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HUMAN RIGHTS *Review*

International Peer-Reviewed Journal 2011 2

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A SHORT CRITIQUE OF THE JUDGEMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS ON ARTICLE 301 OF THE TURKISH PENAL CODE[*]

Asst. Prof. Dr. Selman DURSUN[**]

ABSTRACT

The European Court of Human Rights (ECrtHR) has concluded in the case of *Akçam v. Turkey* that art. 301 Turkish Penal Code (TPC) does not meet the "quality of law" requirement attached in the Court's settled case-law to art. 10 subsection 2 European Convention on Human Rights (ECHR), because of its unacceptably broad terms, which result in a lack of foreseeability as to its effects.

In this short critique, it is defended that the most important guarantee for the expression-based crimes such 301 is the right of criticism, as a ground of justification (defense), and the right of criticism is codified as a special justification ground at subsection 3 of 301. The content and limits of the right to criticism as meant in art. 301 subsection 3 TPC appear to be determined within the framework of art. 10 ECHR and the case law of the ECrtHR, and according to art. 90 para. 5 of the Constitution of the Republic of Turkey, art. 10 ECHR takes precedence in the interpretation of art. 301 TPC. However, the Court did not discuss these points in its judgment. Consequently, despite of the position of the ECHR in Turkish legal system and other safeguards, saying that 301 does not meet the "quality of law" may qualify as an unjust interference in the criminalization power of the State.

Key Words: The European Court of Human Rights, Akçam v. Turkey, Article 301 of the Turkish Penal Code, the principle of legal certainty, quality of law, justification grounds (defenses), the freedom of expression, the right of criticism, Article 90 of the Constitution of the Republic of Turkey, interference in the criminalization power of the State

ÖZET

Avrupa İnsan Hakları Mahkemesi (AİHM) Akçam ve Türkiye davasında verdiği kararda, Türk Ceza Kanunu'nun Türklüğü (Türk Milletini) aşağılamayı cezalandıran

[*] The Judgment of the European Court of Human Rights (The Case of Altuğ Taner Akçam v. Turkey), 25 October 2011, No. 27520/07. Tulkens (President), Jočienė, Björgvinsson, Popović, Sajó, Karakaş, Raimondi.

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301. maddesinin, içerdiği ifadelerin genişliği sebebiyle doğurduğu etkilerin öngörülemez olduğu gerekçesiyle, Avrupa İnsan Hakları Sözleşmesi'nin (AİHS) ifade özgürlüğüne ilişkin 10. maddesinin 2. fıkrası bağlamında Mahkemenin yerleşik içtihatlarının gerektirdiği "kanun niteliğini" taşımadığı sonucuna varmıştır.

Bu kısa eleştiride, ifade özgürlüğüyle ilişkili suçlarda en önemli güvencenin, suçun hukuka aykırılık unsurunun oluşmasını engelleyen bir hukuka uygunluk nedeni olarak eleştiri hakkı olduğu, 301. maddenin 3. fıkrasında da bu hakkın özel olarak vurgulandığı, eleştiri hakkının kapsamının belirlenmesinde ise Anayasanın 90. maddesinin 5. fıkrası uyarınca iç hukukumuzun bir parçası olan AİHS'nin 10. maddesinin ve konuyla ilgili AİHM içtihatlarının dikkate alındığı, incelenen Kararda bu hususların değerlendirilmediği, dolayısıyla tüm bu olgular karşısında 301. maddenin "kanun niteliği" taşımadığının söylenmesinin, devletin cezalandırmaya ilişkin yasama yetkisine haksız bir müdahale olarak nitelendirilebileceği görüş**ü** savunulmuştur.

Anahtar Kelimeler: Avrupa İnsan Hakları Mahkemesi, Akçam ve Türkiye, Türk Ceza Kanunu madde 301, belirlilik ilkesi, kanun niteliği, suçun hukuka aykırılık unsuru, ifade özgürlüğü, eleştiri hakkı, Anayasa madde 90, Avrupa İnsan Hakları Sözleşmesi madde 10, devletin cezalandırma yetkisine müdahale

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I. THE SUMMARY OF THE JUDGMENT

As a professor of history, who researches and publishes extensively on the subject of the historical events of 1915 concerning the Armenian population living under the Ottoman State, the applicant published an editorial opinion in *AGOS*, a bilingual Turkish-Armenian newspaper, entitled "Hrant Dink, 301 and a Criminal Complaint". In this editorial opinion, the applicant criticized the prosecution of Hrant Dink, the late editor of *AGOS*, for the crime of "denigrating Turkishness" under Article 301 of the Turkish Penal Code (TPC). He also requested, in an expression of solidarity, to be prosecuted on the same grounds for his opinions on the Armenian issue. Following this publication, a complaint was lodged against the applicant with the public prosecutor. In this complaint, it was alleged that the applicant's defense of Hrant Dink in the editorial violated Articles 301, 214 (incitement to commit an offence), 215 (praising a crime and a criminal) and 216 (incitement to hatred and hostility among the

people) of the TPC. After the investigation, the public prosecutor made a decision of non-prosecution on the grounds that the statements made by the applicant, in his capacity as a professor of history, came within the realm of protected freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), hence did not cause denigration of "Turkishness", nor amount to incitement to commit a crime, the praising of a crime or criminal, or incitement to hatred and enmity amongst the people. Following this decision, the complainant filed an objection against the decision of non-prosecution whilst another complaint was lodged against the applicant with the public prosecutor containing the same allegation. Both these further complaints were also dismissed.

In Strasbourg, the applicant complained that the existence of art. 301 TPC interfered with his right to freedom of expression. He maintained that the mere fact that a criminal investigation could potentially be started against him under this provision for his scholarly work on the Armenian issue caused him great stress, apprehension and fear of prosecution and thus constituted a continuous and direct violation of his rights under art. 10 of the Convention. The applicant also alleged that art. 301 TPC did not provide sufficient clarity and failed to provide adequate protection against arbitrary interference.

The Government asserted that the impugned legal provision had never been applied against the applicant and that proceedings which have been started had been terminated by a definitive decision of non-prosecution decision. This constituted a clear sign that the applicant's opinions were protected by his right to freedom of expression under art. 10 of the Convention. Accordingly, the applicant did not qualify as a victim, and his complaint, which alleged the incompatibility of a national law *in abstracto*, should be inadmissible, as it would amount to an *actio popularis*. As regards the future risk of prosecution, the Government underlined that the applicant was unlikely to suffer prejudice in the future because certain safeguards had been introduced by the amendment of art. 301 which had significantly reduced prosecutions under this provision. In this regard, the Government emphasized the fact that in order to commence investigations under art. 301 public prosecutors needed to obtain authorization from the Ministry of Justice.

The Court concluded that an applicant is entitled to claim to be the victim of a violation of the Convention, even if he is not able to allege in support of his application that he has been subject to a concrete interference. In such instances, the question whether or not an applicant can be regarded as a victim under the Convention involves determining whether the contested legislation is in itself compatible with the Convention's provisions. According to Court, the applicant had shown that he is actually concerned with the evaluation of events of 1915, that he was involved in the generation of expressions targeted by art. 301, and therefore is directly affected.

In the Court's opinion, while the legislator's aim of protecting and preserving the Turkish Nation and fundamental State institutions from public denigration can be accepted to a certain extent, the scope of the terms under art. 301 TPC, as interpreted by the judiciary, is too wide and vague. Thus, the provision constitutes a continuing threat to the exercise of the right to freedom of expression, i.e. the wording of the provision does not enable individuals to regulate their conduct or to foresee the consequences of their acts. Taking into consideration the number of investigations and prosecutions brought under this provision, any opinion or idea that is regarded as offensive, shocking or disturbing can easily be the subject of a criminal investigation by public prosecutors, and the safeguards put in place by the legislator to prevent the abusive application of art. 301 by the judiciary do not provide a reliable and continuous guarantee or remove the risk of being directly affected by the provision because any political change over time might affect the interpretative attitudes of the Ministry of Justice and pave the way to arbitrary prosecutions. As a result, the Court stated that art. 301 of TPC does not meet the "quality of law" required by the Court's settled case-law, since its unacceptably broad terms result in a lack of foreseeability as to its effects.

II. THE CRITIQUE OF THE JUDGMENT

1. The European Court of Human Rights (ECrtHR) has concluded in the case of *Akçam v. Turkey* that art. 301 TPC does not meet the "quality of law" requirement attached in the Court's settled case-law to art. 10 subsection

2 ECHR, because of its unacceptably broad terms, which result in a lack of foreseeability as to its effects. If the content integrity of art. 301 TPC, the legal effects and place of the European Convention on Human Rights (ECHR) in the Turkish legal system and the elements of crime in art. 301 TPC are taken into consideration, this decision is very open to criticism. The decision includes a predictive judicial assessment of art. 301 TPC based on some improper and partly abusive practices which took place in the past, rather than a technical-judicial analysis of the provision, which leads to undue interference in the criminalization authority of the State.

2. In its assessment of art. 301 TPC, the ECrtHR did not fully analyze all aspects of this provision. While subsections 1 and 2 of this provision describe the elements of the criminalization, subsection 4 of art. 301 TPC refers to the condition of permission of the Ministry of Justice for the investigation and prosecution of the crime. Subsection 3 contains a special ground of justification which directly affects the provision's "quality", from the perspective of the legality standards. In this subsection, it is expressly determined that "*The expression of an opinion for the purpose of criticism does not constitute an offence*". Moreover, art. 90 para. 5 of the Constitution of the Republic of Turkey declares the superiority of the ECHR over national law[1]. As such, art. 10 ECHR takes precedence in the interpretation of art. 301 TPC. Art. 26 subsection 1 TPC, which holds that "*No punishment is given to a person exercising his rights*", is also important in this regard. However, the Court has not assessed these provisions.

3. According to Turkish penal law, an act constitutes a crime, if it fulfils the material and mental elements of the crime description, if there is no ground of justification. In other words, fulfilling the crime description is not sufficient; the act must also be illegal in the sense that it is "illegal",

[1] The text of this provision reads as follows: *"International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail".*

whilst no justification grounds (defenses) exist[2]. Although justification grounds generally do not require specification in relation to each type of crime, subsection 3 of art. 301 TPC regards an exception to this general rule, as it does constitute a special justification ground is codified within the provision. This ground represents the right of criticism[3]. The content and limits of the right to criticism as meant in art. 301 subsection 3 TPC appear to be determined within the framework of art. 10 ECHR, as well as art. 26 of Turkish Constitution, which regulates the Freedom of Expression and Dissemination of Opinion. Thus, as long as an expression is exercised within the content of the right of criticism, that act will not constitute a crime under art. 301 TPC[4]. The Court did not discuss this point in its judgment, despite the fact that the non-prosecution decision of Turkish prosecutor in this case based on art. 10 ECHR.

4. The ECHR's assessments of art. 301 TPC from the perspective of the principle of legal certainty are also problematic. As part of the principle of legality, the certainty principle regards one of the basic principles of Turkish penal law (art. 2 subsection 1 TPC)[5]. However, as set forth in the Court's decision, absolute certainty is unattainable in legal definitions of crimes, whilst this difficulty is more evident in expression-based crimes. The most important guarantee for these types of crimes is to determine properly the limits of right to freedom of expression, as a ground of justification (defense). In this context, the Court's evaluations of the legal

[2] İzzet Özgenç, **Türk Ceza Hukuku Genel Hükümler**, (Turkish Penal Law, General Provisions) Ankara, Seçkin Publishing House, 2010, pp. 154, 263 et seq.; Mahmut Koca, İlhan Üzülmez, **Türk Ceza Hukuku Genel Hükümler**, (Turkish Penal Law, General Provisions) Ankara, Seçkin Publishing House, 2011, pp. 75, 210 et seq. Under TPC, these are the defenses: The execution of the provision of a statute (art. 24/1) or orders of a competent authority (art. 24/2), self-defense (art. 25/1), and the exercise of a right (art. 26/1) and consent of a relevant person (art. 26/2).

[3] See also the legal grounds of art. 301 TPC at Cumhur Şahin, İzzet Özgenç, Adem Sözüer, **Türk Ceza Hukuku Mevzuatı** (Turkish Penal Law Legislations), Ankara, Seçkin Publishing House, 2011, Vol. 1 (Codes), pp. 431-433.

[4] See Mehmet Emin Artuk, Ahmet Gökcen, Ahmet Caner Yenidünya, **Ceza Hukuku** Özel **Hükümler** (Penal Law, Special Provisions), Ankara, Turhan Publishing House, 2010, pp. 1087-1092. For the Turkish case law see Osman Yaşar, Hasan Tahsin Gökcan, Mustafa Artuç, **Yorumlu-Uygulamalı Türk Ceza Kanunu** (Turkish Penal Code with Comments-Case Law), Ankara, Adalet Publishing House, 2010, Vol. VI (Articles 257-345), pp.8334-8341, 8346-8373. See also the legal grounds of art. 301 TPC at Şahin, Özgenç, Sözüer, pp. 432-433.

[5] Özgenç, p.111 et seq; Koca, Üzülmez, p.47 et seq.

certainty provided by the wording of art. 301 TPC, especially where they are based on the risk of (arbitrary) prosecutions and abusive applications of provision are not satisfactory. Because this grounds are not peculiar to art. 301. The same reasons can be put forward for all other types of expression-based offences. As such, any criticism of any person can lead to a risk of criminal investigation for crimes such as defamation, depending on the right to complaint of the injured party. A right to complaint can also be abused, but this fact cannot solely be a criterion for the "quality of law" of the relevant article.

5. It is true that in practice, there were some problems related to art. 301 of TPC. The problems due to wrong applications stemmed from difficulties in the delineation of the scope of the right to criticism, rather than the broadness of the terms of subsection 1 and 2 of art. 301 TPC. As noted above, if the scope of the right to criticism is determined by taking art. 10 ECHR and the case law of the ECrtHR in relation to this provision into consideration, these problems do not appear. As a matter of fact, in this case, the Turkish prosecutor has made the non-prosecution decision, by taking into consideration and by referring art. 10 ECHR. On the other hand, the permission of Ministry of Justice is the most important safeguards against problems due to probable abusive applications of art. 301. Consequently, despite of the position of the ECHR in Turkish legal system and other safeguards, saying that 301 does not meet the "quality of law" may qualify as an unjust interference in legislative power of the State.