

European Court of Human Rights judgments on the right to freedom of expression

Bulletin VI: ROUND-UP OF FREEDOM OF EXPRESSION JUDGEMENTS: NOVEMBER 2012

14 December 2012

During November 2012, the European Court adopted judgments in the following freedom of expression cases:

- *Mengi v. Turkey* (nos. 13471/05 and 38787/07), 27 November 2012
- *Bayar and Gürbüz v. Turkey* (No. 2) (no. 37569/06), 27 November 2012
- *Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands* (application no. 39315/06), 22 November 2012
- *Belek v. Turkey* (nos. 36827/06, 36828/06 and 36829/06), 20 November 2012
- *Bargao and Domingos Correia v. Portugal* (nos. 53579/09 and 53582/09), 15 November 2012
- *PETA Deutschland v. Germany* (no. 43481/09), 8 November 2012

The judgments concerned the following issues:

- **"Harsh language allowed if the sole intent of the statement was not to insult but discuss a matter of legitimate public interest" –**

Mengi v. Turkey (nos. 13471/05 and 38787/07), 27 November 2012

The applicant, a journalist, wrote a series of articles in a daily newspaper criticising provisions of the new draft criminal code which proposed reduced sentences for certain offences committed against women and children. The articles criticised the members of the drafting commission, two of whom sued and obtained damages for defamation. The applicant's first article had referred to one of the drafters as "having a discriminatory attitude as regards criminal provisions concerning women and children", and commented that "instead of having elderly legal scholars, we should now have young lawyers working at the Justice Commissions. Those who are in touch with world developments and who are aware that discriminatory attitudes have become out of date". The second article had commented on the professor's attitude towards rape. He had commented that some rape victims should marry their rapists. In response, the author had said, "I believe that certain people should be urgently locked up in a clinic. When the degree of their illness has reached such a level as to cause severe harm to society this is inevitable. This unhealthy mentality will cause harm to thousands of women and children (every day we read in the papers about eight to twenty perverts raping young

girls and women in every corner of Turkey) and will incite ignorant, unemployed and sick people to commit crimes.”

The European Court held that the defamation convictions constituted a violation of the right to freedom of expression. The Court noted that the articles concerned the applicant’s comments on certain allegedly controversial provisions of the draft Criminal Code. In the applicant’s opinion these provisions were discriminatory against women and, if adopted, would have harmful effects on them and on children. She alleged that some of the drafters of these provisions had a discriminatory mindset. This was an issue of public interest. The Court noted furthermore that, as drafters of the new criminal code, the plaintiffs in the defamation action were public figures who had laid themselves open to greater criticism and scrutiny than ordinary individuals.

While the applicant had used harsh language that could be perceived as offensive, her articles were value judgments and part of heated debate in society on a controversial topic. The Court noted that the applicant used an informal style, which had not been taken into account by the domestic courts. The Court recalled that while offensive language may fall outside the protection of freedom of expression if the sole intent of the statement is to insult, the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression, as it may well serve merely stylistic purposes. For these reasons, the European Court held that the conviction for defamation was not “necessary” in a democratic society.

- **Publishing political opinion should not be criminalized**

Bayar and Gürbüz v. Turkey(No. 2) (no. 37569/06), 27 November 2012

The applicants are the owner and editor of a Turkish newspaper which had published articles about the Kurdistan Workers Party, PKK, which is considered a terrorist organisation in Turkey, and had cited statements from two of its members. They were convicted of “publishing propaganda through the press against the indivisible unity of the State” and “publication of statements by an illegal armed organization”.

The European Court of Human Rights held that the conviction constituted a violation of the right to freedom of expression. It recalled its jurisprudence in similar cases, and noted that the writings in question merely contained statements of one of the PKK’s leaders, expressing his views on the reorganization of the PKK and the union of leftist movements after the election. The articles did not constitute a call to use violence, armed resistance or an uprising, and they did not constitute hate speech. The conviction of the applicants was therefore not ‘necessary in a democratic society.

Belek v. Turkey(nos. 36827/06, 36828/06 and 36829/06), 20 November 2012

The applicant is a Turkish newspaper publisher who had been convicted for the publication of articles that included statements by the Kurdistan Workers Party, PKK, regarded as a terrorist organisation by the Turkish authorities, and commented on the possible establishment of a Kurdish state in Iraq. The convictions were for “propaganda through the press against the indivisible unity of the State” and “publication of a statement from an illegal armed organization.”

The European Court of Human Rights held that these convictions violated the right to freedom of expression. It referred to earlier, similar cases and noted that the writings in question did not constitute a call to use violence, armed resistance or an uprising, and could not be considered 'hate speech'.

- **State surveillance violated right to confidentiality of journalistic sources**

Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands(application no. 39315/06), 22 November 2012

The applicants, a Dutch newspaper and two of its journalists, had published articles about investigations by the AIVD (Dutch secret service) which suggested that they had obtained highly secret documents that had become available in the criminal circuit of Amsterdam. The Dutch courts ordered the newspaper to surrender these documents. Separately, the journalist applicants brought civil proceedings against the State claiming that their phones had been tapped. The applicants appealed both issues to the European Court of Human Rights.

The European Court considered the matters jointly under Articles 8 (protecting privacy) and 10 (protecting the right to freedom of expression) of the Convention and found a violation of both in relation to the interception of communications. The Court found that the AIVD had used its special powers (to intercept communications) to circumvent the protection of a journalistic source. The use of these special powers had been authorised without prior review by an independent body with the power to prevent or terminate it; and judicial review would have been unable to restore the confidentiality of the journalists' sources once it had been destroyed. The Court therefore concluded that there had been a violation of Articles 8 and 10 as the law had not provided appropriate safeguards in respect of the powers of surveillance used.

With regard to the order to surrender documents, the Court found that the need to identify the AIVD official(s) who had supplied the secret documents to the applicants had not justified the surrender order. The person(s) in question could have been found simply by studying the contents of the documents and identifying the officials who had had access to them. Further, while the Court accepted that it had been legitimate for the AIVD to check whether all documents taken had been withdrawn from circulation, it had not been sufficient to justify the disclosure of the applicant's journalistic source. The Court noted in that connection that this withdrawal could no longer prevent the information which they contained from falling into the wrong hands in any case, as it had probably long been known to persons described by the parties as criminals. The actual handover of the documents taken had not been necessary as visual inspection to verify that they were complete, followed by their destruction, would have sufficed.

- **If acting in good faith on a public interest and on a factual basis, one should not be required to prove the full truth of allegations**

Bargao and Domingos Correia v. Portugal(nos. 53579/09 and 53582/09), 15 November 2012

This case concerned the conviction for defamation of two individuals who wrote a letter to the ministry of health, complaining of an abuse of power by an official in a local public health centre.

Part of this letter was published in a local newspaper. While disciplinary proceedings were initiated against the public official, the defamation conviction was upheld since the applicants could not prove the full truth of their allegations. The European Court of Human Rights held that this conviction constituted a violation of the right to freedom of expression: the allegations were made in a simple private letter to the relevant government institution, even if parts of it were published in a local newspaper, and concerned legitimate concerns of public interest. The applicants had a factual basis on which to make their allegations, even if they could not prove them fully, and had acted in good faith. The defamation conviction could not therefore be considered to have been “necessary in a democratic society”.

- **Injunction on animal rights campaigners to protect the dignity of holocaust victims did not violate right to freedom of expression in the context of Germany’s history**

PETA Deutschland v. Germany(no. 43481/09), 8 November 2012

PETA Deutschland, the German branch of the animal rights organisation PETA, planned to launch an advertising campaign entitled “The Holocaust on your plate”, showing posters which bore a photograph of concentration camp inmates along with a picture of animals kept in mass stocks, accompanied by a short text. The Central Jewish Council in Germany obtained a court injunction ordering PETA to refrain from publishing seven specific posters, arguing that the campaign was offensive and violated their human dignity as holocaust survivors as well as the personality rights of the family members one of them had lost. PETA launched appeals to the Federal Constitutional Court which were rejected, holding that the campaign banalised the fate of the victims of the Holocaust.

The European Court of Human Rights found that the injunction did not violate PETA Deutschland’s right to freedom of expression. While it held that the intended campaign did not aim to debase concentration camp, the Court held that the facts of the case could not be detached from the historical and social context of the holocaust – particularly in Germany. The Court accepted the German Government’s stance that they deemed themselves under a special obligation towards the Jews living in Germany. In that light, the Court found that the German courts had given relevant and sufficient reasons for granting the civil injunction.

Furthermore, as regards the severity of the sanction, the proceedings had not concerned any criminal sanctions, but only a civil injunction preventing PETA from publishing seven specific posters. Finally, PETA had not established that it did not have other means at its disposal to draw public attention to the issue of animal protection.

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