NJ 2016/336

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
21 oktober 2014, nr. 9540/07
(G. Raimondi, I. Karakaş, A. Sajó, N. Vučinić, E. Kūris, R. Spano, J.F. Kjølbro)
m.nt. E.J. Dommering

Art. 3, 10, 41 Eerste Protocol EVRM

ECLI:NL:XX:2014:801

Vrijheid van meningsuiting. Veroordeling tot ruim 13 jaar gevangenisstraf en ontneming kiesrecht wegens belediging nagedachtenis Atatürk door standbeelden met verf te besmeuren. Proportionaliteit. Schending art. 10 EVRM en art. 3 Eerste Protocol.

Klager is een Turkse burger die in Ankara (Turkije) woont. Hij heeft een universitaire studie afgerond, maar is al geruime tijd werkloos. Hij heeft het Turkse Ministerie van Onderwijs verzocht om in aanmerking te komen om leraar te worden. Dit verzoek is afgewezen. Uit protest tegen deze afwijzende beslissing besmeurt klager in de tuinen van twee basisscholen standbeelden van Atatürk met verf. Hij wordt aangehouden en vervolgd op basis van Law no. 5816 on Offences committed against Atatürk. De rechtbank veroordeelt klager wegens belediging van de nagedachtenis van Atatürk tot een gevangenisstraf van meer dan 22 jaar. De rechtbank heeft de gebruikelijke gevangenisstraf met vijf vermenigvuldigd, omdat klager vijf keer beelden heeft besmeurd.

De Turkse Hoge Raad verwerpt het beroep van klager op zijn recht op vrijheid van meningsuiting. Wel oordeelt de Hoge Raad dat de rechtbank onvoldoende heeft gemotiveerd waarom sprake is van vijf overtredingen in plaats van een. De rechtbank heeft klager hierop veroordeeld wegens een overtreding, maar heeft naast het ontnemen van het kiesrecht wel de maximale gevangenisstraf opgelegd, te weten ruim 13 jaar.

EHRM: Het antwoord op de vraag of het besmeuren van standbeelden met verf kan worden gezien als een vorm van meningsuiting hangt af van de aard van de handeling of het gedrag in kwestie, waarbij in het bijzonder moet worden gekeken naar het objectief gezien expressieve karakter daarvan, maar ook naar de subjectieve doelstelling of intentie van degene die de uiting doet. Standbeelden van Atatürk besmeuren met verf moet objectief gezien als een expressieve handeling worden beoordeeld, waarbij klager zijn 'lack of affection' ten aanzien van Atatürk tot uitdrukking wilde brengen. Hij is niet vervolgd en veroordeeld ter zake van vernieling, maar ter zake van belediging van de nagedachtenis van Atatürk. Op zichzelf kan het redelijk zijn om deze nagedachtenis te beschermen, maar de opgelegde sanctie is volledig disproportioneel. De strafbare feiten rechtvaardigen geen vergaande gevangenisstraf met verlies van stemrecht. Derhalve is sprake van schending van art. 10 EVRM. Ook is art. 3 Eerste Protocol geschonden, aangezien het gaat om het volledig uitsluiten van het kiesrecht van alle gevangenen, zonder dat een individuele beoordeling heeft plaatsgevonden.

Murat Vural
tegen
Turkije.

EHRM:

The law[1]

I. Alleged violation of Articles 10, 17 and 18 of the Convention

36. Relying on Article 10 of the Convention, the applicant complained that he had been punished for having expressed his opinions. He added that the punishment imposed on him had been excessive, disproportionate to the offence in question, and incompatible with Articles 17 and 18 of the Convention.

37. The Government contested the applicant's arguments.

38. The Court deems it appropriate to examine the complaint solely from the standpoint of Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

39. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

1 (...)

B. Merits

1. Applicability of Article 10 of the Convention and the existence of an interference

40. The applicant argued that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology,[2] (...) and to criticising the Kemalist ideology itself.

41. The Government considered that defiling Atatürk's statues was considered to be an act of vandalism with the element of insulting Atatürk's memory. By virtue of the nation's deep sense of respect and adoration for Atatürk, his memory was protected by law.

42. In the opinion of the Government, it was not the expression of views that was punishable under the Law on Offences Committed Against Atatürk, but, rather, insulting Atatürk's memory or vandalising his statues. That law did not prevent individuals from criticising the personality or ideas of Atatürk or Kemalist policies. Vandalising Atatürk's statues was not a legitimate way of expressing views under Article 10 of the Convention.

43. Having regard to its intensity, the applicant's aggression against the statues had been qualified as vandalism and vandalism was a violent way of expressing hatred. Although the applicant had the right to express and disseminate his thoughts and opinions through speech, writing, pictures and other media without recourse to violence, he had chosen not to do so. Instead, in order to justify his acts of vandalism the applicant had sought legal protection before the national courts by invoking his right to freedom of expression. In the opinion of the Government, the applicant's unlawful actions had fallen outside the scope of freedom of expression guaranteed by Article 10 of the Convention.

44. The Court reiterates that Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204). Indeed, a review of the Court's case-law shows that Article 10 of the Convention has been held to be applicable not only to the more common forms of expression such as speeches and written texts, but also to other and less obvious media through which people sometimes choose to convey their opinions, messages, ideas and criticisms.

45. For example, Article 10 of the Convention was held to include freedom of artistic expression — notably within the scope of freedom to receive and impart information and ideas — which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. 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. Hence there is an obligation on the State not to encroach unduly on the author's freedom of expression (see *Müller and Others v. Switzerland*, 24 May 1988, §§ 27 and 33, Series A no. 133). It is noteworthy that in reaching that conclusion the Court noted that Article 10 of the Convention does not specify that freedom of artistic expression comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression (*ibid*., § 27).

46. The wearing or displaying of symbols has also been held to fall within the spectrum of forms of 'expression' within the meaning of Article 10 of the Convention. For example, in its judgment in the case of *Vajnai v. Hungary* the Court accepted that the wearing of a red star in public as a symbol of the international workers' movement must be regarded as a way of expressing political views and that the display of such vestimentary symbols fell within the ambit of Article 10 of the Convention (no. 33629/06, §§ 6 and 47, ECHR 2008 [*NJ* 2009/371, m.nt. E.J. Dommering; *red.*]; see also *Fratanoló v. Hungary*, no. 29459/10, § 24, 3 November 2011). Similarly, the Court held that the display of a symbol associated with a political movement or entity, like that of a flag, was capable of expressing identification with ideas or representing them and fell within the ambit of expression protected by Article 10 of the Convention (see *Fáber v. Hungary*, no. 40721/08, § 36, 24 July 2012).

47. The Court has held that opinions, as well as being capable of being expressed through the media of artistic work and the wearing or displaying of symbols as set out above, can also be expressed through conduct. For example, in its judgment in the case of *Steel and Others v. the United Kingdom* (23 September 1998, §§ 90 and 92, *Reports of Judgments and Decisions* 1998-VII) the Court held that taking part in a protest against a grouse shoot, during which attempts were made to obstruct and distract those taking part in the shoot, and breaking into a motorway construction site and climbing trees which were to be felled and onto some of the stationary machinery which was to be used in the construction, constituted expressions of opinion within the meaning of Article 10 of the Convention even though they had taken the form of physically impeding certain activities. In doing so it rejected the respondent Government's argument that the protest activities of the applicants had not been peaceful and that Article 10 of the Convention had thus not been applicable.

48. Similarly, in *Hashman and Harrup v. the United Kingdom* ([GC], no. 25594/94, § 28, ECHR 1999-VIII) holding a protest during which a fox hunt was disrupted by blowing a hunting horn and by engaging in hallooing was held to constitute an expression of opinion within the meaning of Article 10 of the Convention.

2 Kemalist ideology is the political ideology of Mustafa Kemal Atatürk, and is based on six main pillars of ideology; republicanism, nationalism, populism, secularism, statism and revolutionism.

49. Referring to the above-mentioned judgments in the cases of *Steel and Others* and *Hashman and Harrup*, the Court reaffirmed in its decision in the case of *Lucas v. the United Kingdom* ((dec). no. 39013/02, 18 March 2003) that protests can constitute expressions of opinion within the meaning of Article 10 of the Convention. This case concerned an applicant who was arrested, detained and subsequently convicted of the offence of breach of the peace for having sat in a public road leading to a naval base in order to protest against the decision of the British Government to retain nuclear submarines.

50. In a similar vein, in its judgment in the case of *Tatár and Fáber v. Hungary* the Court considered that the public display for a short while of several items of clothing representing the 'dirty laundry of the nation' amounted to a form of political expression. The Court referred to the applicants' actions as an 'expressive interaction', and in rejecting the Government's argument that the impugned event had in fact constituted an assembly and thereby required scrutiny under Article 11 of the Convention, it held that the event had 'constituted predominantly an expression' and had thus fallen within the scope of Article 10 of the Convention (no. 26005/08 and 26160/08, §§ 29, 36 and 40, 12 June 2012).

51. The scope of 'expression' was once again the subject matter of the Court's examination in the case of *Christian Democratic People's Party v. Moldova (no. 2)* which concerned a political party which had been prevented from holding a protest demonstration in a square because the Municipal Council had considered that during the meeting there would be calls to a war of aggression, ethnic hatred and public violence. The applicant Party's objection was rejected by the Court of Appeal, which held that the Municipal Council's decision had been justified because the leaflets disseminated by the applicant political party had contained such slogans as 'Down with Voronin's totalitarian regime' and 'Down with Putin's occupation regime'. The Court of Appeal also recalled that during a previous demonstration organised by the applicant political party to protest against the presence of the Russian military in Transdniestria, the protesters had burned a picture of the President of the Russian Federation and a Russian flag. In its judgment the Court held that the applicant party's slogans, even if they had been accompanied by the burning of flags and pictures, were a form of expressing an opinion in respect of an issue of major public interest, namely the presence of Russian troops on the territory of Moldova (no. 25196/04, §§ 9 and 27, 2 February 2010).

52. The examples referred to above show that all means of expression are included in the ambit of Article 10 of the Convention. The Court has repeatedly stressed that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see, *inter alia, Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V). In the same vein, it considers that an assessment of whether an impugned conduct falls within the scope of Article 10 of the Convention should not be restrictive, but inclusive.

53. Moreover, the Court has held in cases concerning freedom of the press that it is neither for the Court nor for the national courts to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists because, as stated above (see paragraph 44 above), Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see, *inter alia, Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298). The Court considers that the same can be said for any individual who may wish to convey his or her opinion by using non-verbal and symbolic means of expression, and it thus rejects the Government's argument that '[a]lthough the applicant had the right to express and disseminate his thoughts and opinions through speech, writing, pictures and other mediums without recourse to violence, he had chosen not to do so' (see paragraph 43 above).

54. In light of its case-law the Court considers that, in deciding whether a certain act or conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question. The Court notes that the applicant was convicted for having poured paint on statues of Atatürk, which, from an objective point of view, may be seen as an expressive act. Furthermore, the Court notes that in the course of the criminal proceedings against him the applicant very clearly informed the national authorities that he had intended to express his 'lack of affection' for Atatürk (see paragraphs 11, 18 and 22 above), and subsequently maintained before the Court that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology and the Kemalist ideology itself (see paragraph 40 above).

55. In this connection, regard must be had to the fact that, contrary to what was submitted by the Government, the applicant was not found guilty of vandalism, but of having insulted the memory of Atatürk (see paragraph 20 above). In fact, the national courts accepted that the applicant had carried out his actions in order to protest against the Ministry of Education's decision not to appoint him as a teacher (see paragraph 19 above).

56. In light of the foregoing the Court concludes that through his actions the applicant exercised his right to freedom of expression within the meaning of Article 10 of the Convention and that that provision is thus applicable in the present case. It also finds that the applicant's conviction, the imposition on him of a prison sentence and his disenfranchisement as a result of that conviction constituted

an interference with his rights enshrined in Article 10 § 1 of the Convention.

2. Compliance with Article 10 of the Convention

57. The applicant complained that his actions had been severely and disproportionately penalised and his right to freedom of expression had thus been breached.

58. The Government, beyond disputing the applicability of Article 10 of the Convention, did not seek to argue that the interference had been justified within the meaning of Article 10 of the Convention.

59. Interference with an applicant's rights enshrined in Article 10 § 1 of the Convention will be found to constitute a breach of Article 10 of the Convention unless it was 'prescribed by law', pursued one or more legitimate aim or aims as defined in paragraph 2 and was 'necessary in a democratic society' to attain them.

60. The Court observes that the restriction on the applicant's freedom of expression was based on the Law on Offences against Atatürk. As can be seen from its relevant provisions (see paragraph 31 above), it is sufficiently clear and meets the requirements of foreseeability. The Court is therefore satisfied that the interference was prescribed by law. Moreover, it considers that it can be seen as having pursued the legitimate aim of protecting the reputation or rights of others (see *Odabaşı and Koçak v. Turkey*, no. 50959/99, § 18, 21 February 2006; see also *Dilipak and Karakaya v. Turkey*, nos. 7942/05 and 24838/05, §§ 117, 130–131, 4 March 2014). It therefore remains to be determined whether the interference complained of was 'necessary in a democratic society'.

61. The Court reiterates that its supervisory functions oblige it to pay the utmost attention to the principles characterizing a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every individual. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society' (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24).

62. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued (*ibid.*). As set forth in Article 10 of the Convention, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, *inter alia, Zana v. Turkey*, 25 November 1997, § 51, *Reports* 1997-VII).

63. The Court has frequently held that 'necessary' implies the existence of a 'pressing social need' and that the Contracting States have a certain margin of appreciation in assessing whether such a need exists, but that this goes hand in hand with a European supervision (*ibid.*).

64. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in question was 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' (see, *inter alia, Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I [*NJ* 1999/713, m.nt. E.J. Dommering; *red.*]). In this connection, the Court reiterates that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference (see, *inter alia, Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 66, ECHR 1999-IV).

65. The Court is aware that Atatürk, founder of the Republic of Turkey, is an iconic figure in modern Turkey (*Odabaşı and Koçak*, cited above, § 23), and considers that the Parliament chose to criminalise certain conduct which it must have considered would be insulting to Atatürk's memory and damaging to the sentiments of Turkish society.

66. Nevertheless, the Court is struck by the extreme severity of the penalty foreseen in domestic law and imposed on the applicant, that is over thirteen years of imprisonment. It also notes that as a result of that conviction the applicant has been unable to vote for over eleven years. In principle, the Court considers that peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence (see, *mutatis mutandis, Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, § 43, 17 May 2011). While in the present case, the applicant's acts involved a physical attack on property, the Court does not consider that the acts were of a gravity justifying a custodial sentence as provided for by the Law on Offences against Atatürk.

67. Thus, having regard to the extreme harshness of the punishment imposed on the applicant, the Court deems it unnecessary to examine whether the reasons adduced for convicting and sentencing the applicant were sufficient to justify the interference with his right to freedom of expression (see *Başkaya and Okçuoğlu*, cited above, § 65). Nor does it deem it necessary to examine whether the applicant's expression of his resentment towards the figure of Atatürk or his criticism of Kemalist ideology amounted to an 'insult', or whether the domestic authorities had any regard to the applicant's freedom of expression, which he had brought to their attention on a number of occasions (see paragraphs 18 and 20 above). It considers that no reasoning can be sufficient to justify the imposition of such a severe punishment for the actions in question.

68. In the light of the foregoing, the Court concludes that the penalties imposed on the applicant were grossly disproportionate to the legitimate aim pursued and were therefore not 'necessary in a democratic society'. There has accordingly been a violation of Article 10 of the Convention.

II. Alleged violation of Article 3 of Protocol No. 1 to the Convention

69. Relying on Article 3 of Protocol No. 1 to the Convention the applicant complained about the ban which had been imposed on him by the domestic courts and which prevents him from voting. Article 3 of Protocol No. 1 to the Convention reads as follows:

> 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

70. The Government contested that argument.

A. Admissibility

71. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

72. The applicant complained that his conviction had not only resulted in his imprisonment, but had also prevented him from, *inter alia*, voting.

73. The Government acknowledged that Article 3 of Protocol No. 1 guaranteed individual rights, including the right to vote and to stand for election, and did not contest that the applicant's right to vote had been restricted in the present case.

74. The Government referred to the Explanatory Report of the Criminal Code where the rationale behind section 53 of the Criminal Code is set out (see *Söyler*, cited above, § 17), and submitted that the legitimate aim of the restriction was the applicant's rehabilitation. They maintained that the restriction on the right to vote in Turkey was not a 'blanket ban' because the applicable legislation limited the scope of the restriction in accordance with the nature of the offence. Referring to the judgment in the case of *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX), the Government argued that, unlike the situation in the United Kingdom, the Turkish legislation restricting the right to vote was only applicable to persons who had committed offences intentionally. In the United Kingdom the legislation was applicable to all convicted prisoners detained in prisons, irrespective of the length of their sentence, the nature or gravity of the offence, and their individual circumstances.

75. In Turkey the constitutional provisions concerning the issue of prisoners' voting rights had undergone two amendments in 1995 and 2001. In 1995 the Constitution had been amended to exclude remand prisoners from the scope of the restriction because disenfranchising a person detained in prison pending the outcome of criminal proceedings against him was considered incompatible with the principle of presumption of innocence. In the 2001 amendment, persons convicted of offences committed involuntarily had been excluded from the restrictions on voting. As it stood today, the national legislation was applicable only in respect of offences committed intentionally. In the opinion of the Government, offences committed intentionally were 'stronger' in nature as they included the element of 'intention'.

76. The Court points out that the rights guaranteed by Article 3 of Protocol No. 1 to the Convention are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law; a general, automatic and indiscriminate restriction on the right to vote applied to all convicted prisoners serving sentences is incompatible with that Article (see *Hirst (no. 2)* [GC], cited above, §§ 58 and 82). These principles were subsequently reaffirmed by the Grand Chamber in the case of *Scoppola (no. 3)* (cited above, §§ 82–84, 96, 99 and 101–102). The Court also reiterates that Article 3 of Protocol No. 1 applies only to the election of the 'legislature' (see *Paksas v. Lithuania* [GC], no. 34932/04, § 71, ECHR 2011 (extracts)).

77. The Court observes that the applicant's conviction became final on 5 February 2007 and he was released from prison on licence on 11 June 2013. During that time he was not allowed to vote. Furthermore, in accordance with the applicable legislation, his disenfranchisement did not end when he was conditionally released from prison on 11 June 2013, but will continue until the date initially foreseen for his release, 22 October 2018 (see paragraph 24 above). Thus, between 5 February 2007 and 22 October 2018, that is, for a period of over eleven years, the applicant has been and will be unable to vote. The Court observes that two parliamentary elections were already held between 5 February 2007 and the date of the examination by the Court — on 22 July 2007 and 12 June 2011 — and the applicant was unable to vote in either of them.

78. In light of the above, the Court concludes that the applicant was directly affected by the measure foreseen in the national legislation which has already prevented him from voting on two occasions in the parliamentary elections.

79. The Court has already found it established that in Turkey disenfranchisement is an automatic consequence derived from the statute and that it is indiscriminate in its application in that it does not take into account the nature or gravity of the offence, the length of the prison sentence — leaving aside suspended sentences shorter than one year (see paragraph 33 above) — or the individual circumstances of those convicted. It has noted moreover that the Turkish legislation contains no express provisions categorising or specifying offences for which disenfranchisement is foreseen and that the automatic

and indiscriminate application of this harsh measure in Turkey regarding a vitally important Convention right does not fall within any acceptable margin of appreciation (see *Söyler*, cited above, §§ 36–47).

80. Nothing in the present case allows the Court to reach a different conclusion. In the light of the above, the Court concludes that there has been a violation of Article 3 of Protocol No. 1 to the Convention on account of the applicant's disenfranchisement.

III. Other alleged violations of the Convention

81. The applicant complained that, by imposing on him the maximum prison sentence applicable under domestic law and calculating his prison sentence on the basis of a new law (Law no. 5275), his rights under Articles 5, 6 and 7 of the Convention had been breached. The applicant further complained that Law no. 5816 was incompatible with Article 14 of the Convention because it gives the judge too wide a discretion to choose a prison sentence of between one year and five years. As a result, different courts handed down different sentences for the same offence. Finally, relying on Article 11 of the Convention, the applicant complained about the ban which was imposed on him by the domestic courts and which prevented him not only from voting and taking part in elections, but also from running associations, parties, trade unions and cooperatives.

82. Having regard to its conclusions under Article 10 of the Convention and Article 3 of Protocol No. 1 (see paragraphs 68 and 80 above), the Court considers it unnecessary to examine the admissibility and merits of these complaints.

IV. Application of Article 41 of the Convention

83. Article 41 of the Convention provides:

> 'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

A. Damage

84. The applicant claimed 60,000 euros (€) in respect of pecuniary damage and € 65,000 in respect of non-pecuniary damage. In calculating his claim for pecuniary damage the applicant relied on the minimum wage and multiplied it by the total number of months he was sentenced to serve in prison.

85. The Government argued that the applicant's claims were excessive and unsupported by evidence.

86. Having regard to the applicant's failure to submit to the Court any documents showing his employment status, income and loss of income, the Court rejects the applicant's claim for pecuniary damage. On the other hand, it awards the applicant € 26,000 in respect of non-pecuniary damage.

Noot

1. Turkije kent een aantal strafbepalingen die je kunt zien als de republikeinse voortzetting van het oude delict majesteitsschennis. Je mag de 'Turksheid' van de natie niet beledigen. Een ander delict is het beledigen van de nagedachtenis van de stichter van de republikeinse natie, Atatürk. Dat delict is in deze en in de zaak *Cengiz e.a.* (*NJ* 2016/337) het onderwerp. Dit delict is uitgewerkt in gedetailleerde strafbepalingen, waarvan er een verbiedt dat je een standbeeld of een mausoleum van de grote held beschadigt, vernielt of besmeurt. De dertigjarige Murat Vural gooide in de periode april-juli 2005 in de stad Sincan vier keer een pot verf over verschillende standbeelden van Atatürk, waarvan er in Turkije nogal veel in de openbare ruimte staan. Bij de vijfde poging in september werd hij op heterdaad betrapt toen hij bij een standbeeld bezig was een pot verf open te maken, voordat hij met de geopende pot op de naast hem liggende ladder tegen een standbeeld zou klauteren. Toen hij werd opgepakt gaf hij als motief op dat hij wrok koesterde jegens de stichter van de republiek. Later in het proces voegde hij er aan toe dat het ministerie van onderwijs hem niet als leraar had willen aanstellen, en dat hij daardoor reeds geruime tijd werkloos was. De door hem besmeurde beelden stonden dan ook in de meeste gevallen voor een school. Hij werd veroordeeld voor het besmeuren van het standbeeld van Atatürk. Omdat het op openbare plaatsen en meermalen was gepleegd leidde dat tot strafverzwaring tot maar liefst tweeëntwintig en een half jaar gevangenisstraf. In het cassatieberoep beriep hij zich op art. 10 EVRM omdat hij met deze acties een mening had geuit (zijn misnoegen over de beslissing van het ministerie van onderwijs hem niet aan te stellen) en de vader des vaderlands niet had willen beledigen, maar slechts gebrek aan genegenheid ('affection') jegens hem had betoond. Zijn tweede grief was dat hij het feit maar één keer had gepleegd en niet vijf keer zoals de rechtbank had vastgesteld. De eerste grief wordt verworpen, op het tweede punt krijgt hij gelijk. De zaak gaat terug naar de rechtbank. Deze maakt een andere rekensom op basis van het een keer plegen van het delict en komt nu op dertien jaar gevangenisstraf uit. Het voegt er nog de bijkomende staf van opschorting van zijn politieke rechten (waaronder het actieve en passieve kiesrecht) aan toe. Het hiertegen gerichte cassatieberoep wordt in februari 2007 verworpen. Murat zit dan een gevangenisstraf van meer dan zes jaar uit voordat hij in juni 2013 voorwaardelijk in vrijheid wordt gesteld.

2. Het EHRM moet eerst onderzoeken of art. 10 EVRM aan de orde is. Daartoe zet het zijn jurisprudentie over 'symbolic speach' op een rij (overwegingen 40-56). Dat zijn de zaken over het in de openbare ruimte tonen van symbolen (o.a. de zaak *Vajnai* over de rode communistische ster, EHRM 8 juli 2007, appl. 33629/06, *NJ* 2009/371, m.nt. E.J. Dommering) en sociale acties waarbij symbolen

worden uitgebeeld. Deze rechtspraak vat het in overweging 54 samen in een algemene regel: om te beoordelen of een daad of een handeling binnen het bereik van art. 10 valt moet de aard, in het bijzonder het expressieve karakter daarvan volgens objectieve maatstaven worden geduid, evenals het doel dat de uitvoerder van de handeling in aanmerking had genomen. Volgens deze twee criteria moet Murat's verfpottenactie gezien worden als de expressie van een mening in de zin van art. 10 EVRM.

3. Het vervolg van het arrest legt een probleem in de toetsingsmethodiek van het verdrag bloot dat wordt verwoord in de dissenting/concurring opinion van de Hongaarse rechter Sajó (daarin bijgevallen door twee 'concurring' rechters). Dat probleem bestaat hierin dat het Hof de 'kwaliteit' van de wetgeving waarop de beperking berust niet in abstracto op de inhoud kan toetsen. Deze zelfde problematiek komt in de zaak *Cengiz* aan de orde. Het Hof toetst wel abstract als het gaat om de vraag of de wetgeving waarop de beperking berust toegankelijk en voldoende duidelijk ('accessible' en 'forseeable') is. Andere voorbeelden van meer abstracte toetsing zijn als de rechtsbescherming onvoldoende is (art. 6 en 13 van het verdrag) en bij schending van positieve verdragsverplichtingen, waar wetgeving die de uitoefening van het grondrecht moet verzekeren ontbreekt (het geen zich veelvuldig bij art. 8 voordoet). Soms heeft een geconstateerde concrete schending een zodanig structureel karakter dat in het kader van de naleving van de uitspraak (art. 45 van het verdrag) de veroordeelde staat er niet aan ontkomt de wetgeving aan te passen. In dit geval constateert het in overweging 60 dat het delict van de 'Atatürk schennis' voldoet aan de eisen die het stelt aan 'prescribed by law' moet zijn. Kort gezegd: het is voldoende duidelijk wat het delict inhoudt. Het vervolg van het arrest gaat dan over de proportionaliteit van de opgelegde beperking (de straf en bijkomende straf) met de voorspelbare uitkomst dat de opgelegde straffen disproportioneel zijn. Klaarblijkelijk zag het geen mogelijkheid de *toepassing* van de strafbepaling in strijd met art. 10 te achten, zoals in de zaken over de communistische rode ster waar het de uitleg van de Hongaarse rechter die onvoldoende rekening hield met de gewijzigde omstandigheden, veroordeelde.

4. Rechter Sajó stelt het delict zelf aan de orde en gaat daarbij op de 'Amerikaanse toer'. Het Amerikaanse Supreme Court acht immers staatswetten die uitingen op inhoudelijke gronden verbieden of beperken in strijd met het First Amendment. Sajó redeneert: een strafbepaling die in feite kritiek op Atatürk beperkt is een inhoudelijke beperking die in strijd is met art. 10 EVRM. Dat is tot dusver niet de benadering van het Hof. Zo veroordeelde het ook niet bepalingen die holocaustontkenningen in abstracto verbieden (bijvoorbeeld in Frankrijk en Duitland). Het zou het Hof ook vrij snel in een politiek conflict brengen omdat het de geschiedenis van de lidstaten niet voldoende respecteert. De uitspraak van het Hof in deze zaak is in zoverre structureel dat er een duidelijk signaal naar Turkije van uitgaat dat het opleggen van dit soort straffen bij dit delict geen genade in Straatsburg vinden.

E.J. Dommering

NJ 2016/337

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS

1 december 2015, nr. 14027/11 en 48226/10
(P. Lemmens, I. Karakaş, N. Vučinić, K. Turković, R. Spano, J.F. Kjølbro, S. Mourou-Vikström)
m.nt. E.J. Dommering

Art. 10 EVRM

NJB 2016/401
ECLI:CE:ECHR:2015:1201JUD004822610

De vrijheid om inlichtingen of denkbeelden te ontvangen of te verstrekken. Blokkering toegang (video)website YouTube. Onvoldoende wettelijke basis. Schending art. 10 EVRM.

Klagers zijn als docenten respectievelijk hoogleraar in de rechtsgeleerdheid verbonden aan Turkse universiteiten. In mei 2010 zijn zij een rechtszaak gestart tegen de Turkse Staat om de blokkering van de toegang tot YouTube op te heffen. De toegang tot deze (video)website was op 5 mei 2008 op last van de strafrechter van de rechtbank te Ankara geblokkeerd wegens de aanwezigheid van tien video's die beledigend zouden zijn voor de nagedachtenis van Atatürk. Klagers voerden aan dat de blokkade impact had op hun professionele, academische activiteiten en wezen op het algemene publieke belang bij een vrije toegang tot YouTube. De rechtbank en later ook het gerechtshof oordeelden evenwel dat de toegangsblokkade in overeenstemming was met de wet. Nu klagers geen partij waren bij de procedure die tot de blokkade had geleid, waren zij bovendien niet-ontvankelijk in hun vordering. De toegang tot YouTube bleef nog geblokkeerd tot 30 oktober 2010. Toen werd, in reactie op een verzoek van de eigenaar van het copyright op de tien bewuste video's, de toegang tot de website op last van het openbaar ministerie weer vrijgegeven.

EHRM: Omdat de opdracht om de toegang tot YouTube te blokkeren niet direct tegen klagers gericht was, onderzoekt het Hof eerst of zij wel als slachtoffers in de zin van het EVRM kunnen worden aangemerkt. Het Hof overweegt in dit verband dat klagers YouTube actief gebruikten. Ze bekeken, downloadden én deelden video's voor professionele doeleinden. Daarbij is van belang dat via YouTube niet louter artistieke of muzikale informatie wordt verspreid. De site is ook een populair platform voor politieke discussie en voor politieke en sociale activiteiten. Met de blokkering van YouTube werd een voor klagers belangrijke bron van informatie gesloten, terwijl de betreffende informatie niet gemakkelijk op andere wijze toegankelijk was.