

ANNOTATIE

# **Akdeniz v. Turkey (ECtHR, no. 41139/15) – Academics get the short end of the stick in news reporting judgment**

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1. The European Court of Human Rights' judgment in *Akdeniz and others v. Turkey* is a set-back for its progressive development of three partly overlapping sets of freedom of expression principles: the public's right to know, the right to participate effectively in public debate, and academic freedom. After a brief recap of the facts of the case, each set of principles will, in turn, be analysed in relation to the case.

## **Facts**

2. At the centre of this case was an interim injunction by the Turkish courts banning the dissemination and publication (on any medium) of information on a parliamentary inquiry into allegations of corruption against four former ministers. The blanket ban was challenged by three applicants: two academics and a journalist. At the material time, Yaman Akdeniz was a professor of law at Bilgi University and director of the NGO, *Cyber-Rights.Org*; Kerem Altuparmak was an assistant professor of law and director of the Centre for Human Rights at Ankara University. Both regularly engage in academic and public discussions on freedom of expression issues. Fatma Banu Güven was a well-known journalist, political commentator and tv news presenter. All three applicants requested the Turkish courts to lift the ban, claiming it violated their right to freedom of expression. The Turkish Constitutional Court dismissed their request on the grounds that they were not directly or personally affected by the ban and thus lacked victim status.

3. The European Court of Human Rights subsequently considered the applicants' claims to victim status under Article 34 ('Individual applications') of the European Convention on Human Rights.[1] The Court distinguished between the journalist and the academics, granting victim status to the former but not to the latter. In respect of the journalist, the Court followed its familiar line that the blanket ban, as a form of prior restraint on freedom of expression, merited careful scrutiny. It found that the ban lacked legal basis and that it moreover prevented Fatma Banu Güven from gathering information she needed in order to perform her journalistic activities and contribute to public debate. It held – unanimously – that her right to freedom of expression, as guaranteed by Article 10 of the Convention, had been violated.

4. By contrast, the Court found that the academic applicants had not demonstrated how the impugned prohibition had affected them directly and thus lacked victim status. The Court declared – by a majority – the academics' applications inadmissible.

### **The public's right to know**

5. In its ground-breaking *Sunday Times* judgment in 1979, the Court found that the public has the right to be "properly informed".[2] Ever since, this finding has been prominent in the Court's canon of freedom of expression principles. However, the adverb "properly" has – by accident or design – fallen by the wayside. The Court has only used the adverb on a smattering of occasions since, leaving the staple principle as the right to be informed *tout court*. Despite this cropping of the original principle, a powerful precedent was set and the principle still holds sway today.

6. The public thus has a right to receive information and ideas on matters of public interest and, moreover, the media have the task of imparting such information and ideas.[3] This presupposes that the media can access information about public affairs, which it is incumbent on them to impart. Indeed, as the Court recalls (referring to its *Dammann* judgment), the preliminary gathering of information is an "inherent" part of the journalistic process.[4] In other case-law not referenced in the present judgment, the Court has stressed the importance of media and journalists having first-hand access to (sources of) information, e.g. parliamentary proceedings (*Selmani & others*),[5] interviewees in asylum-seekers centres (*Szurovecz*),[6] demonstrations and other events (*Pentikäinen*).[7]

7. There is a clear and legitimate public interest in being informed about a parliamentary inquiry into alleged corruption of former ministers. There is also a clear and legitimate need for such an inquiry to enjoy a degree of confidentiality. It is hard to see how these competing interests were balanced in the ban that covered reporting across *all* media and communications channels. The blanket character of the ban deprived the public, including

journalists and academics, of *any* information about the parliamentary inquiry. Tailored restrictions on reporting could have preserved relevant confidentiality around the inquiry and would have been more proportionate from a freedom of expression perspective.

8. That the prohibition on reporting was of limited duration can hardly be considered an attenuating factor from a freedom of expression perspective. Its limited duration should be seen in the light of another key and recurrent observation by the Court, namely that news is a “perishable commodity”.<sup>[8]</sup> A delay in publication – “even for a short period” – can reduce the newsworthiness of a topic and its value for informing public debate.<sup>[9]</sup>

9. In this author’s view, the Court was unduly strict in its reluctance to accept that Akdeniz and Altıparmak were victims of a violation of their right to freedom of expression in the sense of Article 34 of the Convention. Article 34 does not envisage the possibility of an *actio popularis* or a challenge to domestic legislation *in abstracto*.<sup>[10]</sup> Instead, applicants are required to be able to claim on arguable grounds that they themselves have been direct or indirect victims of a violation of the Convention resulting from an act or omission which can be attributed to a Contracting State.

10. In its assessment, the Court drew on its *Tanrikulu and others v. Turkey* decision, in which it had denied victim status to readers of a daily newspaper who claimed their right to receive information was violated as a result of a ban on the distribution of the newspaper pursuant to a regional state of emergency.<sup>[11]</sup> This is an inappropriate analogy as it focuses on readers who passively receive information and overlooks the importance of active academic participation in public debate (for further omission which can be attributed to a Contracting State, discussion, see below). If the Court had relied on other analogies, it could have fashioned a less strict approach. Its judgment in *Open Door and Dublin Well Woman v. Ireland*, for instance, points to the possibility of limiting the class of applicants for the purposes of establishing direct effects, thereby distinguishing it from an *actio popularis*.<sup>[12]</sup> It was relevant in *Open Door and Dublin Well Woman* that there was a risk of the applicants being directly prejudiced by the measure complained of. The case concerned an injunction imposed by the Irish courts on Open Door and Dublin Well Woman to restrain them from providing certain information to pregnant women concerning abortion facilities outside the jurisdiction of Ireland by way of non-directive counselling.

### **The right to participate in public debate**

11. In its *Dink v. Turkey* judgment, the Court held that States have a positive obligation “to create a favourable environment for participation in public debate by everyone”.<sup>[13]</sup> Everyone means *everyone*: journalists, individuals, NGOs, academics, whistleblowers, citizen journalists,

bloggers, users of social media, etc. This principle has been consolidated and further specified in a line of case-law, culminating in *Magyar Helsinki Bizottság v. Hungary* (hereafter, ‘*MHB*’).[14]

12. Along the way, the milestone judgment for recognising citizen journalism was *Cengiz & others v. Turkey*,[15] interestingly involving two of the named applicants in the present case (Yaman Akdeniz and Kerem Altıparmak) as the “others” alongside the eponymous applicant, Serkan Cengiz. The case concerned a court order to block access to YouTube for all internet users in Turkey. The Court granted standing to the applicant academics and found that their right to freedom of expression had been violated because as active users of YouTube, they had been particularly affected in their academic work, insofar as they were unable to access certain information or to upload content. It distinguished the earlier *Akdeniz* case[16] (again, the same Yaman Akdeniz), in which it considered the applicant – as a mere user of two music-streaming websites in Turkey – to be only indirectly affected by the relevant blocking measure. In the present case, the Court seems to roll back the protection for academics’ participation in public debate that it had previously recognised in *Cengiz & others*.

13. This is a puzzling and a problematic development. Following *Dink* and *MHB*, everyone should be able to participate effectively in public debate. It should not matter whether or not they are journalists, as long as they make a purposeful contribution to public debate. In other circumstances, the Court has found that a distinction between journalists and academics was not of particular relevance and reiterated that “the Convention offers a protection to all participants in debates on matters of legitimate public concern”. [17]

14. Furthermore, in order to participate effectively in public debate, it is necessary for persons or organisations exercising public watchdog functions to be able to access accurate information. After all, “accurate information” is a “tool of their trade”. [18] In this regard, a “high level of protection” extends to academic researchers. [19]

### **Academic freedom**

15. An underdeveloped perspective in the present judgment is that of academic freedom, a nascent but somewhat nebulous notion that overlaps extensively with freedom of expression issues. Academic freedom comprises not only teaching and research, but also so-called extra-mural expression, typically expert contributions to public debate. [20]

16. Academic expertise, channelled through the media and social media, can enhance the quality of public debate. Academics can draw on their expertise to explain, clarify and qualify complex concepts and processes and make them comprehensible for the wider public. As Robert Post, a leading US legal scholar, puts it: “Reliable expert knowledge is necessary not

only for intelligent self-governance, but also for the very value of democratic legitimation”.<sup>[21]</sup> In the context of public debate, academics should be able to bring their “reliable expert knowledge” to bear on actual situations and processes. To do so effectively, they need to be able to gather relevant information about those situations and processes. If such information is unavailable, academics’ assessments and comments will likely be abstract and acontextual, which diminishes their value for public debate. The ability to access, reflect on and apply relevant information are successive, integral steps in the process of providing academic commentary, just as they are in journalism.

17. In his partly dissenting opinion, Judge Egidijus Kūris is critical of the absolute character of the prohibition on reporting. He is also very critical of the apparent distinction in principle between two breeds of public watchdog, and would-be differences in their levels of vigilance. Judge Kūris also strikes a personal note by spelling out how restrictive the reporting ban and such a distinction would have been for him prior to his election as a judge of the Court: he was namely a university professor who made regular contributions to public debate, including on topics such as parliamentary inquiries. Judge Kūris’ stance is consistent with his strong defence of academic extra-mural speech, developed together with fellow Judges Sajó and Vučinić in their joint concurring opinion in *Mustafa Erdoğan and Others v. Turkey*.

18. In the present case, the Court seems to have downplayed the importance of academic contributions to public debate, compared with its position in its *Cengiz & others* and *MHB* judgments. Academics have been given the short end of the stick. It is to be hoped that the importance of academic contributions to public debate will carry greater weight in future case-law.

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[1] Article 34 (‘Individual applications’) reads: “The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. [...]”

[2] *The Sunday Times v. United Kingdom (no. 1)*, 26 April 1979, no. 6538/74, § 66, Series A no. 30.

[3] *Ibid.*, § 65.

[4] Paragraph 70, referring to *Dammann v. Switzerland*, 25 April 2006, no. 77551/01, § 52, 25

April 2006.

[5] *Selmani and Others v. the former Yugoslav Republic of Macedonia*, 9 February 2017, no. 67259/14.

[6] *Szurovecz v. Hungary*, 8 October 2019, no. 15428/16.

[7] *Pentikäinen v. Finland* [GC], 20 October 2015, no. 11882/10.

[8] *Observer and Guardian v. United Kingdom*, no. 13585/88, 26 November 1991, § 60, Series A no. 216.

[9] *Ibid.*

[10] For analysis, see: D. Harris, M. O’Boyle & C. Warbrick e.a., *Law of the European Convention on Human Rights* (4<sup>th</sup> ed.) (Oxford, Oxford University Press, 2018), p. 88.

[11] *Tanrikulu and others v. Turkey* (dec.), 6 November 2001, nos. 40150/98, 40153/98 and 40160/98.

[12] *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, nos. 14234/88, 14235/88, § 44, Series A no. 246-A.

[13] *Dink v. Turkey*, 14 September 2010, nos. 2668/07 and 4 others, § 137.

[14] *Magyar Helsinki Bizottság v. Hungary* [GC], 8 November 2016, no. 18030/11.

[15] *Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, ECHR 2015 (extracts).

[16] *Akdeniz v. Turkey* ((dec.), 11 March 2014, no. 20877/10.

[17] *Braun v. Poland*, 4 November 2014, no. 30162/10, § 47.

[18] *Magyar Helsinki Bizottság v. Hungary* [GC], 8 November 2016, no. 18030/11, § 167.

[19] *Ibid.*, § 168.

[20] *Mustafa Erdoğan and Others v. Turkey*, 27 May 2014, nos. 346/04 and 39779/04, § 40. See also: *Sorguç v. Turkey*, 23 June 2009, no. 17089/03, § 35; *Lombardi Vallauri v. Italy*, 20 October 2009, no. 39128/05, § 43, and *Kula v. Turkey*, 19 June 2018, no. 20233/06, § 38.

[21] Robert C. Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven & London, Yale University Press, 2012), pp. 32-33.