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Prosecution of a publisher for 'denigration' of Turkey violated Article 10

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This blog post was written by Ronan Ó Fathaigh

On 4 September 2018, the European Court of Human Rights delivered a unanimous judgment on Turkey's controversial Article 301 insult law, and for the first time applied Article 46 of the European Convention, holding that amending the insult law would "constitute an appropriate form of execution" of the Court's judgment. The *Fatih Taş v. Turkey (No. 5)* judgment is notable not only for its application of Article 46, but also given that it is the fifth set of criminal proceedings the Court has considered against an Istanbul-based publisher over the publication of various books and periodicals (see *Fatih Taş v. Turkey*, *Fatih Taş v. Turkey (No. 2)*, *Fatih Taş v. Turkey (No. 3)*, and *Fatih Taş v. Turkey (No. 4)*). In all five judgments, including four in the past year alone, the Court has found violations of Article 10's guarantee of freedom of expression, or Article 6 over the length of the criminal proceedings.

Facts

The case involved Fatih Taş, owner and chief editor of the Istanbul-based

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publishing house Aram Publishing. In early 2004, Taş's publishing company published a book comprising a collection of articles concerning the disappearance of a young journalist, [Nazım Babaoğlu](#), in Turkey's south-east city of Siverek in 1994. The book alleged the journalist had been kidnapped by town guards, and included passages critical of State authorities, including that there was a "State-mafia-criminal gang relationship," and the Kurdish people had stood up to "massacres of the past," like those "perpetrated in bloody fascist dictatorships."

Three months after the book's publication, the Istanbul Public Prosecutor charged Taş under Article 159 of the former Criminal Code, which criminalised "publicly denigrating the Republic," over the above passages. The offence carried a possible three-year prison sentence. While awaiting trial, Article 159 was replaced by Article 301 of the new Criminal Code, which introduced a provision allowing prison sentences to be commuted to a judicial fine in certain circumstances. Nevertheless, over a year later in 2005, the Istanbul Criminal Court convicted Taş of denigrating the Republic, and imposed a six-month prison sentence. Notably, 18 months later in 2007, the Court of Cassation quashed the first-instance court's judgment, finding it had failed to correctly apply the most favourable provision under the new Criminal Code. When the case returned to the Istanbul Criminal Court in 2008, Taş was instead sentenced to a judicial fine. However, the proceedings finally came to an end three years later, when the Court of Cassation struck the case out as being "time-barred." Taş subsequently made an application to the European Court, claiming the seven years of criminal proceedings against him had violated his Article 10 right to freedom of expression.

Judgment

The first question for the Court was whether there had been an "interference" with Taş's freedom of expression. The Turkish government argued criminal proceedings alone could not constitute an "interference," pointing out the proceedings had ended with neither a conviction nor sentence imposed, having been ultimately ruled time-barred. However, the Court rejected the government's argument, and applied the principle from its [Dilipak v. Turkey](#) judgment: criminal proceedings against a journalist, based on serious charges over a considerable length of time, are liable to have a "chilling effect" on a journalist's desire to

express his views on matters of public interest, and creates a “climate of self-censorship affecting both himself and (all) other journalists.” Such criminal proceedings, even where eventually declared statute-barred, constitute an interference with freedom of expression, as such a declaration does not alter the fact the proceedings placed the journalist “under pressure for a substantial period of time.” The Court in *Fatih Taş (No. 5)* similarly found the criminal proceedings, lasting over seven years, and eventually struck out as statute-barred, constituted an interference with Taş’s Article 10 right to free expression.

The Court then noted that the interference had a legal basis under Article 159 of the former Criminal Code, and Article 301 of the new Code, but reiterated “doubts as to the foreseeability of these provisions,” which had been expressed in earlier case law. In particular, the Court cited *Altuğ Taner Akçam v. Turkey*, where the Court had stated Article 301 had “unacceptably broad terms,” and was a “continuing threat to the exercise of the right to freedom of expression.” However, the Court in *Fatih Taş (No. 5)* considered it “not necessary to decide” the issue of foreseeability, given its conclusion on the necessity of the interference.

The Court then turned to whether the proceedings had been “necessary in a democratic society.” It noted that the book dealt with the disappearance of a journalist, which was “undeniably a subject of general interest.” The Court then reviewed the passages, and noted they were “harsh and exaggerated criticisms of the State authorities,” but were not “gratuitously offensive or abusive,” and “did not incite violence or hatred,” which was the essential element to be considered under Article 10. Consequently, the Court held the criminal proceedings, which had been liable to have a chilling effect on Taş’s expression on matters of public interest, did “not meet a pressing social need,” and “not necessary in a democratic society.” The Court therefore concluded there had been a violation of Article 10.

Finally, the Court turned to Article 46 of the Convention, which concerns execution of judgments. The Court earlier noted it had already considered 13 cases concerning prosecutions under Article 159/301. Notably, the Court considered its conclusion in *Fatih Taş (No. 5)*, as well as previous judgments concerning similar prosecutions, stemmed from a problem relating to the application of Article 159/301 in a manner “incompatible with the criteria established by the Court’s

case-law.” Thus, the Court held that “bringing the relevant domestic law into conformity” with the Court’s case-law would “constitute an appropriate form of execution which would make it possible to put an end to the violations found.”

Comment

At an individual level, the judgment is a great victory for Fatih Taş. However, it must be remembered that Taş had been forced to bring five applications before the European Court, over multiple and lengthy prosecutions targeting Taş’s publishing house. Taş endured two separate five-year prosecutions under the Prevention of Terrorism Act, which were ultimately found by the European Court to violate both Article 6 and 10 (see *Fatih Taş v. Turkey* and *Fatih Taş v. Turkey (No. 2)*) which entailed a “real and effective restraint,” and had a chilling effect on “his very profession.” Taş also endured a further seven and a half years of criminal proceedings, which are detailed in *Fatih Taş v. Turkey (No. 3)*, and although eventually declared “time-barred,” the European Court unanimously held a violation of Article 10, in view of the “chilling effect which those proceedings may well have caused.” And similarly, *Fatih Taş v. Turkey (No. 4)* details the eight-and-a-half years of criminal proceedings conducted against Taş over publication of the book *33 Days in the Deluge*, also ruled “time-barred,” and similarly found by the European Court to violate Article 10. It should be emphasised that these were not borderline cases; all five judgments by the European Court were unanimous.

The more general point concerns Article 159/301 of the Criminal Code. As the Court noted in *Fatih Taş (No. 5)*, these provisions have resulted in 13 cases before the European Court. This state of affairs seems to have been the motivation for the Court in *Fatih Taş (No. 5)* to finally apply Article 46 of the Convention, and hold that bringing the domestic law into conformity with the Court’s case-law would “constitute an appropriate form of execution which would make it possible to put an end to the violations found.” This is the first time the Court has applied Article 46 relating to Article 159/301, and was first suggested by Judge Pinto de Albuquerque in a concurring opinion in the 2015 *Dilipak v. Turkey* judgment. While the majority in *Dilipak* found a violation of Article 10 under the “necessary in a democratic society” limb, and awarded damages, Judge Pinto de Albuquerque argued that the majority should have gone much further.

In this regard, Judge Pinto de Albuquerque noted that the Court had made “crystal-clear” in *Altuğ Taner Akçam v. Turkey* that the “notorious Article 301 had to be reformed,” but “no changes were made.” This was a reference to the Court’s holding in *Altuğ Taner Akçam v. Turkey* (see this [post](#)) that Article 301 “does not meet the ‘quality of law’ required by the Court’s settled case-law, since its unacceptably broad terms result in a lack of foreseeability as to its effects.” And yet, Judge Pinto de Albuquerque noted the “inertia of the Turkish legislature in this area of criminal policy since *Altuğ Taner Akçam*.” As such, Judge Pinto de Albuquerque was convinced the “time has come to express a clear and solid position of principle,” and it was “indispensable to issue an injunction to the respondent State under Article 46.” Given the “large number of legal suits brought against journalists,” the Turkish legislature must abolish Article 301 or replace it with a criminal provision “criminalising assaults on the reputation of State bodies created strictly as a bulwark against a clear and imminent threat to national security.”

Judge Pinto de Albuquerque’s concurring opinion in *Dilipak* provides a good context to the current thinking within the Court, and it is hoped that the Court’s judgment in *Fatih Taş (No. 5)* will bring about much-needed reform of Article 301, and indeed end its “continuing threat to the exercise of the right to freedom of expression” (*Altuğ Taner Akçam v. Turkey*, para. 93).

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