

Lessons from Turkey: Anti-Terrorism Legislation And The Protection of Free Speech

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SUMMARY

Anti-terrorism legislation, in particular some offences in the Terrorism Act 2000, have a restrictive potential for serious journalism. Such offences will need to be measured against the requirements of Article 10, a Convention right. In this paper the approach of the Court of Human Rights to restrictions on freedom of expression made against a background of political violence is examined through a consideration of a number of freedom of expression cases brought against Turkey in the 1990s.

INTRODUCTION

It is widely accepted that state responses to terrorism should be proportionately compatible with the values of an open society, values which include freedom of expression¹. Commentators are concerned that some of the offences created by

¹ Eg C. Walker, *Blackstone's Guide to Anti-Terrorism Legislation* (Blackstone, London, 2002) p.6; C. Walker, 'Constitutional governance and special powers against terrorism' (1997) 35 *Columbia Journal of Transnational Law* 1. 'Above all, there must be a vibrant and inclusive democracy which can discern the difference between vituperative and immature hot air and violence with the potential to spill blood and which holds its nerve and its cherished values in the face of the heat and light

the Terrorism Act 2000, as amended by the Anti-terrorism, Crime and Security Act 2001, may have a serious “chilling” impact on freedom of political expression and, in particular, on the freedom of the broadcast and print media to publish stories dealing with “terrorism” that result from serious journalistic investigations². In so far as the anti-terrorism offences can be committed by expression that does not directly incite to violence, prosecutions would be likely to raise issues for Article 10 of the European Convention on Human Rights (ECHR). The responses of Turkey, in the late Twentieth Century, to Kurdish separatism and other movements for constitutional change have given rise to an important series of cases in which the Court of Human Rights (the Court) considered the limits of freedom of expression made in the context of politically driven violence. The cases disclose general principles and provide pointers to the Convention compatibility of specific media practices, such as the interviewing of members and leaders of banned organisations, and are relevant to any assessment of the Convention compatibility of the United Kingdom’s legislation.

of the terrorist spectacular.’ Walker (2002) , pp.18-19; cf H. Fenwick, *Civil Rights New Labour, Freedom and the Human Rights Act* (Longman, Harlow, 2000) pp.60-61.

² See in particular Fenwick n1 above, Chapter 3, esp pp.63, 90-91, from which a number of points in the first part of this paper are derived. See also Walker, (2002) n.1 above, p.116; L. Hickman, ‘Press freedom and the new legislation’ (2001) 151 6948 NLJ 716; G. Robertson QC and A. Nicol, *A. Robertson and Nicol on Media Law* (Sweet and Maxwell, London, 2002) pp.586-592.

FREEDOM OF EXPRESSION AND THE ANTI-TERRORISM OFFENCES

The anti-terrorism offences with the potential for restricting effective reporting are, first, offences in section 12 of the Terrorism Act 2000 that may be committed by holding meetings with leaders and members of proscribed organisations; secondly, offences in sections 19 and 35B of the Act which impose a duty on people, journalists and media organisations not excluded, to disclose to the police suspicions of another's involvement in terrorist activity, and the information on which the suspicion is based³; thirdly, section 39 which makes it an offence to disclose to others the fact that a terrorist investigation is taking place and, fourthly, section 58 which creates offences relating to obtaining information which may be useful to terrorists⁴. In addition the Terrorism Act extends the scope of incitement to violence, an offence that can be committed by the means of media publication⁵.

The underlying problem with these offences is that, as commentators have shown, the definition of terrorism in the Act is drawn very

³ E.g. *R (Kurdistan Workers' Party and others) v Secretary of State for the Home Department* [2002] EWHC Admin 644, [2002] A.C.D. 99, at para 43, on the dilemmas of Estella Schmid, a journalist reporting on the Kurdistan nationalist movement in the United Kingdom.

⁴ For discussion of these offences see Walker (2002), n.1 above, chapters 2.5, 3.2, 4.6, 6.6; Fenwick, n.1 above, pp. 85, 90-91, 98

⁵ *R v Most* (1880-81) L.R. 7 Q.B.D. 244

wide and can include not only dreadful atrocities committed against civilians but a much wider range of activities, such as damage to GM crops or animal liberation activities, that might, reasonably, be handled by the ordinary rules and procedures of the criminal law⁶. Likewise, terrorism is so defined as to include the activities of individuals and organisations involved in armed struggle against oppressive dictatorships. The constitutional assumption is that police, ministerial and prosecution discretion will be exercised reasonably so as to avoid oppressive uses of the Act. However this discretion, the judgment between politically motivated unlawful actions which are properly subject to special powers and those which are not, belongs to the authorities, not to the media. The latter are required to report suspicions etc. that relate to the wide, ethically and politically undifferentiated, conception of terrorism contained in the Act.

Most of the offences, though not the meetings offence (section 12), include a “reasonable excuse” defence⁷ and it is in this context that the extent of the legal protection of media freedom is likely to be considered by a court⁸. Section 58, concerning the possession of information useful to terrorism, requires only that the defence raise “an issue” which the trial court accepts as being

⁶ E.g., Fenwick, n.1 above, pp. 78-80; Walker (2002), pp. 26-7; R (*Kurdistan Workers' Party and others*) v Secretary of State for the Home Department [2002] EWHC Admin 644, [2002] A.C.D. 99, at [36]

⁷ The Terrorism Act 2000, ss. 19(3), 38B(4), 39(5)(b) and 58(3)

⁸ Cf, *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin) (public order offences)

relevant to a reasonableness defence. The emphasis given to media freedom under both the Convention and in common law is a strong reason for the courts to accept that good faith journalism is such an “issue”. If so, the burden then shifts to the prosecution to prove that the defence is not reasonable in the circumstances⁹. The disclosure offences (sections 19 and 38B) or the interference offence (section 39) require the defence to prove, on a balance of probabilities, that the reasonableness defence is made out¹⁰ which is likely to require more than simply providing evidence that the *actus reus* was committed in the course of good faith journalism. The requirement that prosecutions require the consent of the Director of Public Prosecutions or the Attorney General, part of whose purpose is to consider “the public interest, and to protect defendants from the risk of oppressive prosecutions”¹¹, may give some protection to the media but illustrates further the fundamental problem for journalists of trying to assess which of the range of political causes and actions that are capable of being judged terrorist will also be subject to prosecution under the Act.

THE RELEVANCE OF THE TURKISH CASES

The Terrorism Act 2000 offences do not directly restrict freedom of expression. Article 10 ECHR, however, protects not just expression itself but the conditions

⁹ The Terrorism Act 2000, s. 118

¹⁰ Cf *Attorney General's Reference (No 4 of 2002)* [2003] EWCA Crim 762 (regarding s. 11(2) Terrorism Act 2000)

¹¹ *R v DPP ex parte Kebilene* [1999] 3 W.L.R. 972, 977, per Lord Steyn

necessary for expression. The power of journalists to protect their sources, for example, is “one of the basic conditions for press freedom”¹². Other “basic conditions” for effective journalism can reasonably be thought to include matters, such as holding meetings, obtaining information and respecting confidentiality, whose legality is brought into question by the Terrorism Act. The extent to which the basic conditions of journalistic activity require protection will partially derive from the content of political expression that Article 10 protects. The Turkish cases illustrate the principles and scope of Article 10 protection for political expression, including journalism, made in relation to a situation of serious political violence much of which clearly involves “terrorism” as defined by the 2000 Act¹³. These principles may need to be taken into account¹⁴ when a court is addressing the reasonableness or proportionality of any criminal limitation on the basic conditions necessary for such expression.

The cases in issue were brought by newspaper owners, journalists, academics, other commentators, even poets, who were prosecuted by the Turkish authorities in the early 1990s¹⁵. The background was the violent anti-Turkish,

¹² *Goodwin v United Kingdom* (1996) 22 E.H.R.R. 123 at [39].

¹³ The principal non-state protagonist, the P.K.K., is a proscribed organisation under Schedule 2 of the Terrorism Act 2000.

¹⁴ S. 2 Human Rights Act 1998

¹⁵ For a list up to 2000 see Walker (2002), n.1 above, p.66. For summary of cases: European Human Rights Law Review “Freedom of Expression: Convictions for Publications of Material Relating to the Military Actions of the Authorities in

separatist, struggle of the Kurds, waged, in particular, by the PKK¹⁶ and the violent response of the Turkish police and military forces. The Turkish anti-terrorism laws, unlike the provisions of the Terrorism Act, were specifically aimed at political expression. They made it an offence to express, in various forms, ideas which undermined the territorial integrity and national unity of Turkey and these included expressions of support for the PKK. The offences did not require proof of an intention to incite violence (although some prosecutions included incitement to violence). Turkish law also made it an offence to identify state officials involved in counter-terrorism activity. A vital aspect of the background to the Turkish cases were allegations of killing, torture and destruction made against the anti-terrorists forces of the Turkish army and police¹⁷.

THE JUDGMENTS

South East Turkey” (1999) E.H.R.L.R. 6 636-9. Turkey has now accepted that this part of its anti-terrorism laws is in need of urgent review and friendly settlements have been agreed in more recent cases which the Court had declared admissible, e.g. *Zarakolu v Turkey* Ap. 37061/97 and *Özler v Turkey* Ap. 25753/94.

¹⁶ Partiya Karkeren Kurdistan (the Kurdistan Workers Party) an illegal organisation under Turkish law and alleged to be a terrorist organisation.

¹⁷ These also gave rise to a series of ECHR cases, see: C. Buckley “The European Convention on Human Rights and the Right to Life in Turkey” (2001) 1 Human Rights Law Review 1 35

In all but three cases¹⁸, the Court of Human Rights decided that there had been a violation of Article 10. The issue for the Court was focused on proportionality and the need for the prosecutions in a democratic society. The cases are grounded on the general principles dealing with freedom of political expression and its importance in the maintenance of a democratic society characterised by pluralism, tolerance and broadmindedness¹⁹. The Court has long recognised that states are entitled, with a considerable margin of appreciation, to adopt special measures to combat terrorism²⁰ and these can extend to media restrictions. Such restrictions remain subject to the principles of Article 10. Even in a context of political violence, Article 10 protects ideas and information that may “offend, shock or disturb the state or any section of the population”²¹. Though states have a margin of appreciation, the decisive role for the Court in determining whether a restriction is ‘reconcilable with freedom of expression’, is emphasised.

¹⁸ *Zana v Turkey* (1999) 27 EHRR 667; *Süreç v Turkey (No 1)* (1999) Ap 26682/95, *Süreç v Turkey (No 3)* Ap 24735/94.

¹⁹ E.g. *Zana*, n.18 above, at [51]. Non-Turkish authority for these basic principles, cited in later Turkish cases, includes *Fressoz and Roire v France* (2001) 31 E.H.R.R. 2 at [45].

²⁰ E.g. *Brogan v United Kingdom* (1989) 11 EHRR 117 at [48] citing, to more general effect, the surveillance case *Klass v Germany* (1979-80) 2 E.H.R.R. 214 at [48].

²¹ First used by the Court in *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737 at [49].

There is an essential role for the media. It has not only a right but something close to a duty to impart information and ideas to the public and to facilitate the free expression of analysis and opinions even on difficult political issues²². In respect of Article 2 and 3, states have a positive duty to protect journalists and the media²³. Nevertheless, the media has no special privilege which would allow it to overstep reasonable and proportionate restrictions. The ‘duties and responsibilities’ clause in Article 10(2) is cited as imposing particular responsibilities on the media in situations of conflict and tension. As in the United Kingdom, the positive duty to protect life under Article 2 may require appropriate restraints on the media to prevent reporting that may amount to an incitement²⁴. As the Turkish cases make clear, the duties and responsibilities of the media can extend to owners and editors.

The principal locus of the Court’s concern is on the distinction between expression that may be “offensive, shocking or disturbing” and expression that goes further and is an incitement to violence. The problem is that the applicable principles are expressed at a level of generality that can have little determining effect on the outcome of cases. Given the problems of dealing with speech against a climate of violence and given the non-absolutist nature of Article 10, the Court seems to hedge its bets. There is, it says, little room within Article 10 for

²² E.g. the Commission’s Report in *Aslantis v Turkey* (1999) Ap. 25658/94 at [47].

²³ *Özgür Gündem v Turkey* (2001) 31 E.H.R.R. 49 at [43].

²⁴ *Venables and another v News Group Newspapers* [2001] 1 All E.R. 908 citing *Osman v United Kingdom* (2000) 29 E.H.R.R. 245 at [116].

restrictions on political speech and debate on questions of public interest. The highest protection, higher than given to speech attacking individuals or politicians, is for criticism of governments and their policies. Public opinion expressed mainly through the media, must be free to scrutinise government actions and governments, given their dominant position, must be prepared to accept criticism without resorting to criminal sanctions²⁵ even if the criticism can be regarded as provocative or insulting or which involve serious allegations against security forces²⁶. Nevertheless the Court accepts that, as guarantors of public order, states may use appropriate, non-excessive, criminal measures against the unjustified attacks and criticisms of its adversaries; its duty is to show “restraint” in this matter especially where alternative means of reply are available²⁷. The formula here is, arguably, a little loose. It brings together two issues which, under free speech principles, are properly separated: restrictions on expression which are justified by the need to maintain public order and restrictions aimed at the criticisms of adversaries, whether justified or not. If the latter is the dominant concern of the state something stronger than “restraint” is required. In other formulations, however, the Court is much clearer: “where a publication cannot be categorised as inciting to violence, Contracting States cannot with reference to the prevention of disorder or crime restrict the right of the public to be informed by

²⁵ E.g. *Baskaya and Okçuoglu v Turkey* (2001) 31 EHRR 10 at [62].

²⁶ *Özgür Gündem*, n. 23 above, at [60].

²⁷ *Karatas v Turkey* (1999) Ap. 23168/94, see *Castells v Spain* (1999) 14 E.H.R.R. 445 at [46].

bringing the weight of the criminal law to bear on the media”²⁸. Where speech, in its terms, appears to go further than threaten public order and incites violence, the Court allows states a wider margin of appreciation on the need for criminal restraints²⁹. Such tolerance of restraint on political speech against a background of political violence is, however, qualified by the Court. Restrictions on political speech must be closely scrutinised for compatibility with Article 10 and the Court is empowered to make the ‘final ruling’ on the matter³⁰ and determine for itself whether the interference was a ‘fair balance’ between state and individual³¹, being proportionate and based on ‘relevant and sufficient’ reasons³². In particular the Court is wary that states may use the fact of background political violence to create criminal offences in respect of political speech, particularly media reporting of banned organisations, that, though provocative, insulting, offensive, shocking or disturbing does not incite violence and should be protected³³.

There is, in a sense, something for everybody in these familiar general principles with which the Court begins its assessment of the legality of criminal convictions based on expression. An examination of the more particular

²⁸ *Erdogdu v Turkey* (2002) 34 E.H.R.R. 50 at [71].

²⁹ *Baskaya*, n.25 above, *ibid.*

³⁰ E.g. *Okçuoglu v Turkey* (1999) Ap. 24246/94, at [43].

³¹ *Zana*, n.18 above, at [55].

³² *Zana*, n.18 above, at [51]. For greater particularity on the Court’s role see *Association Ekin v France* (2002) 35 E.H.R.R. 35 at [56].

³³ *Süreç and Özdemir v Turkey* (1999) Ap. 23927/94 at [63].

considerations that were important in determining the outcomes of the Turkish cases contributes to understanding how the Court weighs the significance of its general principles and what are the matters that it focuses upon in their application. It is suggested that they are relevant to the issue of media freedom under the Terrorism Act 2000.

The Terrorism Act 2000 does not directly ban the reporting of the activities of proscribed organisations or the publishing or broadcasting of the direct speech of leaders or members. However, the general power of ministerial censorship of broadcasting that was used in the Northern Ireland ban remains³⁴. Any media ban which had a significantly detrimental effect on the communication of information and ideas, would be hard to make compatible with the Convention. *Süreke and Özdemir v Turkey* (1999), for example, involved a published interview with a leader of the PKK. The Court made it clear that criminal sanctions based on the simple fact of interviewing the leader of a proscribed organisation, thus allowing him to speak for himself in a hard hitting, one-sided and uncompromising and implacable way, could not, without more, be justified under Article 10(2)³⁵. Implicitly the right to “receive information and ideas” was in issue since any such ban would show a failure to have sufficient regard to the public’s right to be informed of a “different perspective” on the matters in issue.

³⁴ s. 336(5) Communications Act 2003 and Clause 8(2) of the Agreement between the government and the BBC.

³⁵ *Süreke and Özdemir*, n.33 above, at [61]; see also *Süreke v Turkey* (4) (1999) Ap. 24762/94.

For the Court the issue is whether or not the content of the interview amounts to an incitement. The ‘duties and responsibilities’ clause in Article 10(2) imposes particular burdens on the media in situations of conflict and tension lest by the publication of views of representatives of organisations which resort to violence against the State it become a vehicle for the dissemination of hate speech and the promotion of violence³⁶. However, absent incitement, the Court is openly wary of states using a ban on proscribed organisations to prevent the public being informed of the position of proscribed groups. Broadcasting bans may be easier to justify given the immediacy and power of broadcasting³⁷ nevertheless any justification depends on showing that there was relatively little impact on the media’s ability to report and comment on the issues.

In order to determine whether not a restriction on expression is justified under the terms Article 10(2) the Court attends both to the meaning of the written or spoken words (or, presumably, to other signifying features of non-verbal expression) and to the context in which the expression took place. The balance of

³⁶ E.g., *Süreke and Özdemir*, n.33 above, at [63]. This duty is not confined to the media but to ‘persons addressing the public’, *Aslantas*, n.22 above, at [47].

³⁶ Bans on direct speech were upheld by the Commission in *Purcell v Ireland* Ap. 15404/89 and *Brind v United Kingdom* (1994) 18 E.H.R.R. CD76. The reasoning stressed the differences between broadcasting and the print media and the relatively minor impact of the ban on the ability of the media to report on the actions of proscribed organisations.

words and context was the basis of regular dissents or separate concurring judgments.

The words in issue must be capable of being an incitement to violence and this matter, initially, can be addressed independently of context. The factor which “it is essential to take into consideration” is whether violence, armed resistance or insurrection is encouraged³⁸. There is no requirement that journalists or commentators display neutrality in respect of the aims, the purposes sought, of armed struggle³⁹. If, for example, the overall thrust of the piece in issue is critical of the state then it will be protected by Article 10 even if the words are virulent and the criticism acerbic⁴⁰. The language used can be aggressive and the judgements harsh, but the piece will still be protected by Article 10 so long as it does not glorify or encourage violence⁴¹. Words such as “resistance”, “struggle” or “liberation”⁴², used approvingly, or accusations of “state terrorism” or “genocide”⁴³ are in themselves insufficient to constitute incitement. Descriptions and arguments couched in uncompromising terms may simply reflect the hardened attitudes of the different sides to a struggle rather than be incitements to

³⁸ *Ceylan v Turkey* (2000) 30 EHRR 73 at [36].

³⁹ As in *Okçuoglu*, n.30 above, at [45].

⁴⁰ *Ceylan*, n.38 above, at [33].

⁴¹ Eg *Sener v Turkey* (2003) 37 EHRR 34 at [44]-[45].

⁴² *Gerger v Turkey* (1999) Ap 24919/94 at [50].

⁴³ *Ceylan*, n.38 above, at [33].

violence⁴⁴. Expressions of determination and a refusal to compromise are not in themselves incitements⁴⁵. Justification of political violence of the past will not necessarily be an incitement⁴⁶.

Acerbic criticism of state policy, without more, will not be incitement. The words used, albeit to be discounted against context, must be capable of being an incitement to violence. In some Turkish cases, the Court emphasised the need for the words in issue to involve a clear encouragement of violence. For example, the words ‘we want to wage a total liberation struggle’ were, in the context of the violent struggle between the PKK and Turkey, sufficient to justify a criminal restriction under 10(2). Restriction was further justified in so far as the overall burden of the publication was that recourse to violence is a necessary and justified means of self-defence⁴⁷. Passages in publications that advocate intensifying the armed struggle, glorify war, espouse an intention to fight to the last drop of blood, can be seen, in terrorist, civil war, context as incitements to violence⁴⁸. Passages which seek to instill deep seated and irrational hatred, which stir up base emotions and harden existing prejudices or which appeal to a desire for bloody revenge can

⁴⁴ *Süreke (No 4)*, n.35 above, at [58].

⁴⁵ *Süreke and Özdemir*, n.33 above, at [61].

⁴⁶ *Gerger*, n.42 above, at [47].

⁴⁷ *Süreke v Turkey (No 3)* Ap. 24735/94 8th July 1999 at [40].

⁴⁸ *Özgür Gündem*, n.23 above, at [65].

be incitements including where the object of the irrational hatred and the desire for revenge are the security forces⁴⁹.

The authorities may claim that words have a hidden or implicit meaning of support for violence. The Court recognises this as a possibility but the burden is on the authorities to produce evidence of the double meaning. Expressing support for a proscribed group engaged in violent actions but at the same time claiming to reject political violence or referring to attacks on civilians as “mistakes” may be treated as a contradiction but which is also an ambiguity and, in context, is reasonably capable of being an incitement⁵⁰.

The Court of Human Rights, in determining whether a restriction on words capable of being inciting is proportionate, will have regard to the context in which the words were published. Contextual matters can occasionally be significant in confirming the inciting quality of the words. Words spoken by political leaders, for example, may have this effect⁵¹. More commonly contextual factors serve to deny the proportionality of the state’s restrictions despite words which, in other contexts, could be capable of inciting violence. For example, ‘its time to settle accounts’ was not an incitement when read in the overall context of

⁴⁹ *Süreke (No 1)*, n.18 above, at [62].

⁵⁰ As in *Zana*, n.18 above. See also *Hogefeld v Germany* (2000) Ap. 35402/97 (urban terrorism)

⁵¹ As in *Zana*, n.18 above, (former mayor), cf *Ceylan*, n.38 above, (trade union leader)

an essentially romanticising literary work⁵². Where the overall tone of a piece is generally peaceful, suppression on the basis of an occasional violent phrase, in a work with a generally peaceful tone is arguably disproportionate⁵³. Similarly criminal restrictions may be disproportionate if the type of publication means that only a very limited threat to national security, public order or territorial integrity is likely. Publication in a small circulation journal distributed away from the source of violence⁵⁴ or through reading to a self-selected group at a funeral⁵⁵ or in a book rather than the mass media⁵⁶ may indicate the absence of a need to suppress. Contextual factors may create an intellectual or sentient distance from the violent reality and the Court recognises a need to protect the autonomy of artistic speech, and above all, academic discourse, which is addressed to the circumstances of violent struggle. Lack of impartiality in such speech does not justify restriction⁵⁷ and restriction cannot be founded on claims about the underlying motive of the writer. Factors such as publication in an avowedly literary form such as a poem, novel or epic⁵⁸ or as a romantic elegy dealing with heroic figures from past

⁵² *Surek (No 4)*, n.35 above.

⁵³ See *Stankov v Bulgaria* (2001) Ap. 29221/95 at para 101, a non-Turkish case

⁵⁴ *Okçuoglu*, n.30 above, at [48] (neither were the words capable of being an incitement).

⁵⁵ *Gerger*, n.42 above, at [50].

⁵⁶ *Arslan v Turkey* (2001) 31 EHRR 9 at [48].

⁵⁷ *Arslan*, n.56 above, at [45].

⁵⁸ *Polat v Turkey* (1999) Ap 23500/94.

struggles⁵⁹ may indicate that, notwithstanding express or implicit support for a banned organisation or even for violence⁶⁰, suppression is disproportionate. An implication of this is that it will be relatively easy for the state to demonstrate the proportionality of criminal penalties relating to words capable of being incitements which are published in the mass media⁶¹. Similarly, suppression of a private individual expressing him or herself through poetry, for example, will require greater justification in terms of an incitement effect than publication by political organisations. A publication which aims at an academic or intellectual analysis of the issue, is likely to be protected even though the analysis is one which identifies and broadly supports the position of those opposing the state⁶².

The freedom of the media to name politicians, officials, military officers and others involved in counter-terrorism and to report and comment on their words and actions is an issue in the Turkish cases. Naming in a way which incites hatred and perhaps violence can legitimately be suppressed⁶³. Restrictions on the identification of officials for the reason that, by being brought into contempt, they might then become terrorist targets can be justified under Article 10(2) even in the absence of direct incitement (it may even be a positive duty on states under Article

⁵⁹ *Süreks (No 4)*, n.35 above, at [58].

⁶⁰ E.g. *Karatas*, n.27 above, at [52].

⁶¹ *Polat*, n.58 above, at [47].

⁶² E.g. *Baskaya and Okçunoglu*, n.25 above, at [64]; *Sener*, n.41 above, at [45]; *Erdogdu and Ince v Turkey* (1999) Ap. 25067/94 at [52].

⁶³ As *Süreks (No 1)*, n.49 above, at [62].

2). This is recognised by the Court in *Süreke v Turkey (no 2)* (1999)⁶⁴. This reason, however, may not be sufficient, particularly if identification is linked to serious allegations of misconduct. The proportionality of criminal suppression based on the need to protect officials' identities, can depend upon the existence of a legally available defence by which the truth of the allegations and any public interest in their publication is available to the publisher or broadcaster⁶⁵. There may be a breach of Article 10 if allegations cannot be made because it is an offence to name officials. The fact that the names of officials are already in the public domain or that other newspapers have published them without prosecution is relevant to a judgment of proportionality⁶⁶.

The proportionality of a restriction on publications can also depend on the prosecution and penal practice of the state: whether or not the state moves straight to prosecution rather than seeking changes in content⁶⁷, the persistency of the prosecution authorities, and, if there is a conviction, the severity of the penalty⁶⁸.

⁶⁴ Ap. 24122/94 at [37]-[39].

⁶⁵ The anti-terrorism legislation in the United Kingdom does not ban such information; publication could be an offence under the Official Secrets Act 1989 which, notoriously, does not have a public interest defence.

⁶⁶ *Süreke (No 2)*, n.64 above, at [39]; *Özgür Gündem*, n.23 above, at [68].

⁶⁷ *Incal v Turkey* (2000) 29 E.H.R.R. 449 at [55].

⁶⁸ E.g. *Baskaya and Okçuoglu*, n.25 above, at [66].

DISSENTING JUDGMENTS AND CONTEXT

The Turkish free speech cases are notable for dissenting opinions on the Article 10 issue⁶⁹. There were dissents against findings that there had been a violation of Article 10. The tenor of the dissent of, in particular Judge Gölcüklü, the Turkish judge, was that the Court of Human Rights failed to give sufficient margin to the state in respect of publications which arguably, because of ambiguities in what was said, disclosed an implied incitement.

There are also dissents against the no-violation decisions and, on similar grounds, concurring opinions in violation cases. These dissents, associated with Judge Palm, argue that making the distinction between words which are shocking and offensive and words which incite to violence requires less a focus on the meaning of the words and more on the context in which they are expressed. The central question for a court is whether there is a real and genuine risk that the words spoken might incite violence. This requires:

a measured assessment of the many different layers that compose the general context in the circumstances of each case. Other questions must be asked. Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words. Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of

⁶⁹ Judge Gölcüklü, the Turkish judge, also regularly dissented from the finding of a breach of Article 6, right to a fair trial, in respect of the Turkish National Security Court, which tried the applicants at first instance.

the impugned speech? Were the words far away from the centre of violence or on its doorstep? It is only by careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society”⁷⁰.

Judge Bonello in separate dissents and concurring opinions, specifically wishes to relate the Article 10 jurisprudence to the “clear and present danger” test formulated in the first half of the Twentieth Century by the United States Supreme Court. On Judge Bonello’s account of the test, its aim is to confine unprotected speech to that which “is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action”⁷¹.

It is clear from the outcomes to the cases they associated with, that the underlying purpose of the dissents by Judges Palm and Bonello was to establish the need for a higher degree of proximity between political expression and likely resulting violence than was implied by the approach of the majority. However, the “clear and present danger” test has been associated in the past with highly restrictive decisions⁷². Furthermore it and any context approach, brings an invitation to make a trade-off between the likelihood that an expression will bring

⁷⁰ In a number of cases, e.g. *Süreke and Özdemir*, n.33 above.

⁷¹ E.g. *Baskaya and Okçunoglu*, n.25 above, at [O-1111]-[O-1117], quoting *Brandenburg v Ohio* 395, U.S. 444 (1969) at 447 and other U.S. cases.

⁷² Eg *Schenk v USA* 249 U.S. 47 (1919); *Whitney v California* 274 U.S. 357 (1927)

about a forbiddable consequence (political violence, for example) and the seriousness of the consequence should it occur⁷³. The restrictive implications of such a trade-off in radical politics cases is one of the reasons why the Supreme Court no longer uses the test, at least in “hate speech” cases. The nature and degree of, for example, the “Al’qaida” threat, might imply that the possibility of such a trade off could be used to justify a greater degree of restriction on expression made against a background of political violence than could be justified under the more literal focus that the majority exemplified in the Turkish cases.

CONCLUSION

The disclosure and other offences in the Terrorism Act 2000 have the capacity to restrict the basic conditions for journalism and hence to raise issues under Article 10 ECHR. Compatibility of prosecutions for the offences with Article 10 will require reading down the offences so that any resulting restraint on freedom of expression is a restraint on expression which is capable of being an incitement to violence rather than expression which only shocks, disturbs or offends. This fundamental distinction, illustrated by the outcomes of the Turkish cases, is not expressly found in the Act but should be important if, for example, journalists or a media organisation seek to defend themselves on the grounds of the reasonableness of their activities. It is clear from the Turkish cases that harsh, partial reporting of events and of organisations associated with political violence, is protected expression and is not in itself incitement. Similarly the reporting of

⁷³ *Dennis v US* 341 US 494 (1951).

the activities and views of banned organisations and their leaders is not necessarily an incitement, nor is the naming of anti-terrorist officials, especially if they are also the subject of allegations of violent behaviour. It follows that, although the “duties and responsibilities” clause bears more heavily on the mass media than on other forms of publication, the avowedly impartial, regulated, journalism typical of UK broadcasting and, to a lesser extent, the press, would seem to have considerable scope under Article 10 for effective reporting. It is possible that restriction will come from self-censorship and a reluctance by media organisations to engage in court battles on the scope of Article 10. On the other hand it is clear that nothing in Article 10 should prevent prosecutions relating to the publication of expressions of hatred, the justification of violence and so on. The context of an expression is important and it is a matter on which the Court is divided. It is not clear that the minority’s stress on context will necessarily support a less restrictive approach and it may be that the majority position which, though it recognises context, requires that the words be expressly capable of incitement, may, in relation to the reporting of the terrorist threat, be more permissive of reasonable journalism. The discretion of police and prosecutors and the UK media’s sense of its responsibilities, should, it is suggested, be refined by awareness of the Court of Human Rights’ understanding, as illustrated by the Turkish cases, of the border between incitement and the merely offensive, disturbing or shocking. On that basis reasonable and effective reporting of the “war on terrorism” and of other forms of radical politics, can be sustained.