Savva Terentyev t. Rusland

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(Jäderblom (president), Lubarda, Dedov, Pastor Vilanova, Poláčková, Schukking, Elósegui)

Vrijheid van meningsuiting. Strafrecht. Context.

[EVRM art. 10]

In een verkiezingsperiode deed de politie in de Russische republiek Komi een inval bij een lokale krant, waarbij de kantoren werden doorzocht en alle harddisks in beslag werden genomen omdat de software beweerdelijk illegaal zou zijn geïnstalleerd. Daarop werd in de media en op blogs het nodige negatieve commentaar geleverd. Klager plaatste op een blog van een vriend een zeer negatief getoonzet commentaar, waarin hij de politie met de nodige scheldwoorden uitmaakte voor een diersoort met de laagst denkbare intelligentie en waarbij hij aangaf dat het geweldig zou zijn als zij in een Auschwitz-achtige oven twee keer per dag konden worden verbrand, zodat de samenleving van dit vuil kon worden verlost. Daarop werd klager strafrechtelijk vervolgd en tot een voorwaardelijke gevangenisstraf veroordeeld vanwege het oproepen tot haat en geweld jegens een 'sociale groep'. Het Hof oordeelt dat er op het moment van de veroordeling geen gangbare juridische definitie van deze laatste term voorhanden was en dat dat de nodige onduidelijkheid kan hebben opgeleverd, maar ook dat het eens in de zoveel tijd nu eenmaal noodzakelijk is om een nieuw begrip in wetgeving voor het eerst uit te leggen; daarom moet toch worden aangenomen dat er voldoende wettelijke grondslag was voor deze veroordeling. Vervolgens gaat het Hof uitvoerig in op de redelijkheid van de veroordeling. Waar scheldwoorden normaal gesproken nog wel eens buiten de reikwijdte van art. 10 EVRM kunnen vallen, is hier vooral sprake van een vulgaire toonzetting en daarmee sprake van een wel door art. 10 beschermde stijlkeuze. De bewoordingen moeten daarbij in context worden bekeken. Dat het hier ging om een verkiezingsperiode acht het Hof relevant, omdat het dan extra belangrijk is dat meningen vrij kunnen worden geuit, en ook dat het hier gaat om een onderwerp van algemeen belang. De uitingen waren provocatief, maar metaforisch en emotioneel van aard. Auschwitz-verwijzingen of verwijzingen naar de Holocaust zijn ook niet zonder meer onaanvaardbaar; ook dit hangt af van de context. Het Hof acht verder van belang dat geen individuele personen zijn getroffen door de uitingen, maar alleen een algemene dienst die tegen een stootje moet kunnen en als onderdeel van de staat extra tolerantie moet kunnen tonen. Dat is hoogstens anders als er een directe dreiging is van onlusten of geweld, maar dat is hier niet aangetoond. Ook wijst het Hof erop dat het verspreidingsbereik van het commentaar beperkt waren, ook al was het op een blog geplaatst, en dat de uiting al vrij snel is verwijderd. Niet is gebleken dat er veel publieke aandacht voor was, in ieder geval niet tot het moment dat klager ervoor werd vervolgd. De nationale rechters hebben tot slot deze punten niet voldoende onderzocht en het Hof benadrukt nogmaals dat de relevante bepalingen uit de strafwetgeving nogal zijn uitgerekt, terwijl in het kader van vrijheid van meningsuiting dergelijke bepalingen juist eng moeten worden uitgelegd. Schending art. 10 EVRM.

Savva Terentyev

tegen

Rusland

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1. In its judgment in the *Savva Terentyev v. Russia* case, the European Court of Human Rights held unanimously that there had been a violation of Article 10 of the Convention. The unanimous nature of the conclusion suggests that the outcome was uncontroversial, at least among the judges in the Third Section of the Court. Thus, the usefulness of the judgment lies not so much in any controversial points, but rather in the Court's patient explanation of the reasoning that led to its unanimous finding. It insists on the importance of a contextual evaluation of the impugned expression. This is an important re-affirmation of one of the Court's guiding principles in cases concerning freedom of expression. The principle bears re-affirming because it is not always fully adhered to in practice.

2. Before examining the necessity of the interference with the applicant's right to freedom of expression, the Court had to consider whether the legislative provision underlying the case met the 'prescribed by law' criteria (i.e., accessibility, clarity and foreseeability) in the Court's standard test as to whether there had been a violation of the right to freedom of expression. The applicant had been convicted for "having publicly committed actions aimed at inciting hatred and enmity and humiliating the dignity of a group of persons on the grounds of their membership of a social group" (para. 21). At the operative time, the term, "social group", contained in Article 282(1) of the Russian Criminal Code, had not yet been clarified through judicial interpretation. This gave rise to questions about the clarity and foreseeability of the provision, with the applicant objecting to the domestic courts' interpretation that it covered the police. After an interesting deliberation (paras. 53-59), the Court was satisfied that the criteria were met.

3. The comment posted by the applicant, for which he was convicted, was entitled, "I hate the cops, for fuck's sake". The comment was written in response to a post on a blog run by an acquaintance of his; the focus of that post was a search and seizure action by the police at the office of a local newspaper. The applicant's comment read as follows:

> "I disagree with the idea that 'police officers still have the mentality of a repressive hard stick in the hands of those who have the power'. Firstly, they are not police officers but cops; secondly, their mentality is incurable. A pig always remains a pig. Who becomes a cop? Only lowbrows and hoodlums – the dumbest and least educated representatives of the animal world. It would be great if in the centre of every Russian city, on the main square ... there was an oven, like at Auschwitz, in which ceremonially every day, and better yet, twice a day (say, at noon and midnight) infidel cops would be burnt. The people would be burning them. This would be the first step to cleansing society of this cop-hoodlum filth."

The Court takes a very dim view of the language used. It describes the above text as being "framed in very strong words" and as "largely [using] vulgar, derogatory and vituperative terms" (para. 67). It reiterates that offensive language amounting to "wanton denigration" "may fall outside the protection of freedom of expression" (para. 68). It also recalls,

conversely, that vulgarity "may well serve merely stylistic purposes" and that both the style and substance of expression are ordinarily protected by Article 10 (para. 68).

4. The Court then turns to the fact that the applicant was convicted for expression that was adjudged to have incited hatred and violence (as opposed to expression that was merely insulting). It embarks on a contextual examination to ascertain if the impugned expression could indeed "be seen as promoting violence, hatred or intolerance" (para. 69). The context here was, broadly, a public debate on a matter of societal interest during an election period – a context in which restrictions on freedom of expression must be "strictly construed" (para. 70).

5. In this particular context, the Court notes that the impugned expression "shows [the applicant's] emotional disapproval and rejection of what he saw as abuse of authority by the police and conveys his sceptical and sarcastic point of view on the moral and ethical standards of the personnel of the Russian police. Seen in this perspective, the statements in question can be understood as a scathing criticism of the current state of affairs in the Russian police and, in particular, the lack of rigour in the recruitment of their personnel" (para. 71).

6. It considers the call for the ceremonial incineration of "infidel cops", coupled with a reference to Auschwitz, to be "particularly aggressive and hostile in tone" (para. 72) and "particularly striking" (para. 73). Nevertheless, unlike the domestic courts, it did not see the call as one that was intended literally, but as "a provocative metaphor, which frantically affirmed the applicant's wish to see the police 'cleansed' of corrupt and abusive officers ('infidel cops'), and was his emotional appeal to take measures with a view to improving the situation" (para. 72).

7. The Court is at pains to point out that its qualifications of the impugned expression should not be seen as condoning the language or the tone used by the applicant (para. 73). It notes that the text does not reveal "any intention to praise or justify the Nazis' practices used at Auschwitz" and in that connection, it recalls its earlier case-law which holds that mere mention of the Auschwitz concentration camps and the Holocaust is not enough, of itself, to justify an interference with the right to freedom of expression (para. 73). It also recalls its earlier case-law, according to which symbolic acts – like the one in the present case – can be expressions of dissatisfaction and protest rather than calls to violence. The Court has dealt with this delicate matter very well. On the one hand, it has looked beyond the highly emotive words and tenor of the applicant's comment and evaluated them in unemotional, contextual terms. On the other hand, it has also made very clear that it distances itself from the applicant's comment. Given how they have positioned themselves *vis-à-vis* a particular expression that may offend, shock or disturb, it is as if the Court's judges are themselves practising the *Handyside* principle that they so often preach.

8. Another significant point in the Court's contextualised assessment was that the applicant's remarks "did not attack personally any identifiable police officers but rather concerned the police as a public institution" (para. 75). The Court's public figures doctrine, which it has progressively rolled out since its *Lingens v. Austria* judgment, now extends to civil servants exercising official functions. Under that doctrine, public figures are expected to tolerate more criticism than ordinary citizens, by virtue of their public tasks, which they have consciously taken on. This is particularly true, the Court adds, when the criticism "involves a reaction to what is perceived as unjustified or unlawful conduct of civil servants" (para. 75). This is a

logical consequence of the public figures doctrine, but it sits somewhat uneasily in the context of prevalent (verbal) violence directed at the police and controversies about public displays of the A.C.A.B. ("All Cops Are Bastards") acronym (see further, W.F. Korthals Altes' case-note on the *Savva Terentyev* judgment: *Mediaforum* 2018-5, pp. 142-3).

9. With apposite references to a range of cases forming its "hate speech jurisprudence", the Court has differentiated the police from various groups that have enjoyed protection from offensive expression in certain circumstances. The Court takes the view that "the police, a law-enforcement public agency, can hardly be described as an unprotected minority or group that has a history of oppression or inequality, or that faces deep-rooted prejudices, hostility and discrimination, or that is vulnerable for some other reason, and thus may, in principle, need a heightened protection from attacks committed by insult, holding up to ridicule or slander" (para. 76). Nor did the Court see any indication that the impugned expression could ignite any social or political sensitivities in such a way as to cause a real threat of violence to the police. The Court also attached weight to the apparently insignificant impact of the impugned expression. Although the expression was made online, it attracted negligible attention before it was removed, and the applicant was not a well-known blogger or popular user of social media (i.e., actors who contribute to, and can influence, public debate) (para. 81).

10. In this judgment, the Court's textual analysis broadens quickly and deliberately into a strong contextual analysis. Its express attention for the interplay of contextual factors (see, for example, paras. 66, 69 and 84) is welcome, as those factors "can often have a relativising (or occasionally, even a transformative) impact on the interpretation of the bare facts of a case" (T. McGonagle, 'An Ode to Contextualisation: İ.A. v. Turkey', [2010] 1 *Irish Human Rights Law Review*, pp. 237-251, at pp. 250-1). In the past, the Court has sometimes been criticized for paying inadequate attention to contextualising factors when assessing whether impugned practices measure up to its established principles (*ibid*.).

11. In this case, the Court tries to face up to an intractable problem of online communication. The internet is a place where the free flow of information, in particular information that is valuable for democratic deliberation, has to compete with torrents of "viral hate" (A.H. Fox and C. Wolf, *Viral Hate: Containing its Spread on the Internet* (New York: Palgrave Macmillan, 2013) and to navigate its way through a proliferation of "cyber cesspools" (B. Leiter, "Cleaning Cyber-Cesspools: Google and Free Speech", in S. Levmore and M.C. Nussbaum (Eds.), *The Offensive Internet: Speech, Privacy, and Reputation* (Cambridge, Massachusetts, and London, England: Harvard University Press, 2010), pp. 155-173). In its recent case-law, the Court seems to be reluctantly resigned to the fact that much online communication is simply vulgar and offensive (see, for example, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, § 77, 2 February 2016 and *Tamiz v. the United Kingdom* (dec.), no. 3877/14, § 81, 19 September 2017; see also: J. Rowbottom 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71(2) *The Cambridge Law Journal*, 355-383). The vulgarity or offensiveness of an expression alone does not legimitize criminal sanctions (see generally para. 69).

12. Crucially, the Court underscores that "although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for an offence in the area of a debate on an issue of legitimate public interest will be compatible with freedom of expression as

guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence" (para. 83). The Court found that the impugned expression in the present case amounted to neither hate speech nor incitement to violence. It moreover stresses that strong safeguards need to be in place to prevent States from abusing criminal law provisions. It puts down an important marker for States, which is worth quoting in full: "The Court stresses in the above connection that it is vitally important that criminal law provisions directed against expressions that stir up, promote or justify violence, hatred or intolerance clearly and precisely define the scope of relevant offences, and that those provisions be strictly construed in order to avoid a situation where the State's discretion to prosecute for such offences becomes too broad and potentially subject to abuse through selective enforcement" (para. 85). The Court is laying it on the line here. It is warning not only about the chilling force of criminal sanctions on freedom of expression, but also about how the *mala fide* enforcement of the criminal law can worsen the wind-chill. This resonates with the Court's recent case-law concerning Article 18 of the Convention (Limitation on use of restrictions on rights).

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