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Annotatie bij EHRM 22 november 2016 (Kaos GL / Turkije), European Human Rights Cases, 2017-6, nr. 100

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1. At first glance, the European Court of Human Rights' judgment in the case of *Kaos GL v. Turkey* does not appear to have much significance. The Court itself has assigned it a Level-3 ("low importance") classification, meaning that it is "of little legal interest" insofar as it is a routine application of existing case-law (HUDOC online database). In the case, the Court mainly had to apply familiar principles to a set of straightforward facts which pointed towards a *prima facie* violation of the applicant's right to freedom of expression. Nevertheless, the judgment does reveal some interesting issues, namely that the Court still seems ill at ease when faced with public-morality restrictions on the right to freedom of expression.
2. The Court re-affirmed, as a matter of course, the well-established principle that artistic expression is protected under Article 10 of the European Convention on Human Rights (hereafter, 'ECHR') (para. 47). It recognised this principle explicitly for the first time in its *Müller and Others v. Switzerland* judgment, reasoning that those "who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society" (ECtHR 24 May 1988, Series A no. 133, no. 10737/84, ECLI:CE:ECHR:1988:0524JUD001073784, para. 33). The Court has consistently followed and incrementally developed the principle ever since, for example by recognising the specific features of satire as a form of artistic expression (for overviews, see: A. Nieuwenhuis, 'Kunst en belediging: sleutelroman en karikatuur', *Mediaforum* 2016-1, p. 2-11, at 3; A. Nieuwenhuis & S. Koning, 'Kunst in Straatsburg: Een analyse van de jurisprudentie van het EHRM', *Mediaforum* 2010-3, p. 70-78, and P. Kearns, 'Essay 10: Artistic Liberty and the European Court of Human Rights', in *Freedom of Artistic Expression – Essays on Culture and Legal Censure* (Oxford: Hart Publishing Ltd. 2013); for a leading judgment on satire, see: *Vereinigung Bildender Künstler v. Austria*, ECtHR 25 January 2007, no. 68354/01, ECLI:CE:ECHR:2007:0125JUD006835401, «EHRC» 2007/46 case comment Gerards).
3. It is a given that States must not encroach unduly on the freedom of expression of those engaging in artistic expression. But everyone exercising his/her right to freedom of artistic expression is governed by certain duties and responsibilities and is not immune from the possibility of limitations as provided for in Article 10(2), such as the protection of morals in the present case (*Kaos GL*, para. 48).
4. The notion of (public) morals is elusive. In 1988, in its *Müller and Others* judgment, the Court held, emphatically, that "it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals" (para. 35). It added that societal understanding of morals "varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject" (*ibid.*). In the present judgment, the Court maintains that just as in 1988, there is still no consensus within Europe about what "morals" entail (*Kaos GL*, para. 49).

5. Hence, the Court is quick to resort to its margin of appreciation doctrine. Initially developed in the Court's case-law, a reference to the doctrine will be enshrined in the Preamble to the ECHR as soon as the Convention's Amending Protocol No. 15 enters into force. Under this doctrine, States are given a certain amount of discretion in how they regulate expression. That discretion is supervised by the Court, which does not take the place of the national authorities, but reviews decisions taken by them. The extent of the discretion afforded to States varies depending on the nature of the expression in question. Whereas States only have a narrow margin of appreciation in respect of political expression, they enjoy a wider margin of appreciation in respect of public morals, decency and religion. That is because "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge" to give an opinion on the exact content of the requirements of public morals (*Kaos GL*, para. 49).

6. While the premise for the margin of appreciation doctrine may well be sound, its application can prove problematic in practice. It is susceptible to politicization as it can provide the Court with a convenient excuse not to engage with particularly sensitive issues, e.g., religious affairs or public morals. Lord Lester of Herne Hill, a well-known free speech advocate in the United Kingdom, has rightly warned of how the Court's application of the doctrine can result in a "variable geometry" of human rights which pays undue deference to national or regional 'sensitivities'" (Lord Lester of Herne Hill, Q.C., "The European Convention on Human Rights in the New Architecture of Europe: General Report", 38 *Yearbook of the European Convention on Human Rights* (1995), p. 223-236, at 226-227).

7. Based on, but also extrapolating from, the present case, Lord Lester's warning is particularly acute in respect of States which have laws and policies on homosexuality that are regressive or repressive. An uncritical application of the doctrine must not allow such States to resist or opt out of developing international standards of human rights protection. The Court's living instrument doctrine is important here. That doctrine holds that the ECHR is not static, but organic. It must evolve over time and be interpreted by the Court in light of present-day conditions (*Tyrer v. United Kingdom*, ECtHR 25 April 1978, Series A no. 26, no. 5856/72, ECLI:CE:ECHR:1978:0425JUD000585672, para. 31).

8. Another well-established principle that required routine application by the Court in *Kaos GL* concerns prior censorship or restraint, which constitutes a very far-reaching interference with the right to freedom of expression. The seizure of the entire print-run (375 copies) of issue no. 28 of the magazine before it could be distributed was a textbook case of prior restraint. Although prior restraint is not expressly prohibited under the ECHR, it entails inherent dangers for freedom of expression. Thus, any measures preventing the dissemination of ideas or information, in particular by the media, call for "the most careful scrutiny by the Court" (para. 50).

9. The Court furthermore recalls that information "is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest" (*ibid.*). In the present case, the copies of the magazine were seized and held by the Turkish authorities for a period of five years and seven months, corresponding to the period stretching from 21 July 2006 until 29 February 2012. These were, respectively, the date on which legal proceedings against the applicant were initiated and the date on which the applicant was ultimately acquitted by the Court of Cassation. By the time the national courts had found in favour of the applicant and the copies of the magazine had been returned, the content was devoid of any news value or interest.

10. The Court held that the measures restricting the applicant's right to freedom of expression were not necessary in a democratic society. It observed that the national courts had not provided reasoning for the judgments taken. Given the far-reaching consequences of the impugned

measures (described above), the national authorities' mere reference to protection of public morals – in a general way and without reasoning – simply did not pass muster in the eyes of the Court (para. 58).

11. Even after it had found that the impugned measures were not necessary in a democratic society, the Court proceeded to consider that issue no. 28 of the magazine was not suitable for the wider public, which the applicant also acknowledged (para. 60). The Court noted that the issue of the magazine explored the topic of pornography from different perspectives, in particular those of the LGBT community. It noted the explicit nature of some of the pictures published alongside critical and analytical articles. It singled out one image of a homosexual act between two men, both of whom actually represented the painter himself. The Court was of the view that the pictures, especially the one it singled out, notwithstanding their intellectual and artistic character, were of a nature that could offend the sensibilities of an uninformed audience (para. 59). The Court did not, however, explain what was so offensive about the pictures above and beyond the fact that they were sexually explicit.

12. The Court thus distinguished between the intended LGBT readership and other sections of the public who would not necessarily have been well-informed about the magazine's content. It also downplayed the relevance of the intellectual and artistic character of issue no. 28 of the magazine, which may have limited its broader appeal. Even though most of the 375 copies of the magazine would have been distributed on a subscription basis, with only a small number destined for shops, the Court was particularly concerned that the magazine could come into the hands of minors.

13. Fuelled by such concerns, the Court declared itself open to the proposition that the measures taken to prevent certain groups, especially minors, from accessing the magazine, corresponded to a pressing social need (para. 60). However, it then stressed the importance of seeking more proportionate measures, such as banning the sale of that issue of the magazine to under-18s; an obligation to sell the magazine in packaging with a warning for under-18s, or even withdrawing copies from shops, but allowing its distribution to subscribers (para. 61).

14. The proportionality principle is, of course, crucial when it comes to determining appropriate responses to identified harms, but an assessment of proportionality should place more weight on considerations of impact than the Court did in this judgment. With only a small share of an already small print-run being destined for shops (as the Court acknowledged in para. 60), the chances of teenagers or children obtaining copies of the magazine were reduced. It is also likely that only a fraction (if any) of the copies actually sold in shops would have been sold to minors. From the perspective of such limited dissemination, one cannot help but feel that the Court's fears that minors would be harmed by some of the content of issue no. 28 of the magazine, are somewhat exaggerated.

15. In light of these considerations and in particular the concern to prevent harm to the sensibilities of a group in society which was not even the target readership of the magazine, it is difficult to understand how the seizure of all copies of issue no. 28 of the magazine could be seen as *necessary* in a democratic society or as corresponding to a *pressing social need*. After all, the Court tends to interpret the necessity criterion in a strict manner. It has repeatedly noted that “whilst the adjective ‘necessary’, within the meaning of Article 10(2), is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’ and that it implies the existence of a ‘pressing social need’” (*The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, Series A no. 30, no. 6538/74, ECLI:CE:ECHR:1979:0426JUD000653874, para. 59).

16. The paternalistic approach of the Court can also be gauged in another way. The Court focuses on the unsuitability of some of the content of the magazine for minors, thereby underlining its concerns over the impressionability and vulnerability of minors. But protecting minors from harmful content is only one side of the coin. The other side of the coin involves the empowering and educational/developmental benefits for minors that flow from giving them the freedom to access content that may be considered unconventional or contrary to public morals. Furthermore, sexual curiosity and experimentation often begin before the age of 18.

17. The Court does not explicate its paternalistic approach in any detail. It is to be hoped that future cases will provide the Court with an opportunity to examine the very complex nature of minors' right to freedom of expression, especially in an increasingly digitised world. The Convention on the Rights of the Child (CRC), with its emphasis on the evolving capacities and best interests of the child, and an ever-growing body of scholarship on relevant topics, could provide valuable guidance (see, for example, L. Smith, 'Convention on the Rights of the Child: freedom of expression for children', in T. McGonagle and Y. Donders, eds., *The United Nations and Freedom of Expression and Information: Critical Perspectives*, Cambridge: Cambridge University Press 2015, p. 145-170). Moreover, Article 13(1) of the CRC expressly provides for the right of the child "to *seek*, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, *in writing or in print, in the form of art, or through any other media of the child's choice*" (emphasis added). This right may be subject to certain restrictions, as provided by law and necessary for, *inter alia*, the protection of public morals (Article 13(2), CRC).