The situation of freedom of expression – Turkey and the European Union
Abstract

This study will shed light on the meaning of article 301 of the Turkish Penal Code and its inconformity with fundamental principles of the European Union and fundamental human rights. The trial of Nobel Prize winner, Mr Orhan Pamuk and the killing of Mr Hrant Dink in January 2007 have both put focus on the notorious article 301 of the Turkish Penal Code.

The purpose of the study is to answer the main question; In what way does article 301 of the Turkish Penal Code infringe the freedom of expression outlined in article 10 of the European Convention on Human Rights and what should the European Union do about it?

The conclusion is that article 301 of the Turkish Penal Code infringes the right to freedom of expression stated in article 10 of the European Convention on Human Rights. It does undermine the essence of the right by invoking a wide range of self-censorship, by its ambiguous language and by the way it is applied. The restrictions are interpreted broadly and leave nothing but an arbitrary article left to apply for the courts. The European Union holds the power to influence Turkey and can therefore enforce an abolition of article 301 of the Turkish Penal Code. Time will tell if Turkey will fully safeguard freedom of expression as it is stated in article 10 of the European Convention of Human Rights and in the praxis of the European Court of Human rights and the European Court of Justice.
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1. Introduction

This study will shed light on the meaning of article 301 of the Turkish Penal Code and its inconformity with fundamental principles of the European Union and human rights. The trials of Nobel Prize winner, Mr Orhan Pamuk and the killing of Mr Hrant Dink in January 2007, have both put focus on the notorious article 301 of the Turkish Penal Code. What does the situation of freedom of expression look like in Turkey today and in what way can the European Union influence Turkey to safeguard the right to freedom of expression? These are some of the questions which will be answered in this study. A discussion of future Turkish accession to the European Union will be held in light of the questioned article. In the mission of following the purpose, contiguous topics will be described in order to better understand the situation of freedom of expression in Turkey.

1.1. Purpose

The purpose of the study is to answer the main question; In what way does article 301 of the Turkish Penal Code infringe the freedom of expression outlined in article 10 of the European Convention on Human Rights and what should the European Union do about it?

1.2. Demarcation

The demarcation of the used material has been based on documents and articles which process the freedom of expression as it is formulated by the European Court of Human Rights and the European Court of Justice.

1.3. Method and material

There is a lack of literature and research on the chosen subject. Therefore the latest information can be found on the websites of online newspapers and non-governmental organizations. Furthermore, relevant documents from the European Union have been studied such as progress reports and pre-accession strategy documents.
1.4. Disposition

The first part of the study will give an up-to-date presentation of article 301 of the Turkish Penal Code and the situation of freedom of expression in Turkey and in the European Union. The following chapter will give an account for Turkey’s application to the European Union, from 1987 and onwards. A presentation of article 10 of the European Convention on Human Rights and its application will follow. The topic of the Armenian genocide will be presented given that the mentioning of the genocide is a crime in Turkey. This will be followed by a description of highly topical cases from Turkish courts.

The study finishes by the author’s analysis of the facts and by her answering of the main question.
2. Background

Turkey has ratified the most important conventions on human rights such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Turkish constitution does further also in itself enclose fundamental human rights where the freedom of expression is included. This justifies an inquiry of the application of an article in the domestic criminal code which imposes restrictions on the freedom of expression.

3. The substance

3.1. The situation of freedom of expression in Turkey

A narrow interpretation of the rights in the Turkish constitution is ongoing in Turkey, as well as a broad application of the restricting articles. This has led to the imprisonment of popular voted politicians, journalists, authors, labour unionists and representatives of non-governmental organizations after they have exercised their right to freedom of expression. However these cases would probably not have led to either prosecution or imprisonment in any Member state of the European Union (EU). In January 1998, 91 journalists could be found in Turkish prisons. Public criticism of the armed forces as well as approaches of peaceful alternatives to the Turkish fundamental principles on territorial integrity and secularisation can both lead to prosecution. Censorship laid down by the state of foreign journals is infrequent. However, Turkish journals have been subject to censorship at their time of publication. Furthermore the Turkish media itself, aware of the stringent restrictions of the freedom of expression, practises self-censorship to a great extent. There is also a common confiscation of journals, books and films. The confiscations frequently involve the Kurdish situation in south-eastern Turkey; it is quite infeasible to give an objective and independent account of the situation of the Kurds.
In June 2005 legislative reforms took place in Turkey, which led to the amendment of former article 159\(^4\) that was replaced by the newer but slightly vaguer\(^5\) article 301 of the Turkish Penal Code (TPC). Article 301 TPC, like its precursor, makes a whole world aware of the peril that fundamental human rights are exposed to. Why is that so? The reason is that the article does not only infringe the freedom of expression, but also imprisons the very essence of the right. The article states that:

1. Public denigration of Turkishness, the Republic or the Grand National Assembly of Turkey shall be punishable by imprisonment of between six months and three years.

2. Public denigration of the Government of the Republic of Turkey, the judicial institutions of the State, the military or security structures shall be punishable by imprisonment of between six months and two years.

3. In cases where denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third.

4. Expressions of thought intended to criticize shall not constitute a crime.

Even at first-sight, a sense of limitation of expression strikes the observer. The use of the unclear and broad term “Turkishness” should awaken one’s intuition questioning the article’s conformity with freedom of expression.

During the year of 2006, 72 individuals were prosecuted under article 301 TPC, an increasing number compared to 29 prosecutions in 2005.\(^6\) Seven of the cases led to conviction, while thirteen were acquitted and five were dropped on the bases of either being declared statute-barred or due to lack of consent from the Ministry of Justice.\(^7\)

\(^4\) Article 159 (amended: 1961/235) of the Turkish Penal Code / Türk Ceza Kanunu (No. 765, Adopted March 1, 1962) – Those who publicly insult or ridicule the moral personality of Turkishness, the Republic, the Parliament, the Government, State Ministers, the military or security forces of the state, or the Judiciary will be punished with a penalty of no less than one year and no more than six years of maximum security imprisonment.


\(^7\) The cases of Hrant Dink, Sabri Ejder Öziç, Eren Keskin, Aziz Özer, Erol Özkoçay, Mehmet Fethi Dördüncü and Hanefi Bekmezci ended in conviction, BIA²’s 2006 Report, BIA News Center 16/02/2007 [http://www.bianet.org/2006/11/01_eng/news92115.htm].
3.2. The importance of human rights – an emerging consciousness in the EU

The EU, which from the beginning was aimed to be an economic coalition, the European Economic Community as it was called in its earlier days, has today become much more than just an economically oriented organization. Starting with the Treaty of the European Union (TEU) in 1992 a sense of policy regarding European identity has grown stronger. Today the political aspects of EU have reached the same important level as the economical ones. This is notable for example in the union’s external relations. The founding treaties did not, for example, make any reference to the respect of human rights or to the principle of democracy. Consequently, questions considering human rights and social and political issues did not form such a large part of the Union as they do today. As a result of reaching desired political influence, the EU has worked towards establishing a homogenous policy throughout its members. A need of transparency, principles of democracy, equality, social justice and respect for human rights has been crucial in bringing the citizens of the EU closer to its institutions. Furthermore, the four freedoms of EU have brought about a substantial impact on the lives of the citizens. This has automatically transformed social and political issues to the main subject on the agenda of EU integration.

3.2.1. Sources other than Community law, contributing case-law from the European Court of Justice

Signs of a more clear approach to fundamental rights can be seen in the Community legislation and in the practice of the European Court of Justice (ECJ) that gradually started to apply sources other than community law in its judgments when dealing with fundamental rights. It had identified the constitutional traditions of the Member States and the international treaties to which the Member States belonged (in particular the European Convention on Human Rights) as two sources of protection of human rights. It had also stated that fundamental rights were general principles held by the EU. The acknowledgement led to the European Parliament’s, the Commission’s and the Council’s signing of a Joint Declaration in 1977. Although the document was not legally binding, it proved the will of the Community’s

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9 Turkey and the EU, Harun Arikan, p. 112.
10 Ibid.
11 Nold KG v. Commission (Case 4/73) para. 13, Rutilli v. Minister for the Interior (Case 36/75) para. 32, for more recent cases see Johnston v. Chief Constable of the RUC (Case 222/84) para. 18, P v. S. & Cornwall County Council (Case C-13/94) para. 18, Coote v. Granada Hospitality Ltd (C-185/97) paras. 21-23.
political institutions to continue to respect the fundamental rights arising from the two sources identified by the Court.

Moreover, the Court of First Instance as well as ECJ consistently refer to the “special significance” of the European Convention on Human Rights (ECHR) as a key source of inspiration for the general principles of European Community law. The Court not only quotes the articles of ECHR, but also applies the jurisprudence of the Court. The case of Connolly v. Commission is of particular interest to this study since it directly refers to the jurisprudence regarding article 10 ECHR. Mr Bernard Connolly, a former official of the European Commission, was removed from his post on grounds of writing a book called “The Rotten Heart of Europe”. The book deals with the process of European integration in the economic and monetary field and is based on his professional experiences which he has gained while carrying out his duties at the Commission. The question of censorship and freedom of expression arises as Mr Connolly claims that certain provisions of the Staff Regulations create a system of prior censorship which, in principle, is contrary to the interpretation of article 10 ECHR. The ECJ finds the ground of appeal unfounded yet the elaboration of article 10 ECHR is quite rewarding.

3.2.2. Advantageous amendments in the field of fundamental rights in Community law

An important step towards enhancing fundamental rights was the enforcement of the Single Act in 1987 which in its preamble states that:

“Members are determined to work together to promote the democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and fundamental rights and the European Social Charter”

In the field of implementing the policy in EU’s external relations, the preamble goes on by stating that the EU is:

“(…)aware of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistent solidarity in order to more effectively protect its common interests and

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13 See cases such as Ellinki Radiophonia Tileoarassi AE v. Dimotiki Etairia Pliroforissis & Sotiros Kouvelas (Case C-260/89) paras. 41-45 and Kremzov v. Austria (Case C-299/95) para. 14.
16 Single European Act, preamble.
independence, in particular to display the principles of democracy and in compliance with the law and with human rights to which they are attached so that together they make their own contributions to the preservation of international peace and security, in accordance with the undertaking entered into by them within the framework of the United Nations Charter”.

Furthermore, the TEU also pushed for the importance of human rights by stating in article F:

“(…)the importance of systems of government founded on principles of democracy, respect for fundamental rights, protection of human rights and fundamental freedoms”.

The latter article was amended by the treaty of Amsterdam which gives a more concrete statement, declaring the ECHR as the main source of a definition of human rights. Article 6 of the treaty (former article F of the TEU) states that:

“1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law (…)”

The EU has demonstrated a progress in upholding human and fundamental rights as a union policy which the Member States have to apply. But what influence has the EU had on Turkey in the field of fundamental and human rights?

3.3. Turkey’s application to the EU – a historical preview

From 1987, when Turkey’s application was filed to the European Union by former president Turgut Özal, violations of human rights were increasing fast until 1995. A factor in this matter is that the unfavourable development of the protection of human rights was due to the attitude of the EU as well as that of the government of Turkey. It has been argued that the EU had great suspicions towards a Turkish accession, whereas the Turkish government was not convinced of the benefits which a membership would bring in exchange of restrictions of the

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17 Ibid.
Protection of human rights. As Turkey is a NATO member and a buffer against militant Islam, it gives the country a sphere to play on its favourable position.\textsuperscript{20} This positive element forms a part of another factor which states the strategic position of Turkey. For this reason, the EU has forcibly avoided a tough talk on human rights and turned a blind-eye to gross violations of human rights committed by Turkey.\textsuperscript{21}

After 1995 annual reports, stemming from major human rights organizations, showed a reduction in almost every category of human rights violations. The optimistic progress has been explained by some as not the result of the EU’s efforts but of powers coming from within the country, demanding retraction of political violence. In January 1995, a customs union between Turkey and the EU came into force. The negotiations which had led up to the union were held during a time when gross violations of human rights were carried out on a regular basis in some areas of Turkey; From 1991 onwards, anyone who confessed himself/herself as being a “Kurdish patriot” was shot dead by the Turkish army. This was a result of the army’s new approach in fighting the banned Kurdistan Workers Party (PKK). In 1992, killings with political motives took place more or less on a daily basis. The two following years, over a thousand shootings were carried out by “unknown assassins” who were guided, it has been claimed, by security forces. Hundreds of civilians were killed by police and disappearances were increasing. By 1994 there were over 50 documented cases of disappearances and 34 deaths in custody. Journalists, politicians and trade unionists were serving time in prison on a regular basis as newspapers and books were being confiscated by prosecutors for criticism aimed at the state institutions or Kemal Atatürk.\textsuperscript{22}

During this time of terror, final negotiations were ongoing at the same time but the EU did not intervene. Nevertheless, some concerns could be heard from the European Parliament on the violations of human rights. The European Parliament passed strongly critical resolutions but none of them were taken seriously by the Turkish government. The cause of this disregard of the resolutions has been explained as the result of 2 factors. One is that the European Parliament was seen by the Turks as a stand for European politicians to vent their thoughts, an

\textsuperscript{20} Enlargement and Integration in the European Union, Christopher Preston, p. 217, Building a bigger Europe, EU and NATO enlargement in comparative perspective, Martina A. Smith & Graham Timmins, p. 143-146.
\textsuperscript{21} Turkey and European Integration, Accession prospects and issues, Graham Uğur, Mehmet & Canefe, Nergis, p. 241-242, Building a bigger Europe, EU and NATO enlargement in comparative perspective, Martina A. Smith & Graham Timmins, p. 143-146.
\textsuperscript{22} Turkey and European Integration, Accession prospects and issues, Graham Uğur, Mehmet & Canefe, p. 242-244.
institution which lacked power but made a lot of noise. The other factor lies in the Turkish government’s distrust of the European Parliament due to the bias of the Greek parliamentarians from a Turkish point of view. A sort of disgust and scepticism towards Europe was constantly present amongst the Turkish elite. In June 1995, former State Minister Ayvaz Gökdemir called three female European parliamentarians “prostitutes coming from Europe” and the same year in May, former Foreign Minister, Erdal İnönü, in an effort to divert the attention given by the EU to human rights, delivered the following statement: “(…) The principle of human rights has taken precedence over another important principle – that of not interfering in the internal affairs of other states.”23 The European Commission answered back in an interim report stating that “The European Union strongly supports constitutional and legal reform in Turkey and the Commission will continue to follow developments closely and will keep Parliament informed.” Despite the tense dialogue with hints of ultimatums and despite reports from Amnesty International on patterns of abuse and recommendations, the customs union came into force in January 1995 without any reforms taking place. The manner in which the customs union was bargained stands as an example of the EU’s lack of influence in generating reforms.24

The only remarkable international influence during this period came from the Council of Europe. Nevertheless, one should mention the very important change in Turkish legislation which was later on brought forward with the vast help of the EU, the abolition of the death penalty and the recognition of minority language rights25.

3.4. In what way is the EU influencing Turkey regarding article 301 TPC?

Looking at the past interactions between the EU and Turkey and the amount of influence that the EU has had on the country, it is important to examine what the EU does with regard to freedom of expression during the pre-accession period. The Accession Partnerships and European Partnerships contain priorities that each country has to strive for in order to reach EU-membership. The partnerships are based on the Commission’s progress reports and form

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23 Ibid at p. 245.
24 Ibid at p. 245-246.
the core of the EU’s pre-accession strategy. The Accession Partnership with Turkey was first outlined in 2001 and updated in 2006 aiming at directing Turkey in the accession progresses. It contains both medium and short-term priorities. The short-term priorities are intended to be achieved within one to two years covering reinforced political dialogue, political and economic criteria, and the acquis (the whole body of EU legislation and policies). Freedom of expression can be found in the listing of the short-term priorities where it is stated that Turkey has to “Ensure the exercise of freedom of expression, including freedom of the press, in line with the European Convention on Human Rights and in accordance with the case law of the European Court of Human Rights.” In its recommendation on Turkey’s progress towards accession in 2004, the Commission concluded that further improvements were needed in the area of freedom of expression and noted that the new Penal Code had only provided limited progress.

In the Commission’s report on Enlargement Strategy and Main Challenges 2006 – 2007, there is a direct reference to article 301 TPC where the Commission states that the ensuring of freedom of expression implicates “repealing or amending Article 301”. The Commission addressed the problem in its progress report for 2006, wherein a positive picture is given of the progress for training the judicial institutions to comply with the judicial reforms. A circular was issued in January 2006 by the Ministry of Justice concerning freedom of expression in written and visual media. Prosecutors were instructed to take both Turkish legislation and ECHR into consideration when dealing with such cases. The circular also established a mechanism for a monthly monitoring of criminal investigations and court cases

26 The EU recalled the need for the country to “continue to work towards full and effective implementation of the pre-accession strategy and reforms, in particular as regards strengthening the independence and functioning of the judiciary, the exercise of fundamental freedoms (association, expression and religion)” at the Accession Conference with Turkey, EU Opening Statement for the Accession Conference with Turkey, para. 6.

27 During the accession negotiations arrangements are established under which the candidate countries commit themselves to applying the acquis. The acquis includes all the EU's treaties and laws, declarations and resolutions, international agreements on EU affairs and the judgments given by the Court of Justice. It also includes action that EU governments take together in the area of justice and home affairs and on the Common Foreign and Security Policy. Candidate countries have to accept the acquis before they can join the EU, and make EU law part of their own national legislation. Communication from the Commission to the European Parliament and the Council – Enlargement Strategy and Main Challenges 2006 – 2007, COM(2006) 649, p. 7-8, Europa Glossary http://europa.eu/scadplus/glossary/community_acquis_en.htm.

28 Ibid at p. 53, Council Decision of 23 January 2006 on the principles, priorities and conditions in the Accession Partnership with Turkey, CELEX Nr. 32006D0035.


involving the press and media. Despite the mentioned efforts, the Commission still expresses serious concerns with regard to freedom of expression by targeting article 301 TPC for restricting expression of non-violent opinions. The Commission states that prosecutions and convictions of the expression of non-violent opinions based on provisions in the national legislation, in particular article 301 TPC, “creates a climate of self-censorship in the country.” Although it is stated in article 301 TPC that “expression of thought intended to criticize shall not constitute a crime,” the article has been applied in court to prosecute and convict non-violent opinions expressed by journalists, writers, publishers, academics and human rights activists. The report goes on by condemning the conviction of former writer, Mr Hrant Dink and states that the article “needs to be brought into line with the relevant European standards” the current situation demonstrates that “freedom of expression is not yet guaranteed by the present legal framework.” The Council shares the concern of the Commission in its Presidency Conclusions of December 2006.

3.5. Article 10 of the European Convention on Human Rights

Freedom of expression is one of the fundamental rights which must be protected in all Member States of the EU. Through article 10 ECHR, governments are compelled to respect the freedom of expression. The article states that:

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.

32 Ibid at p. 9, 14.
33 Ibid at p. 14.
34 Ibid.
35 Section 3.8.1.
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.

The article gives a person the right to freely express him-/herself even if the opinion might provoke parts of the population or the government. Article 10 ECHR secures an essential part of a democratic state.

3.6. Article 10.2 ECHR; Restrictions on freedom of expression

As stated in the article itself, freedom of expression may be subject to restrictions, but the jurisprudence of the Court of Human Rights has demonstrated a narrow interpretation of article 10.2 ECHR. In the Handyside case the Court of Human Rights laid down the basic principles of freedom of expression. It was stated that despite of the restrictions that may be laid on the freedom of expression, paragraph 2 “does not give the Contracting States an unlimited power of appreciation. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it does not cover only the basic legislation but also the decision applying it, even one given by an independent court.”

It was also stated that “freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), 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. /.../ This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.”

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38 Sunday Times v UK (application no. 6538/74) para. 65.
39 Handyside v UK (application no. 5493/72) para. 49.
40 Ibid.
A number of cases against Turkey have been brought forward to the Court of Human Rights on the freedom of expression where violation of article 10 ECHR has been found.\textsuperscript{41} Article 46.1 ECHR obliges states to “undertake to abide by the final judgment of the Court in any case to which they are parties”. The stated responsibility entails obligations on respondent states. They must take measures in favour of the applicants to put an end to violations and, as far as possible to erase their consequences (\textit{restitutio in integrum}),\textsuperscript{42} as well as to take the measures needed to prevent new, similar violations.\textsuperscript{43}

The Committee of Experts for the Improvement of Procedures for the Protection of Human Rights\textsuperscript{44} has established an inventory\textsuperscript{45} of general measures taken by the Contracting States to implement the decisions made by the Convention bodies when they were first established. This inventory was last updated in May 2006 and lists no measures taken by Turkey regarding article 10 ECHR.

There was a decrease in number of convictions against Turkey ruled by the European Court of Human Rights on freedom of expression during 2006. The amount of compensation was 221,000 € and gave 45 individuals compensation for their damages.\textsuperscript{46}

\textsuperscript{41} Arslan v Turkey (application no. 23462/94), Zana v. Turkey No. 2 (application no.26982/95), Incal v. Turkey (application no. 22678/93) Reports 1998-IV, Sener v Turkey (application no. 26680/95).

\textsuperscript{42} Article 41 ECHR.

\textsuperscript{43} Scozzari and Giunta v Italy (applications nos. 39221/98 and 41963/98) para. 249, Papamichalopoulos and others v. Greece (article 50) (application no. 14556/89) para. 34.

\textsuperscript{44} Set up by the Committee of Ministers of the Council of Europe.

\textsuperscript{45} General measures adopted to prevent new violations of the European Convention on Human Rights {H/Exec (2006)1, last updated May 2006}.

\textsuperscript{46} BIA\textsuperscript{2}’s 2006 Report, BIA News Center 16/02/2007 \url{http://www.bianet.org/2006/11/01_eng/news92115.htm}.  


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3.7. The Armenian genocide; A target for article 301 TPC

Cases which have been tried by Turkish courts concerning article 301 TPC are of great importance to examine. Firstly a short account will be given of the underlying history of some of the cases which 92 years later have led to the case of Mr Hrant Dink,47 Mr Orhan Pamuk48 and other journalists and authors who have exercised their right to freedom of expression on this specific matter. In 1915 genocide was committed against the Armenian population of Turkey.49 The genocide has been recognized by countries all over the world and its recognition by Turkey has been held as a precondition for Turkey’s accession to the EU by the European Parliament.50 The refusal of recognition by the Turkish government leads to a situation where journalists, authors etc are being prosecuted and punished for mentioning its occurrence, a rational fact seen in light of article 301 TPC. Turkey has for over 90 years denied that any genocide against Armenians was committed. Article 301 TPC gives the government the right to imprison its own citizens for disagreeing. Thus the article can be apprehended as a defence of the state.

3.8. Turkish case-law

Due to the legislative reforms which took place in May 2005, the case-law on article 301 TPC is fairly new. Irrespective of the short amount of time that has passed since it was first stipulated, the article has been applied in a number of cases triggering national and international disputes. Some of the high-profile cases on article 301 TPC will be presented below.

47 See section 3.8.1.
48 See section 3.8.2.
3.8.1. The case of Mr Hrant Dink

Mr Hrant Dink, a citizen of Turkey, was the editor of a magazine called Agos, published in Turkish and Armenian. Mr Dink was of Armenian origin with a burning passion for human rights, the freedom of expression and the recognition of the Armenian genocide. He was well-known for his peaceful open debate and criticism of the Armenian identity and Turkey’s abnegation of the genocide. As passionate as he was for human rights, Mr Dink also strived for a proper democracy in Turkey and was in favour of EU-accession. In 2004, Mr Dink published a series of articles entitled “The Armenian identity”. These articles led to charges under article 301 TPC for “insulting Turkish identity”. The hearings commenced on July 27, 2005, at Şişli Administrative Court, where Mr Dink was tried alongside Mrs Karin Karakaşlı, editor-in-chief for the magazine. Later that year, on October 7, Mrs Karakaşlı was exempted from the trial while Mr Dink was sentenced to six months in prison. The sentence was given three days after Turkey had begun its negotiations for EU accession, which had brought along serious talks on improving the respect of human rights in Turkey.

The irony of the sentence is that Mr Dink called for Armenians to overcome their “hatred” against “the Turk” as the source of their pain and loss from the genocide. Instead he suggested alternative peaceful measures that Armenians could turn to for reconciliation. The line saying "poisoned blood associated with the Turk", taken out of its context, led to his conviction. The intention with the phrase “poisoned blood” was to describe the Armenians’ blood that had been poisoned by their pain caused by Turks.

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51 “I am an Armenian of Turkey, and a good Turkish citizen. I believe in the republic, in fact I would like it to become stronger and more democratic. I don’t want my country to be divided, but I want all the citizens to be able to live fully and contribute their diversity to this society – as a source of richness.” – Hrant Dink, 2006
52 “Hrant Dink convicted, atmosphere turns sour” Turkish Daily News, October 8, 2005
53 “International PEN – Writers in Prison Committee, half-yearly caselist to 31 December 2006”
54 “Court sentences Turkish editor of insulting the state” by Vincent Boland, FT.com, October 7, 2005, p.1
55 “Hrant Dink: an open Democracy tribute” by Isabel Hilton and Anthony Barnett
56 “Hrant Dink: Forging an Armenian Identity in Turkey” by Üstün Bilgen-Reinart, February 7, 2006
The sentence was however suspended for five years considering that Mr Dink did not have a criminal record. The condition of the suspended sentence was that he would not commit similar acts again. A violation would mean that he would have to serve six months in prison and an additional sentence for the committed crime. Mr Dink’s appeal to a higher court on July 12, 2005, resulted in the upholding of the earlier sentence. Dink launched an appeal against his sentence and in February 2006, the Chief Prosecutor told the Appeals Court that the phrases which were used in Mr Dink’s article could not be considered as insulting. Despite the Chief Prosecutor’s statement, the Court decided to uphold the decision. 57 At this point Mr Dink was cited as saying that he would take the case to the European Court of Human Rights. 58

Later that year, on September 25, Mr Dink was charged once again under article 301 TPC together with his son Arat Dink and editor-in-chief Serkis Seropyan. The charges concerned another article published on July 21, 2006, in Agos, entitled “I vote against 301” which could have led to a three-year-prison sentence. 59 The article contained a statement which Mr Dink had given in an interview to Reuters news agency on July 14, wherein he expressed his conviction of the occurrence of the Armenian genocide. He also made it clear that he would not be silenced regarding that issue, nor would he leave the country despite the death threats against him. The trial date was set for March 22, 2007, but this never took place. Mr Dink was murdered on January 19. He was shot in the head outside his office two months before the trial.

On July 14, 2007, the proceedings in the case regarding the article “I vote against 301” continued despite of Mr Dink’s death. On the day of the trial the court dropped the case against Mr Hrant Dink. Meanwhile the Public Prosecutor pleaded for a three-year-prison sentence for the remaining defendants, Arat Dink and Serop Sarkisyan. The trial was adjourned to July 18, 2007, and adjourned once again until October 11, 2007, in order to

57 “Trials against writers, journalists and publishers continue under article 301” http://www.ifex.org/20fl/layout/set/print/content/view/full/74203.
investigate the defence lawyers’ claim that the judges were not objective. Thus the lawyers demanded their withdrawal.60

3.8.2. The case of Mr Orhan Pamuk

On February 5, 2005, Mr Pamuk was interviewed by a Swiss newspaper, Das Magazin, in which he was quoted saying that “30,000 Kurds and 1 million Armenians were killed in these lands, and nobody but me dares to talk about it”.61 This expression sparked irritation amongst nationalist lawyers in Turkey who petitioned prosecutors to bring charges against him under article 301 TPC for insulting “Turkish identity”. Despite the fact that original investigations had been dropped against Mr Pamuk which were initiated by a Public Prosecutor, another case was brought against Mr Pamuk by a different Public Prosecutor who presented a different interpretation of article 301 TPC. In April 2005, a sub-governor was reprimanded on account of his order to destroy all of Mr Pamuk’s books, an order which was never carried out.62 On December 16, 2005 at the launching of Mr Pamuk’s trial by the Şişli Primary Court No. 2 in Istanbul,63 riot-like activities were taking place outside the court, where amongst other things Mr Pamuk’s car was vandalized and invectives such as “traitor” could hardly be ignored.64 The defence lawyer had insisted that the case would be tried under the old penal code, article 159, since the alleged crime was committed previous to the legislative reforms in June 2005. The judge seems to have followed this line since he referred the case to the Ministry of Justice which was in accordance with article 159 TPC. The trial was adjourned and set for February 7, 2006.

On January 20, 2006, the Minister of Justice, Cemil Cicek, declared that the case was out of his jurisdiction after the legislative reforms in May 2005. Mr Cicek’s response was expounded by the court as a refusal to grant the case permission to proceed. On January 23, 2006, the case against Mr Pamuk was dropped.65

64 Joan Smith’s reporting from Mr Pamuk’s trial, 16 December 2005, published in English Pen, 9 January 2006 http://www.englishpen.org/writersinprison/bulletins/joansmithreportsonorhanpamukst/.
65 “Turkey Drops Orhan Pamuk Trial” Spiegel Online International, January 23, 2006
Turkey has been widely condemned for letting a case such as this one become reality.\(^6^6\) Mr Olli Rehn, the European Union’s enlargement commissioner, expressed his “serious concern” about it and suspected the action of being a protest against the legislative reforms which took place in June 2005.\(^6^7\) Furthermore, the European Union’s enlargement commissioner said one day before the trial that “it is not Orhan Pamuk who is on trial but Turkey”.\(^6^8\) On the other hand, Mr Rehn showed a positive approach to the dropping of the case and was quoted saying that it was “good news for freedom of expression in Turkey”. However he expressed his concern regarding similar cases which were still pending at the time of his utterance.\(^6^9\)

The decision of the Turkish court to drop the case was greeted by European legislators, but as Mr Haluk Inanici, the defence lawyer of Mr Pamuk pointed out, the grounds for dropping it are of great importance. Mr Inanici reprimanded the court for dropping the case on grounds of bureaucratic turbulence rather than of freedom of expression. "The court dropped the charges not because the trial violated the freedom of speech, but because there was a missing approval by the Justice Ministry to proceed with the trial" the lawyer was cited as saying.\(^7^0\) Mr Inanici had preferred an acquittal of Mr Pamuk rather than a dropping of the case.\(^7^1\)

3.8.3. The case of Mrs Elif Shafak

The case of the prominent writer whose books have been translated into many languages and who has achieved recognition in several countries is a reflection of the case of Mr Orhan Pamuk. Mrs Shafak was charged under article 301 TPC for “insulting Turkishness” in her

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\(^6^7\) “Turkey’s Pamuk Trial Tests Commitment to Free Speech” December 8, 2005 [http://hrw.org/english/docs/2005/12/08/turkey12174.htm].


\(^7^1\) “Pamuk’s Counsel Displeased with the Decision”, Zaman Istanbul, Kayseri, Today’s Zaman, January 24, 2006 [http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=28986].
latest novel, “The bastard of Istanbul”. The grounds for the charges were based on a statement made by a fictional character referring to the Armenian genocide in 1915. What angered Turkish nationalists was the use of the term “genocide”. This was seen as a denigration of Turkishness and an expression of hatred against Turks; In the novel the terms “Turkish butchers” and “slaughtered like sheep” are being mentioned by characters referring to the Armenian genocide.72

After hearing Mrs Shafak and her publisher Semih Sökmen, the Beyoğlu Public Prosecutor in Istanbul dismissed the charges against her on June 7, 2006. Mrs Shafak alongside with her publisher, had insisted that her novel was a work of art, literature and more so, a fictional statement which she was being prosecuted for. In light of this argument, the prosecutor found a follow-up of the charges inappropriate. Despite the Public Prosecutor’s announcement of the incorrectness of the charges levied against Mrs Shafak, the 7th High Criminal Court in Istanbul overruled the dismissal of proceeding. This was followed by a complaint filed by a right-wing lawyer, Kemal Kerincsiz, a member of “Unity of Jurists”.73 The trial against Mrs Shafak was set for September 21, 2006, a trial which Mrs Shafak could not attend due to giving birth to her child. The court refused to re-schedule the hearing on grounds of birth giving, which resulted in Mrs Shafak’s inability to defend herself in a trial where she was being prosecuted. Despite her absence, the trial ended with an acquittal which was formally announced on October 5, 2006, stating that the contested statements were not necessarily shared by the author herself.

3.8.4. The case of Mr Fatih Tas

Mr Fatih Tas, a student of Communications and Journalism at the University of Istanbul and also the owner of Aram publishing house, was taken to trial on November 17, 2005 for “insult to the state and to the army” under article 301 TPC. The ground for his charges was a publication of a Turkish translation of US academic, John Tirman’s “Spoils of war: the Human Cost of America’s Arms Trade” (Savas Ganimetleri: Amerikan Silah Ticaretinin Insan Bedeli), first published in the US in 1997. The book puts focus on the subject of US weapons being used in acts against human rights committed against the Kurds in Turkey. It

73 “Unity of Jurists” is a grouping of right wing lawyers which members often file complaints against journalists and authors under article 301 TPC.
goes on criticising the Turkish military, nationalism and Atatürk’s policy as fascism.\textsuperscript{74} The charges aiming at the insult of Attaürk are reinforced by Law No. 5816, which protects the moral personality of the founder of the modern state of Turkey, Mustafa Kemal Attaürk.\textsuperscript{75}

The prosecutor pleaded for a ten and a half year prison sentence, based on the grounds that Mr Tas should be tried separately for each insult he was accused of. In his defence, Mr Tas pointed out that the book did not contain anything which had not already been up for discussion in the Turkish Parliament or the media. The accused also accentuated his averseness to insult Turkey or Turkishness. Two translators, Mr Aysel Yildirim and Mr Taylan Tosun, stood as co-defendants for performing their jobs of translating the book. On November 29, 2006, just over a year after the commencement of Mr Tas’ trial, he was acquitted together with his co-defendants. The coordinator for Turkey at Amnesty International’s branch in France, Mr Claude Edelmann, said that the case was “unprecedented in the world”.\textsuperscript{76}

During the case regarding Tirman’s book, Mr Fatih Tas, as publisher, and Mr Taylan Tosun, as editor, were subject to charges concerning a very similar case. Two other defendants, Mr Ender Abadoglu, the translator of the book, and Mr Faruk Kurhan, a reductor of the book “Manufacturing Consent” written by Noam Chomsky and Edward S. Herman were also accused for the same allegation. The trial was opened on October 17, 2006,\textsuperscript{77} where all defendants were accused of interference with article 216 and article 301 of the Turkish Penal Code for "publicly denigrating Turkishness, the Republic and the Parliament" (article 301) and "inciting hatred and enmity among the people" (article 216). Attorney Kilic pleaded “criminal liability” outlined in article 11/4 of the Press Law stating that it was contrary to the Constitution and the European Convention on Human Rights and requested an adjournment. The plea was rejected and the trial continued. Mr Abadoglu claimed in his defence that he had only done what was asked of him, which was to translate the book, thus the opinions were held by the author and not by himself. He drew parallels to translating press releases


considering the stirring of the Armenian genocide bill in the French Parliament surrounded by opinions in favour of genocide recognition.\textsuperscript{78} The translator said that “In a similar way, the views of French parliamentarians who are supporting the Armenian genocide claims were translated and published in newspapers. There are no cases filed against these translators. Hence, I think translators can’t be held responsible”.\textsuperscript{79} Mr Tosun asserted that his role was to make sure that the book was translated correctly and into good Turkish; "As far as I checked it, there was no problem in the translation" Mr Tosun continued: "I did not see any factors of offence in the work". Mr Kurhan claimed that he had not found any statement giving ground for charges under article 216 (“inciting hatred and enmity”) and that “the very sole of controversial article 301 served to protect the immunity of the state and was open to interpretations and mistakes.”\textsuperscript{80}

When all defendants were heard, attorney Yilmaz said that “If we are putting an author, linguist and a professor of philosophy with international importance on trial, we should give these individuals the right to defend themselves in the courts of the land”. By this the attorney was referring to Noam Chomsky, the author of the book. "My client before you has translated the work of this writer who we cannot put on trial. Unfortunately with such cases we are living in the shadows" Mr Yilmaz added. Attorney Demirci denied the allegations and asserted that since none of the four defendants were charged for their own opinions, the court would receive a written defence. Judge Efendiler allowed attorney Demirci’s request and adjourned the court to December 20, 2006. Attorney Kilic added that it was the United States which served as the target in the book and that “US operations, massacres and coups throughout the world are being explained. The way these reflect in the media are being revealed. In this context it is a strange situation that four people are on trial under articles 216 and 301.”\textsuperscript{81} On the December 20, 2006, all four defendants were acquitted.\textsuperscript{82}

\textsuperscript{78} In October 2006, the National Assembly of France approved a law which makes it a crime to deny the Armenian genocide during and after World War I, if it is approved by the Senate then it will become a law. “France acts to outlaw denial of genocide” by Thomas Crampton, International Herald Tribune, October 12, 2006 \url{http://www.iht.com/articles/2006/10/12/news/france.php}.

\textsuperscript{79} “Freedom of speech under continuing attack in Turkey” by Sinan Ikinci, World Socialist Website, October 27, 2007 \url{http://www.wsws.org/articles/2006/oct2006/turk-o27.shtml}.

\textsuperscript{80} “Chomsky’s Publisher On Trial” by Erol Onderoglu, BIA News Center, October 19, 2006 \url{http://www.bianet.org/2006/11/01_eng/news86760.htm}.

\textsuperscript{81} Ibid.

\textsuperscript{82} “Turks acquitted over Chomsky book” BBC News, Europe, International version, December 20, 2006 \url{http://news.bbc.co.uk/1/hi/world/europe/6198021.stm}.  

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Mr Chomsky rejected the accusations made by the Public Prosecutor and was cited as saying that “the indictment raises no question about the accuracy of the evidence reported, or our treatment of it, or its appropriateness in the context of the discussion. Nor has there been a serious question raised elsewhere. The claim of the prosecution, then, reduces to invoking the principle that appropriate and significant truths are unacceptable when the state authorities object to them. There should be no need for further comment”.

3.8.5. The case of Mr Ragip Zarakolu

In 1977, Mr Ragip Zarakolu founded Belge Publishing House together with his late wife Mrs Ayse Nur. The publishing house has published numerous critical writings on violations of human rights around the world, especially those committed in Turkey. Mr Zarakolu has for over 30 years been a target for various articles in the Turkish legislation which obstruct the freedom of expression. On May 3, 2007, a two-year long trial against Mr Zarakolu ended with an acquittal. He was charged for publishing the book of George Jerjian, “The truth will liberate Us” on grounds of “insulting the State” as stated in article 301 TPC. The book tells of the mass deportations of Armenians during the last century and holds government officials close to Kemal Atatürk responsible for those actions. On November 22, 2005, a committee of experts was appointed in order to investigate if the book infringes article 301 TPC. Although the trial ended with an acquittal of Mr Zarakolu, a new case was opened against the translator of the book, Mr Atilla Tuygan. If Mr Tuygan is found guilty, he will face a seven and a half year prison sentence. Another case is still pending against Mr Zarakolu. It involves the publishing of Dora Sakayan’s book “An Armenian Doctor in Turkey: Garabed Hatcherian: My Smyrna Ordeal of 1922”. Mr Zarakolu has been accused of “insulting the army” and “insulting Turkishness”.

4. Analysis

An attempt to answer the main question of the study will follow in the forthcoming analysis; In what way does article 301 TPC infringe the freedom of expression outlined in article 10 ECHR and what should the EU do about it?

As it stands now, Turkey has a long road ahead in reaching the aims of article 10 ECHR. Being a signatory to the ECHR should be reason enough to comply with the Convention, but the Turkish Penal Code, de lege lata, serves other interests than those of article 10 ECHR and remains incompatible with the article even after legislative reforms. The question is if an EU membership will imply a repeal or amendment of article 301 TPC.

We have already witnessed long negotiation talks where violations of human rights have formed an extremely important question in the case of the Customs Union in 1995 between the EU and Turkey. The outcome of the negotiations should be seen as a set-back on human rights in Turkey, since no reforms were made in order to secure human rights despite the establishment of the union. Does this event not insinuate a re-run of what happened in 1995 if Turkey becomes a member of the EU? It is the author’s meaning that the set-back on human rights should be strongly considered when EU negotiates and follows up on Turkey’s progress in the pre-accession period. The EU is, as it was at the time of the Customs Union, unsatisfied with the situation and concerned by the infringements of human rights. Let us not forget that the conditions for human rights were even worse at that time but that the issue was still put aside during those negotiations. The difference with negotiating and monitoring this time is that the question is not of only the Parliament’s concern, but also of the Commission’s and the Council’s.

None of the paragraphs in the article are compatible with the jurisprudence on article 10 ECHR. The term “Turkishness” itself imposes restrictions on freedom of expression, since it breaches the principle of legality. If it is not clear what “Turkishness” means, then it is quite difficult to know which statement that constitutes a crime. This can most certainly lead to an arbitrary application of the article. Furthermore, it is stated in paragraph 4 of article 301 TPC that opinions aiming to criticize fall outside the scope of the article. When looking closer at the wording of the article, it becomes clear that all of the paragraphs refer to opinions which
criticize, for example criticizing the government of Turkey; How can an insulting yet non-violent statement aimed at a government constitute anything but criticism?

As it is today, the whole article functions as a trap where controversial thoughts are being caught and punished. From what has been excerpted from relevant EU documents, it is quite clear that the EU officially calls for the repealing or amendment of article 301 TPC as a condition in the accession process. In order for the Turkish Penal Code not to violate freedom of expression as it is expressed by the ECHR and the European court of human rights, thus also by the EU, de lege ferenda, article 301 TPC has to be repealed. The EU has formulated the condition with clear instructions. In October 2006, Turkey was told to safeguard freedom of expression as a “matter of urgency” and that waiting for Turkish judges to rule on the issue was not enough since legislative reforms were badly needed.88 Turkey was told to either repeal or amend article 301 TPC.89 The Turkish response to the question has so far only been verbal and slippery. The Foreign Minister, Mr Abdullah Gul, has on various occasions stated that a change of article 301 TPC is to come (see below).

Parliamentary elections were recently held in Turkey on July 22, 2007, which resulted in the Justice and Development Party’s (AKP) victory. A new reform package is currently being developed under the instructions of Prime Minister Mr Recep Tayyip Erdogan, aiming to bring Turkish laws closer to EU standards. Even though the repealing of article 301 TPC is listed among the EU’s requests, the abolition of the article is not on the government’s agenda. The leading people of AKP have however acknowledged the need to amend the article and believe that the faults of article 301 TPC lie in its interpretation, not in its wording.90

Last year NGO’s and civil society organizations were requested by Prime Minister Recep Tayyip Erdogan to draft new proposals for article 301 TPC. Different organizations including the Turkish Union of Chambers and Commodity Exchanges drafted a 10-page proposal which was handed to the Prime Minister.91 Foreign Minister Mr Abdullah Gul said earlier this year

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that the Turkish government values the views of non-governmental organizations on article 301 TPC. The government is willing to cooperate with such organizations if the article is amended, said the Foreign Minister. Gul was most probably referring to the proposal mentioned above.\textsuperscript{92} The draft proposal suggests clarifying abstract elements in the article and replacing the term “Turkishness” with the “Turkish nation” or “the state of the Republic of Turkey”, since the article at present is inconsistent with “general legal principles regarding the clarity of the crimes concerned.”\textsuperscript{93}

Talks on amending the article imply a positive change in the area of freedom of expression, but the fact that the subject is missing from the government’s agenda implicates concern. At a time when article 301 TPC is causing a heated-discussion in Turkish politics, the government should address the problem by making serious attempts of improvement. If the problem is put aside until the discussion has cooled down, there is a possibility that modifying the article will result in minor and superficial changes. Thus the Turkish government should not stall the amendment or repealing of article 301 TPC.

The European courts have made it clear that restrictions on freedom of expression shall be narrowly interpreted. Most of the cases from the Turkish courts which have been presented in this study have one thing in common; the mentioning of the Armenian genocide. Statements on that specific subject have brought the authors and journalists directly to court. When asking the question “were the restrictions in article 10.2 ECHR narrowly interpreted in comparison to the case of Mr Hrant Dink?” it becomes clear that the Turkish court has performed an incorrect application of article 10.2 ECHR. Mr Dink was convicted for expressing a non-violent opinion about the Armenian genocide and according to the case-law of the Court of Human Rights, freedom of expression is applicable also to opinions which “offend, shock or disturb the State or any sector of the population”. Accordingly, opinions angering nationalists or contradicting a nation’s official learning of history should not be subject to restrictions. Therefore my answer to the question is no.


The case-law which has been presented in this study from the Turkish courts seems to owe a lot to a group of nationalist-leaning jurists. The charges against Mr Hrant Dink, Mr Orhan Pamuk and Mrs Elif Shafak were all filed by the same prosecutor, Mr Kemal Kerincsiz who is the leader of “Unity of Jurists”, a group of ultra-nationalist lawyers. The prosecutor has specialized in cases involving article 301 TPC and has launched investigations against high-profiled persons such as Mr Jacques Chirac (former president of France), Mr Joost Lagendijk (Member of the European Parliament), and the Swedish Academy (for awarding Mr Orhan Pamuk the Nobel Prize in 2006). Jacques Chirac is a supporter of the recognition of the Armenian genocide and during his mandate he suggested the recognition as a pre-condition for Turkish EU accession. He is therefore not very popular amongst Turkish nationalists.

The “Unity of Jurists” sent a petition to the prosecutor’s office aiming to take Mr Joost Lagendijk to court for statements he had made about the Turkish military. The jurists accused him of breaching article 301 TPC and it is quite clear from the following quote from the petition that Mr Lagendijk had touched a sore point; “Where does he find the audacity to consider himself above and immune from Turkish laws and to insult the Turkish army and the Turkish judiciary?”94 The Public Prosecutor did not follow up on the probe on grounds of freedom of expression. This was seen as a progress towards freedom of expression, since the prosecutor could easily have referred to Mr Lagendijk’s parliamentary immunity, but chose to follow the European Courts’ case-law.95 As for the launched investigation against the Swedish Academy, Mr Kemal Kerincsiz claimed that the award had been given on political stances rather than literary.96

Many of the cases which “Unity of Jurists” lies behind have resulted in acquittals. If charges on grounds of article 301 TPC end in acquittals, then maybe the article is not such a big threat to freedom of expression as one would think. Nevertheless there are some factors which prove the latter statement wrong. An acquittal should mean that the defendant can get back to his or her normal life. However, the reality testifies that the lives of the charged people under article

94 Citation of Mr Kemal Kerincsiz http://www.lawinfo.com/index.cfm/fuseaction/News.story/msgID/bc97a504-958b-42ff-a98f-67ff3147bf89.
301 TPC changed despite an acquittal. Mr Orhan Pamuk as well as Mrs Elif Shafak are seen as traitors in the eyes of many Turkish nationalists. The accusation of violating article 301 TPC places people in an unpleasant situation. One could argue that a person accused of rape might never lose that label or reputation even if found innocent. The difference between such cases and article 301 TPC-cases is that the latter gain publicity which can turn great masses of a nation against one person. Another factor is that the mere existence of the article and the precedent that it creates will most probably lead to self-censorship. The message that is being sent when prosecuting people for their opinions is that statements which go against the public opinion will likely lead to prosecution. Does not self-censorship undermine the purpose of freedom of expression? Can a nation be called a democracy if journalists, authors, publishers, translators etc feel compelled to apply self-censorship? Is a nation really a democracy when the spreading of information is obstructed by laws and when a person’s right to be informed of its government’s activities is denied?

Furthermore, all cases do not end with acquittals. Mr Hrant Dink was convicted to a six months suspended prison sentence. The court’s verdict made him guilty of insulting the Turkish state and “Turkishness”. In fact, the nationalist masses of Turkey found him guilty for treason and for this he was murdered by a young nationalist. The application of article 301 TPC can also be seen as a struggle by the nationalists against EU-membership. An opinion poll held in the beginning of 2006 showed that 62% of the Turkish population saw themselves as “nationalists” and 32.3% among these declared themselves as “fully-nationalists”. A simultaneous poll showed that 50.3% of the Turkish population agreed with the statement that “the European Union wants to divide Turkey”, while 36.3% disagreed. By invoking article 301 TPC and launching investigations against authors who are positive to an EU accession and also against high-profile persons who represent the EU, the lawyers accomplish to create an atmosphere where “the West” is portrayed as a rude, humiliating stranger poking its nose in domestic concerns. The opinion polls testify of a likely adherence to the negative picture of the EU. When playing with those cards, a possible acquittal or dropping a case really does not matter, since the aim to denigrate the EU has been achieved. However, one should not forget the huge gathering at Mr Hrant Dink’s funeral, where Turks were crying “We are all Hrant Dink” and condemning his death and article 301 TPC.

The inventory of general measures taken by the Contracting States to implement the decisions taken by the Convention bodies of the Council or Europe has until last year not shown any steps made by Turkey to implement decisions taken by the European Court of Human Rights. This highlights the importance of the EU’s powerful impact. If the EU stands adamant on repealing or amending article 301 TPC, the accession process can end in two ways. Turkey will either make sufficient efforts in order to meet European standards and by doing so, liberate its citizens from self-censorship and bans on non-violent expressions, or it will choose not to and jeopardize 20 years of accession process. Either way has great impact on the everyday-lives of Turkish citizens. The future will tell if EU succeeds in upholding the right to freedom of expression or submits to other factors such as economy.

Supposing Turkey becomes a member of EU and continues breaching article 10 ECHR, will the EU just sit back with its hands tied or can something be done to change such a serious situation? Article 7.1 in the TEU gives the Council a possibility to sanction such negative behaviour if “a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission” is handed to the Council. Before any decisions can be made “the Council shall hear the Member State in question”. The Council can then, acting by a majority of four-fifths of its members, after obtaining the assent of the European Parliament, determine if “there is a clear risk of a serious breach by the Member State of the principles mentioned” in article 6.1 TEU. After inviting the Member State in question to submit its observations, the Council can after “meeting in the compositions of the Heads of State or Government and by acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament”, determine the existence of a Member State’s serious and persistent breach of the principles in article 6.1 TEU according to article 7.2 TEU. What then happens, if the Council finds a Member State guilty of breaching article 6.1 TEU, is that it can, acting by a qualified majority, “decide to suspend certain of the rights deriving form the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council”, article 7.3 TEU. During the suspension period, the Member State will still be bound by the obligations in the Treaty. Such suspension would most probably harm the Member State’s international reputation and relations. If the Member State in question has disregarded all other recommendations, then the risk of suspension should generate a change.
5. Conclusion

The answer to the main question, in which way article 301 TPC infringes the freedom of expression outlined in article 10 of the ECHR and what the EU should do about it, is that article 301 TPC infringes the right to freedom of expression stated in article 10 ECHR. It does undermine the essence of the right by invoking a wide range of self-censorship, by its ambiguous language and by the way it is applied. The restrictions are interpreted broadly and leave nothing but an arbitrary article left to apply for the courts. The EU holds the power to influence Turkey and can therefore enforce an abolition of article 301 TPC in return for a membership. It is noteworthy that the enforcement of freedom of expression will be to the benefit of democracy in Turkey. Will journalist, authors, publishers, translators etc be able to freely express themselves without a threat of a sentence shadowing their thoughts? Only time will tell…
6. Bibliography

Literature

Arikan, Harun


Grigoriadis, Ioannis N.


Preston, Christopher


Smith, Martin A. & Timmins,


Graham Uğur, Mehmet & Canefe, Nergis

Turkey and European Integration, Accession prospects and issues, Routledge, London: 2004
Non-governmental organizations

- **Amnesty International**
  
  “Turkey: Article 301 is a threat to freedom of expression and must be repealed now!”


- **English PEN**
  
  “Turkey: Ragip Zarakolu acquitted” May 9, 2007
  

  - Joan Smith’s reporting from Mr Pamuk’s trial, December 16, 2005, published in English Pen, January 9, 2006
  

- **Human Rights Watch**
  
  “Turkey: Pamuk Trial Tests Commitment to Free Speech” December 8, 2005
  

- **International Freedom of Expression Exchange**
  
  “Trials against writers, journalists and publishers continue under article 301” May 4, 2006
  

- **International PEN**
  
  “Turkey: Trial Against Publisher Ragip Zarakolu Ends With Acquittal” May 9, 2007
  

  - “Turkey: Alarmed At The Number Of Writers and Publishers Facing Prosecution” November 15, 2005
  

  - “International PEN – Writers in Prison Committee, half-yearly Caselist to 31 December 2006”
  

- **PEN American Center**
  
  “Honorary Members, Ragip Zarakolu”
  

- **Reporters Without Boarders**
  
  “Annual Report – 2007”
  
Official Publications


- Council Decision of 23 January 2006 on the principles, priorities and conditions in the Accession Partnership with Turkey, CELEX Nr. 32006D0035.


- General measures adopted to prevent new violations of the European Convention on Human Rights, Stock-taking of measures reported to the Committee of Ministers in its control of execution of the judgments and decisions under the convention (Application of former articles 32 and 54 and of article 46). Council of Europe {H/Exce (2006)1, last updated May 2006}.

- Opening Statement for the Accession Conference with Turkey

- Presidency Conclusions of the Brussels European Council 14/15 December 2006.

Online News Centers


• “Åtal mot turkisk författare läggs ner” by Titti Nylander, Sveriges Radio, January 23, 2006

Legislation

http://www.echr.info/.

• Single European Act

• Treaty of Amsterdam, Consolidated version in Official Journal C 340, November 10, 1997


• Treaty of Paris (Treaty Establishing the European Coal and Steel Community)

• Treaty of Rome

Case Law

Cases from the European Court of Justice

• Connolly v. Commission (Case C-274/99P).

• Coote v. Granada Hospitality Ltd (C-185/97).

• Ellinki Radiophonia Tileorassi AE v. Dimotiki Etaireia Pliroforissis & Sotirios Kouvelas (Case C-260/89).

• Hanydside v UK (application no. 5493/72).

• Johnston v. Chief Constable of the RUC (Case 222/84).

• Kremzov v. Austria (Case C-299/95).

• Nold KG v. Commission (Case 4/73).
• P v. S. & Cornwall County Council (Case C-13/94).
• Rutilli v. Minister for the Interior (Case 36/75).
• Sunday Times v UK (application no. 6538/74).

Cases from the European Court of Human Rights
• Arslan v Turkey (application no. 23462/94).
• Incal v. Turkey (application no. 22678/93) Reports 1998-IV.
• Papamichalopoulos and others v. Greece (article 50) (application no. 14556/89).
• Scozzari and Giunta v Italy (applications nos. 39221/98 and 41963/98).
• Sener v Turkey (application no. 26680/95).
• Zana v. Turkey No. 2 (application no. 26982/95).

Other Sources
• “Der meistgehasste Türke” by Peer Teuwsen, Das Magazin, No 5, 2005 (in German).
• Interview with David Gaunt, professor of history at Södertörn University by Armine Kanakanian, May 20, 2007.
• “The water finds its crack” by Hrant Dink, openDemocracy, December 13, 2005

• “Vrijheid van meningsuiting reden Lagendijk niet te vervolgen” February 8, 2006

APPENDIX

Interview with Professor David Gaunt at Södertörn University
by Armine Kanakanian, May 20, 2007

Is the Armenian genocide a statement claimed by few or an actuality? What is the status today and what is your opinion in the matter of validity?

- Historians, except from a few in Turkey and some in the states, all agree that the Armenian genocide took place. There is so much evidence. In the archives of every country, material can be found from that period such as articles in journals. Everyone knew what was going on.

In which way does the denial of the genocide affect Turkey’s chances of joining the EU?

- The denial put together with other facts such as not recognizing earlier treatments of minorities, not fulfilling the Copenhagen criteria and not respecting human rights constitute an obstacle in the accession process. The denial is like a brick in a wall of other obstacles, the genocide itself doesn’t constitute an obstacle for accession. There are other obstacles that Turkey must overcome in order to join the Union. The denial on the other hand constitutes problems for the country in different ways. If you look at it from an economic point of view, it aggravates Turkish-Armenian relations mostly in the Karsh district which suffers from economic difficulties.

What is your general opinion about freedom of expression in Turkey?

- It’s terrible. Some journalists have toughened up after the killing of Hrant Dink. I know of many situations where people have felt threatened and therefore self-censored themselves.

Do you think that self-censoring is on going in a big scale in Turkey?

- There are some brave journalists who won’t pay any attention to that but they are guarded by the security police. I know of many journalists who receive threats with claims that their articles are untrue when in fact they contain nothing but the truth.
Could you mention any names of those you know who have received threats?

- That would be very unwise of me. When you write a thesis, the Turkish embassy can order it thus mentioning names would not be good. But I can mention the Kurdish newspaper, “Gundem” in Turkey which at the moment is suspended. They have received threats as a result to an article they published about a mass grave in the Mardin district in October/November last year reporting it as an Armenian mass grave, as the villagers were claiming it to be. There is also a newspaper called Nokta which was suspended on accounts of revealing preparations of a planned Coup attempt. And then we have Agos, Hrant Dink’s newspaper. I was there three weeks ago and they didn’t have any supervision by the police. The situation is very unpleasant but there are a few brave journalists. There are also some oppositionists, for example the historian Halil Berktay who is accompanied by men from the security police when he is outdoors.

Being an author of both books and articles concerning the Armenian genocide, have you at any point received threats or been opposed by the Turkish side?

- They try their hardest. A conference is actually going to be held today by the President of the Turkish Historical Society where he will reveal “the truth” about me and our correspondence. I have really no idea what it is that he is going to “reveal” about me. The correspondence concerns a mass grave which was found in Turkey, close to the Syrian boarder. It is of his meaning that the skeletons found in the grave are from the time of the Roman Empire while I claim that, if the villagers are right, the skeletons are from Armenians who were massacred there, and if so, then I could also mention names of cities that they must have derived from. He challenged me to go to Turkey and make an investigation. So I went to Turkey, to the mass grave but to my surprise someone had removed the skeletons, all 38 of them. Obviously he had already made an investigation of the findings and I refused to make my own investigation of an empty grave.

Has your work been published in Turkey?

- The translation of my book will soon be terminated. It should be published before summer. It will be published by Ragip Zarakolu, a human rights expert, also owner of Belge publishing house. I believe that it might stir up a heated debate and Belge publishing house will most probably be sued. The more attention an article or book gets, the more turbulence it causes. In all these kind of cases it seems to be a group of nationalist journalists who are in contact with a specific court. In this specific district of Istanbul, these cases are accepted by the court almost every time.
Critics say that article 301 TPC is vaguer than its precedent (article 159 TPC). Do you think this has been done deliberately?

- I don’t think that neither Hrant Dink nor Ragip Zarakoulu would have been prosecuted under article 159 TPC. By making article 301 TPC less specific, it allows a broader interpretation and therefore it can be used arbitrarily which a group of nationalists are obviously taking advantage of.

Do you think that politicians in Turkey wish to change the situation of freedom of expression?

- It seems like politicians have a lack of control of the application of article 301 TPC. Only a few months after the legislative reforms, weird cases were being launched. The EU told Turkey right from the start that the reforms weren’t sufficient and that something had to be done. The Turkish government chose to let the proceedings continue to see what the praxis of the article would be. This was a tactical error, they should have amended the article from the beginning.

What is the EU doing to influence politicians in this specific matter?

- The EU has given recommendations and said all that is needed. It is up to the politicians in Turkey to act on the recommendations.