

Final Report

on The Danish Helsinki Committee monitoring of the trial in Diyarbakir, Turkey, against 56 mayors.

Summary:

In April 2008 the court in Diyarbakir, Turkey, found 53 mayors from the Kurdish minded political party DTP guilty of having glorified a criminal organisation by sending a letter to the Danish Prime Minister, encouraging him not to withdraw the transmission license of a television broadcast station, ROJ TV, which via satellite transmits from Denmark in i.a. Kurdish. The ruling is based on the finding that the television station is a communication channel for the terrorist movement PKK. The Danish Radio- and Television Board has two times turned down Turkish reports against ROJ TV as unfounded. The mayors were acquitted for the indictment of having supported a terrorist movement. The punishment was stipulated to imprisonment in 75 days, but the court decided that the convicts in stead of imprisonment could pay a fine of 1875 YTL. The sentence can not be appealed. The Helsinki Committee on Human Rights finds the trial with certainty to violate article 6 of The European Convention on Human Right on fair trial and the sentence most probably to violate article 10 on freedom of expression. The Committee call on the functioning of the Turkish courts to be made part of the current reform negotiations.

The Facts:

The letter

On the 27.12.2005 the following letter was sent to the Danish Prime Minister, signed by 56 mayors from the southeastern part of Turkey:

Diyarbakır, December 27, 2005

Dear Mr. Anders Fogh Rasmussen:

This letter is to express our concerns about the ongoing debates and developments around the situation of ROJ TV. As members of The Democratic Society Party (DTP), who are mayors of 56 municipalities located predominantly in the Kurdish-populated regions of Turkey, we are worried about the anti-democratic approaches through which the case of ROJ TV is being handled by the Turkish government in the international arena. Unfortunately, we observe that there still exists a fundamental difference between Turkey and the European civilization in matters of freedom of press and expression.

That the ROJ TV broadcasts are aired from Europe is a disturbing fact for us, too. This has been a direct consequence of the constitutional and legal regulations that do not allow for free Kurdish broadcasting in Turkey. It was only thanks to the pressures in the process of Turkey's integration with the EU that Turkey has granted limited rights for broadcasts in Kurdish language, with state television airing 45-minute programs on a weekly basis. Privately-owned local television stations wanting to broadcast in Kurdish, on the other hand, are still faced with legal and often arbitrary administrative obstacles. As is also well-known by the international community restrictions on freedom of expression are situated at the heart of the authoritarian political tradition that has repressed any kind of difference in terms of culture, language and identity in Turkey. We expect the Turkish government to abide by and fulfill the political criteria stated in the Copenhagen Document.

So, rather than banning the ROJ TV, we hope that Turkey will eventually legalize, embrace and become a constituent of the voice of ROJ TV. We wish that one day ROJ TV will be able to broadcast from nowhere else but from Istanbul, Ankara or Diyarbakir, and will be only one among many other Kurdish TV stations that will be launched also with the support of the Turkish government.

It is a well-known fact that ROJ TV has millions of audiences within and outside Turkey. Whether one agrees or not with the broadcasting policy of the TV station, the content and arguments of its programs, is something to be discussed, and should always be discussed given the fact that free flow of information and ideas is the lifeblood of political debates. But the banning of ROJ TV would not contribute to our efforts to create a truly pluralistic and democratic life in Turkey. We believe that, within the current state of politics, the voice of ROJ TV represents a constructive and positive contribution towards the progress of freedom of expression, that is one of the essential foundations of European democratic civilization that cannot yet be fully guaranteed within Turkey.

For a truly democratic life to flourish in Turkey, ROJ TV should not be silenced. This is the sincere and common demand of the people we represent at the level of local governments. The elimination of the voice of ROJ TV would mean the loss of an important vehicle in the struggle for democracy, human rights and fundamental freedoms of democratic civilization.

*Kind regards,
(56 signatures)*

ROJ TV

ROJ TV mentioned in the letter broadcasts via satellite from Denmark in pursuance of a Danish license. The target group is i.a. Kurdish speaking persons in Turkey.

The Turkish government has in several cases requested the Danish government to withdraw the license urging that the station is connected to PKK, which is considered to be a terrorist organisation. The UK and France have previously banned the predecessors of the ROJ TV activities, MED TV and MEDYA TV, and 2008 the German Interior Ministry in accordance with the German Law on Organisations banned the broadcasts of ROJ TV in Germany.

According to Danish law a broadcasting license can be withdrawn if the programmes in any way encourage hatred based on race, sex, religion, nationality or sexual observance. The question of withdrawal is to be decided by a Radio- and TV Board. This board has in two cases in 2005 and 2007 found no basis for withdrawal. The 2005 decision of the board was based on the interpretation that “...encouragement to hatred...” means direct requesting. Therefore the fact that a person, an organisation or the like has a specific attitude can not in itself lead to it being encouragement. This is also the case even if the person or the organisation in the surroundings is known to have that attitude. Furthermore the Board has in the interpretation of “encouragement to hatred” stressed that statements or information, which by any of the parties could be understood or interpreted as encouragement or urging, must be stated with the purpose of encouraging or urging to hatred (intention) in order to be embraced by the article. Transmission of information in itself will not be embraced by “encouragement”. A further interpretation would prevent a free press from informing and enlightening about the relations and the events in society and in the world, which the press finds it relevant to inform on. This involves according to the estimate of the Board further that a possible effect of transmission of information, as for instance transmission of news, in itself is not covered by the article...”.

The trial

The indictment

The indictment by the chief prosecutor of Diyarbakir dated 13.6.2006 prosecutes the 56 mayors in accordance with Article 250 in the Criminal Procedure Code for violation of the Articles 314/3 and 220/7 of the Penal Code (No. 5237), referring to Article 314/2 of the Penal Code and Article 5 of the Anti-Terror Law (No. 3713) and the Articles 53 and 58/9 of the Turkish Penal Code

The indictment refers i.a. to the following punishable acts (summary):

- Before the letter was sent the competent organs of the state of the Turkish Republic began its attempts to shut the television channel called ROJ TV, which broadcasts over the satellite with its broadcasting license obtained from Denmark.
- ROJ TV is the broadcasting organ of the illegal organization PKK, which has been established to separate some parts of the Eastern Anatolia and South Eastern Anatolian regions from the State of the Turkish Republic through armed struggle and to establish a separate state based on Marxist-Leninist ideology.
- The above mentioned letter has been stated to be written in order to voice a legal and democratic request. However what has not been taken into consideration is that ROJ TV broadcasts in line with the views of the PKK terror organization and that the top-level officials of this organization also take their place in the administration of the television channel.
- In reality, what is trying to be achieved with the letter prepared to voice democratic requests is to inhibit the closure of ROJ TV, which makes propaganda of the PKK terror organization, just like MED TV and MEDYA TV, which were shut down. Through this the aim is the continuation of the broadcasting of one of the organization's propaganda channels. This has been admitted at the end of the letter through the statement “the elimination of this voice would mean the loss of an important mechanism in the struggle for democracy, human rights and democratic civilization's fundamental freedoms”.
- Abdullah HICAP, the Chairman of the Board of Directors (of ROJ TV), has at the same time participated in the programs with the PKK/KONGRA-GEL terror organization's executive council. It is not possible that the defendants, due to their positions, were not aware of this situation.
- Therefore the real aim of the defendants' requests is to prevent the closure of the television channel that makes propaganda for the terror organization and to halt any efforts to deprive the organization of a visual propaganda tool.
- Through this behavior of theirs they have aided the illegal PKK/KONGRA-GEL terror organization knowingly and willingly.

The court sessions

9 sessions were held in the Diyarbakir 5th Heavy Criminal Court in the period from September 2006 to April 2008.

The court had 3 judges sitting. The indictment were read by and the interrogation of the indicted persons made by the chairman of the court. The prosecutor was situated in line with the judges at a raised bar and was dressed in a gown similar to that of the judges. The defence lawyers were placed on the floor and were wearing different gowns. The prosecutor entered the room and left it together with the judges. The prosecutor confirmed that he is present at the considerations of the judges and spends breaks during the sessions together with them. They live in special houses for judges and prosecutors and they have a common professional organisation.

The monitoring of the Helsinki Committee

The Danish Helsinki Committee for Human Rights has attended 5 of these court sessions and has had meetings with the Turkish prosecution authority, several of the lawyers for the defence, several of the indicted mayors and with a number of human rights organisations in Diyarbakir.

The sentence

The sentence dated 15.4.2008 acquitted 53 of the mayors for violation of the articles mentioned in the indictment, but found them guilty in violation of article 215 of the same law by having glorified a criminal organisation.

3 mayors, who had not been present at the meeting where the decision to write the letter was made, were completely acquitted.

The 53 mayors were each sentenced to 3 month imprisonment, which because of their confessions were reduced to 75 days imprisonment. However the court decided that the convicts in stead of serving the imprisonment could choose to pay fines of 25 Turkish Liras per day, totalling a fine of 1875 Liras, corresponding to about 500 €. According to information they have all chosen that option. The sentence can not be appealed.

The considerations and grounds of the court

The court found it proven that there is what was described as an “organic connection” between ROJ TV and PKK, and ROJ TV in reality to be the media channel of PKK towards the public. That is concluded from the evidence, which has consisted of TV broadcasts with i.a. PKK leaders, statements from defected or imprisoned PKK members, identity between persons in ROJ TV and PKK, the history of establishing ROJ TV etc.

ROJ TV is therefore by the court through the broadcasts found to have committed and to continue to commit a criminal act by the support to PKK, which is considered an armed terrorist organisation, as they describe the criminal acts of PKK as positive and legal and encourages the use of violence and to commit crimes. As the security situation in Southeast Turkey is, the court found it justified to limit the freedom of expression. The court found it evident that ROJ TV exceeds those limits of freedom of expression and opinion.

As mentioned the court however acquitted the mayors for the indictment of having supported terrorism. The court based it on the fact that the letter does not express any support or sympathy for the substance of the broadcasts or for the broadcast policy of ROJ TV and therefore does not support PKK.

As PKK was indeed found to be a criminal organisation the mayors were in stead convicted for having violated Article 215 in the Penal Code, which forbids the glorification of criminal persons and organisations. The glorification is according to the court due to the emphasizing of the positive sides of the existence of ROJ TV, for instance by describing the TV station as a constructive and positive contribution to the development of freedom of expression, which is an important tool in the fight for democracy, human rights etc.

Assessment of the sentence related to The European Convention on Human Rights

Fair Trial (Article 6)

The Court of Human Rights have passed several decisions on the interpretation of article 6.1., which gives anyone the right to a fair trial “*by an independent and impartial tribunal*”.

Irrespective of the slight difference in the composition of the national legal systems the Court has drawn a clear line in support of declaring it a violation of Article 6 in situations where the prosecution has access to attend the considerations of the judges and through that to their internal deliberations, discussions on the importance of the evidence and the question of guilt¹.

The Helsinki Committee considers it to be beyond doubt that Turkey violates Article 6.1. by having given the representative of the prosecution access to attend the considerations of the judges during this case. This violation must be considered especially serious, as it raises the question of the justice of the foundation of the sentence.

According to information this trial is in this aspect not different from other trials in Turkey. “The impartiality of the judiciary” is also one of the points mentioned in the yearly EC Progress Reports (2008 Report p. 10, 67 and 71), which however does not especially mention these aspects of the functioning of the Turkish courts.

The Helsinki Committee call on the presence of the prosecutors during the considerations of the judges etc., to be made part of the current reform negotiations between EC and Turkey.

Freedom of expression for public servants (Article 10)

The grounds of the sentence read: “*Hence, defendants who are not only the mayors of the regions that elected them, but as the mayors of the State of the Republic of Turkey should act more responsibly when it comes to the long struggle against terror, and if they are going to take up any activity, then they should take up initiatives to help end the terror (which) has led to the loss of lives of thousands of innocent citizens and hundreds of martyrs from the security forces and (to) raise efforts to build an atmosphere of peace and security.*”

These remarks must be interpreted as the court stating a special obligation for the convicts in their capacity as mayors in the Turkish state to express themselves in conformity with the governmental policy for fighting terrorism.

Article 10 confers freedom of expression to “*everyone*”. Basis is therefore that the same freedom of expression apply to everybody. The practice of the Court of Human Rights have also stated that for instance military personnel have the same freedom of expression as other citizens, as far as they do not reveal classified information.

The Court of Human Rights is not seen to have passed decisions on the freedom of expression of mayors. Such decisions would probably also only have limited value as precedent as the legal

¹ Borgers 30/10 1991 Vermeulen 20/2 1996, Van Orshoven 25/6 1997, Lobo Machado 20/2 1996, Kress 7/6 2001, Kosser 21/3 2002, APBP 21/3 2002, Theraube 20/2 2002.

situation of mayors differs with each country. In Turkey the tasks of mayors are seen to be of administrative character and not political, although they are democratically elected.

A related yet different problem has occurred in cases on *Berufsverbot*, in which the Court has been tasked to decide whether it is an encroachment in the freedom of expression to demand loyalty and support to the constitution in order to obtain or remain in public service. The decisions of the Court have been so specific that you can hardly deduce a general line.

The legitimation in Article 10.2 of the possibility of limitation in the freedom of expression requires it however to be done through law and “...*be necessary in a democratic society due to the national security, territorial integrity and public security...*” etc. The sentence of the Diyarbakir court does not refer to any legal basis for a special limited freedom of expression for mayors.

If the court has attached this any importance in its decision, the Helsinki Committee must consider it to be a violation of article 10.

Freedom of expression for political statements

On ROJ TV

As mentioned before the court found PKK to be a terrorist organisation and that ROJ TV by supporting it commits criminal offences. The court states that ROJ TV exceeds the limits of freedom of expression. The sentence reads: “*It is substantive that as explained above concretely, ROJ TV has and continues to commit a crime by endorsing and claiming the actions of PKK, an armed terror organization, in public through its broadcasts, and sees the crimes by the mentioned organization as positive and legitimate. It's clear that its broadcasts exceed the borders of freedom of expression and opinion and it is an action of incitement to use violence and commit crimes.... It could be alleged that the broadcasts made by the television channel called ROJ TV should be evaluated within the scope of freedom of expression. However, it should be accepted free of explanation that this does not cover the fact that the broadcasts are made in favor of PKK, which has the attributes of an armed terror organization accepted by international law to implement violence and violent methods, and the mentioned broadcasts making the propaganda of the organization.*

As a result, evaluating an organization that takes up terror positively, approving their acts, supporting and defending it can only mean that there is a desire for the continuation of violence and incitement of it. When the sensitive situation in terms of security in the South East Anatolian Region and the terror atmosphere that is wished to be created there is taken into account it is not possible to evaluate the propaganda and the justification of the terror organization within the scope of freedom of expression.”

On the mayors

The considerations of the court as to the question of freedom of expression of the mayors nevertheless to give a statement in support of the non-closure of ROJ TV are seen from the following remarks in the grounds of the sentence: “*In the letter written there are no expressions that show embracement of or support for ROJ TV's broadcasting policy and furthermore in the letter mentioned they have said that the broadcasting policy of ROJ TV can be a matter of discussion. Hence, since through the letter written it can not be proved that the defendants have a*

secret aim of aiding the PKK terror organization it has been concluded that the defendants have not committed the crime of knowingly and willingly aiding the organization stated in Article 314/2 via Article 314/3 and 220/7 of the Turkish Penal Code No. 5237.

Another restriction brought upon the freedom of expression has been imposed through Article 215 of the Turkish Penal Code No. 5237. With the mentioned article the glorification of a crime or of an individual because of a committed crime publicly has been considered a crime and has been excluded from the scope of freedom of expression.

It has been observed that within the contents of the letter the defendants have expressed that the closure of ROJ TV shall not contribute to the building of a plural and democratic life in Turkey, in the present political atmosphere ROJ TV representing a constructive and positive effort in the development of freedom of expression, which is one of the touchstones of European democratic civilization, but which has not been totally procured in Turkey, the closure of ROJ TV would mean a loss of an important mechanism in the struggle for democracy, human rights and the fundamental freedoms of the democratic civilization. With such a way of expression it is seen that the television channel called ROJ TV, which has been determined in detail above to broadcast in favor of a terror organization called PKK, which the State of the Republic of Turkey and member states of EU together with international law have accepted to be a terror organization and is struggling against, is being glorified. In general when the mentioned letter is evaluated as a whole it has been understood that there is an effort to show the television channel called Roj TV, which tries to harm the public order by orienting the people of region to violence and terror methods, as being good and acceptable, support is shown, by owing up to it the channel is defended before the Denmark State as well as before the public. There is also a desire to effect the Danish state through efforts to make the existence of the television channel known in the other member states of the EU and furthermore that by showing the television channel as being positive its value is raised...

Furthermore, it is foreseen both by jurisdiction and by the defendants that by writing the mentioned letter freedom of expression and opinion can be interfered with. Because it has been seen that the letter which is the subject of the court case, has been used as propaganda material before international law and various organs of EU through efforts during the stage of investigation and prosecution. “

It is seen that the court has found the conviction not to be a violation of article 10 in The European Convention of Human Rights on freedom of expression referring to “public safety”.

Article 10.2. does indeed have a possibility of limiting in the freedom of expression “*by law and are necessary in a democratic society, in the interests of ...public safety, for the prevention of disorder or crime...*” Statements on questions of public interest are however in the very core area of article 10 and are therefore especially protected.²

In the cases hitherto presented The European Court of Human Rights has very carefully considered the background to the statements and the purpose, including whether the purpose is to create a debate or inform about a subject of public or general interest, for instance the conduct of the authorities. This clearly has been the situation in the case in question.

² Oberschlick 23/5 1991: “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention”. Zana 25/11 1997: “In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the public opinion. Moreover the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings”

The Court of Human Rights has granted a special wide protection to the media and has demanded especially weighty grounds in order to limit the freedom of expression of the media, supporting the function of the media as organ of control, source of information and creator of opinion. It is to be assumed that this extended protection also is due to those, who express themselves in support of this freedom of the press. In this connection it is likely that it will carry weight that the Danish Radio- and TV Board has twice reviewed the material received from Turkey and which you would expect to be the most burdening material existing. In neither of the cases the Board has found the broadcasts of ROJ TV to contain anything but ordinary news in line with other European TV broadcasters.

Based on these remarks it is to be assessed whether Turkey has in this case had reasons for limiting the freedom of expression in accordance with article 10.2. There is only limited legal usage of relevance. It is however to be assumed that the starting point will be a restrictive interpretation of the authority to limit the freedom of expression in a case dealing with expressions in support of the media, especially towards Turkey which is among the countries most frequently found to have violated human rights, especially on the Kurdish question³. In the opposite direction counts that Turkey has the right to and can expect understanding for the very difficult security situation in the country, although not necessarily for all measures used in its fight against terrorism.

The ECs "Turkey 2008 Progress Report" expresses p. 16 misgivings for the use of i.a. Article 215 in the Turkish Penal Code to criminalise persons expressing also non-violent opinions on the Kurdish issue. The case of the 53 mayors is mentioned specifically in the report.

The Helsinki Committee considers it from a total assessment to be most probable that the Court of Human Rights in this case would not find it to have been "necessary in a democratic society" for Turkey to limit the freedom of expression of the mayors, and that it therefore in its conviction of the 53 mayors has violated Article 10 on freedom of expression.

Copenhagen, the 13th of December 2008.

Mikael Lyngbo

³ See i.a. Sürek 8/7 1999, Özgür Gündem 16/3 2000, Yakmurdereli 4/6 2002.