“Academics for Peace“ and their Freedom of Expression

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On 5 May 2018 Academics for Peace Germany issued a call for solidarity asking academics around the world to analyse and discuss criminal prosecutions against their colleagues by Turkish lower courts for signing what is familiarly now known as the ‘Academics for Peace Petition.’ The petition, published in January 2016, was signed by around two thousand academics from both Turkey and from abroad. The petition raised concerns, using strong language, about the conduct of Turkish security forces in their counter-terrorism operations carried out in response to violent actions by the PKK terrorist group and their supporters in south-east Turkey in the summer of 2015. One signatory, Füsun Üstel, professor of political science, was found guilty of committing the crime of terrorist propaganda under Article 7(2) of the Turkish Counter Terrorism Law and now faces fifteen months of imprisonment. Her case is now pending before the Court of Appeal. If the appeal court agrees with the assessment of facts and law by the lower court, she will serve a prison sentence.

I am not one of those who signed the petition. Having witnessed the systematic disciplinary proceedings and the criminal prosecutions of my colleagues, I have, however, signed a second petition along with over 600 other academics that calls for respect for the

constitutional protection of the freedom of expression of the original petition signatories.

In this blog post, I review the reasoning of the 32rd Heavy Penalty Court that meted out the 15 month custodial sentence upon Professor Dr. Füsun Üstel, on 4 April 2018. In so doing, I show that the constitutional protection of Üstel's freedom of expression has not been respected by the Court in its judicial reasoning.

I provide two grounds for this from my close reading of the judgment. First, the Heavy Penalty Court failed to recognise the lexical priority of freedom of expression as a constitutional fundamental right as a matter of form. Second, the Court does not provide sufficient reasons for why Üstel's imprisonment is necessary in a democratic society as a response to protecting national security. The judgment, if not overturned by the Appeal Court, will widen the gap between constitutional and international protections of freedom expression and the anti-rights reasoning structures emerging across the country's lower criminal courts. The appeal court needs to correct this and bring the behaviour of the lower courts within the realm of judicial reasoning based on the protection of fundamental rights.

Form: No constitutional lexical priority of freedom of expression

Political expression as a constitutional and human right is a core pillar of the Turkish constitutional legal order. It is based on the premise that protection of political expression has a formal lexical priority to reasons for limiting it, provided by domestic law. The case law of the Turkish Constitutional Court, echoing international human rights law and comparative constitutional rights jurisprudence, has been very clear that any limitation on freedom of expression must meet the requirement of exceptionality and must be justified as a measure of last resort (*Emin Aydin*). This case law further states that limitations of freedom of expression must meet the necessity in a democratic society test (*Emin Aydın*, para 48).

The Füsun Üstel judgment of the 32rd Heavy Penalty Court neither mentions nor engages with the protection of freedom of expression under of the Constitution. Indeed, not on one of its 20 pages does the judgment engage with the case law of the Constitutional Court. The judgment shows no awareness of the lexical priority that the Turkish constitutional legal order accords to freedom of expression. In one sentence, and in passing only, it states that the suppression of expression is necessary in a democratic society, without explaining why in concrete terms.

In contrast to its lack of interest in its own Constitutional Court, the judgment contains a handful of vague references to the European Court of Human Rights, arguing that this Court would agree with the outcome reached in this case. There is, however, no mention of a single case or a single jurisprudential test to support this claim. The judgment, too, has vague references to the United States Supreme Court (a court well known for its freedom of expression safeguards), although not a single case is cited or discussed. There are further references to the detention of ETA supporters in Spain and the United Kingdom's approach to counter-terrorism. None of these, however, are substantiated and it is unclear how they

relate to the signing of a petition by an academic. The judgment asserts that the US and the EU would not allow propaganda from the so-called Islamic State, and that not even 'less developed' countries would tolerate being accused of carrying out a massacre.

Instead of working with standards of legal reasoning intrinsic to the Turkish legal order, and the European Court of Human Rights, of which Turkey is part, the Court offers us an unsubstantiated list of examples to assert that the signature of the Professor is terrorist propaganda and this is unacceptable anywhere in the world.

Substance: No test of necessity to restrict freedom of expression

It is well known that, in order to assess whether an intervention in political expression through criminalisation is constitutional in a legal order, the necessity of that intervention must be shown in concrete terms. In the parlance of the Turkish Constitutional Court (TCC) and the European Court of Human Rights, this requirement is known as the test of "necessity in a democratic society". The TCC holds that the nature of the statement, its form, content, reach, timing, the person making the statement must be taken into account to show whether an intervention is necessary (*Emin Aydın*, par. 48). The case law of the TCC further requires that the very concrete reasons by first instance courts must justify the limitation with respect to a specifically identified legitimate aim (*Erdem Gül ve Can Dündar*, par. 98). In the case of Professor Üstel, who was indicted for terrorist propaganda, we may assume that the legitimate aim would be the protection of national security. This in turn means that the reasoning for why Professor Üstel's signature to this petition poses a concrete risk to national security must be judicially explained.

The judgment of the 32nd Heavy Penalty Court bases its argumentation of necessity on three pillars: the content of the petition, the timing of the petition and the subsequent actions taken by academic communities in Turkey and abroad following the prosecutions of academics.

As to content, the Court takes the view that the petition directly criticises the Turkish military, police and even the judiciary in strong and unacceptable language. The Court contrasts this with the lack of any criticism of the PKK (an organisation with a long history of terrorist acts and which initiated or took an important part in the violent events in the summer of 2015) in the same text. The Court, therefore, takes the view that the lack of criticism of the PKK and the strong criticism of the Turkish state offers strong evidence in and of itself that the text was drafted, and, in turn, supported to create propaganda for a terrorist group. The further Court takes the view that the petition inaccurately describes the events of the summer of 2015 and that the text uses the language of PKK in its statement of facts, thus directing its criticism to the Turkish security forces and not against the PKK. In support of this, the Court offers a general account of events to show that it was the PKK that spearheaded the violence and the state forces' sole goal was to stop the violence. The Court lastly finds additional evidence of terrorist propaganda when the petition calls for international observers to carry out fact-finding missions, indicating, in cryptic language, that 'we all know what this means'.

In terms of the timing of the petition's publication, the Court finds that this is additional

evidence making the petition part of a counter-propaganda effort of the PKK to legitimise the group's actions nationally and internationally. The Court further notes to other, related events (seminars, conferences, international publications by academics and the cancellation of academic events in Turkey in response to the prosecutions of the signatories) as evidence of continued, further PKK propaganda. All academics supporting the rights of free expression for the petition signatories are, therefore, part of a larger propaganda machine.

Two important concerns of substantive legal reasoning are at stake in these discussions of the Court.

First, the Court implicitly requires that political expression is protected when it is measured and balanced. According to the Court, when raising concerns about the conduct of state actors, one must also raise concerns about the conduct of terrorist organisations. The Court further holds that those who hold academic titles have a duty to express themselves within the boundaries of the law. Both of these starting points have no judicial basis. The role of courts is not to tell us what expression is balanced and measured, but whether political statements that are not, can be legitimately restricted in a democratic society. The yardstick for this is not what domestic law says on criminalising expression, but what the Constitution says on restricting expression.

Second, the judgment is missing one central essential piece of substantive reasoning. Domestic courts are under a duty to give reasons as to why the signing of a petition by an academic (regardless of the judges' obvious strong disagreement with its content and timing) justifies a criminal intervention based on real and immediate risks that the petition poses to national security. How has Professor Üstel's signature undermined Turkish national security? What clear and present danger was posed by her signature? The judgment makes no attempt to answer this essential question, but merely holds that the qualification of a text as terrorist propaganda is sufficient to justify the necessity of the intervention in the rights of the petitioner.

Conclusion

The individual criminal prosecution of Professor Üstel based on the qualification of the petition she signed as terrorist propaganda worsens the judicial protection of the constitutional right to freedom of expression in Turkey. The judgment of the 32nd Heavy Penalty Court neither formally nor substantively respects the constitutional rights protection afforded to political speech in Turkey. Instead, the judgment proposes an alternative and anti-rights judicial reasoning structure by arguing that the petitioners are hiding behind freedom of expression to disguise their terrorist propaganda. Yet, under the Turkish Constitution and under all the international human rights regimes to which Turkey is party, freedom of expression is protected as a sword, not as a shield. A judge's duty lies in assessing whether this sword has concretely harmed public interests.

To hold that a petition signed by 2,000 academics on a matter that is of public interest harms the national security of the great country that Turkey is, does not stand up to judicial scrutiny. Those who have disagreed with the petition have said this loudly and clearly on countless occasions. Turning the voice of the politically most powerful in a society into a

custodial sentence undermines the boundaries between politics and judicial reasoning.The appeal court must correct this anti-constitutional rights trajectory of Turkish lower courts.

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