Constitutional Court finds violations in the Academics for Peace case (Application no 2018/17635)

On 26 July 2019 the Constitutional Court of Turkey delivered a judgment concerning freedom of expression of ten academics who were convicted under anti-terrorism law for signing a peace petition, a group publicly known as "Academics for Peace". In this leading case, the judges of the Grand Chamber were evenly divided: whilst eight judges were against finding a violation, the other eight judges, including the President of the Court whose vote had a special weight pursuant to Art.57 of the Rule of the Court, decided that the applicants' right to freedom of expression was violated.

Background

On 11 January 2016, a petition called "We will not be a party of this crime" was made public with initial signatures from 1128 academics and researchers from Turkey and abroad, criticising the Turkish government for its implementation of recent curfews and anti-terrorism operations in Kurdish districts of Turkey. In the petition, the use of curfews and employment of heavy weaponry by security forces were criticised as "*deliberate and planned massacre*" perpetrated by the state violating human rights and other obligations under international law. The authorities were urged to immediately end the violence; to punish those responsible for human rights violations, to provide redress for damages, to allow access of independent observers to the region and lastly, to create conditions for lasting peace in the region.

After its publication, the President severely criticised the signatories, accusing them of being "supporters of terrorism", "dark forces" or "fake academics" and a smear campaign against these academics was disseminated further in pro-government media. Afterwards, public prosecutors across the country filed indictments against the signatories charging them mainly with the criminal offence of disseminating propaganda in support of the PKK pursuant to Article 7(2) of the Anti-Terror Law (Law no. 3713). Some of the academics were arrested and detained during these proceedings. Administrative and disciplinary sanctions were imposed against them by their Universities and a number of them were dismissed by executive decrees during the state of emergency with ensuing limitations on their passports and employment in public sector.

Criminal Proceedings

In their decisions, the 'heavy penal courts' held that the applicants had justified and legitimised the actions of a terrorist organisation by presenting the state's military operations as "massacres" causing the death of civilians in the petition, which amounted to propaganda in support of PKK. Taking into account ongoing conflict and security risk in the region during that period concerned, they convicted the applicants under Article 7(2) of the Anti-Terror Law. The applicants' requests for appeal were rejected by the higher courts.

As to the execution, the prison sentences were deferred for all convicted applicants, but one, Füsun Üstel, who went into prison to serve her criminal sentence of 15 months following the appeal court's decision upholding her conviction. For those whose sentences were deferred are subjected to a probationary period during which if any other offence is committed, full sentences would be served for both offences.

Complaining that their convictions constituted a violation of their rights to freedom of expression, fair trial and prohibition on restricting rights for illegitimate purposes, as guaranteed under Articles 10, 6 and 18 of the European Convention of Human Rights (ECHR), the applicants submitted an individual application to the Constitutional Court (CC).

The Judgment of the CC

In its judgment, citing its recent judgment in Ayşe Çelik case, the majority of the Court stressed once again that Article 7(2) of the Anti-Terror Law did not criminalise any expression associated with terrorism but only those justifying, praising or inciting to resort to methods constituting coercion or violence used by a terrorist organization (para. 80).

In the decision it was asserted that for propaganda for a terrorist organization to be criminalised, two conditions set out under Article 5 of the Council of Europe Convention on the Prevention of Terrorism must be met, namely, the special intent for disseminating propaganda and a danger to public order that a terrorist offence of a similar kind would in fact be committed. As to the latter condition, the CC stressed that the prosecuting authorities had to show that danger of a certain level had arisen taking into account the specific circumstances of each case (para.84). Otherwise, criminalizing indirect incitement to terrorism (through criminalizing apology, legitimising or praising a terrorist organization or its conducts) may potentially pressurize freedoms, particularly political expression.

Moreover, the majority of the Court challenged the assumptions made by prosecuting authorities and the instance courts that the impugned petition was organised on the basis of a call made by the PKK, having sought support for its aims in the region, due to the lack of evidence (para 89 and 95). Furthermore, the majority rejected any negative inferences being drawn against the applicants from the fact that the petition only called on the state authorities to end conflict and

violence but not the PKK (para.96). In this regard the majority noted that one-sided or biased information or opinion could not be a justification for an interference with the freedom of expression, which would otherwise risk limiting the public debate to which civil society contributes through its appeals to public authorities (para.97).

To assess the perceived danger and necessity of an interference, the CC called for a complete analysis of all circumstances of the case taking into account content, context, identity of the person who made the impugned expression, timing and impact of the statement as a whole (para.86). On this basis, the majority disagreed with the lower courts' analysis and found that content of the petition did not praise, justifies or incite the violent methods or terrorism but rather called for the end of conflict and violence and respect for human rights. In this connection it reiterated that even those expressions that are deemed "to offend, shock or disturb the state or any sector of the population" are protected under the right to freedom of expression (European Court of Human Rights (ECtHR), Handyside v. the United Kingdom, No: 5493/72, 7/12/1976 para.49).

Paying special attention to the identities of the applicants as academics, who would enjoy broader freedoms to express their opinions, the judgment confirmed that strict protection is required for academic expressions and also those related to matters of public interest as seen in the instant case. It reiterated that the acts or negligence of public authorities were subjected to public scrutiny in a democratic society and that authorities have to tolerate criticism. In the proportionality assessment, noting the severe chilling effect of resorting to criminal law, even if a criminal sentence is suspended in the end, may result in limiting public debate and silencing different voices in a democratic society. In conclusion, observing that the applicant's statement had not praised or glorified violence nor had it aimed to instill hatred, the majority decided that the applicants' conviction under Article 7(2) of the Anti-Terror Law did not correspond to "a pressing social need" and thus, their right to freedom of expression under Article 26 of the Turkish Constitution was violated.

A Brief Assessment of the Judgment

This is an important judgment underlining the fundamental principles of freedom of expression particularly in relation to political expression in the context of fight against terrorism. The judgment calls for a stricter interpretation and application of the offence of disseminating propaganda in support of a terrorist organisation under Article 7(2) of the Anti-Terror Law, given the relevant international standards and case-law of the ECtHR. It challenges subjective assumptions made by prosecuting authorities or courts, exceeding the legal limits of the impugned provision and requests that a link to be established between the elements of propaganda and the impugned expression and any proof to be shown for the perceived risk of terrorism to justify the criminalisation of propaganda under Art. 7/(2) of Anti-Terror Law. Another positive aspect of the decision is that the judgment stressed the importance

of academic freedoms, entailing freedom of opinion and expression by the members of academia not only on issues of their expertise but also on any matters of public interest, calling closer scrutiny for any interference by authorities (para.111).

On the other hand, some elements in the judgment raises familiar concerns. For instance, the CC seems to have felt obliged to state that "the Constitutional Court is not in any ways in agreement with the content [of the petition]" and unnecessarily remarked on the tone used in the petition by referring it "biased and offensive containing exaggerated comments" and being "aggressive towards security forces" (para.124). Despite the applicants' allegation that the real aim of their prosecution was to silence and punish them as part of a larger campaign targeting dissents, the Court conveniently did not find it necessary to examine this claim.

The reasonings of dissenting judges presented at the annex of the judgment are noteworthy to show the variation of interpretations on the nature of the crime of propaganda for terrorism and on the limits of freedom of expression in a democratic society.. As presented in the the first published dissenting opinion (signed by judges Serdar Özgüldür, Burhan Üstün, Muammer Topal and Rıdvan Güleç) the dissenting four judges seem to be in complete disagreement with the reasoning and conclusion adopted by the court as they asserted that propaganda against "integrity and unity of the nation and country" and any expression that contradicts with "the principle of loyalty to the state" could not be protected under freedom of expression. This defies established principles and the case-law of the ECtHR on freedom expression. It reflects the findings of the international monitoring bodies, such as the Commissioner for Human Rights, raising concerns about tendencies in the Turkish judiciary to see their primary role to protect "the state" over protecting the rights of individuals.

Similarly, the second dissenting opinion (signed by judges Kadir Özkaya, Recai Akyel, Yıldız Seferinoğlu and Selahaddin Menteş) emphasises on the "duties and responsibilities" of individuals, including academics, in exercising their freedom of expression, and criticises the declaration for its accusative statements against the state authorities in the time when the conflict had been at its peak. These judges noted that the offence of disseminating propaganda in the Turkish law is not a crime of "harm" but a crime of "danger" and that state authorities have a "broad margin of appreciation" in criminalising propaganda for terrorism, particularly if the impugned statement has any links with violence. By relying on an abstract risk and reversing the burden of proof against the freedoms, they asserted that the statements in the petition, as negatively portraying the state authorities and its operations against terrorism, would have a potential to incite members of PKK or its sympathisers to resort to violence or to encourage them to commit terrorist crimes at time concerned (paras.35, 36 and 39).

Despite its shortcomings, this ruling, as it stands, has set precedent for more than 700 academics whose cases have been pending before the domestic courts and for many others prosecuted under Article 7(2) of Anti-Terror Law, a provision which has been extensively used to restrict legitimate criticism and peaceful expressions in Turkey. The divided opinions in the CC , however, indicates that fluxes in the case-law may continue and the protection provided for expressions critical of the authorities may not reach to the level required by the Art. 10 of the ECHR in every case. Nevertheless, it represents an opportunity for the CC to consolidate the approach taken in this judgment and send clearer messages to the implementing authorities, hopefully with less divided majority in its future rulings.

The Turkey Litigation Support Project

The Turkey Litigation Support Project (TLSP), jointly with Amnesty International, ARTICLE 19 and PEN International, submitted a third party intervention before the ECtHR on three applications concerning the cancellation of passports of academics who signed the same petition. The TLSP also provided expert opinions examining international law standards relevant to the criminalisation and prosecution of free expression which have been submitted before the Heavy Penal Courts trying a group of Academics for Peace. It further participated in a number of actions, including urgent appeal calls to the UN Special Procedures, to raise awareness of the situation of academics in Turkey. The TLSP will continue monitoring the developments in these cases and implementation of the CC judgment against the worrying criticism made by the governmental authorities of this important ruling.