Thematic factsheet[1]
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'PRIOR RESTRAINTS' AND FREEDOM OF EXPRESSION: THE NECESSITY OF EMBEDDING PROCEDURAL SAFEGUARDS IN DOMESTIC SYSTEMS

Prior restraints are State actions that prohibit speech or other forms of expression before they can take place. In contrast to a system of subsequent punishment, which permits the communication but imposes a subsequent penalty for its publication, prior restraints prevent communication from occurring in the first place. They can take a variety of forms such as: judicial injunctions prohibiting the publication of certain facts or opinions with a view to protecting someone's reputation; judicial or administrative bans on the circulation, distribution or sale of publications; judicial orders prohibiting journalists from practicing their profession on a permanent or temporary basis; a ban on the future operation of the media outlet by suspending/revoking its broadcasting licence or ceasing its activities. Article 10 of the European Convention on Human Rights does not prohibit prior restraints as such. However, because of the considerable danger they represent for democratic societies, restrictions of this kind call for the most careful scrutiny. According to the case law of the European Court of Human Rights described below, only where the criteria for prior restraints are clearly indicated in the law and procedural safeguards are embedded in domestic systems to prevent any arbitrary encroachments upon the freedom of expression could prior restraints be acceptable and compatible with the right to freedom of expression. In this regard, the principle of proportionality is of particular importance.

Lack of procedural safeguards when issuing injunction against national newspaper preventing it from imparting information

Cumhuriyet Vakfı and Others v. Turkey - 28255/07
Judgment 8.10.2013

The applicants were respectively the owner, publisher, editor-in-chief and chief editorial writer of a daily Turkish newspaper Cumhuriyet. In April 2007, in the run-up to the presidential elections, the newspaper published a political advertisement that reproduced a quote from a 1995 British newspaper article in which one of the candidates in the 2007 elections, Mr Abdullah Gül, was alleged to have said: "It is the end of the Republic of Turkey – we definitely want to change the secular system". Mr Gül subsequently brought defamation proceedings against the applicants. In May 2007 a domestic court issued an injunction restraining re-publication of the quote published in Cumhuriyet and of any news related to the pending defamation proceedings.

According to the European Court of Human Rights, the very general and unqualified terms of the ban set out in the injunction rendered its scope unclear and potentially extremely wide. In particular, the lack of clarity as to what material could and could not be published under the interim measure could be interpreted as forbidding coverage of any political statement made by Mr Gül relating to the subject of

[1] This document presents a non-exhaustive selection of the CoE instruments and of the ECtHR relevant case law. Its aim is to improve the awareness of the acts or omissions of the national authorities likely to amount to a hindrance of the European Convention of Human Rights. This information is not a legal assessment of the alerts and should not be treated or used as such.

secularism in Turkey. In the Court's view, the injunction was therefore vulnerable to abuse and could have had a chilling effect not only on the Cumhuriyet newspaper, but also on the Turkish media as a whole in the period concerned. The injunction had remained in force for over ten months, including during two stages of the Presidential elections, as a consequence of the lack of a time-limit and the absence of any periodic review as to its continuing necessity or of a prompt determination of the merits of the case.

The length and breadth of the injunction therefore had the effect of preventing the newspaper from contributing to the public debate surrounding the elections and the candidature of Mr Gül at a critical time in Turkish political history. The unexplained delays in the procedure and the failure to limit the impugned measure to a reasonable period had thus rendered the restriction on the applicants' freedom of expression unduly onerous. The domestic court had not provided any reasoning for its decisions to grant the injunction and to refuse the ensuing request for it to be lifted. This lack of reasoning deprived the applicants of an important procedural safeguard. In addition, since the applicants had been unable to contest the interim injunction until over a month after it was first granted, they had been placed at a substantial disadvantage vis-à-vis their opponent, especially considering the perishable nature of news and the specific political environment in which the impugned measure had been applied.

In the light of these procedural deficiencies, and bearing in mind the severity of the punishment failure to comply with the interim measure would have entailed, the injunction had not constituted a justified or a proportionate interference with the applicants' right to freedom of expression.

Conclusion: violation of Article 10 (freedom of expression)

Orders suspending publication and dissemination of newspapers, considered propaganda in favor of terrorist organisations

Ürper and Others v. Turkey - 14526/07
Judgment on 20.10.2009

The applicants were the owners, executive directors, editors-in-chief, news directors and journalists of four daily newspapers whose publication and distribution was repeatedly suspended in 2006 and 2007 for periods ranging from fifteen days to a month by court orders issued under anti-terrorist legislation. The newspapers were accused of publishing propaganda in favour of a terrorist organisation, condoning crimes the organisation had committed, and revealing the identity of officials engaged in the fight against terrorism, so making them targets for terrorist attack. The applicants lodged unsuccessful objections to the suspension orders.

The European Court of Human Rights recalled that, although prior restraints on the media were not *per se* incompatible with the Convention, those in the applicants' case had been imposed not on particular types of article, but on the future publication of entire newspapers, whose content was unknown at the time the court orders were made. In the Court's view, both section 6(5) of the Prevention of Terrorist Act and the court orders had stemmed from the hypothesis that the applicants, whose "guilt" was established without trial in proceedings from which they were excluded, would recommit the same kind of offences in the future. The preventive effect of the suspension orders thus entailed implicit sanctions to dissuade the applicants from publishing similar articles in the future and to hinder their professional activities, when less draconian measures – such as the confiscation of particular issues or restrictions on the publication of specific articles – could have been envisaged. Accordingly, by suspending the publication and distribution of the newspapers, albeit for short periods, the domestic courts had largely overstepped the narrow margin of appreciation afforded to them and unjustifiably restricted the press's essential role as a public watchdog.

The practice of banning the future publication of entire periodicals under section 6(5) went beyond any notion of necessary restraint in a democratic society and, instead, amounted to censorship.

Conclusion: violation of Article 10 of the Convention (freedom of expression)

See also, on the same topic,

- ***Turgay and Others v. Turkey***, judgment of 15 June 2010;
- ***Aslan and Sezen v. Turkey*** and ***Aslan and Sezen v. Turkey (no. 2)***, judgments of 17 June 2014

Administrative bans on the dissemination of publications of foreign origin or written in a foreign language

Association Ekin v. France **no. 39288/98**
Judgment 17.7.2001

At the time of the facts of the case, the Minister of the Interior was granted powers by the French Law of 1881 on the press to impose general and absolute bans throughout France on the circulation, distribution or sale of any document written in a foreign language or of any document regarded as being of foreign origin, even if written in French.

According to the European Court of Human Rights, although Article 10 does not prohibits prior restraints on publication as such, a legal framework ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse of power is dully required since news is a perishable commodity and delaying its publication, even for a short period, may well deprive it of all its value and interest. In this particular case, the Court noted that the French press law at that time was couched in very wide terms and conferred wide-ranging powers on the Minister of the Interior to issue administrative bans on the dissemination of publications of foreign origin or written in a foreign language. Such legislation appeared to be in direct conflict with the actual wording of Article 10 of the Convention, which provides that the rights set forth in that Article are secured "regardless of frontiers". Although the exceptional circumstances in 1939, on the eve of the Second World War, might have justified tight control over foreign publications, the argument that a system discriminating against publications of that sort should continue to remain in force appear currently to be untenable. As regards the judicial review of administrative bans, the Court noted the procedures in place in France provided then insufficient guarantees against abuse. Such review was not automatic and the administrative courts only carried out a limited review. In practice, the applicant had to wait more than nine years before obtaining a final judicial decision.

Conclusion: violation of Article 10 of the Convention (freedom of expression)

See, also

- *Editions Plon v. France*, no. 58148/00, 18 May 2004 [French courts' injunction prohibiting the applicant company and Dr Gubler from continuing to distribute the book "Le Grand Secret", following a request by President Mitterrand's widow and children, who complained of a breach of medical confidentiality, an invasion of President Mitterrand's privacy and injury to his relatives' feelings]
- *Sapan v. Turkey*, 44102/04, 8 June 2010 [Turkish court order banning the distribution of book for almost two years and eight months on basis of unreasoned judicial decisions]

Refusal by British Board of Film Classification to grant distribution certificate for video work containing erotic scenes involving St Theresa of Avila and Christ

Wingrove v. the United Kingdom - 17419/90
Judgment 25.11.1996

The applicant, Mr Nigel Wingrove, is a film director who directed the making of a video work entitled "Visions of Ecstasy". According to the applicant, the idea for the film was derived from the life and writings of St Teresa of Avila, the sixteenth-century Carmelite nun and founder of many convents, who experienced powerful ecstatic visions of Jesus Christ. Visions of Ecstasy was submitted to the British Board of Film Classification ("the Board"), in order that it might lawfully be sold, hired out or otherwise supplied to the general public or a section thereof. The Board rejected the application for its blasphemous content, in accordance with the relevant provisions of domestic law.

The European Court of Human Rights noted that Visions of Ecstasy portrayed*, inter alia*, a female character astride the recumbent body of the crucified Christ engaged in an act of an overtly sexual nature. The national authorities considered that the manner in which such imagery was treated placed the focus of the work "less on the erotic feelings of the character than on those of the audience, which is the primary function of pornography". They further held that since no attempt was made in the film to explore the meaning of the imagery beyond engaging the viewer in a "voyeuristic erotic experience", the public distribution of such a video could outrage and insult the feelings of believing Christians and constitute the criminal offence of blasphemy. This view was reached by both the Board of Film Classification and the Video Appeals Committee following a careful consideration of the arguments in defence of his work presented by the applicant in the course of two sets of proceedings. Bearing in mind the safeguard of the high threshold of profanation embodied in the definition of the offence of blasphemy under English law as well as the State's margin of appreciation in this area, the reasons given to justify the measures taken could be considered as both relevant and sufficient.

The Court noted that it was in the nature of video works that once they become available on the market they can, in practice, be copied, lent, rented, sold and viewed in different homes, thereby easily escaping any form of control by the authorities. In those circumstances, it was not unreasonable for the national authorities, bearing in mind the development of the video industry in the United Kingdom, to consider that the film could have reached a public to whom it would have caused offence. The use of a box including a warning as to the film's content would have had only limited efficiency given the varied forms of transmission of video works mentioned above.

Conclusion: no violation of Article 10 (freedom of expression)

General ban to broadcast live interviews with the spoke persons of organizations condoning terrorist activities

Betty Purcell and others v. Ireland - no. 15404/89
Decision 16.04.1991

This case concerns a general prohibition falling on journalists from broadcasting any interviews or recording of statements uttered by any person whom they know to be a member of one of the proscribed organizations listed in a ministerial order.

The European Court of Human Rights noted that the purpose of those restrictions was to deny representatives of known terrorist organisations and their political supporters the possibility of using the broadcast media as a platform for advocating their cause, encouraging support for their organisations and conveying the impression of their legitimacy. Although such restrictions may cause the journalists

some inconvenience in the exercise of their professional duties, they do not amount to disproportionate restrictions on their right to freedom of expression.

The Court highlighted in this regard that radio and television are media of considerable power and influence. Their impact is more immediate than that of the print media, and the possibilities for the broadcaster to correct, qualify, interpret or comment on any statement made on radio or television are limited in comparison with those available to journalists in the press. Live statements could also involve a special risk of coded messages being conveyed, a risk which even conscientious journalists cannot control within the exercise of their professional judgment. Given the limited scope of the restrictions imposed on the applicants and the overriding interests they were designed to protect, they can reasonably be considered "necessary in a democratic society".

Conclusion: manifestly ill founded

Order prohibiting the applicants from working as journalists for one year in a classic defamation case

Cumpănă and Mazăre v. Romania - 33348/96
Judgment 17.12.2004

The European Court of Human Rights noted that the order prohibiting the applicants from working as journalists for one year following the publication of an article about presumed misappropriation on the part of local elected representatives had been particularly severe and could not in any circumstances have been justified by the mere risk of their reoffending. The imposition of such a preventive measure of general scope, albeit subject to a time-limit, had contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society. The Court accordingly considered that, although the interference with the applicants' right to freedom of expression might have been justified, the criminal sanction and the accompanying prohibitions imposed on them by the Romanian courts had been manifestly disproportionate in their nature and severity to the legitimate aim pursued by the applicants' conviction for insult and defamation.

Conclusion: violation of Article 10 of the Convention

One-year suspension of right to broadcast, following repeated radio programmes deemed to be contrary to principles of national unity and territorial integrity and likely to incite violence, hatred and racial discrimination

Medya FM Reha Radyo ve ÿletiÿim Hizmetleri A.ÿ. v. Turkey (dec.) - 32842/02
Decision 14.11.2006

The applicant is a Turkish limited company which broadcasts radio programmes. In 1998 a decision was taken by the broadcasting regulatory authority (Radio and Television Supreme Council) to suspend its authorisation to broadcast on account of comments made during a programme that undermined the existence and independence of the Turkish Republic, as well as the principles of State and national unity and the indivisibility of the nation. The Supreme Administrative Court set aside the decision, which had never been enforced. However, the applicant company again broadcast comments that showed disrespect for the above-mentioned principles and it was issued with a warning by the broadcasting regulatory authority. Subsequently, after the applicant company had broadcast comments considered capable of inciting people to violence, terrorism or racial discrimination, or of provoking feelings of hatred, the regulatory authority decided on two occasions to suspend its right to broadcast for a 30-day period, and finally imposed a ban on broadcasting for 365 days – the maximum penalty, in view of the reiteration of its offending conduct.

The European Court of Human Rights held that the suspension of the applicant company's right to broadcast radio programmes had constituted interference with its right to freedom of expression. The interference had been prescribed by law and had pursued legitimate aims. As to whether it had been necessary in a democratic society, the grounds given by the authorities to justify the penalty had been "relevant and sufficient" in view of the nature of the comments broadcast by the applicant. Lastly, the interference had been proportionate to the legitimate aims pursued, as dissuasive penalties might prove necessary when misconduct reached such a degree as that observed in this case and became intolerable in that it constituted a negation of the founding principles of a pluralistic democracy.

Conclusion: inadmissible (manifestly ill-founded)

180-day prohibition to broadcast certain type of comments: disproportionate interference

Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey 6587/03
Judgment 27.11.2007

The applicant, Nur Radyo Ve Televizyon Yayıncılığı A.Ş., is a limited company in the radio broadcasting sector based in Istanbul. In October 1999 the Radio and Television Supreme Council (Radio ve Televizyon Üst Kurulu – RTÜK) censured the applicant company for broadcasting certain comments by a representative of the Mihr religious community, who had, among other things, described an earthquake in which thousands of people had died in the Izmit region of Turkey in August 1999 as a "warning from Allah" against the "enemies of Allah", who had decided on their "death". The representative had also compared the "fate" of "non-believers", who were presented as victims of their impiety, with that of the members of the Mihr community. The RTÜK found that such comments breached the rule laid down in section 4 (c) of Law no. 3984 prohibiting broadcasting that was contrary to "the principles forming part of the general principles laid down in the Constitution, to democratic rules and to human rights". Noting that the applicant company had already received a warning for breaching the same rule, the RTÜK decided to suspend its radio broadcasting licence for 180 days with effect from 8 November 1999. The applicant company challenged this measure in the Turkish courts, but to no avail. It argued, in particular, that it had put forward a religious explanation for the earthquake which all listeners were free to support or oppose.

The European Court of Human Rights acknowledged the seriousness of the offending comments and the particularly tragic context in which they had been made. It also noted that they had been of a proselytising nature in that they had accorded religious significance to a natural disaster. However, although the comments might have been shocking and offensive, they did not in any way incite to violence and were not liable to stir up hatred against people who were not members of the Mihr religious community. The Court further reiterated that the nature and severity of the penalty imposed were also factors to be taken into account when assessing the proportionality of an interference. It therefore considered that the broadcasting ban imposed on the applicant company had been disproportionate to the aims pursued, in violation of Article 10.

Conclusion: violation of Article 10 of the Convention

See also, regarding **a 365-day suspension of the company's operating licence on account of a song** which it broadcast,

the case of *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey* 11369/03 [The applicant company, Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş., is a radio and television station which used to broadcast in Istanbul. The case concerned in particular the 365-day suspension of the company's operating licence on account of a song which it broadcast. The Radio and Television Council (Radyo ve Televizyon Üst Kurulu – the RTÜK) took the view that the words of the

offending song infringed the principle set forth in section 4(g) of Law no. 3984, prohibiting the broadcasting of material likely to incite the population to violence, terrorism or ethnic discrimination, and of a nature to arouse feelings of hatred among them. Conclusion of the European Court of Human Rights: violation of Article 10 (freedom of expression)]

Impossibility due to a public monopoly to be granted a broadcasting license to impart information

Informationsverein Lentia and Others v. Austria - no. 13914/88; 15041/89; 15717/89; 17207/90
Judgment 24 .11.1993

This case concerns an impossibility to set up a radio and a television station, as under the Austrian legislation in force at the relevant time, this right was restricted to the Austrian Broadcasting Corporation, an autonomous public-law corporation. According to the Austrian Government, only the system in force, based on the monopoly of the Austrian Broadcasting Corporation, made it possible for the authorities to guarantee the objectivity and impartiality of reporting, the diversity of opinions, balanced programming and the independence of persons and bodies responsible for programmes.

The European Court of Human Rights did not share its views. It stated that a public monopoly was the measure imposing the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need. As a result of the technical progress made over the last decades, justification for these restrictions can no longer today be found in considerations relating to the number of frequencies and channels available. Citing the practice of other countries which either issue licenses subject to specified conditions of variable content or make provision for forms of private participation in the activities of the national corporation, the Court noted that it cannot be argued that there were no equivalent less restrictive solutions. The experience of several European States of a comparable size to Austria, in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed by the Government, namely that the Austrian market was too small to sustain a sufficient number of stations to avoid regroupings and the constitution of "private monopolies", to be groundless.

Conclusion: violation of Article 10 of the Convention

See, for other examples of case law on refusal to be granted a broadcasting license,

- *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, 32240/96, [Refusal to grant a broadcasting license because of the public monopoly] 20.10. 1997: violation of Article 10
- *Leveque v. France*, no. 35591/97, 23.11.1999 [Justified refusal to grant a broadcasting license to a local radio] : inadmissible
- *United Christian Broadcasters Ltd v. the United Kingdom*, no. 44802/98, 7.11.2000 [General ban on awarding a national radio license to a body whose objective were of a religious nature]: no violation of Article 10
- *Demuth v. Switzerland*, no. 38743/97, 5.11.2002 [Refusal to grant a broadcasting license to a company wishing to promote cars and car accessories]: no violation of Article 10
- *Groppera Radio AG and Others v. Switzerland*, no. 10890/94, 28.3.1990 [Ban on cable retransmission in Switzerland of programs broadcast by sound radio from Italy]: no violation of Article 10