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БОРБА ПРОТИВ ТЕРОРИЗМА И ОГРАНИЧЕЊЕ СЛОБОДЕ ИЗРАЖАВАЊА: Нека разматрања о појединим пресудама Европског суда за људска права

***Апстракт**: Борба против тероризма и слобода изражавања на међународном нивоу као и на нивоу држава које су се обавезале међународним инстументима за заштиту људских права су неминовно у сукобу. Турски Закон о спречавању тероризма (Закон бр 3713 усвојен 12 априла 1991 године) је пример који би могао послужити другима у циљу идентификовања области могућег конфликта. Одељак 7 (2) овог Закона предвиђа да свака особа која шири пропаганду у корист неке терористичке организације подлеже кривичној казни од једне до пет година затвора. Овај Закон и одговарајуће одредбе турског кривичног закона, као и примена ових закона од стране турских власти, су непрестано давали повод за подношење захтева Европском суду за људска права у вези са чланом 10 Европке конвенције о људским правима, који гласи: 1. Свако има право на слободу изражавања… 2. Пошто остваривање ових слобода повлачи за собом дужности и одговорности, оно се може подвргнути формалностима, условима, ограничењима или казнама прописаним законом и неопходним у демократском друштву у интересу националне безбедности, територијалног интегритета или јавне безбиједности, ради спријечавања нереда или криминала… Суд је утврдио да је Турска починила повреду члана 10 Конвенције, нарочито у случајевима Ibrahim Aksoy (бр. 28635/95, 30171/96 и 34535; 10. октобар 2000), Halis (бр 30007/96; 23 мај 2002) као и у случајевима новијег датума као што су Çamyar and Berktaş (бр 41959/02; 15 фебруар 2011) и Kiliç and Eren (бр 43807/07; 29 новембар 2011). У свим овим судским предметима, Суд је пресудио да се ове појединачне интервенције не могу оправдати као неопходне у демократском друштву.*

У овом раду, аутор тумачи аргументе Европског суда за људска права у овим случајевима и пореди их са недавно пресуђеним случајевима где је Суд такође утврдио повреду члана 10 Европске

конвенције али ван контекста тероризма, установивши да интервенција државних органа која је предмет расправе није била неоподна у демократском друштву. Аутор посвећује посебну пажњу питањима од јавног интереса која су била предмет расправе у случају Šabanović v. Montenegro and Serbia (бр. 5995/06; 31. мај 2011). У раду се изводи закључак да се стандардни „тест неопходности", који је Европски суд образложио у неким ранијим случајевима (на пример, Nilsen and Johnsen v. Norway, бр 23118/93; 25 новембар 1999), још увек може једнако применити на процењивање неопходности државне интервенције у судској расправи која се односи на питања од јавног интереса као и на процењивање предузетих (државних) мера које се тичу члана 10 Конвенције у контексту борбе против тероризма.

***Кључне речи**: борба против тероризма, слобода изражавања, члан 10 Европске конвенције о људским правима, тест нужности за легитимну интервенцију, судске пракса Суда у Стразбуру.*

Fight Against Terrorism and Limitation of the Freedom of Expression: Some Remarks on Recent Judgments of the European Court of Human Rights

1. Introduction

The freedom of expression, as guaranteed by art 10 European Convention on Human Rights (ECHR) is certainly not the fundamental right which forms the focus of the European Court of Human Rights' (ECtHR) control of state acts aiming at fighting terrorism. The most recent judgment in the context of fight against terrorism, the case of NADA v Switzerland[1] shows that it is the right to respect of private life which in conjunction with procedural rights (art 13 ECHR) raises many more concerns, in particular in the context of international terrorism. Mr Nada, an Italian and Egyptian citizen living in the enclave Campione d'Italia, surrounded by Swiss territory, was found having been violated in his rights under art 13 in conjunction with art 8. The Court held that Mr Nada did not have any effective means of obtaining the removal of his name from the list annexed to the Swiss Taliban Ordinance, which was set up by Switzerland in order to implement the Al-Quaeda sanctions system initiated by the US in the United Nations (UN) Security Council. In the opinion of the

[1] Application no 10593/08. Judgment of the Grand Chamber of 12 September 2012.

Court, Mr Nada, therefore, did not have any remedy in respect of the respective violations.[2] Further to that the ECtHR found that the measure by which Mr Nada was prohibited from entering or passing through Switzerland had breached his right to respect for his private life, including his professional life, and his family life. Mr Nada was prevented from seeing his doctors in Italy or in Switzerland and from visiting his friends and family. The measure was not proportionate and therefore not necessary in a democratic society.[3]

On the other hand states involved in the fight against terrorism regularly use anti-terror acts or general criminal law in order to hinder movements or organizations which they define as terroristic to find support through books, press, and other media.

This paper undertakes to analyze three recent respective Turkish cases against the background of a judgment on defamation which declared Montenegro of having violated art 10 ECHR. It is aimed to elaborate whether the ECtHR in terrorism cases is applying a different standard from the one in other art 10 cases. The cases selected for contrastive analysis are the following:

- Case of Šabanović v Montenegro and Serbia on the one hand;[4] and
- Case of Çamyar and Berktaş v Turkey;[5]
- Case of Kiliç and Eren v Turkey;[6]
- Case of Kutlular v Turkey on the other hand.[7]

2. The Facts and Allegations of the Parties

2.1. Case of Çamyar and Berktaş v Turkey

Çamyar is the owner of a publishing house in Istanbul which published a book edited and to most parts written by the second applicant Berktaş. The book was a critique of the Turkish penitentiary system. The second applicant as far as author based on her own experience criticized the cell system in Turkey which

[2] (fn 1), para 213.
[3] (fn 1), paras 149, 198 – 192 and 198 f.
[4] Application no 5995/06; judgment of 31 May 2011, which became final on 31 August 2011.
[5] Application no 41959/02; judgment of 15 February 2011, which became final on 15 May 2011.
[6] Application no 43807/07; judgment of 29 November 2011, which became final on 29 February 2012.
[7] Application no 73715/01; judgment of 29 April 2008, which became final on 29 July 2008.

in her view facilitates ill-treatment and leads to deaths in prison.[8] In four other articles written by persons that were imprisoned because of having been involved in the illegal armed organization called "TIKB" ("Bolşevik") they – based on their own experience – spoke against the isolation of prisoners, ill-treatment of detainees and in general poor prison conditions.[9] In 2000 the public prosecutor brought forward a criminal charge against the applicants based on arts 36 and 169 Criminal Code as in force at that time and on sections 5 and 8 of the Prevention of Terrorism Act.[10] The respective provision of the Criminal Code provided that "*any person who, knowing that an armed gang or organization is illegal, assists it, harbours its members, provides it with food, weapons and ammunition or clothes or facilitates its operations in any manner whatsoever shall be sentenced to no less than three and no more than five years' imprisonment.*"[11] The relevant provisions of the Turkish Prevention of Terrorism Act imposed imprisonment of one to five years on persons who disseminated propaganda in favor of a terrorist organization.[12] According to the public prosecutor and Turkish government the "TIKB (Bolşevik)" had been involved in a number of terrorist acts, was, therefore, called a terrorist organization under Turkish law and aimed at separating a part of the Turkish territory and establishing a Marxist-Leninist regime in this entity. Further to that, they argued dissemination of separatist propaganda within the Kurdish community and incitement of hatred and hostility on the basis of race and religion.[13] In the criminal proceedings the applicants pleaded not guilty and that their book was written only against fascist policies in Turkey and the existing prison system. They claimed a violation of arts 6 and 10 ECHR.[14] At the end of all local appeals the first applicant was sentenced to three years and nine months of imprisonment which was converted to a fine of approximately 2,000 €. The second applicant was sentenced to ten months' imprisonment and to a fine of approximately 200 €.[15]

The applicants argued a violation of art 10 ECHR, because their conviction was not justified since they pretended having been punished because of using the phrase "*The freedom fight of the Kurdish people*" in their book. They considered the interference as a new obstacle for the freedom of press and

[8] (fn 5), paras 5 f.
[9] (fn 5), para 7.
[10] Turkish Law no 3713 of 12 April 1991.
[11] (fn 5), paras 8 and 22.
[12] (fn 5), para 23.
[13] (fn 5), para 8.
[14] (fn 5), para 12.
[15] (fn 5), paras 18 and 20.

the freedom to impart opinions.[16] The Government argued that the interference was justified, because the book "*incited hatred and hostility and praised terrorist crime.*" It referred to its legitimate margin of appreciation under the provisions of the second paragraph of art 10 ECHR.[17]

2.2. Case of Kiliç and Eren v Turkey

In 2006 during the Newroz celebrations in the Turkish city of Patnos slogans were shouted which later were disclosed by the Patnos Security Directorate investigation as praising the imprisoned leader of the Kurdistan Workers' Party (PKK), an illegal organization.[18] Irrespective of the fact that both applicants denied having shouted such slogans the Patnos Public Prosecutor initiated criminal proceedings against them in the Patnos Criminal Court. They were charged of dissemination of the propaganda of an illegal organization, which charge, however, was changed by the Criminal Court into violation of art 215 Turkish Criminal Code, namely approving an offence committed or praising a person on account of an offence he or she has committed.[19] The provision foresees imprisonment of up to two years. Both applicants were found guilty of this crime by the Erzurum Assize Court in 2007 and were sentenced to twenty-five days imprisonment each. This prison sentence, which was final under Turkish law, was then commuted to a fine of 270 €. The first applicant paid the fine. The penalty of the second applicant was suspended for a period of five years.[20]

The applicants complained that their conviction and sentencing violated inter alia art 10 ECHR.[21] The Government held against that the applicants' convictions had been based on law and were justified by the need to protect national security, public safety and to prevent disorder and crime. In the opinion of the Government they were proportionate.[22]

2.3. Case of Kutlular v Turkey

The applicant is journalist in Istanbul and owns the journal Yeni Asya. In 1999, this journal organized a religious ceremony in a mosque in Ankara in memory of the founder of a Muslim sect or school. At the beginning of the ceremony a brochure with the title "The Earthquake – A Warning of God" was

[16] (fn 5), para 32.
[17] (fn 5), para 33.
[18] (fn 6), para 6.
[19] (fn 6), paras 8 – 10 and 15.
[20] (fn 6), paras 12 – 14.
[21] (fn 6), para 16.
[22] (fn 6), para 20.

distributed referring to the earthquake which hit the North-West of Turkey earlier the same year and caused many victims. The preface of the brochure established a connection of this earthquake with certain political events and the alleged violation of religious instructions in the respective region. This link was reinforced by answers given by the appellant to questions of journalists in public at the beginning and at the end of the ceremony.[23] Based on some of these answers, the Prosecutor of the Republic of Turkey initiated a criminal proceedings against the applicant under art 312 §§ 2 and 3 of the Turkish Criminal Code because of dissemination of hatred and hostility by means of religious discrimination. The public prosecutor held that the applicant tried to divide the Turkish society into two groups, the group of the religious believers and the group of the persons oppressing the believers.[24] The applicant argued that the Prosecutor deliberately had eliminated certain parts of his speech and the brochure and also the questions of the journalists. The elements of the crime he was accused of were not given. Besides he was neither the author nor the distributor of the brochure.[25]

Initially, the applicant was sentenced to imprisonment for two years and one day and a fine. This sentence was reversed a couple of times also in the context of changes of the law. Finally the period of imprisonment was fixed with one and a half year based on a new provision of the Criminal Code.[26]

The applicant argued that his conviction was inter alia a violation of art 10 ECHR, in particular, in connection with an ambiguous wording of the respective provision of the Criminal Code.[27] He emphasized that his statements were based on religious interpretations. Nothing can be explained only with natural reasons. There are always spiritual reasons to be taken into consideration. This goes also for the earthquake of 1999. He admitted that he had criticized the Government and that the actions of the Government were a reason for the earthquake.[28]

2.4. Case of Šabanović v Montenegro and Serbia

Due to the circumstance that the facts of the case and relevant procedures concerned only the territory of Montenegro, the complaint was rejected with regard to Serbia, but decided in the merits with regard to Montenegro.[29] It is a

[23] (fn 7), paras 4 – 6.
[24] (fn 7), paras 7 f.
[25] (fn 7), paras 9 – 11.
[26] (fn 7), paras 21 – 28.
[27] (fn 7), para 30.
[28] (fn 7), para 37.
[29] (fn 4), paras 28 and 29.

case of conviction because of defamation. In 2003 a daily Montenegrin newspaper reported that the water in the applicant's area of Herceg-Novi contains various bacteria. This report was based on a health report requested by the Chief State Water Inspector, who obviously looked for alternative water sources. In the same was article a statement of the applicant, who was Director of a public Water Supply company holding that there were regular tests that did not show such results. He, being a member of the Socialist People's Party (SNP), stated that the water was always filtered before pumped into the system.[30] At a press conference on the same day the applicant reinforced this statement and added that the Chief Inspector had been promoting the interests of two private companies with (unlawful) licenses to develop additional water sources and was directed to do so by his Democratic Party of Socialists (DPS), which at the time was the major partner in the coalition government of the state.[31]

The Chief Inspector submitted a private criminal action for defamation against the applicant, because the latter's statements were untrue and caused damage to his reputation. The applicant defended himself by stating that his statement was a value-judgment which he could prove. The court found the applicant guilty and sentenced him to three months imprisonment suspended for a period of two years.[32] The court found only the sentence of the applicant's statement "*The Inspector [...] works in the interest and at the request of [the two companies], as directed by the DPS*" as defamatory and not supported by facts. It rejected the argument of a value-judgment. Moreover, in the court's view the applicant was aware of the damage of his statement and, therefore, had a defamatory intention. The applicant's appeal against this decision failed.[33]

The applicant complained a violation of art 10 ECHR emanating from his criminal conviction.[34]

The Government argued that the applicant's statement was one of the facts rather than a value judgment. He misused his freedom of expression at the press conference which was not necessary to be organized. The public interest requires information which should be true, in particular as to the quality of drinking water. The interference with the applicant's freedom of expression was necessary in a democratic society and proportionate to its legitimate aim.[35]

[30] (fn 4), para 7.
[31] (fn 4), para 8.
[32] (fn 4), paras 9 – 12.
[33] (fn 4), paras 13 – 16.
[34] (fn 4), para 26.
[35] (fn 4), paras 30 – 34.

3. The ECtHR's Finding in the Terrorism Cases

In all three cases against Turkey, the ECtHR applied its standing scheme for supervising whether interferences with the freedom of expression are justified.[36] The Court neither saw a problem as to the legal basis for the interference,[37] nor as to a legitimate aim to be pursued by the interference.[38] It focussed on exercising its supervisory function on whether Turkey used its margin of appreciation as to the interference complained of was necessary in a democratic society in order to pursue the legitimate aim.[39] The Court ascertained whether "*a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations.*"[40] It analysed the facts of the cases with the aim of figuring out whether there was any call for violence going beyond a mere hostile tone of the incriminated statements.[41] In none of the three cases the Court found an encouragement of the use of violence and in all three selected cases considered the measures of Turkey as disproportionate to the aims pursued as a consequence.[42] In the case of Çamyar and Berktaş and in the case of Kutlular, the Court used also additional arguments.

4. Evaluation and Summary

The reasoning of the ECtHR in the Šabanović case follows its established jurisprudence in defamation cases involving public officials and information of public interest. The Court emphasized the right "*to impart, in good faith, information on matters of public interest even where the statements in question involved untrue and damaging statements about private individuals*" and asked

[36] See for many others eg Ch. Grabenwarter, Europäische Menschenrechtskonvention. Wien 2009[4], 274 – 295.
[37] See Çamyar and Berktaş v Turkey (fn 5), para 34; Kiliç and Eren v Turkey (fn 6), para 22; Kutlular v Turkey (fn 7), para 40.
[38] See Çamyar and Berktaş v Turkey (fn 5), para 34; Kiliç and Eren v Turkey (fn 6), para 22; Kutlular v Turkey (fn 7), para 41.
[39] See Çamyar and Berktaş v Turkey (fn 5), paras 35 – 37; Kiliç and Eren v Turkey (fn 6), paras 23 f; Kutlular v Turkey (fn 7), paras 42 – 46.
[40] See Kiliç and Eren v Turkey (fn 6), para 25.
[41] See Çamyar and Berktaş v Turkey (fn 5), paras 38 – 40; Kiliç and Eren v Turkey (fn 6), paras 27 – 30; Kutlular v Turkey (fn 7), paras 46 – 49.
[42] See Çamyar and Berktaş v Turkey (fn 5), paras 40; Kiliç and Eren v Turkey (fn 6), paras 29 f; Kutlular v Turkey (fn 7), paras 49, 52.

for take "*into account whether the expressions at issue concern a person's private life or their behaviour and attitudes in the capacity of an official."* The Court repeated earlier judgments by saying that *"senior civil servants acting in an official capacity are subject to wider limits of acceptable criticism than private individuals*".[43]

The ECtHR accepted the applicant's wish to respond to the newspaper article by organizing a press conference in order to inform the public that the water pumped into the system had been filtered and was thus safe for use. His criticism of the Chief Inspector in the view of the Court related to the latter's capacity as an official. The applicant's statement, which was considered to be a statement of fact, was held by the Court as "*a robust clarification of a matter under discussion which was of great public interest*".[44] The Court noted that the domestic courts had failed to situate the applicant's statement in a broader context and saw the disproportionality of the interference as to the aim pursued in the seriousness of the criminal sanction which was imposed on the applicant.[45]

Comparing the Court's reasoning in the terrorism cases with the Montenegrin case of defamation of a public official in a matter of great public interest it can be resumed that the ECtHR is following one and the same standing jurisprudence as to art 10 ECHR in both types of cases. It is the call for violence which forms the critical threshold of the application of art 10 ECHR by states in the terrorism context. Below this threshold the Court is willing to accept statements of rather a "*robuste nature*" as being protected by the freedom of expression like it shows comparably liberal in defamation cases involving a matter of great public interest.

[43] (fn 4), para 37.
[44] (fn 4), para 41.
[45] (fn 4), paras 42 – 44.

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Fight Against Terrorism And Limitation Of The Freedom Of Expression: Some Remarks On Recent Judgments Of The European Court Of Human Rights

Summary

The paper compares three cases against Turkey involving terrorism and freedom of expression with a Montenegrin case involving a defamation of a public official in a matter of great public interest. It finds that in all four cases the ECtHR applied its standing scheme for supervising whether interferences with the freedom of expression are justified. The Court neither saw a problem as to the legal basis for the interference, nor as to a legitimate aim to be pursued by the interference. It focussed on exercising its supervisory function on whether Turkey and Montenegro used their margin of appreciation as to the interference complained of was necessary in a democratic society in order to pursue the legitimate aim. Since the Court in none of the three Turkish cases found an encouragement of the use of violence, it considered the measures of Turkey as disproportionate to the aims pursued as a consequence. In the Montenegrin case, the ECtHR accepted the applicant's "robust clarification of a matter under discussion which was of great public interest" and found his freedom of expression violated considering the seriousness of the criminal sanction which was imposed on the applicant. Not terrorism as such and this context, but the call for violence makes the difference between a defamation case in a matter of great public interest and a terrorism case with regard to the freedom of expression.

Key words: *European Court of Human Rights, Case of Šabanović v Montenegro and Serbia, Case of Nada v Switzerland, Case of Çamyar and Berktaş v Turkey, Case of Kiliç and Eren v Turkey, Case of Kutlular v Turkey, terrorism, freedom of expression, Article 10 European Convention on Human Rights*