Recent Developments in the Field of Freedom of Expression in Turkey

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After the approval of its official candidate status in 1999, Turkey undertook radical reforms to meet the European Union (EU) accession criteria. Particularly, the last part of the previous legislative term of the Turkish Grand National Assembly (TGNA) saw profound amendments to key legal documents, which make up the backbone of the restrictive human rights regime in the country. This article focuses on these developments with special reference to the characteristics of the current political regime in Turkey. In the first section of the article, a conceptual framework for studying the problems of freedom of expression in Turkey shall be proposed. In the second section, an overview of the legal framework of free speech and its application in Turkey shall be presented from a historical point of view. The third section shall be devoted to the detailed analysis of recent changes in the key legal documents concerning freedom of expression. The article shall be concluded with a brief discussion on whether the recent reforms in the field of freedom of expression bring Turkey closer to the legal and political standards accepted and applied by the members of the EU.

Conceptual Framework

Democracy means basically a free and fair competition between ideologically different political groups to gain power.1 Democracy, even in this minimalist formulation, requires the existence and promotion of different worldviews. To put it differently, democratic competition must be open to all members of society, even

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1 Such minimalist formulations draw on Joseph Schumpeter's classic definition. He defines '... the democratic method...', as '... that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.' Joseph A. Schumpeter, Capitalism, Socialism and Democracy (New York, Harper & Row, 1976) p. 269.
to those rejecting the principles of democracy. Here, the dilemma arises: how can democracies defend themselves against their enemies without compromising basic principles, which make them democratic? Suppressing anti-democratic ideologies would obviously harm the principle of tolerance, which constitutes the very essence of democracy; allowing them, on the other hand, would result in the demise of democratic order. So, what can be done? Different conceptions of democracy answer this question differently. According to the model of procedural democracy, what is important is to guarantee the free and fair competition of candidates through electoral mechanisms, who would acquire power with the support of the majority. The ideologies of those running in this open competition are not relevant in a procedural democracy. As a result, those who aim at destroying the democratic regime itself may come to power in this model of democracy, at least theoretically, by utilizing democratic channels. The model of substantive democracy, on the contrary, does not tolerate such groups and individuals. According to those, defending substantive conception of democracy, none of the rights can be used to abolish the right itself or other fundamental rights. To put it simply, there is no 'freedom to destroy freedom' in a substantive democracy.

G. Fox and G. Nolte, in their well known essay, focus on the dilemma explained above and classify certain states within the framework of a procedural-substantive dichotomy. They also subdivide the latter broad categories into 'tolerant' (i.e. passive) and 'militant' (i.e. active) categories to bring procedural-substantive classification closer to meaningful ideal types. According to the authors, state practice can be categorized as follows: (1) tolerant procedural democracy (e.g. the United Kingdom); (2) militant procedural democracy (e.g. the United States); (3) tolerant substantive democracy (e.g. France); (4) militant substantive democracy (e.g. Germany).

Militant substantive democracy, then, involves measures and precautions against anti-democratic forces. These measures and precautions can be introduced basically at two levels: at one level, activities of those political parties and associations, rejecting democratic procedures and values, can be controlled by state authorities. Even they can exceptionally be closed down by the competent authority, which is a constitutional court in many cases, if they pose a threat to the democratic order. At another level, and in a more indirect manner, the propaganda of anti-democratic institutions and principles is not tolerated. Thus, in a militant substantive democracy, freedom of expression can be limited by law to stop such activities of anti-democratic forces. As mentioned above, Germany has been cited as one of the prominent examples of substantive militant democracy. Indeed, the German Basic Law contains defensive mechanisms at both levels; Article 18 (regulating the forfeiture of certain basic rights in case of their abuse) and Article 21/2 (allowing the closure of political parties, which seek to impair or abolish the free basic democratic order or to endanger the existence of the Federal Republic of Germany) are the embodiment of the concept of militant democracy at the first level. At the second level, Article 5 (recognizing freedom of expression, freedom of the press and freedom of reporting and introducing limitations for the latter) provides German state authorities with effective tools for coping with the enemies of democracy. Certain provisions in the Criminal Law, on the other hand, materialize the restrictions envisaged by Article 5 of the Constitution. For example, Section 86 of the Criminal Code prohibits the dissemination of propaganda, which supports the ideas of the Nazi regime, unconstitutional parties, or prohibited associations; Section 130 prescribes attacks on human dignity, which incite hatred in a manner that is capable of disturbing the public peace; Section 131 criminalizes the production or dissemination of writings, which describe cruel or otherwise inhuman acts of violence against human beings in a manner which expresses a glorification which portray such acts of violence as harmless or which represents the cruel or inhuman aspects of the event in a manner which injures human dignity. The Federal Constitutional Court in Germany fills the content of the concept of militant democracy and puts emphasis on the precedence of the 'free democratic order' over individual liberties, including freedom of expression. Such legal reasoning for the limitation of free speech, needless to say, is not tenable in a procedural democracy. Indeed, the jurisprudence of the US Supreme Court stands in sharp contrast with that of the Federal Constitutional Court of Germany.

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3 '... democracy allows a majority, through the government it has elected, to make any social decisions, except those that destroy democracy.' Ralph Gilbert Ross, *Democracy, Party, and Politics*, (1954) 64:2 Ethics, 105-125, at 108.
7 "The Militant Democracy of the Basic Law allows the government actively to protect the free basic democratic order in two ways. First, certain provisions in the Basic Law expressly authorize action if the order is threatened. Second, other provisions may be used by the government to protect the order; the most important being limitations on the freedom of expression." David A. Jacob, "The Ban of Neo-Nazi Music: Germany Takes on the Neo-Nazis," (1993) 34:2 *Harvard International Law Journal*, 562-580, at 566.
Today, other examples of substantive militant democracy can be found in such European countries as Austria and Spain, particularly after the recent rise of racist and separatist movements. The European Court of Human Rights (ECHR) also leaves its doors open to the model of militant democracy, particularly when trying cases concerning freedom of association within the framework of Article 11 of the European Convention of Human Rights (ECHR). As for freedom of expression (Article 10 of the Convention), however, the Court interprets the limits of this freedom more narrowly than those of freedom of association. According to the Court, restriction of freedom of expression is permissible, only if '... 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.' That means that the Court would allow the application of the model of substantive militant democracy in a given society, however, it also holds that '... the need for any restrictions must be established convincingly.' Here, the Court applies the criterion of the 'pressing social need' to investigate whether the interference with freedom of expression is 'necessary in a democratic society.'

Turkey can be placed under the category of substantive militant democracy within the context of the typology explained above. Indeed, as I shall try to demonstrate later, one may find several legal mechanisms and regulations in the Turkish legal system to protect the democratic order directly or indirectly. However, it is here important to note that militant characteristics of the regime in Turkey have outweighed its democratic nature in many cases. Undoubtedly, militant substantive democracy is still (or should be) an acceptable version of democracy in accordance with the universally accepted parameters of democracy, yet one should always bear in mind that there is a thin line between militant substantive democracy and 'illiberal democracy.'


For example, the European Court of Human Rights upheld the dissolution of the Welfare Party by the Constitutional Court of Turkey on the basis of its tripartite test; i.e. 'prescribed by law', 'legitimate aim', 'necessary in a democratic society'. Refah Partisi (The Welfare Party) and Others vs Turkey (41340/98) (2001) ECHR 491 (31 July 2001); Refah Partisi (The Welfare Party) and Others vs Turkey (41340/98) (2003) ECHR 87 (13 February 2003) (w w w.echr.coe.int).


RECENT DEVELOPMENTS IN FREEDOM OF EXPRESSION IN TURKEY

If the measures and precautions, aiming to protect democracy, are taken to the extreme, particularly at the level of freedom of expression, then the regime may lose its liberal-democratic characteristics. This has been the case in Turkey until recently.

Freedom of Expression in Turkey: A Historical Overview

On paper, freedom of expression was guaranteed by all republican constitutions of Turkey, namely the constitutions of 1924, 1961 and 1982. The 1924 Constitution enumerated freedom of thought and speech – among other freedoms, such as freedom of conscience, freedom of publication, freedom of assembly and religion – as the natural rights of Turks (Article 70). Although this was a progressive step, particularly when compared with the highly inadequate legal regulations introduced during the reform period in the Ottoman State, it was little more than a constitutional sham, given the authoritarian practices of the Republican People's Party (RPP) in the single-party era, covering the first two decades of the young Turkish Republic. Turkey made a transition to multi-party politics through the 1950 elections, in which the Democratic Party (DP) had defeated the RPP decisively in the ballot box. Having come to power, the DP did not hesitate to exploit the weakness of the Constitution of 1924, particularly its failure to establish an effective mechanism, such as the constitutional review of the legislation, to protect fundamental rights and freedoms against the whim of the majority. As its popularity waned, the DP made several laws and applied them strictly to ensure the opposition in the country. Needless to say, the primary victim of the DP's authoritarian policies was freedom of expression. These developments paved way for the 1960 military coup, which had been engineered by a group of middle-rank officers to stop the growing authoritarianism of the DP.

The 1961 Constitution, the second one in the republican era, was drawn up by a bicameral constituent assembly. The Assembly was composed of the National Unity Committee (Milli Birlik Komitesi), comprising the leaders of the coup, and the House of Representatives (Temesciler Meclisi), comprising indirectly elected as well as appointed and co-opted civilians. Although the drafting process of the 1961 Constitution was hardly democratic, the resulting document was truly democratic in its nature. Here, it can be said that the makers of the 1961 Constitution learned their lessons well from the past and corrected the defects of the 1924 Constitution, particularly in terms of establishing a more effective protection mechanism for fundamental rights and freedoms. The new Constitution, on the one hand, included a well-elaborated catalogue of rights and freedoms; on the other, it disallowed any activities that endangered the national security of the country.

other, it established a powerful constitutional court to ensure the constitutionality of laws. Both freedom of thought and freedom of expression were recognized by the Constitution (Article 20). However, due to the particularly vague wording of the related provisions, the grounds and the extent of restrictions envisaged for these freedoms came to be the subject of heated discussions within academic and political circles. More importantly, the lack of clarity in these constitutional provisions allowed the Constitutional Court to interpret them in a way to declare three controversial articles of the Penal Code (namely, articles 141, 142 and 163) constitutional. These articles, creating virtually a "crime of thought", were widely used by state authorities to curb the activities of Communist, Kurdish nationalist, and Islamist groups respectively. In fact, these articles were inserted in the Turkish legal system before the Constitution of 1961, but they survived into the times of the latter. They were preserved even after the promulgation of the third republican constitution, the Constitution of 1982, until their replacement by Article 8 of the Anti-Terrorism Act in 1991.

The 1960 military coup was a reaction to the DP’s growing authoritarianism. The 1980 military coup was also a reactionary movement, but this time the target of the leaders of the coup was not only one political party and its policies, but all political parties and most civil society organizations as well as the whole institutional framework in which they operated. Makers of the Constitution of 1982 considered that the rights and liberties, which had been granted generously to Turkish citizens by the Constitution of 1961, were responsible for the political violence and terrorism between 1961-1980, claiming more than five thousand lives. The 1982 Constitution was drawn up by a bicameral constituent assembly, comprising again the leaders of the coup (National Security Council [Milli Güvenlik Konsesi]) and civilians (the Consultative Assembly [Danışma Meclisi], selected by the former. Accordingly, the Constitution of 1982, just as the Constitution of 1961, was the product of a body, which had not been created democratically. These two documents, however, were totally different from each other as far as their content was concerned; limitation was the rule, liberty was the exception in the Constitution of 1982.

The traces of the 1980 military coup could not easily be erased from the Turkish society. Particularly those provisions of the 1982 Constitution and accompanying regulations at the statutory level, allowing the exercise of civil liberties and political rights only within a very narrowly defined area, preserved the spirit of the 1980 coup. As the Turkish political life became normalized, these legal arrangements were overhauled by the incumbent authorities one after another. This liberalization process began in the early 1990s and reached its peak after the approval of Turkey’s official candidate status by the EU in 1999.

Within the context of freedom of expression, as mentioned above, first, Article 141, 142 and 163 of the Penal Code were replaced by Article 8 of the Anti-Terrorism Act in 1991. The Anti-Terrorism Act, although generally carrying disproportionate penalties for the crimes enlisted in it, was seen as an improvement, since the Act eased somewhat the prohibitory procedures conducive to the unduly strict limitation of freedom of expression. For example, the 'Law Concerning Publications and Broadcasts in Languages other than Turkish', promoting the concept of 'language prohibited by law' in the Turkish legal system, was repealed by Article 23(e) of the Anti-Terrorism Act. The Act, however, was not immune to criticisms in general. As I shall try to discuss in detail below, particularly Article 8 of the Act was criticized on the ground that it perpetuated the notion of 'propaganda against the indivisibility of the state,' and included such vague terms as '... by any means or with any intention or idea ...' in the definition of the crime.

There had also been an ongoing debate on the Constitution. It was amended by the Turkish Grand National Assembly (TGNA) in 1987, 1993, 1995, 1999 (two times), 2001, 2002 and 2004. Among these, the 2001 amendments were the most comprehensive modification in the current Constitution since its inauguration and had significant impact on fundamental rights and freedoms, including freedom of expression.

Article 13 of the Constitution of 1982 stipulated that the rights and freedoms can be restricted on general grounds, which were enunciated in this Article, as well as on specific grounds, which could be found in related articles. Accordingly the Constitution of 1982 originally introduced a 'layered' limitation system for rights and freedoms. The 2001 amendments expanded the scope of the latter by deleting the general grounds from Article 13. Another innovation in Article 13 was that the principle of 'the essence of rights', one of the main pillars of the protection mechanism of the Constitution of 1961, was reinstated. With the recent amendment, the limits of the grounds for restriction of rights and freedoms in this Article (i.e. the limits which determine how far the state may go in legitimately interfering with the domain of individuals by restricting their rights and freedoms), were also rearranged. Apart from these, those circumstances in Article 14 of the Constitution, which had been considered as the abuse of fundamental rights and freedoms, were also reduced in number and limited in content by the 2001 amendments.

Freedom of expression was originally guaranteed by Article 26 of the current Constitution. Article 26, titled 'Freedom of Expression and Dissemination of Thought', provided that: 'Everyone has the right to express and disseminate his thought and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities ...' According to the Article, this freedom can be restricted '... for the purposes of preventing crime, punishing offenders, withholding information duly classified as a State secret, protecting the reputation and rights and the private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.'

During the 2001 constitutional reform Article 26 was rewritten. First, those general grounds for restriction, deleted from Article 13, were reincorporated in Article 26 as specific grounds for restriction. This was counter to other constitutional amendments concerning freedom of expression - such as the repealing of
the prohibition of languages other than Turkish in Article 26. Some amendments were regressive. Generally, however, these amendments could be seen as the first steps towards establishing a more effective protection mechanism for rights and freedoms in Turkey.

The 2001 constitutional reform was followed by a series of amendments to key legal documents. The TGNA had adopted three packages, publicly known as ‘harmonization laws’, to bring national legislation closer to international human rights standards. The new government, formed by the Justice and Development Party (UDP, Adalet ve Kalkınma Partisi) after the early parliamentary elections on 3 November 2002, declared its commitment to legal reforms; thus the TGNA adopted five more packages of harmonization laws since the beginning of the new legislative term on 14 November 2002. Within the context of ‘harmonization laws’, particularly amendments to Article 8 of the Anti-Terrorism Act, Article 159 and 312 of the Turkish Penal Code have generated great concern in and outside Turkey.14

Article 8 of the Anti-Terrorism Act and the 'Indivisibility of the State'

On Turkey’s path towards the membership of the EU, one of the most radical steps taken by the current government was undoubtedly the abolition of Article 8 of the Anti-Terrorism Act. This Article, criminalizing activities against the indivisibility of the state, bore the danger of being used against persons and groups whose views did not suit the state authorities on the basis of political considerations.15 Indeed, prosecutors had frequently invoked Article 8 to persecuted left-wing as well as right-wing activists in Turkey. During the recent legal reform campaign, Article 8 of the Anti-Terrorism Act was first amended by Law No. 4744 of 19 February 2002, entailing only the reduction of penalties in the Article. Then, as a more radical step, the TGNA abrogated Article 8 of the Anti-Terrorism Act by Law No. 4903 of 19 June 2003.

It is interesting to note that debates about Article 8 did not come to an end even after its abolition. President Ahmet Necdet Sezer sent Law No. 4903 back to the TGNA for reconsideration on 30 June 2003. Sezer argued that the repealing of


15 According to the original version of the first paragraph of Article 8: 'Regardless of method and intent, written or oral propaganda, along with meetings, demonstrations and marches that have the goal of destroying the indivisible integrity of the state with its territory and nation of the Republic of Turkey cannot be conducted.' The phrase 'Regardless of method and intent' was deleted from the text of the Article in 1995.

Article 8 would create a vacuum in the struggle against terrorism. According to Sezer, such a vacuum would not be filled with the existing Article 312 of the Turkish Penal Code. Consequently, despite the President’s veto, Law No. 4903, repealing Article 8 of Anti-Terrorism Act, was readopted by the TGNA on 15 July 2003.

Undoubtedly, the repealing of Article 8 of the Anti-Terrorism Act is a positive development on its own in terms of ensuring effective protection of freedom of speech in Turkey in the short run. However, it cannot be seen as a long-term guarantee from a constitutional point of view. For, as long as the current constitutional framework for fundamental rights and freedoms as well as freedom of expression remains as it is, it is quite conceivable that the lawmakers in the TGNA may pass a law similar to Article 8 of the Anti-Terrorism Act or even a more restrictive piece of legislation in the future. In other words, existing constitutional provisions do not rule out the possibility of taking new restrictive measures, which would choke the freedom of expression more seriously than ever. To draw attention to this danger, I wish to look closer at the constitutional framework of freedom of expression in the Constitution of 1982 in detail.

As explained above, Article 8 of the Anti-Terrorism Act mainly punished activities against the indivisible integrity of the state. While doing so, the Article outlawed two categories of activities; namely ‘written, oral and visual propaganda’ and ‘assemblies, demonstrations and manifestations’. That means that, limitations in Article 8 concerned both ‘Freedom of Expression and Dissemination of Thought, (Article 26 of the Constitution)’ and the ‘Right to Hold Meetings and Demonstration Marches, (Article 34 of the Constitution)’. So, it would be appropriate to consider these rights and freedoms respectively when discussing the effect of Article 8 of the Anti-Terrorism Act on free speech in Turkey.

Let us start with the right to hold meetings and demonstration marches. Article 34, regulating this right, was reformulated during the 2001 constitutional amendments.16 In the revised version of the Article, ‘the safeguarding the indivisibility of the state’, which was the main element of the formulation of the crime in Article 8 of the Anti-Terrorism Act, is not counted among the specific grounds for restriction. So, at first glance, one may argue that the current constitutional framework for the right to hold meetings and demonstration marches militates against the legislature reinstating Article 8 of the Anti-Terrorism Act in the future. This, however, would be a hasty conclusion. One should take into account Article 14 of the Constitution, titled ‘Prohibition of Abuse of Fundamental Rights and Freedoms’, to address this problem properly. Circumstances, which had been considered as abuse of

16 According to the revised version of Article 34: ‘Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission. / The right to hold meetings and demonstration marches shall only be restricted by law on the grounds of national security, and public order, or prevention of crime commitment, public health and public morals or for the protection of the rights and freedoms of others. / The formalities, conditions, and procedures governing the exercise of the right to hold meetings and demonstration marches shall be prescribed by law.’
European Public Law

Article 159 of Turkish Penal Code and 'Insulting Public Institutions'

Amendments to Article 159 and 312 of the Turkish Penal Code were not as radical as those to Article 8 of the Anti-Terrorism Act. Within the context of harmonization laws, Article 159, mainly punishing insult against public institutions, was amended three times: first, the limits of penalties in the Article were reduced by Law No. 4744, adopted by the TNGA on 19 February 2002. Then, a paragraph was added to the Article by Law No. 4771 of 3 August 2002, stating that: 'Those written, oral or visual expressions of thought made with the sole purpose of criticism and without the intention to insult or deride the institutions in question would not constitute a crime.' Lastly, by Law No. 4963, adopted by the TNGA on 30 July 2003, limits of penalties were further reduced, and a previously added paragraph to the Article by Law No. 4771 was reformulated to consolidate its meaning.

According to the original version of the Article, which is still in force with minor changes: 'Those who publicly insult or ridicule Turkishness, the Republic, the Parliament, the moral personality of the Government, State Ministers, the military or security forces of the state, or the moral personality of the Judiciary will be punished with a penalty of no less than six months and no more than three years of severe imprisonment.'

Before analyzing its content in detail, it would be appropriate to dwell on the problem of constitutionality of Article 159. It appears that none of the grounds in Article 26 of the Constitution can fully justify the restrictions foreseen in Article 159 of the Turkish Penal Code, except '... ensuring the proper functioning of the judiciary ...' which would only cover one of the categories of crime in Article 159, namely insult to courts. That is, it is difficult to see how only insulting public institutions can endanger national security, public order and public safety, the basic characteristics of the Republic or threaten the indivisible integrity of the State with its territory and nation. At first glance, it may be thought that the ground of 'protecting the reputation and rights and private and family life of others' would provide the basis of the limitations in Article 159, yet, here it should be noted that this ground,
which is compatible with Article 10 of ECHR, aims basically at protecting genuine persons, not such public institutions as the TGNA, the government, ministries, the military and security forces of the state, and the judiciary. In the same vein, the limitations in Article 159 cannot be justified by the circumstances enumerated in Article 14 as an abuse of rights and freedoms either. To be more exact, it can hardly be argued that merely insulting public institutions would "violate the indivisible integrity of the state with its territory and nation, and endanger the existence of the democratic and secular order of the Turkish Republic."

Although the constitutionality of Article 159 of the Turkish Penal Code is questionable, it should be noted that the constitutionality of this provision can now only be contended before the courts by individuals. In the Turkish constitutional system, the President of the Republic, parliamentary groups of the party in power and of the main opposition party and a minimum of 1/3 of the total members of the TGNA can apply to the Constitutional Court for the annulment of a given piece of legislation (Article 150). However, these governmental organs can exercise this right within sixty days after publication of the contested legislation in the Official Gazette (Article 151). None of the organs mentioned above applied to the Constitutional Court within sixty days for an Article 159 review. So, the latter can only be brought before the Constitutional Court by challenging its constitutionality before the ordinary courts. According to Article 152 of the Constitution, if a court, applying a specific norm, finds that the latter is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality of a specific norm, submitted by one of the parties in a given case, it refers the question of constitutionality to the Constitutional Court. It is, then, still possible that the Constitutional Court may control Article 159 in terms of its constitutionality in the future. However, until then, it will continue to serve as a tool to limit freedom of expression in Turkey. So, our task should be to explore its impact on freedom of expression against the background of newly-introduced legal arrangements. Here, one may mention three defects of the Article and possible solutions to them:

First, the Article contains such vague terms as "Turkishness" and 'Republic' whose content can only be filled in by the judiciary during the application of the Article. Although it is normally expected that judges and prosecutors would construe such terms to expand the scope of freedom of expression, not the other way around, the obscure wording of this Article may provide the basis for further limitation of free speech through judicial interpretation. That is, if these terms are interpreted broadly, theoretically, almost all criticisms of the existing social and governmental structure can be considered as insulting or ridiculing 'Turkishness' or the 'Republic'. So, it would be desirable to eliminate these terms from the definition of the crime.

Second, Article 159 attributes moral personality to corporate bodies. Taking into account the fact that insult is punished under contemporary legal systems because of its potential to inflict psychological harm on the human person, one may argue that criminalizing insults against legal entities has no rational ground. This being

so, the regulation may have practical utility for state authorities to crack down on the political opposition. There have been many such examples in the application of Article 159 in Turkey. Accordingly, the Article can be reformulated to correct this major defect in a way that ensures that only insults against genuine persons (i.e. public officials), performing their functions in those public institutions, are punished.

Third, Article 159, even in its current form, carries rather heavy penalties. So, one may suggest that criminal sanctions should be replaced by civil sanctions as far as the crime of insult is concerned. Here, it should be ensured that financial penalties should not be too heavy to make freedom of expression meaningless. In connection with the latter, alternative remedies to litigation, such as publication of an apology, a correction or a reply should also be made available. If Article 159 is to be kept in the Turkish legal system as it is, it can be suggested that at least the penalties should be reduced further. Particularly, the penalty of imprisonment with a 'severe' jail term to three years according to the amended version, seems incompatible with the standards accepted and applied by other European countries.

Apart from the above-mentioned points, Article 159 can be criticized on the ground that it fails to introduce a subtle criterion to distinguish 'insult' from 'criticism.' This drawback of the Article has been responsible for the imprisonment of dozens of Turkish citizens, expressing their critical opinions about state organs, not even necessarily in a harsh tone. As mentioned above, taking into account particularly this criticism, the TGNA amended Article 159 twice during the recent legal reform campaign. If we only focus on the wording of the newly-added paragraph, stating that expressions made with merely the intention of criticism do not incur any penalty, we may reasonably question whether the recent amendment has added something new to the existing regulation, since it is clear that expressions made solely with the purpose of criticism of a public institution, are out of the scope of the crime of insult, notwithstanding whether this point is explicitly indicated in the Article itself.

Nevertheless, when reading this paragraph, it should be borne in mind that inferior norms in a legal system cannot be interpreted without taking into account the superior ones. Thus to construe the real meaning of the new paragraph in Article 159, one should analyze the related articles of the Constitution. In spite of the fact that the 1982 Constitution tips the balance in favour of the state as far as


22 For example, in a regional conference on 'Defamation and Freedom of Expression', organized by the Council of Europe, overwhelming majority of participants recommended that '... defamation and insult should be decriminalized.' 'Conclusion', Regional Conference on Defamation and Freedom of Expression, Strasbourg, 17-18 October 2002, (www.coe.int)
the relations between the latter and citizens are concerned, we may argue that it still reserves room for a more liberal interpretation of legal norms at the statutory level, particularly in the field of human rights. Accordingly, it can be maintained that interpreting the newly-added paragraph to Article 159 can be interpreted in favour of free speech.

We may flesh out the above-mentioned argument as follows: First, The ECHR - whose jurisprudence may be referred to by Turkish judges on the basis of Article 90 of the Constitution, according to which international agreements have precedence over laws - underlines the link between the democratic order of the society and freedom of expression: 'Freedom 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 person: it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broad-mindedness without which there is no 'democratic society.' Second, Article 2 of the Constitution describes the Turkish Republic as a democratic state. As accepted by many, one of the most important traits of a democratic state, distinguishing it from a non-democratic state, is that the former is based on the principle of accountability of rulers, i.e. popular control of government. In this connection, a citizen's right to criticize state authorities appears as an indispensable characteristic of a democratic state. Third, the original as well as the revised versions of Article 13 of the Constitution provide that restrictions of fundamental rights and freedoms shall not be in conflict with 'the requirements of the democratic order of the society.' The Constitutional Court of Turkey, whose decisions bind other state organs, understands the term of 'the requirements of the democratic order of the society' broadly. That is, the Constitutional Court, with few exceptions, declares in its decisions that this term refers to those universally recognized principles and values of democracy, not only to those defined by the Constitution itself.

So, we can combine these three points to make the following arguments: if freedom of expression is one of the main elements of democracy, then punishing words must be an exception not the rule in a democratic state and society. If Turkey, as declared by the Constitution, is a democratic state, then all state authorities must strive to protect free speech as much as they can. In this line of argument, the newly-added paragraph to Article 159 is not seen as a totally useless regulation. Given the fact that the line between insult and criticism has been blurred in practice, the new formulation, addressing directly judges and prosecutors, can be seen as a reminder that the restrictive clauses in Article 159 should be construed narrowly. In other words, when drawing the border between insult and criticism, judges and prosecutors should bear in mind the horatatory meaning of the newly-added paragraph to Article 159 and strive to expand the realm of criticism, as it should be in a democratic state and society.

All in all, it should be pointed out that Article 159, even in its revised form, falls short of appeasing internal and international criticisms. Despite the fact that similar 'insult laws' can be found elsewhere, one may observe a general tendency that they have become obsolete in many countries, particularly in Western Europe. Accordingly, in the light of international experience, one may suggest that Article 159 should be abolished. Such a decision would put an end to the debate on Article 159 once and for all.

**Article 312 of Turkish Penal Code and 'Inciting Crowds to Enmity and Hatred'**

Of the three pillars of the cumulative restriction mechanism for freedom of expression in Turkey, Article 312, particularly its second paragraph, has been the most widely used by state authorities so far. With the 'First Harmonization Package', Paragraph 2 of Article 312, prohibiting inciting crowds to enmity and hatred on religious, racial, social or cultural grounds, was amended (Law No. 4744 of 6 February 2002) in such a way that the aggravating clause in the original version ('creating danger for public order') was incorporated into the definition of the crime itself. That is, now, one is to be punished for incitement, if his or her act is dangerous for the public order. This new formulation, just as the new paragraph of Article 159 of the Turkish Penal Code, seems to provoke new questions, rather than solving the existing ones. Two points are worth discussion. First, the meaning of the term of 'public order', added to Article 312 in its recent revision, should be clarified. The equivalent term in the paragraph before its amendment was 'public security.' Accordingly, one may argue that the concept of 'public order' is broader than the concept of 'public

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34 According to the newly formulated paragraph 2 of Article 312: 'One who openly incites people to each other to enmity and hatred on the basis of differences of social class, race, religion, sect or region, in a way which would be dangerous for public order, will be punished by imprisonment of one to three years.' Apart from these, according to another paragraph added to Article 312: 'Those who defame in a way to degrade a section of society and to offend human dignity will be punished. Although the term of 'a section of society' is not sufficiently clear, this addition would contribute to the protection and promotion of multi-cultural characteristics of Turkish society through proper judicial interpretation.
security", so the scope of the restrictions under Article 312 was expanded. Second, it should be investigated whether the new formulation of Article 312, paragraph 2 introduced more subtle criteria for criminalizing expressions targeting or adjacent to violence. Here, one may distinguish two different models, a process which is compatible with the procedural democracy-substantive democracy dichotomy, as far as the inclusion of the element of causation in the definition of incitement is concerned. According to the German model, a causal nexus is not sought between the statement and the harm resulting from it; i.e. punishing a speech without proving causation of harm or even intent to harm is acceptable in those legal systems applying this model. According to the American model, known as the "clear and present danger test", the punishment of a speech depends on the proof of an imminent probability of resultant criminal activity, i.e. it is required that the expression is directed to and is likely to cause imminent lawless action. The traces of the latter can be found in certain decisions of the ECHR. Moreover, the Court uses a technique similar to the clear and present danger test, particularly in the cases of Article 10. That is, it takes into account the elements of "place, time, and effect" when assessing whether interference with freedom of expression is justified by the existence of a "pressing social need". What is decisive, then, is not the content of the statement in abstract, but the context in which the statement is made. Such inquiry, obviously, involves a factual analysis of the impact of the statement concerned, most importantly of its capacity to create a clear and present danger for the society.

In this context, Article 312 of the Turkish Penal Code comes closer to the German model. Undoubtedly, Turkey may improve the liberal-democratic characteristics of its regime even by applying the latter. Here, however, the burden falls on the shoulders of the judges, who may complement, or more correctly soften the German model with the elements of the doctrine of clear and present danger, just as the ECtHR has done. More safely, Article 312 should be rewritten to incorporate the clear and present danger test into the Turkish legal system. Lastly, our analysis would be incomplete, if we do not dwell on the constitutionality of Article 312. Before the 2001 amendments, there was a condition in Article 14 of the Constitution, dealing with abuse of rights and freedoms: "...creating discrimination on the basis of language, race, religion or sect..." This was almost the replication of the criterion established by Article 312 of the Turkish Penal Code and provided the constitutional basis of the limitations in this Article. During the 2001 constitutional amendments, this condition was removed from Article 14 of the Constitution. Now, it seems at first glance that the limitations in Article 312 lost its constitutional ground. However, this analysis would be misleading in the presence of Article 26 of the Constitution. As explained above, the revised version of Article 26 envisaged that the exercise of freedom of expression and dissemination of thought may be restricted for the purpose of protecting "...public order...". Here, the Constitution takes into account the end, not the means; that is, how public order is disturbed is not important. So, any activity disturbing public order shall be considered an abuse of rights and freedoms – including "inciting people to enmity and hatred on the basis of differences of social class, race, religion, sect or region", as formulated by Article 312 of the Turkish Penal Code. Furthermore, after the addition of the phrase "... in a way which would be dangerous for public order "., Article 312 became harmonious with the amended version of Article 26 of the Constitution. So, the exercise of freedom of expression and dissemination of thought may be restricted for the purpose of protecting "...public order...". Consequently, the limitations in Article 312 of the Penal Code can be justified on the basis of Article 26, although not on the basis of Article 14 of the Constitution.

Conclusions

In this article, the author has focused on recent amendments to three articles of two significant laws, concerning the exercise of freedom of expression in Turkey, namely the Anti-Terrorism Act and the Turkish Penal Code, with special reference to the 2001 amendments to the Constitution. When we assess these amendments within the context of Turkey's efforts of harmonizing its human rights laws with the European "constitutional acquis", we may conclude that these are crucial steps, yet they are not sufficient. As for Article 8 of the Anti-Terrorism Act, although it was abolished during the recent legal reform campaign, the current Constitution

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may still provide abundant ground for even more restrictive regulations. That is, when the political climate changes, the TGNK may adopt a law similar to Article 8 of the Anti-Terrorism Act in the future. Article 159 and 312 of the Turkish Penal Code, which are still in force at the time of the writing of this article, may create a formidable obstacle to the effective protection of freedom of expression. To make them more compatible with EU standards, these laws should be abolished, or at least amended further in the light of the suggestions presented above. Until then, however, the main responsibility lies with the judges who may interpret the newly-introduced arrangements in a more liberal way, as called for by the Constitution, to strengthen the existing guarantees for free speech in Turkey.

Turkey has been seen as an illiberal democracy by many for years. The EU, the final intended destination of Turkey’s political journey, also evaluated Turkey from this perspective and demanded legal and political reforms in key human rights areas, of which freedom of expression is the most prominent one. Recent reforms in the field of freedom of expression made Turkey move further from illiberal democracy towards substantive military democracy, which is basically compatible with the ‘constitutional acquis’ of the EU.

As Özbudun puts it, Turkish democracy is still in the process of consolidation and its full consolidation depends upon the achievement of a reasonable degree of consensus on such fundamental issues as Islamic fundamentalism and Kurdish nationalism. Until then, the application of the model of militant substantive democracy seems to be acceptable, even necessary to protect democracy in Turkey against its enemies. Undoubtedly, there were sociological and historical reasons behind the emergence of the concept of militant democracy in Germany; this is also true for Turkey. In this sense, Turkey’s adherence to this model of democracy can be seen as an example of ‘transformative constitutionalism’, as ‘…a technique for identifying a pathology in the existing social structures of a constitutional democracy, and for taking steps to eliminate those structures’. If Turkey, while taking these steps, can avoid becoming an illiberal democracy, transformative constitutionalism may play a crucial role in the consolidation of Turkish democracy.

Postscript

After the completion of the present study, important developments have occurred in Turkey concerning freedom of expression. The Turkish Grand National Assembly (TGNK) adopted a new penal code on 25 September 2004, which was to come into force on 1 April 2005.

A number of new measures were introduced by the new Penal Code, most of which were the subject of heated discussions. Particularly, a major controversy erupted over the provisions concerning freedom of expression. A large coalition of non-governmental organizations, led by journalists’ groups, demanded the revision of these provisions to bring them in line with the international human rights standards. These demands were clearly supported by the opposition party, judicial authorities, academicians and international organizations, as a result of intensive pro-revision campaign, the Government decided on 31 March to postpone the implementation of the new Penal Code from 1 April to 1 June.

Those provisions, analyzed in this article, were reformulated in the new Penal Code. Article 159 and 312 of the old Code were replaced by Article 201 and 216 of the new Code respectively. Article 501 of the new Code is mainly the repetition of Article 159 with minor changes in the wording. Article 216 of the new Code, in turn, differs somewhat from Article 312 of the old Code in respect of its inclusion of the ‘clear and present danger’ criteria. In spite of this progressive step, however, the same article creates new obstacles to the effective protection of freedom of expression by punishing the defamation of religious values in its newly-added paragraph.

Apart from these, the new Penal Code contains some other arrangements, such as Article 305 (‘acts against the fundamental national interests’), which would reverse the gains achieved in the field of freedom of expression in Turkey during the recent reform process.

As a concluding remark, it can be predicted that the debates over the new Penal Code in general and over the provisions mentioned above in particular will continue in the foreseeable future in Turkey.