The Chilling Effect of Turkey's Article 301 Insult Law

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Dink v Turkey (2668/07) Unreported September 14, 2010 (ECHR)

Altug Taner Akcam v Turkey (27520/07) (2016) 62 E.H.R.R. 12; [2011] 10 WLUK 687 (ECHR)

Tas v Turkey (6810/09) unreported 4 September 2018 (ECHR)

Dilipak v Turkey (29680/05) unreported (ECHR)

*E.H.R.L.R. 298 Abstract

This article discusses how the approach of the European Court of Human Rights has evolved in seeking to protect freedom of expression from the chilling effect of Turkey's controversial art.301 *insult law. The article reveals the early reluctance within the Court to find that the law's provisions were incompatible with freedom of expression, and yet the analysis now demonstrates how the Court's concern for the chilling effect has led the Court to two adopt notable approaches: first, the Court permitting applicants to argue that the law, in and of itself, violates the* European Convention on Human Rights*, even where an applicant has not been convicted, nor even prosecuted under the law; and secondly, the Court's application of its rarely-used competence under* art.46 of the European Convention*, finding that amending* art.301 *would "constitute an appropriate form of execution" of the Court's judgment.*

Introduction

In September 2015, Judge Pinto de Albuquerque wrote an influential concurring opinion, urging his colleagues on the European Court of Human Rights (European Court) that the "time has come" for the Court to "issue an injunction" over the "inertia of the Turkish legislature" in either amending or abolishing art.301 of the Turkish Criminal Code,1 which criminalises "publicly degrading the Turkish nation".2 The Court had already held that art.301 represented a "continuing threat" to freedom of expression,3 and indeed, in 2011,

had permitted an applicant to argue that the law, "in and of itself",4 violated the European Convention on Human Rights, due to its chilling effect on freedom of expression. This was so even where the applicant had never been convicted under the law, and indeed, had never even been prosecuted.

While a majority of the Court was unwilling to adopt Judge Pinto de Albuquerque's approach in 2015, nearly three years to the day, in September 2018, the Court would deliver a unanimous judgment, which for the first time held that amending art.301 would "constitute an appropriate form of execution" of the Court's judgment.5 The purpose of this article is to discuss the evolution of Court's consideration of art.301 ***E.H.R.L.R. 299*** and freedom of expression under art.10 of the European Convention, and to understand the significance, if any, of the Court's consideration of art.301's chilling effect.6

The Court's "serious doubts" over Article 301

In order to understand the Court's approach to art.301, we must first turn to the tragic circumstances at issue in the Court's 2010 judgment in *Dink v Turkey*.7 The case concerned the Istanbul-based journalist Hrant Dink, who was editor of the Turkish-Armenian *AGOS* newspaper. The case arose in late 2003, when Dink published a series of articles on the identity of Turkish citizens of Armenian origin. The articles argued that the Turkish refusal to recognise the Ottoman Empire's actions toward Armenians in 1915 as "genocide" had been highly destructive for Armenian identity, and that having the genocide recognised had become the raison d'être of the Armenian people.8 The final article included that the "purified blood that will replace the blood poisoned by the 'Turk' can be found in the noble vein linking Armenians to Armenia", with the article arguing that Armenian authorities should work more actively to strengthen the Armenian diaspora's ties with the country.9

In 2004, a member of a Turkish nationalist group made a criminal complaint over the articles, and the Şişli Prosecutor's Office brought criminal proceedings against Dink under the former art.159 (now art.301) of the Turkish Criminal Code, which prohibited "publicly denigrat[ing] Turkishness".10 Nationalists demonstrated against Dink during the trial, and in October 2005 the Şişli Criminal Court convicted Dink of denigrating Turkishness, and imposed a suspended six-month prison sentence. The Court held that the applicant's statement that, "the purified blood that will replace the blood poisoned by the 'Turk' can be found in the noble vein linking Armenians to Armenia", constituted a denigration of Turkishness. The decision was upheld by Turkey's Court of Cassation, and while criminal proceedings were still ongoing, tragically, in January 2007, the applicant was shot dead outside the newspaper's offices.11

A week before his death, Dink had lodged an application with the European Court, claiming his conviction for denigrating Turkishness had violated his right to freedom of expression under art.10.12 Following his death, Dink's family also made an application to the European Court, claiming that Turkey had failed to fulfil its positive obligation under art.2 of the European Convention to protect Dink's right to life.13 The Court unanimously found that there had been a violation of art.2; however, for present purposes, the focus is on the application under art.10 concerning Dink's conviction.14

The first issue for the Court was whether it could consider Dink to be a "victim" under art.34

of the Convention,15 and whether there had been an "interference" with freedom of expression, as the Turkish government argued that Dink had "died before a final conviction was pronounced by the Criminal Court". ***E.H.R.L.R. 300*** 16 However, the Court held that the application was admissible, holding that even if criminal proceedings are "abandoned on procedural grounds", where the "risk of being found guilty and punished remains, the person concerned may validly claim to have been directly affected by the law in question and claim to be a victim of a violation of the Convention".17 Further, there had been an interference with freedom of expression, as the "confirmation of guilt" by the Court of Cassation, "taken alone" constituted an interference with freedom of expression.18

The second issue was whether the interference had been "prescribed by law", as it was argued that the term "Turkishness" under the former art.159 (now art.301) had an "extraordinarily flexible scope".19 In this regard, the Court admitted that "serious doubts may arise as to the foreseeability for the applicant Fırat [Hrant] Dink of his criminalisation under Article 301 of the Criminal Code".20 However, the Court decided that "in view of the conclusion reached by the Court on the necessity of the interference", it was "not necessary" to decide the question of "prescribed by law".21 Similarly, on the question of whether the law "pursued a legitimate aim", the Court also stated that it had "serious doubts", but considered the question "closely linked to the examination of the necessity of the interference".22 Thus, the main question for the Court was whether the interference had been necessary in a democratic society.

The Court reiterated its strict standard of scrutiny under art.10, in that there is "little scope" for restrictions on political expression.23 Notably, the Court applied the principle that the government's "dominant position requires it to exercise restraint in the use of criminal proceedings, especially if there are other means of responding to unjustified attacks and criticisms by its opponents".24 The Court examined the statements in the articles, and crucially, the Court held that "taken as a whole", the articles did not "incite violence, armed resistance or uprising", which was an "essential element to be taken into consideration".25 Further, the articles were not "gratuitously offensive", nor did they incite violence or hatred.26 The Court concluded that the applicant's conviction did not correspond to any "pressing social need",27 and there had thus been a violation of art.10.

The Court in *Dink* admitted that there were "serious doubts" over art.301, but was hesitant about holding that the provision was not prescribed by law, focusing instead on the proportionality of the interference with freedom of expression. Notably, two judges in *Dink*, Judge Sajó and Judge Tsotsoria, wrote a concurring opinion, arguing that the Court should indeed have held that art.301 was not "prescribed by law",28 considering that the very existence of art.301 was "unacceptable", as it was "too broad" and "unclear", creating a constant "temptation of self-censorship", 29 The Court's focus on proportionality was not the "best way" to protect freedom of expression against this "self-censorship".30

Article 301's chilling effect

One year after the *Dink* judgment, the Court would again consider Turkey's art.301 law, and indeed, would unanimously adopt the approach advocated by Judge Sajó and Judge Tsotsoria in *Dink*. And crucially, the Court would not only find that art.301 had a chilling effect on freedom of expression and consequent ***E.H.R.L.R. 301*** risk of self-censorship,

it would allow an applicant to argue that the law, in and of itself, violated art.10, even where the applicant has not been convicted, nor even prosecuted under the law.

The case was *Altuğ Taner Akçam v Turkey*,31 where the applicant, a history professor, had published an editorial opinion in the *AGOS* newspaper in 2006, criticising the earlier prosecution of Dink under art.301, and requested, as an act of solidarity, that he also be prosecuted for his similar views on the 1915 Armenian question. A week later, a criminal complaint was lodged with the Eyüp public prosecutor, alleging that the applicant's article amounted to "denigration of Turkishness" under art.301. The applicant was summoned to the Şişli public prosecutor's office to make a statement. However, in January 2007, the investigation against the applicant was terminated by the Şişli public prosecutor, concluding that the newspaper article "came within the realm of protected expression under art.10" of the European Convention.32 A further complaint was filed against the public prosecutor's non-prosecution decision, however in October 2007, the Beyoğlu Assize Court held that the non-prosecution decision "was in accordance with procedure and law".33 No further investigation was instigated against the applicant after October 2007.

Even though the applicant had never been prosecuted under art.301, he decided to make an application to the European Court, claiming that the very "existence" of art.301 interfered with his right to freedom of expression.34 In particular, the applicant argued that the "mere fact that an investigation could potentially be brought against him under this provision" caused him "fear of prosecution".35 The first question for the Court was whether there had indeed been an "interference" with the applicant's freedom of expression, as the government argued that (a) art.301 "had never been applied against the applicant", (b) the proceedings had been "terminated by a definitive non-prosecution decision by the public prosecutor", and (c) art.301 had been amended in the interim.36

The Court first held that it is "open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct because of it or risk being prosecuted".37 This occurred because of the "chilling effect that the fear of sanction has on the exercise of freedom of expression, even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future".38 Applying this principle, the Court held that even though art.301 has not yet been applied to the applicant's "detriment", the "mere fact that in the future an investigation could potentially be brought against him has caused him stress, apprehension and fear of prosecution". 39 This forced the applicant to "modify his conduct by displaying self-restraint in his academic work in order not to risk prosecution under Article 301".40 Further, the Court held that thought and opinions on public matters are of a "vulnerable nature",41 and the "very possibility" of a prosecution may impose a "serious burden on the free formation of ideas and democratic debate and have a chilling effect".42

The Court concluded that the criminal investigation commenced against the applicant, and the standpoint of the Turkish criminal courts on the Armenian issue in their application of art.301, confirmed that there existed a "considerable risk of prosecution faced by persons who express 'unfavourable' opinions", and indicated that the "threat hanging over the applicant is real".43 The Court dismissed the government's ***E.H.R.L.R. 302*** argument concerning the applicant's lack of victim status, and also held there had been an interference with applicant's right to freedom of expression under art.10.

The Court then examined whether the interference had been "prescribed by law".44 The Court first noted that while the Turkish legislator's aim of protecting and preserving values and state institutions from public denigration "can be accepted to a certain extent", the Court held that the scope of the terms under art.301 of the Criminal Code, as interpreted by the judiciary, is "too wide and vague", and thus the provision constitutes a "continuing threat to the exercise of the right to freedom of expression".45 The Court then considered three major amendments that had been made to the law, namely (a) the terms "Turkishness" and "Republic" were replaced by "Turkish Nation" and "State of the Republic of Turkey"; (b) the maximum prison term imposable on those found guilty was reduced; and (c) any investigation into an offence was now subject to the permission from the Minister of Justice.46 However, the Court held that the amendments did not introduce a "substantial change or contribute to the widening of the protection of the right to freedom of expression", and the inclusion of permission from the Minister of Justice did not "remove the risk" of arbitrary prosecutions, as "any political change in time might affect the interpretative attitudes of the Ministry of Justice and open the way for arbitrary prosecutions".47 It followed, according to the Court, that art.301 did not meet the "quality of law" required, as its "unacceptably broad terms result in a lack of foreseeability as to its effects".48 Thus, the interference had not been prescribed by law, resulting in a violation of art.10. The judgment was unanimous, with Judge Sajó sitting in the Chamber.

The significance of the Court's judgment in *Altuğ Taner Akçam* is apparent when we consider that: (i) the law under consideration had undergone an amendment since the time of the application; (ii) there had been no prosecution against the applicant, with a non-prosecution decision being issued; and (iii) the applicant had made no challenge to the law in the domestic courts. Nonetheless, the Court considered it was entitled to essentially review the compatibility of the amended law with art.10, and ultimately found a violation, as it was overbroad and vague, all because of the law's chilling effect. Focusing on the Court's consideration of this chilling effect, the Court applied the principle both when finding an interference with freedom of expression, and when considering whether the interference was prescribed by law. The principle was that a chilling effect arises from a law where the "risk" of being affected by the law discourages a person from engaging in similar expression "in the future",49 or forces a person to display "self-restraint" in their expression to avoid liability.50 The Court found that the art.301 law violated art.10 due to its "unacceptably broad terms", and had a chilling effect on the applicant, even though the applicant "was not prosecuted and convicted of the offence".51 What concerned the Court was the chilling effect on future freedom of expression, because an investigation could potentially be brought, and a future risk of prosecution.52

Thus, Court was adopting the approach advocated by Judge Sajó and Judge Tsotsoria in *Dink*, in order to insulate freedom of expression from the chilling effect and risk of self-censorship created by art.301. It should be noted that the Court's approach in *Altuğ Taner Akçam* very much mirrors the US Supreme Court's overbreadth doctrine, which allows overbroad and vague laws to be challenged "on their face", in the absence of a prosecution, in order to prevent a chilling effect that results from the existence and threatened enforcement of these laws.53 This is typified in the Supreme Court's *Dombrowski v Pfister* judgment, where the Court held that due the "sensitive nature of constitutionally protected expression", the Court had "not required that all of those subject to overbroad regulations risk prosecution to test their rights".54 This

was because "vindication of freedom of expression" should not have to "await the outcome of protracted litigation",55 and the "prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression".56

Hesitancy within the Court arises again

The Court in *Altuğ Taner Akçam* explicitly found that art.301 was a "continuing threat" to freedom of expression, as the "wording of the provision" and its "unacceptably broad terms" did not meet the "quality of law" required by the Court's settled case-law.57 And yet, four years later in 2015, hesitancy arose in the Court once again over art.301, this time concerning its criminalisation of "degrad[ing] the military or security organisations of the State".58 A majority of the Court in *Dilipak v Turkey* admitted that "serious doubts might arise as to the foreseeability" of art.301, but in view of the Court's finding as regards the necessity of the interference, it "considers it unnecessary to decide on this matter".59

Dilipak involved an Istanbul-based journalist who had a written a front-page article in a 2003 edition of the weekly magazine *Türkiye'de Cuma*. The article was entitled "If the pashas refuse to obey", and criticised a number of high-ranking officers in the Turkish military who were about to retire. The article included allegations that some generals in the army "appeared to have links with certain business circles, the media, senior civil servants and even the Mafia", and were "endeavouring to create a political atmosphere that tallied with their worldview".60

Six months later, the Military Prosecutor's Office with the Third Army Corps in Istanbul applied to the Military Court for the applicant's prosecution under art.95 of the Military Criminal Code, which criminalises "damaging hierarchical relations within the army and undermining confidence in commanding officers".61 Seven months later, the Military Court declined jurisdiction in favour of the Bakırköy Assize Court, holding that the offence at issue was not military in nature, and the applicant should be tried by the non-military courts for "denigration of the State armed forces", under the former art.159 (now art.301) of the Criminal Code.62 The Military Prosecutor lodged an appeal, and in 2005 the Military Court of Cassation quashed the decision declining jurisdiction and referred the case back to the Military Court, finding that the article was "liable to undermine the lower ranks' confidence in [the generals] and thus damage hierarchical relations within the armed forces".63 Following this, between 2006 and 2010, the case was considered by five different courts considering jurisdiction issues over application of the former art.159 (art.301),64 until finally, in June 2010, the Bakırköy 2nd Criminal Court declared the proceedings statute-barred under the Military Criminal Code.

While the applicant was never convicted, he made an application to the European Court, claiming that the criminal proceedings against him for offences involving "denigration of the army" violated his right to freedom of expression, as they were designed to "deter him from exercising his profession", and "constituted a threat against him and also against all journalists dealing with political topics", in particular criticism of the military. ***E.H.R.L.R. 304** 65

The first question for the Court was whether there had been an interference with the applicant's right to freedom of expression, as the government argued that the applicant had not been convicted by the criminal courts, and the prosecution "had been abandoned

on expiry of the limitation period".66 The Court held that in certain circumstances which have a "chilling effect on freedom of expression", this can confer on individuals "who have not been finally convicted" the status of victim of interference in the exercise of their right to freedom of expression.67 This included where criminal prosecutions based on specific criminal legislation are discontinued for "procedural reasons but the risk remains that the party concerned will be found guilty and punished, that party may validly claim to be the victim of a violation of the Convention".68

Applying this principle, the Court held that the six-and-a-half years of criminal proceedings conducted against the applicant under art.95 of the Military Criminal Code and art.159 of the former Criminal Code, "in view of the chilling effect which those proceedings may well have caused, cannot be viewed as solely comprising purely hypothetical risks to the applicant, but that they constituted genuine and effective restrictions *per se*".69 The declaration that the proceedings had become time-barred merely put an end to these risks but "did not alter the fact that those risks had placed the applicant under pressure for a substantial period of time".70 Thus, the Court held that there had been an interference with freedom of expression.

The Court then turned to whether the interference had been "prescribed by law", and whether the "broad scope" of "damaging the hierarchical structure" of the armed forces under art.95 of the Military Criminal Code, and "denigrating the armed forces" under art.301 of the Criminal Code, diminished the foreseeability of the legal provisions in question.71 The Court admitted that if prosecutors interpreted these terms as applying to "comments made" concerning "army officers on general political subjects", then "serious doubts might arise as to the foreseeability for the applicant" on being charged under art.95 or art.159/301.72 However, the Court concluded that "in view of its finding as regards the necessity of the interference", it "considers it unnecessary to decide on this matter".73

The Court moved to whether the interference had been necessary in a democratic society. The Court first noted that the article concerned an issue which was "indubitably a matter of public interest in a democratic society", targeting high-ranking military officers.74 While the article included "severe, scathing criticism", the Court held that it was in no way gratuitously offensive or insulting, or that it constituted incitement to violence or hatred.75 The Court then added that the commencement of criminal proceedings "looked rather like an attempt by the competent authorities to use criminal proceedings to suppress ideas or opinions considered as disruptive or shocking, whereas in fact they had been expressed in response to publicly stated viewpoints concerning the sphere of general politics".76

Finally, the Court held by prosecuting the applicant for serious crimes over a "considerable length of time", the authorities had a "chilling effect on the applicant's desire to express his views on matters of public interest".77 The Court accepted the applicant's submission that commencing such proceedings was liable to "create a climate of self-censorship affecting both himself and (all) other journalists who might be considering commenting on the actions and statements of members of the armed forces relating to ***E.H.R.L.R. 305*** general politics in the country".78 As such, the Court concluded that the criminal proceedings were not proportionate, and in violation art.10.79

Altuğ Taner Akçam stands for the proposition that an applicant may claim to be a victim of a violation of art.10 where an overbroad criminal law provision creates a chilling effect on expression on matters of public interest, even in the absence of a criminal prosecution.

Dilipak built upon this proposition, and laid down the principle that an applicant may claim to be a victim of a violation of art.10 where lengthy criminal proceedings create a chilling effect on expression on matters of public interest, even where these proceedings are ultimately discontinued. Both of these judgments were built upon the recognition of the "vulnerable nature" of expression on matters of public interest, 80 similar to the US Supreme Court's recognition of the "sensitive nature" of constitutionally protected expression under the First Amendment.81

While the *Dilipak* judgment was unanimous, the Court's reluctance to consider whether the interference was prescribed by law was taken to task in a concurring opinion by Judge Pinto de Albuquerque. The concurring opinion argued that the Court had made "crystal-clear" in *Altuğ Taner Akçam* that the "notorious Article 301 had to be reformed", but "no changes were made", and Judge Pinto de Albuquerque noted the "inertia of the Turkish legislature in this area of criminal policy since *Altuğ Taner Akçam*".82 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".83 Given the "large number of legal suits brought against journalists", the Turkish legislature must abolish art.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".84 Thus, Judge Pinto de Albuquerque was calling upon the Court to apply art.46 of the European Convention,85 and find that the domestic law should be brought into line with art.10.

There is merit to Judge Pinto de Albuquerque's view, and it was quite curious that the Court in *Dilipak* did not find that art.301's criminalisation of denigrating the army was (similar to *Altuğ Taner Akçam*) overbroad and vague. This was all the more curious given that the Court in *Dilipak* explicitly recognised that the proceedings "looked rather like an attempt by the competent authorities to use criminal proceedings to suppress ideas or opinions" on matters of public interest considered "disruptive", and were "liable to create a climate of self-censorship".86 The Court in *Altuğ Taner Akçam* had found art.301 was overbroad *precisely* because it "easily"87 allowed criminal proceedings targeting public-interest expression.

Court applies Article 46

While a majority of the Court were unwilling to adopt Judge Pinto de Albuquerque's approach in 2015, nearly three years to the day, in September 2018, the Court would for the first time hold that amending art.301 would "constitute an appropriate form of execution" of the Court's judgment.88 The case was *Fatih Taş v Turkey (No.5)*,89 where the applicant was Fatih Taş, the owner and chief editor of the Istanbul-based ***E.H.R.L.R. 306*** publishing house Aram Publishing. In early 2004, the applicant'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".90

Three months after the book's publication, the Istanbul Public Prosecutor charged the applicant under art.159 of the former Criminal Code, which criminalised "publicly denigrating the Republic", over the above passages.91 The offence carried a possible three-year prison sentence. While awaiting trial, art.159 was replaced by art.301 of the new Criminal Code, which introduced a provision allowing prison sentences to be commuted to a judicial fine in certain circumstances.92 Nevertheless, over a year later in 2005, the Istanbul Criminal Court convicted the applicant 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, the applicant 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".93

The applicant subsequently made an application to the European Court, claiming the seven years of criminal proceedings against him had violated his art.10 right to freedom of expression. The first question for the Court was whether there had been an "interference" with 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.94 However, the Court rejected the government's argument, and applied the principle from *Dilipak*: 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".95 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".96 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 the applicant's art.10 right to free expression.

The Court then noted that the interference had a legal basis under art.159 of the former Criminal Code, and art.301 of the new Code, but reiterated "doubts as to the foreseeability of these provisions", which had been expressed in earlier case law.97 In particular, the Court cited *Altuğ Taner Akçam*, where it had stated art.301 had "unacceptably broad terms", and was a "continuing threat to the exercise of the right to freedom of expression".98 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.99

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 ***E.H.R.L.R. 307*** interest".100 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 art.10.101 Consequently, the Court held the criminal proceedings, which had been liable to have a chilling effect on the applicant's expression on matters of public interest, did "not meet a pressing social need", and "not necessary in a democratic society".102 The Court therefore

concluded there had been a violation of art.10.

However, the Court's analysis did not end there, and the Court turned to art.46 of the Convention on the execution of judgments. Notably, the Court considered that its conclusion in *Fatih Taş (No.5)*, as well as previous judgments concerning similar prosecutions, stemmed from a problem relating to the application of art.159/301 in a manner "incompatible with the criteria established by the Court's case-law".103 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".104

Fatih Taş (No.5) was the first time the Court applied art.46 of the Convention to its consideration of Turkey's art.301, and follows Judge Pinto de Albuquerque's approach advocated in his concurring opinion in *Dilipak*. In *Dink*, *Altuğ Taner Akçam* and *Dilipak*, the Court had only applied art.41 in awarding damages as just satisfaction,105 but with the application of art.46 in *Fatih Taş (No.5)*, the Court has now explicitly indicated the individual measure Turkey should adopt to end the violation of art.10, and subject to supervision by the Council of Europe's Committee of Ministers. The Court has previously highlighted how it will only "exceptionally" apply art.46 in indicating the individual measure to be taken by a respondent state,106 and the judgment in *Fatih Taş (No.5)* indicates how much concern the Court attaches to art.301's creation of a "climate of self-censorship".107

Conclusion

In light of the Court's case-law discussed, it is hoped that the Turkish government and legislature will abolish art.301, and end its "continuing threat" to freedom of expression.108 Of course, Turkey is not alone in its criminalisation of insulting the state. As recently as 2017, the Organization for Security and Co-operation in Europe identified 14 Council of Europe Member States that still criminalise insulting the state, including Austria's Criminal Code, which prohibits "publicly and in a hateful manner insulting or disparaging the Republic of Austria", while Germany's Criminal Code also criminalises "insulting or maliciously expressing contempt toward Germany", and carries a possible prison sentence.109 These Member States should also take note of the Court's case-law on art.301; and assess whether abolishing ***E.H.R.L.R. 308*** similar national criminal law provisions might send a powerful signal that art.301 is an unacceptable continuing threat to freedom of expression, which arises even in the absence of widespread convictions. As the former President of the European Court, Judge Jean-Paul Costa explained, the chilling effect is akin to the sword of Damocles,110 with its value being that it hangs—not that it drops.111

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1. *Dilipak v Turkey (App. No.29680/05), judgment of 15 September 2015* (Concurring opinion of Judge Pinto de Albuquerque at [1]).

2. See *Altuğ Taner Akçam v Turkey (2016) 62 E.H.R.R. 12* at [44] ("A person who publicly degrades the Turkish nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the judicial bodies of the State, shall be sentenced to a penalty of imprisonment for a term of six months to two years"). For a discussion of art.301, see E. Ozbudun and F. Thrkmen, "Impact of the ECtHR Rulings on Turkey's Democratization: An Evaluation" (2013) 35 Human Rights Quarterly 985, 989–992; B. Algan, "The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey" (2008) 9 German Law Journal 2238; and J. Tat, "Turkey's Article 301: A Legitimate Tool for Maintaining Order or a Threat to Freedom of Expression?" (2008) 37 Georgia Journal of International and Comparative Law 181.

3. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [93].

4. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [59].

5. *Fatih Taş v Turkey (No.5) (App. No.6810/09), judgment of 4 September 2018* at [29].

6. For a discussion of the European Court's case-law on art.10, see *D. Voorhoof, "Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges", in P. Molnár (ed.), Free Speech and Censorship Around the Globe (Budapest: Central European University Press, 2015), pp.59–104*. For a discussion of the Court's consideration of the chilling effect in other areas of art.10 case-law, see R. Ó Fathaigh, "Article 10 and the Chilling Effect Principle" (2013) E.H.R.L.R. 304; and R. Ó Fathaigh, "The Chilling Effect of Liability for Online Reader Comments" (2017) E.H.R.L.R. 387.

7. *Dink v Turkey (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09), judgment of 14 September 2010*. See Case Comment (2011) E.H.R.L.R. 101; and *L. Peroni, "Freedom of Expression in Turkey: When Changes in the Wording Are Not Enough" (5 October 2010) Strasbourg Observers*, https://strasbourgobservers.com/2010/10/05/freedom-of-expression-in-turkey-when-changes-in-the-wording-are-not-enough [Accessed 23 May 2019].

8. Case Comment (2011) E.H.R.L.R. 101.

9. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [16].

10. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [54].

11. See *S. Arsu, "Editor Who Spoke for Turkey's Ethnic Armenians is Slain" (20 January 2007), The New York Times, p.A3*.

12. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [94].

13. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [55].

14. The Court also considered Turkey's positive obligations under art.10 (see *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [137]–[138]. See *T. McGonagle, "Positive obligations concerning freedom of expression: mere potential or real power?", in O. Andreotti (ed.), Journalism at risk: Threats, challenges and perspectives (Strasbourg: Council of Europe, 2015), pp.9–35*.

15. European Convention art.34 ("The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto").

16. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [102].

17. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [105].

18. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [108].

19. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [112].

20. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [116].

21. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [116].

22. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [118].

23. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [133].

24. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [133].

25. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [134].

26. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [135].

27. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* at [136].

28. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* (Concurring opinion of Judge Sajó, joined by Judge Tsotsoria).

29. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* (Concurring opinion of Judge Sajó, joined by Judge Tsotsoria).

30. *Dink (App. Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09)* (Concurring opinion of Judge Sajó, joined by Judge Tsotsoria).

31. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12*.

32. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [10].

33. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [12].

34. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [53].

35. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [53].

36. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [60]–[63].

37. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [68], citing *Dudgeon v United Kingdom (1982) 4 E.H.R.R. 149* at [41].

38. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [68].

39. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [75].

40. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [75].

41. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [81].

42. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [81].

43. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [82].

44. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [85]–[96].

45. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [85]–[96].

46. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [90].

47. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [94].

48. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [95].

49. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [68].

50. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [75].

51. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [75].

52. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [75]–[76].

53. See R. Sedler, "Self-Censorship and the First Amendment" (2011) 25 Notre Dame Journal of Law, Ethics & Public Policy 13, 17.

54. *Dombrowski v Pfister 380 US 479 (1964)*, 486.

55. *Dombrowski v Pfister 380 US 479 (1964)*, 487.

56. *Dombrowski v Pfister 380 US 479 (1964)*, 494.

57. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [93]–[95].

58. See *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [43]–[44] ("A person who publicly degrades … the military or security organisations of the State shall be sentenced to a penalty of imprisonment for a term of six months to two years").

59. *Dilipak (App. No.29680/05)* at [58].

60. *Dilipak (App. No.29680/05)* at [5].

61. *Dilipak (App. No.29680/05)* at [6].

62. *Dilipak (App. No.29680/05)* at [8].

63. *Dilipak (App. No.29680/05)* at [12].

64. *Dilipak (App. No.29680/05)* at [14]–[17].

65. *Dilipak (App. No.29680/05)* at [34].

66. *Dilipak (App. No.29680/05)* at [43].

67. *Dilipak (App. No.29680/05)* at [44].

68. *Dilipak (App. No.29680/05)* at [45].

69. *Dilipak (App. No.29680/05)* at [50].

70. *Dilipak (App. No.29680/05)* at [50].

71. *Dilipak (App. No.29680/05)* at [57].

72. *Dilipak (App. No.29680/05)* at [58].

73. *Dilipak (App. No.29680/05)* at [58].

74. *Dilipak (App. No.29680/05)* at [67].

75. *Dilipak (App. No.29680/05)* at [68].

76. *Dilipak (App. No.29680/05)* at [68].

77. *Dilipak (App. No.29680/05)* at [72].

78. *Dilipak (App. No.29680/05)* at [72].

79. *Dilipak (App. No.29680/05)* at [73].

80. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [81].

81. *Dombrowski v Pfister 380 US 479 (1964)*, 486.

82. *Dilipak (App. No.29680/05)* (Concurring opinion of Judge Pinto de Albuquerque at [15]).

83. *Dilipak (App. No.29680/05)* (Concurring opinion of Judge Pinto de Albuquerque at [1]).

84. *Dilipak (App. No.29680/05)* (Concurring opinion of Judge Pinto de Albuquerque at [15]).

85. European Convention art.46 ("1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties"). See *L. Sicilianos, "The Role of the European Court of Human Rights in the Execution of its own Judgments: Reflections on Article 46 ECHR", in A. Seibert-Fohr and M. Villiger (eds), Judgments of the European Court of Human Rights—Effects and Implementation (London: Routledge, 2014), pp.285–315*; and H. Keller and C. Marti, "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments" (2015) 26 European Journal of International Law 829.

86. *Dilipak (App. No.29680/05)* at [72].

87. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [93].

88. *Fatih Taş (No.5) (App. No.6810/09)* at [29].

89. *Fatih Taş (No.5) (App. No.6810/09)*.

90. *Fatih Taş (No.5) (App. No.6810/09)* at [12].

91. *Fatih Taş (No.5) (App. No.6810/09)* at [14].

92. *Fatih Taş (No.5) (App. No.6810/09)* at [18].

93. *Fatih Taş (No.5) (App. No.6810/09)* at [13].

94. *Fatih Taş (No.5) (App. No.6810/09)* at [24].

95. *Fatih Taş (No.5) (App. No.6810/09)* at [29].

96. *Fatih Taş (No.5) (App. No.6810/09)* at [29].

97. *Fatih Taş (No.5) (App. No.6810/09)* at [33].

98. *Fatih Taş (No.5) (App. No.6810/09)* at [32], citing *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [93].

99. *Fatih Taş (No.5) (App. No.6810/09)* at [33].

100. *Fatih Taş (No. 5) (App. No.6810/09)* at [39].

101. *Fatih Taş (No. 5) (App. No.6810/09)* at [39].

102. *Fatih Taş (No. 5) (App. No.6810/09)* at [40].

103. *Fatih Taş (No. 5) (App. No.6810/09)* at [45].

104. *Fatih Taş (No. 5) (App. No.6810/09)* at [45].

105. European Convention art.41 ("If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party").

106. *Fatullayev v Azerbaijan (2011) 52 E.H.R.R. 2* at [174]. In *Fatullayev*, the Court found a journalist's conviction and imprisonment for defamation violated art.10, and held, under art.46, that "the respondent State shall secure the applicant's immediate release" (at [177]). However, it would be 13 months later when the applicant was finally released, following a "Decree of the President of the Republic of Azerbaijan of 26 May 2011 pardoning 90 persons including the applicant" (see Committee of Ministers, 1115 (DH) meeting, 7–8 June 2011—Decision Cases No.4 / Cases against Azerbaijan 40984/07 35877/04, CM/Del/Dec(2011)1115/4). See A. Donald and A.-K. Speck, "The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments" (2019) 19 H.R.L.R. 83, 106 (commenting that "it is uncertain as to how far [Fatullayev's] release may be attributed directly to the prescriptive order in the ECtHR judgment"). See also, *E. Barry, "Azerbaijan: Pardon for Political Prisoner" (27 May 2011), The New York Times*, https://www.nytimes.com/2011/05/27/world/asia/27brfs-azerbaijan.html [Accessed 23 May 2019].

107. *Fatih Taş (No.5) (App. No.6810/09)* at [29].

108. *Altuğ Taner Akçam (2016) 62 E.H.R.R. 12* at [93].

109. *Organization for Security and Co-operation in Europe, Defamation and Insult Laws in the OSCE Region: A Comparative Study (Vienna: OSCE, 2017), pp.19–20*, www.osce.org/fom/303181 [Accessed 23 April 2019].

110. *Cumpănă and Mazăre v Romania (App. No.33348/96), judgment of 10 June 2003* (Joint dissenting opinion of Judges Costa and Thomassen).

111. *Arnett v Kennedy 416 US 134 (1974)*, 281 (Marshall, J, dissenting).