

## DEVELOPMENTS

# The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey

By *Bülent Algan\**

### A. Introduction

Article 301 of the Turkish Penal Code (TPC),<sup>1</sup> much debated at both national and international levels, has recently been subject to an amendment aimed at clarifying its meaning and averting more distressing cases related to freedom of expression. It should be noted that the former article 301 was an amended version of article 159 of the former TPC of 1926. As Türkan Sancar rightly states in her comprehensive book on both articles 159 and 301, article 159 is an article which has been revised many times.<sup>2</sup> It was amended seven times after coming into effect in 1926<sup>3</sup> (in 1936,<sup>4</sup> 1938,<sup>5</sup> 1946,<sup>6</sup> 1961,<sup>7</sup> twice in 2002,<sup>8</sup> and 2003<sup>9</sup>). The new TPC was introduced as a package of penal-law reform prior to the opening of negotiations for Turkish

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<sup>1</sup> Turkish Penal Code (Türk Ceza Kanunu / TCK), Law no: 5237 of 26 September 2004.

<sup>2</sup> See TÜRKAN Y. SANCAR, TÜRK LÜĞÜ, CUMHURİYETİ, MECLİSİ, HÜKÜMETİ, ADLİYETİ, BAKANLIKLARI, DEVLETİN ASKERİ ve EMNİYET MUHAFAZA KUVVETLERİNİ" ALENEN TAHKİR ve TEZYİF SUÇLARI (ESKİ TCK M. 159/1 - YENİ TCK M. 301/1-2) 46 (2006).

<sup>3</sup> Law no: 765 of 1 March 1926.

<sup>4</sup> Law no: 3038 of 11 June 1936.

<sup>5</sup> Law no: 3531 of 29 June 1938.

<sup>6</sup> Law no: 4956 of 20 September 1946.

<sup>7</sup> Law no: 235 of 5 January 1961.

<sup>8</sup> Law no: 4744 of 6.2.2002 and Law no: 4771 of 3 August 2002. These laws were adopted as a result of the efforts for EU membership aimed at harmonizing Turkish laws with EU standards. The first one is known as the 1st Adjustment Law/Package, while the latter as the 2nd Adjustment Law/Package. See Türkan Yalçın Sancar, *Türk Ceza Kanunu'nun 159. ve 312. Maddelerinde Yapılan Değişikliklerin Anlamı*, 52 ANKARA ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ (AÜHFHD) 88, 88-89 (2003).

<sup>9</sup> Law no: 4963 of 30 July 2003.

membership of the European Union, and came into effect on 1 June 2005. Article 301 stated the following:

1. A person who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey, shall be sentenced a penalty of imprisonment for a term of six months to three years.
2. A person who publicly denigrates the Government of the Republic of Turkey, the judicial bodies of the State, the military or security organizations, shall be sentenced to a penalty of imprisonment for a term of six months to two years.
3. Where denigrating of Turkishness is committed by a Turkish citizen in another country, the penalty to be imposed shall be increased by one third.
4. Expressions of thought intended to criticize shall not constitute a crime.<sup>10</sup>

Although this text of the law did not draw attention initially, article 301 loomed large both in Turkey and the European Union after a number of conspicuous cases and criminal investigations of well-known novelists and journalists such as Nobel Laureate Orhan Pamuk, Hrant Dink, Perihan Mağden, Elif Şafak, and even Joost Lagendijk, chairman of the EU-Turkey Joint Parliamentary Committee.<sup>11</sup> Such

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<sup>10</sup> The translation of the article was as follows in an OSCE document:

(1) A person who explicitly insults being a Turk, the Republic or Turkish Grand National Assembly, shall be imposed a penalty of imprisonment for a term of six months to three years.

(2) A person who explicitly insults the Government of the Republic of Turkey, the judicial bodies of the State, the military or security organisation shall be imposed a penalty of imprisonment for a term of six months to two years.

(3) Where insulting being a Turk is committed by a Turkish citizen in a foreign country, the penalty to be imposed shall be increased by one third.

(4) Expression of opinions with the purpose of criticism does not require penalties.

See Miklos Haraszti, *Review of the Draft Turkish Penal Code: Freedom of Media Concerns* (2005), 20 November 2008, available at: [http://www.osce.org/documents/rfm/2005/03/14223\\_en.pdf](http://www.osce.org/documents/rfm/2005/03/14223_en.pdf), last accessed 26 November 2008. For another translation, see EDWARD GRIEVES & VAHIT BIÇAK, TÜRK CEZA KANUNU 165-166 (2007).

<sup>11</sup> Orhan Pamuk was tried because he said that "30,000 Kurds and one million Ottoman Armenians were killed in Turkey." The case was then dropped by the court. Elif Şafak was tried because of her expressions in her book "Father and Bastard." She said "I am the grandchild of genocide survivors who lost all their relatives to the hands of the Turkish butchers in 1915, but I myself have been brainwashed

harsh applications of this article by the Turkish judiciary compelled the government to revise it<sup>12</sup> but the government did not espouse the idea of annulling it forever.<sup>13</sup> Instead, they settled for bringing article 301 in line with the European standards designated by the European Convention of Human Rights.<sup>14</sup> Consequently, article 301 has been revised again, coming into force on 8 May 2008 and signifying the ninth revision since it was first adopted. The new article 301 reads as follows:

Denigrating the Turkish Nation, the State of the Turkish Republic,  
the Institutions and Organs of the State

1. A person who publicly denigrates Turkish Nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the judicial bodies of the State, shall be sentenced a penalty of imprisonment for a term of six months and two years.
2. A person who publicly denigrates the military or security structures shall be punishable according to the first paragraph.
3. Expressions of thought intended to criticize shall not constitute a crime.

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to deny the genocide because I was raised by some Turk named Mustafa." She was acquitted at the first hearing, as there were no elements of the crime envisaged in article 301. For a number of well-known cases emanating from article 301 and their summaries, see *Document - Turkey: Article 301: How the Law on "Denigrating Turkishness" Is an Insult to Free Expression*, AMNESTY INTERNATIONAL, 10 May 2008, available at: <http://www.amnesty.org/en/library/asset/EUR44/003/2006/en/dom-EUR440032006en.html>, last accessed 26 November 2008.

<sup>12</sup> According to the Turkish Minister of Justice, 1,189 people were being taken before a court by the first quarter of 2007 alone for article 301 violations. The number of total cases in the same period was 744. See TBMM TUTANAK DERGİSİ, 23. Dönem 2. Yasama Yılı 81. Birleşim, 25 March 2008.

<sup>13</sup> The attitude of opposition parties was patterned. Nationalists stated positively that they were against any change while the Kurdish-oriented Democratic Society Party strongly espoused abolition of the article. Similar views were also available among the Turkish jurists. See TÜRKİYE BAROLAR BİRLİĞİ (Turkish Bar Association), TCK 301 35-36 (2007).

<sup>14</sup> The need to bring Turkish legislation in line with European standards was emphasized in The European Commission's Progress Report on Turkey. See Commission of the European Communities, *Commission Staff Working Document, Turkey 2006 Progress Report* (November 2006). According to the Report, certain provisions of the TPC, especially article 301, have been used to restrict the expression of non-violent opinions. See p. 14-15.

4. The prosecution under this article shall be subject to the approval of the Minister of Justice.<sup>15</sup>

This essay aims to determine whether the amended version can really decrease the number of cases that arise due to the breach of this article and thus make freedom of expression more “practicable” in Turkey. The essay shall proceed by (Part B) examining the viability of the latest amendments to article 301 which include (i) references to Turkish nation and the State of the Turkish Republic instead of Turkishness and the Republic; (ii) reduced punishment and (iii) the approval requirement from the Minister of Justice as a condition for trial. The essay shall then (Part C) examine the ongoing problems with the keyword denigrate by (i) examining the ambiguities of the word and (ii) the judicial interpretation of the word.

#### **B. The Latest Version of Article 301: What’s New?**

The answer to the question of why article 159 and now article 301 have been subject to so many adjustments lies in its essential character and content. In a nutshell, article 301 has great importance for not only its juridical aspect, but also political.<sup>16</sup> In other words, its application can vary dramatically subject to changes in political atmosphere and legal or interpretative attitudes in the field of civil and political rights, especially in the field of freedom of expression. Legal texts in such content can easily be interpreted by adjudicators in a liberticidal and draconian manner. Its application, then, is strictly related to the structure of the state and how basic rights and their limits are understood by the sovereign powers, especially by the judiciary.<sup>17</sup>

The former article 301 was formulated to embrace several “values” and to protect governmental bodies from attacks. The text was very comprehensive; Turkishness, the Republic, the Parliament, the Government, the judicial institutions, the military and security structures were protected against “public denigration.”<sup>18</sup> As the

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<sup>15</sup> Law no: 5759 of 30 April 2008. Published in the Official Gazette [Resmi Gazete] on 8 May 2008.

<sup>16</sup> According to one author, the crimes regulated by articles 159 and 301 are generally characterized as “political crimes.” See KÖKSAL BAYRAKTAR, *SIYASAL SUÇ* 103 (1982).

<sup>17</sup> The interpretation of article 301 by the Turkish judiciary has been sharply criticized by many authors. According to one of them, article 301 functioned as a “political weapon of the judiciary against freedom of expression.” See Erol Önderoğlu, *301: İfade Özgürlüğüne Karşı Yargının Politik Silahı*, 65 ANKARA BAROSU DERGİSİ 19, 19-23 (2007).

<sup>18</sup> The key word in the article, *aşağılamak* was translated into English differently by the authors. Apart from denigration, the words “humiliate,” “insult,” “deride” and “degrade” are also used. See, *inter alia*,

Government was determined to protect and preserve these values and governmental institutions, they preferred revising the article to leaving them wholly “indefensible” by annulment.

The amendment can be analyzed along three lines. First of all, the terms “Turkishness” and “Republic” have been replaced by the terms “Turkish Nation” and “State of the Republic of Turkey.” The second change signifies a reduced maximum imprisonment for those found guilty and excludes consideration of any aggravating circumstances. The final amendment to the previous form of the article is that any prosecution under the law shall be subject to approval of the Turkish Minister of Justice. The purpose of this amendment is, evidently, to hinder public prosecutors in filing suits arbitrarily under article 301.

Although the drafters of the TPC had never espoused the idea of excluding an article with similar content to that of article 301, they were well aware that such an article could potentially give rise to controversial cases and heated debates about freedom of expression. The paragraph emphasizing that expressions of thought intended to criticize should not constitute a crime was incorporated in the article as a result of that concern. This statement had also been drafted to bring to law enforcement personnel’s attention that “denigration” should be demarcated from free expression. Seen from this angle, it was an open warning directed to the public attorneys and to the judges.

*I. From “Turkishness” to “Turkish Nation”; From “Republic” to “the State of the Turkish Republic”*

According to a major change in the article, public denigration of the “*Turkish Nation*” and “*the State of the Turkish Republic*” shall be punishable instead of denigrating “*Turkishness*” and the “*Republic*.” As these terms have been the basis for numerous cases under the article, an analysis of this amendment would be useful.

It seems that this change mainly aims at crystallizing some of the notions cited in the article so as to dispel the ambiguity in the wording of the article giving rise to conspicuous cases, in whole or at least in part. It should also be noted why the

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Anthony Lester, *Redefining Terror*, INDEX ON CENSORSHIP 103, 105 (2007); Thomas W. Smith, *Leveraging Norms: The ECHR and Turkey’s Human Rights Reforms*, in HUMAN RIGHTS IN TURKEY, 262, 272 (Zehra F. Kabasakal Arat); Gabriel Noah Brahm Jr., *Reading City of Quartz in Ankara: Two Years of Magical Thinking in Orhan Pamuk’s Middle East*, 11 RETHINKING HISTORY 79, 85 (2007); GRIEVES & BIÇAK (note 10), 165. However, the word *aşağılamak* is not fully synonymous with the words *tahkir* and *tezyif*, which were used in article 159 of the former TPC. This will be explained below.

drafters of the former article 301 preferred the term “*Turkishness*” to “*Turkish Nation*.” As they noted in the rationale for the former article 301:

“What is meant by the term “*Turkishness*” in the article is, a common entity which has come into being as a result of the common culture peculiar to the Turks living anywhere around the world. This entity is wider than the term “*Turkish Nation*” and it encompasses the societies who live outside Turkey and who are participants of the same culture. What is meant by the term Republic is, the State of the Republic of Turkey.”<sup>19</sup>

It is obvious that the wider the scope of the article, the more limited the freedom of expression is. In this way, it can be said that replacement of “*Turkishness*” by the term “*Turkish Nation*” by the 2008 amendment to the article would broaden the frontiers of freedom of expression according to the lawmakers. On the other hand, the drafters also admitted above that there was no noteworthy difference between the terms “*Republic*” and “*the State of the Turkish Republic*.” In this context, the change signifies a clarification in the wording, but not in the content, and so does not contribute to expanding the enjoyment of freedom of expression.<sup>20</sup>

Not only had the drafters of the TPC, but also a number of jurists dealt with the meaning of Turkishness and the Turkish Nation. On the one hand, there were authors arguing that the terms “*Turkish Nation*” and “*the State of the Republic of Turkey*” should be used because of their concrete nature and content, while “*Turkishness*” and “*Republic*” were abstract in nature and their inclusion in the Penal code would prove problematic.<sup>21</sup>

According to a second view, both “*Turkishness*” and the “*Turkish Nation*” have the same meaning. From this perspective, “[w]hat is meant with Turkishness is Turkish society and nation. The lawmaker intended to protect both Turkishness and the sense of being attached to the Turkish Nation” by means of article 301.<sup>22</sup> It is

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<sup>19</sup> TBMM, 22. Dönem, Yasama Yılı 2, Sıra Sayısı 664, 688.

<sup>20</sup> This view is supported by a decision of the Turkish Supreme Court of Appeals: “It was seen indispensable to safeguard the Republic... against any attack in terms of common good and it has been added to article 159 for that reason. “The Republic” and the word “State” are synonymous. Therefore, denigration of the state is, on account of its character, constitutes the denigration of the Republic”. CGK, E. 1998-9/70, K. 1998/156, judgment of 5 May 1998.

<sup>21</sup> See İZZET ÖZGENÇ, TÜRK CEZA KANUNU GAZİ ŞERHİ (GENEL HÜKÜMLER) 1075 (2006).

<sup>22</sup> DOĞAN SOYASLAN, CEZA HUKUKU ÖZEL HÜKÜMLER 666-667 (1999). Similarly, it is obvious that “*Turkishness*” is related to a component of the state, the “people” of the state, and corresponds to the “*Turkish nation*.” See SANCAR, *supra* note 2, 83-84.

noteworthy that the Italian Penal Code, which was the main source or reference of the Turkish Penal Code of 1926, punished the denigration of the “*Italian Nation*,” but not of “*being Italian*.”<sup>23</sup> Therefore, it may be assumed that there is no reason for interpreting Turkishness and Turkish Nation differently from each other.

From this viewpoint, a change in the wording really changed nothing in the content of the article. This can be determined considering the practice of the Turkish criminal courts.

According to the Turkish Supreme Court of Appeals, there is no major difference between “*Turkishness*” and the “*Turkish Nation*.” In the *Hrant Dink* case, they interpreted what Turkishness meant in the former article 159 and stated:

The term “*Turkishness*” is related to a component of the state, namely the people, and, what is meant with this term is the Turkish Nation. Turkishness means “humanitarian, religious and historical values constituting the Turkish nation and an entirety of national and moral values composed of national language, national feelings and customs.”<sup>24</sup>

On the one hand, this interpretation of the judiciary, which is contrary to that of the legislative organ, may be seen as contributing to freedom of expression because Turkish courts have not favored the idea that Turkishness is more extensive than the Turkish nation. On the other hand, now that both terms are understood in the same manner, the amendment is meaningless as the wording of the article is still as ambiguous as it was. In other words, nothing changed despite the change in the wording.

Another problem, which is not less bothersome than the problem mentioned above, is the ambiguity of both terms. They are too vague to be taken as a base for punishing those expressing opinions, and the amendment has not corrected this. Many definitions can be found for “*nation*,” “*Turkish Nation*,” and “*Turkishness*.” Vagueness is the common character for all.<sup>25</sup>

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<sup>23</sup> According to article 291 of the Italian Penal Code, a person who publicly denigrates the Italian Nation shall be sentenced a penalty of imprisonment for a term of between one year and three years. This crime was added to the Italian Penal Code in 1939.

<sup>24</sup> See Yargıtay Ceza Genel Kurulu, E.2006/9-169, K. 2006/184, judgment of 11 July 2006.

<sup>25</sup> See SANCAR, *supra* note 2, 70-86.

In conclusion, article 301 remains problematic despite the amendment. That is, the values protected are still as vague as they were before and, as a result, the ongoing ambiguity of the article still constitutes a threat to citizens' rights to freedom of expression. Whenever such an article is preserved in the Penal Code, subsistence of the problem is natural.

### *II. The Reduced Punishment*

A second change in the article is the reduction of the envisaged sanction. It has two aspects. According to the new text of the article, firstly, those found guilty of publicly denigrating the Turkish nation, state, parliament, legal bodies, government, military or police can be sentenced to a term of imprisonment of up to two years, while previously the judges were allowed to charge the guilty to up to three years of imprisonment. This change is important as imprisonment up to two years opens the way for suspension of the jail term.

According to a second change, no aggravating circumstances are envisaged in the new article 301. In other words, when the activity of denigrating the Turkish Nation is committed by a Turkish citizen in a foreign country, this does not increase the punishment anymore.

Although these changes do not bring about a guarantee for the enjoyment of freedom of expression, it may be useful in satisfying the fulfillment of the proportionality principle by fairly punishing unlawful aggression toward the values and institutions enumerated in the article, including expressions which can in any way come within the limits of freedom of expression.

### *III. Approval of the Ministry of Justice as a Condition for Trial*

According to the last change in the article, public prosecutors will have to get authorization from the Ministry of Justice in order to file suits under article 301. Paragraph 4 states that "[t]he prosecution under this article shall be subject to the approval of the Minister of Justice."<sup>26</sup> It must be noted that such a pre-condition for opening the proceedings is, in fact, not new for this article. Premises of today's article 301 also required the assent of various official channels. For example, in the

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<sup>26</sup> During the drafting stage of the amendment, it was planned that the President of the Republic be authorized for this approval instead of the Minister of Justice. Later, considering that such a duty was incompatible with the position of the President of the Republic, the Minister of Justice was authorized. The Turkish Head of State, according to article 101 of the Turkish Constitution, has to remain impartial. Although article 101 implies that his impartiality is mainly in the political area, it was supposed that his involvement with judicial affairs would shade his impartiality.

first version of Turkish Penal Code, approval of the Chairmanship of the Turkish Grand National Assembly was necessary to start the process in its article 160. The competent authority then was changed in 1936<sup>27</sup> as competence was divided between the Ministry of Justice and Ministry of National Defense. In 1938, the Ministry of Justice was made fully competent, as division of the above-mentioned competence was seen as inappropriate by the lawmakers. However, this mechanism was excluded in the new TPC until the most recent amendment.

The basis for this amendment is, obviously, to prevent public prosecutors from opening the proceedings arbitrarily under the cloak of protecting the values and state institutions specified in the article. This supposed breakthrough is intended to prevent or at least diminish the criticisms directed to the government at both national and international levels, as this article is seen as a threat to freedom of expression. Thus, this measure, which apparently looks like an administrative treatment, may well be seen as a political interference of the essential character and content of the article, which is not only legal, but also political, as mentioned above.

In reality, approval of the Ministry for opening proceedings does not provide us a reliable and continuous guarantee. It largely depends on the manner of the political authority. Any change in the ruling political will or changing political balances in EU-Turkey relations may impede this guarantee from functioning. It is stressed that as long as article 301 remains on the statute book, it will be exploited by nationalist elements in Turkish society and by the state apparatus.<sup>28</sup> At least, this will remain as a bothersome possibility so long as this provision is conserved in the Penal Code.

### **C. The Ongoing Problem with the Article: The Meaning of “Denigrate”**

#### *I. Ambiguity or “suspect flexibility” of the word “denigrate”*

It has been shown above that, despite the amendment, the content of article 301 still remains problematic. Another issue with the article is the vagueness of the word “denigrate.” A chronic problem with the article is how the word is understood by public prosecutors and the judges of Turkish Criminal Courts.

The prohibited action in article 301, namely “*public denigration*,” constitutes the *corpus delicti* of the crime. In other words, the sanctions apply when the values and

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<sup>27</sup> Law no: 3038 of 11 June 1936.

<sup>28</sup> Amanda Akçakoca, *EU-Turkey Relations 43 Years on: Train Crash or Temporary Derailment?*, EUROPEAN POLICY CENTRE, EPC ISSUE PAPER NO. 50 (2006) 13.

state institutions are publicly denigrated. The drafters of the article diligently asserted that expressions of thought intended to criticize should not constitute a crime and inserted a paragraph emphasizing this thought. This was, as said above, an open warning from the lawmakers to the judicial organs underlining that judicial bodies should make a distinction between criticism as an integral part of freedom of expression, and denigration which constitutes a breach of that right. Considering that in the mind of the Turkish legislature, the values and state bodies enumerated in the article deserve protection by law against any aggression and that they preferred to keep article 301 as a guard in the Penal Code, the meaning attributed to the word “denigrate” by the Turkish courts is of vital importance.

An important difference between article 301 and article 159 is exclusively phraseological. In other words, how the two forms of the article denote “denigrate” differ. Article 159 embraced the terms *tahkir* (to offer an insult) and *tezyif* (to deride) to correspond with “denigrate,” while the drafters of article 301 preferred to use the word *aşağılamak* (to denigrate) instead. According to one view, this change in the wording introduced nothing new. It was only for simplifying or purifying the text of the article, as the former words were of the origin of Arabic language, while the latter was Turkish to the core. By this change, it is asserted that only the text of the article was changed and the wording was formulated to be more understandable, but the content was still the same.<sup>29</sup>

Nevertheless, this change is strongly criticized by other groups. In their view, this change can not be interpreted as merely a linguistic matter; *tahkir* and *tezyif* on the one hand, and *aşağılamak* on the other, are not synonymous in reality. The terms *tahkir* and *tezyif* were adopted as the translation of *vilipendio* (denigration), the corresponding term in the *Zanardelli Act* of Italy. There was no definition for those terms in either the former TPC or the Italian Penal Code.

The term *aşağılamak* nearly connotes *tezyif* conceptually,<sup>30</sup> but excludes *tahkir*. In other words, when an expression is assessed by a court as deriding, its owner could face a sanction under article 301 even though that expression does not imply an insult. The meaning of *aşağılamak*, then, may cover more moderate expressions contrary to or compared with *tahkir* and *tezyif*. Thus, it is alleged that this amendment dangerously expanded the scope of applicability of the article.<sup>31</sup> The

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<sup>29</sup> For this view, see, for example, Hakan Hakeri, *Yeni Ceza Kanunu'nda ve Yargıtay'ın Yeni Kararlarında Düşünceyi Açıklama Özgürlüğü'ne Aykırılıklar*, 15 HUKUK DÜNYASI 9, 10 (2005).

<sup>30</sup> SANCAR, *supra* note 2, 168.

<sup>31</sup> YAŞAR SALIHPAŞAOĞLU, *TÜRKİYE'DE BASIN ÖZGÜRLÜĞÜ* 182 (2007).

term *tahkir* is still used in other provisions of TPC.<sup>32</sup> If the drafters of TPC as a whole had really aimed to exclude originally non-Turkish words from the text of the law, they would have excluded the word *tahkir* from other provisions too. To conclude, the use of *aşağılamak* instead of *tahkir* and *tezyif* signifies the deterioration of freedom of expression.

## II. How the Word “Denigrate” is to be Interpreted by the Courts

In a democratic society, legal provisions have to be interpreted in light of the principle of *in dubio pro libertate* (if in doubt favor liberty). Considering this principle, the interpretation must be in favor of the rights as much as possible. *In dubio pro libertate* is a principle of interpretation which is indispensable for a true democratic society.<sup>33</sup> This principle functions to steer the thoughts of the interpreter in the direction of expanding basic rights.<sup>34</sup> Beside constitutional norms, hierarchically lower norms too can be understood in the light of this principle. Application of this principle becomes more important when legal provisions are formulated vaguely and need clarification by the judges. If article 301 is interpreted by the courts in this way, its problem is solved to a large extent.

Obviously, replacement of the word *tahkir* and *tezyif* with *aşağılamak* by the Turkish legislative organ is not satisfying for the sake of freedom of expression. Denigration, like the meanings of values and institutions under protection by the article, remains too vague and needs interpretation for law enforcement personnel. Yet the Turkish courts may change this by interpreting the article in a liberal manner in the future. As it is impossible for the legislative bodies to formulate legal texts in absolute clarity, it is often expected that courts interpret and demystify ambiguous terms. It is especially important in the field of human rights.

The European Court of Human Rights, which is recognized by the Turkish Republic as a State Party to the Convention, accepts that it is impossible to formulate legal provisions in absolute precision.

The Court has, however, already emphasised the impossibility of attaining absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society (see the Barthold judgment of 25

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<sup>32</sup> Article 341, for example. See *Id.*, 182.

<sup>33</sup> Mithat Sancar, TEMEL HAKLARIN YORUMU 324-325 (1995).

<sup>34</sup> *Id.*, 330.

March 1985, Series A no. 90, p. 22, § 47). The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague (see, for example, the Olsson judgment previously cited, *ibid.*).<sup>35</sup>

The Court has also already stated precisely how freedom of expression and its limits set by article 10 of the Convention are to be interpreted. The Court gives us a hint in its *Müller and Others* judgment on how to read the provisions similar to article 301. The Court states as follows:

Such measures, which constitute "penalties" or "restrictions", are not contrary to the Convention solely by virtue of the fact that they interfere with freedom of expression, as the exercise of this right may be curtailed under the conditions provided for in paragraph 2 (art. 10-2). Consequently, the two measures complained of did not infringe Article 10 (art. 10) if they were "prescribed by law", had one or more of the legitimate aims under paragraph 2 of that Article (art. 10-2) and were "necessary in a democratic society" for achieving the aim or aims concerned.<sup>36</sup>

On the other hand, the Court says that the limits of permissible criticism are wider with regard to political bodies than in relation to a private citizen.<sup>37</sup> The court also stressed that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress, and that the enjoyment of 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*.<sup>38</sup> Thus, such ideas should be tolerated to achieve a truly democratic society, of which pluralism, tolerance and broadmindedness are hallmarks in the Court's view.

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<sup>35</sup> Eur. Court H.R., *Müller and Others v. Switzerland*, Judgment of 24 May 1988, Series A no. 133, para. 29. See also *Sunday Times v. the United Kingdom (no. 1)*, Judgment of 26 April 1979, Series A no. 30, para. 49; *Hertel v. Switzerland*, Judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, para. 35.

<sup>36</sup> Eur. Court H.R., *Müller and Others*, para. 28.

<sup>37</sup> Eur. Court H.R., *Castells v. Spain*, Judgment of 23 April 1992, para. 46.

<sup>38</sup> See Eur. Court H.R., *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Series A no. 24, para. 49. See also *Lingens v. Austria*, Judgment of 8 July 1986, Series A no. 103, para. 41; *Jersild v. Denmark*, Judgment of 23 September 1994, Series A no. 298, para. 37; *Zana v. Turkey*, Judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, para. 51.

However, the practices and the interpretations of the Penal Code by the Turkish judiciary organs are not very encouraging. Considering the decisions of the Turkish Court of Appeals at length, it can be said that they are not very stable or analogous. Some do look promising, while other decisions are quite restrictive of freedom of expression. For example, the Turkish High Court held rightfully in 1976 that:

[a]s taking the fascist words “dry-throated and bloodthirsty” and “if they have tanks, rifles, panzers, fascism” at the end, then interpreting them as denigrating (*tahkir* and *tezyif*) the spiritual personality of the Government by simple analogy and inference is impossible, ...the crime described in article 159 of TPC does not come into being... in view of choosing an ...exaggerated way of expression.<sup>39</sup>

In addition, the Court of Appeals contends that they adopt the case law of the European Court of Human Rights on article 10 (freedom of expression) of the Convention. Admittedly, numerous examples where the Turkish Court of Appeals refers to or simply repeats the opinion of the ECHR regarding freedom of expression can be found. According to the Court:

Freedom of expression indeed embraces the rights of not thinking the same as the majority, questioning or even criticizing the established régime. Moreover, the ideas which are traumatic nature, which irritate the majority of the society and direct them towards debates are under the protection of freedom of expression.<sup>40</sup>

In another case, a criminal court of first instance almost repeated the quotation above and acquitted a writer that said “the state should cease being a criminal organization and should be based on law.”<sup>41</sup>

Paradoxically, in a considerable number of cases, the Turkish Court claims that the European Court’s case law on freedom of expression is considered in the process of adjudication, and that the final decisions are unequivocally in conformity with those of the European Court of Human Rights. However, this is seen to be misleading even by the dissenting minority members of the Court. This attitude of

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<sup>39</sup> See, Yargıtay Ceza Genel Kurulu, E. 1976-9/247, K. 1976-258, Judgment of 24 May 1976.

<sup>40</sup> See, Yargıtay 8. Ceza Dairesi, E. 2003/2930, K. 2004/5686, Judgment of 22 June 2004.

<sup>41</sup> Bakırköy 2. Ağır Ceza Mahkemesi, Judgment of 20 January 1997. See SANCAR, *supra* note 2, 217. For other similar decisions of Turkish Court of Appeals, see also p. 218.

the Turkish Court of Appeals can be evidenced by the Court's statement of reasons in the Hrant Dink case, a typical example. In this case, the Court first defined the scope of freedom of expression similar to the European Court of Human Rights:

Freedom of expression is applicable to the information or ideas which are not only favorably received or regarded as inoffensive or as a matter of indifference, but also to those that are in opposition with the state or a part of the society and which disturb them. It is a necessity for a democratic society system and pluralism. Criticism too emanates from this freedom. Harshness emanating from the essential character of criticism does not constitute a crime, and since criticism is not complimentary, it can naturally be rigid, offensive and distressing.<sup>42</sup>

But later, having emphasized that freedom of expression is not unlimited and is subject to limitations both in article 10, paragraph 2 of the ECHR and in national law, the majority of the members of the Court regarded Dink's column as violating the limits of freedom of expression.<sup>43</sup>

In sum, Turkish Courts very often pretend to consider the case law of the European Court of Human Rights, but then conclude that national laws and their interpretation of the present case is in full conformity with them.<sup>44</sup> When Turkish courts relinquish this interpretation of freedom of expression and its limits, the problem will be automatically solved to a large extent. In plain words, Turkish Courts should bring their understanding of freedom of expression in line with that of the European Court of Human Rights. Otherwise, no amendment of law will contribute to the protection of that freedom. The solution to the problem mainly depends on a change in mentality, not in the law.

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<sup>42</sup> Yargıtay Ceza Genel Kurulu, E.2006/9-169, K. 2006/184, Judgment of 11 July 2006.

<sup>43</sup> *Id.* For a similar decision of the Court of Appeals, see Yargıtay Ceza Genel Kurulu, E. 20048-201, K. 200530, Judgment of 15 March 2005 and the dissenting opinion thereafter.

<sup>44</sup> For an example of articles 10 and 11 of the European Convention of Human Rights, see Yargıtay 9. Hukuk Dairesi, E. 2004/28345, K. 2004/24792, Judgment of 15 September 2004. In this case, the closure of a trade union, Eğitim-Sen was demanded because of the opinions declared in its statute. The Court of Appeals concluded that non-closure of the trade union by the court of first instance was unlawful. Eğitim-Sen survived by extracting the controversial part of the statement from the statute.

#### **D. Conclusion**

It has been shown above that article 301 (and article 159 of the former TPC) has been subject to continuous debates and several amendments since it was first adopted in 1926. Although the enactment of the new TPC was first approved of in EU circles, it appeared that the formulation of article 301 was a total failure in terms of the exercise of freedom of expression. After long controversies, the Government decided to revise the article.

The 2008 amendment has not solved the controversial elements of the article. It remains cloudy not only because of the ambiguity of the meanings of the values and state bodies protected by the article, but also by the meaning of “denigration.” How “denigration” is interpreted by Turkish Courts is of vital importance for the enjoyment of freedom of expression, as the condition of approval of the Minister of Justice is not always a reliable guarantee because of the political character of the article.

The interpretation of the article as a whole in favor of liberties would also confute the idea that the 2008 changes on the article are only cosmetic. European Court of Human Rights decisions can lead the Turkish courts on this matter. However, the Turkish Courts, which ignored the criteria on freedom of expression and its limits set by the Strasbourg organs, will have to resolve their restrictive apprehension urgently.

Finally, it should be kept in mind that even if the amended article 301 is deemed satisfactory in terms of freedom of expression, there are other freedom-curbing laws in the Turkish Penal Code that need to be changed, too. The Turkish judicial bodies, provided that they adapt their decisions to those of the European Court, can broaden the frontiers of freedom in Turkey as a whole, including, but not limited to, article 301 and freedom of expression.

