ACADEMICS FOR PEACE – Marietta Edit- HMJ edits

The Turkish Constitutional Court concluded that the conviction of 10 academics on charge of “spreading propaganda for a terrorist organization,’’ for having signed a petition criticizing the State’s military operations, violated the right to freedom of expression guaranteed by Article 26 of the Constitution. On January 11, 2016, the applicants, who were among 1128 academics and researchers calling themselves “Academics for Peace’’, signed a petition entitled “We will not be a party to this crime.’’ The petition denounced the excessive and lethal force used by security forces during anti-terror operations in Southeastern Turkey and invited the Government to take the initiative for ending the armed conflict. The applicants were subsequently indicted by the Istanbul Public Prosecutor for disseminating propaganda on behalf of the armed organization PKK (Kurdistan Workers’ Party). All applicants were convicted and sentenced to 15 months of imprisonment under Article 7(2) of the Anti-Terror Law for disseminating terrorist propaganda. The pronouncement of the judgment was suspended for all applicants except Prof. Zubeyde Fusun Ustel. The Constitutional Court, by a judgment rendered with 8 for and 8 against votes, concluded that the right to freedom of expression of the 10 academics was violated by their imprisonment.

FACTS

On January 11, 2016, 1128 academics from Turkey and abroad, signed a petition entitled “We will not be a party to this crime’’, calling for an end to human rights violations resulting from the curfews declared by the State in different cities of Southeastern Turkey in 2015. The petition criticized the Turkish state for forcing its citizens in Kurdish provinces to go hungry by implementing  round-the-clock curfews  and for attacking civil settlements with heavy weapons, and it called for the abandonment of the “deliberate and planned massacre and deportation of Kurdish and other peoples of the region’’. It demanded that the Government ensure accountability for grave violations of the right to life, liberty and security; prohibit torture and ill treatment; and compensate victims for all damages inflicted. The statement also issued a call to return to the peace process that had been interrupted after the national elections of June 7, 2015 and urged the Government to take the responsibility for establishing a lasting peace.

Since the petition was released, public support has boosted the total number of signatories to 2218 even as signatory academics have been subject to political and legal repression. As of the date of the Constitutional Court’s decision, 405 academics had been dismissed from their posts and banned from public service. These events took place after an attempted military coup triggered the declaration of a nationwide state of emergency and subsequent issuing of decree-laws. In addition to expulsions, a large number of academics faced preventive suspension from their offices or were forced to retire. In September 2017, the Istanbul Public Prosecutor started to file individual indictments against the signatories under Article 7(2) of Turkish Anti-Terror Law for disseminating terrorist propaganda on behalf of PKK. Article 7(2) of the Anti-terror law defines the crime of propaganda as “justifying, praising or inciting the use of coercion or violence by a terrorist organization.’’

The applicants are among those who had their judgments delivered. All of the applicants were convicted to 15 months of imprisonment with a suspension except Prof. Zubeyde Fusun Ustel who, after the approval of her sentence by the Court of Appeal on February 25, 2019, was imprisoned on May 8, 2019 and then was released on July 22, 2019, four days before the Constitutional Court delivered its judgment.

The applicants filed individual applications before the Constitutional Court after their sentence became definitive, arguing that their conviction violated their right to freedom of expression and to a fair trial. The Constitutional Court decided to merge the individual applications of 10 academics into one file and deferred it to its General Assembly on July 3, 2019.

*The Parties Arguments*

The applicants argued that the petition was essentially intended to call for peace, that academic freedom must be provided with a broader protection for its potential contribution to public interest and that academics, as citizens, were entitled to freely express their opinion on political matters. According to the applicants, the Government should have tolerated the harsh and disturbing criticism in the petition.

They further contended that their conviction did not meet the “prescribed by law’’ prong of the Three-Part Test since the petition did not justify, praise or encourage the use of violence pursuant to Article 7(2) of Anti-Terror Law. The applicants claimed their conviction resulted from a broad interpretation of the Article, which was against the will of the legislator. Hence, in their case, Article 7(2) was not interpreted in such a manner that enabled them to foresee the consequences of their action. Therefore, they argued that their conviction constituted an interference that could not be considered as prescribed by law.

The Government responded that the impugned petition must be considered within the particular context in which it had been published, that was during a time when violent terrorist attacks were escalating in Southeastern provinces and security forces were obliged to take military measures against several declarations of self-governance by the PKK. Drawing on the Council of Europe Convention on the Prevention of Terrorism, the Government argued that specific restrictions on messages that may constitute direct or indirect incitement to terrorist acts were compatible with the European Convention on Human Rights. It also urged the Court to take into account the manner in which the impugned expressions were disseminated, the audience that it intended to influence, and thus the potential impact of the expression while assessing the necessity of the restriction.

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**Decision Overview**

**T**he Court examined the merits of the case in terms of the necessity of the interference, rather than on whether it was prescribed by law. Considering first the issue of ‘incitement to violence’, the Court recalled that not all kinds of expression of opinion related to terror constituted a crime under Turkish law. Only propaganda disseminated in such a way as to justify, praise or encourage the use of methods by terrorist organizations, such as coercion, violence or threats, could be considered a crime. Hence declaring opinions that are in line with the ideology, social or political goals of a terrorist organization, or endorse the organization’s opinions on political, economic and social issues cannot be considered as propaganda of terrorism, unless they include expressions which encourage the use of violence or terrorist activity. [para. 80-81].

The Court observed that the criminal courts, in establishing incitement to violence, essentially relied on a supposed call raised by one of the PKK leaders to the intellectuals in the country two months before the publication of the petition. However, the Court noted the criminal courts did not show any evidence beyond a presumption that the signatories had actually followed the orders of the PKK [para. 89]. The Court held that in the absence of specific and demonstrable evidence, the conviction of people by criminal courts and public authorities on the basis of hypothetical assumptions, that a certain statement had been made by following the orders of an organization, would place a great constraint on freedom of expression [para. 95].

One of the arguments adopted by criminal courts to justify the conviction of academics was that they did not address the terrorist organization in their petition to end the conflict but only the State. The Constitutional Court thus said that academics cannot be blamed for not considering an illegal organization and the State as equal subjects. The Court declared that punishing academics for that would eradicate public debate.

Regarding the criticism of public authorities, the Court recalled that the limits of acceptable criticism were even wider for a politician, and in a democratic system, the actions or omissions of public authorities must be subject to the close scrutiny, not only of the legislative and judicial authorities, but also of public opinion. Moreover, public authorities have other ways to react or respond to the attacks or criticism of them by using different means. Hence, they should display restraint in resorting to criminal proceedings as a response to unjustified verbal attacks. [para. 106-107]

In this regard, the Court pointed out that even if the statements in the petition were harsh, they did not directly target a person or an official. Therefore, according to the Court, the Criminal Courts argument that the petition aimed to humiliate Turkey in the international arena could not be accepted as a legitimate reason to interfere with freedom of expression. The Court concluded that it was constitutionally impossible to punish people for terrorist propaganda on the basis of hypothetical assumptions and to limit their freedom of expression on the basis of reputation and prestige of authorities. The Court further noted that, taken as a whole, the impugned petition called on the authorities to end the armed conflict and guarantee the principles and norms related to the right to life. When a statement of opinion is related to the right to life guaranteed under Article 17 of the Constitution, the criticism towards the actions of official authorities must be received with a greater degree of tolerance. [para. 108-109]

Acknowledging the link between the petition and academic freedom, the Court held that it was crucially important for the country and society that academics be able to express themselves, even outside the realm of their professional expertise, in order to challenge prevailing opinions on the most critical and delicate of political matters. [para. 113]

Turning to the physical elements of the crimes as defined under Article 7(2), the Court reiterated that after the amendment of April 30, 2013, the crime of terrorist propaganda was considered to be committed only if the propaganda was made in such a manner that legitimizes, praises or incites the use of methods constituting coercion, violence or threats. In order to determine whether a crime had been committed or not, a direct and objective link must be established between the elements of the offence and the action. In other words, the conclusion must not consist of a subjective interpretation that ascribes a remote meaning of written expressions t beyond the wording of the law. [para. 117] Accordingly, the Court recalled once again that statements related to social and individual problems arising from the State’s legitimate struggle against terrorism could not be considered capable of encouraging people to engage in terrorist acts or as increasing the risk that such criminal acts may be committed [para. 119]. Therefore, the impugned petition could not be considered to encourage terrorism or the use of terrorist methods. The Court concluded that none of the criminal courts in their judgments clarified in which ways the petition justified, praised or encouraged methods that consisted of coercion or threats. Therefore, the reasons adduced by the criminal courts in their decisions could not be considered to be relevant and sufficient. [para. 122]

On the question of proportionality of the interference, the Court highlighted the particular importance of freedom of expression for academics whose life is centered around doing research, expressing opinions, participating in conferences and seminars and advancing arguments. The Court found that even if the prison sentence was deferred, the punishment had a chilling effect that could deter them from expressing their opinions in the future. Consequently, according to the Court, the probability of prison sentences caused the applicants stress and fear.  [para. 135]

The Constitutional Court ultimately declared that in a democratic society, the imposition of prison sentences for expressing opinions would lead to self-censorship, which would result in the eradication of public debate and hence an important mechanism to hold public authorities accountable. Further, in a democratic society, the State is expected to contribute to debate on issues of public concern by responding to criticism through appropriate communication channels and making relevant information open and accessible. The State must not impede through threats of punishment. [para. 137]

In the light of the above reasoning, the Court concluded­ that the interference with the applicants’ freedom of expression was not necessary in a democratic society and as a result, violated Article 26 of the Constitution.