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THE NEW VERSION OF TURKISH PENAL CODE ARTICLE 301: AN EVALUATION

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ABSTRACT

Article 301 of the Turkish Penal Code (TPC) is a very controversial article both in Turkey and in the international arena. It has been criticized on the grounds that it restricts and even does away with freedom of expression. The first version of Article 301 of the TPC No. 5237 maintained the general characteristics of the last version of Article 159. However, while on the one hand some people continually expressed their demands for the complete abolishment of this article, on the other hand some expressed the opinion that the article should be made more concrete. As a result of these efforts, the article was revised with a law dated 30 April 2008. Although the number of sentenced cases has decreased since the last amendment, discussions about and criticism of the article have not ended. This study analyzes the last version of the article and tries to clearly delimit this type of crime, particularly because it restricts the freedom of expression.

ÖZET

Türk Ceza Kanunu'nun (TCK) 301. maddesi (Türk Milletini, Türkiye Cumhuriyeti Devletini, Devletin Kurum ve Organlarını Aşağılama) (765 sayılı TCK madde 159) Türk ceza hukukunda en problemli maddelerden birisi olarak görülmektedir. Bu madde yurt dışında da çok eleştirilen bir maddedir. Uygulamada Hrant Dink, Orhan Pamuk, Elif Şafak gibi yurtdışında da tanınan kişilerin bu maddeden mahkum edilmesi dolayısıyla, bu maddenin ifade özgürlüğünün önündeki en önemli engellerden biri olduğu sıklıkla vurgulanmaktadır. Türk Ceza Kanunu'nun 301. Maddesinin ilk hali, bir takım değişiklikler yapılarak 765 sayılı TCK'nın 159. Maddesinin son halini büyük ölçüde korumuştu. Ancak kamuoyunda, bu maddenin tamamen kaldırılması ya da daha somut hale getirilmesi yönündeki eleştiriler üzerine 30.4.2008 tarihli 5759 sayılı kanunla madde yeniden düzenlenmiştir. Ancak bu değişiklikten sonra da madde üzerindeki tartışmalar ve eleştiriler son bulmamıştır. Bu makalede son haliyle maddenin ifade özgürlüğü karşısındaki durumu ele alınmış ve bu suç tipinin sınırlarının net olarak çizilmesine çalışılmıştır.

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A. INTRODUCTION

Article 301 of the Turkish Penal Code[1] (TPC) is a very controversial article both in Turkey and in the international arena. It has been criticized on the grounds that it restricts and even does away with freedom of expression. As famous people such as Orhan Pamuk, who was awarded the Nobel Prize; Hrant Dink, who was killed in an armed attack; and Elif Shafak who has a large readership in Turkey and around the world, have been put on trial, and some even sentenced, in accordance with this article, interest in Article 301 has been kept alive. Such type of crime was first regulated with Article 159 of the TPC of 1926[2]. It was amended several times until the new Turkish Penal Code of 2004 was adopted. The first version of Article 301 of the TPC No. 5237 maintained the general characteristics of the last version of Article 159. However, while on the one hand some people continually expressed their demands for the complete abolishment of this article, on the other hand some expressed the opinion that the article should be made more concrete. As criticism of the article has increased in domestic and foreign public opinion because of the trials of the abovementioned famous people under this article and because of its restriction on freedom of expression, the government first requested opinions from domestic non-governmental organizations on the issue and then drafted a law for amendment of the article. As a result of these efforts, the article was revised with a law dated 30 April 2008[3]. The final version of the law is as follows:

"Denigration of the Turkish nation, the Republic of Turkey, institutions and bodies of the State"

ARTICLE 301

1. A person who publicly denigrates the Turkish nation, the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or judicial institutions of the State shall be punished by imprisonment of between six months and two years.
2. A person who publicly denigrates the military or security organizations shall be punished in accordance with paragraph 1.
3. Expressions of thought intended to criticize shall not constitute a crime.

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1 Turkish Penal Code, Law No. 5237, Date of Adoption: 26 September 2004.

2 Turkish Penal Code, Law No. 765, Date of Adoption: 1 March 1926. This Code is adapted from the Italian Penal Code of 1889.

3 Law No: 5759, Date of Adoption: 30 April 2008.

4. Launching a criminal investigation shall be dependent upon permission of the Justice Minister.

An appeal was lodged with the Constitutional Court for the abolishment of paragraph 4 of Article 301, which necessitates permission of the Minister of Justice for launching a criminal investigation for this crime, on the grounds that Article 301 conflicts with the Constitution; however the Constitutional Court rejected this request in its decision of 6 May 2009. On 24 December 2008, the Minister of Justice stated[4] that he had given permission for only 70 of the total 519 requests between 5 May 2008 and 23 December 2008.

Although the number of sentenced cases has decreased since the last amendment, discussions about and criticism of the article have not ended. This study analyzes the last version of the article and tries to clearly delimit this type of crime, particularly because it restricts the freedom of expression.

B. ARTICLE 301 AS A RESTRICTION ON THE FREEDOM OF EXPRESSION

Undoubtedly, Article 301 of the TPC is directly related to the freedom of expression and freedom of thought. The Republic of Turkey prescribes these freedoms in its Constitution and has also adopted international documents that protect these freedoms in its domestic law.

In the Constitution of the Republic of Turkey, Article 25 is entitled "Freedom of Thought and Opinion" and Article 26 is entitled "Freedom of Expression and Dissemination of Thoughts". According to Article 25, "Everyone has the right to the freedom of thought and opinion. No one shall be compelled to reveal his thoughts and opinions for any reason or purpose, nor shall anyone be blamed or accused on account of his thoughts and opinions".

As seen above, there are not any restrictions in Article 25. However, Article 26, after first recognizing the freedom of expression and dissemination of thought, then states that these freedoms may be restricted for several reasons. According to Article 26, "Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing, in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing.

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[4] See, available at: http://www.cnnturk.com/2008/turkiye/12/24/bakanlik.301e.dair. 519.dos-yadan.70ine.izin.verdi/506104.0/index.html, last visited on 9 July 2009.

The exercise of these freedoms may be restricted for the purposes of protecting national security, public order and public safety, and the basic characteristics of the Republic, safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary."

On the other hand, Turkey has signed several important agreements on human rights and pursuant to Article 90 of the Constitution these agreements are a part of Turkish domestic law. Moreover, in the event that the provisions of these agreements in the fields of fundamental rights and freedoms conflict with the provisions in domestic law, the former are superior to the latter and it shall not be asserted that these provisions are unconstitutional[5]. A new reason for "renewal of trial" was added through a provision included in the Turkish Criminal Procedure Code[6] within the framework of the harmonization process with the European Union. According to subparagraph F of the first paragraph in the article entitled "Reasons for the renewal of trial in favor of the sentenced person", "In the event that it is concluded through the final decision of the European Court of Human Rights (ECtHR) that the criminal sentence is given in a way that violates the protocols of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its annexes and that this sentence is dependent on this contradiction, it is a reason for renewal of the trial." As can be seen, Turkey has accepted the protections of the ECHR in terms of the freedom of thought and expression. In this regard, Turkey must fulfill the requirements of the provisions related to the freedom of thought and freedom of expression in Articles 9 and 10 of this Convention. Turkey is also required to take into account the decisions of the ECtHR as they establish precedents for cases involving freedom of thought and expression.

As also stated in Article 10 of the Convention, there are certain restrictions on the freedom of expression of thought in democratic societies. Surely the

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5 The Turkish Constitution, Article 90/4: "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."

6 Law No. 5271, Date of Adoption: 4 December 2004.

freedom of expression is also not exempted from restrictions in democratic societies. In fact no freedom is infinite absolutely. An absolute freedom causes anarchy. In an anarchic environment there cannot be a state regime or in the end a democracy. However, as is the case with other fundamental rights and freedoms, there is also a limit to the restrictions on the freedom of expression. In its decisions, the ECtHR uses the limiting criteria prescribed in the Convention in order to limit these restrictions. According to these criteria, in national law a restriction of the freedom of expression cannot be regarded as a violation of Article 10 of the Convention provided that it has three basic characteristics. Firstly, this restriction should be necessary in a democratic society. Secondly, the restriction should be prescribed by the law. Thirdly, the restriction should serve a legitimate purpose (ECHR, Article 10/2).

The European Court of Human Rights put forward an essential understanding of the ideas encompassed in the freedom of expression in the case of *Handyside v. The United Kingdom*[7]. The Court stated as follows:

"*Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued*."[8]

The Court concluded that the freedom of expression is broader as regards political topics[9]; that statements questioning the current regime of the state enjoy the guarantee of freedom of expression; and that solely expressing these opinions in an abrupt, aggressive and even hostile manner does not result in an exclusion from this protection[10]. Another point the Court emphasized in terms of freedom of expression is that declarations promoting violence and armed insurrection cannot be considered protected by Article 10 of the Convention; but in order to evaluate a declaration under

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7 Eur Court H.R., *Handyside v. The United Kingdom*, Judgment of 7 December 1976, Series A no. 24.

8 Eur Court H.R., *Handyside v. The United Kingdom*, para. 49.

9 See Eur Court H.R*, Sürek and Özdemir v. Turkey*, Judgment of 8 July 1999, para. 60.

10 See Eur Court H.R., *Ceylan v. Turkey*, Judgment of 8 July 1999, para. 34; *Polat v. Turkey*, Judgment of 8 July 1999, para. 45.

this article, many factors such as the community to which it was addressed, the place and time in which the declaration was made, the position and characteristics of the declarer, and the manner of declaration should be taken into account[11].

Within the framework of these general principles, it is clear that Article 301 of the Turkish Penal code should be regarded as a restriction on the freedom of expression. Turkish policy-makers decided to protect certain values and institutions against interference in the form of "denigration" and criminalized these acts. Because of the notoriety of this article inside and outside the country and unfair trials and sentences that have resulted from this article, it may be claimed that this article should not exist at all and should be abolished immediately. However, it can also be suggested that certain of this country's common values cannot be left unprotected. Furthermore, many European countries have such an article in their legislation[12]. Under the circumstances, without ignoring the reality, it appears that making comments that will pave the way for implementation of the current article in a way that does not violate freedom of expression or that violates it at the lowest level is unavoidable. At least it may be regarded as a sign of normalization that the issue began to lose its sensational dimension on the agenda due to the recent changes to the law, even though these were required by the harmonization process with the European Union, and due to the lower number of cases filed as compared to in the past. However, in order to prevent transformation of this normalization into a bomb ready to explode with the changing of the wind, delimitation of this crime is an important assurance of the freedom of expression.

C. LEGAL VALUES PROTECTED BY ARTICLE 301

The aims of this law are, through criminal sanction, to preclude acts degrading the values and institutions listed in Article 301 of the TPC and to protect these institutions. Avoiding the loss of authority of these values and institutions and maintaining their prestige is what lies behind this protection. The functioning of these values, bodies and institutions that are crucial parts of the government might be hindered by tarnishing their reputation, honour and

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[11] See Eur Court H.R., *Gerger v. Turkey,* Judgment of 8 July 1999, para*. 50; Karatas v. Turkey,* Judgment of 8 July 1999, para. 52.

[12] See German Penal Code, Article: 90/a, b; Italian Penal Code, Article: 290, 291; French Press Law Article: 23, 30, 31; Belgium Penal Code, Article: 277; Poland Penal Code, Article: 133; Spanish Penal Code, Article: 543.

prestige. Therefore, the protection of the state bodies listed in Article 301 against degrading acts also contributes to their proper functioning[13].

The Supreme Court of Appeals, in its decisions made during the period when the now-abolished TPC No. 765 of 1926 was in force, specified what this article protected: "*This provision, undoubtedly, protects the political and legal entities of the government and their parallel interests. The main purpose in listing these institutions, which constitute the State and are considered as the integral elements of a synthesis, and imposing sanctions on any acts against them is to protect the legal personality, reputation and legal interest of the State. By this provision, institutions that are listed in the article and constitute the State and the notion of the State are protected, but the protection of individuals, groups or people in these institutions is not intended*"[14].

However, it must be noted that the type of crime determined by Article 301 protects the legal interest of the whole society and nation, without considering individuals. Therefore, Article 301 does not apply to acts of insulting someone for "being a Turk" or personally humiliating a member of the parliament[15].

On the other hand, particular consideration must be attached to the fact that the values and institutions listed in the Article are not absolutely privileged or above reproach. Assuming these values and institutions as privileged and in a way sanctifying them may result in automatically deeming every criticism against, and expression of every idea about, these values and institutions an offence, which jeopardizes freedom of thought and expression. Therefore, an understanding that is compatible with democratic structures considers protection of prestige within a functional framework. Such an approach places due importance on the freedom of thought. In this regard, non-disclosure of the activities of essential state bodies that directly concern

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13 TÜRKAN y. SANCAR, Türklüğü, Cumhuriyeti, Meclisi, Hükümeti, Adliyeyi, Bakanliklari, Devletin Askeri ve Emniyet Muhafaza Kuvvetlerini" Alenen Tahkir ve Tezyif Suçları (Eski TCK m. 159/1 – Yeni TCK m. 301/1–2) 65–66 (2006). also see, Mehmet Emin Artuk - Ahmet Gökçen - Caner Yenidünya, Ceza Hukuku Özel Hükümler 1101 (2008).

14 *Yargıtay Ceza Genel Kurulu* (The General Assembly of Criminal Panels of the Supreme Court of Appeals) *Resolution no. 2001/9–132–155*. See SANCAR, (note 15), 65. Pro: *Yargıtay Ceza Genel Kurulu*, *Resolution no. 9–127/157*, Judgment 22 May 1995. See Vural Savaş – Sadik Mollamahmutoğlu, Art 159, in: TÜRK CEZA KANUNU'NUN YORUMU (Vural Savaş – Sadik Mollamahmutoğlu eds, 1999), 1963.

15 See Ersan Şen, *Türk Ceza Kanunu Madde 301*, 2 CEZA HUKUKU DERGİSİ (CHD) 3, 8–9 (2007).

society does not help protect their prestige; likewise, revealing the facts does not harm these values and institutions[16].

The legal values protected by Article 301 are as follows: the Turkish nation, the State of the Republic of Turkey, the Turkish Grand National Assembly, the Government of the Republic of Turkey, the judicial bodies of the State, and the military and security organizations.

I. The Turkish Nation: The term "Turk" may be considered from different points of view. Its definition may vary depending on the criterion taken as a basis. In fact, definitions have been made based on sociological, historical, cultural, ethnical or purely legal aspects, each leading to different results. We think that the definition of a term in a legal text should be of a legal nature. Therefore, it would be appropriate to turn to law for the definition of this term.

According to Article 66 of the Constitution of the Republic of Turkey, "Everyone bound to the Turkish State through the bond of citizenship is a Turk". It is clear that the definition here is based on the bond of citizenship, a legal concept, rather than an ethnic or any other origin[17]. Based on this definition, we can denominate the group of people bound to the Turkish State through the bond of citizenship as the Turkish nation.

In the original version of Article 301, before it was amended by Law No. 5759 dated 30 April 2008; the term "Turkishness" (Türklük) was used instead of "Turkish nation"[18]. This was a controversial term and it has been claimed to be the reason for the undue trial of a number of well-known people because it was ambiguous and open to broad interpretation[19]. During this period some people supported replacing the term with "Turkish nation"[20]; however, others

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16 SANCAR, (note 15), 67; ÇETİN ÖZEK, TÜRK BASIN HUKUKU 190 (1978).

17 Prof. Metin Feyzioğlu, *Atatürk ve Hukuk*, *in* ORD. PROF. SULHİ DÖNMEZER ARMAĞANI, 846, 848 (Türk Ceza Hukuku Derneği Dergisi, 2008).

18 This concept, which was in the now-abolished TPC No. 765, was explained in the preamble as follows: "...the term Turkishness refers to the common asset yielded by the common culture of Turks, living anywhere in the world. This asset is broader than the term Turkish nation, including communities outside Turkey who are contributors to the same culture". Sancar criticises this definition in the preamble and notes by way of interpretation that the term "Turkishness" does not denote the term "Turkish nation", which may lead to an ethnic, even racist meaning. See SANCAR, (note 15), 85.

19 Famous people such as Hrant Dink, Orhan Pamuk, and Elif Shafak were tried for insulting "Turkishness".

20 See SANCAR, (note 15), 2006, p. 85–86; İZZET ÖZGENÇ, TÜRK CEZA KANUNU GAZİ ŞERHİ (GENEL HÜKÜMLER) 1075 (2006); Türk Ceza Hukuku Derneği'nin TCK'nın 301. maddesiyle İlgili Olarak

argued that it was not just a simple term and that it represented some important values[21]. The Supreme Court of Appeals, in its decisions concerning the article, generally used the term "Turkishness" in ethnic, linguistic, historic and cultural contexts and, in some of its decisions, established a relationship between "Turkishness" and the "Turkish nation"[22].

In fact, considering the principle of legality and its sub-principle of the precision and clarity of laws, it was appropriate to replace the term "Turkishness", which was open to broad interpretation and carried ambiguity, with "Turkish nation"[23]. It may be alleged that the term "Turkish nation" is also an abstract concept and may be interpreted broadly, hence paving the way for decisions that are contrary to the freedom of expression. Against this allegation, it may be argued that to some extent every law contains abstract and general expressions and that this is not contrary to law-making practice. As a matter of fact, in its decision in the case of *Öztürk v. Turkey*[24]*,* the ECHR states the following:

"*The Court refers to its established case-law to the effect that one of the requirements flowing from the expression 'prescribed by law' is the foreseeability of the measure concerned. Thus, a norm cannot be regarded as a*

Hazırladığı Rapor, *in* TÜRKIYE BAROLAR BIRLIĞI'NIN TCK'NIN 301. MADDESI İLE İLGILI OLARAK HAZIRLADIĞI RAPOR 1, 93 (Meslek Kuruluşları ve Konfederasyonlar Toplantısı, 2.2.2007)

21 See Şen, (note 17), 16–17.

22 E.g.: "In a conversation among several people about pre-elections for the election of MPs, the accused said 'they elect the bad ones among the good ones; actually, Turkey is a corrupt and villainous country'… The term Turkishness in Article 159 of the TPC refers to the total of national moral values consisting of humane, ethical, religious and historical values and national language, emotions and traditions. Attacking these moral values means insulting and derogating Turkishness. Therefore, it is determined that by expressing the foregoing statements because of corruptions in the elections and referring directly to these corruptions Turkishness has been insulted and degraded; and it is contrary to the word, spirit and the purpose of the law..." *Yargıtay 1. Ceza Dairesi* (Supreme Court of Appeals, 1. Criminal Chamber), *Resolution no.* 1665/1980. See Vural-Mollamahmutoğlu, (note 16), 2038. "As the term Turkishness refers to the total of national moral values consisting of humane, ethical, religious and historical values and national language, emotions and traditions, attacking this body of values may lead to the offence of insulting "Turkishness". *Askeri Yargıtay (Military Court of Appeals), Resolution no, 60/73, Judgment 08 April 1999*. Askeri Yargıtay Kararları Dergisi (Mil. YKD), 527, 527-528 (2001).

23 Pro: ARTUK-GÖKCEN-YENIDÜNYA, (note 15), 1105. Con: Bülent Algan,. *The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey*, 9 German Law Journal, 2237, 2244 (2008), available at: http://www.germanlawjournal.com/article.php?id=1066.

24 Eur. Court H.R., *Öztürk v. Turkey*, Judgment 28 September 1999.

'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice"[25].

II. The State of the Republic of Turkey: A republic refers to a form of government where the sovereignty rests in the whole society rather than in one person or a group. In accordance with Article 1 of the Constitution of the Republic of Turkey, the Turkish State is a Republic. The Republic refers to the State of the Republic of Turkey. In fact, with the amendment by Law No. 5759 dated 30.08.2008, the term "Republic" in the previous version of the article was replaced by "the State of the Republic of Turkey"[26]. In its decisions before that change was made, the Supreme Court of Appeals considered the term "Republic" to mean "state"[27].

III. The Turkish Grand National Assembly (TGNA): The TGNA is the constitutional organ with legislative power. Pursuant to Article 6 of the Constitution, "Sovereignty is vested fully and unconditionally in the nation. The Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution". These organs are legislative (Art. 7 of the Constitution), executive (Art.8) and judiciary (Art.9). Article 7 of the Constitution states that "Legislative power is vested in the Turkish Grand National Assembly on behalf of the Turkish Nation. This power

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25 Eur. Court H.R., *Öztürk v. Turkey,* para.54.

26 Before the amendment, the preamble of the article stated that "Republic refers to the State of the Republic of Turkey".

27 "…The Republic and state are synonymous. Accordingly, degrading and insulting the State means degrading and insulting the Republic. A state refers to a legal entity representing the highest power and authority established within the country …". *Yargıtay Ceza genel Kurulu*, *Resolution no*. 9-70/156, *Judgment 5 May 1998*. See Osman Yaşar, Art 159, in: İÇTIHATLI TÜRK CEZA KANUNU (Osman Yaşar ed., 2001), 356-357. "The Republic is one of the values protected by the Article. The term 'Republic', as emphasised by Resolution no: 70-156 dated 5.5.1998 of the General Assembly of Criminal Panels, is synonymous with 'State'. Therefore, insulting and degrading the State means insulting and degrading the Republic. …". *Yargıtay Ceza Genel Kurulu, Resolution no. 9-123/253, Judgment 21 May 2002*. See SANCAR, (note 15), 90.

cannot be delegated". Thus the Turkish Grand National Assembly indicated in Article 301 refers to the organ defined in Article 7 of the Constitution which exercises the legislative power. Here, the subject protected by Article 301 is not the individual or groups of members of the parliament. Because of its executive function, the prestige, reputation, reliability, credibility and authority of the Assembly as a whole is protected. Article 301, therefore, does not cover the protection of individuals or groups of members of the parliament[28]. It should, however, be analyzed whether it covers the members of the judiciary[29].

IV. The Government of the Republic of Turkey: This refers to the whole Council of Ministers, which consists of the Prime Minister and ministers, as the executive body of the State. The Council of Ministers is regulated by Article 109 and successive articles of the Constitution. As the term Government implies the Council of Ministers as a whole, targeting the Prime Minister alone or an individual minister does not fall under Article 301[30]. In daily life, the actions that most affect citizens are those related with the duties of the Government. Therefore, it is the Government which is most frequently exposed to severe criticism. Of the crimes covered under this article, the greatest numbers of cases engaging the judiciary have involved insults against the government. Achieving and maintaining a pluralist and peaceful democratic political life rely on both a tolerant and permissive government and employment of a liberal stance by the jurisdiction[31]. However, it has been said that in Turkey, governments have tried to make this provision more severe by introducing amendments, and that in order to preclude any criticism they have often invoked Article 301 (or Article 159 of the abolished TPC No. 765)[32].

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28 SANCAR, (note 15), 94; ARTUK-GÖKCEN-YENİDÜNYA, (note 15), 1107.

29 SANCAR, (note 15), 94.

30 ARTUK-GÖKCEN-YENIDÜNYA, (note 15), 1107.

31 "It is contrary to law to decide to convict the accused unless the conclusive evidence of the fact that the accused uttered the statement 'murderer government' with the crowd during the march is disclosed to the court". *Yargıtay 9. Ceza Dairesi*. *Resolution no. 757/904, Judgment 23 February 1982.* See Muhtar Çağlayan, Art 159, in: GEREKÇELI, AÇIKLAMALI, İÇTIHATLI TÜRK CEZA KANUNU (Muhtar Çağlayan ed., 3. ed., 1984), 262.

32 SANCAR, (note 15), 112. "…It is clear that the accused degraded and insulted the spiritual entity of the government by stating that the 'Government of the Republic of Turkey acts shamelessly by taking what the people own, rather than providing things to them'...and that this statement, without a doubt, is against the government, as the word 'shamelessly' has a degrading and insulting implication". *Yargıtay Ceza Genel Kurulu, Resolution no. 9/504-40, Judgment 29 January 1979*. See Çağlayan (note 33), 252.

V. Judicial Organs of the State: Article 9 of the Constitution states that "Judicial power shall be exercised by independent courts on behalf of the Turkish Nation". Accordingly, the term "judicial organs" expressed in Article 301 refers to all independent courts. The judiciary is one of the three powers of the State. Hence, including the judicial organs in the mandate of Article 301 enables the protection of the three powers of the State (with their authority and function). Basically, the purpose of Article 301 and equivalent ones in other countries is to protect these three powers (legislative, executive and judiciary) together. The content of the article, however, goes beyond its basic purpose[33]. Protection of judicial organs means the protection of these organs independently of their constituents, i.e. judges and public prosecutors, as a whole. Therefore, insults to judges or public prosecutors or a council of judges are not covered by Article 301[34].

VI. State Military or Security Organisations[35]***:*** The military apparatus of the State refers to the Turkish Armed Forces, i.e. the army. In this respect, Article 301 applies when the Army, represented by the Turkish General Staff or any one of the land, naval and air forces which are the main components of the Turkish Armed Forces, is targeted as a whole.

As for the term "security organisations of the State," it refers to the police and gendarmerie forces responsible for the protection of citizens and the apprehension of crimes, which are subordinate to the General Directorate of Security Affairs and the General Command of the Gendarmerie. For offenses to be covered by Article 301, it is required that insults target whole units or their main components. For this reason, Article 301 does not apply to insults targeting units such as regiments, brigades, battalions or companies; military classes, such as infantry and artillery; individuals, even those of high rank; or departments of the security apparatus such as judicial, political, or administrative departments or the riot police, that are outside the abovementioned mandate[36]. The decisions of the Supreme Court of Appeals, however, are not consistent. The court has

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33 SANCAR, (note 15), 148.

34 ARTUK-GÖKCEN-YENIDÜNYA, (note 15), 1108.

35 The fact that Article 301 uses the phrase "military and security organisations of the state" while Article 159 of the abolished TPC No. 765 used "military and security forces of the state" has been criticized. This has shifted the protected entity from a "power" down to an "organisation," which, without any reason, has expanded the forbidden area delimited by the penal norm at the expense of the individual's zone of freedom. See Zeki Hafızoğulları, Liberal, Demokratik Toplum, Hukuk ve Devlet Düzeninde İfade Hürriyetinin Sınırı, 17 TÜRKIYE BAROLAR BIRLIĞI DERGISI, 85, 98 (2004).

36 SANCAR, (note 15), 129, 145; ARTUK-GÖKCEN-YENIDÜNYA, (note 15), 1109.

deemed in some of its decisions that degrading acts against one part of the security apparatus are sufficient to constitute an offence[footnote 38 should be moved here], while requiring[37] in some other decisions that the military or security apparatus be targeted as a whole[38].

D. MATERIAL AND MORAL ASPECTS OF THE CRIME DELINEATED BY ARTICLE 301.

The material component of this crime is to "publicly denigrate" the values and organs specified in the article. To denigrate means to scorn and to carry out derogatory actions[39]. In Article 159 of the abolished TPC No. 765, the acts that constitute this crime are described as "defamation (*tahkir*) and deriding (*tezyif*)". Defamation and deriding have the following meanings in the dictionary: Defamation means degrading, insulting, and denigrating[40]. To deride means to mock, ridicule, show scorn, to laugh at and make sport of[41]. Denigrating (*aşağılama*) is a pettier offence when compared to defamation and deriding.[42] It corresponds partially to defamation, but not to deriding. Furthermore, it is a vague term, being used in a broad sense in daily language. Thus, one may assert that replacement of the words "defamation and deriding" with "denigration" has made it easier to commit the offence delineated in Article 301, and that freedom of expression has thereby been further restricted[43].

In material terms, Article 301 requires that the act of "denigration" be made "publicly" (*alenen*). In the dictionary, "publicity" means[44]: "1. being evident and clear; being overt rather than hidden; 2. the apparent form, outer

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37 See *Yargıtay 1. Ceza Dairesi, Ceza Genel Kurulu, Resolution no. 1663/1981, Judgment 25 Jun 1976*. Savaş-Mollamahmutoğlu, (note 16), 1597–1598.

38 See *Yargıtay Ceza Genel Kurulu*, *Resolution no. 8/147–178, Judgment 5 April 1976*. Çağlayan, (note 33), 255.

39 Available at: http://tdkterim.gov.tr/bts/?kategori=verilst&kelime=a%FEa%F0%FDlamak&ayn=tam, last visited on 9 July 2009.

40 Available at: http://tdkterim.gov.tr/bts/?kategori=verilst&kelime=tahkir&ayn=tam, last visited on 9 July 2009.

41 Available at: http://tdkterim.gov.tr/bts/?kategori=verilst&kelime=tezyif&ayn=tam, last visited on 9 July 2009.

42 ARTUK-GÖKCEN-YENIDÜNYA, (note 15), 1102; SANCAR, (note 15), 168.

43 Pro: SANCAR, (note 15), 168; Algan, (note 25), 2246-2247. Con: Şen, (note 17), 14.

44 Available at: http://tdkterim.gov.tr/bts/?kategori=verilst&kelime=alenen&ayn=tam, last visited on 9 July 2009.

appearance of things". First of all, publicity occurs when an act is committed via the press or in the presence of more than one person. However, publicity also encompasses some acts committed in private places, in addition to acts committed in public places, where it can be heard or noticed by others. In this respect, words uttered in private places where nobody or only intimates are present do not fall under this concept, but words are regarded to be public when uttered in the presence of many people despite being in a private place. Therefore, a publicly committed offence should be considered an offence committed in places where it can be heard or noticed by others, i.e. is likely to be disseminated, rather than an attack committed in the presence of other parties. However, the judge has to be very careful in evaluating the particular circumstances of an event in order to determine whether a concrete threat took place or not[45].

The moral aspect of the offence is the intent. The offence specified in Article 301 of the TPC is among the offences committed intentionally. The perpetrator must be aware that his act of denigration is public and deliberate and also the fact that he is denigrating values and organs specified in the article[46].

E. ILLEGALITY

To be regarded as an offence under Article 301 of the TPC, an action should be illegal. Accordingly, one of the legal justifications must not exist[47]. As offenses specified by Article 301 constitute a special type of denigration, considerations of legality will be handled in terms of the said offence exploiting the freedom of expression and media in particular. Accordingly, actions that fall within the right to criticize, to inform and to make comments would not be regarded as illegal.

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45 See SANCAR, (note 15), 177.

46 "In a quarrel between a contractor, the accused, and his worker, the complainant, about not paying wages, as a response to complainant's comments that 'I will sue you and obtain my money via the state', the accused said, 'fuck you and fuck the State....'. Since this statement constituted swearing at the complainant and the accused did not have the intent to insult the regime (republic), it is contrary to the law to condemn the accused rather than acquitting him of an offence that, according to legal concepts, did not occur". *Yargıtay 9. Ceza Dairesi, Resolution no., 576/599, Judgment 9 March 1983*. See ARTUK-GÖKCEN-YENİDÜNYA (note 15), 1110.

47 Legal justification can eliminate the illegality of an action, in other words it is a reason for eliminating of an offense formation, such as legitimate defense, necessity and use of a right. Please see legal justification under Article 24-26 of the Turkish Penal Code.

The following clause stresses that Article 301 does not apply to statements that fall within the right to criticize: *"Expressions of thought intended to criticize shall not constitute a crime".*

Making a distinction between criticism and expression that constitutes a crime is of vital importance in defining the legal regime to which a right to free thought is subject and in determining the democratic nature of a political system as a whole. At this point the major problem regarding Article 301 comes to light. The fact that the boundary between "denigration" and criticism is being blurred by courts of law or delineated counter to the concept of criticism can turn this article into a serious threat to free speech. With regards to statements concerning the policies and activities of state bodies in particular, the definition of this boundary counter to free speech would pave the way for serious harm to democratic principles and functioning.[48]

It should be noted that the right to free thought was born from the need to especially protect criticism directed towards government. Thus, the penal protection afforded to the values and institutions specified in Article 301 should not turn into a shield that annihilates or limits freedom of expression and restricts the scope of criticism. The possibility of uttering criticism against these institutions, especially in a harsh manner, should not be lost from sight[49].

In light of these considerations, it may be seen as tautological that expressions of thought intended to criticize do not constitute crimes. Moreover, since "exercising one's right" is described in Article 26 of the Turkish Penal Code as a legal justification and since the right to criticize is included in its scope, spelling this out may seem meaningless.[50] This viewpoint

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48 SANCAR, (note 15), 211.

49 At this point it will be appropriate to recall the important decisions in Lingens v. Austria and Castells v. Spain. For example, in Castells v. Spain the Court made the following statement in its decision*: "The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith".* Eur Court H.R., *Castells v. Spain,* Judgment 23 April 1992, para. 46.

50 See ARTUK-GÖKCEN-YENIDÜNYA (note 15), 1114.

is undoubtedly true. Taking into consideration, however, that the application of this regulation points to a very critical problem, that the article is being invoked in many situations where the right to criticize is exercised and thus poses an obstacle to freedom of thought, and that a warning has been made about it,[51] it is possible to comprehend it.

In a study of such narrow scope, it is impossible for us to handle the discussions regarding the exact point at which the limits of the right or freedom to criticize are considered to be exceeded. However, it is beneficial to stress that the application of this law in Turkey in recent years is more liberal than it was in previous years. The Court of Appeals, in making use of the parameters used in the decisions of the ECHR, puts its signature on decisions that take a broad approach to freedom. For example, the Court of Appeals has given the following decision in the Susurluk case, which was top on the agenda for a while in Turkey: "*In Article 159 of the Turkish Penal Code (amended as 301) the concept of State (Republic) and the core state intuitions as well as those stated under the article are protected and there is no mention of the protection of individual persons or groups within these institutions. In the period when the Susurluk Event, in which some civil servants were said to be involved, was top on the agenda, a press release by the Human Rights Association regarding the accused Provincial Directorate, which read, 'In a country where the State became a mafia and mafia became a state….those who use brute force…run the country, violate rights …chiefs of police, members of parliament, state governors conduct dirty and secret business … Turkey became a Latin American state... the security forces pose a threat to the security of the society…The murders by unknown actors are actually committed by the state…there is a counter-guerrilla organization behind political crime…' was found not to constitute an offence for it just emphasizes the status of the people in the core institutions of the state …*"[52].

One of the ECHR criteria in relation to the freedom of thought used by the Court of Appeals is as follows: "*It must not be forgotten that freedom of expression also encompasses not thinking as the majority do, questioning the established order, and even the right to criticize. Moreover, ideas that are unsettling or upsetting to most of society and lead to disagreement are also considered to be within the scope of freedom of expression.*"[53]

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[51] Türkan Sancar, *Türk Ceza Kanunu'nun 159 ve 312 Maddelerinde Yapılan Değişikliklerin Anlamı*, 52 ANKARA ÜNIVERSITESI HUKUK FAKÜLTESI DERGİSİ (AÜHFD), 89, 96 (2003).

[52] *Yargıtay Ceza Genel Kurulu*, *Resolution no., 9-70/156, 5 May 1998*, 24 Yargıtay Kararları Dergisi (YKD), 905, 905-910 (1998).

[53] See SANCAR, (note 15), 218.

However, when "Turkishness," one of the values protected under Article 301, is the matter in question, the Court of Appeals is seen to behave more sensitively and to adopt limiting interpretations.[54] This was particularly seen in the Hrant Dink case, which occupied public consciousness for a long time. Upon the appeal of the decision which convicted Hrant Dink, the Court of Appeals upheld the decision of the local court and stated the following regarding the right to criticize[55]: "*The freedom of expression is applicable not only to news and thoughts that are favourable or thought to be harmless or are not worth to taking an interest in, but also news and thoughts that are against some part of the state or the society, or that make people uncomfortable. This is required by democratic society and pluralism, which constitutes a source of criticism. The harsh nature of criticism does not constitute a crime. It is normal that criticism is harsh, offensive and hurtful, for it is not praise. As for the fact that a criticism made in an insulting and rude manner that goes beyond the boundaries of politeness depends on the educational and cultural level of the one who criticizes: in criticizing institutions, statements should not be made that insult or denigrate without explanation; they should remain within the limits of expressions of thought; and statements that are injurious to or would destroy the dignity of institutions, or make their existence controversial, should be avoided. In this light, statements and declarations that cannot be considered expressions of thought are not included in the concepts of freedom of thought and freedom of expression that are protected by law, and the 'right to criticize' will not be possible."*[56]

F. AUTHORIZATION BY THE MINISTER OF JUSTICE

According to clause 4 of Article 301, launching an investigation into this offence requires authorization by the Minister of Justice. This adjustment was added to the Article in April 30. The purpose of this clause is to decrease the number of cases filed under this article. It falls to the Minister of Justice to filter out cases not in the public interest. This system has both advantages and disadvantages. Unlike Public Prosecutors, who must file cases when the conditions foreseen by the type of crime occur, the Minister of Justice can evaluate the situation with regard to the public interest and can prevent a case

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54 Changed as "Turkish Nation" with the law dated 30 April 2008 numbered 5759.

55 *Yargitay Ceza Genel Kurulu*, *Resolution no.* 2006/9-169-184, *Judgment 11 July 2006*, available at: http://www.yargitay.gov.tr/content/view/148/81/, last visited on 9 July 2009.

56 Available at: http://www.yargitay.gov.tr/dmdocuments/guncel_kararlar/184.doc, page: 17-18, last visited on 9 July 2009.

from being filed or even nullify the investigation envisaged by Article 301. In this respect, the fact that the number of cases has, in practice, - it can be seen from the figure has been given the introduction part - decreased after the addition of the authorization requirement reveals that the amendment has served its purpose, at least partially. On the other hand, it is a matter of concern that the Minister of Justice has a political identity. There is a risk of political behaviour by a political person. Evaluating the authorization requirement from the perspective of Turkey's current political position, the situation seems to be in favour of freedom.[57] It is unlikely for the Minister of Justice of a country which is after European Union membership to authorize the application of an article that has been criticized in Europe. We may conclude that, in the period while Turkey attempts to join the European Union, all actors, both internal and external, will serve as a kind of inspection mechanism for Article 301.

The fact that Article 301 is persistently being emphasized during Turkey's harmonization process with the European Union lends support to this idea. There is a question of whether it is the article itself or the evaluations made by the authorities implementing the article that constitutes a problem. It could be said that Article 301 carries major importance not just for legal life but also for political life. The application of Article 301 differs according to changes and transformations in politics, in other words due to changes in the political winds, as well as flexibility and rigidity in the area of freedom. Therefore, in the context of relations between criminal law and politics this article deserves special attention since its application is shaped according to the state structure, freedoms, and differences in understanding about the limits of such freedoms. That may be the underlying reason for the frequent amendment of this article in the past.[58].

G. CONCLUSION

The freedoms of thought and of expressions of thought are among our fundamental rights. Though it is impossible to put limitations on the freedom

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[57] The relation between criminal law and politics is real. Criminal law intends to protect the fundamental rights and freedoms as well as restrict them. Thus, criminal law, which is a very important tool of power, can be liberalist in democratic systems while it can be repressive in authoritarian and totalitarian systems. In this respect, political targets are of vital importance in the formulation of criminal law as legislation and jurisprudence. The fluctuations and bottlenecks in the ever evolving area of human rights reflect on criminal law and these reflections can sometimes be repressive and sometimes promote freedoms. Sancar, (note 53), 94.

[58] See Sancar, (note 53), 94.

of thought, the freedom of expressions of thought may restrict on some grounds. This is valid in both international law and national law. No community or state that has a democratic state regime today would accept that freedoms are absolute and unrestricted. However, what is most important is that restrictions of freedoms have a limit and by all means should be imposed in accordance with certain parameters.

Turkey has implemented formulations that guarantee the freedoms of thought and of expression of thought in its domestic law. Moreover, it has adopted the European Convention on Human Rights, a very significant document in the area of human rights, in its domestic law. Accordingly, it has also adopted the jurisdiction of the European Court of Human Rights. In other words, Turkey must take into consideration the restricting parameters based on the Convention (ECHR) which are formulated by the Court.

A number of regulations of the freedom of expression, serving various purposes, have being made in Turkish law, as in many European countries. With regard to the restricting parameters, these regulations may have the potential to over-restrict freedoms or even do away with them. The offence delineated by Article 301 of the Turkish Penal Code may be seen as an example of this. At this point, it would not be a solution to take the easy road and simply remove the article because of this potential. Perhaps its removal could easily be accepted in a social order in which on the one hand tolerance dominates to such a large extent that there would be no need for an immediate reaction to every expression of thought and on the other hand everyone who expresses their opinions would show respect for the rights of the others. Currently, it seems inevitable that the law must keep the balance. As the law corresponds to imposing an order on the conflicting interests in society, each individual who is subject to law is required to make slight concessions to their freedoms. The concern here is to impose due restrictions and keep a balance so as not to do away with freedoms. The parameters of the European Human Rights Court which have been adopted by Turkey in its domestic law help to ensure this.

The mode of regulation used by a state to restrict freedom is of great importance. The restriction should be consistent with the parameters of the Convention and should meet the requirements of the principle of legality, especially clarity and precision. With the recent amendments, Article 301 can be said to meet the requirements a bit better. It should be emphasized that it is adjudication which will solve the issue. Judicial practice often changes without any amendment in the law. Judicial power has a major role in realizing

personal freedoms and its interpretations may at times restrict the exercise of these rights while at other times protecting freedoms and facilitating their use. The stronger a state's self-protection reflex, the more assets will come under its protection and the more acts will constitute offences. Furthermore, if those who implement the laws, i.e., those who are supposed to interpret the laws, feel themselves responsible for protecting the state, the area of regulation will be enlarged, which will pose a serious threat to freedom. Thus, intolerance of criticisms against the institutions, organizations and values known as or defined as sacred will increase.

As regards freedom of expression, Turkey can be said to have made a considerable leap in the process of harmonization with the European Union Law. It is a reality that the area of freedom is interpreted narrowly due to certain issues stemming from the sensitivity of the society. However, as the level of democratization and tolerance of freedoms increases, it is likely to overcome these problems.

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