EHRC EUROPEAN HUMAN RIGHTS CASES UPDATES

ANNOTATIE

Melike v. Turkey (ECtHR, 35686/19) – Social media 'likes' and freedom of expression: the ECtHR's tentative considerations

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Facts

1. In its *Melike v. Turkey* judgment, the European Court of Human Rights has for the first time considered the status of 'likes' on social media from a freedom of expression perspective.[1] The Court held unanimously that there had been a violation of Article 10 of the European Convention on Human Rights, arising from the dismissal of the applicant, a contractual employee of the Turkish National Ministry of Education, for having 'liked' a number of posts by third parties on Facebook. The posts in question were virulently critical of alleged repressive practices by the authorities and of alleged abuse of pupils in establishments controlled by the authorities. The posts that the applicant liked only received around ten likes and a few comments.

2. The applicant worked as a cleaner at the department of national education at Seyhan in Adana, Turkey; she was employed on a permanent contract. As a contractual employee – not formally a civil servant – the applicant's status was subject to ordinary employment law. According to the disciplinary committee's decision to dismiss her, which was upheld on appeal by the national courts, the impugned acts of liking were liable to disturb the peace and order in the applicant's workplace. After exhausting all domestic remedies, the applicant lodged an application with the European Court of Human Rights, claiming that her dismissal

amounted to a violation of her right to freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights.

Straightforward application of principles

3. The Court recalled that human rights also apply in the professional sphere, under both public and private law, and that they entail negative and positive State obligations. Leaning on, *inter alia*, its *Palomo Sánchez and others v. Spain* judgment, the Court reiterated that under the positive obligations that flow from Article 10, States must protect the right to freedom of expression even when threats to the right emanate from private actors.[2]

4. The Court considered the nature of the applicant's employment and its implications for (restrictions on) her right to freedom of expression. It recalled its finding in earlier case-law that employees' "duty of loyalty, reserve and discretion" to their employer is more pronounced in the case of civil servants (para. 48). As the applicant was not a civil servant, she should not have been subject to a heightened level of professional discretion or any limitations on her right to freedom of expression that could have accrued from such status. It was also relevant for the Court that the applicant was not a well-known personality.

5. The Court held that the national courts had failed to conduct a sufficiently in-depth examination of the tenor and context of the impugned content to support the finding that the applicant's likes were liable to disturb peace and order in her workplace. The posts consisted of virulent political criticism of *inter alia* alleged repressive practices by the authorities; calls to demonstrate and protest against those practices; and denunciations of alleged abuse of pupils that purportedly took place in institutions under the control of the authorities (para. 46 and more extensively, para. 6). The Court found the topics addressed in the impugned posts to be "essentially and incontestably" questions of public interest and thus contributions to the public debate of those questions (para. 47). As such, there was very little scope for restrictions.

6. The Court's assessment was straightforward, sound, unsurprising and uncontroversial. The novel element was its tentative consideration of 'likes'. The Court first drew on its existing "internet case-law".[3] It recalled the importance of the internet as a tool for free expression and communication; for accessing vast quantities of information and news; and for participating in political discussions and debates on topics of general interest. It also sounded a cautionary note about the accompanying risk that clearly unlawful speech, including defamation, hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online.[4]

Features and impact of social media 'likes'

7. After this general recapitulation, the Court homed in on a specific feature of online communication – 'likes', just as it did for hyperlinks in its *Magyar Jeti Zrt. v. Hungary* judgment.[5] In that case, it considered the role of hyperlinks in the architecture of the internet, and in particular how hyperlinks influence the free flow of information online. The "very purpose" of hyperlinks, the Court found then, is to direct to other webpages and resources and thus "to allow Internet users to navigate to and from material in a network characterised by the availability of an immense amount of information" (para. 73). Hyperlinks therefore contribute "to the smooth operation of the Internet by making information accessible through linking it to each other" (*ibid.*). This appreciation of the functional value of hyperlinks is important because the Court strives to interpret the right to freedom of expression in such a way as to ensure that it is practical and effective in contemporary society.[6] Without hyperlinks, it would be very difficult to access information *effectively* in a vast and complex system characterized by the networked distribution of information.

8. In *Melike*, the Court describes the 'like' button as a current and popular way of exercising freedom of expression online, by indicating a user's intention to endorse or promote particular content. However, unlike in *Magyar Jeti Zrt*., the Court does not explore the "very purpose" of the 'like' button in much depth. Had it done so, it might have stated more firmly that pushing the 'like' button is a performative expressive act and explored the ramifications of such a qualification. It might also have found that the social or peer-validation underpinning likes can be persuasive in the "attention economy",[7] which is characterized by fierce competition for users' limited attention. The social validation of content can enhance the perceived trustworthiness of the content or its author and increase the likelihood that the user will rely on it. As individuals "often use mental shortcuts to limit cognitive load when processing information for decision-making", social validation can become a convenient heuristic for navigating abundant information.[8] This can lead to a "bandwagon heuristic", whereby "the more positive feedback something receives, the more likely it is to be viewed as credible".[9]

10. The Court underlines that the applicant merely liked the content; she did not create it. It makes the laboured point that liking content cannot be considered as having the same weight as sharing content via social media, insofar as liking content merely expresses sympathy for the published content, and not an active desire to disseminate the content (para. 51). The Court thus distinguishes the act of liking from the act of distribution. This distinction is by no means clear-cut. It is based on an outdated understanding of how content is spread online. Whereas in the past, content was mainly spread in linear fashion, from sender(s) to receiver(s), in the contemporary online environment, dissemination of content is more dynamic and diffuse.

11. Content is spread online not only when it is 'pushed' by individual acts of publication or

broadcast, but also when it is 'nudged' by algorithmic recommender systems. User engagement with particular content, for instance through sharing and liking, can trigger algorithmic amplification and lead to increased prominence for the content. The Facebook algorithm decides for the platform which posts to push in users' feeds. The algorithm's ranking signals are concerned with relationship, type of content, popularity and recency.[10] Popularity is determined by how others (especially one's Facebook friends) share and engage with content, through liking it and commenting on it, etc. Liking content can thus influence its promotion and prominence.

12. Similarly, depending on the design of a platform and the default and personal settings, liking content may be tantamount to disseminating it. This is the case, for instance, if one's followers are automatically notified when one likes content, thereby 'nudging' it into their timelines or highlights and drawing their attention to it. In the "attention economy", such nudging and prioritisation of content is hard currency. It is easy to understand why some authors speak of a "Like economy".[11]

Media literacy in the digital environment

13. Having now established that liking content may lead to its algorithmic dissemination, where does that leave the Court's finding that the applicant only wanted to express sympathy for the content and did not have an active desire to disseminate the content? Could or should the applicant have known that by pushing the like button, she was also pushing the content into an algorithmically constructed feed? A media-literate user, who is digitally savvy, would have been aware of the consequences of liking content. However, research suggests that a majority of users may not know that Facebook's NewsFeed is algorithmically constructed.[12]

14. The Court has previously shown its awareness of the complexity and overwhelming nature of the online information and communications environment, which calls for clear legal frameworks to guide expressive conduct online.[13] The need to promote media and information literacy (MIL) in the digital environment is equally important. As noted by the Council of Europe's Committee of Ministers in 2018: "In light of the increased range of media and content, it is very important for individuals to develop the cognitive, technical and social skills and capacities that enable them to effectively access and critically analyse media content; to make informed decisions about which media they use and how to use them; to understand the ethical implications of media and new technologies, and to communicate effectively, including by creating content".[14] MIL is thus essential for individuals to be able to appreciate the consequences of communicative engagement in the digital age. On such reasoning, it is only a small step to argue that the promotion of MIL falls squarely within States' positive obligation to foster a favourable environment for participation in public debate

by everyone.[15]

Unaddressed issues and looking ahead

15. The broader dynamics of freedom of expression in the online attention economy are not addressed in the *Melike* judgment. The Court goes no further than a terse acknowledgement that 'likes' on social media can be considered a way of flagging interest or approval for particular content (para. 44). But beyond 'likes', users engage with content in a variety of ways and for a variety of reasons: to endorse or promote a viewpoint or standpoint; to trigger or provoke reflection and discussion; to contest or dispute a statement or an opinion; to expose or debunk a claim; to indicate irony or incredulity. "RTs ≠ endorsements" (or "Retweets are not endorsements") is a conventional disclaimer on Twitter accounts. Are such disclaimers sincere and do they carry any legal weight and help to stave off liability for retweeting possibly illegal third-party content? Whether such disclaimers should be taken at face value will depend on various contextual factors. Wider patterns of expression or action may confirm or belie the true views of the re-tweeter. And whatever the motivation for sharing content, the mere act of engagement by users influences the algorithmic determination of the prominence of the content.[16] The more users interact with content, the more recommender systems will promote that content.[17]

16. In *Melike*, the Court has dipped its toes into the waters of online liking and sharing. It has briefly taken the temperature of the water and will now have to look up and face the relentless waves rushing towards the shore. It will need to develop a more sophisticated and epistemic understanding of how liking and sharing online content affect the exercise of the right to freedom of expression in the digital age. Fast.

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[1] *Melike v. Turkey*, ECtHR 15 June 2021, no. 35786/19, ECLI:CE:ECHR:2021:0615JUD003578619.

[2] *Palomo Sánchez and Others v. Spain*, ECtHR [GC] 12 September 2011, nos. 28955/06 and 3 others, ECLI:CE:ECHR:2011:0912JUD002895506.

[3] European Court of Human Rights (Research Division), Internet: case-law of the European Court

of Human Rights, Case-law research report, 2015, available at:

https://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf; European Court of Human Rights (Press Unit), Fact sheet – New technologies, May 2021, available at: https://www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf.

[4] Building on *Delfi AS v. Estonia,* ECtHR [GC] 16 June 2015, no. 64569/09, ECLI:CE:ECHR:2015:0616JUD006456909, § 110.

[5] *Magyar Jeti Zrt v. Hungary*, ECtHR 4 December 2018, no. 11257/16, ECLI:CE:ECHR:2018:1204JUD001125716.

[6] See, for example, *Airey v. Ireland*, 9 October 1979, no. 6289/73, ECLI:CE:ECHR:1979:1009JUD000628973, Series A no. 32.

[7] The term, "attention economy", was coined by Michael H. Goldhaber in 1997: Michael H. Goldhaber, "The Attention Economy and the Net", *First Monday*, Volume 2, Number 4 - 7 April 1997, available at: https://firstmonday.org/ojs/index.php/fm/article/download/519/440.

[8] Paul Mena, Danielle Barbe and Sylvia Chan-Olmsted, "Misinformation on Instagram: The Impact of Trusted Endorsements on Message Credibility", *Social Media + Society*, April-June 2020: 1–9, at p. 3.

[9] *Ibid*., p. 4.

[10] Paige Cooper, "How the Facebook Algorithm Works in 2021 and How to Make it Work for You", Hootsuite, 10 February 2021, available at: https://blog.hootsuite.com/facebook-algorithm/.

[11] Carolin Gerlitz and Anne Helmond, "The like economy: Social buttons and the data-intensive web", 15(8) *New Media & Society* (2013), 1348-1365. 1351-2 (4-5). Gerlitz and Helmond describe this economy as: "an infrastructure that allows the exchange of data, traffic, affects, connections, and of course money, mediated through Social Plugins and most notably the Like button". – *ibid*., at p. 1353.

[12] Jennifer Cobbe and Jatinder Singh, "Regulating Recommending: Motivations, Considerations, and Principles", *European Journal of Law and Technology*, Vol. 10, Issue 3, 2019, p. 17 [of online article].

[13] *Editorial Board of* Pravoye Delo *and Shtekel v. Ukraine*, no. 33014/05, § 64, ECHR 2011. The specific focus in this case was on journalists/professional media.

[14] Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, 7 March 2018.

[15] *Dink v. Turkey*, ECtHR 14 September 2010, nos. 2668/07 and 4 others,

ECLI:CE:ECHR:2010:0914JUD000266807, § 137. For commentary, see: Tarlach McGonagle, "Positive obligations concerning freedom of expression: mere potential or real power?", in Onur Andreotti, Ed., *Journalism at risk: Threats, challenges and perspectives* (Strasbourg, Council of Europe Publishing, 2015), pp. 9-35.

[16] See, for critical analysis, Denis Staunton, "'Anger and hate easiest way to grow on Facebook,' says whistleblower", *The Irish Times*, 25 October 2021, available at: https://www.irishtimes.com/business/technology/anger-and-hate-easiest-way-to-grow-on-facebook-says-whistleblower-1.4710204.

[17] Cobbe and Singh, "Regulating Recommending", *op. cit.*, p. 8 [of online article].