant did not confine herself to claiming freedom and self-determination for the Kurdish people, to demand the lifting of the ban on the PKK and most severely to condemn its continuation, which would fall within the ambit of the applicant's freedom of expression. Seen in the context of the aims of the overall campaign, the declaration also contained the statement that the applicant would continue to support the PKK even if the ban imposed on its activities was not lifted. This was already implied in the concluding statement, that the applicant would "assume all responsibility arising therefrom", that is to say from any flouting of the ban. The Regional Court also considered that the campaign had the further aim of overburdening the public prosecution service with such a large number of criminal proceedings that they would not be able to cope.

17. The Regional Court considered as mitigating factors, *inter alia*, the importance of the right to freedom of expression.

18. On 15 January 2004 the Federal Court of Justice (*Bundesgerichtshof*), referring to its own pilot judgment given on 27 March 2003 (see relevant domestic law and practice, below), dismissed the applicant's appeal on points of law. According to that court, the Regional Court's interpretation of the applicant's statement and the evaluation of her behaviour were compatible with the right to freedom of

expression as enshrined in Article 5 of the Basic Law. Having regard to the context and the circumstances of the case, the Regional Court had comprehensively and coherently refuted the applicant's allegations that she had not participated in a campaign which had been organised by the PKK with the aim to hamper the criminal prosecution of breaches of the ban by provoking a massive quantity of criminal investigations, but that she had merely intended to express her opinion on the ban. This was demonstrated by the fact that the applicant and the other campaigners did not address themselves to the Federal Interior Ministry, which would have been competent for lifting the ban, but addressed a massive quantity of collected individually signed declarations to the public prosecutor's office. The applicant's unwillingness to abide by the ban was further demonstrated by the fact that she had been previously convicted of a similar offence and that she had flouted the ban in another, separate way by financially supporting a sub-organisation of the PKK.

19. The Federal Court of Justice finally considered that the Regional Court had sufficiently weighted the importance of the right to freedom of expression when assessing the sentence.

20. On 20 March 2004 the applicant lodged a constitutional complaint in which she complained that her right to freedom of expression and her right to petition had been violated.

21. On 26 September 2006 the Federal Constitutional (*Bundesverfassungsgericht*), in a reasoned decision of 21 pages, refused to accept the applicant's complaint for adjudication as being unfounded.

22. The Federal Constitutional Court held that the applicant's statements fell within the ambit of her right to freedom of expression under Article 5 of the Basic Law. It considered, however, that her conviction was justified under paragraph 2 of that same Article as being based on a general law. The Federal Constitutional Court considered, at the outset, that the activities of an association could only be banned if it generally and continuously pursued dangerous aims, which was established by the enforceable ban issued by the Interior Ministry. Section 20 § 1 no. 4 of the Law on Association was not directed against the expression of an opinion as such, but only against the purposeful support it lent to the association's activity which had been prohibited in the interest of protecting the democratic state based on the rule of law. An individual person who pursued his own political aims was not concerned; he was merely prevented from doing so by supporting the activities of a prohibited association.

23. It followed that only such behaviour was subject to criminal liability, which was relevant with regard to the purpose of the banning order. Furthermore, the behaviour had to be related to the association's activity. Art. 5 § 1 of the Basic Law had not to cede already where someone advocated the same opinions as the organisation affected by the ban; it did have to cede, however, if an unbiased observer gained the impression that

this was an action which was directly related to the association. The necessary relation to the purpose of the banning order was lacking where statements of opinions worked towards a lift of a ban of activities, which was protected by the right to freedom of expression in the interest of the openness of the democratic process.

24. In the context of the criminal courts' examination of whether the constituent elements of an offence exist, freedom of opinion took second place without a weighing being required in the individual case, notwithstanding individual weighing that was necessary on other levels, for instance as regarded the fixing of the fine. The only decisive question was whether the above-mentioned criteria had been met.

25. With regard to the application of these principles in the instant case, the Federal Constitutional Court found as follows:

> (a) The courts answered the question of whether the self-declarations bore sufficient relation to the association's activity in the affirmative. According to the facts established by the lower courts, which are constitutionally unobjectionable, the declarations were made in the context of a mass campaign initiated and steered by the PKK leadership, which was carried out Germany-wide and attracted considerable public attention. The campaign was preceded by large-scale advertising, the content of the declaration was discussed among Kurdish compatriots, and the letters were collected and submitted, sometimes in the course of demonstrations. The headline and the text of the declaration itself ("I am also a follower of the PKK", "I further declare that I belong to the PKK") also made it possible for the courts to infer, in a constitutionally unobjectionable manner, a sufficient relation precisely to the PKK as the organisation affected from the ban on activities.
>
> (b) The courts observed the principles established by the Federal Court of Justice in its judgment dated 27 March 2003, that the self declarations would nevertheless have been exempt from criminal liability as expressions of the right to freedom of expression if they had restricted themselves to demanding freedom and self-determination for the Kurdish people, to calling for a lift of the ban on the PKK's activities and severely condemning the maintenance of that ban. The right to freedom of expression includes the right to assert one's opinion as effectively as possible. The effect of a strengthening of solidarity that goes along with a support of the lift of the ban is to be tolerated in the interest of the free expression of opinion even if it is at the same time an expression of sympathy for the banned association.
>
> The courts, however, assumed in a constitutionally unobjectionable manner that the self-declarations in favour of the PKK transgressed the boundaries, thus determined, of declarations of solidarity and sympathy in favour of an association affected by a ban on activities to the extent that they had to be understood as a commitment made by those signing it not to respect the ban on activities in the future and not to be deterred from contravening the ban even by the threat of criminal sanctions. The courts could assume without misjudging freedom of opinion that such a declaration of willingness to break the law that was made in the context of a mass campaign complied with the constituent element of the offence in question."

26. The Federal Constitutional Court further considered that the criminal conviction did not violate the applicant's right to petition as enshrined in the Basic Law.

27. This decision was served on the applicant's counsel on 16 October 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Constitutional Law

28. Article 5 of the German Basic Law (Freedom of Expression) reads as follows:

> "(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources(...).
>
> (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.
>
> (3)...."

Article 9 of the Basic Law (Freedom of Association) provides:

> "(1) All Germans shall have the right to form corporations and other associations.
>
> (2) Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited."

29. Article 103 of the Basic Law (ban on retroactive criminal laws) provides:

> "(1)...
>
> (2) An act may be punished only if it was defined by a law as a criminal offence before the act was committed."

2. The Law on Associations

30. The relevant sections of the Law on Associations (*Vereinsgesetz)* read as follows:

Section 3

Banning

> "An association can only be treated as being banned if the competent authority established by decree that its aims or its activity contravene the criminal law or that it is directed against the constitutional order or against the idea of international understanding ..."

Section 18

Geographical applicability of bans imposed on associations

"...If a (foreign) association does not have a sub-organisation within the geographical applicability of this Act, the ban (section 3 paragraph 1) is directed against its activity within that territory."

Section 20

"Anyone who, within the geographical applicability of this act, by pursuing an activity

(...)

4. contravenes an enforceable prohibition under section 18 sentence 2 (...)

Will be sentenced to up to one year's imprisonment or to a fine."

31. On 27 March 2003 the Federal Court of Justice issued a pilot judgment (no. 3 StR 377/02) on the criminal liability incurred by signing the "self declaration" which also forms the subject matter of the instant complaint.

32. The Federal Court of Justice confirmed its earlier case-law that a person contravened an enforceable prohibition within the meaning of section 20 § 1 no. 4 in conjunction with section 18 sentence 2 of the Law on Association if his activity made reference to the banned activity of the association and was conducive to those activities. The acts had to be actually suited to producing an advantageous effect in regard to the banned activities.

33. The court considered that the submission of these signed declarations within the framework of a large-scale campaign was concretely suited to support the PKK's activities. Having regard to the overall context of the statement and to the circumstances of the campaign, the Federal Court of Justice considered that it could be ruled out that the signatories confined themselves merely to demand freedom and self-determination for the Kurdish people, a lifting of the ban and most severely to condemn the maintenance of the ban. This statement would have been covered by their right to freedom of expression. However, the concluding statement, according to which the signatories declared that they assumed "all responsibility arising therefrom" (that is to say from the non-observance of the ban) made it unequivocally clear that they were ready to flout the ban and to bear the ensuing criminal prosecution. Otherwise, the addendum would not make sense, as these consequences could not be expected for the mere utterance of criticism and the request for a lifting of the ban, which would be covered by the right to freedom of expression and thus be exempt from criminal liability.

34. This interpretation was further corroborated by the fact that it had been the campaigners' declared aim to overburden public prosecution authorities with such a large number of proceedings that they would be unable to cope.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant complained that her criminal conviction for signing the declaration violated her right to freedom of expression as provided in Article 10 of the Convention, which reads as follows:

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

36. The Government contested that argument.

A. Admissibility

37. 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 applicant's submissions

38. The applicant complained that her criminal conviction had not been necessary in a democratic society and had been disproportionate. There was no pressing social need justifying the restriction imposed on her right to freedom of expression. In this respect, the applicant emphasised that the

declaration had been submitted within the framework of a political debate on issues of public interest. Furthermore, the boundaries of what was to be regarded as permissible criticism were wider with respect to Government activities as opposed to those of criticism directed against individual persons. Governmental actions and omissions had to be subject to an open public debate in a democratic society; this was particularly relevant for the applicant, who, as a non-national, was excluded from participating in the electoral process.

39. The applicant emphasised that the self-declarations did not advocate the use of violence against the State or against individual persons. As the Government themselves had confirmed, the PKK's activities had been largely peaceful at the relevant time. The national courts did not establish a real threat to public order or safety by the PKK in general or the self declaration campaign, nor did they examine or find any proven actual impact of the PKK on the national security or public safety. None of the decisions reviewed the legality of the ban on the PKK or questioned its necessity in a democratic society. Insofar as the Government relied on the European Union's list of terrorist organisation, the applicant submitted that these listings, according to the case-law of the European Court of Justice, were unlawful and could not be the basis for criminal consequences on individuals. The national courts had failed to determine whether the interference with freedom of expression reflected a pressing social need in the individual case. Regardless of necessary considerations on other levels, for instance the determination of the penalty, they had ruled that freedom of speech had to generally take second place and there was no weighing on this stage.

40. Furthermore, the applicant's criminal conviction was based on the assumption that the declaration did not confine itself severely to disapprove of German policy, but that it also had a positive effect on the PKK. However, the correct interpretation of the declaration had been in dispute between the applicant and the German authorities. Having regard to the declaration's ambiguity, the risk of interpretation could not be held against the applicant. She did not declare her readiness to break the law or overstep the boundaries of the right to freedom of expression or of the criminal law in any way.

41. The applicant finally submitted that the penalty imposed on her was unusually high. In this respect, she pointed out that 150 daily fines were the equivalent of five months' income or 150 days of imprisonment, respectively.

2. The Government's submissions

42. According to the Government, the applicant's conviction, which interfered with her right to freedom of expression, was justified under Article 10 § 2 of the Convention.

43. The relevant provisions of the Law on Associations were formulated with sufficient precision to enable the citizen to regulate his conduct – if need be with appropriate advice – and to foresee the consequences which a given action might entail.

44. The Government further submitted that a banning order was issued in cases in which associations, through their political activities, impeded or jeopardised the internal or external security, public order or other important interests of the Federal Republic of Germany or of a *Land.* The criminal law sanction helped to enforce the ban. It served the same legal interests and thus pursued a legitimate aim pursuant to Article 10 § 2 of the Convention.

45. With regard to the existence of a "pressing social need" the Government submitted that the PKK represented a threat to the criminal laws, the idea of international understanding and the internal security of the Federal Republic of Germany. They pointed out that the banning order issued on 22 November 1993 was legally binding. The applicant or other PKK sympathisers were free to demand that the ban be set aside. The setting aside of the prohibition fell within the discretion of the responsible authority. However, neither during the time at issue in this case nor today there had been reasons to exercise this discretion in the organisation's favour. The PKK was and remained an organisation of incalculable militant volatility.

46. The Government further pointed out that the PKK, in May 2002, was included in the European Union's list of terrorist organisations and continued to be on that list, which was subject to regular review.

47. Only the ban on the association's activity was an effective means of averting this risk. The right to freedom of expression was manifest in the preconditions set out in section 20 § 1 no. 4 in conjunction with section 18 second sentence of the Law on Associations and had to recede whenever the activity exclusively served to realise objectives which contravened the ban.

48. According to the Government, the German courts took account of the importance of the right to freedom of expression when interpreting section 20 § 1 no. 4 of the Law on Associations. They emphasised that the criminal sanction was not directed against the expression of opinions as such, but against the targeted promotion of the banned activities of an association. Accordingly, the individual would not be affected where he himself was actively pursuing certain political aims; he was only barred from doing so by supporting the activities of an association which had been banned. It had therefore to be distinguished whether the banned activities of the association were promoted or whether the aim was to get the ban lifted, the latter being permissible under the right to freedom of opinion.

49. The court which dealt with the instant case applied section 20 § 1 no. 4 in accordance with these principles. The courts also examined in detail the interpretation put forward by the applicant. The examination was not limited to the last sentence of the self-declaration, although this was of

decisive importance. The addition would otherwise not make sense, since possible consequences for which responsibility was to be assumed were obviously not to be expected when one only voiced criticism of a ban and called for it to be lifted. Such a statement would without doubt be covered by the right to freedom of expression and would thus not be a punishable offence. This the applicant could also recognise. She could thus not invoke the fact that she bore a "risk of interpretation".

50. As regards the weighing up of interests within the context of Article 10, the domestic courts took into account the fact that the applicant had submitted the declaration within the framework of a campaign which had been initiated by the PKK leadership. She had actively supported this campaign by collecting the individual declarations and by assuring that the handing over drew public attention. The fact that she chose the public prosecutor's office as her forum clearly showed that the collection of signatures was aimed at creating a flood of proceedings; the applicant also adopted the objectives of the campaign as her own.

51. The Government finally submitted that the domestic courts correctly took into account the right to freedom of expression by assessing a very moderate fine.

3. Assessment by the Court

52. The Court notes, at the outset, that the applicant's criminal conviction was not based on the fact that she expressed a certain opinion. All domestic courts adjudicating the case expressly acknowledged that the applicant's statements fell within the ambit of her right to freedom of expression and that she was allowed to demand freedom and self-determination for the Kurdish people, to call for a lift of the ban on the PKK's activities and severely to condemn the maintenance of that ban. The courts considered, however, that the declaration also had to be understood as a commitment made by those signing it not to respect the ban on activities in the future. According to the courts, this statement was suited to provide the PKK with security for planning further unlawful activities and was likely to strengthen solidarity with other potential supporters and thus contravened the ban imposed on the PKK's activities.

53. Accordingly, it is not the Court's task to examine whether the applicant was allowed to express a specific opinion – which she was undisputedly allowed to do – but whether the applicant's criminal conviction for lending support to an illegal organisation violated her right to freedom of expression under Article 10 of the Convention.

54. The Court notes that it was not disputed by the Government that the applicant's conviction by the national courts amounted to an "interference" with her right to freedom of expression. Such interference will infringe the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by

law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

55. The Court notes that the applicant's conviction was based on section 20 § 1 no. 4 in conjunction with section 18, second sentence, of the Law on Associations.

56. The Court reiterates that the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among many other authorities, *Grigoriades v. Greece*, 25 November 1997, § 37, *Reports of Judgments and Decisions* 1997-VII). Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Whilst certainty is highly desirable, it may entail excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are a question of practice (see *Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 49, Series A no. 30 and *Flinkkilä and Others v. Finland*, no. 25576/04, § 65, 6 April 2010).

57. Turning to the circumstances of the instant case, the Court observes that section 20 § 1 of the Law on Associations, by imposing criminal liability on "anyone who,...by pursuing an activity,...contravenes an enforceable prohibition under section 18 sentence 2", is couched in rather broad terms. It notes, however, that the Federal Court of Justice, in its pilot decision given on 27 March 2003 (see §§ 31-34, above), confirmed its earlier case-law that a person contravened an enforceable prohibition if his activity made reference to the banned activity of the association and was conducive to those activities. The acts had to be actually suited to producing an advantageous effect in regard to the banned activities. The Court considers that this interpretative case-law was sufficiently precise to make the consequences of her action foreseeable for the applicant. The Court is therefore satisfied that the applicant's conviction was "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

58. The Court further observes that the applicants' conviction was designed to protect public order and safety and thus pursued legitimate aims within the meaning of Article 10 § 2.

59. It remains to be determined whether the interferences were "necessary in a democratic society". This implies the existence of 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 supervision by the Court (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V).

60. The Court notes that the penalty imposed on the applicant was intended to assure that the ban on the PKK's activities was respected. The Court observes that the prohibition order imposed on an organisation's activities would be ineffective if its followers were *de facto* free to pursue the banned organisation's activities (see, *mutatis mutandis, Etxeberria and Others v. Spain*, nos. 35579/03, 35613/03, 35626/03 and 35634/03, § 52, 30 June 2009). The Court further observes that the domestic courts expressly acknowledged the applicant's right to call for a lifting of the prohibition order imposed on the PKK in 1993. It was not disputed by the parties that the prohibition order was subject to review and could be lifted by the Interior Ministry. It follows that the applicant remained free to address herself – also in a public way – to the competent authority and to demand the lifting of the prohibition order in view of the alleged change of circumstances. It follows that the applicant would have been in a position effectively to work towards a lifting of the prohibition order without risking criminal prosecution.

61. The Court takes note of the applicant's submissions that she had not expressed the willingness to flout the prohibition order. It observes, however, that the domestic courts have thoroughly examined the content of the declaration signed by the applicant within the general context, thereby taking into account the fact that it had been made within the framework of a large-scale campaign initiated by the PKK leadership. Furthermore, they took into account that the applicant had undisputedly contravened the prohibition order in a separate way by making a donation to a sub-organisation of the PKK which had also been subjected to the ban. By way of conclusion, the German courts ruled out that the declaration could be interpreted in a different way which did not call for criminal liability. Having regard to the thorough examination by the domestic courts, the Court does not consider that the interpretation they gave to the applicant's statement was contrary to her rights under Article 10 of the Convention.

62. The Court finally observes that the criminal courts, when assessing the sentence, considered as mitigating factors that the applicant was relying on her right to freedom of expression. Furthermore, the sanction imposed, which amounted to 150 daily fines of eight euros each, does not appear to be disproportionate.

63. In the light of all foregoing considerations, the Court concludes that the courts have sufficiently taken account of the applicant's right to freedom of expression in the course of the criminal proceedings against her. There has accordingly been no violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 IN COMJUNCTION WITH ARTICLE 7 OF THE CONVENTION

64. The applicant further complained that her conviction raised an issue under Article 10 in conjunction with Article 7 § 1 of the Convention, which reads as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

65. The Court notes that the applicant, when lodging her complaint with the Federal Constitutional Court, has not relied on Article 103 § 2 of the Basic Law, which provides that an act may be punished only if it was defined by a law as a criminal offence before the act was committed. The Court considers that the guarantees in Article 7 § 1 of the Convention and in Article 103 § 2 of the German Basic Law are largely identical. In order to exhaust domestic remedies within the meaning of Article 35 § 1, the applicant would therefore have been obliged to invoke Article 103 § 2 of the Basic Law before the Federal Constitutional Court. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 10 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 27 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Kalaydjieva is annexed to this judgment.

P.L.
C.W.

DISSENTING OPINION OF JUDGE KALAYDJIEVA

I find myself unable to follow the logic which brought the majority to the conclusion that "the [national] courts have sufficiently taken account of the applicant's right to freedom of expression in the course of the criminal proceedings against her". In the absence of any reasoning in the domestic decision-making process, these conclusions appear to deviate from the principle of subsidiarity and to substitute the Court's own considerations for those of the national courts in determining the compatibility of a measure affecting the rights under Article 10.

The applicant was sentenced for signing a declaration in 2001 in support of lifting the ban on activities of PKK imposed by virtue of an Order of the Minister of Interior in 1994. On 27 March 2003 the Federal Court of Justice issued a pilot judgment on the criminal responsibility incurred by this act, finding that it *could be ruled out that the signatories limited themselves to demanding freedom and self-determinatio*n - *a statement which would have been covered by the right to freedom of expression and thus be exempt from criminal liability*. In their view the content of the "self-declarations" went beyond the mere exercise of this freedom and made it unequivocally clear that signatories were "*ready to flout the ban and to bear the responsibilities thereof*".

In so far as the majority was convinced that in view of this interpretation the applicant was not convicted for an act committed in exercising her freedom of expression within the ambit of Article 10 of the Convention, a conclusion that this provision was not applicable to the circumstances of the case might have been more appropriate to meet their views. Having however come to the conclusion that the imposed sentence interfered with the applicant's freedom of expression, with which I agree, this Court is required to determine *"whether the reasons adduced by the national authorities to justify the interference were 'relevant and sufficient'... [T]he 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 others *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 88-91, ECHR 2004-XI).

In the present case the competent Regional Court found that the declaration which the applicant signed, *"was not covered by her right to freedom of expression* and at the same time considered the importance of this right as a mitigating factor in determining the imposed fine" (§§ 16-17). The Federal Court of Justice found on appeal that the court below *had* "*sufficiently weighed the importance of the applicant's right to freedom of expression*". Like in several similar cases (see page 4 of the Observations of

the Applicant), the Federal Constitutional Court was of the view that the applicant's statements fell within the ambit of the applicant's right to freedom of expression (§ 22). It considered that *in the context of the criminal courts' examination,* "*freedom of expression took second place without a weighing being required in the individual case*" (§ 24). In my view these circumstances suffice to demonstrate that the national courts were not required to and accordingly failed to determine whether the interference with the freedom of expression reflected a pressing social need justifying the interference in the individual case of the applicant.

Looking also at the fact that the applicant's conviction was based on an interpretation of the law which classified her act as punishable two years after it was committed, I am far from convinced that the interference with the applicant's rights under Article 10 was "prescribed by law", or that "the (national) courts have sufficiently taken account of the applicant's right to freedom of expression in the course of the criminal proceedings against her".