Turkey's Article 301: A Legitimate Tool for Maintaining Order or a Threat to Freedom of Expression?

Jahnisa Tate*

Table of Contents

I. Introduction: Article 301 as a Threat to Freedom of Expression ...................................... 182

II. Background: Turkey and the Historical Ideologies Behind Article 301 .............................. 187

III. Article 301 is Enacted ................................................................. 197

IV. Article 301 Conflicts with Turkey's International Obligations ........................................ 201
   A. Areas of Conflict ................................................................... 201
   B. Historical Background of the European Convention on Human Rights ...................... 202
   D. The European Court of Human Rights' Response To Turkey's Restriction of the Freedom of Expression ............................................................ 207
   E. Turkey's Stance on Article 301 as a Violation of Its International Legal Obligations ........ 211

V. The Current State of Article 301 ........................................................................... 214

VI. Is There a Better Alternative? ........................................................................ 215

VII. Conclusion ...................................................................................... 216

* J.D. 2009, University of Georgia School of Law; B.A. Political Science 2006, Clark Atlanta University.
When Turkey implemented its new penal code in June of 2005, hope of improved protections for constitutional rights and freedoms accompanied it. These hopes proved to be short-lived, however, because it soon became evident that the new Turkish Penal Code was devoid of some of the most important protections: the right to freely speak one’s thoughts and the right to respectfully dissent against your government. The biggest threat to these hopes is Article 301 of the new penal code. By making it a crime to insult “Turkishness,” or to denigrate the Government of Turkey, Article 301 threatens what has been universally recognized as one of the most fundamental rights: the freedom of expression.¹

Article 301 of the new penal code preserves Article 159 of the prior penal code.² Further, Article 159, which criminalizes “insults” against state institutions, “has been used to prosecute and imprison those [who] have made peaceful criticisms.”³ When Article 301 was first enacted in 2005, it stated:

1. Public denigration of Turkishness, the Republic or the Grand National Assembly of Turkey shall be punishable by imprisonment of between six months and three years.
2. Public denigration of the Government of the Republic of Turkey, the judicial institutions of the State, the military or security structures shall be punishable by imprisonment of between six months and two years.
3. In cases where denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third.
4. Expressions of thought intended to criticize shall not constitute a crime.⁴

² Id.
³ Id.
Article 301 has been featured in high profile cases in Turkey involving the prosecution of journalists, artists, and writers charged with denigrating the government.\(^5\) Article 301 has even sanctioned restrictions on access to the Internet; on March 7, 2007, access to YouTube, a prominent website used for video sharing, was banned in Turkey in accordance with a court order.\(^6\) This decision followed the posting of a video on YouTube insulting Mustafa Kemal Atatürk, the modern founder of Turkey.\(^7\) This ban, however, only lasted two days; after complying, Turkey's leading internet service provider successfully petitioned the court to restore access to the site on the condition that the videos in question be removed.\(^8\) Many criticized the court's initial ban, likening it to "'closing a whole library because of a single book which was found improper.'"\(^9\)

The United States and various human rights organizations criticize Article 301 as being a threat to freedom of expression and consider the Article to be at odds with Turkey's international legal obligations.\(^10\) The opponents of Article 301 demand that Turkey immediately abolish the Article.\(^11\) The most vocal of these opponents is the European Union (EU), which in the past

---

\(^5\) Verity Campbell et al., Turkey 51 (10th ed. 2007).

\(^6\) Sangamitra Ramachander, Internet Filtering in Europe, in Access Denied: The Practice and Policy of Global Internet Filtering 189 (Ronald Diebert et al. eds., 2008).

\(^7\) Id. See also Posting of Tom Zeller Jr. to The Lede, http://www.thelede.blogs.nytimes.com/2007/03/07/youtube-banned-in-turkey-after-insults-to-ataturk/ (Mar. 7, 2007, 09:59 EST) (describing that the video clips were created as a part of an online exchange between ethnic Turks and Greeks wherein Atatürk was spuriously referred to as a homosexual).

\(^8\) See Ramachander, supra note 6, at 189–90.


\(^10\) See Amnesty Int'l, supra note 4, para. 3; see also International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 19, at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) ("Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds . . . ."). European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 (as amended by Protocol 11) [hereinafter European Convention on Human Rights] ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.").

\(^11\) See Amnesty Int'l, supra note 4 (describing Amnesty International's objections).
refused to negotiate with Turkey over its potential membership into the EU because of Turkey's "problematic record [with] human rights." Amidst the criticism, Turkey continues to support Article 301, and instead of repealing the Article, the Turkish government "has repeatedly argued that laws similar to Article 301 exist in other European countries and that Turkey needs such a law." Even though the government has not stated definitively why "Turkey needs such a law," one could speculate that the need may be driven by a desire to maintain the integrity of the Turkish identity.

Part II of this Note will trace the development of the Turkish identity and the nexus between maintaining this identity and the enactment of Article 301. This Part will examine the history of Turkey, starting with the fall of the Ottoman Empire and the current national identity crisis between Turkish-Kurds and Turkish nationalists. Turkish-Kurds seek to increase their participation in the political system and gain the rights shared by all Turkish citizens, while Turkish nationalists aim to maintain the secular nature of the country. Turkish nationalists believe that "separatism underlies any expression of Kurdish interests," and this belief motivates the Turkish nationalists'

---

12 JANET DINE ET AL., COMPANY LAW IN THE NEW EUROPE: THE EU ACQUIS, COMPARATIVE METHODOLOGY AND MODEL LAW 89 (2007). In December of 2005, the EU declared its intention to "closely watch the trial of Orhan Pamuk, accused of insulting Turkish national identity after an interview about the Armenian genocide." Id. at n.75. Their vigilance is intended to test Turkey's European credentials. Id. However, Olli Rehn, the Enlargement Commissioner has warned Turkey that the Turkish Penal Code will have to be amended so that it conforms to European Union standards. Id. See also Olli Rehn, EU Comm'r for Enlargement, Accession Negotiations with Turkey: The Journey Is as Important as the Final Destination, Speech before the European Parliament Plenary Session (Sept. 28, 2005), available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/id/d-tr20051123_12/d-tr20051123_12en.pdf (encouraging Turkey "to continue and accelerate its process of internal transformation and its transition towards a fully fledged liberal democracy respectful of human rights and minorities"). See also Nicole F. Watts, Institutionalizing Virtual Kurdistan West: Transnational Networks and Ethnic Contention in International Affairs, in BOUNDARIES AND BELONGING: STATES AND SOCIETIES IN THE STRUGGLE TO SHAPE IDENTITIES AND LOCAL PRACTICES 121, 133 (Joel S. Migdal ed., 2004) ("In 1996 the European Community received more complaints against Turkey than any other country . . . [European Court of Human Rights] rulings have placed tremendous political, moral, and financial pressure on Turkey . . . ."). Statistics further show that by December of 1998, a quarter of the ECHR's pending applications, 1,825 cases out of 7,771, were against Turkey and seventy percent of those cases involved Kurds. Id.

13 Human Rights Watch, Turkey: Government Amendments Will Not Protect Free Speech (Apr. 17, 2008), http://hrw.org/english/docs/2008/04/17/turkey18591.htm. However, Human Rights Watch notes that while it may be true that other countries have similar laws, such "antiquated laws" are rarely used in these countries. Id. However, in Turkey, the situation is quite different: 1533 individuals stood trial under Article 301 in 2006 alone and another 1189 stood trial in the first quarter of 2007. Id.
unwillingness to expand Kurdish cultural rights and political opportunities.\textsuperscript{14} This Part will focus on how the history of Turkey and the establishment of the Turkish identity with the presence of so many different ethnic groups has led some Turkish citizens to desire a democracy and others to desire a more authoritarian regime that will protect the traditional Turkish identity. This authoritarian regime is what drives the desire to keep Article 301 intact.

Part III traces the history of Article 301 and explores its immediate effects. Legally, Article 301 effectively nullifies the clause of the Turkish Constitution that reads: "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."\textsuperscript{15} It also prevents Turkish citizens from accessing fundamental rights. Politically, Article 301 effects Turkey's global reputation and impairs its relations with many countries, even its allies. Finally, from a moral perspective, Article 301 prohibits progress. While Article 301 did not stand out immediately when the Turkish legislature enacted the new penal code, its far-reaching effects quickly became obvious when notable Turkish journalists and writers began to face prosecution for speaking out against sensitive topics, such as the Armenian Genocide and the denial of civil rights to Turkish-Kurds.

Part IV examines how Article 301, through the limitations it places on speech, contradicts the freedom of expression standards set forth by the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).\textsuperscript{16} This Part discusses the origins of the Convention and its relevant provisions that provide for freedom of expression. This Part also discusses the European Court of Human Right's (ECHR) response to Article 301, and Turkey's response to allegations that it is violating its

\textsuperscript{14} See BARBARA HARFF & TED ROBERT GURR, ETHNIC CONFLICT IN WORLD POLITICS 47–48 (2d ed. 2004) (discussing how the Kurdish Worker's Party's use of terrorism to pursue an independent Kurdish state created a backlash among Turkish nationalists).

\textsuperscript{15} Turk. Const. art. 90. On October 2, 2008, Turkish President Abdullah Gül addressed the Turkish Parliament at the opening ceremony of its new legislative year, and during his speech, Gül said that the most pressing issue for the Republic is the drafting of a new constitution. Mümtazér Türköne, New Constitution, TODAY'S ZAMAN, Oct. 4, 2008, http://www.todayszaman.com/tz-web/yazarDetay.do?haberno=154922. President Gül expressed a desire to see a new constitution that is "'advanced'" and "'provide[s] guarantees for fundamental rights and freedoms and strongly reinforce[s] the democratic, secular and social state governed by law.'" Id.

\textsuperscript{16} See European Convention on Human Rights, supra note 10, art. 10 (discussing freedom of expression).
international legal obligations under the European Convention. Even though restrictions on freedom of expression are sometimes permissible, the European Convention prescribes strict requirements for when it is permissible to abridge this right.\footnote{See id. art. 10, para. 2 (listing several instances “in a democratic society, in the interests of national security, territorial integrity or public safety” when it is necessary to curtail the right); see also Letter from the International PEN and the International Publishers Association to Prime Minister of Turkey Recep Tayyip Erdogan (Nov. 24, 2006), available at http://www.article19.org/pdfs/letters/turkey-penal-code.pdf.} Turkey’s inability to ensure that its laws are commensurate with the standards set forth by the EU is important because Turkey is seeking membership into the Union.\footnote{See generally Turkey-Key Documents, European Commission, Enlargement, http://ec.europa.eu/enlargement/candidate-countries/turkey/key_documents_en.htm (last visited Oct. 18, 2008) (collecting EU documents relevant to Turkey’s bid for accession).} Regardless, some members of the justice system and some Turkish nationalists believe that the underlying reason for enacting Article 301, maintaining a unified identity, deserves more protection than protecting the right to free expression. Furthermore, these individuals are opposed to modifying these rules to achieve what could be a more economically, socially, and politically desirable result: EU membership.

Part V discusses the current state of Article 301, focusing on the international pressure to revise Article 301 and on the Turkish legislature’s actual plans for revision. Part VI questions whether there is a better alternative that Turkey can utilize in trying to achieve its legitimate goals while ensuring that the state is not sacrificing the individual rights of citizens. Part VII ventures in the opposite direction and briefly questions whether the enactment of Article 301 is the type of state action that is necessary in establishing a democracy. The ultimate conclusion of this Note, however, is that Turkey must abolish Article 301 and recognize the freedom of expression as necessary in establishing a true democracy.

Since its inception in 2005, Article 301 has affected Turkey both internally and externally. It has turned citizen against citizen and has hindered Turkey’s relations not only with the EU, but also with some of Turkey’s allies.\footnote{On January 19, 2007, a teenage nationalist assassinated notable Turkish-Armenian newspaper editor Hrant Dink. Dink angered many nationalists by speaking out about “the mass killing of Armenians by Truks in the early [twentieth] century.” Sarah Rainsford, Killing Sparks ‘Turkishness’ Row, BBCNEWS, Feb. 9, 2007, http://news.bbc.co.uk/2/hi/world/europe/6343809.stm. Ultranationalist extremists have committed similar crimes in an attempt to suppress democratic ideals. See Sebnem Arsu, Suspects in Journalist’s Killing Came From A Hotbed of Turkish Ultranationalist Sentiment, N.Y. TIMES, Feb. 8, 2007, at A12 (discussing the attempted lynching of leftist protestors, the killings of two professors and a Catholic priest, and the bombing of a McDonald’s restaurant which was “chosen as a Western target”).} The
Article's effects on foreign relations focus on its failure to acknowledge the Armenian Genocide and the resulting strain on the relationship between Turkey and Armenia. Turkey should amend Article 301, even if the country feels as though it "needs such a law." A wise man once said, "Peace can only last where human rights are respected, where the people are fed, and where individuals and nations are free." Turkey's unbridled fear that inflammatory statements against the government and polarizing criticism will fracture the Turkish identity cannot justify infringing on the exercise of fundamental rights.

II. BACKGROUND: TURKEY AND THE HISTORICAL IDEOLOGIES BEHIND ARTICLE 301

In order to understand the rationale behind the enactment of Article 301, one must understand the history of Turkey and the nature of the Turkish identity. Turkey is a country with a rich history of disputes over territorial boundaries and internal disputes between groups of Turkish citizens with different ideologies that stem back to the fall of the Ottoman Empire. Whether it involves battling with its close neighbor, Greece, over territorial disputes or regulating internal disputes between Turkish nationalists and the group of citizens they consider outliers, the Turkish-Kurds, Turkey seems to consistently be in a state of unrest.

When the Ottoman Empire reached its zenith in the fifteenth century, it was one of the greatest empires the world would ever see, having expanded its rule from the Caucasus to the Balkans to North Africa. However, during what came to be referred to as the Period of Decline, from the second half of the sixteenth century until the end of the nineteenth century, the Empire gradually lost momentum. It was during this period that the rest of Europe began to transform intellectually, economically, and technologically, while the Ottoman Empire remained "oblivious." In an attempt to keep up with the changing

21 Human Rights Watch, supra note 13.
23 See Metin Heper, The Ottoman Legacy and Turkish Politics, 54 J. INT'L AFF. 63, 63–68 (2000) (discussing the history of Turkey and its many internal political tension).
24 Heper, supra note 23, at 63.
25 Id.
26 Id. at 63–64.
times, some Turkish citizens attempted to form the first public bureaucracy by emulating their European counterparts. But the country's Islamist traditionalists opposed these efforts. In 1923, the Turkish Republic was founded, enabling the "Westernizing reformers [to gain] control over the country." After this paradigmatic shift in control, the country underwent various periods of transformation that included the introduction of a multi-party democracy and the "[substitution of] enlightened reasoning for Islamic dogma."

Even though the country has undergone numerous transformations, including the acceptance of many Western ideals, "[c]ontinuity rather than change characterizes Turkish political culture." Numerous political norms that developed during the six centuries of the Ottoman Empire still affect "contemporary Turkish politics." In particular, the Ottoman Empire was focused on "keeping the realm together . . . and the maintenance of law and order within the country." The Ottomans were constantly asking themselves the critical question: "How can this state be maintained?" In light of this question, "the Ottomans adopted a circular notion of justice" which was based on finding rules that "contributed to the public welfare which in turn [would provide] the state with the resources necessary to maintain power." According to the Ottomans, "the welfare of society depended upon the well-being of the state." But the Ottoman Empire's fatal flaw may have been its over-emphasis on the state.

The Ottoman Empire's overemphasis on the state proved to be too divisive for the Empire to withstand. "From the 1880s onward, a group of young (junior) Ottoman bureaucrats[collectively known as Young Turks,] who had been educated in the modern, European-style colleges," and who had become

27 Id. at 64.
28 Id.
29 Id.
30 Id.
31 Id. at 63.
32 Id.
33 Id. at 64.
34 Id. at 66.
35 Id.
36 Id.
37 See Erik Jan Zürcher, Young Turks, Ottoman Muslims and Turkish Nationalists: Identity Politics 1908–1938, in OTTOMAN PAST AND TODAY'S TURKEY 150, 150 (Kemal H. Karpat ed., 2000) ("All through the nineteenth century nationalism proved a debilitating virus for the multinational Islamic state that was the Ottoman Empire.").
dissatisfied with the "impotence of the government," overthrew an autocratic sultan and established a constitutional, parliamentary regime. But according to one scholar, "their espousal of constitutionalism clashed with their elitism." To the elite, "the constitution was an instrument and an emblem of modernity, but not a goal per se." It was this kind of casual disregard for the tenets of fundamental rights that has led to Turkey's current dilemma; as Turkish history shows, when Turkish leaders have "faced a choice between modernization and genuine democracy, they always opted for the former." The Young Turks "attributed primary significance to maintaining the unity of the state and believed that the salvation of society resided in the welfare of the state." But unfortunately, "[t]his preoccupation with the significance and welfare of the state led to the emergence of a center-periphery cleavage along cultural lines." The cultural orientation of the ruling class differed from the rest of the population. Consequently, the ruling class, with their burgeoning familiarity with Western culture, began to perceive the general population as unsophisticated.

Religion also contributed to the cultural divisions. Before the nineteenth century, "despite the fact that the elite and commoners subscribed to different versions of their religion, Islam had served as a vital link between them." However, in the nineteenth century, many members of the elite secularized and began to view "themselves as far superior to the [general] people." A substantial consequence of the "center-periphery conflict in the Ottoman Empire was that politico-cultural problems took precedence over socio-economic issues in the agenda of the state." For example, "the Ottoman elite

---

38 Id. at 151. The Young Turks consisting "primarily of members of the bureaucratic and military elites, carried on the political elitism of the Old and Young Ottomans." Heper, supra note 23, at 67. They "dominated Ottoman politics from 1912 to 1918." Id.
39 See Zürcher, supra note 37, at 151. "Their background as members of the administrative elite and their adherence to positivism, with its fundamentally undemocratic attitudes and deep-rooted mistrust of the masses, led them to see themselves as an enlightened elite on a mission to educate their people." Id.
40 Id.
41 Id.
42 Id.
43 Id. at 66.
44 Id.
45 Id. at 67.
46 Id. at 66-67.
47 Id. at 67.
48 Id. at 68.
had no interest in mercantilism and did not ... use tariffs to collect revenue."

The elite believed that "peace and prosperity depended on keeping the
members of each class in their respective places." Their antiquated belief in
the caste system as the key to prosperity "prevented the elite from
understanding the logic of a capitalist economy." In 1923, five years after the
Ottoman defeat in the First World War, the Turkish Republic was born.

The founders of the new Turkish Republic were fearful that the Republic
would follow in the footsteps of its predecessor and be torn apart along the
primordial lines of religion, culture, and ideology at any moment. It is this
fear of division and an "over-emphasis on harmony" that has acted as a
"serious barrier to the emergence of adversarial politics in Republican
Turkey."

How the Turkish state is defined has been one of the biggest challenges in
trying to maintain one national identity. Kemal Atatürk, the founder of
modern Turkey, formulated six principles representing a political program for
social change. Atatürk, whose achievements included leading the Turkish
national liberation struggle, putting an end to the Ottoman dynasty, and
creating the Republic of Turkey, was elected Turkey's first President in 1923.
He sought to adopt the standards and practices of European nations and to
prohibit practices that would inhibit progress. Atatürk believed that the
reforms that the Ottomans had implemented over the centuries were "too
concessionary as the Ottomans had sought to appease both traditionalists and
modernists." He also believed these reforms led to the failure of the Empire
and the "future of the republic depended on how it was able to ... avoid the
mistakes of the past." In accordance with his beliefs, Atatürk formed six
principles: secularism, nationalism, republicanism, populism, etatism, and

49 Id.
50 Id.
51 Id.
52 See also Zürcher, supra note 37, at 157.
53 See Heper, supra note 23, at 68.
54 Id. at 69.
55 Cf. Marwan Bishara, A Vote on Turkey's Identity, INT'L HERALD TRIB., July 21, 2007, at 6
(discussing how secularism, nationalism, and republicanism define Turkey in light of the 2007
election).
56 Sabri M. Akural, Kemalist Views on Social Change, in ATATÜRK AND THE MODERNIZATION
OF TURKEY 125, 125 (Jacob M. Landau ed., 1984) (listing the six principles).
58 STEPHEN VERTIGANS, ISLAMIC ROOTS AND RESURGENCE IN TURKEY 42 (2003).
59 Id.
60 Id.
revolutionism (reformism). While all six principles were worthy goals, three of them, secularism, nationalism, and republicanism, emerged as the three pillars that would define modern Turkey.

"Secularism was the foundation stone on which all the other Kemalist reforms, the reforms of Atatürk and his disciples, were built." "Ataturk's awareness of Islam's historical role" and his recognition that the ulema, the body of Muslim clergy, could offer "potential communication channels for dissident messages led him to conclude that religion could be an important obstacle in the route to modernization." Further, "[t]he absence of Islam, and indeed religion generally, in recent Western achievements and its perceived role in the Ottoman decline was confirmation for Atatürk that it should not be influential within a modern Turkish republic." Atatürk's beliefs about Islam started a "trend of secularization interwoven with nationalism that was unique to Turkey." It was unique to Turkey because, typically, the Western process of secularization involved separating church and state completely. The secular movement supports restrictions on religious practices in public and advocates a strong separation between church and state. However, according to the Turkish idea of secularization, Islam was subjected to state control. For example, laws were passed that only permitted secular teaching in compulsory elementary education. Finally, in an act driven by secularism, reference to Islam as the official religion of Turkey was removed from the Turkish constitution in 1928. The process of secularization was designed to put an end to hostility based on religion and to create a more unified country.

---

61 See Akural, supra note 56, at 125. See also Bishara, supra note 55.
62 See Bishara, supra note 55.
63 Akural, supra note 56, at 126.
64 VERTIGANS, supra note 58, at 42.
65 Id.
66 Id. In 1924, important theological institutions began to be abolished. Id.
67 Id.
68 See Bishara, supra note 55.
69 VERTIGANS, supra note 58, at 42.
70 Id. at 43. "As part of the new education, the ulema were 'impugned . . . for the decline of the Ottoman Empire.' " Id. (omission in original) (quoting SERIF MARDIN, RELIGION AND SOCIAL CHANGE IN MODERN TURKEY 155 (1989)).
71 Id.
72 Cf. Kemal Kirişçi, Minority/Majority Discourse: The Case of the Kurds in Turkey, in MAKING MAJORITIES: CONSTITUTING THE NATION IN JAPAN, KOREA, CHINA, MALAYSIA, FIJI, TURKEY AND THE UNITED STATES 227, 238 (Dru C. Gladney ed., 1998). The leaders of the Turkish Republic did not see Islam as a unifying factor. Id.
Nationalism is multifaceted in that Atatürk envisioned not just the “establishment and preservation of a national state with complete independence conditioned by modern Turkish nationalism” but also a state that was focused on a unified identity not based on religion or race. Quite simply, nationalism refers to the common citizenship of all Turkish citizens regardless of background because Atatürk believed in a strict definition of the national identity. “All citizens of Turkey [we]re Turks,” and they were to join together to form the building blocks of the nation that would unite to create the national culture.

Republicanism, the foundation of Kemalist ideology, is “comprise[d of] the notions of popular sovereignty, freedom, and equality before the law” and was originally intended to combat the totalitarian tendencies of the fallen Ottoman Empire. However, ironically, even though Atatürk conceived republicanism as a democratic regime based on true representation of the popular will, “he preferred the authoritarian political practice of the old system as a way of reaching his goals. Consequently, liberalism and democracy were not a part of the Kemalist principles.”

While Atatürk intended for secularism, nationalism, and republicanism to compliment each other, different political parties have adopted various forms of these individual principles while refusing to incorporate all three as intended. Additionally, while the Islamist AK Party (AKP), the current ruling party, accepts the secularism and republicanism framework of the constitution, the party has been accused by the opposition Republican Peoples Party (CHP) of “compromising Turkish identity by its overtures to the Kurds . . . .” Since the three pillars were supposed to facilitate the creation of a unified national identity, it is no surprise that this multi-party regime has garnered much criticism from journalists and the country’s elite who felt that a rational democracy was necessary.

73 Mustafa Aydin, Determinants of Turkish Foreign Policy: Historical Framework and Traditional Inputs, in SEVENTY-FIVE YEARS OF THE TURKISH REPUBLIC 171 (Sylvia Kedourie ed., 1999).
74 See id. at 174.
75 Id.
76 See id. at 171.
77 HEINZ KRAMER, A CHANGING TURKEY 7 (2000).
78 Bishara, supra note 55.
79 Id. The CHP questioned the AKP’s commitment to nationalism because it believes that the AKP compromises the Turkish identity by attempting to enlist the support of Kurds who comprise about a quarter of the population. Id.
80 See Metin Heper & Tanel Demirel, The Press and the Consolidation of Democracy in
The elite were divided over what type of democracy would best serve the country. The “state elite”—Atatürk, the intellectual-bureaucratic elite, and military officers—defended the secular-democratic state and rational democracy, which placed the long-term interests of the community over narrow political interests. The other side of this political cadre was the political elite, who championed the idea of a popular democracy and placed narrow political interests ahead of the general public interest. In short, “[f]or the state elite, the Republic came first and democracy second. For the political elite, the reverse held true.” The state elite won this political tug-of-war between the country’s leaders. According to one scholar, this was a mixed blessing for Turkey because, despite the fact that the failure of the nation’s leaders to come to agreement resulted in several military interventions, the country had not resorted back to an authoritarian regime. This was because the military leaders saw democracy as a means of facilitating rational policymaking and not as a way of creating popular representation.

The current system of government could be considered a watered-down form of democracy. For example, the Turkish constitution on its face grants citizens such basic rights as the freedom of communication; freedom of residence and movement; freedom of conscience, religious belief, and conviction; freedom of thought and opinion and the right to disseminate one’s thoughts and opinions. The Turkish constitution also grants the press the right to be free from censorship.

However, even though the Turkish constitution grants citizens many rights, the original text of the constitution enacted under the military regime of 1980...
to 1983 placed "severe restrictions on the actual exercise of these rights." The preamble of the Turkish constitution originally stated: "[N]o protection shall be afforded to thoughts or opinions contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its State and territory, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk . . . ."

Furthermore, Articles 13 and 14 allow fundamental rights to be abridged, more specifically the right to freedom of speech, when necessary. Article 13, originally stated:

Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health.

Similarly, Article 14 stated:

None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish State and Republic, of destroying fundamental rights and freedoms, of placing the government of the State under the control of an individual or a group, or establishing the hegemony of one social class over the others, or creating discrimination on the basis of language, race, religion or


91 TURK. CONST. pmbl. (1982) (amended 2004). On March 26, 2002, Parliament passed a package of statute reforms that included amending the preamble to remove the provision that "merely having ‘thoughts or opinions’ deemed contrary to Turkey’s national interests could be deemed illegal, but the substitution of ‘actions’ did not remove the objection that the restriction as a whole was dangerously vague and catch-all." Hale, supra note 90, at 114–15.

92 See Hale, supra note 90, at 110 ("[T]he original texts of Articles 13 and 14 placed severe restrictions on the freedom of expression.").

93 Id. at 110–11 (emphasis added) (quoting TURK. CONST. art. 13 (1982) (amended 2001)).
Article 14 aims to prevent the abuse of fundamental rights and freedoms. But while prevention of abuse is a justifiable reason for placing restrictions on the exercise of speech, the restrictions placed on the right to exercise one's rights and freedoms in the Turkish constitution are considerably broader than in other states in the European Union.

For example, the Romanian constitution contains a clause that stipulates when certain rights and freedoms can be restrained. Article 53(1) states:

The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.

Most notably, the Romanian constitution qualifies these restrictions as applying "only if necessary." The Romanian constitution also stipulates that any restrictions placed on freedoms "shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom." What sets these clauses apart from Article 14 of the Turkish constitution is that Romania has clearly stated that proportionality and necessity will be important factors in the applicability of restrictions on any freedoms listed in the Romanian constitution. In contrast, Turkey has not placed any constitutional checks on the government's power to restrict freedoms, and this deficiency in the Turkish constitution has manifested itself in the vicious prosecutions that have taken place under Article 301.

As mentioned before, the emphasis that is placed on maintaining "one national identity" is also a driving force behind the enactment of Article 301.

---

94 Id. at 111 (quoting TURK. CONST. art. 14 (1982) (amended 2001)).
95 ROM. CONST. art. 53(1).
96 Id.
97 Id. art. 53(2).
99 See supra text accompanying note 55. "Turkey claims that all Turkish citizens are treated equally, but its unwillingness to acknowledge minority differences results in de facto unequal
One ethnic group in particular, the Kurds, represent up to an estimated one-fifth of the country’s population, but as a consequence of the traditional emphasis on one Turkish national identity, they have faced restrictions on their language, culture, and freedom of expression. “Ethnicity was an alien concept to the Ottoman’s,” and the only “line of demarcation” recognized in the empire was between Muslims and non-Muslims. Therefore, the Republic adopted civic nationalism to structure its national identity and began to use word “Turk” to describe those who pledged loyalty to Turkey; Turk was not meant to refer to ethnic or religious groups.

After many decades of political, cultural, and socio-economic strife, Turkey is still having trouble shifting from a government focused on the long-term interests of the community to one focused on reconciling the state, group, and individual interests. The state and political elite, mentioned above, continue to stand on opposite sides, and they are unwilling to fix the political instability that their conflicting views have caused. Consequently, democracy in Turkey is not fully developed, which is likely why undemocratic rules such as Article 301 have been able to remain in force even under harsh criticism. But “[t]he recent designation of Turkey as a candidate for full membership in the European Union [has] provided new impetus for Turkey to democratize further.” Turkey cannot accede to the EU unless it fully complies with all of the EU’s demands, which include ensuring that Turkey complies with EU standards for human rights. At one point in time, the EU stated that it would

---

100 Watts, supra note 12, at 129.
101 See FREEDOM HOUSE, supra note 99.
102 See Heper, supra note 23, at 75.
103 Id.
104 Id. at 81–82.
105 See id. (positing that “state and political elite could adopt polar views and cause political instability”).
106 See supra note 87 and accompanying text.
107 Heper, supra note 23, at 82. Heper states, “although the Ottoman legacy continues to influence Turkey’s political culture and practice, the overall direction is toward greater democracy and enhanced responsiveness of the government to the wishes and demands of the population at large, not only the ruling elites.” Id.
108 See Hale, supra note 90, at 107–08 (noting that the EU’s conditions included reform in expression rights, treatment of minorities, the death penalty, torture, prison conditions, rights of civil associations, and the operation of the judiciary). Hale notes that “as the European Union’s program for enlargement into Eastern Europe got off the ground, respect for human rights was made a sine qua non for candidate countries.” Id. at 108. Furthermore at its meeting in 1993,
refuse to enter into accession negotiations with Turkey without evidence that Turkey had met the "political criteria" for membership.\textsuperscript{109}

In conclusion, the Ottoman Empire and the various political parties and ideologies that have emerged since the Empire's fall have molded Turkey and its current political state. The country's leaders and steadfast nationalists have decided that the best way to maintain one national identity in the presence of so many different ideologies and ethnicities is to stifle dissidents and prohibit any insults against the Turkish culture. Article 301 was born out of this desire to protect the Turkish culture.

III. ARTICLE 301 IS ENACTED

In October 2004, a new penal code was enacted to replace the outdated code,\textsuperscript{110} which had been in effect since 1926.\textsuperscript{111} Many Turkish citizens welcomed the new penal code, thinking that it would bring more protection for individual rights and freedoms.\textsuperscript{112} This was not simply wishful thinking given that the constitution had been amended only months early in May of 2004 to say: "Should the international treaties on the fundamental rights and freedoms... and national laws contain contradictory stipulations on the same subject, the provisions of international law would prevail."\textsuperscript{113} However, the Turkish legislature had other ideas. They included Article 301 in the new penal code "as [a] secret gun[ ]... not displayed to the international community but nicely kept in a drawer, ready for action in case [the government] decided to hit someone in the head."\textsuperscript{114} Consequently, instead of bringing the progress and the freedoms that the Turkish citizens hoped for, the new penal code imposed more limitations on basic human rights.

the European Council affirmed that "'membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.' " \textit{Id.} (quoting Copenhagen European Council, \textit{Presidency Conclusions} (June 21–22, 1993)).

\textsuperscript{109} \textit{Id.} at 108.


\textsuperscript{111} Yasemin Celik Levin, \textit{The Effect of CEDAW on Women's Rights, in} \textit{HUMAN RIGHTS IN TURKEY} 202, 210 (Zehra F. Kabasakal Arat ed., 2007).

\textsuperscript{112} \textit{Id.; cf.} Oran, \textit{supra} note 110, at 54.

\textsuperscript{113} Oran, \textit{supra} note 110, at 54.

Articles 300-302, which adopt Articles 145, 158, and 159 of the 1926 penal code respectively, were incepted to "suppress 'insults' to the President of the Republic, the Turkish flag and symbol, the national anthem, the Turkish national identity, the republic or the Grand National Assembly, the Turkish government and the judicial organs or military and security organs."\(^{115}\) Offenses are punishable by sentences ranging from two to four years of imprisonment, and the sentences are subject to an increase by one-third if they are committed by a Turkish citizen while he or she is abroad or if a member of the media insults the President.\(^{116}\) The harsh sentences do not fit the crime, and their enforcement has brought the Turkish Penal Code under intense scrutiny. Other countries have similar provisions, but unlike Turkey, they have declined to enforce them.\(^{117}\)

Turkey, in contrast, has prosecuted noted journalists and novelists for violations of Article 301.\(^{118}\) "Nationalists" have assisted in increasing the number of individuals prosecuted by "'[taking] it upon themselves to alert the prosecutor about speeches and newspapers that 'denigrate[ ] Turkishness,' and [by calling] for the prosecution of the perpetrators.'"\(^{119}\) Once a "call for prosecution," also known as \textit{suç duyurusu}, is made, prosecutors and judges act on it as though they are obliged to do so even though Article 301 contains no express provision that requires prosecution for possible violators.\(^{120}\)

One of the most striking cases was the prosecution of noted novelist and 2006 Nobel laureate, Orhan Pamuk, who was tried after he mentioned the Armenian Genocide committed by Ottoman Turks.\(^{121}\) Even though the charges were dropped in early 2006, the case brought Turkey's Article 301 to international attention, and at that point, "the damage to Turkey's reputation had been done."\(^{122}\) A less well-known case, but one that demonstrates the fact

\(^{115}\) Id. at 46.

\(^{116}\) Id.

\(^{117}\) Id. France has laws against insulting the President and laws prohibiting defamation or insulting of governmental administrative bodies. Id. However, the last recorded instance of this law's enforcement was in the mid 1960s. Id. Hensler and Müller note, "Such protectionist legislation which is still in use is more associated with repressive regimes of the past rather than modern democracies." Id.

\(^{118}\) See id. (discussing cases). See, e.g., Howard Chua-Eoan, \textit{Orhan Pamuk}, Time, Apr. 30, 2006, at 111, 111 (listing Pamuk as one of the one hundred people who shape the world and discussing his trial for insulting Turkishness).

\(^{119}\) Oran, supra note 111, at 55.

\(^{120}\) Id. It is unclear whether this process has continued after the 2008 amendment to Article 301.

\(^{121}\) See \textit{CAMPBELL ET AL.}, supra note 5, at 51.

\(^{122}\) Id.
that the Turkish justice system is eager to prosecute at the urging of nationalists, is the case of Perihan Magden she was a journalist and author who was tried for "‘turning people against military service’" through an article she wrote entitled Conscientious Objection Is a Human Right.123 "[U]ltranationalists were allowed to loudly demonstrate outside the courtroom throughout hearing" and “[c]ritics claim the fact that security forces did little to quell the protestors makes them complicit.”124 At her hearing, Magden said she could not believe that she was in court and that she had to defend herself for writing an article that “defended conscientious objection as a human right and a right that is recognized by the [United Nations] and other countries.”125

Article 301 makes it not only a crime to express oneself, but the Article also makes it a crime for individuals to propagate the expression of others.126 Consequently, many publishers have also been prosecuted under Article 301.127 Fatih Taş, a twenty-six-year-old student of communications and journalism at Istanbul University and the owner of Aram publishing house, was prosecuted and later acquitted for publishing a Turkish translation of a book by American academic John Tirman, The Spoils of War: the Human Cost of America’s Arms Trade.128 The book alleged that the Turkish military committed numerous human rights abuses against a large part of the Kurdish population.129 Taş argued that the book was not intended to insult Turkey or “Turkishness,” but the prosecutor demanded that Taş be tried for each “insult” in the book as a separate charge.130 Other publishers have been prosecuted for publishing books that “denigrat[ed] the state and the republic” under Article 301 and for “insulting Atatürk’s memory.”131 In a country where it can be a crime to even

123 Id.
124 Id.
125 Turkish Writer in Call-Up Trial, BBC.COM, June 7, 2006, http://news.bbc.co.uk/2/hi/europe/5054732.stm. The Turkish constitution states that where a national law conflicts with an international treaty or law regarding fundamental rights, the international law will stand, TURK CONST. art. 90; however, cases like those brought against Magdan demonstrate that this provision is consistently ignored.
128 Id.
129 Id.
130 Id.
131 Id.
portray Turkish people in a "bad light," journalists, publishers, and novelists alike are very limited as to what they can put down on paper for fear that they too may find themselves in court defending their right to freely express themselves.

However, while many of these journalists, publishers, and novelists have faced jail time and ostracism within the Turkish society, none have paid the high price that Hrant Dink, editor of the bilingual Turkish-Armenian newspaper Agos and a well-known public figure in Turkey, had to pay for his writing a book about the Armenian Genocide of 1915. In 2005, shortly after Article 301 was passed, Dink was charged with insulting "Turkishness." It is well-known that Turkey continues to deny that the systematic killing of Armenians during the final years of the Ottoman Empire was genocide, while it punishes those who recognize the event as genocide. Dink also wrote about democratization and human rights in Turkey, issues that made him a target for prosecution and the recipient of numerous threats from nationalists, who viewed him as a traitor and called for his emigration.

In 2006, Dink was prosecuted for the third time on charges of "denigrating Turkishness." Prior to this trial, Dink had been issued a six-month suspended prison sentence following an October 2005 conviction on other charges of "denigrating Turkishness" after a Turkish court ruled that one of his articles had described Turkish blood as "dirty." Following this conviction and a failed appeal attempt, Dink expressed his desire to leave Turkey in a 2005 interview with the Associated Press: "I don’t think I could live with

132 Id.
134 See Obituary: Hrant Dink, supra note 133.
137 See Press Release, supra note 136.
138 See Obituary: Hrant Dink, supra note 133.
an identity of having insulted them [Turks] in this country . . . if I am unable to come up with a positive result, it will be honourable for me to leave this country.' However, before he could leave, a young Turkish nationalist killed Dink in a "horribly assassinating [that] silenced one of Turkey's bravest human rights defenders." More than one-hundred thousand Turks of a wide variety of ethnic backgrounds took to the streets of Istanbul to protest Dink's murder, shouting, "We are all Hrant Dink. We are all Armenians." The trial and assassination of Dink focused the world's attention on Turkey and made Dink a martyr for "all supporters of freedom of expression." The death of Dink shocked citizens, national human rights organizations, and allies of Turkey alike, but the promise of change has remained just that—a promise. Even though Prime Minister Erdogan stated on January 19, 2008 that Turkey will "steadfastly continue along the path toward fully realizing freedom of expression," he has been known to successfully charge artists for depicting him as an animal. "With this level of hypocrisy, it remains to be seen whether continuing pressure and international exposure from the increasing number of cases will eventually force the government into acting on its declared commitment to freedom of expression." The hypocrisy displayed by Prime Minister Erdogan threatens Turkey's already imperiled international reputation and promises to close the door to Turkey's hope of EU membership.

IV. ARTICLE 301 CONFLICTS WITH TURKEY'S INTERNATIONAL OBLIGATIONS

A. Areas of Conflict

In December 1999, the EU's Helsinki summit recognized Turkey as an official candidate for accession. As with any other candidate country, Turkey is required to address the political reforms that apply to all candidate

---

139 Id.
140 Press Release, supra note 136 (quoting Maureen Greenwood-Basken, Amnesty Int'l USA Advocacy Director for Europe and Central Asia).
141 See Letter from Gates & Rice, supra note 135.
142 See id.
143 Id. (quoting Prime Minister Erdogan).
144 See CAMPBELL ET AL., supra note 5, at 51.
145 Id.
146 Hale, supra note 90, at 108.
countries. Even before Article 301’s enactment, Turkey had been ordered to focus on four crucial areas of human rights reform that were specifically problematic and that needed to be addressed in preparation for accession. One such area of concern involved the infringement of: “freedom of expression and association and of political parties.” However, it is evident that Article 301 directly impedes the right to free expression. This is important because a judicial body of the EU, the European Court of Human Rights (ECHR), is committed to protecting freedom of expression rights set out by the Convention. Turkey is answerable to the ECHR both by virtue of the fact that Turkey is a signatory to the Convention and through its bid for membership into the EU, where “respect for human rights was made a sine qua non for candidate countries.” Consequently, Turkey must do everything in its power to make sure it complies with its international obligations regarding human rights. This Part discusses the background of the Convention and the relevant provisions concerning freedom of expression. It also discusses relevant judgments handed down from Turkey’s highest court and heard before the ECHR, wherein the ECHR defined the extent to which Turkey can abridge freedom of expression. Even though Turkey is fully aware of its international obligations, it continues to abridge freedom of expression in an almost defiant manner.

B. Historical Background of The European Convention on Human Rights

In 1950, the European Council created and adopted the Convention. Its official title is “The Convention for the Protection of Human Rights and Fundamental Freedoms.” It opened for signature in Rome on November 4, 1950 and took effect September 1953. The European Council used the 1948 Universal Declaration of Human Rights as the framework for the Convention, setting out to create a convention that would facilitate “collective enforcement of certain... rights set out in the Universal Declaration.”

147 Id.
148 Id. at 107.
150 Hale, supra note 90, at 108.
151 European Court of Human Rights, supra note 149, para. 1.
152 Id.
153 Id.
154 Id. See also Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N.
However, once the Convention was created, the Council realized it needed to create judicial bodies to enforce it. The Council created three institutions: The Committee of Ministers of the Council of Europe, created in 1951; the European Commission on Human Rights, created in 1954; and the ECHR, created in 1959. The Council created the ECHR to be the main instrument for enforcing human rights, and "where states accepted the right of individual application to the Court by their citizens (which Turkey has done since 1991) the Convention became internationally justiciable."

In its original version, the Convention made the right of individual application voluntary, and individual application could only be exercised against those member states that had accepted the right. However, Protocol No. 11 to the Convention subsequently made the acceptance of the right of individual application compulsory, and member states no longer have the freedom to choose whether they will be held accountable to the ECHR for violations.

Another change combined the ECHR and the Commission. The ECHR and the Commission had a heavy caseload and it was difficult for the ECHR to keep up its supervisory role over those states that chose not to submit to individual application. Before Protocol No. 11, states had to file a complaint with the Commission, which would determine the admissibility of the complaint. The Commission would then offer to help the parties come to a peaceful resolution. If no resolution could be reached, then a report detailing the facts and expressing an opinion on the merits of the case was transmitted to the Committee of Ministers. Once the report had been transmitted, the complaining state could bring its case before the court, but individuals could not bring their cases before the court. Caseload statistics seem to demonstrate that this system was not the most efficient; thus, the Convention was reformed to simplify the structure of the court and to unify the

---


156 See Hale, supra note 90, at 108. See also European Court of Human Rights, supra note 149, para. 3.

157 European Court of Human Rights, supra note 149, para. 3.

158 Id. para. 6.

159 Id. para. 3.

160 Id.

161 Id.

162 Id. para. 4.
ECHR and the Commission into a single, full-time court where individual application to the court would be compulsory.\textsuperscript{163}

However, the Council found that there was an even more efficient way to guarantee that individual rights were vindicated. As the European Union began a campaign for enlargement in Eastern Europe, "respect for human rights was made a \textit{sine qua non} for candidate countries."\textsuperscript{164} Consequently, the European Council made it clear that countries seeking membership into the EU would have to create "institutions [within their own state] guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities."\textsuperscript{165} Thus, under this new policy, countries falling under the auspices of the Convention must create certain institutions for guaranteeing rights helping to ensure that the ECHR does not get overburdened by petitions claiming human rights violations.\textsuperscript{166}

\section*{C. Freedom of Expression Rights in the European Convention on Human Rights}

The Convention, the first regional human rights treaty, regulates freedom of expression for countries that are signatories to the treaty.\textsuperscript{167} Article 10, paragraph 1 of the Convention states: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."\textsuperscript{168} However, these rights are not absolute.

The second part of Article 10 states:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention

\textsuperscript{163} \textit{Id.} para. 6.
\textsuperscript{164} See Hale, \textit{supra} note 90, at 108.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Cf. id.}
\textsuperscript{168} See European Convention on Human Rights, \textit{supra} note 10, art. 10, para. 1.
of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.\textsuperscript{169}

Under the Convention, a country cannot abridge that right without demonstrating that the speech falls within one of the expressions of Section 2.\textsuperscript{170} Both the ECHR and the former Commission consistently interpreted the freedom of expression rights guaranteed by the Convention as being "'one of the basic conditions for [the] progress [of a democratic society] and for the development of every man.'"\textsuperscript{171}

In \textit{Handyside v. United Kingdom}, a publisher was penalized for a publication that, according to the United Kingdom, interfered with the "protection of morals" in society.\textsuperscript{172} The publisher complained that the United Kingdom imposed the restrictions to "muzzle a small-scale publisher whose political leanings met with the disapproval of a fragment of public opinion."\textsuperscript{173} The ECHR stated that "'[f]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.'"\textsuperscript{174} The protections of Article 10 thereby extend "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."\textsuperscript{175} Because morals are derived from unique characteristics like time and place, the court recognized state authorities are often in the better position to determine when public morals need to be protected.\textsuperscript{176} However, the court noted that its duty was to give the utmost protection to freedom of expression because of its importance in a democratic society.\textsuperscript{177}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{169} \textit{Id.} art. 10, para. 2.
\item\textsuperscript{170} \textit{Handyside v. United Kingdom}, 24 Eur. Ct. H.R. (ser. A) at 21 (1976) (finding that interferences with the right of freedom of expression by public authorities "entail a ‘violation’ of Article 10 if they do not fall within one of the exceptions provided for in paragraph 2").
\item\textsuperscript{171} \textit{Ubeda de Torres}, supra note 167, at 6 (alteration in original) (citing \textit{Handyside}, 24 Eur. Ct. H.R., 23, para. 49).
\item\textsuperscript{172} \textit{Handyside}, 24 Eur. Ct. H.R. at 24.
\item\textsuperscript{173} \textit{Id.} at 25.
\item\textsuperscript{174} \textit{Id.} at 23.
\item\textsuperscript{175} \textit{Id.}
\item\textsuperscript{176} \textit{Id.} at 22.
\item\textsuperscript{177} See \textit{id.} at 23 (noting that the court’s "supervisory functions oblige it to pay the utmost attention to the principles characterising a ‘democratic society’ ").
\end{enumerate}
\end{footnotesize}
found that this interpretation of the rights guaranteed under Article 10 is the only way to ensure the "pluralism, tolerance and broadmindedness without which there is no 'democratic society.'" \(^{178}\)

This case shows that the ECHR seeks to grant individuals the freedom to express themselves as long as that expression does not interfere with the general welfare. While the ECHR and the Convention are separate entities from the EU, \(^{179}\) members of the EU are expected to abide by the terms of the Convention. \(^{180}\) The Treaty on European Union (TEU) states:

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

(3) The Union shall respect the national identities of its Member States. \(^{181}\)

These provisions of the TEU show that "the European Union has a very clear position on membership: democracy is a must." \(^{182}\) If a member state violates human rights in a "serious and persistent" way, it can lose its rights under the treaty. \(^{183}\)

Even if Turkey was not actively seeking EU membership, as one of the Convention's original signatories, it is obligated to further the goals of the Convention. \(^{184}\) Despite its obligations, Turkey has failed to conform to the

\(^{178}\) Id. The European Court further ruled that it would require States to present, for the court's review, evidence and arguments so that it could "decide . . . whether the reasons given by national authorities to justify the actual measures of 'interference' . . . are relevant and sufficient under Article 10 § 2." Id. at 23–24.

\(^{179}\) See Michael T. Arnheim, The Handbook of Human Rights Law: An Accessible Approach to the Issues and Principles 2 (2005) (explaining that the ECHR was established to "operate the Convention").


\(^{183}\) See Alston & Weiler, supra note 180, at 6 (internal citations omitted).

\(^{184}\) Cf. Watts, supra note 12, at 132 (discussing Turkey's role as signatory to the Convention).
Convention even in light of direct orders from the ECHR and the enticement of EU membership in exchange for human rights reform.

D. The European Court of Human Rights’ Response To Turkey’s Restriction of the Freedom of Expression

The ECHR has already clearly defined the limitations that can be placed on freedom of expression.\(^{185}\) Several decisions make it clear that the government must be able to tolerate criticism.\(^{186}\) Since Turkey’s laws against freedom of expression clearly contradict the freedoms guaranteed by the Convention, prosecutions by the Turkish high court under Article 301 have not been able to find favor in the ECHR.

In several cases, the ECHR has issued judgments specifically relating to freedom of expression in Turkey.\(^{187}\) The court was guided by the following principle: “[A] state may only restrict free expression under Article 10(2) where it can demonstrate ‘a pressing social need which would justify the finding that the interference complained of was ‘proportionate to the legitimate aim pursued.’” \(^{188}\) Using this standard, the court found that Article 10 had been violated in two recent cases, but found that the restrictions at issue were permissible under Article 10(2) in a third.\(^{189}\)

In the 1998 case of *Incal v. Turkey*, Turkey convicted Ibrahim Incal, a Turkish national and lawyer, for publishing a leaflet that military officials believed contained separatist propaganda “capable of inciting the people to resist the government and commit criminal offences.”\(^{190}\) The leaflet criticized “the measures taken by the local authorities, in particular against small-scale illegal trading and the sprawl of squatters’ camps around the city.”\(^{191}\) The court rejected Turkey’s argument that the pamphlets were “intended to foment an insurrection by one ethnic group against the State authorities” and that the suppression of terrorism was a “pressing social need” sufficient to justify

\(^{185}\) See Özgür Gündem v. Turkey, 2000-III Eur. Ct. H.R. 1, 25 (summarizing principles used to examine if measures are “necessary in a democratic society”).

\(^{186}\) See, e.g., id. at 26 (finding that authorities of a democratic state must tolerate of criticism, even when that criticism is provocative or insulting); see also Castells v. Spain, 236 Eur. Ct. H.R. (Ser. A) at 23 (“The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen.”).


\(^{188}\) Id. (quoting Incal v. Turkey, 1998-IV Eur. Ct. H.R. 1547, 1568).

\(^{189}\) See HUMAN RIGHTS WATCH, supra note 187, at 18.


\(^{191}\) Id. at 1552–54 (reproducing the entire pamphlet in question).
interference with Incal’s Article 10 rights." The ECHR “did not discern anything in the leaflet which might be regarded as incitement of part of the population to violence, hostility or hatred between citizens.”

In 1998, the court found, in Socialist Party v. Turkey, that Turkey had violated Article 11, which protects the right to freely associate. Even though this case ultimately turned on the right to freedom of association, the court closely aligned Article 10’s freedom of expression protections to the rights guaranteed in Article 11. The Constitutional Court of Turkey (Constitutional Court) argued that the former head of the Socialist Party had advocated for the “[creation] of minorities” within Turkey and for the establishment of a Kurdish-Turkish federation, both undertakings which directly contradict Turkey’s efforts to build one unified nation where all citizens are “Turks.” The ECHR found that “the dissolution of the [Socialist Party] was disproportionate to the aim pursued and . . . unnecessary in a democratic society” and the statements, “though critical and full of demands, did not appear to it to call into question the need for compliance with democratic principles and rules.”

In Zana v. Turkey, the ECHR held that Turkey had not violated Article 10 of the Convention. This case involved Mehdi Zana, a former mayor of Diyarbakir, Turkey. Mr. Zana had publicly expressed his support for the Worker’s Party of Kurdistan (PKK) liberation movement, an organization considered a terrorist organization by many. This statement was troubling because security forces and PKK members had clashed in southeast Turkey, claiming the lives of 4,036 civilians and 3,884 security force members. The court agreed with the European Commission of Human Rights, which

192 Id. at 1568.
193 Id. at 1573. The ECHR also found it important that “a civilian who had to appear before a court composed, even if only in part, of members of the armed forces” had legitimate cause to fear the impartiality and independence of the court. Id.
195 Id. at 1255 (“Article 11 must also be considered in light of Article 10.”).
196 Id. at 1245.
197 Id. at 1259.
198 Id. at 1258.
200 Id. at 2539.
201 Id. at 2540 (“ ‘I support the PKK national liberation movement . . . ’ ”).
concluded that "such a statement from a person with some political standing . . . could reasonably lead the national authorities to fear a stepping up of terrorist activities in the country. The authorities had therefore been entitled to consider that there was a threat to national security and public safety . . . ."\textsuperscript{204}

In light of his political clout and the fact that Zana's support of the PKK coincided with the murders of civilians by PKK militants, the court held that Turkey's actions "pursued legitimate aims under Article 10 § 2."\textsuperscript{205} The court recognized that freedom of expression "constitutes one of the essential foundations of a democratic society,"\textsuperscript{206} but this freedom is subject to "a democratic society's legitimate right to protect itself against the activities of terrorist organizations."\textsuperscript{207}

These cases demonstrate that the ECHR has already set parameters for allowing Turkey to abridge the freedom of expression rights of its citizens. The ECHR followed the Zana precedent most recently in 2000. On July 18, 2000, the court held by a 6–1 vote that Turkey had violated Pelin Sener's right to a fair trial and her right to freedom of expression under Articles 6, section 1 and Article 10 respectively.\textsuperscript{208} Sener, a Turkish national living in Germany,\textsuperscript{209} was the owner and editor of a weekly review entitled Haberde Yorumda Gerçek (The Truth of News and Comments) and published in Istanbul.\textsuperscript{210} "On September 5[,] 1993[,] the Istanbul State Security Court ordered the seizure of the twenty-third edition of the review" on the grounds that the article contained separatist propaganda.\textsuperscript{211}

During the proceedings before the State Security Court, Sener denied the charges and argued that the offense that she was charged with violated her right to freedom of expression in contravention of both the Turkish constitution and Article 10 of the Convention.\textsuperscript{212} Ignoring the reference to the Convention and the Turkish constitution, a panel of three judges found the applicant guilty and sentenced her to six months in prison and a fine of fifty-

\textsuperscript{204} Id. at 2546–47.  
\textsuperscript{205} Id. at 2547.  
\textsuperscript{206} Id.  
\textsuperscript{207} Id. at 2548.  
\textsuperscript{208} See Sener v. Turkey, (unreported decision), http://www.echr.coe.int/ECHR/EN/hudoc (follow "HUDOC Database" hyperlink; then search for "26680/95" in the "Application Number" field).  
\textsuperscript{209} Id. para. 64.  
\textsuperscript{210} Id. para. 6.  
\textsuperscript{211} Id. para. 7.  
\textsuperscript{212} Id. para. 9.
million Turkish liras ($79.50 at time of decision). According to the ECHR, the State Security Court reasoned:

[Sener's] impugned article had referred to a certain part of Turkish territory as "Kurdistan," had asserted that people living there were Kurdish citizens, that the Kurdish nation wanted to be exterminated, that genocide had taken place, that the territory defined as "Kurdistan" had been bombed and burned and that chemical weapons had been used. On these grounds, the court found that the article, as a whole, disseminated propaganda against the indivisibility of the State.

This decision was subsequently appealed in Turkey before reaching the ECHR. The European Commission on Human Rights opined that the measures taken against Sener—"an intellectual whose statements contained sharp criticism of the policy and action of Turkey[—]amounted to a kind of censorship, which was likely to discourage others from publishing similar opinions in the future." It concluded that while states may contravene Article 10 rights when doing so would be "necessary in a democratic society" for "pursuing a legitimate aim," this power is still subject to limitations, and "the need for any restrictions must be established convincingly." The court pointed to the fact that limits of permissible criticism by citizens are wider when directed at the government. The court found that as long as the press does not interfere with the protection of "vital State interests," it is the job of the press to inform the public about vital information that it has the right to receive.

The aforementioned cases show that the ECHR is committed to enforcing the freedom of expression standards set forth in the Convention within the full

\[213\] Id. para. 10.
\[214\] Id. para. 11.
\[215\] See id. paras. 4, 12–15.
\[216\] Id. para. 38.
\[217\] Id. para. 39. The court explained that the "Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court." Id.
\[218\] Id. para. 40.
\[219\] Id. para. 41 ("[I]t is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones.").
spirit of the law. Turkey is expected to abide by these standards; however, to this day, it has not.

Turkey’s non-compliance with ECHR decisions is an issue that has plagued the ECHR and other members of the European community for some time. For example, in 2001, Georges Clerfayt, a member of the House of Representatives of the Council of Europe, asked, “What urgent action [does] the Committee [of Ministers] intend[ ] to take to ensure that Turkey changes its relevant legislation without further delay so as [to] comply with the [ECHR] judgments”? Even though this comment came in response to legislation involving other human rights abuses, it nevertheless highlights that non-compliance with ECHR decisions has been a persistent problem. The ECHR and European Community’s only recourse is to threaten to deny Turkey’s EU membership application unless it amends its laws to conform to the ECHR’s standards.

E. Turkey’s Stance on Article 301 as a Violation of Its International Legal Obligations

Turkey is well aware of its international legal obligations, but it has sought to circumvent the requirements of Article 10 of the Convention by arguing that the restrictions on freedom of expression fall into an exception of the Convention for the protection of the “unity of the Turkish nation and the territorial integrity of the state.” The exception to the freedom of expression rights carved out by the Convention, says: “The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of . . . territorial integrity or . . . for the protection of the reputation or rights of others.” On a few occasions, Turkey has attempted to use this exception to justify its abrogation of human rights.

Such was the case in Socialist Party, decided in 1998, when the Constitutional Court had to answer to the ECHR for ordering the closure of the Socialist Party. While protecting territorial integrity is a protected practice

---

220 See supra note 180 and accompanying text.
222 Id.
224 European Convention on Human Rights, supra note 10, art. 10(2).
in the Convention, the ECHR construes this clause very narrowly. Consequently, in *Socialist Party*, the ECHR rejected the territorial argument and the argument for the promotion of a unified nation. It found that "the dissolution of the [Socialist Party] was disproportionate to the aim pursued and consequently unnecessary in a democratic society." Even though this case was decided in 1998, years before the enactment of Article 301, it demonstrates that Turkey has a history of abridging individual rights in the name of territorial integrity and for the promotion of a unified nation. Also, Article 301's predecessor, Article 159, was in place at the time *Socialist Party* was decided, and it granted the Constitutional Court right to punish anyone who "publicly insult[ed] or ridicule[d] Turkishness, the Republic, the moral personality of Parliament, [or] the Government . . . ."

Article 301 and the recent prosecutions for non-violent expression demonstrate that Turkey has not been striking "a fair balance" between the individual's fundamental right to free expression and its legitimate right to protect itself in compliance with international obligations under the Convention.

While Turkey has pledged to modify Article 301 in order to make its laws commensurate with its international obligations, there are those who doubt Turkey's true commitment to reform. Many believe that Turkish prosecutors and judges have used Article 301 prosecutions as an attempt to undercut the state's efforts to achieve EU membership. Olli Rehn, the European Union

---

226 See supra notes 197–98 and accompanying text. It could be argued that Article 10 of the Convention gives Turkey the right to limit freedom of expression in order to protect territorial integrity or the reputation of the country. However, as demonstrated by *Socialist Party*, fundamental rights such as free expression cannot easily be abridged for the sake of territorial integrity. See discussion supra Part IV.D.


228 Id. at 1259.

229 TÜRK CEZA KANUNU [TURKISH PENAL CODE] art. 159 (1961), translated in HUMAN RIGHTS WATCH, supra note 187, at 21. It has been argued that "[t]he 1982 constitution grants the right of free expression while at the same time qualifying exercise of that right to an absurd degree." Id.; see supra text accompanying note 91.

230 See Zana v. Turkey, 1997-VII Eur. Ct. H.R. 2533, 2548 (stating that the ECHR has to "ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against activities of terrorist organisations").

231 See, e.g., HENSLEER & MÖLLER, supra note 114, at 47 (quoting Orhan Pamuk who claimed Article 301 was intentionally hidden from the international community).

232 See id. (suggesting the decision to hold Pamuk's trial on the anniversary of the EU's decision to open membership with Turkey may be intentional provocation).
Enlargement Commissioner and a Finnish politician, has “suggested that [the trial of Pamuk] may have been staged as a deliberate challenge to recent reform trends.” The Kurdish Human Rights Project pointed out that the date of Pamuk’s trial, was likely deliberately set for December 16 because this is the date of the anniversary of the EU’s decision to open membership negotiations with Turkey. Arguing that this action was more “provocation” than “coincidence,” Human Rights Watch and Commissioner Rehn has urged Turkey to be more proactive in controlling prosecutors and judges who “may well disagree with the government’s project of European Union membership – but [who] are not entitled to express their disagreement by vexatious prosecutions of individual citizens.”

The Commissioner has also called for Turkey to initiate training programs for prosecutors and judges to ensure that they are interpreting Article 301 consistently with the standards set forth by the Convention. Moreover, the Commissioner expects “the Turkish Government [will take] action to amend the Code to close such loopholes that give too much room of [sic] discretion for anti-European interpretations of freedom of expression.” Even though the reformation of Article 301 is just one on a long list of reforms that are being asked of Turkey in their bid to join the EU, freedom of expression is one of the most basic rights; thus, limitations Turkey places on this freedom is one of the main impediments to European membership.

---

233 Press Release, Human Rights Watch, Turkey: Pamuk Trial Tests Commitment to Free Speech (Dec. 8, 2005), http://hrw.org/english/docs/2005/12/08/turkey12174.htm (citing Olli Rehn, EU Comm’r of Enlargement). See also Olli Rhen, EU Comm’r of Enlargement, Accession Negotiations with Turkey: The Time for Celebration is Over, Now Comes the Time for Delivery, Address Before the EU-Turkey Joint Parliamentary Committee (Nov. 23, 2005) (“[I]t seems like some nationalist-minded prosecutors find it easier to fight a rearguard action against the reforms through extremely dubious interpretation of the new Penal Code.”). Rehn further suggested that “[i]t should be made clear to prosecutors that Article 301 of the new Penal Code should be interpreted fully in line with the European Convention of Human Rights. Training programmes for prosecutors and judges to ensure that they fully internalise these principles will also be needed.” Id.

234 See HENSLER & MÜLLER, supra note 114, at 47.


236 Address by Olli Rhen, supra note 233.

237 Id.
V. THE CURRENT STATE OF ARTICLE 301

On April 23, 2008, in an effort to comply with the EU’s requirements for accession, Turkey’s parliament approved a proposal to soften Article 301’s restrictions on free speech. The legislators voted 250–65 in favor of amending Section 301 of the penal code. The most significant change is that the newer version of the law bars insults to the “Turkish nation,” rather than barring insults to “Turkishness” which was a much more vague offense. Other changes include cutting the maximum sentence for denigrating the Turkish identity or institutions from three years in prison to two, with a possible suspended sentence for first-time offenders. Also, now the Justice Minister will have to approve investigation of possible violations of the law.

On May 7, President Abdullah Gul approved the new version of Article 301. While these changes are substantive, opponents of the changes say “the government-proposed changes are only cosmetic and will have little impact on Turkey’s EU bid.” A pro-Kurdish party lawmaker, Fatma Kurtulan “said it was ‘illusive’ to believe that the amendment would advance free speech, saying that it was designed to please the EU but did not bring substantial changes.” Kurtulan asserts that Article 301 needs to be abolished altogether.

The threat of failure in accession negotiations, however, has not inspired the results that many believe it should have—the abolition of Article 301. Article 301 has been heavily criticized by the EU since its inception in 2005, and even though Turkey has long since known that the Article has affected its negotiations with the EU, the country has been in no hurry to abolish the Article. This forces us to consider why the government is now willing to concede to the EU’s demands to expand democratic rights of the nation’s citizens. Moreover, why has the government supported Article 301 even in the

239 Id.
240 Id.
241 Id.
242 Id.
244 Turkey’s Parliament Eases Free Speech Law, supra note 238.
245 Id.
246 Id.
face of so much criticism? Many Turks believe that Turkey has not rushed to do the EU’s bidding because of a growing opinion amongst accession supporters that the EU applies a double standard in its accession negotiations. For example, the European Union admitted Cyprus as a member even though when the United Nations proposed the Annan Plan to settle the Cyprus-Turkish dispute over the divided island nation of Cyprus, “[i]t was the Greek Cypriots who rejected the Annan Plan while the Turkish Cypriots endorsed it.” Even though the Greek Cypriot veto hampered trade, the European Union told Turkey that unless it fulfills its duties under the Ankara protocol—a protocol that extends Turkey’s customs to the ten new member states that joined the European Union May 1, 2004—accession negotiations could be at risk. “This sequence of events has created a sense of unfairness among the Turkish public.” Regardless of whether one supports or opposes Article 301, its status remains questionable even today.

In light of the fact that Article 301 is highly criticized in the international community, Turkey should consider whether there is a better way to achieve the desired objective of maintaining the integrity of the state while committing themselves to the human rights standards of the international community.

VI. IS THERE A BETTER ALTERNATIVE?

Turkey is not the first country to promote the curtailment of certain fundamental rights for the greater good. The United States grants citizens the fullest extent of their constitutional rights while retaining a small amount of control over the content of free expression. There are limited exceptions when certain speech is not protected because of concern for the public welfare, such as the use of “fighting words” and expression that incites violence. The United States has sought to prevent speech that would incite lawlessness and

---

248 Id.
249 Id.
250 Id.
251 See infra note 255 and accompanying text.
252 R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992). This body of law is outside the scope of this Note but uses various legal standards to allow the government to curtail certain types of expression, such as incitement of imminent lawless action, fighting words, defamation, child pornography, and certain forms of commercial speech. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2d ed. 2005).
wreak havoc by constructing rules that further state goals but provide individuals with the maximum rights allowed by the Constitution.\textsuperscript{253}

In America, even though speech is usually protected, "the character of every act depends upon the circumstances in which it is done."\textsuperscript{254} After all, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic. . . ."\textsuperscript{255}

This well-developed body of law, which helps to balance the needs of the public with important individual rights, demonstrates that a country can further its legitimate state interest and still protect its people from an overreaching government. The United States’ jurisprudence on freedom of expression could be a model that Turkey could use to amend Article 301 so that it furthers legitimate state interests and protects the nation’s identity while also promoting stability in the government.

In addition, the ECHR and the Commissioner are willing to uphold some of the provisions of the penal code, as long as judges and prosecutors in Turkey ensure that individual prosecutions are conducted within the spirit of the freedom of expression standards set forth in the Convention.\textsuperscript{256}

\textbf{VII. CONCLUSION}

By retaining Article 301, Turkey has put itself in a precarious position with both its allies and the European Union. Understandably, centuries of unrest have conditioned Turkey to use whatever means possible to maintain control and unity. Given that democratizing has not been an easy road for Turkey and in light of the violence that has plagued the region for centuries, one could argue that Article 301 is the best tool that Turkey has for maintaining peace and order within the region. One scholar argues, "violent conflicts are most likely to occur in countries, which are at the early stages of democratization. . . . [State building] requires subordination of the groups, regulating private and public interests . . . and establishing a strong autonomy in use of coercive power."\textsuperscript{257} However, Turkey must recognize that freedom of expression is one of the indispensable elements to a free society and to individual fulfillment.

\textsuperscript{253} Schenck v. United States, 249 U.S. 47, 52 (1919).
\textsuperscript{254} See id. (citing Aikens v. Wisconsin, 195 U.S. 194, 205–06 (1904)).
\textsuperscript{255} Id.
\textsuperscript{256} Cf. supra notes 235–36 and accompanying text.
Those in Turkey who support EU membership must convince the "deep state," or "the state within the state," that Turkey has "[not] gone far enough in reforming itself along Western lines to pass the EU membership test." This Note shows that the internal struggle within Turkey to create a national identity has created a culture that has become synonymous with the suppression of free speech and other human rights that EU member states are supposed to hold in high regard. Further, Turkey must follow its own constitutional guidelines and ensure that the members of its justice system are committed to making sure that the standards set forth in the Convention are applicable to all Turkish citizens. With its recent bid to join the EU, Turkey is clearly trying to assert itself as a world power. The standards set forth by the Convention ensure that EU member states are those countries that wield great power without abusing it. Turkey, with its rich history and enduring spirit, needs to abolish Article 301 and take its place as one of the world's great countries.
