PC.NGO/26/05
8 June 2005

OSCE Conference on Anti-Semitism and on Other Forms of Intolerance, Cordoba, 8 and 9 June 2005

ENGLISH only

Session 6

ON RACISM OR FEELING GUILTY OR NOT GUILTY

Turgut Tarhanlı[1]

"*Morally speaking, it is hardly less wrong to feel guilty without having done something specific than it is to feel free of all guilt if one is actually guilty of something*."

Hanna Arendt, *Eichmann in Jerusalem, A Report on the Banality of Evil*, p. 298.[2]

Morally speaking, it is not possible to disagree with Arendt on this point. However, as it was later stressed by her, the determination to prevent a real criminal from feeling completely purified from the guilt is the real question that the law should respond to in a democratic society.

Robert H. Jackson, the chief prosecutor of the United States, in his opening statement of the Nazi major war criminals trial, before the International Military Tribunal at Nuremberg in 1945, was aware of a reality regarding the law: "Judicial action always comes after the event". [3]

This time, however, that law did not originate and derive its power from national legal orders. The origins of the legitimacy started to be developed in the international legal order. Besides, according to Jackson, in this particular case, "the real complaining party (…) is Civilization". [4] **Therefore, it should be possible to acknowledge the basic principles upon which the new law bases its legitimacy as a civilized world order and hold individuals responsible for its violation.**

This principle also includes the victors of the War. Prosecutor Jackson, pointing to the judges of the four allied powers, stresses the following: "We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law. This trial represents mankind's desperate effort to apply the discipline of the law (…)" [5]

And Jackson proceeds, completing his speech with these words: "(…) your judicial action will put the forces of International Law, it precepts, its prohibitions and, most of

---

[1] **Turgut Tarhanlı, Professor of International Law and Human Rights Law at İstanbul Bilgi University Faculty of Law; Director of the Human Rights Law Research Center, İstanbul Bilgi University. ttarhanli@bilgi.edu.tr**

[2] **Hanna Arendt, *Eichmann in Jerusalem, A Report on the Banality of Evil*, Revised and Enlarged Edition, Penguin, 1994, p. 298.**

[3] **"Opening Statemnet at Nuremberg by the Chief U.S. Prosecutor, Justice Robert H. Jackson, 1945", *Crimes of War*, Ed. By R.A.Falk, G. Kolko and R. J. Lifton, Vintage, 1971, p. 85.**

[4] ***Ibid*., p. 87.**

[5] ***Ibid*., p. 86.**

all, its sanctions, on the side of peace, so that men and women of good will in all countries may have 'leave to live by no man's leave, underneath the law." [6]

Behind Jackson's impressive speech, it is possible to feel the persecutions and the sufferings of the entire war. This is the starting line of the conception to hold the individuals accountable for establishing and operating the widest and the deepest 'discrimination' system of the modern times; at the same time this is the threshold for the redefinition of our civilization.

After this historical starting point what sort of power and effect would the law have?

I am of the opinion that this question should be answered within the context of the function of law in protecting human rights. It was stated by the International Court of Justice, in the *Barcelona Traction, Light and Power Company, Limited Case*, [7] that in contemporary international law, *inter alia*, "the protection against racial discrimination" is among the *erga omnes* obligations of the states.

In international law, in the period after 1945, it is possible to observe a development designating the mentioned ruling of the Court. While, among the purposes and the principles of the UN Charter there is a general reference to human rights, it should be taken into consideration that only the 'prohibition of discrimination' is stipulated in the entire instrument.

In International Covenant on Civil and Political Rights [8], adopted by the UN General Assembly in 1966, it is emphasized that derogations exercised in time of public emergency should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Therefore, it can be clearly stated that, dating back to Nuremberg trials, in the present international legal order prohibition of all forms of discrimination is not only an *erga omnes* obligation but has also acquired the status of a peremptory norm to be observed by all states.

Today, however, the entire field of human rights has already raised international concern. For instance, in the OSCE countries, from the beginning of the 1990s, haven't the questions relating to human rights been recognized as issues of international concern? Hence, it can not be asserted that such questions should be regarded as internal affairs and should fall within the domestic jurisdiction of states.

Consequently, how should the link between human rights and the right to be protected against racism (including discrimination, anti-Semitism, xenophobia, intolerance) is established? What is the function of law, in a democratic society, taking into consideration the importance of the exercise of the right individually or through

---

[6] ***Ibid*., p. 87.**

[7] ***Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, para. 34.**

[8] **Adopted by the UN General Assembly resolution 2200 A (XXI) of 16 December 1966.**

media, especially in the effective exercise of freedom of expression and in protection against the aforementioned practices of racism?

The European Court of Human Rights held in its *Handyside v. United Kingdom*[9] judgment that freedom of expression "is applicable not only to 'information' or 'ideas' that are favorably 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 would be no democratic society."

In the Court's words the function of the press and the audiovisual media, including the internet, as a 'watchdog' in a pluralist democracy adds importance to this legal viewpoint. Certainly, however, it would be necessary to be sensitive about setting a cautious and fair balance on this matter. Hence, could the meaning of the exercise of freedom of expression in a pluralist democratic society be confined to offensive, shocking or disturbing ideas? Is it possible to argue that such offence, shock or disturbance should have a common borderline? With this approach only, the establishment of a fair balance and the diligence in the maintenance of such balance between the beneficiary of this freedom and the public become essential.

The press and the audio-visual media are the fundamental institutions of freedom to receive and impart information. Therefore, from the perspective of the activities of the institutions providing this freedom and people who would like to disseminate their ideas through these providers, this issue will be considered within the context of freedom to impart information. On the other hand, the individuals affected by the exercise of this freedom would constitute the other perspective of the evaluation concerning this freedom.

What should be the degree of this affect? Or what should be the meaning of the execution of this relationship in a fair balance between the parties to the freedom? In other words, how should the basic criterion for the cautious and fair balance to be established between the rights and interests of the beneficiaries of the freedom to receive and impart information, be determined? To give an immediate answer to this question, in this bilateral relationship, it is possible to come across with a situation where one of the parties' rights may be violated by creation of an impact where power, beyond the reasonable and proportionate use of the freedom, has a determining role. The balance is destroyed or has a tendency to be destroyed towards 'power'. This result, however, should be prevented in the light of the principle of the rule of law in a democratic society.

Jersild v. Denmark **[10]case that was decided before the European Court of Human Rights, about ten years ago, was related to a similar situation. Jens Olaf Jersild, the applicant in this case, is the producer of *Sunday News Magazine* program at *Danmarks Radio* which was broadcasting radio and television programs; he broadcasts an interview with the members of the *Greenjackets*, a youth group with racist tendencies in Denmark.**

---

[9] ***Handyside v. U.K.*** **(1979 – 80) 1 *EHRR*, p. 523.**
[10] ***Jersild v. Denmark*** **(1995) 19 *EHRR* p. 1.**

During this interview the *Greenjackets* members put forward their racist opinions against colored people, foreigners and migrants based on their ethnic or national status. For instance, a *Greenjackets* member says the following: "A nigger is not a human being, it's an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called."

The Court considers the punishment of those persons expressing such racist opinions within the margin of appreciation of Denmark, and does not find a violation of the freedom of expression in the light of the European Convention on Human Rights. However, the Court does not reconcile the punishment of the broadcaster and the producer with the freedom of expression, and declares that Article 10 of the European Convention has been violated concerning these persons.

How should the function of the media, especially the audio-visual media as a follower of the democratic pluralism, be evaluated in terms of that cautious and fair balance? In the light of Article 17 of the Convention, the freedom of expression may not be interpreted as implying the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Convention or at their limitation to a greater extent than is provided for in the Convention. In short, "freedom to destroy freedom" is out of question.

International law is in line with this European legal practice. For instance, the UN Human Rights Committee in its General Comment No. 11[11] on Article 19 and 20 of the International Covenant of Civil and Political Rights mentioned that the State parties, as it is stated in Article 20, are obliged to take measures that prohibit the actions referred to in the article. What is meant by these actions is, first of all, "propaganda of war" and then "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

According to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination [12], "State Parties (…) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof".

This article of the Convention is a 'mandatory' provision for the States Parties. They are not allowed to prevent the exercise of the provision or to suspend it. The United Nations Committee on the Elimination of Racial Discrimination reaffirms in its General Recommendations[13] the mandatory character of this provision and that the States Parties may not state otherwise.

---

[11] **Human Rights Committee, *General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) : 29/07/83, (Article 20).***

[12] **Adopted by the UN General Assembly resolution 2106 A (XX) of 21 December 1965.**

[13] ***See* General Recommendations No. 1, 7 and 15.**

According to the ruling of the European Court in *Jersild v. Denmark* case, there is no doubt that the freedom of expression of the *Greenjackets* can be restricted. On the other hand, the case of Jersild, as the responsible person of the TV program, should be considered separately within the context of the role of media regarding the freedom to impart information.

According to Court's judgment, the statements of the members of the *Greenjackets* should be considered in the context of the rights of persons residing in Denmark and targeted by those statements. Within the context of the restriction criterion at Article 10 (para. 2) of the Convention ("for the protection of the reputation or rights of others"), it is not possible to argue that the members of *Greenjackets* should benefit from the freedom of expression for the purpose of protecting the rights of those persons residing in Denmark and who have been subject to racial discrimination.

However, in the judgment of the Court, regarding the TV presenter and the producer, the responsibility to present the conveyed information and opinions in the context of receiving and imparting information in a fair balance is also stressed. This is an effort to limit or even to prevent the effect of the racist rhetoric by pointing to the counter argument recognized by law. The factors said to maintain the balance are listed as follows:

i) "TV presenter's introduction and the applicant's conduct during the interviews clearly dissociated him from the interviewed"; ii) "he (Mr. Jersild) referred to the criminal records of some of them"; iii) "applicant also rebutted some of the racist statements"; iv) "finally, the filmed portrait surely conveyed the meaning that the racist statements were part of a generally anti-social attitude of the Greenjackets."

As a result, according to the Court it is not possible to restrict the freedom of the media in those topics which may be of interest to the public unless there are "particularly strong reasons".

It is of course possible to define this criterion, in a democratic society, within the context of the restriction criteria in Article 10 of the Convention. However, this issue that was particularly emphasized in *Jersild v. Denmark* case is related to the responsibility of the media to the public. As I have mentioned above, the Court is of the opinion that this responsibility is fulfilled through four factors. This is the consciousness and the responsibility to prevent the racist activities or racist rhetoric from exceeding the limits of the function of informing the public particularly when this function is fulfilled in connection to racism.

These criteria articulate a valid responsibility of the states. Resolution No. 621 of the Permanent Council of the OSCE emphasized the same mentality: "participating States commit to (…) combat hate crimes, which can be fuelled by racist, xenophobic, anti-Semitic propaganda in the media and on the Internet, and appropriately denounce such crimes publicly when they occur" [14].

---

[14] **PC. DEC/621, 29 July 2004, para. 1, vii.**

There is no doubt, however, not only the prevention of the violations of the rights but also some 'additional measures' enabling the effective use of rights is necessary. The need for additional measures should be considered in the light of the 'empowerment' concept which constitutes the essence of human rights law. All these rights and freedoms, in related subject matters, do have a strengthening effect on the status of individuals; and target at finding means of protection against the interferences caused by public authorities or private persons within the system.

However, regarding the types of racism that becomes visible through media, there is no doubt that some additional measures will be necessary in the context of "protection of the rights of others" even though this media activity has been performed within legal boundaries and in a balanced way, in the light of informing the public about the characteristics of racism.

First of all, these measures should aim at reducing the anxiety experienced by those target groups to be effected by those news and information. It was also emphasized in *Jersild v. Denmark* case that some additional measures are required during the performance of media activities. However, the measures in question should not be confined to those. Therefore, preparation of some other programs as a tool for empowerment in the context of protecting the rights of the groups targeted by racism and the free exercise thereof should be considered. Hence, the members of the groups subject to interference, even in different degrees, should be reminded not only of the rights they have within the system, but also the pressure or the anxiety preventing them from exercising these rights efficiently in fact should be eliminated.

This should be regarded as an expression of a parallel responsibility in the context of freedom to impart and receive information. However the effect of racism on freedom of expression may be reduced through measures, containing legal, political and social tools for not only the right in question but also for all other rights and freedoms that may be used as a channel for empowerment by persons who have been subject to racism, which are exercised persistently in the related legal order.

In conclusion, with reference to Hanna Arendt, the very first measure to be taken to prevent the perpetrators of a serious crime like racism from feeling not guilty might be the establishment of legal sanctions; furthermore the parallel measures that should be considered together, in specific or broader terms, are our responsibility, as a society, to be able ask ourselves and answer clearly what we have done for the benefit of the 'victim'.
