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Ronan Ó Fathaigh and Dirk Voorhoof

On 2 February 2021, the European Court of Human Rights (ECtHR) unanimously found that the criminal proceedings against an artist's satirical collage 'insulting' the Turkish Prime Minister violated his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). In an earlier case (*Tuşalp v. Turkey*) about press articles criticising the then Prime Minister, Mr. Recep Tayyip Erdoğan, the ECtHR also concluded that the Turkish authorities had disproportionately interfered with freedom of political expression, by overprotecting the reputation of the Prime Minister (see our blog entitled 'Yes Prime Minister!' [here](#)). In its latest judgment in *Dickinson v. Turkey* the ECtHR confirms that a politician must show a greater tolerance towards criticism, especially when the expression takes the form of satire. Most importantly, the ECtHR found that Article 10 was violated, even where the applicant has 'only' been criminally prosecuted, without any sanction being imposed. The ECtHR considers that being prosecuted for insult of a political leader, with a risk of being imprisoned, has a chilling effect on the right to freedom of expression.

Facts

The applicant in this case is Michael Dickinson, a British national who lived in Turkey for a considerable time, when teaching in two universities in Istanbul, and who was also active as a collage artist. On two occasions, in 2006, Dickinson took part in events during which he exhibited a collage featuring the then Prime Minister, Recep Tayyip Erdoğan. The collage criticised Erdoğan's political support for the military occupation of Iraq, portraying the Prime Minister's head glued to the body of a dog, which was held on a leash decorated with the colours of the American flag. The collage had the following phrase pinned on the dog's torso: 'We Will not be Bush's Dog'. Dickinson was placed in police custody and pre-trial detention for three days, and criminal proceedings were brought against him for insulting the Prime Minister, under Article 125 of the Turkish Criminal Code.

In 2010, Dickinson was ordered to pay a judicial fine of around 3,043 euro for having displayed his collage in public. The Kadıköy Criminal Court considered that Dickinson's work was such as to humiliate and insult the Prime Minister and represented an attack on his honour and reputation. However, the court decided to suspend delivery of its judgment for

five years, on the condition the offender did not ‘commit[] another wilful offence’. In 2015, the court set aside the judgment in respect of which sentencing had been deferred and ordered that the criminal proceedings against Dickinson be discontinued. The court noted that Dickinson had not committed any new intentional offences during the five-year period of suspension and that he had complied with the conditions attached to the supervision order.

Dickinson lodged an application with the ECtHR complaining about the criminal proceedings brought against him for his artistic work as part of a political protest.

Judgment

The ECtHR agrees that the criminal proceedings against Dickinson for a period of nearly four years, and subsequently the five-year period of suspension of delivery of the judgment, amounted to an interference with his right to freedom of expression under Article 10 ECHR, emphasising the chilling effect as a result of such criminal prosecution. The ECtHR considers:

‘que, compte tenu de l’effet dissuasif que la procédure pénale litigieuse, qui a duré environ trois ans et dix mois, la condamnation pénale du requérant et la décision de sursis au prononcé du jugement rendue à l’issue de cette procédure, qui a soumis l’intéressé à une période de sursis de cinq ans, ont pu provoquer, celles-ci s’analysent en une ingérence dans l’exercice par le requérant de son droit à la liberté d’expression’ (§ 38).

As there was no discussion that the interference at issue was prescribed by law and aimed at the protection of the reputation and rights of others, the crucial question before the ECtHR was whether the criminal prosecution against Dickinson could be justified as being necessary in a democratic society.

The ECtHR refers to its established case law and criteria when balancing the right to privacy and reputation as protected under Article 8 ECHR with the right to freedom of expression under Article 10 ECHR (see also *Von Hannover (no. 2) v. Germany* and *Axel Springer AG v. Germany*). The Court is of the opinion that the collage contained a political statement, criticising the Turkish Prime Minister for his policy on the international scene with regard the military actions by the USA, and in particular those in Iraq. According to the ECtHR the message at issue contains *‘une critique acerbe visant le Premier ministre de l’époque, exprimée d’une façon crue et allusive par le biais de l’art de collage’*. The criticism expressed in this collage *‘cherchait principalement à dénoncer l’existence alléguée d’une certaine allégeance du Premier ministre turc au président américain pour des intérêts politiques et financiers. Elle relève ainsi non seulement que ce travail critiquait la politique étrangère mise en œuvre par le Premier ministre, mais aussi qu’il mettait en cause la bonne foi et l’intégrité de ce dernier en insinuant qu’il était mené et soudoyé par des puissances étrangères’* (§ 52).

The cartoonish collage clearly expressed a value judgment about an issue of general public interest related to a country's foreign policy. The criticism was directed against the public functioning of the Prime Minister, and had a sufficient factual basis. Although the depiction of the Prime Minister as a dog in a collage was likely to be perceived as degrading and humiliating by a part of the population in Turkey and might have created some unease among citizens, in the context at issue a cartoonist is permitted to resorting to a certain amount of exaggeration and even immoderate provocation. The ECtHR recalls that those who create, interpret, distribute or exhibit a work of art contribute to the exchange of ideas and opinions essential to a democratic society. Forms of artistic expression and social commentary such as satire, by the exaggeration and distortion of reality which characterise them, and by the use of an ironic and sarcastic tone naturally aim to provoke and agitate.

The ECtHR reiterates:

'que, si tout individu qui s'engage dans un débat public d'intérêt général est tenu de ne pas dépasser certaines limites notamment quant au respect de la réputation et des droits d'autrui, il lui est permis de recourir à une certaine dose d'exagération, voire de provocation, c'est-à-dire d'être quelque peu immodéré dans ses propos (...). Elle rappelle en outre que ceux qui créent, interprètent, diffusent ou exposent une œuvre d'art contribuent à l'échange d'idées et d'opinions indispensable à une société démocratique – d'où l'obligation, pour l'État, de ne pas empiéter indûment sur leur liberté d'expression (...) – et que les formes d'expression artistique et de commentaire social telles que la satire, de par l'exagération et la déformation de la réalité qui les caractérisent, et par l'emploi d'un ton ironique et sarcastique visent naturellement à provoquer et à agiter' (§ 54).

Having regard to the subject matter of the collage, the context of its public exposure and its factual basis, and the provocative style and content, the ECtHR finds that the collage at issue cannot be regarded as gratuitously insulting. In any case, a politician must show a greater tolerance towards criticism, especially when the latter takes the form of satire.

Finally, the ECtHR recalls that the dominant position that State institutions occupy, requires them to exercise restraint in the use of criminal proceedings such as in cases to protect the reputation of the Prime Minister as a representative of the State. It reiterates that the assessment of the proportionality of an interference with the rights protected by Article 10 will in many cases depend on whether the authorities could have used another means than a criminal sanction, such as civil measures. The ECtHR reiterates the chilling effect of criminal prosecution and criminal sanctions, including in cases of suspended delivery of judgment or conviction to the payment of only a moderate fine. Although the delivery of the judgment convicting Dickinson was suspended and this judgment was finally set aside, the ECtHR is of the opinion that the duration for a considerable period of time of the criminal proceedings

against Dickinson on the basis of a serious criminal offence with a risk to be convicted to imprisonment, had a chilling effect on Dickinson's willingness to express himself on matters of public interest:

'même s'il a été sursis au prononcé du jugement de condamnation du requérant et que ce jugement a finalement fait l'objet d'une annulation, avec toutes les conséquences en découlant, à l'issue de la période de sursis de cinq ans, la Cour est d'avis que le maintien pendant un laps de temps considérable des poursuites pénales contre le requérant sur le fondement d'une infraction pénale grave pour laquelle des peines d'emprisonnement pouvaient être requises a exercé un effet dissuasif sur la volonté de l'intéressé de s'exprimer sur des sujets relevant de l'intérêt public' (§ 58).

The ECtHR points at the domestic court's lack of analysis of the proportionality of the penal sanction imposed on Dickinson, and the lack of examination of the chilling effect that this sanction could have on his freedom of expression. In the light of all of the foregoing considerations, the ECtHR comes to the conclusion that the national authorities have not carried out an adequate balancing that complies with the criteria established by its case law dealing with the right to freedom of expression and the right of privacy and reputation. The ECtHR finds that there was no reasonable relationship of proportionality between the interference with the exercise of Dickinson's right to freedom of expression and the legitimate aim of protecting the reputation of the Prime Minister. Therefore, the ECtHR unanimously finds that the Turkish authorities have violated Article 10 ECHR.

Comment

The *Dickinson* judgment is an excellent victory for artistic and political expression in Turkey, especially artistic expression on matters of public interest. While there was international media coverage when Michael Dickinson was charged in 2006, later acquitted in 2008, and subsequently fined in 2010; sadly, Mr. Dickinson did not live to see the European Court of Human Rights deliver its unanimous judgment finding the criminal proceedings against him violated his right to freedom of expression under Article 10 ECHR. He passed away in July 2020 (see also here). However, it is hoped that the *Dickinson* judgment can be a powerful tool in Turkish courts to bolster the protection afforded to artists engaging in controversial artistic expression on Turkish government policy, and the conduct of elected officials and military officials. Unfortunately, artistic expression continues to be subject to disproportionate restrictions in Turkey. It was only recently that the artist and journalist Zehra Doğan was released from prison, having spent nearly three years in a Turkish prison for 'terrorist propaganda', over a painting she shared depicting a town in south-east Turkey that was destroyed in a Turkish military operation (see PEN statement). Indeed, Index on Censorship has detailed the continuing repression of artists in Turkey, while a recent ECPMF report and reports by Article 19, Human Rights Watch and Scholars at Risk (here and here) also document the human rights violations of journalists, artists, academics and members of civil society in Turkey.

The most powerful aspect of the *Dickinson* judgment was the Court's rejection of the Turkish government's argument that because Dickinson's final conviction for insult had been suspended pursuant to [Article 231](#) of the Code of Criminal Procedure (meaning the judgment 'shall not bear any legal consequences for the offender'), there had been no 'interference' with his freedom of expression under Article 10 ECHR. In rejecting this argument, the European Court applied its influential *Dilipak v. Turkey* judgment's chilling effect principle: criminal proceedings 'over a considerable length of time' targeting expression on matters of public interest create a 'chilling effect' and 'self-censorship', and confers the 'status of victim of interference' with freedom of expression under Article 10 ECHR, even in the absence of a conviction or sanction. The Court in *Dickinson* held that the criminal proceedings for insult over a period of 'three years and ten months', and the five-year period of a 'stay' on the conviction (where the risk remains that if an 'offender commits another wilful offence', the court 'shall impose the sentence'), created a chilling effect on Dickinson's 'willingness to express his views on matters of public interest'. Thus, the Court unanimously held that there had been an interference with Article 10 ECHR, and allowed the Court to examine whether Dickinson's prosecution had violated Article 10 ECHR.

Further, the Court was particularly forthright in its condemnation of Dickinson's three-day detention following his arrest by police. The Court applied its unanimous Grand Chamber judgment in *Cumpănă and Mazăre v. Romania*, and held that there was 'nothing' in the circumstances of Dickinson's expression to justify his 'placement in police custody and pre-trial detention', or imposition of a criminal sanction, as such measures 'inevitably' have a chilling effect where it concerns public-interest expression. This was a very strong reaffirmation of the Court's principle that 'peaceful and non-violent forms of expression in principle should not be made subject to the threat of a custodial sentence' (see, e.g., *Murat Vural v. Turkey*; and our [article](#) on 'Article 10 ECHR and Expressive Conduct').

The *Dickinson* judgment continues the strong line of case law from the Court protecting controversial expressive conduct on matters of public interest, such as an anti-corruption activist's placing of an 'obscene' sculpture outside a prosecutor's office (see *Mătășaru v. the Republic of Moldova*, and our [blog here](#)). And similarly, *Stern Taulats and Roura Capellera v. Spain*, concerning a prosecution for 'insult' for burning a photograph in public of the Spanish king and queen, the ECtHR also guaranteed a high level of protection for expressive conduct, qualifying the insult to the Crown as a form of symbolic expression of dissatisfaction and protest, as part of matter of public interest. The *Dickinson* judgment confirms that heads of states and high-ranking politicians (including kings, presidents and prime-ministers) must show a greater tolerance towards criticism, especially when the expression takes the form of satire (see *inter alia* *Lingens v. Austria*, *Oberschlick (no. 2) v. Austria*, *Feldek v. Slovakia*, *Colombani and Others v. France*, *Wille v. Liechtenstein*, *Klein v. Slovakia*, *Ukrainian Media Group v. Ukraine*, *Sokolowski v. Poland*, *Vereinigung Bildender Künstler v. Austria*, *Gutiérrez Suárez v. Spain*, *Karakó v. Hungary*; *Otegi Mondragon v. Spain*, *Tuşalp v. Turkey*, *Eon v. France*, *Ziemiński v. Poland (no. 2)*, and *Mariya Alekhina and Others v. Russia* ([blog here](#))).

Finally, being aware of the worrisome and daunting situation for the right to freedom of expression in Turkey, and the continuous findings of violations of Article 10 by the ECtHR, the Council of Europe has developed a tool kit for the training of the Turkish judiciary on freedom of expression ([here](#)). The training material is tailored for specific target groups, such as judges and prosecutors dealing with criminal or civil defamation, terror-related crimes, press-related offences and administrative law disputes. The assumption and hope are that the domestic judicial authorities in Turkey will be empowered to apply Article 10 ECHR in accordance with the case law of the ECtHR. Victims of violations of their right to freedom of expression, like Dickinson, should not need to apply to the Strasbourg Court and wait for 15 years to have their fundamental right under Article 10 ECHR, eventually *post mortem*, recognised and effectively guaranteed.