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BAHÇEŞEHİR ÜNİVERSİTESİ

Bu proje Avrupa Komisyonu Finansal Desteği ile Gerçekleştirilmektedir.

TÜSİAD

İÇİNDEKİLER

ÖNSÖZ

Düşünce özgürlüğü, özgürlükçü, demokratik sistemin yurttaşlara tanıdığı en temel hakların başında gelmektedir. Bu özgürlük hiç kuşkusuz düşüncelerin oluşabilmesi için gerekli haber ve bilgilerin alınması, bunlara ulaşılabilmesi aşamalarından başlayarak bu bilgileri kullanmak suretiyle kişinin kendi düşüncesinin oluşturulmasına kadar bir çok aşamayı içerir. Ancak, kişilerin kafalarındaki düşüncelerin sorgulandığı engizisyon dönemleri bir yana bırakılırsa, günümüzde düşünce özgürlüğünün en önemli boyutu, hiç kuşkusuz düşüncelerin açıklanabilmesi aşamasıdır. Diğer bir söyleyişle, kişilerin belirli süreçler sonunda oluşturdukları düşünceleri diğer kişilere aktarmaları, diğer kişilerle paylaşmaları aşamasıdır.

Düşünce özgürlüğü, bu yönleriyle demokratik toplumun ve demokratik rejim anlayışının en temel haklarından bir tanesi olarak karşımıza çıkmaktadır. Nitekim, Avrupa demokrasilerinin başlıca yargı organı olan Avrupa İnsan Hakları Mahkemesi de kararlarında, düşünce özgürlüğünün (ya da Sözleşmedeki kullanımı ile düşünceleri açıklama özgürlüğünün), demokratik toplumun üzerine inşa edilmiş olduğu "çoğulculuk, açık fikirlilik ve hoşgörü" anlayışının temel unsurları olduğunu ifade etmektedir.

Düşünce özgürlüğü, demokratik sistem için en temel, en yaşamsal haklardan biri olmakla birlikte, gerek ulusal mevzuatlar, gerek uluslararası sözleşmeler ve gerekse de Avrupa İnsan Hakları Mahkemesi, "bu özgürlüğün" sınırsız olmadığını, demokratik toplum düzeninin zorunlu kıldığı ölçüde sınırlanabileceğini, düşünce özgürlüğüne ulusal mevzuatlar tarafından getirilen bu sınırlamaların yine Mahkemenin denetimine tabi olduğunu kabul etmektedir.

Düşünceleri açıklama özgürlüğü, hiç kuşkusuz, her ülkede özellikle belirli kriz dönemlerinde belirli "sorunlara" neden olan ve bu dalgalanmalara göre kapsamı ve sınırları tartışılmış ve günümüzde de tartışılmakta olan bir özgürlüktür. Nitekim, çok basit bir örnek vermek gerekirse, düşünce özgürlüğüne ilişkin mevzuatın ve ünlü "açık ve mevcut tehlike (clear and present danger)" ölçütünün 1950'lerdeki ABD'deki uygulamasının günümüzdeki uygulamadan son derece farklı olduğu tartışılmaz bir gerçektir.

Türkiye de düşünce özgürlüğü açısından sorunlu ülkelerden bir tanesi olmaya devam etmektedir. Gerek anayasal boyutu, gerek ceza yasalarındaki düzenlenişi, gerek uygulaması ile düşünceleri açıklama özgürlüğü, Türk hukuk sisteminin en sancılı alanlarından bir tanesi olmaya devam etmekte ve bu "sıkıntılar" Avrupa İnsan Hakları Mahkemesi'nin bir çok kararına da konu olmaktadır.

Nitekim yeni Ceza Kanununun 216.maddesi (eski Ceza Kanunu 312), aynı şekilde yeni Ceza Kanununun 301. maddesi (eski Ceza Kanunu 159) bu tartışmanın temelinde yer alan düzenlemeler olarak dikkat çekmektedir.

Bu tartışmanın Türk hukuk sistemine zarar verdiğini ve bir an önce sona erdirilmesinin zorunlu olduğunu düşünen Bahçeşehir Üniversitesi Hukuk Fakültesi ve TUSİAD bu konuyu ilk önce Avrupalı meslektaşları ve hukukçular ile, daha sonra da Türk yargıçları ile tartışmak, konunun tüm boyutlarını masaya yatırmak yönünde işbirliğine gitmeyi bir gereklilik olarak düşünmüşlerdir.

Elinizde tuttuğunuz bu kitap, gerek ulusal gerek uluslararası ölçekte bir çok hukukçu, yargıç ve uygulamacı ile bu konuyu ele almanın, aynı zamanda Türk hukukunu geliştirme ve tartışmaları sona erdirme yönünde çok büyük ve önemli katkıları olacağı düşüncesi ile başlatılan bu projenin ürünüdür. Nitekim, bu tartışma, çalışma ve uğraşıların sonucunda Bahçeşehir Üniversitesi Hukuk Fakültesi Ceza hukukçuları TCK madde 301'in nasıl değiştirilebileceği yönünde bir "öneri" oluşturabilmiş ve bu öneriyi İstanbul Milletvekili Sayın Zülfü Livaneli'nin yasa değişiklik teklifine temel oluşturmak üzere, ilk önce Sayın Livaneli ve dolayısıyla TBMM ile paylaşmıştır.

Söz konusu kitabın, hukuk düzenlerinde, ve Türk hukuk sisteminde çok tartışılan bir konu olan düşünceleri açıklama özgürlüğüne bir hukuksal çözüm bulunmasına katkıda bulunacağı umudunu taşımaktayız. Bu itibarla, çalışmada yer alan, katkıda bulunan Bahçeşehir Üniversitesi Hukuk Fakültesi'ne, TUSİAD'a, maddi destekte bulunan Avrupa Birliği Komisyonu'na, ve katılımları ile konuyu tüm açıklığıyla masaya yatıran tüm meslektaşlara, hukukçulara ve yine destekleri bulunan herkese teşekkür ederiz.

Prof. Dr. Süheyl BATUM
Bahçeşehir Universitesi Hukuk Fakültesi

Başlarken,

Bahçeşehir Üniversitesi 31.08.2006 tarihinde DDH/2006/120-621 sayılı "İfade özgürlüğü hakkının uygulamaları ve sınırlamaları" projesini Avrupa Topluluğu adına Avrupa Komisyonu Türkiye Delegasyonu ile imzalamıştır. 6 aylık olarak öngörülen 32.779 EUR'luk proje, iki ana etkinlikten oluşmaktdır. Birinci etkinlik, AB ülkelerinden davet edilmiş profesyonel ve akademisyenlerin kendi ulusal hukuklarını anlattıkları "Diğerini anlamak" adlı yuvarlak masa toplantısı, ikincisi türk hakim ve savcılarına yönelik olarak "İfade Özgürlüğünde Avrupa Standartları" semineridir.

Elinizde bulunan kitapçık, "Diğerini anlamak" adlı yuvarlak masa toplantısının çıktılarıdır. Projenin yürütülmesi aşamasında ifade özgürlüğü kavramının sadece Türkiye'deki sorun açısından tartışılacağını düşünen gruplar tarafından, projemizin etkinlikleri büyük tepki çekmiştir. Bu kitapçık bizler için ilk olarak yuvarlak masa toplantısı süresince tartışılanları gözler önüne sermek açısından önem arz etmektedir. Ayrıca ikinci etkinliğimiz olan Hakim ve savcı eğitim semineri çıktılarının basılmaması kararı alınmıştır. Hakim ve savcıların Üniversitemizin özgür ortamında, elinizdeki kitapçıktaki programda görebileceğiniz seçkin hocalarımız ve meslektaşları ile yaptıkları görüşmeleri yayınlamanın, türk yargısını etkilediğimiz şeklinde değerlendirilmesinin, projeden çıkması beklenen fikirleri gölgelemesi tehlikesinin önüne geçmiş olduk.

Projenin yürütülmesi sırasında Komisyon tarafından çıkarılan 8 Kasım 2006 ve 8 Kasım 2007 AB İlerleme Raporları, ülkemizde gerçekleşen üzücü gelişmeler, yanlış yorumlamalar ve yükselen tansiyon, bu konu ile uzun zamandır ilgilenmekte olan, çeşitli toplantılar düzenlemekte ve çözüm arayan Üniversitemizin somut bir adım atma isteğini perçinlemiştir.

İfade Özgürlüğü hakkının kullanılması, temel hak ve özgürlükler sisteminde yeralan birçok hakkın vücuda gelmesidir. Her özgürlük gibi mutlak olmayan bu özgürlüğün de sınırlandırılması mümkündür. Bu sınırlarının çizilmesinde, diğer ülke devletlerinin nasıl bir yol izlediklerinın incelenmesi ve ülkemizin ihtiyaçlarına cevap verecek net bir sınırlama politikasının oluşturulması açısından önem arzetmektedir. Bu açıdan avrupa standartlarının belirlenmesi ve tüm ülkelerin birbirlerinden feyz almaları için "diğerini anlamak" adlı yuvarlak masa toplantımızın çok yararlı olduğu tartışılmazdır.

Ülkemizde demokrasi kültürünün oluşması için en önemli temel hak ve özgürlüklerden olan İfade özgürlüğü hakkının sınırları net şekilde belirlenerek kullanılması demokrasinin temel yapı taşı olan çokseslilliği ve yeni jenerasyonların çözülmüş sorunlar üzerinde zaman kaybetmemelerini sağlayacaktır.

Proje Koordinatoru
Ars. Gör. Aslıhan ÖZTEZEL
Bahçeşehir Üniversitesi
Hukuk Fakültesi
Ceza ve Ceza Usul Anabilim Dalı

NEW CHALLENGES AND RESTRICTIONS ON THE FREEDOM OF EXPRESSIONS
16-17 November 2006
Bahçeşehir University

16 November 2006	----	17 November 2006
9:30 - Lawyer Fikret İlkiz Opening Remarks of the Moderator		
Freedom of Expression in Danemark **09:45** - Christopher Badse Legal Officer & Project Manager National Department The Danish Institute for Human Rights **10:05** - Dr. Eddie Khawaja Legal officer, Complaints Commitee for Ethnic Equal Treatment The Danish Institute for Human Rights		**Study of Domestic case - law** **Danemark** **09:45** - Christopher Badse **10:05** - Dr. Eddie Khawaja
Freedom of Expression in England **10:25** - LLB. Andrew Sharland 4-5 Gray's Inn Square		**Study of Domestic case - law** **England** **10:25** - LLB. Andrew Sharland
10:45 - 11:00 COFFEE BREAK **Freedom of Expression in Finland** **11:00** - Dr. Liisa Neiminen University of Helsinki, adjuna professor		**10:45 - 11:00 COFFEE BREAK** **Study of Domestic case - law** **Finland** **11:00** - Dr. Liisa Neimman
Freedom of Expression in France **11:20** - Prof. Dr. Bertrand Mathieu Üniversite Paris / Directeur du Centre de recherche de droit constitutionnel		**Study of Domestic case - law** **France** **11:20** - Maitre Jean - Yves Dupeux SCP Lussan Brouillaud Avocat a là Cour
12:00 - 13:30 LUNCH BREAK		**12:00 - 13:30 LUNCH BREAK**
Freedom of Expression in Germany **13:30** - Dr. Silvia Tellenbach Head of the department Turkey/Iran/Arab States, Max Planck Institute for FForeign and International Criminal Law		**Study of Domestic case - law** **Germany** **13:30** - Dr. Silvia Tellenbach
Freedom of Expression in Greece **13:50** - Dr. Andreas Pottakis Deputy Director of the Academy of European Public Law		**Study of Domestic case - law** **Greece** **13:50** - Dr. Andreas Pottakis
Freedom of Expression in Italy **14:10** - Dr. Stefano Maffei Lecturer in Criminal Procedure, University of Parma		**Study of Domestic case - law** **Italy** **14:10** - Dr. Stefano Delsignore Lecturer in Criminal Procedure, University of Parma
14:30 - 14:45 COFFEE BREAK		**14:30 - 14:45 COFFEE BREAK**
Freedom of Expression in Turkey **14:45** - Levent Korkut Professor at Hacettepe University, Amnesty International **15:05** - Günal Kurşun Research Assistant, Criminal Law, Başkent University		**Study of Domestic case - law** **Turkey** **14:45** - Günal Kurşun
15:30 - 16:30 - CONCLUDING REMARKS		**15:05 - 16:00** - CONCLUDING REMARKS

Bu proje Avrupa Komisyonu finansal desteği ile gerçekleştirilmektedir.

I. BÖLÜM

TEBLİĞLER & TARTIŞMALAR

16 KASIM 2006

İFADE ÖZGÜRLÜĞÜ VE TÜRKİYE'DE YENİ BASIN KANUNU

AV.FİKRET İLKİZ

Giriş

Demokratik sistemlerde siyasal katılım, çoğulculuk esasına bağlıdır. Çağımızda kişilerin bilgi edinmeleri, elde ettikleri bilgiyi yorumlamaları çok önemlidir. Böylece politik tercihlerini daha sağlıklı biçimde kullanabilirler. Özgür ve doğru haber dolaşımı siyasal katılımın sağlanması için önemli bir öncelik kazanmıştır. "Bilgi edinme" ve "özgür ve doğru haber dolaşımı" insanlar için hak olarak kabul edilmiştir. Dolayısıyla kitle iletişim araçları "özgür haber dolaşımı"nın gerçekleştirilmesini sağlamakla görevlidir. "Bilgi edinme hakkı" evrensel bir haktır. Kavram olarak kitle iletişim araçlarının sağladığı haber akışının bir sonucudur. "Haberleşme / İletişim Özgürlüğü" ise bilgi edinme hakkı ile elde edilen bilginin bir başkasına iletilmesini sağlar. Aslında basın özgürlüğü, "bilgi edinme ve yayma özgürlüğü"dür. Bu özgürlüğün ifade özgürlüğü ile düşünce, vicdan ve din özgürlüğü hakkıyla yakın ilişkisi vardır. İfade özgürlüğü tüm hak ve özgürlüklerin "omurgası"dır.

Bir ülkede basın özgürlüğünden söz edebilmek için bulunması gereken temel ilkeler hakkında uluslararası belgelerde görüş birliği vardır. 1948 İnsan Hakları Evrensel Bildirisi'nin 19'uncu maddesi, düşünce ve söz özgürlüğünün, bilgi ve düşünceleri her araç ile "aramak", "elde etmek" ve "yaymak" olduğunu belirtmiştir. İnsan Haklarını ve Ana Hürriyetlerinin Koruma Sözleşmesi'nin 10'uncu maddesinde haberleşme özgürlüğünün ve dolaylı olarak basın özgürlüğünün ön koşullarına değinilmiştir.

1. Avrupa İnsan Hakları Mahkemesine göre İfade Özgürlüğü

İfade özgürlüğünün tanımı için Avrupa İnsan Hakları Sözleşmesinin 10.maddesinde yer alan düzenleme esas alınmalıdır. Herkes ifade özgürlüğü hakkına sahiptir. Bu hak fikir sahibi olma ve hiçbir sınırlama olmaksızın bilgi ve fikirlerin alınması ve paylaşılması haklarını da içerir.

Bu hakkın sınırları maddenin ikinci paragrafında gösterilmiştir. İfade özgürlüğü; demokratik toplumlarda zorunlu önlemler olarak ulusal güvenliğin, toprak bütünlüğünün veya kamu güvenliğinin, kamu düzenini korumanın, suçun önlenmesinin, sağlığın ve ahlakın, başkalarının şöhret veya haklarının korunması, gizli bilgilerin açıklanmasına engel olunması veya adalet gücünün üstünlüğünün ve tarafsızlığının korunması için kanunla ve belirli koşullarla sınırlandırabilir. Yaptırımlara bağlanabilir. O halde basın yayın fiilleri için de Sözleşmenin 10.maddesinin ikinci paragrafında yer alan sınırlandırmaları kabul etmek uygun olacaktır.

Avrupa İnsan Hakları Mahkemesi'ne göre; ifade özgürlüğü demokratik toplumun temelidir. Mahkeme düşünceyi açıklama özgürlüğünü, demokratik toplumların ilerlemesi ve her bireyin gelişimi için temel koşullardan birisi olarak görmektedir.

Mahkeme 7.12.1976 tarihli Handyside-İngiltere davasında verdiği kararında, 10 maddede düzenlenen ifade özgürlüğünün sadece lehte olduğu kabul edilen ya da zararsız ya da ilgilenmeye değmez görülen bilgi ve düşünceler için değil, ama ayrıca devletin ya da nüfusun bir bölümünün aleyhinde olan çarpıcı gelen şok eden rahatsız eden bilgi ve düşünceler için de kabul edilmesi gerektiği görüşündedir. Bunlar çoğulculuğun hoşgörünün ve açık fikirliliğin gerekleridir. Bunlar olmaksızın demokratik toplum olmaz. İfade özgürlüğü alanında getirilen her formalite, yasak veya ceza izlenen meşru amaçla orantılı olmalıdır. Sözleşmenin 10. maddesinin 2. paragrafında öngörülen sınırlamaları üç kısıma ayırabiliriz.

1.Genel yararı korumaya yönelik olan sınırlandırmalar (Ulusal güvenlik, toprak bütünlüğü, kamu güvenliği, düzeni koruma, suçu önleme, sağlığı ya da ahlakı korumak)

2.Diğer kişisel hakları korumaya dönük olan sınırlandırmalar (başkalarının şöhret ya da haklarının korunması, gizli bilgilerin açıklanmasının engellenmesi)

3.Yargının üstünlüğünün ve tarafsızlığının korunması için zorunlu olan sınırlandırma

Söz konusu sınırlamaların kanunla öngörülmesi ve demokratik bir toplumda zorunlu olması gerekir.

Türkiye'de 2004 yılında yeni Basın Yasası kabul edilmiştir. Avrupa İnsan Hakları Sözleşmesi'nin 10. maddesinde yer alan "ifade özgürlüğü" hakkı bu kanunda madde olarak yer almıştır. Böylece "basın özgürlüğü" hakkı yeni Basın Yasasında tanımlamış ve sınırlarını çizmiştir.

2. Türk Anayasalarında Basın Özgürlüğü

Türk anayasalarında basın özgürlüğü konusuna geniş yer ayrılmıştır. 1924 Anayasası'nın 70'inci maddesine göre "...düşünce, söz, yayım... Türklerin tabi haklarındandır". 77'nci maddeye göre de "basın, kanun çerçevesinde serbesttir ve yayımından önce denetlenemez, yoklanamaz".

1961 Anayasası, genel olarak, "düşünce açıklamak hakkına" önem vermiştir. 20'nci maddesinde düşünce açıklama özgürlüğüne sınır getirilmemiştir. Düşüncenin basın yoluyla açıklanması halinde, açıklanan görüşün içeriği ne olursa olsun sınırlandırılamayacağı benimsenmiştir.

1982 Anayasası'nda ise basın özgürlüğü "otoriter ve sınırlı özgürlük" anlayışıyla yeniden düzenlenmiştir. Genelde düşünce açıklamak, özelde ise basın özgürlüğü sınırlıdır. Anayasa'da her ne kadar sansürün yasak olduğu yazılı ise de; basına getirilen "sınırlandırmalar" sürekli sorun yaratmıştır. 2001 yılından itibaren yapılan Anayasa değişiklikleri ile sorunlar giderilmeye çalışılmıştır.

1982 Anayası'nın 25'inci maddesindeki düzenleme şöyledir:

"Herkes, düşünce ve kanaat özgürlüğüne sahiptir.

Her ne sebep ve amaçla olursa olsun kimse, düşünce ve kanaatlerini açıklamaya zorlanamaz; düşünce ve kanaatleri sebebiyle kınanamaz ve suçlanamaz".

Anayasanın 26'ıncı maddesinde "düşünceyi açıklama ve yayma hürriyeti" düzenlenmiştir. 26'ıncı maddede "herkes, düşünce ve kanaatlerini söz, yazı, resim veya başka yollarla tek başına veya toplu olarak açıklama ve yayma hakkına sahiptir. Bu hürriyet resmi makamların müdahalesi olmaksızın haber veya fikir almak ya da vermek serbestliğini de kapsar" denilmektedir. Bu düzenleme ile düşünce ve kanaatlerini açıklama özgürlüğünün, basın özgürlüğünü de kapsadığı ortaya çıkmaktadır. Bu hükmün düzenlenmesinde radyo, televizyon, sinema veya benzeri yollarla yapılan yayımların "izin sistemi"ne bağlanmasının ifade özgürlüğüne engel olmayacağı öngörülmüştür.

2001 yılında yapılan Anayasa değişikliği ile 1982 Anayasası'nın 26'ncı maddesinde basın ve haber alma hürriyetinin hangi amaçlarla sınırlandırılabileceği yeniden düzenlenmiştir. İlgili hükümde "sınırlama" ifadesi kullanılmışsa da, yapılan değişiklik gerçekte "düzenleme" anlamına gelmektedir. 26'ıncı maddenin ikinci fıkrasında "özgürlüğün sınırlandırılabileceği haller" gösterilmiştir. Buna göre; "Bu hürriyetlerin kullanılması, milli güvenlik, kamu düzeni, kamu güvenliği, Cumhuriyetin temel nitelikleri ve Devletin ülkesi ve Milleti ile bölünmez bütünlüğünün korunması, suçların önlenmesi, suçluların cezalandırılması, Devlet sırrı olarak usulünce belirtilmiş bilgilerin açıklanmaması, başkalarının şöhret veya haklarının, özel ve aile hayatlarının yahut kanunun öngördüğü meslek sırlarının korunması veya yargılama görevinin gereğine uygun olarak yerine getirilmesi amaçlarıyla sınırlanabilir."

Yine 26 ıncı madde yapılan değişikliğe göre; "Ayrıca haber ve düşünceleri yayma araçlarının kullanılmasına ilişkin düzenleyici hükümler, bunların yayımını engellememek kaydıyla, düşünceyi açıklama ve yayma hürriyetinin sınırlaması sayılmaz.

Düşünceyi açıklama ve yayma hürriyetinin kullanılmasında uygulanacak şekil, şart ve usuller kanunla düzenlenir."

Anayasanın 27 inci maddesi ise "Bilim ve Sanat Hürriyeti"ni düzenlemiştir. "Herkes, bilim ve sanatı serbestçe öğrenme ve öğretme, açıklama, yayma ve bu alanlardaki her türlü araştırma hakkına sahiptir." Yayma hakkı; devletin şeklinin Cumhuriyet olduğu (Anayasa Madde 1), Cumhuriyetin nitelikleri (Anayasa Madde 2) ve devletin bütünlüğü, resmi dili, bayrağı, milli marşı ve başkenti (Anayasa Madde 3) hakkındaki hükümlerin değiştirilmesi amacıyla kullanılamaz. Ayrıca Anayasanın 27 inci maddesinde yer alan bilim ve sanat hürriyeti, yabancı yayınların ülkeye girmesi ve dağıtımının kanunla düzenlenmesine engel değildir. Anayasa'da düşünceyi açıklama ve yayma özgürlüğü 25., 26 ve 27 inci maddelerle ayrıntılı biçimde düzenlenmiştir.

Anayasanın 28'inci maddesinde "basın özgürlüğü" yer almıştır. Bu maddenin ilk fıkrasında birinci cümlede basının özgür olduğu, sansür edilemeyeceği yazılıdır. İkinci cümlesinde ise "basımevi kurma özgürlüğü", basımevi kurmak için "izin alma ve mali teminat yatırma şartı" konulamayacağı ifadesiyle basın özgürlüğü güvence altına alınmıştır.
28'inci maddenin ikinci fıkrasında, basın ve haber alma özgürlüklerini sağlayacak tedbirleri alma bakımından devlet yükümlü tutulmuştur.
Maddenin üçüncü fıkrasına göre " Basın hürriyetinin sınırlandırılmasında, Anayasanın 26 ıncı ve 27 inci maddeleri hükümleri uygulanır". Yani; basın özgürlüğünün sınırlanmasında düşünce, bilim ve sanat özgürlüklerine ilişkin hükümler ve sınırlandırma ölçütlerinin uygulanacağı kabul edilmiştir.
28 inci maddenin dördüncü fıkrasında bazı yayınların dağıtımının tedbir yolu ile önlenmesi mümkündür. Bu hükme göre, devletin iç ve dış güvenliğini, ülkesi ve milletiyle bölünmez bütünlüğünü tehdit eden veya suç işlemeye ya da ayaklanmaya veya isyana teşvik eder nitelikte olan veya devlete ait gizli bilgilere ilişkin bulunan her türlü haber veya yazıyı yazanlar ve bastıranlar veya aynı amaçla basanlar, başkasına verenler bu suçlara ait kanun hükümleri uyarınca sorumlu olurlar. Bu basılmış eserlerin dağıtımı hakimin vereceği tedbir kararıyla durdurulabilir. Gecikmesinde sakınca bulunan hallerde ise kanunun açıkça yetkili kıldığı merciin emriyle dağıtım önlenebilir. Bu eserlerin dağıtımını önleyen yetkili merci, verdiği bu kararını en geç 24 saat içinde yetkili hâkime bildirir. Eğer hâkim bu kararı en geç 48 saat içinde onaylamazsa, yetkili merciinin verdiği dağıtımı önleme kararı hükümsüz kalır.
Maddenin beşinci fıkrasına göre; olaylar hakkında yayın yasağı konulamaz. Sadece yargılama görevinin amacına uygun olarak yerine getirilebilmesi için, kanunla belirtilecek sınırlar içinde ve hakim tarafından verilen kararla yayın yasağı konulabilir.
Maddenin altıncı fıkrasında yayınların toplatılması hali düzenlenmiştir. Süreli veya süreli olmayan yayınlar için kanunda gösterilen suçların soruşturma veya kovuşturmasına başlanmış olması hallerinde toplatılabilir. Bunun için hakim kararı gerekir. Eğer yayınlar devletin ülkesi ve milletiyle bölünmez bütünlüğünü, milli güvenliği, kamu düzenini bozacak nitelikte ise veya genel ahlakın korunması ve suçların önlenmesi gerekiyorsa gecikmesinde sakınca bulunan hallerde; kanunun açıkça yetkili kıldığı merciin emriyle de yayınlar toplatılabilir. Toplatma kararı veren yetkili mercii, bu kararını en geç 24 saat içinde yetkili hakime bildirmesi gerekir. Hakim bu kararı en geç 48 saat içinde onaylamazsa toplatma kararı hükümsüz sayılır.
Maddenin yedinci fıkrasında süreli veya süreli olmayan yayınların suç soruşturma veya kovuşturması nedeniyle zapt ve müsaderesinde genel hükümlerin uygulanacağı düzenlenmiştir.
Maddenin sekizinci fıkrasında ise Türkiye'de yayınlanan süreli yayınlarda yayınlanan yazı veya haberlerden dolayı; devletin ülkesi ve milletiyle bölünmez bütünlüğüne, Cumhuriyetin temel ilkelerine, milli güvenliğe ve genel ahlaka aykırılıktan dolayı mahkumiyet kararı verilmesi halinde, mahkeme kararıyla süreli yayın geçici olarak kapatılabilir. Kapatılan süreli yayının açıkça devamı niteliğini taşıyan her türlü yayın yasaktır. Bu yayınlar hakim kararıyla toplatılabilir.

3. 5187 sayılı Yeni Basın Kanunu

9 Haziran 2004 tarihinde 5187 sayılı Basın Yasası kabul edilmiştir. 26 Haziran 2004 tarihli Resmi Gazetede yayınlanarak yürürlüğe girmiştir. Yeni yasayla 15 Temmuz 1950 tarihinden beri yürürlükte bulunan 5680 sayılı Basın Yasası tümüyle yürürlükten kaldırılmıştır.
Yeni Basın Kanunu Avrupa Birliğine uyum sürecinde medya alanında yapılan ilk düzenlemelerdendir. Türkiye Cumhuriyeti Anayasasında ve uluslararası sözleşmelerde yer alan "ifade özgürlüğü" hakkına uyumlu olacak biçimde "basın özgürlüğü" kavramına ilk defa yeni Basın Yasası'nda yer verilmiştir. Yeni Kanun ilk maddesine göre: "Bu Kanunun amacı, basın özgürlüğünü ve bu özgürlüğün kullanımını düzenlemektir".
5187 sayılı yeni Kanun'un üçüncü maddesi ise "Basın özgürlüğü" başlığını taşımaktadır. Bu maddede basın özgürlüğü şöyle açıklanmaktadır:

"Basın özgürdür. Bu özgürlük; bilgi edinme, yayma, eleştirme, yorumlama ve eser yaratma haklarını içerir. Basın özgürlüğünün kullanılması ancak demokratik bir toplumun gereklerine uygun olarak; başkalarının şöhret ve haklarının, toplum sağlığının ve ahlakının, milli güvenlik, kamu düzeni, kamu güvenliği ve toprak bütünlüğünün korunması, Devlet sırlarının açıklanmasının veya suç işlenmesinin önlenmesi, yargı gücünün otorite ve tarafsızlığının sağlanması amacıyla sınırlanabilir." Anayasa'da güvence altına alınmış olan basın özgürlüğü kavramı tekrarlanmıştır. Kanunun amacı vurgulanmıştır. Basın özgürlüğü kavramı ve bu özgürlüğün sınırlarının ne olduğu Avrupa İnsan Hakları Sözleşmesinin 10. maddesi ve Anayasamızın 26 ıncı ve 27. inci maddeleri dikkate alınarak belirlenmiştir. Yeni Basın Yasasındaki bir başka olumlu değişiklik ise haber kaynaklarının gizliliği konusudur. Avrupa İnsan Hakları Mahkemesi kararları dikkate alınarak yeni bir düzenleme yapılmıştır. Gazeteciler haber kaynakları bilgi veya belgeleri açıklamayacaklardır. Bu konuda tanıklığa zorlanmayacaklardır. Bu düzenleme hem gazetecileri hem de haber kaynaklarını korumaya yöneliktir. Yasanın 12. inci maddesinin başlığı "Haber kaynağı"dır. Maddeye göre: "Süreli yayın sahibi, sorumlu müdür ve eser sahibi, bilgi ve belge dahil her türlü haber kaynaklarını açıklamaya ve bu konuda tanıklık yapmaya zorlanamaz"

4. Yeni Basın Yasası ve Yargıyı Etkileme

Yeni Basın Yasasının 3 üncü maddesindeki basın özgürlüğü hakkındaki düzenlemeye karşılık aynı yasanın 19 uncu maddesinde yer alan "yargıyı etkileme" başlıklı madde tereddüt yaratmıştır. "Yargıyı etkileme" başlıklı 19. madde şöyledir: "Hazırlık soruşturmasının başlamasından takipsizlik kararı verilmesine veya kamu davasının açılmasına kadar geçen süre içerisinde, Cumhuriyet savcısı, hâkim veya mahkeme işlemlerinin ve soruşturma ile ilgili diğer belgelerin içeriğini yayımlayan kimse, iki milyar liradan elli milyar liraya kadar ağır para cezasıyla cezalandırılır. Bu ceza, bölgesel süreli yayınlarda on milyar liradan, yaygın süreli yayınlarda yirmi milyar liradan az olamaz."
İkinci fıkrasında ise "Görülmekte olan bir dava kesin kararla sonuçlanıncaya kadar, bu dava ile ilgili hâkim veya mahkeme işlemleri hakkında mütalaa yayımlayan kişiler hakkında da birinci fıkrada yer alan cezalar uygulanır."
Ancak uygulamada bu maddeye dayanılarak açılan davalar sorun yaratacaktır. Yasanın 19. maddesi kamu davası açılıncaya kadar "içerik yayınlamayı" yasaklamaktadır. Bazı hallerde adli bir haberin yazılmasından sonra gazeteci hakkında yargılamayı etkilemekten dolayı davalar açılabilir. Kamuoyunda merakla izlenen ya da toplumu yakından ilgilendiren bazı önemli davaların "haber" olarak yayınlanması bile suç sayılabilir. Örneğin işkence iddiası ile yargılanan kamu görevlileri hakkındaki dava haberleri de "yargıyı etkiledi" suçlamasıyla karşılaşabilir.
Ayrıca maddenin ikinci fıkrasındaki "mütalaa yayınlama" hali hakkındaki yasak tüm davaları kapsayacak şekilde genişletilmiştir. Eski Basın yasasındaki (Madde 30) düzenleme sadece ceza davaları hakkındaki mütalaa yayınını yasaklıyordu. Artık yeni düzenleme ile hukuk ve idari davaları, Anayasa Mahkemesinde görülmekte olan davaları ve diğer davaları da kapsayacak şekilde genişletilmiştir. Kısacası tüm mahkemelerde görülen her türlü davada verilecek karar kesinleşmeden mütalaa yayını yasaklanmıştır. Karar kesinleştikten sonra mütalaa yayını serbesttir.
5187 sayılı Basın Kanunu'nun yürürlüğe girdiği tarihten yaklaşık üç ay sonra 26 Eylül 2004 tarihinde 5237 sayılı yeni Türk Ceza Kanunu kabul edilmiştir. Yeni Türk Ceza Kanunu 1 Haziran 2005 tarihinde yürürlüğe girmiştir.
5237 sayılı yeni TCK'da da benzer bir düzenleme vardır. Bu TCK'nun 288. maddesidir. Bu madde 5187 sayılı Basın Yasasında yer alan "Yargılamayı etkileme" suçunun benzeridir. TCK'nun 288 inci maddesinin başlığı "Adil yargılamayı etkilemeye teşebbüs"tür. Madde şöyledir : "(1)Bir olayla ilgili olarak başlatılan soruşturma veya kovuşturma kesin hükümle sonuçlanıncaya kadar, savcı, hakim, mahkeme, bilirkişi veya tanıkları etkilemek amacıyla alenen sözlü veya yazılı beyanda bulunan kişi, altı aydan üç yıla kadar hapis cezası ile cezalandırılır."

Bu maddenin ikinci fıkrasında yer alan "Bu suçun basın ve yayın yolu ile işlenmesi hâlinde verilecek ceza yarı oranında artırılır." şeklinde düzenleme 27 Mayıs 2005 tarihinde kabul edilen 5377 sayılı yasa ile kaldırılmıştır.
Bu maddenin konma gerekçesine göre; bir yargı kararı kesinleşmeden önce tanıkların beyanlarını veya bilirkişi mütalâalarını veya mahkeme hüküm ve kararlarını etkilemek amacıyla baskıcı ve kötü niyetli yayınlar yapılmasını önlenmektir. Madde gerekçesine göre; adalet cihazının yansızlığını sağlamak için bu madde getirilmiştir. Yargının sadece iktidarlara karşı korunması yeterli değildir. Kitle iletişim araçlarıyla yapılan "yargısız infaz"lara karşı da yargıyı korumak gerekir. Yeni TCK'da bu maddeye bu nedenle yer verildiği ileri sürülmüştür.
Basın Yasası'nda "Yargıyı Etkileme" suçunun cezası para cezasıdır. Ancak yeni TCK ile getirilen ceza "hapis" cezasıdır. Gazeteci hem Türk Ceza Kanunu ve hem de Basın Yasası düzenlemesi karşısında yargıyı etkilemek iddiası ile ceza davası ile karşılaşabilir. Bu durum uygulamada sorun yaratabilir. Türk Ceza Kanunu genel kanundur. Basın kanunu ise özel kanundur. Ama her iki yasa karşısında da gazetecilerin "ifade özgürlüğü" ve "basın özgürlüğü" zedelenmiştir. Her an ceza soruşturması açılabilir.

Sonuç:

Türkiye'de ifade özgürlüğü dikkate alınarak uyum yasaları çerçevesinde düzenlemelere geçilmiştir. 3 Ekim 2001 tarihli 4709 sayılı yasa ile Anayasa'da değişiklik yapılmıştır. "Düşünceyi açıklama ve yayma hürriyeti"(madde 26) "bilim ve sanat hürriyeti" (madde 27) ile "Basın hürriyeti" (Madde 28) başlıklı maddeler ifade özgürlüğü dikkate alınarak yeniden düzenlenmiştir. 26. maddede yer alan "Düşünceyi açıklama ve yayma hürriyeti" AİHS'nin 10. maddesindeki "İfade Özgürlüğü"ne paralel düzenlemedir.

Kabul edilen 5187 sayılı yeni Basın yasasının 1. maddesinde yasanın amacı basın özgürlüğünü ve bu özgürlüğün kullanımını düzenlemektir. Basın yasasının 3. maddesi ise "Basın özgürlüğü" başlığını taşımaktadır. AİHS 10. maddesi Basın Yasasının 3 üncü maddesine alınmıştır. Hatta basın özgürlüğünün bilgi edinme, yayma, eleştirme ve eser yaratma haklarını da içerdiği maddede kabul edilmiştir. Basın özgürlüğünün sınırlandırılması ile ilgili sayılan ölçütler 10. maddenin ikinci paragrafından alınan sınırlandırmaların aynısıdır.

Yeni Basın Yasası AİHS 10. maddesini kanun maddesi haline getirmiştir. Dolayısıyla Basın özgürlüğü iç hukuk mevzuatında herkesin İfade özgürlüğü anlamında korunan temel bir insan hakkı olarak tanınmıştır.

Buna karşılık aynı yasanın 19. maddesinde yer alan "Yargıyı Etkileme" başlıklı düzenleme Basın Yasası'nda yer alan basın özgürlüğü kavramı ile çelişmektedir. Gazeteciler adli haberleri nedeniyle ceza tehdidi altında kalacaklarından dolayı bu düzenleme ifade özgürlüğüne de aykırıdır.

Yeni TCK' da "Adil Yargılamayı Etkilemeye Teşebbüs" suçunun kanun metninde çıkarılması hukuk devleti ilkelerine daha uygun olacaktır.

Ayrıca yeni Basın Yasasının 19 uncu maddesinde yer alan "Yargıyı Etkileme" suçunun başlığı değiştirilmelidir. Madde başlığı "Adli haber" olmalıdır. Madde metninin ise gözden geçirilerek yeniden düzenlenmesi gerekir.
Yeni Basın Yasasının maddeleri arasında kullanılan dil nedeniyle çelişkiler vardır. Basın suçları yeniden düzenlenmelidir. Yeni Türk Ceza Kanunu ile çelişkileri giderilmelidir.

THE EVALUATION OF THE NEW TURKISH PRESS LAW IN TERMS OF THE FREEDOM OF EXPRESSION

Av. Fikret İlkiz

Political participation in democratic systems depends on pluralism. Therefore, people's acquisition of information and "the circulation of free and accurate news" for them to make political choices more efficiently as result of interpreting this information have contemporarily gained a significant priority. "Information acquisition" and "the circulation of free and accurate news" have been upheld as a humane right. Thus, mass media means have been considered as instruments charged with realizing "the circulation of free news". "The right to acquire information" is an international right. As a concept, it is an outcome, a result, of the flow of news provided by mass media means. "Freedom of Communication" is the process that ensures dissemination of the information acquired through the right for acquiring information. Freedom of the Press is actually "the freedom to receive and impart information". This freedom has close links with the freedom of expression, of thought, of conscious and of religion. Freedom of expression is "the spine of rights".

There is an agreement among international papers on the general or basic elements which are prerequisites for being able to mention about the freedom of the press in any country. The nineteenth (19^{th}) Article in 1948 the Declaration of Human Rights states that freedom of thought and speech requires the rights to "search", "acquire", and "disseminate" information and thoughts with every possible means. The tenth (10^{th}) Article of the Convention for the Protection of Human Rights and Fundamental Freedoms also mentions the indispensable pre-requirements for the freedom of communication, therefore of the press.

1. FREEDOM OF EXPRESSION IN RESPECT TO THE EUROPEAN COURT OF HUMAN RIGHTS

To define freedom in respect to European Human Rights Convention Article ten (10) should be taken as the basis. Everyone has the freedom of expression. This right includes to have an idea and to receive information and ideas and to share these without any limitations. In democratic societies the limits of these rights are defined in the second paragraph of the article. Freedom of expression may be limited by law likewise under certain circumstances such as protection of security and unity of the land public order to avoid crime to protect health, ethics and rights of other people to provide confidential information of people or to protect superiority of justice as necessary precautions. It emphasizes when it is really necessary. It may be subject to some sanctions. Thus regarding press activities it will be convenient to accept the limitations defined in article ten (10) of the convention.

According to the European Court of Human Rights, freedom of thought is the base of democratic society. The court considers freedom of expression as one of the basic conditions for the development of societies and individuals. By the 7 December 1967 "Handyside vs. England" judgment the court the is in the opinion that the freedom of expression defined under Article ten (10) should cover not only the information and ideas that are in favour or harmless or negligible but also for the information and ideas which are against the state or some part of society which are shocking and irritating. These are the requirements for pluralism, tolerance and being open minded. A democratic society cannot survive without these. Any formalities, prohibitions or penalties to be applied within the framework of freedom of expression should be in proportion with the reasonable aim or scope.

The restrictions prescribed in the second paragraph of the tenth (10^{th}) article in the contract can be divided into three parts.

1. Those to protect common benefit (national security, integrity of the territory, public safety, protecting the order, preventing crime, protecting health or morality.
2. Those to protect other personal rights (protecting the reputation and rights of others, preventing secrets from being revealed)

3. Those which are to ensure the authority and impartial functioning of the judiciary.

The restrictions mentioned are to be prescribed by law and be obligatory in any democratic society.

The new Press Law, approved in Turkey in 2004, used the concept of Freedom of Expression in the tenth (10th) article of Convention for the Protection of Human Rights and Fundamental Freedoms as an article and defined the right for "freedom of the press" by law and made its limitations clear.

2. FREEDOM OF THE PRESS IN TURKISH CONSTITUTION

Press freedom widely takes part in the Turkish constitution. In the 70th Article of the Constitution of 1924, it was said that "... thought, speech, dissemination... are some of the natural rights of the Turkish people" and in the 77th Article the decision that "the press is free within the limitations of laws and can not be inspected or examined before dissemination" had taken place.

The Constitution of 1961 gave importance generally to "the right of expression of thought" and in its 20th Article, it was advocated that as the expression of thought is not restricted, in case thought is expressed via the press the thought expressed can not be restricted either whatever the content it may have.

Freedom of the press in the Constitution of 1982 was regulated in accordance with the line of "authoritarian and limited freedom". To express thought in general and freedom of the press in particular are both limited. The problems were tried to be clarified by modifications on the constitution since 2001.

With subsequent amendments, in the twenty-sixth (26th) Article of the Constitution of 1982, dimensions of limitations of the freedom to receive and impart information and ideas were re-determined. In the relevant decision, although the phrase "limitation" was used, limitation justification means "regulation" characteristically in reality. Furthermore, in the international documents which were signed by the Turkish authorities, the existence of parallel regulations has been approved as well.

The regulation in the twenty-fifth (25th) Article of the Constitution is as follows: "Everyone has the right to express and disseminate his thoughts and opinion. On no condition can anyone be obliged to declare his own thoughts and opinions and in no way can he or she be accused or ashamed for his own thoughts and opinions.

Also in the twenty-sixth (26th) Article dimensions of this freedom has been explained under the title of "freedom of expression and dissemination of thought".

In the twenty-sixth (26th) Article, it has been stated that "Everyone has the right to express and disseminate his thoughts 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."

With this regulation in the Constitution, it appears that the freedom of expression of thought and opinion also includes the freedom of the press.

In the continuation of the relevant Article, it was stipulated that the assumption of this paragraph would not hinder the connecting of dissemination made via radio, television et al, to the "permission system".

The decision in the second paragraph of the twenty-sixth (26th) Article and about the "situations in which the freedom can be limited" was amended in 2001 and redefined as follows:

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

By the amendments made on article twenty-six (26) of the constitution "The regulatory provisions relevant to the use of instruments to broadcast news and ideas will not be deemed as limitation of broadcasting and expressing the ideas as long as these do not obstruct the broadcast."

The form of conditions and procedures regarding the freedom of expressing and broadcasting the idea shall be regulated by law.

Article twenty-seven (27) regulates the freedom of science and arts. "Everyone has the right to learn teach express broadcast and to make all the investigations on science and arts."

The right to broadcast cannot be used for amending Article 1 of the constitution which says that the state is the Republic. Article 2 regarding qualifications of the republic. Article 3 regarding the unity, formal language, flag, national anthem, and capital city. Besides freedom of science and arts defined under Article twenty-seven (27) of the constitution does not prohibit to regulate the entrance and distribution of foreign publications to the country.

The right of freedom to express and broadcast the ideas is regulated under Articles twenty-five (25) twenty-six (26) and twenty-seven (27) in details.

After the freedom of expression and dissemination of thought in the Constitution was discussed in a detailed way, "the freedom of press" was addressed in the 28th Article.

In the first paragraph of this Article, after the statement that the press is free and can not be censored, "The freedom of establishment of a printing house", which constitutes the first condition of the freedom of the press, has been secured with the statement of "the establishment of a printing house shall not be subject to prior permission or the deposit of a financial guarantee".

Paragraph 3 of the article says "Provisions of articles 26 and 27 shall be used with regard to the limitations of press freedom." In other words, the provisions and criteria regarding the science and arts freedom shall be applied for limitation of press freedom.

According to the decision under discussion, "anyone who writes or prints any news or articles which threaten the internal or external security of the state or the indivisible integrity of the state with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets and anyone who prints or transmits such news or articles to others for the above purposes, shall be held responsible under the law relevant to these offences. Distribution may be suspended as a preventive measure by the decision of a judge, or in the event delay is deemed prejudicial, by the competent authority designated by law. The authority suspending distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order suspending distribution shall become null and void unless upheld by a competent judge within forty-eight hours at the latest."

According to the fifth paragraph of the Article no ban would be placed on the reporting of events except by the decision of judge issued to ensure proper functioning of the judiciary, within the limits specified by law.
In the sixth paragraph it states that periodical and non-periodical publications might be seized by decision of a judge in cases of ongoing investigation or prosecution of offences prescribed by law, and, in situations where delay could endanger the indivisible integrity of the state with its territory and nation, national security, public order or public morals and for the prevention of offence by order of the competent authority designated by law. The authority issuing the order to confiscate would notify a competent judge of its decision within twenty-four hours at the latest. The order to confiscate would become null and void unless upheld by the competent court within forty-eight hours at the latest.

Under paragraph 7 it is expressed that the general provisions will be applied for the confiscation of periodicals or non-periodical publications under investigation.

Under paragraph 8 the periodical publication may be temporarily closed by the decision of the court because of a sentence handed down with regard to any news or articles in conflict with the unity of the state, or nation, basic principles of the republic, national security or general ethics. Any prohibited publication which continues to publish is forbidden. These publications can be confiscated by the decision of a judge.

3. THE NEW PRESS LAW, LAW NO: 5187

The Law of Press, Law No: 5187 and with the Approval Date of the 9th of June 2004 came into force via being published in the Official Gazette No: 25504. With introduction of the new law, the Law of Press No: 5680, which had been valid since 15th July, 1950, was totally abolished.

The new Press Law is one of the first regulations made in the field of media and in the European Union Adaptation process. The concept of "press freedom" takes part in the new Press Law in compliance with freedom of expression which takes part in the constitution of the Turkish Republic and international conventions.

In the first Article of the New Law text, aim of the law is expressed as follows: "The aim of this law is to arrange freedom of the press and exercise of this freedom".

The first article of the law No: 5680 that was abolished conveys the assumption that "the press is free". The statement "Freedom of the Press" is not mentioned. Only the arrangement that "the press is free" takes place in the first article.

The third article of the new Law No: 5187 exceptionally conveys the title "freedom of the Press". In this article, terms of freedom of the press is stated as follows:
"The press is free. This freedom includes the right to acquire and disseminate information, and to criticize, interpret and create works. The exercise of this freedom may be restricted in accordance with the requirements of a democratic society to protect the reputation and rights of others as well as public health and public morality, national security, and public order and public safety; to safeguard the indivisible integrity of its territory; to prevent crime; to withhold information duly classified as state secrets; and to ensure the authority and impartial functioning of the judiciary."

In the Constitution, the concept of freedom of the press has been repeated and aim of the law has been emphasized. What the concept of freedom means and the limitations of this freedom have been designated in the tenth (10th) article of the European Human Rights Agreement and in the twenty-

sixth (26th), twenty-seventh (27th), and twenty-eighth (28th) Articles of our Constitution.

4. COMPROMISING FREEDOM OF THE PRESS AND THE JUDICIAL PROCESS

In contrast to the amendment about freedom of the press in the 3rd Article of the New Press Law, the nineteenth (19th) article of the same law titled "compromising the judicial process" creates suspicion. The nineteenth (19th) Article titled "compromising the judicial process" is exactly as follows: "In a period beginning with preparatory inquiry to nol pros (nolle prosequi), or to open public lawsuit, a person who publishes material about the proceedings of the Republican prosecutor, judge or court or content of documents regarding the inquiry shall be sentenced to pay a major fine ranging from 2 thousand to 50 thousand YTL. This fine cannot total less than 10 thousand YTL for regional periodicals and 20 thousand TL for nation-wide periodicals." And in its second paragraph it is stated that "any individual who publishes comments about the judge or court proceedings before the case concludes with a final verdict shall be punished as under paragraph 1 above."

However, in practice any case that will be brought to the court by means of this article will pose some problems. The nineteenth (19th) Article of the law prohibits "publishing court proceedings". In this case, after scripting of the judicial information, journalists may be sued for "affecting the judgment".

Even publication of major cases concerning the society dramatically as "comment" can be regarded as a crime. A case comment published about officials being judged with the claim of torture may lead to the judgment of the journalist.

Furthermore, with the new amendment, the prohibition about "publishing comment" in the second paragraph of the Article has been expanded so that it includes all of the cases.

Former prohibition of publishing comment, which only concerned the criminal cases, has been amended from now on as to include the administrative court cases, law cases or cases under process in the State Council, in short all cases.

Even to broadcast some important cases as news which are subject to the interest of the public may be deemed a crime. For example, news about public officials which are under trial for the charge of torture may be considered as effecting the judge's decision.

In the second paragraph of the Article the prohibition of publishing comments has been expanded to cover all cases. In the old Press Law "article 30 prohibited publishing comments only for criminal cases. The new regulation expanded the provision to cover all civil and administrative cases taken in the state council and any and all cases. In brief, to publish any comments regarding any pending cases is prohibited before the outcome of the decision. If an appeal is launched no publication may be made until the Supreme Court's decision has been handed down.

The new Turkish Criminal Law 5237 has become effective on 26 September 2004 approximately 3 months after Press Law 5187. The validity date of Turkish Criminal Law had been postponed to 1 June 2005.

The Article that directly concerns our subject is the 288th Article of the new Turkish Criminal Law No: 5237. Since this Article is similar to the crime "Compromising the Judicial Process" in Press Law No: 5187. The Article 288 of Turkish Criminal Law No: 5237 titled "Attempt to Compromise the Fair Judgement" is as follows: "(1) Until an investigation or vindication about an event is concluded with a final verdict, the person who commits a verbal or written declaration aiming to affect the judge, the prosecutor, the court, the expert or the witnesses is sentenced to imprisonment of six months to three years. (2) In case of committing this crime via press and publishing, the sentence is increased by half.

The justification of this Article is to prevent the publication of insincere and despotic declarations in order to affect decisions and verdicts. As to the justification, this Article is to foster the impartiality of justice. Only the trustees protecting against political powers are not enough to provide neutralism of the device of justice. Due to the practices described as "execution without judgement" made by mass media, this decision was attached to the new Turkish Criminal Law.
In Press Law the penalty for effecting a judgement is a financial penalty. However in the new Turkish Criminal Law it is imprisonment. Journalists may be subject to the claim of effecting a judgement both under Turkish Criminal Law and Press Law. This will cause confusion. Turkish Criminal Law is a general law where the Press Law is a special law. However the freedom of expression and Press Law for the journalist is undermined under both laws. They may be subject to criminal investigations.

CONCLUSION

In Turkey, in the judicial area, first regulations regarding freedom of expression have been held in the framework of the adopted laws. With the law no: 4709, dated: 3 October 2001, differentiation in Constitution has been obtained and "freedom of expression and dissemination of thought" (Article 26), "freedom science and arts" (Article 27) and the decision conveying the title "freedom of the Press" regulated in Article 28 are reorganized regarding freedom of expression. "Freedom of expression and dissemination of thought" in Article 26 is a parallel regulation to "freedom of expression" in Article 10 of Convention for the Protection of Human Rights and Fundamental Freedoms.

In the first Article of the new Press Law no: 5187, the aim of the law is to regulate the freedom of press and the exercise of this freedom. The third Article of the Press Law is titled as "Freedom of the Press". It is the law text form of Convention for the Protection of Human Rights and Fundamental Freedoms Article 10. Furthermore, parallel to the freedom of expression, it is accepted that the freedom of the Press also contains right of receiving and disseminating information, criticizing and creating a work. The measurement that is regarded as related to limitation of freedom of the Press is the same of the limitations taken from the second paragraph of Article 10.

In contrast to the amendment about freedom of the press in the 3rd article of the New Press Law, the 19th article of the same law titled "compromising the judicial process" creates suspicion. Journalists are threatened of punishment about their news relevant to the 19th article of Press Law. Thus this article is contrary to freedom of press.

Tendency of taking out the 288th article of Turkish Penalty Law is agreeable to create democratic society system and it is suitable to law state principles.

Finally the 19th article of Press Law, "compromising the judicial process must be titled "Judicial News" and must be looked over again. In this condition it needs an amendment.

CHRISTOPHER BADSE

Danimarka İnsan Hakları Enstitüsü
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Adım Christopher Badse ve burada Danimarka İnsan Hakları Enstitüsü adına ilk konuşmayı yapmak üzere bulunuyorum. Danimarka'dan, Erik Khawaja ve ben sunumu ikiye bölerek gerçekleştireceğiz. İlk olarak ben ifade özgürlüğünün Anayasal çerçevesinden bahsedeceğim ve sonrasında Khwaja Danimarka Ceza Kanunu'nda bulunan ifade özgürlüğünün sınırlanmasına ilişkin hükümlerden bahsedecek.

Anayasal çerçeveden bahsetmek gerekirse: Hemen her Anayasa'da olduğu gibi, Danimarka Anayasası'nda da muhtelif insan haklarından oluşan bir insan hakları katalogu bulunmaktadır. Ve bizim de Anayasamızda bir ifade özgürlüğü kısmı mevcuttur. Anayasamız 1849'da kabul edilmiştir ve ifade özgürlüğüne ayrılan 77. kısım neredeyse orijinal halindedir; hiçbir değişiklik olmadığı söylenebilir. Buraya eklenen tek şey, "Herkes fikirlerini yazılı ve sözlü olarak ifade edebilir" girişidir. Bu değişiklik, 1953 yılında yapılmıştır. Bunun dışında, orijinal metin tamamen 1849'da kabul edilmiş halini sürdürmektedir. Danimarka'da Anayasal düzenlemelerin uygulanması, oldukça sınırlı kalan bir husustur. Anayasa'da ifade özgürlüğüne ilişkin olarak en yaygın uygulanan nokta, sansür yasağıdır. İkinci alt kısımda görüleceği üzere, "sansür veya engelleyici başka herhangi bir önlem uygulanamaz". Fakat, 77. kısımla ilgili problem, birinci alt kısımda "herkes fikirlerini beyan etme hakkına sahiptir fakat bu, kanunların otoritesine tabi olabilir" şeklindeki ibaredir. Görülüyor ki, bir fikir yayınlandıktan sonra yasaklanabilir veya bir yaptırıma maruz kalabilir. Bu sebeple akademisyenler, Danimarka'da gerçek anlamda bir ifade özgürlüğü olup olmadığı konusunu tartışmış ve bir yayının sonradan bir yasağa maruz kalmaması ihtimalinin olmaması gerektiğini ortaya koymuşlardır. "Herkes, yargılanmaya ve mahkemece bir ceza verilmesi riskiyle karşılaşmaksızın fikirlerini ifade etme hakkına sahiptir" şeklinde bir politik fikir mevcuttur.

.....Sansür kısmına dönecek olursak, sansür yasağı, Krallık döneminde her bir eserin yayımlanmadan evvel bir kontrolden geçmesi alışkanlığının önlenmesine yönelik olarak getirilmiştir. Fakat, sınırlayıcı uygulamalara gidilebilir. Örneğin, basılmakta olduğu bilinen bir eserle ilgili olarak bir mahkemeye gidilip yayımlanması engellenebilir. Eğer hakimleri, yayımlanmasını durdurmanızın önemli olduğuna ikna edebilirseniz, durdurulabilecektir.

...Danimarka'da Danimarka Anayasası'ndan ziyade Avrupa İnsan Hakları Sözleşmesinin kullanılması veya uygulanması eğilimi ortaya çıkmıştır. Zira, içtihat hukuku bu yönde gelişmiştir ve avukatlar "Bir davada bir Anayasa hükmü gerçekten kullanılabilir mi" konusunu tartışmaya başlamışlardır. Hatta bazen, savunmanızda Anayasa hükümlerine yer veriyorsanız, bu, savunma kıtlığı içinde olduğunuzu gösterir şeklinde yorumlar bile ortaya çıkmaktadır. Anayasa'nın Danimarka'da algılanışı bu şekildedir.

...Danimarka'da en çok odaklanılan nokta, Avrupa İnsan Hakları Sözleşmesi'nin 10. maddesidir. Fakat tabi ki, bunun yanı sıra, ifade özgürlüğüne yer veren diğer sözleşmeleri de –özellikle BM Medeni ve Siyasi Haklar Sözleşmesi madde 19- göz önünde bulundurmak gerekir.

...Ayrıca şunu da vurgulamanın önemli olacağını düşünüyorum: Avrupa Birliği ve İnsan Hakları söz konusu olduğunda, Fransa ve Hollanda'da referanduma sunulan Avrupa Birliği Anayasası'na da başvurmak gerekir. Burada bir çok uluslararası belgede sözü edilen insan haklarından bahsedilmektedir.

Christoffer BADSE

Legal Officer & Project Manager
National Department
The Danish Institute for Human Rights

My name is Christoffer Badse and I am here to make the first presentation today on behalf of the Danish Institute for Human rights, which is the national human rights institution in Denmark, established according to the UN -Paris principles and a focal point for research, and discussion and debates of human rights issues in Denmark. On behalf of the institute, I want to thank you for the invitation here, to speak today. We are two from Denmark Mr. Eddie Khawaja and I, and we have split the presentation in two. For the first 15-20 minutes, I will talk about the constitutional framework, freedom of expression, and the traditions in Denmark and after that Mr. Khawaja will talk about the restrictions we have in the Danish Criminal Code. Also, some of you asked me yesterday and (if I have to speak louder please say so.. .) I was asked yesterday of course of the infamous cartoon; the drawings. We will of course also talk about this, however we will, I think we will wait for an in-depth discussion for tomorrow when we talk about specific cases we'll touch upon this; the development in this case. So, the constitutional framework, as in all constitutions, we have a catalogue of human rights in the Danish constitution. And we also have a section on freedom of speech. And, as you can see, the constitution is from 1849 and the section 77 is almost in the original form, because nothing really been changed. The only introduction, the only amendment to this section has been the introduction of: 'anyone is entitled to publish his ideas in writing and speech'. That was introduced in by the amendment in 1953. Otherwise, the original text is from 1849. So it's quite an old piece of legislation and it hasn't been changed much and it hasn't really been 'used' much in case law. The Danish tradition for applying constitutional legislation is limited. The Danish Constitution and the tradition kind of split between what we say the censorship part of it, which was very important for the files of the constitution to ban censorship. As we can see in sub-section two; 'censorship and other preventive mention may never been reintroduced.' It is actually, 'may never be reintroduced' that is kind of special, because you can of course change the constitution and remove this sentence. But just us to underline, that this has seen as very important not to have this censorship. But, the problem with section 77 is that as we can see in sub-section 1, 'anyone has the right to publish his and her ideas but it is subject to the authority of the codes. So they can actually prohibit afterwards the idea has been published or printed, one can sanction that publication. So it has been discussed by academics 'is there a room and an expression in the Danish Constitution which are allowed and can not be afterwards sanctioned by the court. There is a special political idea that 'everybody has the right to express without being tried and sentenced by a Court of Law. So this is been discussed, and I will turn to that discussion later. The catalogue of rights has also includes the classical freedoms human rights freedoms, as freedom of assembly, association, the new code for order 'authorities to enter one's home, right to privacy, freedom of religion and so on. And of course it is very difficult only to talk about freedom of expression we need to take it into the context of especially freedom of assembly and freedom of association which I will also touch upon. Because in Danish tradition, in Danish legislation, legal history is reserving a quite a big room for this freedom, for all kinds of expressions and all kind of for example associations which we will in other countries see banned. But returning to the censorship part, this was actually the intention to abolish the old tradition that the King had to, or the authorities had to examine all printings before they were published. It is however, possible to make a restraining conjunction. You need to; if you are aware that a publication is underway, you can go to a court of law and stop the publication in progress. If you can convince the judges that it is important that you stop it before, it can be stopped.

Afterwards, you have to make your case before court of law, but you have the possibility initially to stop that publication.

We have two examples which are very briefly described. We have the free masons. (I think it's called in English.) There was television broadcasting, a documentary on their initiation rituals. And this was intended for domestic broadcasting you would say for television station, and the free masons wanted an injunction for this, to stop the broadcasting and they succeeded in doing so. And the Supreme Court found that the initiating rituals are private matter and it wasn't a matter of public interest. What we see here is an assessment of 'what is a matter of public interest?' and that is of course has to with the freedom of speech. Another example: this was an artist that made a poster which kind of ridiculing the Danish industry and the Danish farmers for using too much penicillin on the animals in the farms. And they are making this funny poster and the farmers and the industry wanted to stop that poster because they found it was full of wrong information. But the court stressed that the poster was a contribution to the public debate and part of the free exchange. So you can see there is a difference between these two cases. The Free Masons' private initial rituals are not considered part of an interest for the public debate, while using medicine by the farms are considered to be, or assessed to be the matter of public interest. So these are kind of two judgments that show kind of what assessments are done by this; the court. I have to say these are quite old judgments, from the 80's, and there is a tendency in Denmark to use more or apply more the European Convention on Human Rights than actually the constitution. Because, you have the case law from the European Court and as I said before, the Danish Constitution is living a quiet life and it has actually been discussed by lawyers; 'Can you really use the constitution for making a case? Sometimes it is said that when you use the constitution that's because you run out of arguments. So that is how it is perceived in the traditional Danish context. And sometimes therefore, you use more the case law from the European Court of Human Rights than actually the constitutional case law.

Of course freedom of expression can be limited. Eddie will after my presentation go in to that with the sections in the criminal code. So, what has been discussed is that freedom of expression as in a constitutional approach should be used as a value, as a guiding principle, guiding the legal interpretation unless important considerations indicate otherwise. And that is, for example, hate speeches against minorities. But the guiding point should be the freedom of expression as a corner stone in the constitution and should also be interpreted in the light of article 10 in the European Convention on Human Rights which, as you know, indicate the use of what is necessary in the democratic society. That's actually what they talking about also in the Danish context, what interference of freedom of expression can be done? What is necessary in democratic society? But point of departure should be freedom of expression. In the Danish context we use, there is a focus on article 10 in the European Convention of Human Rights. But of course we should also be aware of all the other conventions where freedom of expressions are protected, especially in the UN Convention on Civil and Political Rights; article 19. The increased focus especially on the European Convention of Human Rights was especially after the incorporation of the convention in 1992 which became domestic part of Danish legislation. Denmark ratified the European Convention on Human Rights in as early as 1953 and signed it in 1950. As a point of the departure Danish legal tradition and you would say the relation with international convention is a dualistic principle, which also they exist in the UK. However, during the years, there is been a shift where you actually can apply international non-incorporated conventions in the Danish courts and so the matter of practice has been changed so we actually have situation where judges or some judges you can say, of using non-incorporated conventions and others are more reluctant and also there is

of course there is also in practical terms there is a lack of knowledge by Danish attorneys of other human rights conventions than the European Convention of Human Rights. But the European Convention of Human Rights is definitely the most used in the Danish courts. When I make this presentation, we of course have to not only talk about the European Convention of Human rights but also talk about the European Union. And whether there has been a shift in use of freedom of Human Rights situation in Denmark before and after joining the European Union. And we joined in 1973, and you would say in a European context, the human rights are not really that developed, there was not that much case law at that point. We were of course aware of the obligations concerning the European Convention of Human Rights. But many of the conventions were very new at that point the UN conventions, the main conventions are from 1966, so that's not really been a huge discussion or demands for changes in legislation when we joined the EU. And it was at that point of economic community so there was not so much to talk about human rights' issue at that point of the more like the freedom of movement of the workers and so on. As you can see we also have an issue with the Faroe Islands and Greenland which are also part of Danish Realm. We tend to forget but when talking about Denmark we should remember that we also have home rule governments in Greenland and Faroe Islands which are also part of Danish rule and as you can see they are not part of the European Union.

It is important I think to stress that when we are talking about the European Union and fundamental rights, we also have to think about the new charter, the EU constitution which was put on hold after the referendum in France and the Netherlands and the Charter on fundamental rights which you could say is very similar to the European Convention Human Rights but its also sum up of other obligations made by the European Union member states. It refers to other international human rights documents.

Also, you can say when you are talking about being a member of the EU, one should also be aware of the so-called margin of appreciation and the dynamic interpretation of human rights obligations.

This was examplified in a recent judgment on Denmark from this year. The European Court of Human Rights actually refer to Charter of fundamental rights, this judgment is about freedom of assembly, freedom of association, negative freedom of association where the judges also refer to the European Social Charter, they refer to that even when Denmark signed up to the Convention, they explicitly said that close shop agrrements were in accordance with the obligations. However, the new judgment said that because of the development in Europe, it has changed so; the negative right of freedom of association is also included in other International Human Rights obligations. So, even though actually Denmark explicitly stated that in their opinion closed shop agreements was in accordance with their obligations of Denmark. So this has actually changed quite rightly in a dynamic interpretation of human rights' obligations. But I think I will stop here and give the floor to Eddie Khawaja. I don't know if there is room for questions.

ERIK KHAWAJA

Danimarka İnsan Hakları Enstitüsü
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Teşekkür ederim. Şimdiden programın oldukça gerisinde kaldığımız için giriş kısmını geçerek doğrudan bugün Danimarka ceza hukukunda bulunan ifade özgürlüğüne ilişkin düzenlemelerden bahsedeceğim. Şunu da belirtmeliyim ki, konuşmamda ifade özgürlüğü ile ilgili tüm düzenlemelere değil, en önemlilerine ve son 2-3 yılda en çok tartışılanlara -ve özellikle de 1 yıl önce büyük krize yol açan karikatür örneğine- değineğeceğim.

Danimarka ceza hukukunda ifade özgürlüğüne ne gibi sınırlamalar getirildiğini, iki ana bölümde incelemek istiyorum. Bunlardan ilki, bireylerin hakları veya bir grup bireylerin haklarıdır. Örneğin, ayrımcılığa uğramama hakkı, özel hayatın gizliliği hakkı, vb. Bunların yanında ikinci bölümde ise, devleti ilgilendiren kamu güvenliğinin korunması, halkın terörist aktivitelerden korunması gibi konular söz konusu olmaktadır. Buradaki haklar, bireylerin veya bir grup bireylerin hakları ile çoğunlukla örtüşebilmekte ise de, ikinci bölüm haklar genellikle Danimarka toplumuna ve Danimarka kurumlarına yöneliktir. Son olarak, dini dogmaların, ibadetlerin, vs korunması ise ayrı bir kategori oluşturmaktadır ki burada söz konusu olan tek tek bireylerin değil, bir dinin kendisinin korunmasıdır. Konuşmamda değineceğim konu başlıklarını böylece sıralamış bulunuyorum.

Bir diğer önemli kategoriyi de kamu görevlileri ve devlet sırrı ve bunların ifade özgürlüğü ile ilişkisi konuları oluşturmaktadır. Özellikle 11 Eylül sonrası getirilen anti-terör düzenlemeleri, bir paket halinde Danimarka Ceza Kanunu'na da girmiş bulunmaktadır. Bu bağlamda, yabancı milletleri, devletleri aşağılamaya ilişkin özel hükümlerden bahsetmek istiyorum. Bu hükümler, Danimarka'nın kendisini çok ilgilendirmemektedir zira burada söz konusu olan, bir diğer devletin aşağılanmasıdır.

Yabancı devletleri aşağılamaya yer veren düzenlemeye bakacak olursak:

Türk hukukunda bu durumun ilginç olduğunu düşünüyorum çünkü Ceza Kanunu'nun 301. maddesine "Türklüğü" aşağılamak gibi bir kavram bulunmaktadır. Danimarka'da böyle bir düzenleme yoktur. Danimarka devletine veya Danimarka'nın menfaatlerine, kurumlarına karşı hareket edilebilir veya bunlar hakkında aşağılayıcı sözler sarf edilebilir. Böyle bir hükmün koyulmuş olmasındaki amaç, Danimarka'nın diğer devletlerle ve uluslar arası organizasyonlarla olan ilişkilerini korumaktır. Burada temel olarak söz konusu olabilecek eylemler, bir bayrağın bir eylem, vs. sırasında yakılması gibi eylemlerdir. Burada bir devletin bayrağının yakılması, hukuka aykırı bir fiil teşkil edecektir. (Fakat yukarıda da dediğim gibi, Danimarka bayrağı burada söz konusu olmamaktadır.) Aynı durum, aslında yakılması sorun yaratmayan Avrupa Birliği bayrakları bakımından da geçerlidir, fakat Avrupa Konseyi bayrağı bakımından değil ve Danimarka Avrupa Birliği'ne üye olduktan sonra bu konuda tam olarak ne oldu bilemiyoruz. İlk bayrağı yakabilirsiniz, ikincisini yakamazsınız ve ABD bayrağını da yakamazsınız çünkü devletlerle iyi ilişkilerimiz olsun istiyoruz

Şöyle söylenebilir ki, buradaki husus, kendi içinde bir sınırlama getirerek diğer devletlerle ilişkinin korunması suretiyle Danimarka'nın kendi menfaatinin korunmasıdır. Bunun ilginç bir düzenleme olduğunu düşünüyorum ve zannediyorum ki çoğu ülkede buna benzer bir hüküm yoktur.

ERIK KHAWAJA

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Thank you very much. As we can see we are already now behind schedule. I'll just skip the introduction remarks and just go right into the criminal law on the freedom of expressions that do actually exist in Denmark today. One introduction on note will just be; this will not be an exhaustive list of all the restrictions there are in the criminal code because there are a lot of them. I am just taking out some of the more important ones that I will focus on and some of the ones that have been debated during the last 2 or 3 years. And especially during the cartoon crisis that Denmark entered into one year ago. Just, a quick introduction remark; going on my back ground, because I do actually on a daily basis work as a legal officer in the institute of human rights, working with discrimination law, discrimination issues and discrimination issues on the European Community law bases and also on the human rights basis. So, you could say that I have an inherent idea of find the limits of freedom expression to some extent. Especially when we talk about hate speech and liable slander targeted at minorities, which might have some other human rights issues that collide with the freedom of expression. I'll try to conceptualize the idea of how the criminal code in Denmark works, and how it lists different restrictions in the rights of freedom of expression and try to list them in two main categories. The first one, which goes on the protection of individuals' rights or groups of individuals rights, which will mainly be other human rights issue. For instance, the right not to be discriminated, the right to privacy, those issues and then a more broad category which mainly relates to the state issues in Denmark which would be; protection of public security, protection of the population against terrorist activities; this one could overlap with individual or group rights but is mainly related to the Danish society and such and the Danish institutions and such. The protection of Danish relations to foreign states has a rather unique status in the criminal code which I will come back to. And the last one; the protection of religious dogmas worship, religious worship and such, which does not such relate to people with a religion but to the religion itself. I've listed the provisions and the concepts that I'll run through during this next 20 minutes. Those being first of all; hate speech, as I mentioned. It's a main limitation of freedom of expression in Denmark today, in the sense that it is the one that is being 'used' most. That's where we see a lot of case law, that's something that pops up in debate every year, every month almost. Besides this, we have, of course like any other country probably, a slander and liable provision which limits or which gives protection to individuals or groups of individuals of not being subjected to slander and liable, which is used rather rally in the Danish context today but it's not being brought that often to the court. What I should say is that the main difference between these two provisions is that the first one is on the public prosecutions and the other one is not. So you have to bring the case on your own behalf to the court.

Besides this, I'll go into in the second category, into the question of public employees, secrecy obligations, how that relates to the freedom of expression and what limitations can be put on people working in public administrative. Anti-terror provisions and instigations to permit crimes which is a bit of rather broad category, which is been introduced after 9/11, and which is part of a package that has been introduced into the Danish criminal code, which relates to privacy issues, which relates directly to freedom of information, freedom of speech issues and to some extent, some very wide restrictions on these rights of the citizens in Denmark. Then I'll move on to going to this specific provisions on; the prohibition against insulting foreign nations, foreign states, which is unique in the sense that it does not cover Denmark but only foreign nations. And then I will go into what was really important in the carton crisis; the blasphemy provisions in the Danish criminal code, which was tried to be brought in regard to newspaper publishing these cartoons.

The hate speech provision in the Danish law is a rather old one. It's from 1939 and it was actually introduced into Danish legislation and the criminal code following the attacks and the violations in Germany of the Jewish community where Denmark; the parliament thought this in order to combat and development in Denmark, it could be somehow similar to Germany as there were some Nazi sympathies in Denmark. They introduce this provision which was targeted Jewish community and protecting them and such but have a rather larger scope just protecting against anti-Semitism. In 1971, when Denmark redefined the international convention on the elimination of all forms of racial discrimination, this probation was amended a lot and it was made the main hate speech prohibition in the Danish criminal code, which then gave up and over all protection for large or different groups in the Danish society. I've just listed some of the interesting aspects which are required in all for the limitation of freedom of speech to set in. First of all, this provision only deal with public dissemination put forward in the media, put forward in the meetings but, something that's put forward in public, meaning that the private fear is kept out of this. Besides this, the messages or other ways of expressing views should be have a threatening scorning or degrading nature. And it should target at last group of persons, which to some extent moves it away from the ordinary slander and liable provisions as this is specific groups who could be targeted. So this should be, for instance targeting people from the Middle East, Muslims, or big categories or groups of people because of one of these listed grounds; race, national, ethnic, religion, sexual orientation. And we have some case law on sexual but not much. We have a lot on religion and we have a lot in race. Religion explicitly going on Muslims which have been a debate that has grown in the 80's when there was a large focus on immigration in Denmark. Especially immigration from countries with a vast Muslim population and a lot of statements have risen from politicians and other people going on, many degrading the Muslim population in Denmark, and how this has been protected. I'll not go into the case law as we will touch upon that tomorrow but just to say that looking into the freedom of expression provisions in the Danish constitution and in article 10 in the European Convention on Human Rights. Two issues are really important when talking about the hate speech prohibition. First of all, there is of course it puts limitation to all groups in them but the press has a special role in regard to 266. They have a wider field of freedom of expression than ordinary citizens. The same goes to politicians who participated in the political debate. We have decisions trying to delimit: 'ok how much wider are their freedom of expression than other people?' And now some indications that you have to do some kind of professionality test. Saying: 'O.K. do you cut off the debate? Do you cut off the possibility of expressing your political views by invoking this provision? If you do that you would probably be protected by the freedom of expression and if there are other means for instance other ways of saying things, then the wider and the greater freedom of expression, so that is has to be noted talking to press as, the press in this reproducing things putting nevos into the debate. Of course has a very important role also in the Danish society in order to get a debate about certain issues and this provision does not prohibit them in reproducing or citing the face of ..... by or the people debate about this. But then there is a grace when the protection kicks in a sanction. We will probably get back to that tomorrow when discussing specific cases on this issue. I won't talk much about the slander and liable provision in the Danish criminal code as which might be pretty much similar to other countries' provisions in this field. What other characteristics unique form this probation in comparison with the hate speech provision is that the first of all it also covers private dissemination meaning that it doesn't have to be publicly set, it's ok if it is set persons than it would be covered, this is private fear more than the provision does. Besides this, the group that is protected is different, as it's a specific group, specific individual who in their own right can take the cases on to court. That can not be done under the hate speech provision in theory because a large group of Muslims can not file complaints to the courts saying that their rights have been violated unless it is covered by this specific provision. And if some of the used express just covering a large

group that actually do not have that good protection in the Danish criminal code today. There are few possibilities under the constitution to bring law suits but it has used on the section 63 of the Danish Constitution. Besides this, there are of course the questions when dealing allegations, if they are well founded and true. Then this provision does not kick in. That is also a big difference to hate speech provision where you can not really have well founded expressions. Every expression that have the severity of that covered by that section are illegal, unless the freedom of expression delimits this restriction. The secrecy obligations of public employees is going into a provision that of course has the idea of protecting those public interests but also private interests to some extent where public employees have information on private individuals which I am not suited for the dissemination in the public and such. First of all the provision is mainly involved and has been involved during the last couple of years in some instances dealing with whistle blow tendencies that especially following the .....there had been a tendency that especially one person who provided to some journalist information from the intelligence service regarding Denmark's opinion and assessment on 'why we should go into the war' and 'what the basis for that was.' He is now being convicted in the High Court. And now the Danish public prosecution is going after the journalist who produced this in the paper and wrote the article and trying to hit them as well with this provision. And that's going to be interesting to see whether they of course got the public employee who passed it on illegally. Whether, well they can also go on and say: 'Ok but the journalist who wrote this article would also be prosecuted on the Danish criminal code. That's going to be very interesting. There are some inherent restrictions in some of the information that a public employee can pass on that is not covered by obligation such. First of all, it requires a legal public or private interest that's of course way again it's up for the specific case to assess whether the information at hand is protected. We do in the Danish context look into the public administration to see what is covered public administration specific cases and try to use it on the criminal code whether the information is such surrounds that need a public interest. Then you have to go on to assess whether it's justified to pass on this information and that is mainly an assessment of whether there is a big public interest. If there is big public interest, then the freedom of expression kicks in again and you are not delimited by secrecy obligation as a public employee. And then of course there is section 152e of the Danish criminal code, which goes into saying there are some information which by law are required to be passed on because of their value and then there is of course I am just about to do it. One of the new provisions that were introduced into Danish criminal code after the 9/11 attacks and after the whole debate that has been in other Western European countries on how to fight terrorism is a provision in section 114e of the Danish criminal code which was introduced in 2006, so it's a rather new one, and which was part of a whole package of different provisions introduced into Danish Law. To some extent, limiting fundamental rights of citizens, of privacies issues but especially also the question of freedom of expression. This provision deals with and is as such a widening, a very widening of the ordinary complicity provision that comes up in the Danish law. Because, normally Danish law complicity will kick in where there is some tend to aid as specific illegal act that will occur. This provision does not require any attempt to carry on the specific illegal act. So it is enough probably we don't have any court cases there is one case pending. Its enough just to have some kind of information or express some kind of view that kicks in saying 'well, that might not just for instance this, for instance dissemination of video tapes with images of people committing Jihads, beheadings terrorist acts form Iraq. This guy had, in this case, had a hell lot of tapes with different images of terrorist acts. And was charged with this provision saying you have then, just by having these tapes maybe distribute it may to others. Then you have, to some extent had the intent to promote activities without even having a specific act in mind when doing this. And this of course raises a lot of concerns by human rights lawyers on the issues of freedom of expression and how first of all delimited content of promotion. When do you promote something? Just downloading a piece of video from the internet showing a beheading, is that a promotion of terrorist activity groups in Iraq?

Besides that, there is the great problem of course; the ability. You don't know when you do something will result in committing a crime under this section. So, we are still waiting for this person's, this pending case this person has been among other things prosecuted just by having different tapes, different imaging without having any proven links to any terrorist groups, or any terrorist activities and such. So we are looking forward to see whether this provision will be opposed or whether the freedom of expression in a self within the limits and we hope so. Of course it's the human rights laws, it's very very wide by consequences that we have. Another provision which is unique is the provision against insults targeting foreign states. In the Turkish constitution I think it is interesting because 301 of the Turkish criminal code prohibits violation of the 'Turkishness' and such. In Denmark we do not have such provision. You can violate the Danish interest or the Danish ideas, the Danish institutions and the Danish state and say degrading things about these. But you can not do it against the foreign states. This provision was introduced in order to protect Denmark's relations to other states and also international organizations. It mainly involves, it is mainly in use in regarding burning flags in riots, demonstrations where it will be illegal directly to burn foreign states' flags but not the Danish one. The same goes to for the European Union's flags which is actually OK to burn but not the Council of European Union flag (gülüşmeler) and we don't really know what happened there after Denmark went in to the European Union. Now you can burn the first one but you can't burn the second one and you can't burn the United Nations flag because we would like good relations with other countries (gülüşmeler).The idea is to say that there is a limitation in itself which goes on or is directly linked to the idea of protecting the interest of Denmark in the relations it promises with other nations, which is an interesting provision I think. Not many countries have that last one. The last one I will just touch upon in briefly because we will come back to that one tomorrow when going through the case that will show you detail on the cartoon crisis in the provision in the Danish section, in the criminal code section 114, which deals with blasphemy. It is actually to some extent we can say it is related to the hate speech provision but in other instances, it's not as this one does not relate to Muslims or the group of people who have a specific religious belief. This goes directly to the religion saying: 'well, there is some room for protecting their ideas of Christianity, the idea of Islam, the worship of God and such.' And my personal opinion would be that this provision is probably not as important, not from the human rights' prospective as the hate speech provision. As there is this frequency regarding of protecting of group of persons and they have the human rights they have been given in order not to be discriminated and then their ideas of religion and such, which of course people follow and this provision shows that there is a very close relation to people mocking a religion and then mocking the group; Muslims or Christians who followed this religion. But as an overall rule it does not really deal with the feelings of the group, it deals with the feelings of the religion and such. And it was also, when it was introduced in the, it hadn't been used even three times since the 1930's. There has only been one conviction which was in the 30's, dealing with Anti-Semitism following the Nazi movements and growing tendency. It's been tried with some artist making a movie about Jesus which the God worked. He had been tried with a song dealing with God and mocking, including some blasphemy tendency regarding of sex and God and masturbation and those were not convicted as well. So the relevance has, until the carton crisis there was almost none, nobody really knew this existed until the carton crisis popped up and when this provision was invoked. We'll get back to that tomorrow that did not lead to any prosecution in the court case. It was dismissed by the public prosecution. Because this provision should be interpreted as only covering serious offenses against religious feelings and then the context, when it was introduced; being Anti Semitism, being something that went from maybe mocking the Jewish belief on to putting humans into gas chambers. So it's a whole different context what we see today and therefore in my view, this does not have much relevant and should not be regarded as should not be dealt much relevant as it was really touch upon the essence of restrictions of freedom of expression of people, to be able to criticize and debate religion and such which is inherent in the democratic society. I'll stop here so we can stick somehow to the time and we'll get back to this tomorrow...

ANDREW SHARLAND

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İngiliz Hukuk Sisteminin, Kara Avrupa Hukuk Sistemin'den en önemli farkı yazılı bir Anayasa metninin olmamasıdır. Dolayısıyla İngiliz Hukukunda ifade özgürlünün tanımlandığı ve konuşmalarımızda referans olarak verebileceğimiz yazılı bir kanun maddemiz veya metnimiz söz konusu değildir. Bu anlamda İngiliz Hukukuna göre ifade özgürlüğünün şöyle bir tanımı verilebilir: 'İfade özgürlüğü, yasaklanmamış herşey üzerinde konuşabilme özgürlüğüdür.'

Salman Rüştü davası İngiliz Hukukunda 'blasphemy (dine küfür) kanunu' kapsamında değerlendirilmedi çünkü ilgili Kanun sadece Hristiyan dinini korumaktaydı. Dolayısı ile İngiliz Hukukunda da bizim TCK m. 301 anlamında bir düzenleme olmasına rağmen bu hüküm uygulama alanı bulamamıştır.

ANDREW SHARLAND

Barrister, 4-5 Gray's Inn Square

Thank you. I will talk about the freedom of expression in the UK. Firstly the historical condition, secondly the .....of this year, and finally the last 4 - 5 years rather been..... recently.. Unlike both, the speakers so far talking about Turkey and Denmark and I think most of the speakers we are going to hear in the next couple of days. I didn't start my speech with a reference to our constitution. The United Kingdom, somewhat unusually doesn't have what most people would have understand 'a written constitution. So there is no document, no fundamental document where we can point to alight to freedom of speech. Equally, until very recently; last five years there has been no statute which we can point to with talks about freedom of speech. Historically, in the United Kingdom, freedom of speech is the right to say anything that wasn't expressly prohibited. So it's a very different starting point conceptually to continental Europe and most nations and America, Australia and so forth. I think another important distinction in the UK; again I think most countries, we are going to be talking about their codes, their criminal codes and so forth. And the UK doesn't really have code. We obviously have a distinction between civil law and criminal law and I think in the area of freedom of expression both relevant to their paths. Civil law is more relevant in the UK than a lot of countries. But the criminal law is made up of what is known as the common law offenses and statute offences. Common law offenses are criminal offenses that have been developed by the judiciary and revolved over hundreds of years. Problem with common law offenses; they are often way in precise; how to define you are looking at cases two hundred years old and it is very hard to say what the crime essentially is.

Looking at from the historical position, an English legal theorist someone called Darcy said freedom of discussion in England is little else than the right to say something which a jury, consisting of 12 shop keepers I think is expedient to be said or written. Now this would indicate that unpopular opinion tended to go unprotected. Historically, suppression of expression is critical of government with views necessary to maintain the reputation of government. When I am talking historically, I am talking about two three hundred years ago. There was a common law offense called seditious liable, which protected the criticism of the king and the government. And truth was not a defense to this common law offense. On the grounds that the greater the truth, the greater the liable. This is somewhat alien to modern concept of freedom of expression in human rights but this is where the UK is started. In relation to seditious liable, there is no need to prove intent to insight selection because many intending to publish criticism was unlawful as it was finding fault with your masters and your betters. So, seditious liable common law criminal offense was one of the main ways of restricting freedom of expression in the UK. Second main way was...licensing of the press. That was abolished in 1695 with licensing of other media; the theater somewhat strangely continued until 1968. And in the 60's; prosecutions of theatrical production because they offended good taste and so forth... One area when I think the UK could be set to contributed to idea of freedom of expression is a fundamental dislike of what is known as p.... restraint. I am sure most of you are familiar with different p... restraints and punishment after the act. Well, someone called Blackstone, a constitutional theorist in 1765 said: 'the liberty of the press is indeed essential to the nature of a free state. But this consists in .... no previous restraints on publications and not in freedom from center for criminal matters when published. Every free man has an un-doubtful right to say what he pleases before the public. To forbid this is to destroy the freedom of the press. But if he publishes what is improper, mischievous or illegal, he must take the consequences of his own..... So that's when the few contributions to freedom of speech and thought the UK had had.

I think another substantial contribution is what happened in the US. In reaction to the very restrictive approach in the UK, the US constitution with the first amendment protected freedom of expression very strongly and that was very much a reaction towards the limits in the UK; seditious liable and so forth. Thomas Pane who wrote a number of very important books which let, I think inspired the American Revolution in part with prosecution in the UK for sedition. And so perhaps the UK can be contribution relates to what happened in the US to an extent. In addition to the rule against p.... restraint, perhaps there are other, couple of other areas where historically there was some protection of freedom of expression. In the area of freedom of expression, I have criminal cases or civil liable. These cases were decided by juries. So if you can convince a jury that something was acceptable you would be acquitted. So criticism of unpopular politicians to whom jury members were not sympathetic, then you are O.K. You didn't have judges protecting the state. The other historical protection of freedom of expression was the protection of parliamentarian, what was said in the House of Commons was protected. So if you defame someone in the House of Commons that was subject to absolute protection. Parliamentarians could not be prosecuted in any way relation to what they said in the parliament. This was extended partly to the press, if the press was reporting responsibly what would be debated in parliament, that reporting was protected. So that's very much the historical position, very limited protection of freedom of expression. In the last 20 or 30 years, there has been an evolution, a relatively slow evolution where the rights of freedom of expression have been recognized. I think this one come about in part as a result of European influence. The UK with the signature of European Convention recognized the right of individual protection..... But I think this is a result of the US influence; we obviously share a common language, and there is a lot of similarities between our p... to laws and the common law and statutes. And there is definitely has been an intellectual influence coming from the US which is traditionally recognized the importance of freedom of expression. I am now on to set out the main limitations on freedom of expression as applied now and had in the last 20 or 30 years. Liable laws; again my understanding is within most of Europe, liable tends to focus on the criminal law rather than civil law. The UK has got a fundamentally different approach, liable has, although not exclusively, predominantly being a matter of civil law, which means individuals who have been defamed sue the press or the other individual who made the comment. English liable laws are traditionally being very.....to ..... The burden of proof, the burden of proving falsity is on the speaker. So the burden of proving truth is on the speaker, falsity is presumed. So the press has to positively show something is true rather than the person suing has to show something is false. This has led to forum shopping. You have people suing American publications; the New York Times in the UK even though that newspapers only published three or four hundred copies, and hundreds and thousands of copies in the US because of the US laws protecting freedom of speech they are being sued in the UK. There are number of defenses to liable proceedings; justification you have to show the article is true fact but you actually say it's not an assertion of fact but it's a comment and it's a reasonable comment it's not motivated by malice or qualified privilege. The type of occasion is such that the speaker should be given some protection even though the speech turns out to be true. To run a qualified privilege; defense, you need to show you have a reasonable belief in the truth of the publication and that you investigated the matter carefully and so forth. In 1993, there was a development in the area of defamation where the House of Lords; the highest court in the UK held that local authorities, local government could not sue in liable.....was cancelled and try to sue Times Newspaper for writing critical things about them and it was included by the House of Lords that was not acceptable. Local authority, central government, local government and now political parties can not sue in liable to protect their reputation. The House of Lords drew more US ideas of freedom of expression then article 10 and European concept although article

10 is mentioned in that judgment. One area where there has been some progress in the US is size of awards in defamation proceedings. ..... again there has been some very large awards in the 80's and 90 are....award. Elton John won over million pounds. A toy store won 1,5 millions case you could be familiar with the European Court of Human Rights where European Court concluded the English damages awards were so large that they interfered with the right of freedom of expression. Result of toy store damages awards has sunk quite....insigibly and defamation is less of an issue in relation to freedom of expression in the UK although, it is still an issue. Other areas whether restrictions in the UK on freedom of expression contempt to court which is the interference with the ....administration of justice. This includes scandalize in the court, making comments that undermined confidence in the judiciate and prejudicing active legal proceedings. That is quite important in again it let to quite famous case in Strlosberg; Sunday Times against the UK. England most generate quite a few fundamental cases in Strlosberg case law and Sunday Times being one such case which perhaps we can talk about in more depth tomorrow. The result in Sunday Times decision; the government introduced the contempt court at 1981 which provides for a public interest defense in a lot of circumstances and need for the any prosecution shows extensive risk of prejudice to any civil proceedings. Other areas, where those restrictions of freedom of expression obscenity and decency. That is a criminal provision to.....the corrupt individuals. There is a public good defense. The government is pretty much giving up. Prosecuting literature....very embarrassing defeats in the 1960's. D.H. Lawrence was prosecuted for 'Lady Chatterley's Lover'. Hubert Selby for 'Last exit to Brooklyn' and these were generally unsuccessful. So to attempt to prevent indecency is even harder with more magazines in these days and more DVDs and videos. There is a common law criminal offence for blasphemous liable but, it is fallen pretty much into disuse. There was a prosecution in the 1970's in relation to magazine called 'Gay news' which printed a poem. It had Jesus Christ fantasying about the homosexual relationship with a Roman .... That has been the last prosecution. There had been lot of calls for law on blasphemy to be abolished, but so far it has not been. Blasphemy in the UK only applies to the Christian religion and potentially only the Protestant Christian religion. There are attempts, there was an attempt to get Salman Rüştü prosecuted for blasphemy after he published 'the satanic verses' but it was held, blasphemy only applies to the Christian religion. So it exists but it has fallen into no use. Seditious liable which is I think an offense that is roughly equivalent to section 301 of the Turkish law and also it exist but it has fallen into disuse. There had been one prosecution in the last 70 years. That was in the 30's and that was unsuccessful. So I would say that it would not be politically possible to prosecute someone for criticizing the government generally or criticizing the UK. I think like Denmark, that type of criticism is widely permitted. Racial hatred; is where there are some limitations. Again there had been few prosecutions although in the last year or so there have been few prosecutions to those show threatening or abusive behavior and an intention to stir up racial hatred. The law was initially limited just to racial hatred. So if you thought to stir up hatred against Muslims, that would not be caught because that is religion rather than race. In the last year or so, there has now been a law introduced in relation to religious hatred. This being very controversial, and the law is very limited that so far there had been no prosecutions so its going to be, it is hard to say how big an impact it will have. But the way it's written, it is going to be very hard to bring prosecutions. There is a lot of resistance from comedians in relation to this law. They felt they will able to insult and denigrate religion and they are actually quite successful in their campaign. ...very much a limit the law. The debate in the UK was very much: race is something you born with, it is something you can't change. But religion is a set of ideas and therefore it should be subject to criticism and detention? and ridicule.

And that is why religious hatred is treated in a more limited way than race hatred. We don't in the UK have any laws about holocaust denial which is a very common uncontinental Europe. There has been debated about introducing laws but, so far they don't exist.
One other area where there are significant restrictions is our national security.....prejudice safety and interest are of the state... The statute laws especially....in 1911 very restrictive and a more recent act; 1989 act. It is pretty restrictive. There had been a number of prosecutions in this area but the jury, the English jury today number of prosecutions although on the strict wording of.... guilty of the offence charge. The juries have acquitted them because they failed what was actually been said in the public interest. There is no actual public interest defense. The jury had essentially invented one, so governments have laws to prosecute in that area because they are now extremely hard to get a conviction. Last four or five years, there had been number of significant changes; some for the good, some not so for the good. The European Convention on Human Rights was incorporated into English law from October 2000; so seven or eight years after the Danes incorporated. Like Denmark, we have a j.... system although we have a signature in the European Convention of Human Rights. It didn't become part of domestic law until October 2000. This also had a positive impact on freedom of expression. It is very much limited interpretation of quite broad laws.... impact or in deformation....qualified privilege definitely lot stronger and defamation proceedings now having less than impact on the media then they used to. However, equally since 9/11 and terrorist activities in the UK, there have been a number of recent laws that have been introduced prohibiting the glorification of the terrorism and terrorism is broadly defined. There is discussion in the last couple of weeks about introducing a law prohibiting flag burning. I think, I hope there will be no progress on that but in present you can burn any flag you want in the UK .And traditionally, it had been tolerated, it is not a common form of protest. But in relation to the Danish cartoon incident, there were protests and flags were burnt there, both UK flags and some foreign flags but at present it is permitted. So, the position at present is quite mixed. There were number of attacks on freedom of expression from the government but the present government did incorporate the European Convention on Human Rights into domestic law which is provided some protection. Thank you very much.

LİİSA NEIMINEN

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Öncelikle sizlere Türk hukukunun benim için, AİHM'nin verdiği, Leyla Şahin gibi önemli kararlar dışında tamemen yabancı olduğunu belirtmek isterim. Finlandiya 1995 yılından beri AB'ye, 1990 yılından beri de Avrupa Konseyine üye olduğundan dolayı bizlerin AB içerisindeki tecrübesi burada bulunan diğer AB ülkeleri kadar zengin değil.

....

Özellikle ifade özgürlüğü üzerinde duracağım bu sunumda belirtmek isterim ki Finlandiya hukuku bazı kararlarında özel hayatın gizliliği hakkını, ifade özgürlüğü hakkının üzerinde tutmuş ve bu tutumu AİHM tarafından eleştirilmiştir. 2000 yılında yürürlüğe girmiş yeni Finlandiya Anayasası, eski geleneklere sadık kalınarak hazırlansa da, üzerinde Avrupa Parlamenter demokrasisinden sözedilebilecek önemli değişiklikler yapılmıştır.

...

Temel haklar sisteminde, uluslararası belgeler sadece iç hukuku düzenlemede bir esin kaynağı olmamakta, Anayasa bu belgelere resmi referansları içermektedir.

...

Doğu ve orta Avrupa'da ki aşağı yukarı her ülke Anayasa Mahkemesini sistemlerine yerleştirmişken, Finlandiya'da halen Anayasa Mahkemesi bulunmamakta fakat her Mahkeme'nin Anayasa açık aykırı olduğuna inandığı kanunu uygulamama hakkı bulunmaktadır.

....

İfade Özgürlüğü Finlandiya Anayasasının 12. Maddesinde ve 2. Altbaşlığında açıkça düzenlenmektedir. İfade özgürlüğü, karar alma mekanizmasının açık tartışma süreciyle meydana gelmesi ve bu sürece ve halkın tüm kesiminin katılması anlamını taşımaktadır.

Finlandiya tarihine bakıldığında Basın Kanunu vb. gibi ifade özgürlüğü ile ilgili konularda Rus İmparatorluğu zamanında yaşanan sıkıntılar yaşanmış ve ifade özgürlüğü hakkı bağımsız Finlandiya'nın zorla kazandığı bir hak olmuştur. Bu travmatik sebeplerle toplum için büyük önem arzetmekte ve Fin toplumunda problematik hiçbir tarafı kalmamış bir konudur.

İfade özgürlüğü kişisel bir hak olarak kabul edilmiş sadece flmler, gazeteler yapım firmeları gibi gruplar için bazı sınırlamalar getirilmiştir. Yani Finlandiya'da istediğinizi iletişiminiz olan bir TV kanalında söyleyebilirsiniz fakat bunun yayınlanıp yayınlanmaması o medy grubunun patronunun kararıdır. Çünkü yayıncının sorumluluğu vardır.

İfade özgürlüğü her türlü iletişim teknolojisini ve hertürlü ifadeyi kapsamaktadır. İfade özgürlüğünün amacı, halk iradesinin oluşumuna katkıda bulunmak, halk tartışması yaratmak, yaygın özgür iletişimin, çoğulculuğun ve erkin uygulamalarına karşı toplum kritisizmini geliştirilmesini sağlamaktır. Politik görüşlerin açıklanmasına bir sınır getirlmesi beklenemez.

...

Özgür konuşma ve sembolik konuşma, gösterme amacıyla kabuledilemez hareketler yapılması durumdan farklı değerlendirilmelidir. Kabuledilemez hareketi yapan kişinin kendisininkinden başka bir kimsenin malına zarar verdiği hallerde, devlet otoritesi devreye girecektir ve bir suçtan bahsedilebilecektir. Fakat bayrak yakmak veya bir mülke zarar vermek gibi örneklerde önem arz eden kriter, zarar verilen şeyin, zararı veren kişiye ait olmasıdır.

LİİSA NEIMINEN

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First I want to thank for the invitation. It is a great honour and a pleasure for me to be invited to speak at this conference.

1 General Remarks

I have to admit that the Turkish legal system is totally unknown to me. Of course I know some famous judgements of the European Court of Human Rights, e.g. Leyla Sahin case, but they are not the topic of this conference.

Even though we quest lecturers all come from EU countries, as a standpoint for this conference must be taken that there are great differences between legal systems of our countries. Because Finland has been a member of the EU only from the year 1995, our experiences are not as old as those of many other EU member states, e.g. Germany and France. I want also to mention that Finland has been a member of the Council of Europe – and bound by the European Convention on Human Rights - only from the year 1990. This membership is much shorter than for example the membership of other Nordic Countries. Before the 1990s the official doctrine was that Finland as a neutral country did not want to be a member of those Western organisations.

There are many similarities between the legal systems of different Nordic countries but I mention only one obvious general feature of Nordic constitutional law, i.e. the welfare ideology which incorporates ideas according to which the public sector (state) has a great responsibility for general welfare, and the idea of equality between different social groups as well as between the sexes. This ideology has had a great impact on the Nordic perception of fundamental rights, law and politics.

In this presentation I have a very limited perspective on the Finnish legal system. I try to explain you shortly the basics of the Finnish constitutional system and especially the freedom of expression guaranteed as a fundamental right in the Constitution of Finland. Our legislation is quite fresh in this area, but Finland has had problems with the freedom of expression. With this I refer to some recent judgements of the European Court of Human Rights. The Court had not always agreed with the Finnish Courts as far as concerns the limits of the privacy which is also guaranteed as a fundamental right in the Finnish Constitution. The Human Rights Court has interpreted the freedom of expression more widely than the Finnish Courts, which have stressed more the importance of privacy.

Although the Constitution of Finland from the year 2000 builds on the tradition of earlier constitutional documents and the piecemeal amendments made to them, the new Constitution also includes new elements that make it justified to speak of a modern constitutional document of a European parliamentary democracy.

The constitutional protection of fundamental rights is based on a wide understanding of rights that deserve protection including besides traditional civil and political rights, also economic, social and cultural and environmental rights.
Another distinctive feature of the fundamental rights system is the strong role of international human rights treaties within the framework of the domestic Constitution. International instruments did not only serve as a source of inspiration in formulating corresponding constitutional provisions but the Constitution also includes formal references to internationally protected human rights.

According to the Constitution it is a constitutional obligation of all public authorities to guarantee the observance of constitutional rights and international human rights.

Traditionally the role of the judiciary has not been predominant in the protection of constitutionally guaranteed fundamental rights in Finland. The new constitution has changed the situation at least in theory, because instead of a prohibition of judicial examination of the constitutionality of laws passed by the Parliament the new constitution includes a clause on the jurisdiction of courts to give priority to the constitution in cases where the application of an ordinary law would lead to a manifest conflict with the Constitution. In practice the courts have done in this way very rarely.

Traditionally and even today the main responsibility over the application and interpretation of constitutional rights rest with the Constitutional law committee of the Parliament, within the framework of preview over the constitutionality of new legislation. However, increased interest in international human rights treaties has, since the late 1980s, paved the way for a more active approach by the judiciary. One of the proclaimed objectives of the 1995 fundamental rights reform was also to guarantee in the Constitution a set of directly applicable rights. Since 1995, constitutional rights provisions have relatively often been referred to in the rulings of ordinary and administrative courts, either alone or together with international human rights treaties. The new Constitution from 2000 goes one step further in the same direction, as I already said.

Even though most Eastern and Central European countries have recently established Constitutional Courts as their efforts towards the rule of law. In Finland we don't have a constitutional court, but instead any court has jurisdiction not to apply an ordinary law if that would lead to a manifest conflict with the Constitution.

An important role in the overall framework of rule of law is exercised by the Parliamentary Ombudsman. In the performance of his or her duties the ombudsman monitors the implementation of fundamental rights and human rights. The institution of parliamentary ombudsman is historically a Nordic institution even though nowadays almost all EU member states have an Ombudsman and even the EU has its own ombudsman.

2 . Freedom of Expression

Section 12 of the Finnish Constitution provides that "everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone".

Further subsection 2 of the same section provides that "documents and recordings in the possession of the authorities are public, unless their publications has for compelling reasons been specially restricted by an Act. Everyone has the right of access to public documents and recordings."

Freedom of expression has been regarded as a system that provides for participation in decision-making through a process of open discussion which is available to all members of the community. The right of all members of society to form their own beliefs and communicate them freely to others must be regarded as an essential principle of a democratically-organized society. This means that both historically and also today the right to political communication forms in Finland the core of the freedom of expression.

In Finland the freedom of speech became an issue at the beginning of the 20th century, and the press freedom was established in 1919 with passage if the Freedom of the Press Act. During the period of

autonomy in the Empire Russia from 1809 to 1917 the preventive censorship prevailed. At the beginning of the 20th century the conditions of censorship were rather confusing despite of the 1906 Constitution of Freedom of Speech, Assembling and Association. The freedom of the press without prior restraints was finally established in Finland in 1991 after Finland's independence from Russia in 1917.

Because of these traumatic events freedom of expression is in Finland highly appreciated fundamental right. This does, however, not mean that this right would be totally unproblematic today.

Freedom of speech as a constitutional right has been regarded as an individual right of everyone, but the use of it within organizations alters the individual character. Broadcasting, films, newspapers, magazines and other products of mass communication are all products of working groups and organizations, and this production of mass communication has very little to do with the individual free speech of those who have been employed with the organizations.

So, freedom of speech means that you have right to use free speech in those media you have access to, but the owner of the media may deny the access to the media by claiming that the ownership of media grants the right to determine the content of the media. In practice this will restrict the meaning of individual right very strictly.

Freedom of expression consists of all communication technologies – oral, printing, broadcasting, cable transmission and telecommunications. It comprehends all forms of expressions. The purpose of freedom of expression is to contribute free creation of public opinion, open public discussion, free development of mass communication and pluralism and possibilities for public criticism against the exercise of power. Freedom of expression cannot be limited to mere political expression, but it covers all kinds expressions regardless of their content. It covers artistic expressions and all kind of expressions regardless of their content. It covers artistic expressions and all kind of expressions of creative activities. It covers also commercial expressions.

Freedom of expression could be classified to the active right to send, impart and publish information and to have the access right to obtain and receive information. The access right to receive information is closely connected to the publicity of documents prescribed also in section 12 of the Constitution. The access rights to public documents will be regulated in the Act on Publicity. The publicity of documents is in Finland –and in other Nordic countries – much wider than in most other countries. Publicity is in Finland the main rule.

The use of free speech and symbolic speech should be distinguished from unacceptable actions for demonstrative purposes. Burning flags and destroying property in demonstrations belongs to the protected symbolic speech as long as person destroys one's own property, But if there is a damage to the property of others, the actions constitute criminal offences.
The damaging of the property cannot be justified by the use of demonstrative expressions even if the offender has demonstrative purposes.

The freedom to hold and participate in meetings and demonstrations of Section 13 of the Finnish Constitution intersects with the freedom of speech in the meaning that collective opinions are usually presented in demonstrations. The demonstrations symbolize culmination of the freedom of assembly and freedom of expression.

The prohibition of prior restraints constitutes the core of the freedom of expression. In Finland the prohibition of prior restrains has emphasized that courts and administrative authorities should not in any circumstances prevent the publishing of messages.

The objections to prior restraints date back to the censorship of the repressive political situation prior to 1906. Constraints remained, however, in the form of film and video censorship until the new Act on Film Security in 2001. In spite of the abolition of prior restraints of other forms of expressions, films and videos have been sensitive for the preventive censorship will remain for film distribution to children younger than 18 years.

The Constitution of Finland includes also a right to private life (section 10). When using the right to freedom of expression you may violate someone's right to private life. How to find a balance between these two rights, which have equal status but may have tangible spheres of application? In Finland there is a lot of case-law on this problematic relationship but I shall tell more about it tomorrow.

The EU membership of Finland did not require any significant amendments to the Finnish legislation on freedom of expression. This right has in Finland so long traditions already from the beginning of the 20th century that the europeanization has not been so effective in this field of law.

I want to stress that for example the principle of publicity of documents is in Finland so wide that our system was as a model for publicity guaranteed also in the new Charter of Fundamental Rights of the Union from 2000 (Art. 42: Right of access to documents).

Thank you for your attention!

Prof. Dr. BERTRAND MATHIEU

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İfade özgürlüğü, temel haklar sistemi içerisinde önemli bir yere sahiptir. Düşünce özgürlüğünün bir şartını oluşturduğundan, kişilerin kimliklerini ve entellektüel özerkliklerini ifade edebilmelerini sağlamakta ve toplumdaki diğer kişilerle ilişkilerini düzenlemektedir.
3. Cumhuriyet'te 29 Temmuz 1881 tarihli Basın Kanunu ifade özgürlüğü hakkında liberal bir görüşle yazılmıştır.
... Düşünce özgürlüğü hakkı, birçok hakkı kapsaması ve türev birçok hakka sahip olması dolayısıyla matrisli bir haktır. Fikir ve iletişim özgürlükleri düşünceye bağlı özgürlüklerin temel yapı taşlarını oluşturmaktadır. Bu haklar 1789 bildirgesinde ve Anayasa Mahkemesi kararlarında tanımı bulmaktadırlar.
...
Hiçbir özgürlüğün mutlak ve sınırsız olmadığından hareketle, bu haklara da bazı normativ sınırlamalar getirilmiştir. Genelde hakimler bu sınırlamaları dar yorumlamaktadırlar. Fransız Yargıtay'ının devlet başkanına basın yolu ile saldırıda bulunulması olayına karşı verdiği 21 Aralık 1966 tarihli kararında, somut olayın maddi olarak Devlet başkanının seçim öncesi ve sonrasındaki özel hayatının saldırı ve aşağılama şeklinde sunulmasının, devlet başkanının onur ve saygınlığına zarar verdiğini söylemektedir. Bu kabahat, 5. Cumhuriyet boyunca bşrçok defa kullanılmış, artık günümüzde neredeyse metruk kalmıştır. Aşağılanmaktan devlet güvencesi ile korunan diğer kurumlarda bulunmaktadır. Mahkemeler, silahli kuvvetler, kamu yönetimleri. 1881 Kanunu devlet memurlarının yaptıkları iş ve kişilikleri dolayısıyla aşağılanmalarını da cezalandırmaktadır. Ceza Kanununun 434-25 ve 434-16. Maddeleri bir mahkeme kararına karşı o kararının kredibilitesini düşürecek, yargılama sırasında tanıkları veya kararı etkileyecek yorum yapılmasını suç saymaktadır. Mahkeme kararının saygınlığı kavramında kullanılan kişiyi harekete geçirecek açıklamaların bulunmasıdır. Aynı mantıkla 1987 tarihli Kanun intihara özendirmeyi de suç saymaktadır. 1881 Kanunu 24. Maddesi bazı şuçları, tamamlanmamış olsada bir kimseyi suça teşvik etmeyi suç olarak düzenlemektedir. Bu suçlara örnek olarak, yaşam hakkı, vücüt bütünlüğü, hırsızlık, dolandırıcılık, toplumun temel çıkarlarına aykırı davranış, terör veya terörü övme ve insanlığa karşı suçları övme, düşmanla suç işleme amaçlı işbirliği, bir veya bir insan grubuna karşı etniğine, ulusuna, cinsiyetine, ırkına, dinine, cinsel tercihine, özürüne yönelik nefret ve şiddet verilebilir. İfade özgürlüğüne getirilen sınırlamalar kişiyi korumaya yöneliktir. 1881 kanununda bulunan 35. Madde de ele alınan aşağılama da bu amacı taşımaktadır. Aşağılama bu madde de, "kişinin veya ait olduğu durumun onuruna yönelik tüm saldırılar" olarak tanımlanmaktadır.
... İfade özgürlüğüne getirilen bazı sınırlamalar, temel haklara saygı duyulmasını sağlamak amacı ile getirilmiştir. Bunlar fransız tarihinin ve kamu düzeneninin ürünleridir. Korunmuş değerler arasında semboller, bayrak, milli marş sayılabilir.
2003 yılında ceza kanununa milli marş ve üç renkli fransız bayrağına karşı fiiller girmiştir. Bu kanun Anayasa mahkemesi tarafından Anayasa'ya uygun bulunmuştur.
Daha açık olarak, 1986 tarihli İletişim özgürlüğü kanunu, iletişim özgürlüğünün ancak bir kişinin kişilik değerlerine zarar verdiği sürece sınırlanabileceğini belirtmektedir.
...
Bilim ve araştırma özgürlüğü konusunda ayrıca, tarihin yanıltılarak anlatılması ile üçüncü şahışlara zarar vermeyi amaçlanan davranışları cezalandırmada, medeni sorumluluk hükümleri, hatta daha önemli durumlarda cezai sorumluluktan bahsedilebilecektir. Yargıç, tarihin gerçeklerin hakimi olamaz ve sonuçlar üzerinde açıklama yapmaya yetkisi yoktur. ... 1789 belgesinin mantığını takip ederek, bilimsel olmayan, rahatsız edici ve tehlikeli olanın engellenmesi için, yargıcın "doğru" demesine ve bu bağlamda yargıya ihtiyaç yoktur.

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LA LIBERTE D'EXPRESSION EN FRANCE

La liberté d'expression occupe au sein du système des droits fondamentaux une place essentielle. En effet, constituant une condition de la liberté de la pensée, elle exprime l'identité et l'autonomie intellectuelles des individus et conditionne leurs relations aux autres individus et à la société.
Les vicissitudes de son histoire en France sont étroitement liées à la nature des régimes politiques en place.

Sous la III°République, la grande loi sur la presse du 29 juillet 1881, s'inscrit dans la logique d'une conception libérale de la liberté d'expression. Ce texte, comme on le verra, largement modifié depuis, fédère les éléments législatifs qui caractérisent le principe et les limites de la liberté d'expression, alors même que ces principes et ces limites dépassent le champ de la presse. Alors que cette loi avait considéré que l'interdiction des cris et chants séditieux proférés dans des lieux ou réunion publiques suffisait à protéger la République, la loi du 28 juillet 1894 sanctionne la provocation à la révolte ou à la désobéissance dans un but de propagande anarchiste. Le décret loi du 6 mai 1939, abrogé depuis, institue un régime d'autorisation administrative pour les publications de presse étrangères. La loi du 16 juillet 1949 établit des mesures répressives pour les publications présentant un danger pour la jeunesse. Plus récemment, la loi du 17 juillet 1970 vise à protéger la vie privée des personnes et la loi du 1° juillet 1972 sanctionne la diffamation envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou non appartenance à une ethnie, une nation, une race ou une religion déterminé ainsi que la provocation à la discrimination

Depuis une quinzaine d'années, dans le cadre ou en dehors du champ de la loi de 1881, les interdictions à la manifestation d'opinion se sont développées. Elles recouvrent des préoccupations différentes, la lutte contre le négationnisme du génocide juif (lois du 13 juillet 1990 et du 16 décembre 1992), la reconnaissance de l'esclavage comme un crime contre l'humanité (loi du 21 mars 2001), la reconnaissance du génocide arménien (loi du 29 janvier 2001), l'élargissement du champ de la répression de la provocation aux crimes et délits et de la diffamation commise envers une personne ou un groupe de personnes à raison de leur sexe, de leur orientation sexuelle (« homophobie ») ou de leur handicap (loi du 30 décembre 2004). Elles visent toutes au nom de la protection d'intérêt spécifique à retreindre le champ de la liberté d'expression.

L'analyse du cheminement parcouru doit partir de l'analyse des fondements constitutionnels sur lesquels reposent la liberté d'expression avant d'analyser les limites qui ont pu lui être apportées par le législateur ainsi que les logiques dans lesquelles elles s'inscrivent.

I-L'ANCRAGE CONSTITUTIONNEL DE LA LIBERTE D'EXPRESSION

Trouvant un solide ancrage dans la Déclaration des Droits de l'homme et du citoyen de 1789, la liberté d'expression se manifeste de multiples manières dans nombre de dispositions constitutionnelles et dans l'interprétation qu'en donne le Conseil constitutionnel. Ces principes relèvent de la liberté de la pensée. Ils ont vocation à s'appliquer dans l'ensemble des régimes législatifs qui s'imposent aux différents canaux d'expression dont le nombre et la nature tendent à se développer à l'instar des supports techniques.

1-La liberté de la pensée, une liberté polymorphe

La liberté de la pensée est une liberté matricielle sur cette notion, cf. B. Mathieu, Pour la reconnaissance de principes matriciels, D. 1995, chron. P. 211 en ce qu'elle engendre d'autres libertés qui en dérivent ou qui sont connexes.

Ainsi les libertés de la pensée recouvrent aussi bien les libertés qui permettent la formation de l'opinion que celles qui conduisent à leur expression. Elle recouvrent des libertés substantielles comme des libertés garanties sur ces notions, cf. B. Mathieu et M. Verpeaux, Contentieux constitutionnel des droits fondamentaux, LGDJ, 2002.

Les libertés d'opinion et de communication constituent le cœur de ces libertés liées à la pensée. L'article 10 de la Déclaration de 1789 déclare que « Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi. Ainsi l'expression est d'emblée considéré comme le corollaire de l'opinion, alors même que la Déclaration consacre un article spécifique à la libre communication des pensées et des opinions. La limite (nous reviendrons sur cette question) implique à la fois une menace à l'ordre public et l'intervention du législateur pour caractériser cette menace. L'article 11, affirme que la libre communication des pensées et des opinions est « un des droits les plus précieux de l'homme. Tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminé par la loi ». La limite à cette liberté essentielle renvoie ici à un régime de contrôle a posteriori, de responsabilité, encadrée par le législateur. Le caractère prééminent de la liberté d'expression a trouvé un relais dans la jurisprudence du Conseil constitutionnel qui a considéré que «"s'agissant d'une liberté fondamentale, d'autant plus précieuse que son exercice est l'une des garanties essentielles du respect des autres droits et libertés et de la souveraineté nationale, la loi ne peut en réglementer l'exercice qu'en vue de le rendre plus effectif ou de le concilier avec celui d'autres règles ou principes de valeur constitutionnelle." (décision 84-181 DC).
Parmi ces libertés, certaines doivent être mises en exergue du fait du lien étroit, consubstantiel, qu'elles entretiennent avec le principe de la liberté d'expression. Il en est ainsi au tout premier chef de la liberté de conscience. Cette liberté est articulée autour de la question de religion. Elle implique le droit à la croyance ou à l'incroyance et le droit de choisir entre telle ou telle religion ou tel ou tel courant de pensée.

La liberté de communication comprend également le choix du vecteur de sa pensée. C'est ainsi que le Conseil constitutionnel a considéré que cette liberté impliquait le droit pour chacun de choisir les termes jugés par lui les mieux appropriés à l'expression de sa pensée (décis. 94-345 DC). La liberté d'expression peut être renforcée pour certaines catégories de personnes. Il en est ainsi pour les enseignants chercheurs de l'enseignement supérieur et, spécifiquement, pour les professeurs d'université, cette liberté garantissant à la fois la liberté de la recherche et le pluralisme des opinions dans la formation des étudiants et le développement de leur esprit critique (décis. 83-165 DC et 93-322 DC). En revanche, c'est la liberté de conscience des usagers du service public ou des élèves qui est protégée par les dispositions limitant les modalités d'expression de leur opinion par les fonctionnaires ou les enseignants. Il en est ainsi des dispositifs, traditionnellement encadrés par la jurisprudence du Conseil d'Etat, qui imposent aux fonctionnaires la mesure et la retenue dans l'expression de leur opinion, en tenant compte, notamment, de la place de l'agent dans la hiérarchie, de la nature de ses fonctions ou de ses activités syndicales. (CE 11 janvier 2001, Bouzouquet, R. 44). Il en est ainsi également des dispositions législatives qui prévoient que « Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit » (loi du 15 mars 2004).

Parmi ces libertés liées à la pensée, il en est une qui revêt une importance toute particulière en ce qu'elle conditionne la formation même de la pensée, c'est la liberté de la recherche. Elle constitue la condition de l'accès à la connaissance (décis. 2000-439 DC).
La liberté de la recherche, ou liberté de la science, est un principe dont la valeur constitutionnelle a été reconnue tardivement en droit constitutionnel français (décis. 94-345 DC).

2-L'expression de la portée constitutionnelle du principe de la liberté d'expression au travers de régimes législatifs spécifiques.

C'est le droit de la presse qui a d'abord traduit de manière spécifique la portée du principe de la liberté d'expression. Mais ce droit inscrit, pour l'essentiel dans une loi de 1881, n'a pas fait l'objet d'une véritable jurisprudence constitutionnelle. De la même manière les modifications importantes qui lui ont été apportées, essentiellement depuis 1972, en augmentant sensiblement le champ des dérogations à la liberté ainsi proclamée n'ont pas été soumises au Conseil constitutionnel. Tel n'est pas le cas du droit de la communication audiovisuelle dont le régime juridique traduit la portée constitutionnelle du principe. Ce régime s'adapte à l'évolution des supports d'information et trouvera nécessairement de nouveaux développements dans le droit de l'Internet, chaque support conduisant à analyser en des termes nouveaux le principe de la liberté d'expression. Ainsi le droit de la presse s'intéressait essentiellement à l'émetteur de l'information, alors que le droit de la communication audiovisuelle est plus tourné vers le récepteur, quant au droit de l'Internet, il mêle étroitement l'émetteur et le destinataire, qui peuvent être une seule et même personne.

Le droit de la presse entretient un lien étroit avec la liberté d'expression. D'une part la loi de 1881 inscrit dans son article un le principe selon lequel « l'imprimerie et la librairie sont libres ». D'autre part, ce texte instaure, s'agissant des limites apportées à l'exercice de cette liberté un système répressif par nature plus libéral qu'un système d'autorisation préalable. Par ailleurs, mais cela nous renvoie à des développements ultérieurs, cette loi, dans ses aspects pénaux renvoie à des infractions dont le champ d'application s'étend au delà des activités de presse et qui concernent, au sens large, la liberté d'expression. Le texte vise les journaux, les périodiques et l'affichage.

Selon la jurisprudence du Conseil constitutionnel, la liberté de communication audiovisuelle présente deux caractéristiques essentielles. D'une part, elle jouit, au sein des droits et libertés constitutionnellement reconnus, d'une place privilégiée : c'est une liberté d'autant plus fondamentale que son exercice est l'une des garanties essentielles du respect des autres droits et libertés et de la démocratie (décision 86-217,). D'autre part, elle s'inscrit dans un ensemble plus vaste. Ainsi l'audiovisuel est une des composantes essentielles de l'ensemble des moyens de communication dont la presse fait également partie (décision 86-210 DC).

Le pluralisme des courants d'expression socioculturels, la démocratie et la liberté de communication audiovisuelle forment ainsi un ensemble indissociable, ce qui explique le caractère tout à fait fondamental de cette liberté. (Décis. 89-271 DC, 93-333 DC et 2000-433 DC).

Mais contrairement à la presse, le régime est celui de l'autorisation préalable et non de la sanction a posteriori. Le Conseil constitutionnel a admis (décision 81-129 DC) que l'exercice de la liberté de communication audiovisuelle soit soumis à un régime d'autorisation administrative tant pour des raisons techniques, comme la limitation des fréquences disponibles, que pour des raisons tenant à la réalisation d'objectifs constitutionnels (cf. décision 88-248 DC).

L'encadrement juridique de l'Internet est mis en œuvre par la loi du 21 juin 2004 (loi pour la confiance dans l 'économie numérique). La régulation s'opère, comme pour la presse, essentiellement a posteriori par un régime spécifique de responsabilité qui concerne, notamment, les prestataires techniques, fournisseurs d'accès et d 'hébergement sur cette question, cf. not. D. de Bellescize et L. Franceschini, Droit de la communication, Thémis, PUF,2005, p440 et s. .

II-LA QUESTION DES LIMITES LEGISLATIVES APPORTEES A LA LIBERTE D'EXPRESSION

Si aucune liberté ne présente un caractère absolu, sous réserve peut être de la liberté de conscience dans ce qu'elle a de plus intime, et si l'instrument que représente la proportionnalité permet à l'autorité normative ou au juge de concilier les libertés entre elles et avec des exigences d'intérêt général.

1-Les limites tenant à la protection d'autres exigences constitutionnelles

Les articles 10 et 11 DDHC indiquent ces limites naturelles à la liberté d'expression que constituent

la protection de l'ordre public et l'abus de cette liberté qui renvoie également à la protection des droits d'autrui. A ces exigences s'en ajoutent d'autres qui visent la protection de certaines valeurs qu'incarne la République.

A-La protection de l'ordre public et des droits d'autrui

La protection de l'ordre public est prévue par l'article 10 DDHC comme une limite à la libre communication des pensées.

Le juge de l'application de la loi opère en général une lecture restrictive de ces exigences. Sont en ce sens susceptibles d'engager la responsabilité pénale de leurs auteurs certains propos tenus, notamment, les offenses au chef de l'Etat par voie de presse. Dans une décision du 21 décembre 1966 (bull. 300), la Cour de cassation a défini ce délit comme « matériellement constitué par toute expression offensante ou de mépris, par toute imputation diffamatoire qui à l'occasion tant de l'exercice de la première magistrature de l'Etat que de la vie privée du président de la République ou de sa vie publique antérieure à son élection, sont de nature à l'atteindre dans son honneur ou dans sa dignité ». cf. B. de Lamy, La liberté d'opinion et le droit pénal, précité, p. 241 et s. Ce délit largement invoqué lors des premières années de la Vème République, est quasiment tombé en désuétude depuis un quart de siècle. Ce sont également les institutions de la République, donc l'ordre public, qu'il s'agit de protéger de la diffamation. Il en est ainsi des cours, des tribunaux, des armées de terre, de mer, de l'air, des corps constitués et des administrations publiques. La loi de 1881 sanctionne également la diffamation envers certains titulaires de fonctions publiques commise à raison de leur fonction ou de leur qualité. Le code pénal (art. 434-25 et 434-16) sanctionne spécifiquement l'action de jeter le discrédit sur un acte ou une décision juridictionnelle ou celle de publier des commentaires qui visent à exercer des pressions sur les témoins ou sur les décisions de justice. Ce dernier délit ne semble pas avoir fait l'objet de sanctions par les juges répressifs B.de Lamy, op. précité, p. 271. Quant à la première de ces incriminations, elle exige que l'auteur « ait voulu atteindre la justice considérée comme une institution fondamentale de l'état, dans son autorité et son indépendance » (Cass. crim 11 mars 1997, bull n°96). Relève également de la protection de l'ordre public la sanction de la provocation aux crimes et délits par l'article 23 de la loi de 1881. Il convient alors que cette provocation ait été suffisante pour conduire un individu à passer à l'acte. Dans le même sens une loi une loi de 1987 (art. 223-13 du code pénal) a sanctionné la provocation au suicide. L'article 24 de la loi de 1881 punit également la provocation à la commission de certains crimes et délits alors même qu'elle n'aurait pas été suivie d'effets. Parmi ces crimes et délits : les atteintes à la vie, à l'intégrité des personnes, les vols, extorsions, dégradations volontaires dangereuses pour les personnes, les crimes portant atteinte aux intérêts fondamentaux de la Nation, le terrorisme ou l'apologie du terrorisme et l'apologie des crimes contre l'humanité ou des crimes et délits de collaboration avec l'ennemi, la discrimination, la haine ou la violence envers une personne ou un groupe de personnes à raison de son origine de son ethnie, de sa nation de sa race de sa religion de son sexe, de son orientation sexuelle ou de son handicap. Diverses dispositions pénales visent enfin à protéger les mineurs contre l'accès à des messages à caractère violent pornographique ou de nature à porter gravement atteinte à la dignité humaine (art 227-24 Code pénal). On pourrait également prendre en compte la protection de la santé, comme limite à la liberté d'expression

D'autres limites à la liberté d'expression visent à protéger les individus. Il en est ainsi de la diffamation. Prévu par l'article 35 de la loi de 1881, ce délit est constitué par « toute allégation ou imputation d'un fait qui porte atteinte à l'honneur ou à la considération de personne ou du corps auquel le fait est imputé ». Lorsque les propos incriminés sont considérés comme des opinions il n'y a pas diffamation, faute de l'invocation d'un fait précis cf. B. d Lamy, op. précité, p. 168. Dans cette hypothèse, le prévenu peut échapper à la sanction pénale en apportant la preuve de sa bonne foi ou de la vérité des faits diffamatoires, sauf lorsque l'imputation concerne la vie privée de la personne ou des faits qui remontent à plus de dix années. L'injure est également sanctionnée au titre de la loi de 1881 (art . 33). Les

diffamations ou les injures dirigées contre la mémoire des morts ne sont sanctionnées que dans le cas où les auteurs de ces diffamations ou injures auraient eu l'intention de porter atteinte à l'honneur ou à la considération des héritiers, époux ou légataires universels vivants.

Le respect de la vie privée, de l'image d'une personne et de la présomption d'innocence font également obstacle à une libre diffusion d'informations concernant une personne et font l'objet d'une protection spécifique. En effet, selon la Cour de cassation, la seule constatation de l'atteinte à la vie privée ouvre droit à réparation, indépendamment de l'existence d'un éventuel préjudice (cass. civ. 1 5 novembre 1996, bull. civ. I 378). Les divergences entre la jurisprudence française et celle de la Cour européenne des droits de l'homme traduise le fait que traditionnellement l'arbitrage opéré en France entre la protection de la vie privée et la liberté de l'information était plutôt favorable à la première de ces exigences CEDH arrêt Fressoz et Roire c. France du 21 janvier 1999.

B-La protection des valeurs de la République

Un certain nombre de limites apportées à la liberté d'expression visent à défendre des valeurs plus que des droits, à veiller au respect de principes fondamentaux plus qu'à prévenir des désordres. Ces valeurs peuvent être considérées comme des valeurs essentielles de la République, c'est à dire les principes fondamentaux l'ordre juridique français, produit de son histoire et des exigences contemporaines.

a)Les valeurs protégées

Ces valeurs peuvent s'incarner dans des symboles, le drapeau et l'hymne national. Elles renvoient également à des droits ou libertés jugés particulièrement fondamentaux. Il en est ainsi de la dignité humaine. Les valeurs religieuses sont essentiellement des valeurs individuelles, leur respect s'inscrit également dans ce que l'on peut appeler le pacte républicain, au travers du principe de laïcité qui exprime non seulement une obligation de neutralité mais aussi le respect des croyances de chacun.

Une loi de 2003 insère dans le code pénal (art. 433-5-1 CP), l'incrimination d'outrage public à l'hymne national ou au drapeau tricolore. Cette limitation apportée à la liberté d'expression a été jugée conforme à la Constitution par le Conseil constitutionnel au motif que cette infraction excluant de son champ les œuvres de l'esprit, les propos tenus dans un cercle privé, les actes accomplis lors de manifestations non organisées par des autorités publiques ou non réglementées par elles, le législateur avait opéré une conciliation satisfaisante entre la protection des symboles constitutionnels de la République (art. 2C) et la liberté d'expression de conscience et d'opinion (décis. 2003-467 DC).

Plus généralement, la loi de 1986 relative à la liberté de communication prévoit que l'exercice de cette liberté peut être limité, notamment, dans la mesure requise par le respect de la dignité de la personne humaine. La dignité dont il s'agit doit être considérée comme une valeur plus qu'un droit. En effet, elle signifie l'interdiction de porter atteinte à la dignité d'une personne alors même que celle ci consentirait à cette atteinte ou la solliciterait. C'est un droit objectif, plus qu'un droit subjectif.

Ce droit suppose l'égalité ontologique entre les êtres humains du seul fait de leur appartenance à l'humanité. Il ne suppose pas une égalité réelle mais prohibe toute discrimination tendant à considérer qu'un homme est moins homme du fait de son appartenance à une « race » une ethnie, une religion... C'est dans cette logique que s'inscrit, a priori, la multiplication des incriminations qui, inscrites dans la loi sur la presse de 1881, visent la provocation à la discrimination à la haine et à la violence ou l'injure à l'égard d'une personne ou d'un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non appartenance à une ethnie, une nation, une race ou une religion déterminée, auxquels se sont ajoutées en 2004 les raisons tirées du sexe, de l'orientation sexuelle ou du handicap. Pourtant, il est une chose de répondre civilement ou pénalement du dommage causé à autrui du fait d'une discrimination raciale ou autre , il est une autre chose d'interdire, indépendamment de tout dommage de porter un jugement sur le comportement d'un groupe défini par exemple en fonction de ses orientations sexuelles ou de ses convictions religieuses.

Ces lois posent de réels problèmes de constitutionnalité en ce qu'elles reconnaissent légalement l'existence de groupes faisant l'objet d'une protection spécifique. Il s'agit d'abord d'une rupture avec la conception universaliste des droits de l'homme. Cette conception implique que chaque homme se voit reconnaître une égale dignité du seul fait qu'il est homme sans qu'aucune autre considération ne puisse intervenir. Ainsi cette reconnaissance du groupe est contraire à la Constitution, telle qu'interprétée par le Conseil constitutionnel qui dans sa décision 2004-505 DC a affirmé que « Les articles 1 à 3 de la Constitution ... s'opposent à ce que soient reconnus des droits collectifs à quelque groupe que ce soit, défini par une communauté d'origine, de culture, de langue ou de croyance ». Certes, l'orientation sexuelle ne figure pas dans cette liste, mais elle y trouve nécessairement sa place. Par ailleurs ces lois conférant aux associations la faculté de se porter partie civile en la matière tendent à constituer des sorte de vigiles privés chargés de contrôler l'expression de la pensée.

b-Peut-on contester les valeurs ainsi protégées ?

La question des limites apportées à la liberté d'expression dans une société qui repose notamment sur l'affirmation de ce principe n'est pas nouvelle, l'on se souvient de l'expression « pas de liberté pour les ennemis de la liberté » en vogue sous la Révolution française et dont la mise en œuvre a couvert les pires excès. Elle est récurrente, si l'on se réfère aux considérations embarrassées de la Cour européenne des droits de l'homme sur cette question sur cette jurisprudence, cf. not. F. Sudre, Droit international et européen des droits fondamentaux, PUF, 2005, n° 148 et 242 et s. . L'universalité des droits de l'homme et de la démocratie est probablement une chimère. Le système démocratique est concurrencé par d'autres systèmes fondés sur d'autres valeurs, en particulier des systèmes théocratiques. Dans un tel contexte, il est cohérent, même si l'on peut juger cela inacceptable au regard de notre propre système de valeurs, que le blasphème soit sanctionné et que les préceptes religieux forment l'armature de la loi civile. Cette vision pluraliste des sociétés, ne doit pas induire à un relativisme qui conduirait les démocraties à ne pas défendre leur système de valeurs, ce qui serait suicidaire. Ainsi l'on doit admettre que chaque société a pour devoir de défendre ses valeurs et donc à se protéger contre les agressions qu'elles peuvent subir. En démocratie, le problème fondamental tient cependant au fait que la liberté d'expression est non seulement une valeur, mais aussi la condition même de l'existence du système. Comme le reconnaît à plusieurs reprises le Conseil constitutionnel, la liberté d'expression est une condition première de la démocratie (cf. supra). Ainsi les limites apportées à la liberté d'expression pour des raisons idéologiques peuvent être considérées comme contraires au principe même de la démocratie. Dans une démocratie, il est nécessaire que l'opinion puisse se prononcer sur des questions comme l'immigration, le port du voile islamique, le mariage homosexuel, sans que le débat ne soit encadré par des considérations interdisant d'établir une échelle de valeurs entre les préceptes de telle ou telle religion, la capacité d'adaptation de telle ou telle catégorie d'étrangers, ou la conception que l'on doit retenir de la famille. Il est ainsi un nombre étendu de questions qui se ferment à la discussion à la suite de l'évolution des conceptions sociales dominantes et des lois qui s'y rapportent. A partir de ces considérations très générales, il convient non pas de dégager des solutions casuistiques mais quelques principes qui pourrait canaliser la liberté d'expression sans la détruire. L'une des pistes nous semble pouvoir être trouvée dans un retour à la notion de liberté invoqué, notamment dans la Déclaration de 1789. Ainsi la liberté doit-elle s'imposer quelles que soient les opinions professées. Mais de ce point de vue un certain nombre de considérations doivent être prises en compte et un certain nombre de critères déterminés. Il convient, en particulier, de distinguer entre l'opinion sur les actes et les atteintes aux personnes. Si l'on admet que la limite à la liberté d'expression trouve exclusivement son fondement dans la protection de l'ordre public et des droits et libertés d'autrui et non dans la défense d'une idéologie, il convient de prendre en compte les conséquences de l'exercice de cette liberté et non son contenu. Certains de ces critères peuvent être élaborés à partir de la jurisprudence existante. Le premier tient au mode d'expression. Ainsi le recours à un mode d'expression humoristique peut justifier une moins grande prudence dans une forme d'expression (T. correct. Paris 9 janvier 1992 et cass. Crim. 29 novembre 1994). En effet, dans cette hypothèse, le lecteur, l'auditeur ou le spectateur ont conscience du caractère exagéré du propos et en relativisent la portée. De même le fait que des imputations interviennent dans le contexte d'une discussion politique peut conduire à minimiser leur portée (cass.

crim 9 nov 1969 et cass. crim 9 juillet 1980). On peut établir également des règles particulières s'agissant d'une œuvre littéraire ou artistique. Le support doit également être pris en compte. La publication d'une affiche litigieuse aux carrefours des voies publiques, à la télévision ou dans un journal ou une représentation cinématographique ne présente pas le même problème . En effet, l'accès à l'image s'impose à tous dans le premier cas, elle résulte d'une démarche volontaire dans le second. Par ailleurs doit également être prise en compte l'intention de l'auteur. S'agit-il d'avancer des arguments dans le cadre d'un débat d'opinion ou de vouloir nuire à un individu, ou un groupe d'individu? La question, plus délicate est de savoir si certaines opinions doivent faire l'objet d'une protection privilégie. Il en est notamment ainsi de la liberté religieuse et de conscience, ou de la dignité de la personne humaine. Ainsi peut –on admettre que l'affichage public respecte la conscience de ceux qui seront confrontés en dehors de leur volonté à l'image. Comme le relève le TGI de Paris dans une décision du 23 octobre 1984 D. 1985, p. 31, à propos d'une affiche cinématographique représentant une jeune femme en croix, seins nus, « la représentation du symbole de la croix dans des conditions de publicité tapageuse et dans des lieux de passage public forcé, constitue un acte d'intrusion agressive et gratuite dans le tréfonds intime des croyances des passants ». En revanche, la même représentation dans un film pour lequel la démarche du spectateur est volontaire ne doit pas faire l'objet d'une interdiction. La protection de la conscience des individus n'est ainsi pas incompatible avec une véritable liberté d'expression qui évite la provocation gratuite et imposée. Comme le relève P. Rolland, analysant la jurisprudence de la Cour européenne des droits de l'homme on peut exiger « une modération dans l'expression qui ne fasse pas disparaître le propre de la démocratie, c'est à dire la liberté d'expression sans laquelle il n'y a pas de liberté d'opinion et de conscience » Existe t-il un droit au respect des convictions religieuses dans les médias RFDA 04-1001. Evidemment, ces critères sont difficiles à mettre en œuvre mais tel est l'office du juge. Serait en toute hypothèse radicalement contraire au principe de liberté d'expression une disposition législative visant à interdire les propos et actes injurieux contre toutes les religions et la banalisation du blasphème religieux par voie de caricatures proposition citée par D. de Bellescize, Délits d'opinion et liberté d'expression , D. 2006, p. 1476. .

La protection de l'ordre public, le respect des droits d'autrui, l'interdiction de promouvoir des crimes et délits et la protection des personnes vulnérables constituent probablement les seules limites substantielles à la liberté d'expression qui peuvent être admises dans une société démocratique. On veut par là, proposer une méthode, une voie à explorer, plus qu'un catalogue de solutions.

2-Les limites tenant à la détermination de vérités législatives

La démarche est politiquement similaire en ce qu'elle répond essentiellement à un objectif idéologique lorsque le législateur s'engage dans la détermination ou l'affirmation de vérités historiques transmuées en vérité législative. Sur le plan juridique, la démarche est différente en ce qu'elle ne vise pas seulement à protéger tel ou tel intérêt ou telle ou telle valeur mais à établir une vérité officielle.

A-La loi dit l'histoire

Les lois dites mémorielles qui tendent à reconnaître, à affirmer ou à condamner tel ou tel fait historiques se multiplient. Dépourvues, a priori, de portée normative, sous réserve que le juge ne s'en serve pour développer son propre pouvoir normatif, elles attentent à la liberté d'expression lorsque la négation ou la contestation des vérités ainsi affirmées est assorti de sanctions pénales. Leur constitutionnalité est douteuse, indépendamment même de la question de la liberté de la recherche sur laquelle nous reviendrons.

1-Le développement des lois dites « mémorielles »

La première de ces lois, est la loi dite loi Gayssot (loi du 13 juillet 1990), qui modifie la loi sur la presse de 1881 en réprimant pénalement la contestation du génocide perpétré contre les juifs durant la seconde guerre mondiale. Une loi du 29 janvier 2001 comprend un article unique ainsi rédigé : « la France reconnaît publiquement le génocide arménien ». Une loi du 21 mai 2001 considère l'esclavage opéré dans un certain contexte comme un crime contre l'humanité. Un projet de loi adopté par l'Assemblée nationale le 12 octobre 2006 complète la loi du 29 janvier 2001 sur le génocide arménien en pénalisant

la négation du génocide arménien. Ces lois n'ont pas été soumises au Conseil constitutionnel, Or elles sont manifestement inconstitutionnelles.

2- La question de la compétence du législateur

D'une part, le Conseil constitutionnel a sanctionné les lois non normatives. En effet, selon le Conseil (décis. 2005-512 DC), le caractère normatif de la loi, défini comme se rapportant à l'édiction de règles, est établi sur le fondement de la formule de la Déclaration de 1789 selon laquelle « la loi est l'expression de la volonté générale ». Le Conseil en tire en effet la conclusion que vouloir n'est pas expliquer souhaiter, considérer, désirer, estimer ou constater.

Le Conseil fonde également cette jurisprudence sur la considération qu'un énoncé législatif ambigu ou imprécis va conférer à l'autorité chargée de son application un pouvoir qui le conduira, de fait, à faire la loi substantielle en choisissant parmi les sens possibles de la loi formelle. S'agissant de la question du génocide arménien, le Parlement s'immisce incontestablement dans le domaine des relations internationales et l'on peut d'ailleurs plus largement s'interroger sur la capacité de l'Etat français à juger l'histoire qui est celle de pays étrangers cf. G. Vedel, Les questions de constitutionnalité posées par la loi du 29 janvier 2001, in François Luchaire, un républicain au service de la République, Liber amicorum, Publications de la Sorbonne, 2005, , p. 37 et s. .

Au surplus de telles lois s'inscrivent dans une logique communautariste Or, comme l'a rappelé le Conseil constitutionnel, la Constitution « s'oppose à ce que soient reconnus des droits collectifs à quelques groupes que ce soit, définis par une communauté d'origine, de culture, de langue ou de croyance ». Ce faisant elles violent également le principe d'égalité en opérant une démarche spécifique à certains génocides et en ignorant d'autres, tout aussi incontestables. On pourrait de la même manière considérer que par leur imprécision quant à la nature de l'infraction, ce dont témoignent les décisions de justice qui s'y rapportent, le législateur attente au principe constitutionnel de la légalité des peines et à la sécurité juridique en matière pénale.

Mais, de manière spécifique ces lois violent non seulement la liberté d'expression, de manière disproportionnée, mais aussi et surtout la liberté de la recherche.

B Verités légales et liberté de la recherche

Les conséquences de ces lois « mémorielles » au regard du déroulement de la recherche scientifique sont particulièrement dommageables. S'agissant du génocide juif, les tribunaux s'engagent dans des distinctions approximatives. Ainsi n'est pas sanctionnable le fait de contester les chiffres concernant les actes d'extermination commis dans tel ou tel camps mais est passible de sanctions pénales, le fait de contester le chiffre global des victimes (crim 17 juin 1997). Ainsi la Cour de cassation a t-elle considéré que la contestation des crimes contre l'humanité peut résulter d'une présentation dubitative ou insinuante (crim. 29 janvier 1998). Quant à la détermination des éléments constitutifs de l'infraction, dans l'un des arrêts précités (crim. 17 juin 1997), la Cour de cassation a jugé que la minoration du outrancière du nombre des victimes de la politique d'extermination des juifs caractérise le délit lorsqu'elle est faite de mauvaise foi. Même assez vague, cette formulation renvoie au nom respect de la méthode historique et à l'intention de nuire (cf. infra).. S'agissant de la pénalisation de la négation du génocide arménien, voté en première lecture par l'Assemblée nationale, un député, M. Patrick Devedjian avait proposé d'exclure des poursuites les travaux universitaires, en considération du fait que de tels travaux doivent obéir à des critères d'honnêteté intellectuelle et d'objectivité et faire une place aux points de vue adverses débat A.N., 1° séance du 12 octobre 2006. C'est ainsi l'opinion non fondée scientifiquement et présumée malveillante qui aurait été sanctionnée et non la recherche scientifique à condition qu'elle réponde aux exigences méthodologiques auxquelles elle est soumise. Le fait que cet amendement ait été repoussé traduit bien la volonté d'interdire la recherche historique sur ces questions.

Le problème fondamental, sur le plan théorique, en la matière, est de déterminer si, indépendamment de toute expérimentation ou de toute application, une recherche peut être interdite ou entravée. Le droit à la connaissance concerne aussi bien le chercheur en quête de découvertes, que le public en quête

d'informations. La restriction peut viser, en effet, aussi bien la recherche elle-même, que la diffusion de ses résultats. Le problème est majeur. Il peut être formulé ainsi : peut-on borner la connaissance?

Si l'on prend l'hypothèse de l'activité de l'historien, ici concernée, il convient d'apprécier son activité sous l'angle des fautes qu'il peut commettre. La faute est alors constituée par un manquement à des obligations spécifiques. Par exemple une violation de l'obligation de prudence. Un arrêt de la Cour de cassation, Branly permet de caractériser ces conditions.

Un historien écrit une histoire de la TSF et omet de citer Branly. Cette omission résultant d'une volonté manifeste. La Cour de cassation sanctionne alors un silence circonstancié, un manquement à l'obligation de prudence et d'objectivité de l'historien. Cependant, cette décision tout en s'attachant à la méthode de l'historien ne prend en compte ni ses intentions ni la réalité d'un préjudice.

En 1981, dans une affaire de négationnisme, l'affaire Faurisson, le TGI de Paris opère une distinction entre la vérité juridique et la vérité historique. Le Tribunal reconnaît une liberté pleine et entière d'expression à l'historien. Mais cette liberté est assortie d'une responsabilité, cette responsabilité est susceptible d'être mise en jeu en cas de manquement à l'obligation de prudence de circonspection et de neutralité intellectuelle. Le Tribunal se penche sur la démarche et non sur le contenu des travaux pour considérer que si la recherche avait été plus objective, elle n'aurait pu conduire à la négation de vérités objectives. Dans une décision du 21 juin 1995, le même tribunal est confronté à un historien niant la réalité du génocide arménien. Ce négationisme n'est alors sanctionné par aucune loi.Le tribunal engage la responsabilité civile de l'auteur de ce texte en considérant qu'il a manqué à son devoir d'objectivité et de prudence s'agissant d'un sujet sensible (ce qui renvoie à la protection de l'ordre public) et qu'il a occulté des éléments contraires à sa thèse (méthode historique). En fait comme l'affirme un jugement du Tribunal de Versailles du 17 janvier 1985 : « le juge « n'a ni qualité ni compétence pour juger l'histoire, mais il peut juger les méthodes des chercheurs et vérifier qu'il a bien fait œuvre d'historien ». Ainsi l'historien ne peut avoir d'obligation de résultat quant à la détermination de la vérité, mais il doit faire preuve de prudence et d'objectivité. En fait l'ignorance des exigences méthodologiques, qui pèsent sur les historiens comme sur tout chercheur, conduit à disqualifier le caractère scientifique de l'analyse et à présumer l'intention de nuire. Si cette analyse permet de circonscrire de manière plus précise la question de la responsabilité du chercheur, quelques questions demeurent, notamment celle du juge de la méthode scientifique, celle de savoir si la liberté du scientifique est plus large que celle de « l'homme de la rue ». Mais cette dernière question ne relève pas à proprement parler de la liberté de la recherche. En effet cette liberté ne peut être reconnue, par définition, qu'à celui qui est reconnu comme chercheur. Il n'en reste pas moins que dans la plupart des espèces citées, la responsabilité n'est engagée que si l'historien a commis une faute intentionnelle, qui se manifeste par une intention de nuire et si ses propos causent un préjudice à autrui. Cette intention de nuire qui est au cœur de la démarche peut être identifié par la méthode utilisée. Notamment, elle pourra être caractérisée au moyen d'une dénaturation ou d'une falsification ou une omission d'éléments avérés ou ayant fait l'objet d'une analyse éclairée.

Ainsi les règles de la responsabilité civile sont susceptibles, dans la plupart des cas et sous réserve d'un recours à la responsabilité pénale dans des cas extrêmes, de sanctionner des comportements visant à nuire à autrui au moyen d'une falsification de l'histoire. Le juge ne peut être l'arbitre des vérités historiques, il n'a pas à se prononcer sur le résultat. En revanche, le non respect de méthodes scientifiques confirmées peut le conduire à identifier l'intention maligne, donc à disqualifier le caractère scientifique des propos tenus, au regard des exigences méthodologiques posées par les scientifiques eux mêmes. Réduits à un abus de la liberté d'expression de tels propos qui visent, motivées par des intentions racistes ou autres, à nuire à autrui ou à troubler l'ordre public peuvent être sanctionnés. Ces critères permettent un rapprochement des conditions de limitation du droit d'expression au regard de l'intention des auteurs et du préjudice subi. Certes ces critères peuvent être relativement incertains quant à leur application, mais ils relèvent du droit commun. Ils s'inscrivent probablement assez exactement dans la logique du texte de 1789. Point n'est besoin au législateur, ou au juge, de dire ce qui est « vrai » pour que soit empêché ce qui est à la fois, non scientifique nuisible et dangereux.

SILVIA TELLENBACH

Max Planck Uluslararası Ceza Hukuku Enstitüsü,
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...Madde 98 ile korunan, Federal Almanya Cumhuriyeti veya topraklarından biridir. Biliyorsunuz ki, federe devletler hep birlikte Almanya devletini oluşturmaktadır. Burada korunanlar, Anayasal düzen, federal cumhuriyet ve federal devlet olarak sayılabilir. Maddede "Almanlık" mevhumu yoktur. Hiçbir Alman kanununda "Almanlık"la ilgili bir hüküm bulunmamaktadır. "Anayasal düzen" ile kast edilen de, Alman Anayasası'nda (Grundgesetz) ve bütün federe devletlerin Anayasalarında bulunan bütün Anayasal prensiplerdir. Madde 98'de sözü edilen, oldukça güçlü bir küçük görme, aşağılamadır. Söz konusu söylem, aleni bir şekilde, bir toplantıda veya bir yayının dağıtılması şeklinde gerçekleşmiş olmalıdır. Bu, birbiriyle bağlantısı olmayan birkaç kişinin söz konusu aşağılayıcı söylemi algılaması şeklinde dar anlamda düşünülmemelidir.

...İkinci düzenleme: Anayasal organların aşağılanması. Devletin ve sembollerinin aşağılanması ile benzerlik taşısa da, farklı yönleri de bulunmaktadır. Bu düzenlemede korunan değerler, yasama organları, hükümetler, ve federal ve federe devletlerdir. Türkiye'deki 301. madde ile karşılaştıracak olursak, şunu söylemeliyim ki, Alman kanununda yargı organı bir bütün olarak korunmamakta; yalnızca yüksek yargı organları (Türkiye'deki Yargıtay,vb) özel olarak korunmaktadır. Ayrıca, silahlı kuvvetler de bu maddede hiç korunmamaktadır. Ordunun oldukça sınırlı olarak korunduğu bir diğer madde vardır: 109/D maddesi, "milli savunmaya karşı suçlar" başlığını taşımaktadır.

...Kıta Avrupası dahilindeki hukuk sistemlerinin çoğunda, devleti, devletin sembollerini ve devletin en yüksek seviye görevlilerini koruyan özel hükümler bulunmaktadır. Fakat, son yüzyılda neredeyse bütün Avrupa ülkelerinde, ifade özgürlüğünden yana bir zihniyet değişikliğine gidilmektedir. Devlet, sembolleri, en yüksek organları ve görevlileri gibi değerlerin korunması fikri git gide "eski moda" bir eğilim olarak görülmeye başlanmıştır.

...Almanya'da üçüncü Reigh dönemi adı verilen ve derin izler bırakan bir dönem yaşanmıştır. Söz konusu 12 yılda, Almanya en zalim diktatör ve yandaşları tarafından yönetilmiştir. Bu tecrübeden sonra ifade özgürlüğü kavramı söz konusu bile değildi ve İkinci Dünya Savaşı'ndan sonra kurulan yeni devlette "ifade özgürlüğü" yüksek bir değer olarak kabul edildi. Ve tüm Almanlar, bu 12 yıllık Nazi rejimi döneminden utandılar ve utanmaktadırlar. Ayrıca, uzun yıllar boyu, devletin sembollerinin de Almanlar için hiçbir anlamı yoktu. 1990'larda bazı politik toplantılarda Alman Milli Marşı'nın okunması bile, Alman vatandaşlarının büyük bir çoğunluğunda tedirginliğe sebep oldu. Ve bugün de Almanya'da hiç kimse milli marşın, Türkiye'de olduğu gibi sabahları okullarda söylenmesini hayal bile edemez. ...Alman bayrağından bahsedecek olursak; bayrak Almanya'da yalnızca resmi kurumlarda ve resmi olaylarda kullanılır. Halk tarafından bayrağın kullanılması ise son zamanlarda ortaya çıkmıştır ve bu duruma pek sık rastlandığı da söylenemez. Bayrağın halk tarafından kullanılmasını geçen yıl Dünya Kupası sırasında İtalyanlardan öğrendik. Vatandaşların arabalarına bayrak takarak sokaklarda dolaşmasına daha geçen yıl şahit olduk. Ve birçok insan bunun fazla milliyetçi ve tehlikeli olduğu görüşündeydi.

SILVIA TELLENBACH

Head of the department Turkey/Iran/Arab States, Max Planck Institute for Foreign and International Criminal Law

Okay let's start after having been refreshed in this wonderful atmosphere. Perhaps we could also have continued downstairs but as we need something like the technical equipment we just had to go here. Well as far as I see from the program, it is my own turn now and I shall try to give some explanation about German law. As the background of our meeting is the public discussion about one special provision of the Turkish criminal code that punishes the disparagement of 'Turkishness' and a number of institutions of the state and as it is the task of this symposium to find out how other European countries deal with the same questions I shall start by giving a very short outline about the general provisions concerning offenses and then try to give some explanations to the topic on which we shall focus our attention today.

The German criminal code contains provisions punishing insult, malicious gossip and defamation in its § 185 Criminal Code (CC) and the followings. But according to the general rules of criminal law, it has always to be examined whether an act that seems to be punishable at the first sight may be justified or excused. As to the chapter of insult, § 193 CC, the title of which is Safeguarding Legitimate Interests contains a very broad spectrum of justifications. It runs as follows: Critical judgments about scientific, artistic or commercial achievements, similar utterances, which are made to exercise or to protect rights or to safeguard legitimate interests as well as remonstrances and reprimands of superiors to the subordinates, official records or judgments by a civil servant and similar cases are punishable only to the extent that the existence of an insult results from the form of utterance or their circumstances under which it occurred. And the concept of legitimate interest has to be understood in the light of the constitution which guarantees freedom of expression in its article 5. I just put it here, you can read it and listen at the same time.

Every person shall have the right to freely express and disseminate his opinions; these rights are only limited by provisions of the general laws and provisions for the protecting of young persons and in the right to personal honor. And especially art and scholarship, research and teaching shall be free. But the freedom of teaching shall not release any person from allegiance to the constitution. As you see this right is limited by the right of personal honor which according to the explanation of the constitutional court is also guaranteed by article 1 of the constitution concerning human dignity. Thus there are two constitutional principles in contrast with each other and this conflict must be solved by finding the right balance. In the course of the last decades, the solution was found more and more in favor of the right of freedom of expression. And tomorrow I shall explain some cases to explain this development. Furthermore all these crimes are only prosecuted upon complaint of the victim. This however involves the risk for the victim of having to pay all the costs of the prosecution in case the accused will be acquitted. Thus today it is rather seldom that a person accused of insult, malicious gossip or defamation will really be punished. In practice it happens only if the victim is a member of the police. As to insults of values and central institutions of the state and the members of these institutions, there is a certain number of offenses in Title Three: Endangerment of the Democratic Rule of Law. That shows that the protected value is not or not in the first place the honor of the victim but the rule of law. This title, endangerment of the democratic rule of law, contains provisions such as the continuation of a party which has been declared to be unconstitutional, the dissemination of propaganda for or the use of symbols of unconstitutional organizations which in practice play a role in the case of neo Nazi organizations. That is §§ 86, 86/A CC. But there are also provisions such as the disparagement of state and its symbols, § 90/A CC and the anti constitutional disparagement of constitutional organs. Let us now study these both articles.

The legal values protected by § 90/A CC are the Federal Republic of Germany or one of its lands. You know the federal states altogether form the German state. The other value is the constitutional order. Federal Republic or a federal state means the state as such it means the legal status as a state. It does not contain any notion of 'Germanness' or Almanlık which does not exist in German criminal law, neither here nor in any other German law. Constitutional order means all the constitutional principles contained in the German basic law (The German constitution is called the basic law - Grundgesetz) but also in the constitutions of the federal states. The act of disparagement in § 90/A 1 means a very strong expression of contempt. It must have been committed publicly, in a meeting or through dissemination of writings. The act is committed publicly if it could be perceived, not necessarily that it was perceived, by a considerable number of persons who did not have any connection with each other. It is an aggravating circumstance if the perpetrator intends to give support to efforts against the continued existence of the Federal Republic of Germany or against its constitutional principles. As these both conceptions are not clear in themselves they are defined in the criminal code to fulfill the requirement of legality which is only complied with if the wording of the norms providing punishments is absolutely clear. A person undermines the continued existence of the federal Republic of Germany if he or she causes the abolition of its freedom from foreign domination, the distraction of its national unity or the separation of one of its constituent territories (§ 92 CC). Constitutional principles in this sense of the law are

1. The right of the people to exercise state power in elections and plebiscites and through particular organs of the legislative executive and judicial power and to elect parliament in general direct free equal and secret elections.
2. The subjection of its legislation to the constitutional order and the subjection of the executive and judicial power to statute and law.
3. The right to form and exercise a parliamentary opposition.
4. The replaceability of a government and its responsibility to parliament.
5. The independence of the code and finally the exclusion of any rule by force and decree. All these values are very essential values of a democratic state.

The second provision: anti-constitutional disparagement of constitutional organs (§ 90/B CC) has some similarities in its structure with the disparagement of the state and its symbols but there are also important differences. The protected values of this provision are legislative organs, governments or constitutional courts of the federal republic or one of its federal states or one of their members in this capacity. Comparing with the Turkish article 301, we remark that the judiciary is not protected as a whole but only the constitutional courts not even the highest courtss of the single branches of law as the federal court (Bundesgerichtshof, Yargıtay) or the Bundesverwaltungsgericht, the highest administrative court, Danıştay.

Furthermore the military forces or the security forces are not protected at all in this article. The military is only protected in a very limited way by § 109/D of the criminal code. This article is placed in the title "crimes against national defense" and it runs: whosoever against his better judgment and for the purpose of dissemination makes grossly distorted assertions of a factual nature the dissemination of which is capable of disrupting the activities of the federal armed forces, or disseminates such assertions with knowledge of their untruthfulness, in order to obstruct the federal armed forces in the fulfillment of its duty of national defense shall be punished with imprisonment for not more than five years or a fine. As it can be understood from this text, the act of the perpetrator is a dissemination of knowingly false assertions with the intention to hinder the fulfillment of the duties of army. It is true that knowingly false assertions are never protected by the law of free expressions. But the most important reason for punishing them here is the possible danger for functioning of the army.

The crime of anti-constitutional disparagement can be committed by disparaging the victims publicly in a meeting or through dissemination of writings that means that it is committed by the same acts as the disparagement of the state. But the way it is done requires a certain quality.

First it must be done in a manner endangering the respect for the state, second the perpetrator must intentionally give support to efforts against the continued existence of the state, or its constitutional principles. Whereas in the crime of disparagement of state, this modality is in aggravating circumstance in the crime of anti- constitutional disparagement of constitutional organs it is an element of the crime itself. If this intention which must be proved by the prosecutor is missing, there is no act punishable under this provision. Last point, this crime can only be prosecuted if the constitutional organ or the affected member of the constitutional organ authorizes the prosecution.

Now what about practice? These provisions do not play any considerable role; therefore, it is very difficult to find any cases. When I controled the newest criminal statistics of 2004 as to convictions concerning crimes under the title of endangerment of the democratic rule of law, there are about 1000 convictions regarding dissemination of propaganda or of use of symbols of unconstitutional organizations (as I mentioned before this concerns the neo Nazi scene), but as to all the other 8 crimes of this title there are 63 convictions, only 3 of them were sentences to prison and the execution was suspended in two of these cases. Please remark that we can not see from the statistics how many of these 63 convictions refer to the disparagement of state and anti- constitutional disparagement of the constitutional organs, but at any rate the number is very low and probably none of the three convictions to imprisonment refer to it. In the data collection of the Bundesgerichtshof, the German Yargıtay there are three cases of § 90/A CC and not even one case of the § 90/B CC in the years 2000 till 2006. Now let me make some remarks about this result. In the continental laws, most of the codes have special provisions protecting the state, its symbols and its highest officials. But in the course of the last century, in almost all of the European states, there was a change of mentality in favor to free expression of opinion. A special protection of values such as the state, its symbols and its highest officials against insults was more and more regarded as old fashioned. In Germany there is a special situation of history, namely the period of the third Reich which left deep traces. During these twelve years, Germany was governed by the most atrocious dictator and his accomplices. Freedom of expression did not exist and after this experience it was regarded as an especially high value in the new state that came into existence after the Second World War. And the Germans were and are ashamed of the state and the history of twelve years of the Nazi regime. Therefore there is no pride about Germany, no feeling of Germanness worth of being protected. Also the symbols of state did not play any role for many years. When the Germans in 90s started in some political meetings to sing the national anthem this was regarded with uneasiness by the majority of Germans. And even today nobody would think of singing the national anthem in the morning in schools as it is done in Turkey. As to the use of the German flag, it is a very new phenomenon that it is not only shown at official buildings at official occasions but that also the citizens sometimes show the flag. We learnt that from the Italians living in Germany. When Italy had won an important football match between Italy and an other country, cars with Italian drivers drove through the roads and showed their flags. And at the world championship of football this last year it was the first time that the Germans did the same. And there were some people who said well it is too much of nationalism, too much of esteem for flag, where would this go, it is a danger, and so on.

As to the politicians, they have the right to authorize a prosecution but they are generally expected not to do so. The former German chancellor Helmut Kohl did not give any such authorization in the 16 years of his chancellorship though he had been attacked massively especially by the press during all that time and he did not make any complaint for having been insulted. Chancellor Schröder made some complaints for having been insulted but this was disapproved by the public and sometimes even laughed at.

As to the question of the organizers of this symposium: Germany did not have any concerns about the freedom of expression when it became one of the members of the original European Economical Unity and later on the European Union. Thank you for your patience, I fear, I spoke too much.

Dr. ANDREAS POTTAKİS

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...Yunanistan'da Anayasa Mahkemesi bulunmamaktadır. Tüm mahkemeler, Anayasa'ya aykırılığına inandıkları bir kanunu uygulamamakla yükümlüdürler.

...İfade özgürlüğünü vicdan özgürlüğü tarafından ele alırsak, Yunan Anayasası diğer anayasalar gibi açık bir hükümle vicdan özgürlüğünü düzenlememektedir. Bunun yanında aynı korumayı veren, Yunanistanda bilinen her türlü din için, din özgürlüğü düzenlenmektedir... Vicdan özgürlüğü ve genel olarak ifade özgürlüğü ile ilgili yapmak istediğim bir diğer yorum da, bu iki hakkın da, Yunan Anayasasında düzenlenmiş olan "kişinin kendini geliştirme hakkı" çerçevesinde değerlendiriliyor olabilmesidir.

...Düşünce özgürlüğü bireyin kişiliğinin ayrılamaz bir parçasıdır ve bu özelliği değerinde korunmaktadır. Bu aynı zamanda demokrasinin sine qua non bir özelliği ve demokratik sisitemin yapıtaşlarından biridir. Bu nedenle hiçbir devlet, sınırlama veya etkileşim tarafından engellememesi negatif bir özellik sergilerken, bir politik hak olarak pozitif özellik arzetmektedir.

...İfade özgürlüğünün düzenlendiği 14. Maddenin sınırları aynı zamanda linguistik anlamda da özgürlükleri beraberinde getirir. Yunan Anayasası düzenlemesine göre Yunan devleti hiç kimseyi belli bir dilde konuşmaya zorlayamaz ve herkes dilediği dil, diyalekt vs.de iletişim kurabilir. Belirtmek gerekir ki, Yunan Anayasasının 14. maddesinde düzenlenen ifade özgürlüğü devlet otoritesi ile vatandaş arasındaki ilişkilerde kullanılmakta, diğer hallerde devreye ceza hukuku ve özel hukuk girmektedir.

... Fikir özgürlüğü birçok sebeple sınırlandırılabilir. Bu sınırlamalar özellikle gençlerin korunması, toplumun güvenliğinin, çevrenin korunması konularında yapılabilmektedir. ... Belki de bu toplantımızın konusuyla ilgili olarak verilebilecek olan en iyi örnek onurun korunması konusundadır. Bir kişinin onuruna karşı yapılan saldırılar Yunana ceza Kanununun 361ff maddesince suç olarak düzenlenmektedir. Bu konuda önemli gelişmelerden biri, siyasi parti liderleri, yerel yöneticiler, devlet memurları, yasama organı mensupları gibi devlet otoritelerine karşı saldırgan, ve saygısız bir dil kullanma fiilini düzenleyen Yunan Ceza Kanununun 181. maddesi alanında olmuştur. Bu madde demokratik bir toplumda kabul edilemez niteliği dolayısıyla, kaldırılmış ve demokratik sistemin gerektirdiği hale getirilmiştir. Bu konuda özellikle üzerinde durulan nokta, bu kişilere karşı söylenenlerin kuruma karşı mı, bizzat o kişilere karşı mı söylendiğinin tespit edilmesinin mümkün olmaması konusunda yoğunlaşmış ve bugün artık bu kişilere karşı söylenen sözlerin Ceza Kanununda bulunana onurun korunması kapsamında değerlendirilmesine karar verilmiştir.

... Yunan kimliğini koruma veya her türlü Yunanlılık -gibi bir terim eğer varsa-, Yunan hukuk sistemine ve yunan düşüncesine yabancı bir terimdir. Yunanistan AB üyeliği ile bu konuda bir değişiklik yapmak zorunda kalmamıştır. Yunanistan Avrupa İnsan Hakları Sözleşmesini 1974'te, diktatörlüğün düşüşünden hemen sonra kabul etmiş ve 1975 yılında Anayasasını bu metne baplı kalarak hazırlamıştır. Bu nedenle uluslararası belgelerle uyumlu bir Anayasaya sahiptir.

ANDREAS POTTAKİS

Deputy Director of the Academy of European Public Law

I would like to start my contribution to this colloque by making some general comments about the Greek constitution.

First, the Hellenic Constitution, in line with the general constitutional theory, recognises two types of rights' limitations:

- the internal, which in fact are not limitations, as stated earlier, but conceptual definitions. When, for instance, the Constitution provides for the religious freedom, the definition of what constitutes a religion for the Hellenic Constitution is an internal limitation of this freedom.
- the genuine limitations, which have to do with the manner and the purpose for which a right may or may not be exercised.

The second point I would like to make is that we do not have a constitutional court as such. So the constitutionality of any legislative instrument is the responsibility of every court of whatever degree. The control of the constitutionality of the legal sort of instrument, necessarily in takes the interpretation of a constitutional clause. I mention that because you will notice that on many instances different courts of different degrees have ruled with different criteria on the same basic legislative document. The Greek constitution, unlike in many other republics, federal or not, does not have a general clause on the freedom of consciousness. It protects the religious freedom, the freedom of opinion and information and the freedom of art, science, research, as well as the freedom of the press, printed or electronic. I would like to make two comments on why there is no specific or general provision on the freedom of consciousness in the Hellenic constitution: First, it springs from the general theory of fundamental rights that the constitution always guarantees the minimum and not the maximum. So a common law cannot afford a lower level of rights' protection than the Constitution. On the contrary, it can extend and/or enhance the protection afforded by the Constitution. The second comment that I want to make on this point is that freedom of consciousness and general freedom of expression are completely interrelated The Hellenic Constitution does not protect the freedom of consciousness explicitly, in a specific clause, as many modern constitutional documents and international Treaties and Conventions (e.g. art 9§1 ECHR) do.. They are protected through the general clauses on the respect and protection of the value of the human being and on the right of all persons to develop freely their own personality and participate in the social economic and political life of the country In art 2§1, the Hellenic Constitution provides that the respect of and the protection of the value of a human constitute the prime responsibility of the public order ("respect and protection of the value of the human being constitute the primary obligation of the State"), and this has been interpreted in such a way as to contain the protection of the freedom of consciousness, as this is an integral part of what constitutes the vague concept of the value of a human being. Furthermore, other, more specific expressions of consciousness are also protected in various constitutional clauses relating to the right to develop ones personality (art 5§1a: "all persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages"), the freedom of opinion (art 14), the right of assembly (art 11), the freedom of association (art 12), the freedom to unionise and the right to strike (art 23), the protection of personal data (art 9A) and the secrecy of correspondence (art 19).

I go very quickly to the first point, freedom of religious expression. The freedom of religious belief or consciousness – this is how it is actually articulated in the Hellenic constitution – is composed of two fundamental parameters. First, religious consciousness, in a strict sense, contains freedom of choice, retaining or renouncing a religious belief as well as choosing to be an atheist. And there is also the freedom of worship. If the worship of a religion is in breech of a law or the public order, if it is offending to public decency, it is no longer within the protective shield of the Constitution.

Unlike many other European constitutions, the Hellenic constitution imposes an inherent restriction to its protection of the freedom of religious consciousness that I actually referred to earlier; there is some kind of a definition on what constitutes a religion. The Hellenic constitution protects what it calls "all known religions" and not every kind of religion. A "known" religion, according to the Hellenic Constitution, has to have its dogma, places and manner of worship and organization open, accessible, visible, and in general not secret. So, the definition by the Hellenic Constitution of "all known religions" has little or nothing to do with whether such a religion has followers or not, or with whether anybody knows about this religion; what is crucial is that the dogma, worship and organization of such a religion are accessible to whomever wants to find out more about them.

Criminal legislation complements the protection afforded by the Hellenic Constitution by imposing specific penalties for violation of certain elements falling within the broad concept of religious consciousness. Hence, chapter 7 (arts 198-201) of the Hellenic Penal Code provides criminal ramifications for those who:

- Publicly and intentionally commit blasphemy against God (any God, not just the Christian one...)
- Are publicly blasphemous towards the Sacred
- Publicly and intentionally use profane language against any "known" religion in Greece
- Intentionally attempt to interrupt or disturb a public gathering of a religion "known" in Greece
- Arbitrarily extract a corps or parts of it from its burial ground or commit acts that are inappropriate and sacrilegious against the corps or the burial ground.

Special penal legislation, dating as back as 1939, prohibits proselytism. For the purposes of the penal legislation in force, what matters in a behaviour to classify it as an attempt to proselytise is, naturally, not the use of persuasion or arguments of any sort, but the exploitation of the ignorance, inexperience, trust, or mental or otherwise disability of a person through the use of promises of material, moral, spiritual returns or any other non acceptable and unlawful means (threat, fraud etc). Issues not directly related to the freedom of expression of religious consciousness, like philosophical or political beliefs are, naturally, also protected by the Hellenic Constitution, albeit under different provisions Arts 2§1 on the development of an individual's personality and 5§2 which states that all –and this means irrespective of national, religious, racial, ethic etc background or citizenship status- who are within the Hellenic sovereign territory shall enjoy the absolute protection of life, honour and freedom, without distinctions, of their religious, or political beliefs..
I turn now to the subject that perhaps is closer to what we have been gathered for to discuss, freedom of opinion.

Freedom of opinion is a constitutive part of an individual's personality, and hence protected accordingly. It is also considered a condition sine qua non of democracy and the basic composite of the democratic system, and in this respect it is not only a negative right Constituting a demand against any state interference or restriction. but also positive As a political right.. The freedom of opinion was recognised and protected by all Hellenic Constitutions, even the first, 'revolutionary', one of 1823. It relates to art 10§1 of the ECHR and consists of the right to form, possess, express and spread – but also omit - an opinion. Special constitutional articles provide for and protect the right of expression and spreading of opinions and thoughts orally, in writing and through the press (art 14), while other provide for specific forms and means through which an opinion may be expressed Art 15 deals with T.V, music recording and cinema, art 16 establishes the freedom of artistic and scientific expression, of research and teaching..

Art 14§1 of the Hellenic Constitution reads: "Every person is entitled to express and publicise his/her thoughts, complying with the laws of the state".

The margins of art 14 on the freedom of expression cover also the linguistic means through which a person wishes to express him/herself. Thus, according to the Hellenic Constitution, the Hellenic State cannot oblige any Greek to speak any specific language. They are free to choose in which language they wish to express themselves. By the same token, all languages, dialects etc (whether of a minority or of a particular geographical area) are protected by the Constitution. It has to be noted that the protection of the freedom of expression as stipulated in art 14 of the Hellenic Constitution applies to the relations of citizens with the State and public authorities. In all other affairs, freedom of expression is regulated by penal and civil laws.

Freedom of opinion may be restricted for a variety of reasons, some of which are generally defined, like the protection of morality – especially of the youth - public order and security, the environment From means and forms of expression that may be polluting the environment., of honour.

Public order, in particular, is not considered to be endangered by the expression of opinions or critique, to the extent that the form of expression used does not amount to violent acts. The essence, in fact, of a democratic order is the critique of state and public order structures. Public security may be considered a reason for restricting freedom of opinion, if, by the sharing or disseminating of information, national security is endangered. The most important, perhaps, restriction on the freedom of expression recognised by the Hellenic Constitution, with respect to the subject of the present meeting, is the protection of honour. Offences against an individual's honour Arts 361ff of Hellenic Penal Code. are thus acceptable restrictions of the general freedom of expression.

The most important article in this respect, one that has changed in order to comply with the demands of a modern, democratic regime, is ex article 181 of the Hellenic Penal Code, relating to the use of offensive and disrespectful language towards the authorities. It was perceived in the past as protecting the unassailability of public authorities, party leaders, local administration officials and general officials of state institutions, including the judiciary. Such an interpretation cannot, however, be acceptable in a democratic state. The problem was of theoretical, but also of practical importance: it was difficult to assess when an offensive comment to the honour of a public official as the ones mentioned above was in fact a comment addressed against the person or the institution. Hence, the provision was taken out, and any offensive comment, to the extent that it can be recognised to be directed against the person, carrier of the public office, is to be treated and protected within the provisions of the Hellenic Penal Code on the protection of honour.

A few comments on the freedom of press. Freedom of the press is intrinsically related to freedom of expression, as the press, printed, electronic and digital, is one of the fundamental means of dissemination of opinions.

The freedom of the press under the Hellenic Constitution covers:

- The freedom to publish and distribute press material of any form, shape, in any way and time, under any legal title (with respect also to trademark laws) and in any number of copies,
- The freedom to establish and operate press companies under any private law form,
- The freedom to collect with legal means any information and photographic, audiovisual etc material from within the country or abroad,
- The freedom to publish at any time and in any way news bulletins, comments of a general or specific nature and interest, advertisements etc,
- The freedom to establish journalists' and generally press unions uninhibited from any kind of state involvement, supervision or monitoring,

General restrictions to the freedom of the press to publish opinions and news can be various, most notably on judicial proceedings not yet concluded, on discussions of the Cabinet that for reasons of national interest must remain secret, for the protection of other constitutional rights (e.g. family or personal life, the protection of children and infants personal sphere etc).

Constitutional restrictions are also quite extensive, much more so than in any other European Constitution. It has to be noted that these restrictions do not concern publications that are also or primarily works of art or scientific announcements, as the freedom of artistic scientific expression is not subject to similar kind of restrictions.
The most important and severe measure restricting the freedom of the press, and through it the freedom of expression is the seizure of the journal or magazine, which can be ordered by the prosecutor for any of the following, but only, reasons:

- Content insulting to a known religion
- Content insulting to the President of the Republic
- Information vital to the synthesis, positioning, strategic plans of the Armed Forces,
- Content which purports to violently abolish the form of Government or is directed against the territorial integrity of the State
- Content obscene, which clearly insults public morality, under the particular arrangements stipulated in laws. What is obscene is actually determined by a very old law in Greece dating before the Second World War, I think it was passed in 1939. Unfortunately, it has not been revised to date. Seizure can only take place after the publication of the press material, which also includes its possible circulation. The Court, after having convicted a press material for three times in a time-span of five years, orders its permanent or temporary ban, and in extreme cases, the prohibition on certain or all of its staff of practicing the profession of journalist. The public prosecutor must, within twenty-four hours from the seizure, submit the case to the judicial council, which, within the next twenty-four hours, must rule whether the seizure is to be maintained or lifted; otherwise it shall be lifted ipso jure. An appeal may be lodged with the Court of Appeals and the Supreme Civil and Criminal Court by the publisher of the newspaper or other printed matter seized and by the public prosecutor.

I would also like to make some comments about the freedom of artistic scientific research and teaching expression.
Freedom of artistic expression contains:

- Freedom of production of works of art, and freedom of artistic creation (which also includes the prohibition of any prior special licence requirements for the production of a work of art, e.g. a theatrical play or a movie, art 3 of Law 446/1937 on theatres and art 3 of Law 1108/1942, and art 5 of Law 955/1937 on cinema). No censorship is allowed, unless the artistic work infringes other constitutionally protected values, rights and interests.
- Freedom of circulation and presentation/dissemination of artistic works.
- Freedom of scientific, research and teaching expression contains:
- Freedom of choice of any science;
- Freedom of scientific expression stricto sensu (freedom to formulate, maintain, change, express and propagate a scientific view).

Freedom of scientific expression means the prohibition of any monitoring or control system or the imposition of a licence requirement, other than those relating to the determination of the professional, scientific or research capacity of the teacher/professor. It has to be borne in mind that freedom of scientific, research and teaching expression does not make the scientists a legibus solutus. Teaching cannot be directed towards the usurpation of the established order as expressed by the constitutionally protected form of Government, not be in breach of any criminal or otherwise law.
In order to support and safeguard the scientific, research and teaching freedom of expression, the Constitution provides for the self-management and self-direction of Universities and for the so-called University asylum. The notion of University or Academic asylum is unique in Greece. It basically protects freedom of expression within the university area. But unfortunately it has been used by many as a total protection of the university grounds from an intervention by any state, police or otherwise authority. It is a prime example of an abusive use of a right, when people, not necessarily related in

any way with a University or the academia, barricade themselves within university campuses and are free to do whatever they want, uninhibited from any state or police intervention. I hope this will change, and the true meaning and purpose of the University asylum will be re-established.
I would like to conclude this brief contribution by referring to the criminal aspects of the freedom of expression.
The old Hellenic Penal Code provided an article, which prohibited the use of profane and vulgar language towards authorities of the central and peripheral administration. Article 181 HPC, before the repeal of its first paragraph, read:
'Insults to authorities and the symbols
1. Any person shall be punished with imprisonment for up to two (2) years who:
a) Publicly insults the public, municipal or township authorities, or a leader of a political party recognised by the Rules of Procedure of Parliament The insult of a leader of a political party recognised in accordance with the Rules of Procedure of Parliament was inserted later, with Law 2493/1953.;
b) Insults or, as a display of hatred or contempt, damages or disfigures an emblem or symbol of State sovereignty or the President of the Republic'
This article (art 181) was inserted in chapter five (5) of the Hellenic Penal Code, which contained provisions on offences against the State Power.

Some comments:
- The provision of art 181§1 was first introduced in the Hellenic Penal Law in not exactly the same form with the Draft Penal Code of 1947. Before that, the Penal Law that existed provided for several, similar-type crimes: an article on insolence and impertinence of the form of Government, and articles on contemptuousness of the mark of respect and credit that has to be given to the authorities. Important restrictions, however, were in place to ensure that the application of the articles would not be abused. E.g. the insolence and impertinence of the form of Government was punishable only if it had as a purpose to overthrow the established order. In fact, concerns had been expressed before the establishment of such provisions on their constitutionality and compliance with the democratic principles. According to the explanatory report of the Draft Penal Code of 1924, such provisions risked penalising a simple critique, and could restrict the discussion on government acts and decisions of the authorities, which would not be in compliance with the fundamentals of a liberal, democratic constitutional order.
The relevant literature attempted to establish confines on the application of article 181 HPC:
- Only an authority that was functioning within its defined competences and with respect to the legality requirement was protected. An authority operating outside its legal remit (either because it assumed the power illegally or because it exceeded its competences) was protected by article 181, in this respect.
- The protected value of article 181 was not the individual, personifying the institution of the state, but the institution itself. Hence, personal critique against a person in possession of a public position as the ones mentioned in article 181 did, or at least should not have, constitute the basis of the crime described in article 181, but only if the insolence was directed against the institution and not its personification. A typical example, taught in law schools during the early 1960s, was the following: the sentence 'The Minister of Labour is deceiving the workers' is not within the ambit of article 181, as it is not directed against the institution (Ministry of Labour) but against the particular policy and performance/behaviour of the person holding at a particular moment the post of Minister, while the sentence 'the Ministry of Labour exists to deceive workers' was within the grip of art 181, as it was directed against the institution (the Ministry). Actual cases show that, e.g. a crowd shouting to a Minister of the Government 'traitor, bastard, fascism will not pass', throwing tomatoes and eggs at his car and spitting at it, are not expressions of contempt for the institution but for the specific person Decision 77/1966, Areios Pagos.
The fact that what the value to be protected with article 181 HPC was the prestige of the institutions was also supported by the jurisprudence of the Supreme Civil and Criminal Court (Areios Pagos), which ruled on several occasion that a breach of article 181 and the relevant provisions of the Penal Code

on the protection of an individual's honour could be tried in a case as separate offences. Finally, the relevant literature concurred that it should not be considered insolence and hence breach of article 181 the assertion of a real fact, as if this were the case, then there would not be any space for critique or opposition.

- The notion of authority was also an issue of considerable dispute to be defined. In principle, an authority was taken to signify an organ of the State, which has the competence to exercise freely and on its own prerogative public/state power. This was anyway stipulated in article 1 of the Presidential Decree 611/77 concerning the codification of legislation on the status of public servants and employees. The Supreme Civil and Criminal Court in its jurisprudence extended the meaning to cover:

  - Every legally composed and established judicial synthesis,
  - Judicial inspectors and the prosecutor,
  - The police,
  - The traffic police,
  - The Chief of the Police and the Traffic Police as well as any Director or officer of a police station,
  - The Armed Forces, the General Military Councils (of Army, Air force and Navy), the Supreme Military Council, the Chief of the Armed Forces, the Chiefs of Staff of the different Army Corps,
  - The President of the Republic,
  - The President of the Government, the Cabinet, Ministers, General Secretaries of Ministries,
  - The Coast Guard, the Chief of the Coast Guard,
  - The judicial representative in electoral processes,
  - The Mayor,
  - The Town President,
  - The Notaries.

The State in general is not considered as an authority. As for the clergy and the Church, Law 590/77 distinguished between those Church bodies of the Eastern Orthodox Christian Church of Greece that actually exercised some sort of public power Article 53§2 of Law 590/1977 read:'The Holy Convention of the Hierarchy and the Permanent Holy Convention shall enjoy in the exercise of their competences the protection envisaged in article 181 HPC, while the same protection will also be enjoyed by the Archbishop and the standing bishops in the exercise of their competences for offences committed through the press'., like the Holy Convention, and the rest, which were not considered as authorities According to the report 510/78 of the Prosecutor of Thessaloniki, there was an absence of legal basis for commencing criminal proceedings against a citizen under art 181§1 for being disrespectful towards the Ecumenical Patriarch and Bishops not based within the Hellenic territory - of Chalkidona, Chaldia, Philadelphia, Melini..

- "Publicly", for the purposes of art 181§1, means that the offensive comments were expressed in such a way that they could have come to the attention of an infinite and indistinct number of people, besides those to which it is directly addressed.
- By the wording of art 181§1, it was apparent that the actual behaviour constituting the crime stipulated was not described. It had to be assessed, with substantive and perhaps personal criteria, by the Judge ruling in each case.
- It proved, as understandable, quite difficult to distinguish when the offence was directed against the individual that happens to possess a public post and when against the post/institution itself. In most cases, the boundaries were not easily and clearly demarcated, as both values (the individual's honour and the prestige and authority of the post) were violated.

- The distinction between the institution, whose prestige, reputation and respect had to be protected and the person representing the institution, in his/her professional capacity by holding a post, was known to Hellenic thought even from the classical times. It was eloquently described by Aristotle in his Politics, 34-35).

'For the power does not reside in the juryman or councilor or member of the assembly, but in the court and the council and the assembly, of which the aforesaid individuals (councilors, assemblymen, jurymen) are only parts or members' (Aristotle, Politics III 1282a, 34-35)..

Hence, after the revision of the Hellenic Penal Code with Laws 1738/87 Which reduced the penalty prescribed for breaching art 181§1 from 3 to 2 years. and more recently 2172/93, the first paragraph of article 181 has been repealed. The current article 181 is entitled 'Offences of Symbols of the Hellenic State' and is in fact the old second paragraph, which provides for a penalty of up to two (2) years imprisonment for anyone who, in order to express hatred or contempt, removes, destroys, deforms or taints the official flag of the State or an emblem of its sovereignty. Offences directed against members of the State, holding public posts, are now caught by articles 361ff of the HPC, which relate to crimes against honour. The articles cover the following cases:

- A person offends the honour of another person by words or deeds/defamation (the penalty is imprisonment of up to 1 year and/or compensation,
- A person disseminates before other(s) facts that may harm the reputation and honour of a person (the penalty envisaged is up to two (2) years and/or compensation),
- A person knowingly disseminates false information about another person (the penalty envisaged is at least three (3) months imprisonment and/or compensation).

Article 366 HPC states that for case (ii), if the fact being spread is real, the act is not liable for punishment. However, the proof of the reality of the fact is prohibited when the fact concerns solely family or personal relations, that do not infringe upon the public interest and the spreading was made in bad faith (art 366§1). Furthermore, for all cases where a person spreads information about a fact, for which criminal proceedings have been instigated, the imposition of a penalty on the person (and perhaps the criminal proceedings against him/her) is postponed till the conclusion of the criminal proceedings against the act that was spread. If the court ruling actually imposes a penalty on the act by finding it in breach of a criminal provision, then the defamation is considered to have been proven true, while if the court ruling sets the culprit in the clear, then the rumour is considered to have been proven false.

Art 367 HPC mentions specific exemptions. Hence, the following actions are not considered as illegal, provided that they were not made on information that were knowingly false:

- Negative reviews and critiques of scientific, artistic or professional functions
- Negative comments included in documents of a public authority for matters within its work circle
- Actions that take place for the execution of legal duties, the exercise of public power or the protection of a right or another justifiable interest
- Any other similar case.

In all these cases, criminal proceedings are instigated only after a request/complaint is filed. If the victim is a public servant, and the offence against him/her was committed during his/her service or for matters relating to it, then the right to request the instigation of criminal proceedings lays also with his/her supervising authority and the relevant Minister.

The Hellenic Penal Code also protects companies from libellous spreading of rumours, according to article 364. Hence, whoever makes claims in any way or form before a third person about a company concerning a certain incident related to its commercial activities, the financial situation or generally its business or about the people that are managing or directing the company, and these claims may harm the confidence of the public towards the company is punishable with imprisonment for up to one (1) year or is liable to compensation. If the offender knew that the claim he/she disseminated was in fact not true, then he/she is punished with imprisonment (art 364§3). The offender is acquitted is he/she proves the truth of the claim he/she made (art 364§2).

In offences committed through the press, the Hellenic Penal Code provides that the editor of a newspaper or magazine, in which the libellous report that led to the conviction of its author was published, is obliged to publish in his/her publication the entire body of the court decision within eight days since the decision was sent to him/her by the prosecutor for this purpose, in the same place and covering the same space as the libellous piece. Otherwise, if he/she does not comply, he/she is punished with imprisonment for up to one (1) year or becomes liable to compensation.
In general, freedom of expression is naturally also protected through other provisions of the Penal Code. For instance, chapter 22 HPC provides for penalties for the breach of the secrecy of correspondence, discussions through telephone or in person, the unauthorised copying of software. By the same token, there are also a bunch of other provisions protecting the political system. For instance, the 1st chapter of the Second (special) book of the HPC provides for crimes directed against the form of government, chapter 2 provides for crimes that constitute treason against the Country, while chapter 4 (entitled 'Crimes against the free exercise of political rights') provides for crimes committed against the political bodies and the Government, as well as crimes committed in relation to the free conduct of elections
To conclude, I would like to state that the idea of the protection of Greek identity or any kind of sort of "Greekness", if such a word exists, is unknown to the Greek legal order, as well as to the Hellenic thought in general. I attempted to briefly sketch the legal framework for the protection of the freedom of expression (in all its different connotations). Greek accession to the EU did not bring about important changes to this framework, or at least it was not the reason that instigated any such changes. In fact, the Hellenic legal framework was already in compliance with international conventions on the protection of the freedom of expression not only before Greece joined the EU, but even before it adopted its current constitution Greece ratified the European Convention on Human Rights right after the fall of dictatorship in 1974, while it adopted its constitution in 1975..

Thank you for your attention.

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...İlk olarak, devlet otoritesinin ve diğer devlet kurumlarının itibarını sarsacak söylemlerde bulunulması.. Bizim Ceza Kanunumuz hala 1930'da kabul edilen faşist kanundur ve ifade özgürlüğünü sınırlayan birçok hükmü bulunmaktadır. 1948'de kabul edilen yeni Anayasa ile bu tür sınırlamaların azalmasının yanında, yeni bir kanunla da bu tür suçlar bakımından hapis cezası verilememektedir. Devlet yaptırımlarını, geleneklerini,vs. aşağılamanın cezası 1000 ile 5000 Euro arasındadır. İtalyan bayrağını aşağılamak veya yakmanın cezası da 1000 ile 5000 Euro arasında değişmektedir. Dinin aşağılanması 1000 Euro, devlet otoritesinin aşağılanması 1000-5000 Euro'dur. Bu tür suçlar bakımından halen hapis cezasının bulunduğu bir durum da vardır ki bu da, mahkeme salonunda duruşma esnasında hakim kararını okurken hakimin aşağılanması durumudur. Burada 2 yıla kadar hapis cezası öngörülmektedir.

....Bahsetmek istediğim bir diğer nokta ise, Türkiye'deki 301 konusuna en yakın olan konudur: İtalyan Anayasası'nda kabul edilmiş olan gerçeklere ve değerlere saldırmak. Burada teori ile uygulama arasındaki farka dikkat çekmek isterim. Teoride, konuyu düzenleyen madde 291 metni şu şekildedir: "Her kim, aleni olarak İtalyan milletini aşağılarsa, 1000 ila 5000 Euro para cezasına çarptırılır." Bu maddeye ilişkin bir davanın açıldığını hatırlamıyorum.

...Uygulamada ise, bugün İtalya'da bir kişi doğru olmayan bir şey söylerse veya politik görüşünün ya da aptallığının sonucu olarak bir şey ortaya atarsa, ceza almaz. İtalyan Anayasası'ndaki değerler bakımından bu durum yabancılara oldukça şok edici görünebilir.

...İtalyan Anayasası, ülkenin bütünlüğünü ister. Meclisimizde ciddi bir çoğunlukla gelen ve 15-20 yıldır bulunan parti, aleni olarak, ülkeyi federe devletlere bölmekten veya ülkenin bir bölümünün geriye kalanından tamamen bağımsız olması durumundan bahsetmiştir. Partinin liderine karşı ceza davası açılmıştır çünkü bu söylemler, devletin bütünlüğüne karşı tehdit olarak görülmüştür. Daha akademik bir tonla söylemek gerekirse, bizim Anayasamız genel olarak, faşizme direnme temelleri üzerine kuruludur. Ve direnişin kahramanlarına İtalya'da "partizanlar" denir.

...Yakın zamanda basılan meşhur bir yazarımızın kitabında, özgürlük savaşçıları "haydutlar" olarak nitelendirilmiş ve bu, büyük tartışmalara yol açmışsa da, yazar aleyhine başlatılan bir cezai işlem bulunmamaktadır.

...Şunu da net bir şekilde söyleyebilirim ki, şu anda İtalyan yasalarında "İtalyanlığı" koruyan herhangi bir hüküm bulunmamaktadır.

Dr. STEFANO MAFFEI (M.St., Ph.D. Oxford)

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Ladies and gentlemen, colleagues,

I am delighted to be here today at Bahcesehir University and I shall warmly thank the organizers for their effort in making this event possible at such a crucial time in the political history of Turkey.

This is my first visit to Istanbul and, more importantly, it is the first time that I have been asked to approach the matter of freedom of speech in an international seminar. I am pleased for the opportunity, especially as I may be able – for once - to report some positive developments in Italian law and, further, to focus on a few features concerning the rather liberal approach adopted by Italy with regard to freedom of expression. When one looks at the Italian legal system optimism is a scarce commodity, as Italians themselves do not seem to have a high consideration of their own "way of giving justice" (public confidence in justice is critically low for the reasons explained by S.Maffei-I. Merzagora-Betsos, Crime and Criminal Justice in Italy, in European Journal of Criminology, 2007, forthcoming). In addition, the Human Rights record of Italy in Strasbourg is the worst among all European nations in terms of findings of violations of the European Convention of Human Rights. As a matter of fact, however, most findings of violation concern Article 6 (right to a fair trial) and, more specifically, the extraordinary delays in both civil and criminal proceedings. Instead, Italy was found in breach of Art. 10 of the E.Conv.H.R. only once (Perna v. Italy, 6 May 2003, Application no. 48898/99) and this is a preliminary indication that the extent of protection afforded to freedom of expression is rather satisfactory.

Before turning to the boundaries of freedom of expression and its "criminal" implications let me offer you a few insights into the constitutional framework surrounding the matter. In this respect, I am aligning my considerations to those previously made by the Greek and the German presenters. The Italian Constitution also includes a provision devoted to the freedom of opinion and the freedom of press (art. 21). Particularly significant is the reference to the "freedom of press", since the Constitution - which entered into force in 1948 - marked a departure from the practice of the prior fascist regime. It is well known that - in Italy as elsewhere – the fascist Government directly controlled TV and radio and placed heavy restraints on the printed press: this is why freedom of press held such an important role in the eyes of the framers in their effort towards a renewed democratic society. These are the basic principles that characterize the Italian law on freedom of expression: a) freedom of opinion and expression is announced in broad terms in Art. 21 of the Constitution; b) Art 21 bans against any kind of censorship against the printed press; c) no prior authorization is required for the distribution of any printed publication; d) seizure of a publication is only permitted by virtue of a court warrant when an offence is being committed and only in three copies, for the purpose of securing evidence for trial. In other words, seizure does not involve the whole lot of publication that are being distributed but only those that are necessary to prove the related offence in a court of justice, when and if a trial occurs. The only exception applies in cases of moral turpitude (e.g. porn magazines) for which seizure is admissible for the whole lot of the printed material.

Let's now move on to discuss the criminal offences that may possibly affect or reduce freedom of expression. These "opinion crimes" may be found in both the substantive criminal code (Codice penale) and some separate bodies of law. Please be reminded that my focus is only upon conducts that may potentially affect the "public interest" and that may therefore be regarded as a threat against the integrity of the Country and its institutions. Instead, insults and attacks against the reputation of private individuals – which are also punishable as criminal offences - fall entirely outside the scope of this presentation.

Discussion is in three parts. Firstly, I will consider the aggressions against the reputation of the State authority and its institutions. Later, I will turn to the aggressions against the reputation of the persons representing the institutions (e.g. public officers, the prime minister, members of parliament, judges, prosecutors, etc.). Finally, I will consider the verbal attacks against the "truth" (as in the case of denials of certain established historical facts) or certain core values embedded in the Constitution.

I shall begin from the aggressions against the reputation of the State authority and its institutions. In theory, the Criminal Code lists several offences that could easily serve the purpose of curtailing freedom of speech in this respect. The presence of several "opinion crimes" of this sorts may be easily explained if one considers that the Code entered into force in 1930 and, at the time, the fascist regime was obsessed with securing and promoting the State reputation. Over the last 70 years, however, these provisions have progressively lost their significance. After the early years, they were at first marginalized, then quietly disregarded and eventually quashed by the judgments of the Constitutional Court – since they were deemed to be in contrast with the principles of the 1948 Constitution. In 2006 (Law No. 85/2006) a statute abolished most prison terms for these offences which are now punishable almost exclusively by fines. By way of illustration, insulting the Republic - or any other constitutional organ, including the armed forces - carries a penalty of ğ'5f1.000 to ğ'5f5.000 (Art. 290 of the Criminal Code). Further, insulting the Italian flag is punished by ğ'5f1.000 to ğ'5f5.000 while burning it may lead to 2-year imprisonment (On a lighter tone, Italians tend to buy flags only for soccer championships and, since Italy won the 2006 competition, I am not expecting any burning of flags in the near future....). Insulting a religion carries a penalty of ğ'5f1.000 (Art. 404) and similar provisions are provided for the case of insults against a public authority. A prison term (up to 3-year imprisonment) is prescribed for insulting a judge in the courtroom (Art. 343). There is also an offence in a 1975 statute (Law No 654/1975) that goes along the line of an aggression against a public institution although this is not stricto sensu a "State" institution. This offence is the "incitement of religious hatred" for which the penalty provided is up to a year-and-a-half imprisonment. To summarize: these "opinion" offences have a clear fascist origin (apart from the excitement of religious hatred); they were almost never used in practice; their penalty is rather low; in essence they play little if no impact in affecting freedom of expression.

Let's now move on to the aggressions against the reputation of those individuals that represent State institutions. Reference is primarily to the category of "public officers" such as judges, members of Parliament, police officers, etc. The Italian peculiarity is that, since 1999, there is no longer a special offence to protect their reputation (Law 205/1999). The only applicable offence is the ordinary crime of defamation, which applies now to both public officers and ordinary people (Art. 595 of the criminal code). For the crime of defamation two are the major legal questions that typically arise in a court case. On the one hand, one should carefully look at the content of the statement and its defamatory implications. On the other hand, one should investigate whether the defendant could sensibly claim the defense of exercising one's right to "report events", "to criticize political opinions" and even to advance "satirical comments". Please forgive me as I cannot go now into the details of the criteria established by the Italian case-law but let me assure you that solid and vast jurisprudence clarifies the boundaries of the said defense, in accordance with the profession of the defendant and the victim. As a result, the extent of the defense progressively broadens if the defendant is professionally engaged in the job of reporting news, advocating political views or advancing satirical comments against politicians. For journalists and political writers, as a result, the defense is much broader than an ordinary person could claim, while members of the Parliament enjoy even wider freedom of "verbal aggression" when they make their speeches in the Parliament. There is also an interesting debate concerning the

MP who expresses his views outside the Parliament. In general, however, I align my considerations to the comments made by German presenter: in the last 20 years Italian law tends to favor freedom of expression over other potentially conflicting interests. While in Germany some cases are brought when the victims of defamation are police officers, in Italy charges for defamation against journalists are being prosecuted successfully very often when the victim is a judge and that is for the obvious reason of solidarity within the judiciary. Politicians, instead, enjoy a much smaller degree of protection against the "aggressions" of columnists and TV showmen, while almost all newspapers host ludicrous cartoons depicting their physical defects (e.g. Mr Berlusoni as a Mussolini dwarf, Prodi as a fat big slow man). Recently, a journalist who screamed "clown" to Prime Minister Berlusconi before a crowd was acquitted from all charges.

It is now time to consider the third aspect, which lead us closer to the issue of Article 301 of the Turkish Criminal Code. The topic is that of the aggressions against "the truth" or against values that are embedded in the Constitution. Here the law in the books sharply differs from the law in action. In theory, Art. 291 of the Criminal Code could very well apply to those scenarios. The provision reads as follows: "whoever publicly insults the Italian nation may be punished with a fine from ğ'5f1.000 to ğ'5f5.000". In practice, let me inform you that I do not remember a single case brought under Article 291 in recent years. At the present time, you will not be charged if you argue or if you simply state facts that are untrue or if you sustain a political opinion that is the fruit of ignorance or stupidity. Stupidity or ignorance are not a crime in Italy, despite the wordings of art. 291. Let me give you two examples to substantiate this claim.

The Italian Constitution openly calls for the "unity" of the Republic (Article 5). As you may know, in the last 15 or 20 years a political party with a significant percentage of votes (5% to 9%) has publicly advocated the transformation of Italy into a federal State, and even sometimes publicly called for the separation of portions of the north from the rest of Italy. No criminal charges have ever been brought against the leader of such party. Even when the Northern League has founded the Parliament of the North - a pathetic mock copy of a national legislative authority – no charges have been brought against the leaders, despite strong calls from those who saw this as an humiliation of the value of a "united Italy".

Secondly, it is an undeniable fact that the Italian Constitution is very much based on the values of the resistance against fascism. The values of resistance are frequently referred in the Constitutions and the early political leaders were indeed attached to the resistance movement. The heroes of the resistance are called "partisans": partisans used to fight in the mountains, helped the allies in defeating German troops and fought for the liberation of cities and villages between 1943 and 1945. In 2006 a book was published by a famous Italian writer. The book challenged the traditional stereotype of the good-hearted freedom fighter of the WWII and, instead, described the partisans as "bandits", "murderers" and mercenaries. As one may expect, the book caused sparks of anger among vast sectors of the public opinion (and the left-wing parties) and seriously endangered the life and security of the author (who has been subjects to threats and now lives escorted). Yet, no criminal charges have been brought against him and there has been no question on whether his statements may be regarded as "criminal" in nature, despite their obvious impact on the reputation of the early framers of the Constitution, and the Constitution itself.

On the basis of these cases, and despite the provision of art. 291, I can confidently say that "Italianity" as such does not find any protection in the Italian criminal code at this time.

Thank you.

LEVENT KORKUT

Professor at Hacettepe University
Amnesty International

I am going to present the freedom of expression constitution. I will give little bit historical background of article 301. Then, Günal Kurşun will continue on criminal law dimensions of article 301. First I want to share with you the general rules in the Turkish constitution. Because, they are really important to understand other legal rules in the system. I want to mention first paragraph of the preamble of the constitution. According to this paragraph, "no protection shall be afforded the thoughts or opinions contrary to the Turkish National interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values or the nationalism principles, reforms and modernism of Atatürk". In this especially, I want to underline the terms of "Turkish National interests", "Turkish historical and moral values". These are the terms protected by the constitution and no protection shall be offered thoughts or opinions contrary to them. That means this preamble is a kind of ground for 301 in the Turkish system. Of course preambles are not binding in many constitutional systems but according to the Turkish constitution, the principles and preambles can be used in these judgments. Freedom of thought and opinion; article 25 is the basic article for freedom of thought and opinion. According to this article "everyone has the right to freedom of thought and opinion"; the first paragraph. In the second; "no one shall be compelled to reveal his thoughts and opinions for any reason or purpose, nor shall anyone can be blamed or accused of on account of his thoughts and opinions". In the previous constitution; constitution of 1961, the practice was different. But in 1982 constitution, for the same freedom, two different articles were created. According to article 25 of the constitution, everyone has the right to freedom of thought and opinion. But this only protects thought and opinions are not externalized opinions or speech. The other one is protected by article 26; "freedom of expression and dissemination of thought". In article 26, it reads: "Everyone has the right to express and disseminate his thoughts and opinions by speech, in writing or in picture or thought other media individually or collectively. This right includes the freedom of receive or dispatch information on ideas without interference from official authorities. This provision shall not be precluding subjecting transmissions by radio, television, cinema or similar means to a system of licensing. The exercise of these freedoms may be restricted for the purpose of protecting national security, public order and the public safety, the basic characteristics of the republic and safeguarding indivisible integrity of the state with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret protecting the reputation on 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". This long paragraph covers several restrictions for freedom of expression. Some of them are inline with international instruments including, European Convention but there are others also here... not that much international instruments. One of them should be mentioned here. This article amended in 2001. It was a package and many articles of constitution were amended at that time. And after the amendment, the third paragraph of the article was removed from the constitution. This paragraph was that: "No language prohibited by law shall be used in the expression and dissemination of thought". Although there was no law prohibiting any language in Turkey, this constitutional rule was quite against basic rights and freedoms of individuals and it was removed from the constitution.

Article 27 is on "freedom of science and arts". "Everyone has the right to study and teach freely, explain and disseminate science and arts and can carry out search in this field.

The right to disseminate shall not be exercised for the purpose of changing the provisions of article 1, 2 and 3 of this constitution. The provisions of this article shall not preclude regulation by law of the entry and distribution of foreign publications in the country". This is a little bit bizarre paragraph, again, still valid in our constitution. And that's of course not compatible with international standards. According to this paragraph, foreign publications will benefit from freedom of science and arts in a lower degree. It is unacceptable from the point of international standards.
These are the main articles on freedom of expression in the constitution. Of course there are several others, directly or indirectly related to this field. But I want to end this constitutional dimension here. I want to pass to article 301 of the criminal code.

This article is coming from Italian criminal code of 1890. The Zanardelli Criminal Code. This code translated into Turkish in 1926; the first Turkish penal code in the republican period. At that time the number was 159. And after that there were several amendments in the article. Now, I want to first give you current legal text, the last version of the article, now the article after the new penal code; 301.
First paragraph: "Anyone who publicly denigrates "Turkishness", the Republic or the Grand National Assembly of Turkey shall be punished with imprisonment of from six months to three years.
Second paragraph: 'Anyone who publicly insults the government of the Republic of Turkey, the judicial bodies of the state, the military or police shall be punished with imprisonment of from six months to two years.
Paragraph three: 'Where a Turkish citizen denigrates "Turkishness" in a foreign country, the penalty shall be increased by 1/3.
And the last paragraph: 'Expressions of opinion with the intention of criticism shall not incur punishment.'
In these four paragraphs article regulates insulting Turkishness, the Republic, organs and institutions of the state a separate crime. As I said, the article is coming from 1890; the Italian criminal code. In the 30's, in the 40's, in the 60's, there are four amendments in the article. The most important amendments can be summarized in some headings. First, in 1936 a new paragraph was added to article 160, binding prosecution, the permission of Grand National Assembly. Then this permission removed from the Grand National Assembly to Minister of Justice. This rule remained in the criminal code until 2004. It was; as we discussed in the break, it was an important rule at that time because the Minister of Justice could prevent cases against individuals if he or she wants. But in the new code there is no such rule. There is no permission system. And second important aspect of these amendments, in time we see that number of institutions and values increased. In the first version for example, there was no Turkishness and later it was added and then there was no police department it was added, there were no judicial organs then it was added. In 60 years new institutions and values have been added or covered by the article. The original form expanded to other areas. It is one of the interesting points I should mention. In the first form, there was a paragraph insulting "armed forces and navy" then it was changed to "army". There were some corrections also in the wording of article.
The one of the most important aspects of this article; the crime is completed when you insult these institutions. But insulting; a difficult term, it must be decided by the judges in the last point. I think that the most important difficulty in Turkey, the judges, their culture and their mentality play an important role if still we are discussing this dinosaur article in the criminal code. As we see here in all other countries, in your countries, there are similar articles, but they have not created big problems in your societies especially in terms of freedom of expression. But in Turkey, especially until recently

many people have been judged and prosecuted and imprisoned because of their expressions by using this article. Even now, although there is only one sentenced person; Hrant Dink, the Armenian writer, several cases have been opened against individuals. I just have to mention some of them just to give you an idea against what kind of acts prosecutors opened files. You know the famous case; Orhan Pamuk. I do not want to focus on this case. Tomorrow Günal will give a detailed analysis on his case and the latest developments in the European Court of Human Rights. The second one, Prof. İbrahim Kabaoglu and Prof. Baskın Oran these people were the head and committee member of the human rights advisory board of the prime ministry. And they produced a report on minorities and cultural rights and they were allegedly charged with "publicly denigrating Turkishness" and in their case I don't know what happened. It is still going on. They just produced a report on minority rights and culture rights in Turkey and it is found as 'denigrating Turkishness.' And another one Ragıp Zanaatoğlu, his publisher published a book by Dora Sakayan entitled 'Experiences of an Armenian doctor', just the activity was this and again this was found as denigrating the state and the republic. Same publisher published another book George Gergiyan, called 'The truth will set us free-Armenians and Turks reconciled' and it was again sent to the court. Another one, Abdullah Yıldız; chief editor of the literature publishing house, translation of a book entitled 'The Witches of Smyrna' by Greek author Mara Merimari. Because of this, he was again sent to the court. Fatih Tahi, another young journalist; owner of Aram publishing house, published a book John Tillman entitled 'The spoil for the human cost of America's arm strict', because again insulting Turkishness. Why? Because, there is a map in this book showing some activities of Turkish army in Eastern Turkey. That's the reason. The list goes on. I don't want to take your time. If you can we can talk more in the break. I just wanted to give you an impression what kind of cases are these. I don't want to give you a wrong impression. Most of these people were not and will not be punished by imprisonment. Only one person and that was Hrant Dink, he was imprisoned. But given this process against basic rights and freedoms of individuals, freedoms of expression one of the most important freedoms in a democratic society. Now Günal will give you more technical aspects of this article; article 301. I want to give the floor to him.

GÜNAL KURŞUN

Research Assistant, Criminal Law,
Başkent University

Thank you, thank you very much. My name is Günal Kurşun and I am an instructor in Başkent University-Faculty of Law. I am working on the criminal law and the Criminal procedural law at the same time I am a PhD candidate.

Believe me or not but .....It is very hard to put a security officer in front of a court and if you are successful in this issue, it is again very very hard to see the security officer to have the punishment. In the freedom of expression issue, it is completely the same. If you look in the legal texts, O.K. there is a standard, but in practice we see such examples like Dr. Korkut mentioned before. And I think that Turkey has to change its attitude towards its citizens. And mentality change is needed. If you carry on seeing state's interest above people's interests I think we are not able to solve any problems. Regarding 301, I believe that there are two ways to solve this problem. First we have to admit that there is a problem because it exists, it is a problematic article. And to solve this problem we have two solutions. One is easy solution and the other one is the harder one. The easy solution, you can abolish 301 as a whole. This would solve all the problems regarding 301. But this solution doesn't solve the main problem. Because in the practice we see that if you abolish an article in the Turkish Legal System, one another article comes into force and takes the position. If you abolish 301, I will say it from now; 216, the former 312 which was a very famous article, will take its place. And public prosecutors will carry on issuing statements and there will be punishments. So, the other solution, the harder solution is a mentality change. I believe that this mentality change must begin with giving full independence to public prosecutors and judges. In the debates in the reason bounds, we read in the newspapers that some government officials stated that public prosecutors shall not file cases in some examples like Orhan Pamuk case, especially cases about who commit non violent acts, the public prosecutor must take in to consideration the forth paragraph of 301 which reads as 'Expression of opinion with the intention of criticism shall not incur punishment.' I believe that this is giving the ball to public prosecutors and judges and this is not the way. This won't solve our problem. Because in Turkey we see a situation like, I can not imagine a public prosecutor who won't file a case against Orhan Pamuk in the recent circumstances. If he rejects to file a case, two opportunities will happen. First he can find himself in the very eastern corner of Anatolia, or he can face with disciplinary action. Because according to the constitution, there is a high council of public prosecutors and judges and its president is minister himself and other members of this council are appointed it by the minister himself. And they are deciding who will serve in what place in one call. The other problem is the council's decisions are close to judiciary observation. You are not able to file a case in the administrative court against this council's decision. So, if they send you to very eastern part of Anatolia, there is nothing to do, or if they give you a disciplinary punishment, there is nothing you can do. We have seen many examples in time. Recently we have seen last month Ferhat Sarıkaya case. So the first step to be taken forward must give full independence to the prosecutor.

Let's bind this situation to the minister's permission. If the issue is that much political, let's leave it to a political decision. Ask the Minister of Justice, if he permits, let's file a case from 301, and if he or she doesn't permit, no case will open. This is one another step. Indeed, giving education to public prosecutors and judges must accompany to these kinds of solutions because, we can not ensure the mentality change without giving education to the legal bodies in Turkey.

In this sense, I would like to discuss a little bit the elements of the crime of 301. The physical element, the 'actus reus' of the article 301 is denigration. Some of the translators are translating this wording as 'humiliation' or 'degrading' but I think 'denigration' is the right word. Denigration of what? Denigration of Turkishness, denigration of republic, denigration of grand national assembly, denigration of government, denigration of judicial bodies, denigration of military or police. This is the physical element of the crime. We have seen that in many European countries, there are such provisions against the institutions of the state. But Turkish article's difference is the denigration of 'Turkishness.' So there is a question: Do we find the definition of 'Turkishness' in the penal code? There is no definition but in the reasoning they face with a definition of Turkishness. It says: wherever they live in the world, people who share the common culture belongs to Turks are Turkish. Here, in this definition, do you want me to repeat it? 'Wherever they live in the world, people who share the common culture belongs to Turks are Turkish.' You may catch that; this definition is broader than Turkish nation. As our Italian colleagues mentioned before in the 291 of the Italian criminal code, it is Italian nation. Here it doesn't say 'Turkish Nation' but it says 'Turkishness'. And this definition is broader than Turkish nation because it includes people who don't live in Turkey but shares the same culture. For example, you know that there are some christian Turks or gagavus Turks living in Russia or in Moldova. They are Turkish and if you insult them, there will be insult of Turkishness or denigration of Turkishness. We know what republic is. We know what Grand National assembly is. We know what government is. But in the government's sense, there is another problem. Because, the government doesn't have a legal person. The state has a legal person but the government itself doesn't have a legal person. Judicial bodies? O.K. Military? It comes from the Italian original so half of the fault belongs to Italians. Ok, this is the physical element. What is the mental element of this crime? The mens rea is the general intent of denigration. There is no need for a specific intent. As far as I have observed from the Italian doctrine, there are some autor who says that there is a need of specific intent in this issue but in general sense manly all the lawyers say that it is a general intent, not a specific intent. O.K., this general intent of denigration. Here, we can look to the forth paragraph about the criticism issue. Criticism is a usage of right and this usage doesn't erase intention but it erases contrariness to law. So, the mental element of the crime is general intent of denigration of Turksihness and bla bla bla. I am asking a question at this point: What is the protected value of this crime? My answer is: the prestige of the state. This article is protecting the prestige of the state, the fame, the spiritual or misty way of state. We don't know what it is. In this sense I believe to follow up the second way; the harder way. We have to change our minds and we have to change our mentality on looking to this issue. I mean if you follow up the concrete examples like Dr. Korkut said before. There are 60 or 70 cases that are filed in this year; 2006, from 301. One of them as far as I have observed, taken the punishment, the Hrant Dink case. And the others are still being carried on in the courts. We will wait and see what will happen. But as a result it looks like this article doesn't help in the general or doesn't solve the problem. Tomorrow if we have enough time I will try to analyze the very famous Orhan Pamuk case as I will say much more concrete things. Thank you very much.

DİSCUSSİONS
16. 11.2006

SYLVIA TELLENBACH: (The Moderator) Thank you very much for you both. Turkish speakers gave us a very brief explanation about the Turkey and it's situation. Now, we have about 1 hour for discussions. Let's try to discuss as much problem as possible. Let us collect some questions first and then we will answer them....

ANDREAS POTTAKİS: I have a couple of questions actually the first is to the last speaker about the 301. And the second one is more general so I want to share with everybody, you can tell me your view on it. First of all, about the 'Turkishness' issue, without trying to be provocative or anything, but it seems to me that the essence of the Turkishness, in the way formulated the article and the way you translated it, it wasn't actually to protect the prestige, the prestige of the stage is protected through the President of the Assembly and etc. The Turkishness is something else that also includes in this article and it is the Turkish culture if I understood correctly. And if I can translate it properly, Turkish Christian does not share the same culture with a Turkish Muslim. So it's not caught by 301. This is just...,some I need clarification on this matter. What I am trying to say is that, perhaps the idea that I'm sharing with you it that, if this is the case, and in general, from my experience; let's say from what I read from different articles of different criminal penal codes in Europe and everywhere in the world. The impression I got was that, provisions protecting the prestige of the state, of state institutions, or the authority of the state or the monopoly of the state, all the sort of things that we have today. Usually, where entire in penal codes of states that were young states. OK, I just make this reference because it's so happened, because I was here during the celebration of the 83rd year, sort of celebration of the establishment of the republic? No? A couple of weeks ago? And my impression is; like in the case of Italy and in the case of Greece, we kept an article as long we thought our state is threatened by other internal or external forces. This is a case and I will actually try to present you a case, many cases tomorrow. The moment we actually decided to repeat it; the article, it had to do with the fact that it was so abused in the end, because of political sort of differences, party politics. And they were accusing one the position of the government and etc and so it lost all its importance. So what I am trying to say is that, first, is it perhaps time, or is it just a matter of historical sort of incidents that this article still exists in Turkey and perhaps the Turkish state, the Turkish society, the Turkish nation will be in 10, 20, 30 I don't know, tomorrow, in a short time, be ready to get rid of an article like this, without having to supplement it with something else? It is also the fact that it is Turkish culture which is being protected by it? And if so what is Turkish culture? And if I make another question and everybody can sort of contribute on it. It has to do with freedom of expression through the press. I think maybe my Italian counterparts would actually adress it better tomorrow. I don't know if there was actually case like that in Italy. But ....we had a terrorist group, and it was called the "17th of November" coincidentally. And with every strike they did, they were actually choosing, selecting targets that had to do with state officials or big businessmen representing established order or state authorities or even foreign diplomats and etc. And with every target, every strike they made, they were issuing, publishing a sort of a... lets call it a manifesto, a statement, a big statement that had political sort of references inside and it was mainly addressed to the sort of destruction to the established order, abolition of the constitution and all sort of things. So this political statement, I call it 'political' within brackets was actually allowed to be published in the newspapers in Greece. And to my recollection it must have been, because there were many sort of victims of this terrorist group, more than 15 incidents there were such sort of documents were allowed to be published in the newspapers. There was only one instance that the prosecution decided to seize one newspaper, under extreme pressure by the government.

But because the criminal code the penal code in Greece so provides, the decision of the prosecution has to be sort of reviewed the next day within 24 hours by a court. And the court decided that it was an extreme measure to seize. What I am trying to say is that it has never been seized. I don't know about the Brigade Rosse If they have ever issued such statements in the press.

STEFANO MAFFEI: They did.
Andreas Pottakis: Yes so. And I don't know how the Italian judiciary system reflected on this matter and reacted against this matter. But for me it's just an example of the extension of the freedom of expression through the press.
Stefano Maffei: As Andreas put that in word you know, It is not really a matter for us to take an article as a recipy, because you know every country has it's own problem. But the turkishness and concept has catch me as well.
And that is why that an article should protect the minority. So that's why Turkishness does not work as a concept in my view, because the approach to fundamental right should be that we protect the one that thinks differently, we do not protect those who think conventionally. And there you go if you take in majoritarian concept to the code, you misunderstand the function of fundamental rights and I do not accept the argument. And again I am taking a lighter note, do not worry about it. I do not accept the argument that the crime is not prosecuted, that's not a good argument in Italy and neither in Turkey. Because you may have some people who are deterred any way by the fact that the prosecution will actually take place or the case will be taken to the press. You know I would like to write a book, but you know I don't want to be taken to the press I don't want to have the security guards off my footsteps you know every day. So I don't want to have it. Then and this is my last point. I agree a hundred percent normally young democracies are more worried than you know old democracies, and put this kind of provision in place. There you go we are looking for what to the moment where any democracy will accept denigration; because the more a democracy accepts internal denigration, the more mature it is. This is the least in my view.

LEVENT KORKUT: You are right, this Turkishness first occurs in the criminal code, 1926, there is no such a term in Italian code they add it.

STEFANO MAFFEI: You see it will be very difficult for me to conceptualize a concept of Italianity. Because every Italian will tell you where he comes from whether they are from Rome or Naples.

ANDREAS POTTAKIS: You can not codify on a legal term, but in cultural terms, historical terms as you said they share common cultural grounds or cultural beliefs.

LEVENT KORKUT: But there were some reasons at that time, Turkish nationalism one of the late developed nationalisms in Europe. Therefore it is reactionary, after the collapse of the empire there was another reaction, therefore the moral values of the founders of the republic and people living at that time intellectuals, were trying to protect Turkishness, their nation. But ethnically a little bit different. But now it is different after many years, we can understand this and approach in a more mature way. The problem is today's judges, founders of 20 do they judge mentalities. You know a bad law can be made a good law by judges. They could interpret this article in good way. But unfortunately they did not.

ANDREW SHARLAND: You could discuss and followed the discussion about values and what is it to be British. These are patriotism for land. One of the things we have talked about what is it to be British.

They have a liberal democracy, they tolerate different views and if you could redefine the concept of Turkishness to somehow incorporate tolerance of descendant views or so forth you take it away from the majoritarian viewpoint which I agree is very problematic. Surely there needs to be a debate about what it is to be Turkish. And in 21st century is Turkey sparing to be a secular, Western, democratic nation which respect fundamental human rights and so forth. And if it is surely Turkishness includes tolerance of otherness so maybe debate move forward in that way.

FERİDUN YENİSEY: My name is Feridun Yenisey. I am a professor for criminal law in this university. I would like to draw your attention to one terminology which Günal Kurşun did not mention. So the terminology in this new code which is in effect since 2005 is "aşağılamak" so this is degrading or denigrating, humiliating etc. but it is not defamation, defamation is a different concept in the text. The law made a clear distinction between defamation, and this is worse, so it is deeper than defamation. The second point is that article 301 is in a certain chapter of the criminal code. This chapter protects the principles of the constitutional institutions. So according to my opinion, so it is my personal opinion, Turkishness means one of the portion of Turkish state like it is stated in the article, like national assembly is one of the portion of the state itself and its constitutional organizations, and Turkish nation as a national entity not as broad as it is described in the reasoning. So the reasoning does not count to the text of the code. So we should interpret this in Turkey as a Turkish national person, who belongs to the Turkish nation as a national person. But there is no case laws until now and this is a new code and the case law is not developing so we have to see and look. But the prosecutors have all might so they are applying the old version of their knowledge. So they shall adjust their knowledge to the new concept of the law. But it is very rare to find really good application of the law in all points not only on this point. Many new concepts of the citizen has not been understood by the prosecutors yet.

GÜNAL KURŞUN: Thank you very much for these contributions. I would like to make a visualization. Let's assume two separate people, the first one is ethnically Greek but a Turkish citizen living in Istanbul. And ethnically Greek but Turkish citizen living in Istanbul. If he or she is a Turkish citizen his or her identity is under the protection of the 301. Or as professor Yenisey mentioned this belongs to be some portion of Turkish state. Second person is a Gagavus Turk living in Moldova which is not a Turkish citizen and not living in Turkey. But according to the reasoning of article because it says that all of us know the binding result of the article's interpretation by especially oral interpretation. We are binded with this reasoning. So it says wherever they live in the world, people who shares common culture belongs to Turks. This reasoning I believe that is contrary to many articles of Turkish constitution especially the right of equality even it is contrary to 1924 constitution first article third article and 88th article, because the first Turk defamation was in the first republic's constitution and it says regardless of religion or racial background all people living in Turkey are deemed to be Turk. This was the Turk definition in 1924 constitution, article 88 as far as I know. So this national name in the political theory of Turkey the Atatürk nationality this 1924 constitution's article 88 builds up a Turkish identity. Regardless it is religious or racial background all people living in Turkey. Everybody who are Turkish citizens are Turks. The Greek living in Istanbul. If he is a Turkish citizen he is a Turk. But the other Turk who shares the common culture with me is not a Turk. According to the nationality definition.

LEVENT KORKUT: Turk may mean ethnic origin and citizenship. I think it is a kind of solution.

STEFANO MAFFEI: I do not see a solution. When you say we are trying to define Turkishness okay we can take ethnic religion what do you think is the criteria in place now?

GÜNAL KURŞUN: There are two different definitions. One definition is still in the constitution 1982 constitution says any people who are Turkish citizen are Turk. Citizenship is the definition in the constitution but in the reasoning of this article it brings a broader thing.
I believe that these definitions are contrary to the constitution and it is contrary to the European convention of human rights article 1, 9, 10, 14.

STEFANO MAFFEI: But even if it was not in line with the constitution...

LEVENT KORKUT: It is not as much against the constitution as I said in the preamble of the constitution again we found the same Turk the historical moral values of Turks.

JEAN- YVES DUPEUX: I have just two observations that I want to make in French. The first one is if we are 15 lawyers, jurists trying to find definition of Turkishness, this is a bit scary for the previsibility of the sanction four years of jail. Second I am with the professor's opinion. There is no defamation but there are denigration, which is much more broad and less clarified, than the defamation.

BERTRAND MATHIEU: In the different systems that we study we are doing like democracy and fundamental systems are the same. Fundamental rights are system of value substitute this system to another one, we can consider that Turkishness is one way or another system of value. In these two cases, sometime it is logical to limit expression which is menacing the system. Democracy is a system which is founded on the system of debate. In that case it is not logical to limit any opinion. This is very caricaturel, but if we reason in term of fundamental rights, we will limit the freedom of expression If the foundation of the democratic system is changing we will be more democratic. Our systems are sometime protecting human rights and democracy but not in the same balance.

LEVENT KORKUT: Personally I am supporting abolishment of this article but I agree with Günal on the point that even if we abolish this article we will face the same kind of problems again. Because one of the reasons of this; this balancing security and human rights problem is still a problem in Turkey and there is no good balance both at administrative, legislative and judicial level. It is broader I think picture unless manage to do this. Secondly I want to mention current debates in Turkey especially in civil society some groups proposing new proposals the most important one to abolish this Turkisness or replace it with Turkish nation. I think that in one month probably this Turkishness will disappear. Together with aggravation clause which is also not acceptable.

FERİDUN YENİSEY: Also point of Turkishness I would like to point out that this concept is well defined with court decisions in Turkey and this is not a new concept. It has always existed in the law. I made an expert report on this point years ago. A very famous Turkish author called Aziz Nesin, he said most of the Turks are stupid and he was accused with, 70% of Turks. He said 70% of Turks are stupid. I was asked by the court to establish an expert opinion whether this was insult to Turkishness or not. And according to the court's decisions the pending for many years, the court decides if a person insults the whole Turkish nation he must consider the whole nation then it is a crime. Then I said it is not a crime because he left out some portion, it is not the whole nation. This is a definition of the old code. The new criminal code has new concepts and there is no case law now about the new wording. The wording is the same but it has changed its contents. So I argued that we have to understand this as a portion of the state. Turkish state is not a territory, nation, its institutions it is a state. We can understand only on this concept of Turkishness.

STEFANO DELSIGNORE: Just to underline two points, one has already been said by someone. Also to me, it seems that there is a problem with this "Turkishness" concept in relation with the principle of legality. But another point of view, to me it seems this crime is a vague juridical object. I mean it is not clear to me as we have it of discussion. Which interest that this crime wants to protect? Is- the interest is so important to sacrifice liberty on one side but to be balanced on the other side with the freedom of speech, with the freedom of expression? Because in my point of view if the interest is not so relevant with our system, if it has is not constitutional relevance, it is not justified any way to use criminal law to protect this interest. In my point of view this is the first thing that is not clear. So I want to have some explanation on this point.

CHRISTOPHER BADSE: I want to add something relevant with the human right convention Article 10/2. The article says that the interference must be described by law. It is not only a piece of legislation it is a significant and concrete prohibition in the piece of legislation in the criminal code and if insults against Turkishness the suspense of four year it is very important to have a very very concrete description of what is Turkishness. So I am completely inline with the legality issues that you raised. We need to have a criminal code, a framework which provides a possibility, you mentioned Professor that there is a case-law that maybe you could narrow Turkishness concept down, I do not know much about it, but that would be interesting deal more about. The possibility when it comes to especially the criminal code is very involved in the human rights context. Of course inline with Europe harmonization, it is not only has to be prescribed by law but it also have to be "necessary in a democratic society". So the reasoning behind having this interference in the fundamental right needs to be stressed and argued. I think. Continuing with more Danish examples which we did not mention here this morning was that during the cartoon crisis there was, actually even before the cartoon crisis, there was a discussion of whether you should introduce probation against burning things like flag and it was discussed in Denmark whether this would be in contradiction with the freedom of expression as stipulated in article 10. And the conclusion was that it would not be a violation of article 10 to actually introduce a prohibition against burning things like flag. So you could actually do it. This is very precise actually. We are not talking about the general assembly or the other prohibition against expression against specific institutions but we are talking about as I understand that's vague concept of Turkishness and also whether or not it is necessary in a society and therefore also the excessive use of proportionality in the sentence of the violation of this provision 301. Thank you.

BERTRAND MATHIEU: Je me répète mais si on ne tient pas compte de la distinction et de dénigrement qui ne me semble pas exister dans le droit turc. La diffamation envers les turcs dont la « Turkishness » pourrait être condamné en droit français puis que la loi condanme la defamation contre un group de personne.

TRANSLATOR: We do not make difference between the defamation and denigration. The Turkishness could be convicted in the French Law because the law contains "any aggressive acts against the group of people should be punishned.....

BERTRAND MATHIEU: C'est un problème d'interprétation mais on a cette même logique d'interdire de critiquer un groupe du fait de sa qualité, de sa race et de tout ça. Dans votre exemple la loi française va condamner.

Translator: Always on the same principle that you can not defamate or denigrate a designated population. In your example the French law will consider it as defamation.

STEFANO MAFFEI: What seems to me is that if you can find 1/3 that share the same opinion with you, as a foreigner and then you take him to court and defense for you. Because there is one Turk that shares my view. So you say it is not against Turkishness any more. It has to be 100%.

FERİDUN YENİSEY: Article 301 in the old code was mentioning defamation but this new code has used a different language and the different language is deeper than defamation. It is just lying closer to taking human rights. Denigration "aşağılamak", humiliation is to be considered as taking away the human dignity. This is a new concept introduced to the law. It did not exist before.

JEAN-YVES DUPEUX: So this is a problem of translation. In France, is not as good as it is what you say. Denigration will be called as "denigrement" is when you say this bottle of water is not as good as an another bottle of water.

FERİDUN YENİSEY: But I think the new concept brought by the new code wants to say "taking the human dignity away".

LEVENT KORKUT: I just want to ask a question. Is this degrading actions should they be enough to punish somebody with imprisonment? This crime with rage words, what do you think about it? Not denigration, degrading. For example, when you criticize, harshly, an institution or any value here framed, can- you be claimed?

STEFANO DELSIGNORE: In my opinion, I tried to express this concept. There are two problems one the legal definition is not precise and the second one is that the interest, the object, the reason to punish somebody is to me not clear in this crime. In my opinion the same thing I could say for example when there are crimes which are protecting public morality or something like that which is a concept undefined, vague. So the use of criminal law to protect something so vague to me does not seem correct. So I think that also in this case if the interest is so vague, the choice to have a crime is not condevisible. Otherwise if we give completely different interpretation to the interest to the juridical object of this crime, like the professor seemed to do, because if we connect this concept to the territorial characteristic, but at this point I do not get the meaning of crime so I can not express position in this completely different interpretation of the definition of the crime.

GÜNAL KURŞUN: In Italy you say, value that is protected by the article is not clear with wording Turkishness. Whatever it is denigrating or degrading or humiliating or whatever it is. The logic behind the article is problematic. I will give just one example like our Danish friend said this is 301 but in the article 300, it is if you burn a foreign flag, for example if you burn US flag in United States as far as I know there is a strict court decision and it is free to burn a US flag in US. If you burn US flag in Turkey you will get a punishment. Much more problematic way is if a Turkish citizen commits these kinds of crimes outside Turkey for example in New York there is a circumstance which deals with 1/3 more function. Do you catch the logic behind?

Everybody: No.

STEFANO DELSIGNORE: Just a complete idea; you say in France if somebody discriminates a person in reason of religion, nationality and so on, he would be punished. The same is in Italy. But just to complete the thing that I was saying. The point is that you are in this situation protecting the honor of a person in Italy; I do not know the situation in France. So the interest is to protect the honorability of a single individual person. In this case, I do not get this approach and I do not find a real interest to use the criminal punishment.

BERTRAND MATHIEU: A distinction to make, In France to denigrate a person is not a problem but to denigrate a group is a big problem.

FERİDUN YENİSEY: But this crime is defined in the subsection of "constitutional organs protection. We have another subsection where "the person's dignity is protected". So it is very clear that the protected interest in this matter is the states organs. It is very clear.

STEFANO DELSIGNORE: It is not very clear in the law. I understand the meaning of your observation.

EDDIE KHAWAJA: I totally agree with the Italian view. Because for me the question of defining Turkishness is not interesting. It is going to set before the scene: What is the protective interest? Which are in the widespread? You need some kind of interest in order to limit another human right, this is probably no human rights issue of protection. Then you say okay what is the necessity in a democratic society and I cannot see it. I cannot even see some of the provisions you have in Italy as well protecting state organs what is the necessity in democratic society to protect them. In Denmark we do not have this protection and also there is no need for it in approved democratic society. So you have to step, before saying that we have the same article, what is the protective necessity and interest? What is the protection in the whole session in the law?

GÜNAL KURŞUN: I think the mentality of the law makers was to protect the Turkish state's prestige. But it is not defined. I mean it is very unclear. For me it is impossible.

ERIC KHAWAJA: Is that something necessary, something that is worth protecting? In the article 10, subsection 2 it is not worth a limitation that is legal. So if you do not think this provisions content. Why was it placed in the penal code? Why do we have it in the penal code? What do we want to protect? I think you should start there. Then if you could define a concept that is worth protecting then you can go on to discussion. What is the concept of this specific section in the law? So in Danish constitution we need to define philosophy.

FERİDUN YENİSEY: Are you also criticizing the German's version? German's also have the same.

ERIC KHAWAJA: I have a question what is the protection? There might be a historical for some of the countries like you mentioned, new democracies, new states, where there is something to protect. But we need a definition what is that, what is the interest? When I say interest more worth than the freedom of expression.

FERİDUN YENİSEY: It is the protection of the organs of the state. Germans also do that. So we protect the state. The question would be should we protect state or not?

ANDREAS POTTAKİS: I just want to make a comment on what Stefano just said. I think that Turkishness is like public morality and it has to be vague; that is the purpose. I am really afraid if at some point it becomes specific what Turkishness means. If somebody defined the public morality value specifically as I am concerned like you are if I understood you correctly, whether prosecutor or a court has the right and does have the right in your and my country- it is a sort of asses, when the public morality or decency of the public, this is obviously something which is, it has not been done. But it has to be ready. My problem is not that the idea, the concept of Turkishness, it has to remain vague and dynamic concept.

Today it is what it is, tomorrow perhaps it would be something else. My concern if it is to protect the state, why do not you just simply say Turkish morality or why do not you just put a sentence on the constitution that the promotion of Turkish culture is guaranteed by the state. Why do you have to put Turkishness in the criminal code? The notion of Turkish nationality as Danish or Greek nationality is a legal concept. I have a nationality. This nationality notion doesn't mean that I have a culture. These are not the same thing.
I think from international human right perspective I am really hesitant, you will correct me, but if you take this perspective to say perhaps a person who does not share the same sort of rights with me because he does not share the same sentiency as I do, as he is from a different country, the fact that I can't afford him from my own legal system, rights and sort of protection to me it sounds a bit doggy, it steams on the soverinty of the state, you are holding rights, some protection to people who are not actually of Turkish nationality, not citizens of Turkey. It seems doggy as I said to me.

GÜNAL KURŞUN: The reasoning says the same and I am criticizing the reasoning.

ANDREAS POTTAKIS: Some sort of a legal way, I can not accept professor's opinion because that was the case, the word of Turkishness in this sort of clause or Turkish nationality.

FERİDUN YENİSEY: The word Turkishness has always existed in the previous code. While making the new legislation, they used the old terminology. They did not change the terminology. But the chapter has been removed to another one. If you are trying to understand what the protected interest is you have to look to the chapter where it stands. The chapter's name is the protection of the constitutional organs of the state. So there is now a new meaning of the word of Turkishness according to the new Turkish criminal code, but there is no case law yet. And there has been pending cases about 300 or more and just one conviction. So this shows that the prosecutors are thinking just a little bit else what the Turkishness is and the courts are of different opinion of it. So it did not come to conviction. There must be the case law. What this bring us to our point of the judge. It says it is vague. It is really vague concept we do not know what the content is. There must be an explanation on this.

STEFANO MAFFEI: If I can take it to a more political level, first you could deal with Turkishness Stefano Delsignore we consulted and I think that's really the core issue. One could answer the national identity. So then if you read it, or if we could just jump in 2050 now and we look back at this particular moment of Turkish history, then my question to you is from a political perspective do you agree with a statement that protection of national identity is now initial because there is a feeling in Turkey that joining the European Union would make you lose part of that identity and therefore you announce Turkishness in the code. You see the argument could be there you go the national identity is a value at the moment when you think the identity could be lost because on the point of corporating into European Union could make you lose that identity and there you want to stick to it and there you go you write in the criminal code purely an emotional and symbolic manner and I agree with you Andreas lawyers will have fun clashing the norm before the Turkish court, I am sure there are hundreds and thousands of good Turkish lawyers and it will be fun for them just to you know to take up examples from newspapers and challenging any view that this is against Turkey because they will find examples of other things of the same kind said in the country by people who represent Turk institution, etc. So we define indeed whether they think for the lawyers. But politically is not it true that there is a perception that Turkish public opinion that joining the EU will make you lose national identity? Question mark, is that true or not?

GÜNAL KURŞUN: One another question. Do we really protect Turkish identity with this article?

STEFANO MAFFEI: This I really don't bother checking that.

GÜNAL KURŞUN: Yes but This is important for 301 discussion. Does it really help? Even if the purpose is to defend Turkish identity does it help?

STEFANO MAFFEI: Probably not.

GÜNAL KURŞUN: I mean I believe that at least 70% of Turkish nation when goes to a place drink tea or drink Turkish rakı they insult with friends the Turkish grand national assembly, the government all the other states institutions which are prescribed in the article.

STEFANO MAFFEI: Do the people feel that if they enter they will lose their identity?

GÜNAL KURŞUN: Some of them yes.

FERİDUN YENİSEY: Did you?

STEFANO MAFFEI: No, You see we never had this feeling. We never really felt as much the Greek do or the Turk do. Bezause we belong to cities. I belong to city where as was born. People from Naples belong to Naples people from Milan belong to Milan. You know. We never had this losing of national identity by entering the EU.

ASLIHAN ÖZTEZEL: But normally you have the unity of country isn't it?

STEFANO MAFFEI: Yes the country is unified yes. But nobody will tell you that they are afraid to lose their Italian identity. Most of them actually find it difficult to define what is it the Italian identity.

GÜNAL KURŞUN: Tomorrow I will try to present you the famous Orhan Pamuk case. So with this concrete example we will have the chance to see much more details about 301.

SYLVIA TELLENBACH: Okay now it is five o'clock I will ask whether there are any thoughts today. Well Italy proposed as to give you a task for tomorrow morning. Just to have a comparison between different laws. We shall try to discuss some questions briefly for example to say German, Italian, French or Greek or whatever public institutions are all corrupt. Is it a crime or not? Denying the holocaust or genocide is it a crime or not? Calling prime minister stupid is it a crime or not?

Okay thank you we will meet tomorrow at 9.45 in the morning.

İFADE ÖZGÜRLÜĞÜ HAKKININ UYGULAMALARI VE KISITLAMALARI

Bu proje Avrupa Komisyonu finansal desteği ile gerçekleştirilmektedir.

II. BÖLÜM

TEBLİĞLER & TARTIŞMALAR

17 KASIM 2006

C. BADSE: Thank you. We are going to start here and talk about case law from Danish perspective. Erik Kavaya and I have chosen to do this concentrate on the most talked about case in Denmark which also developed into an international crisis during the last year. I am talking about this; someone called it 'cartoon wars,' 'cartoon crises', 'caricature conflict' and so on. But what we are all talking about is that the 30th of September last year in 2005, a Danish newspaper chose to publish twelve cartoons, some of them which showed the Prophet Mohammad. The caricatures were not all very flattering, some of them were showing Danish politicians, and some of them were showing editors at the newspaper. But the intent behind the caricatures and the publishing of them was to question – and this was what the editors wrote- was to question whether or not there was a self censorship and atmosphere of intimidation. So that cartoonists and featuring artists could not enjoy the freedom of expression as they actually had in the constitutions in the human rights conventions and so on. Because, they had maybe a fear of being intimidated or threaten by fundamentalists; Islamists, in this case. So this was according to the writings of the editorial that was the reasoning behind this initiative that, they asked 40 cartoonists to draw the Prophet Mohammed as they perceived him. And 12 cartoonists replied and sent in their drawings. And this was then published. In the Danish domestic debate the reason also behind this was the publication of a children's book on the life of Prophet Mohammad, where the author said that he had difficulties finding a person that would make the drawings for the children's book and the Prophet Mohammad. It has been published, but as far as I know it is under I mean...uhmm.. the artist is not mentioned by name. So, also, it should also be seen in context of cause of the situation where Denmark must look towards the development in the Netherlands till Van Gogh and the murder of him and the situation of Ali.....And also look towards UK where there also was a theater 'The Sick Temple' which were taken of...wasn't shown. So, this was the background and now the idea is today to give you a short description about the photocopies and you have the description on the ..uhmmm..you would say the editorial where the editors tried to explain why they are doing this and small description of the 12 drawings. When you are in an international context, it is of course difficult to discuss drawings without showing them. However, as it is a sensitive issue for some, it is also difficult to assess whether you should put them on a power point which maybe offense some in the audience. So this is a bit difficult. I have the drawings, I brought them with me and we have also photocopied them. However, I hope that will be..uhmm in an other uhm.. You will have the case and you will have the photocopies and then you can choose to not to see the cartoons if you think they are offending. But I think it is important now we are talking about freedom of speech in a round table meeting and I think it is important that we have of course a possibility to..if we want to see the cartoons and assess whether they are offensive in your views and discuss that. But if there are any objections to that I am of course willing to change the outset. Uhmm..Yes, do you have anything to say about it ?

S. MAFFEİ: Was anybody prosecuted for these cartoons?

E. KHAWAJA: What we will do is that we will come back to that. We will just pass them around, they are nothing and we have a discussion on how 'you would deal with such matter with your own domestic laws, with new criminal code. And then we will come back to what the result was in the Danish case which has not gone to court. Nobody was prosecuted. But we will get back to that because it was under different parts on the Danish criminal code and it was assessed and it was rejected.

C. BADSE: So you have cases and it has been, you could say that around the world there has been newspapers who have chosen to publish these cartoons for various reasons. Some of the publications have been, you could say, support for the freedom of the press, others have been just to make their own issues and also they have also been making some other cartoons and questioning the blasphemy provocation in many countries.

Especially Denmark and Norway was exposed to this situation in the recent years. As you probably know that it developed into a crisis in January in February when there was a burning of Danish embassies in Lebanon and in Syria and also unfortunately other embassies that were in the same building as the Danish embassy. Norwegian embassy...Because that was the first country that published the cartoons.. Islamabad, yes and Kabul and also there was and also in Syrian there was violent demonstrations and people were killed in Kabul during the demonstrations. So it was, something that has been quite highly a discussed in Denmark and freedom of expressions has been fairly discussed by the general public actually. It has been also, I think in a Danish context it has been said that the outset was that freedom of expression is absolute. And there was quite, legally treat I that was a special outset that freedom of expression is absolute. That was said again and again. And also as a human rights lawyer, you know that it's very few rights that are absolute; actually the provision against torture, the provision against slavery, the freedom of thought. These are the.. I think only rights that are absolute. Other rights are of course open for limitations for good reasons. Another thing in the human rights perspective has been how to assess these cartoons which were, in my view, at least on the border of being insensitive and they were provocative. So how to assess them should we put them into the human rights perspective put them into the freedom of expression or the freedom of religion? It is part of the freedom of religion discussion part of the freedom of expression discussion. Or are these two rights intertwine so you can not discuss the one without the other in this case? So this has been quite interesting also. And also especially because of the European Court of Human Rights and the case law where there are a couple of cases which could be interpreted as supporting the freedom of religion view point and I think the reason and the most rightly was to support the idea that interpretation that this case should be put under freedom of expression. But this is also something one can discuss ....

S. MAFFEI: What is interesting for me is not not whether anybody is prosecuted on this or not..... you are entitled to provide protection if you publish something like that meaning whether the state as an obligation, to protect and enforce freedom of speech in the sense of affording you protection after the publication? Let's say the state failed to protect the author of the journal, the author was killed or injured. I've seen an argument in Strasbourg under the article 10,.. that the state will do enough to protect the freedom of expression. Do you understand what I mean?

C. BADSE: Yes, ...I will.....put it under article 2, under right to life and I mean every state in my view has of course the obligation to investigate a murder or an assault on life, on privacy. And this is a positive obligation and you could...I would.. Uhmm...

E. KHAWAJA: The question was that whether there is a positive obligation on the article 10.

C. BADSE: Yes, so but I am also just trying to kind of paint the big picture here for us and also of..while we are waiting for the photocopies to be shared and everybody can have the possibility to look into the argumentation of the editorial. The interesting thing also in the Danish perspective has also been of course the visit of various international human rights, special Barbaturos from the UN. We also have had a, of course also not only take it to the freedom of expression context. This is of course caused this round table, very obvious but one could also think of it as a minority issue like the Muslim minority in Denmark. It is the most vulnerable minority at the moment, or one of the most vulnerable minorities. And this newspaper has been quite critical of religion of Muslims in politically in immigration. However, it is one of the biggest newspapers, it is..... Newspaper, it's not like a right being an extreme tabloid. It is one of the three biggest newspapers; and a high quality newspaper. So this is also to do with the

something of the general, what is called by international special advertorials and the UN committees that the tone of the debated Denmark has been very direct and for people seeing it from the outside and also sometimes from the inside, it is very tough way of finding out dilemmas, problems which should be discussed. So it's very, without any filter you would say and sometimes when you look at the Danish case law in relation to hate speech and in relation to blasphemy but you don't read the blasphemy cases that often. You would be surprised what you can say. So it is a quite extended freedom of speech which is the point of departure in the Danish domestic debate. So...I think the photocopies of the caricatures are here. Are they connected to the editorial? Yes, O.K everybody will have both and you must throw them away or do something with them if you dislike them... Yes?

A. SHARLAND: I actually never seen the cartoons, but in the UK there was a lot of discussions about them...The UK press decided not to published them not because there was any prohibitions on publishing them but ... The media didn't show them either because they were scared for what might happen. If you take cynical view positively....they decided that they couldn't find who indeed published them.

C. BADSE: I think the general reaction in the Danish context was actually a bit surprised that there was no support for it generally. That, there seemed to be at this descript them between I mean, what internal domestic discussions about this issues..? You know.. what you could say and what Danish thought, that was a good tone of debate in other countries? So you can say this was a very domestic initiative which suddenly became internationalized, and then you normally have a filter when you talk internally, like when you talk to a good friend or a family where you have a more direct tone and suddenly you are on the international scene where you have to use a bit more diplomacy and be a bit more cautious in the way of expressions. So this has been kind of, I think I open for the Danish society of how globalize we are. We are used to being able to read about incidents and taking possession of all kind of issues around the globe but we are not used to that we are our self in the spotlight. In this way where we are in the cover of economist and other newspapers or magazines. So I think this would be the instructionary remarks and I think we should.....Yes?

A. POTTAKİS: Can I add something? Could it be that because, my question is that, my impression is that in Muslim religion the problem is not..... there is sort of...like in Christian religion Christ can be shown, the prophet has a face. But in Muslim religion, drawing an image of the Prophet is prohibited. Is it mainly? Is it perhaps for this reason it was that important. Not because it was ridiculed, caricatured or criticize. Even the fact that you are trying to depict the face of Mohammad.....?

C. BADSE : You are right. Exactly, this is all something to do with and I think it is interestingly in relation to what we talked about vague concepts in the criminal code we talked about yesterday. Because, blasphemy also is, what is this, how to define blasphemy in relation to a religion? Because you have on the one hand, maybe you would think that blasphemy should be equal; protection should be equal to every and each religion. But then on the other hand you go into religious prohibitions and then you have to say that you can depict one religion or the prophet but you can not depict the other, which seem to be not completely in line with the equality. Protecting one religion more than other ...you could maybe argue that, but this prohibition against depicting Prophet Mohammad has also been discussed and I also want to hear your views on this in your country. Would this be a violation in itself to depict the Prophet in a very proper way, you know without any ridicule? Or should that be more to this?

S. MAFFEI: To me, when you define an insult you have to find it objectively. You don't assess whether the person feels insulted and then you asses whether it is an insult, for example I call you 'you Italian academic!' this could be an insult for somebody..... but maybe as perceives as such, it is objective what is an insult or not. We don't ask the religious members what they perceive as an insult is to a state to define what is an insult.

S. TELLENBACH: Please we don't have time for discussion....

C. BADSE: So, I think we just take a 5 minutes break to look at the pictures which you already have an opinion. Would you like to wait until the afternoon to...Ok, we will do it ... So, what happened was, what happened after the publications of these 12 cartoons was that individuals have filed a complaint to the public prosecutor. Namely, under section 266b; concerning hate speech against religious groups, and section 140; concerning blasphemy. These were the two provisions in the Danish criminal code which was assessed to be the most relevant in this case. The public prosecutor and his decision were appealed to the director of public prosecutor and the final decision on this case was there were no bases for taking the case to court. In a Danish criminal code this is up to the public prosecutor to decide whether this case has a chance for conviction. So it's not a civil proceedings or an individual can not take hate speech case to court. This is a matter for the public prosecutor to decide whether the case can be opened or if public prosecutor should initiate proceedings against an individual. The public prosecutor made an assessment that, first of all there was discussion whether just depicting the Prophet Mohammad was a violation of the provision against blasphemy. The public prosecutor found that since this was not already because, this was not the provision against depicting the Prophet was not complete that there were existed other pictures of the Prophet Mohammad already. Therefore this was not a violation in itself. So what he actually said that .... he doesn't go further into the argumentation or assessment but he said already because this is the case, this is not in itself a violation of the provision.

S. MAFFEI - So he didn't bring charges?

C. BADSE - No, he didn't bring charges on that account. But also then he goes on to look at each drawing and what he focused on is that –and that was also what the international media had focused on-the one with a man with the children made a bomb?.....,which is seen as the most disrespectful cartoon. So this is what he focused on. And I would say all the others are less disrespectful, so this one was kind of the most provocative. As far as I understand, he actually said that this does not mean that the threshold of insults so it is not serious enough. He knows that there are lot of Muslims in Denmark and abroad was very offended by this cartoon but in a Danish context, looking at Danish case law which Erik mentioned yesterday there was only brief cases and one conviction in the whole history of this section. In a Danish context this is not insulting enough. It does not need the threshold of insults or insensitivity. So, no cases, no proceedings can be initiated on section 140; provision against blasphemy. He then turns to section 266b; and he is very .....

E. KHAWAJA: The thing is that, of course the blasphemy section in the criminal code goes on to the religion and targets the religion as well; protects the religion. The question was then is 266b; the hate speech provision could also go...on this case. And this was also rejected on the grounds that none of these pictures actually targeted at Muslims. It was targeted at the religion and the prophet and there is no implicit idea that the journalists, all the cartoonists targeted the Muslims and tried to mock them and such. So it was rejected then even though if you had the idea that some of these pictures were

not even showing late Mohammad was ordinary person from the Middle East or something else, there would probably be the assessment again that this does not meet the severity that is needed and required in the hate speech provision. This severity criterion is exactly what measures the freedom of expression because that is the flexible part of it where you can say 'O.K, to some extent when freedom of expression is needed focus, you can limit, or you can raise the severity that is required in order for the provision to be violated.' And on that base, they concluded that, on the first argument; none of these pictures actually do target Muslims or people from the Middle East or such, but only the religion and that is uncovered by the provision. And then it was rejected on that base too.

C. BADSE: And he also, he finalized his decision by saying 'then it is not necessary to assess, since I do not initiate proceedings, it is not necessary to assess whether this would actually, If I initiated proceedings and the newspaper was convicted whether that would be an entrenchment of the freedom of expression. So you also, very shortly touch upon international human rights obligations in the relation to the European Convention of Human Rights, you leave out all the others. Convention in relation to the elimination of the racial discrimination and the obligations in religion in relation to civil political rights which also have at minority protection where the states obliged to criminalize hate speech or supporting hatreds against religious groups. So he touched upon it but and that was also discussion of polls in Denmark; 'should proceedings may be raised or initiated?', then the newspaper said they wouldn't go to the court in Strasbourg. So that is kind of the opposite situation. So if they were convicted, they would say court in Strasbourg. The Muslim communities sought and discussed whether they should initiate or take the court, all this decision to the UN Committee system to the court in Strasbourg. They have them all difficult case but we can discuss that later I think. But this was both kind of felt. There are human rights violated if, I mean if the decision was to go against them so this is kind of interesting like two rights or we can discuss whether two rights are colliding or whether they are not colliding; freedom of religion, freedom of expression. But I think we will stop here so we can move on in the program.

E. KHAWAJA: There is of course the whole idea of freedom of press in this case. And we have an earlier case law dealing directly with that issue. Whether they are reproducing or just reporting on something here. That was not really the issue in this case as they did not even come as high the assessment as, there was low case but we had an earlier case which was from the mid 90's, the mid 80's and then went on to Strasbourg, the Jörosen case; a lot deal with the European Court of Human Rights case. With the Danish decisions and the high court and the Supreme Court, as opposed later changed in Strasbourg as an infringement of two journalists rights to the freedom of express of the press. This case dealt with -You are probably familiar with some of the facts in the case, but it dealt with- the journalist in the national Danish television who made a small program; approximately 2 minutes where he interviewed some writing group. He made a short interview with two or three members and had them comment on immigration issues. What did they come with is that they....with some black people, immigrants from ....., animals coming from ...., and apes and compared them in a degrading manner to animals. This case was taken on by the public prosecution going on to the Danish court and of course these persons who made the statements, these members of this writing group were of course convicted. The prosecution went also on to prosecute both the journalist and the head of news of the Danish television. And in both in the high court and in the Supreme Court they were convicted. The bases for the conviction on that case was also the hate speech provision, saying that they, these members in order to violate the provision. There was a lot of debate on the freedom of the press there and in a Danish context it was actually not valued as something special at that stage of time. Of course they have the right to report on issues. But even when they had the right to report an issue the provision would kick in as there is no overall freedom of the press provision in the Danish constitution as we talked in yesterday.

All of Danish criminal code, it goes under the ordinary freedom of expression provision. In the Danish courts they assessed that, this journalist when interviewing these persons was so close in to limp with the views in the sense he provoked them. He got this view fallen into the oven and without his participation and it probably not happened. The conferee of specific elements in this case was that he had paid out certain members of the group and had thought them two or three cases of bears that they have been dredging during the interview and then I think he interviewed them for I think one hour or one and a half hour. And he cut everything down to two minutes with only the harsh statements. Whereas the completed to the relate to other things so he had already the intention to get something very provocative out of this in order to both show the immigration debate in Denmark. But also tiding this…….with how they relate to immigration. The sentence was, as I remember it was a fine, there was no imprisonment in this case. They were fined 2000 Danish cronos (300 Euros), not that much. They then took the case on to Strasbourg in order to say 'this is an entrenchment of article 10 rights', and then the court in a dissembled opinion concluded that that was indeed the case. In that decision, for the first time in the Danish context, the court made us aware of that the freedom of the press that is wider than the freedom of expression and this public washed up role that the media has. And it was assessed on the merits that these facts that were blow up in the Danish case did not really amount to such a severity that a limitation was in place to impose on the journalist. But it just shows that, if we take the Mohammad cartoon case, would have amounted to severity in itself that was of such a high nature, there was some mocking of Muslims, there was some mocking of the religion Islam in this … And then I think the Danish court would, following the experience they had after the overruled of the Jöresen case, they would probably, even with this … have said that freedom of expression in regard to the press, when it just recourse on issues and put forward its own opinions would be covered by the Danish constitutions' freedom of expression provision.

S. DELSIGNORE: I agree but I also think that this cartoon case was especially because it was initiated, they had their own and it was their idea from the very start that this collection of cartoons showing on the newspaper. So they didn't discuss also the public watchdog also being just a messenger of the news. They were creating the news by this I think the media started. ….just had also in the Turkish context to the 301, I think also the Jörosen Cases were interesting saying that ..the court in Strasbourg said that it didn't matter that the fine was small. It was only 300 Euros, what mattered was that the journalists were convicted. So, I mean… even though you have the very limited sanctions for persons violated the criminal code, what matters is not really the amount of fine but it matters that they were convicted.

C. BADSE: In regards to Jörosen case, this Danish case that led to… I think the Jörosen Case was over interpreted in regards of the freedom of press. Because it is, when reporting, it is reproducing something others have said, it is not when giving your opinions in a context. So if an editorial in a newspaper gives an opinion on an issue I think the public watchdog role is of course not relevant because it's not reproducing a debate or such. It is not reporting on issues in society. It is giving a statement; political or something else, feeding directly into the debate and that would probably in a Danish context now be taking back to ordinary freedom of expression provision and not dealing with the vital freedoms of the press in this sense.

And we have two domestic cases that support that ……cases with journalists trying to make him say news by trying to forge passports and trying to get into the airport on a plane, with journalists try to take…order a steak in a restaurant, in an airport restaurant, and then try to smuggle the knife into the plane, trying to show that this is dangerous for security. They then at the national court were planning the public watchdog protection: 'We are journalists we are here to investigate security features in the airport security. And the concept that you have to abide to the rules and regulations like everybody else. It doesn't matter that you are journalist or not, you have violated the provision against forging documents and passports, you are violating security. It doesn't matter that the idea was to show these features; you are convicted. So, I think we pass the floor and now you can have more time for discussions…..

LIISA NIEMINEN: As I yesterday said, in Finland the problem of communication pose the core of the freedom of expression. In this respect we have not had any problems for decades and in this respect the EU membership (1995) or the membership of the Council of Europe (1990) did not require new legislation in Finland or changes in traditional practices.

However, in Finland we have had some problems in finding a balance between the freedom of expression and the right of privacy: both rights are guaranteed by the Constitution of Finland and many international human rights conventions. I think the birth of new kind of judicial problems can at least partly be explained by the birth of new kind of afternoon papers in Finland for the last few decades (so called "yellow press"). In Finland the courts have traditionally underlined strongly the importance of privacy but now after several condemnatory judgments of the European Court of Human Rights Finnish courts have begun to interpret the freedom of expression more widely, perhaps in the same way as in many other countries much earlier.

We have one important case concerning the right balance between freedom of expression and privacy. Next I shall explain it a little more profoundly. I do not know how it is internationally called, but I call it "Karhuvaara case" (Case of Karhuvaara and Iltalehti v. Finland, 16 November 2004). The case has been very controversial in Finland and it has aroused a lively debate also in scientific law journals.

The case goes back to October 1996, when a Finnish afternoon newspaper called "Iltalehti" published an article on a criminal trial concerning the drunken and disorderly behavior, including an assault of a police officer, of Mr. A., who was a lawyer practicing in a small Finnish town, but his wife was a Member of the Parliament. The article bore the title "Husband of a Member of the Parliament hits policeman in restaurant".

In April 1997, Mrs. A, who did not dispute the facts as presented by "Iltalehti", instituted proceedings against e.g. the editor-in-chief of "Iltalehti". This editor-in- chief was Mr. Karhuvaaraa. The ground was that the reporting by Iltalehti had been libelous and had invaded her privacy. She requested that the respondents should be punished with the invasion of privacy and defamation and claimed compensation for non-pecuniary damage caused by the articles.

As editor-in-chief of "Iltalehti" Mr. Karhuvaara admitted to being superficially aware of this type material published but denied any detailed prior knowledge of any specific material in question. But according to section 32 of the Finnish Freedom of the Press Act he was ultimately responsible for any original material published in his newspaper regardless of whether he had been aware of its content. Karhuvaara also argued that the member of the Parliament as a public political figure must tolerate the media more than an average citizen and that it was particular disturbing but an Member of the Parliament was trying to limit defendant's freedom of expression.

In March 1998 the Vantaa District Court convicted Mr. Karhuvaara and two other journalists on one account of invasion of privacy under particularly aggravating circumstances, and they were ordered to pay fines and moreover to pay damages to Mrs. A. The District Court found that as a whole the banner headlines, the front pages and the articles themselves were published with the purpose of drawing the readers' attention principally to Mr. A's marital relationship to Mrs. A. and not with the purpose of depicting events as such. Further it found that the highlighted publication of Mrs. A's name, picture and professional status was in no way necessary in order to report on the criminal trial of Mr. A.

The Court was of the opinion that the protection of the private life of Mrs. A. as a member of the Parliament was narrower than that of other persons but only in so far as matters in question were connected to her public functions and there was a public interest justifying the publication. The fact that the conviction of the spouse of a politician could affect people's voting intentions did not in itself render the matter of public interest such as to justify the publication.

After the District Court the case went to the Court of Appeal but it upheld the District Court's judgment. The Supreme Court refused the defendants leave to appeal.

Then the case went to the European Court of Human Rights, which declared the application admissible. In its judgment in October 2004 the Court held that there has been a violation of Article 10 of the convention, the freedom of expression article. The Court emphasized the essential function the press fulfills in a democratic society. Although the press must not overstep certain bounds, particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities -information and ideas or on all matters of public interest. Journalist freedom also covers possible recourse to a degree of exaggeration, or even provocation. The limits of permissible criticism are narrower in relation to a private citizen than in relation to politicians or governments.

The Court underlined that the protection of the private life guaranteed by the Article 8 of the Convention must be balanced against the freedom of expression guaranteed by the Article 10 of the Convention. According to the Court there must be a fair balance between the conflicting interest of the individual and of the community as a whole.

The Court observed that the articles in question did not contain any allegations of Mrs. A's involvement in the events leading to Mr. A's conviction, or any other kind of allegations against Mrs. A. Nor were any details of Mrs. A's private life mentioned, save for the fact that she was married to Mr. A., a circumstance which was already public knowledge before the publication of the articles in issue. In these circumstances, especially Mrs. A. as a politician had to tolerate more from the press than "an average citizen", the interference with her private life, assuming that there was an interference with the meaning of Article 8, must in any event must be regarded as limited.

The Court noted that the Finnish District Court's opinion that the conviction of the spouse of the politician could affect people's voting intentions. So at least some degree of public matter of interest was involved in the reporting. The Court considered that the domestic courts had failed to strike a fair balance between the competing interests.

This important case from European Court of Human Rights had had some effect in Finland. As an example of new practice I want to mention a case from the Finnish Supreme Court: it was of the opinion that it was allowed to publish the name of a criminal who had committed a very serious crime. Earlier it had concluded that it was not legal to publish the name of the criminal. I think the Karhuvaara case has at least in some way widened the freedom of expression in Finland.

Jean-Yves DUPEUX: I will try to speak English. So I have one assistant here. I have prepared many developments on what we call "jurisprudence" in France on problems about freedom of expression. You can read it in the plan. But I prefer to study with you, four major cases in France, which are interesting because they are in the heart of our debate. First, you must know that about 95% of cases, in the problem of freedom of expression are on defamation, on privacy and on violation of presumption of innocence.

So there are many other crimes or sanctions but mostly we have three common cases sued. I have chosen five decisions. Three where there is emergency were the proceedings of emergency what we call "référée" which gives ability to ask to the judge to forbid the diffusion of a book, newspaper, when it has been published or just before it will be published, you have the ability to ask the judge to forbid the diffusion of publication but it is a diffusion.

So first example: in 1996, our president of republic France, François Mitterrand dies in January. Five days after a publisher publishes a book written by his doctor. Doctor Gebler. In this book, doctor Gebler writes about privacy of the president and also specially about the illness of the president Mitterrand. You know he had cancer from 81 to 95. And doctor Gebler wrote that he was, he describes symptoms of the illness and he writes that president Mitterrand was completely unable to govern the country in 93 to 95. A day after publishing the heir of François Mitterrand sons and his wife perhaps his daughter was out of the wedding but sued, the publisher and the writer Dr. Gebler because they considered that there was violation of privacy; first and especially violation of medical secret of the doctor. The publisher said it is public interest that French people know that their president was no more able to govern and its of public interest too that it will be necessary in the next future to change the constitution. Despite of these arguments the judge forbid the diffusion, three or four days after the court of appeal confirmed. Not for violation of privacy but for violation of the medical secret (it was a civil case) And after that our supreme court that we call "cour de cassation" decided that in there was no criticism to do to the decision of the court of appeals. So the publisher and the writer go to Strasbourg before the Court. And the Court gave its judgment few weeks ago and said, it was conformed to the second alinea of the article 10 of the Convention that the French judge forbids the diffusion of the book because of the violation of the medical secret but what is not conformed is that it was not possible to forbid indefinitely the diffusion of the book. It was necessary to give a delay during which it was not possible to diffuse it. So you see, that is just last problem but on the second alinea of the article 10 it was conformed. So it is the first case I wanted to show you.

Second case what we call in France L'affaire Erriniac. Mr. Elineac was the representative of French government in we say "Prefet" in Corsica (Corse) . And he was killed in Ajaccio in the night he was going to the opera. He was killed by shot in the head, he fell down there was many blood and a photographe take a photo, and this photo was published in "Paris Match". Same as in the affaire of Mitterand the heirs of the "prefet Erriniac" sue in emergency, just after the publishing of Paris Match and asked to the judge first to forbid the diffusion but it was very difficult but second to make injunction in the following numeral of Paris Match to publish a very large letter of excuse. And Paris Match went to the Court of Appeal and the Court decided like the first judge, considered that it was a violation intolerable, very very strong violation of privacy and of right to the face because the "prefet" was in his blood. The argument of Paris Match was first we must inform and second it was another argument and they said remember the photography of Robert Kennedy which was all around the world and it was an important information for people from all over the world to fight against violence and Paris Match said we are in the same circumstances it was representative of the government and we called to fight against violence. But the court of appeal decided to maintain the decision of the first judge. Same for the supreme court and Paris Match goes to Strasbourg too and first judgment was pronounced last week and decided that the application is partly admissible so we must wait. But the terms of the judgment, I suppose it could be a condemnation against France. So it was the second case.

Third case in emergency mutadis mutandis is a little like the problem of the drawings of Mohammed. A trademark of jeans make a publicity and advertising a great poster very very large, it wason the three buildings of Champs Elysees, very very large it was largest poster we have ever seen. And this poster represents "The Last Supper" of Leonardo Da Vinci but with young and marvelous girls naked instead of Apotres and with situation clearly sexually with Christ and twelve ladies and perhaps one or two men but very ambiguous and some hands on those table. French Catholic Church decided also in emergency to ask for the judge to forbid this poster. The French judge it is always the president of the tribunal of Paris, but what were the arguments. The argument was that for Catholic Church, it was and insult to the faith of Christian people and it was an insult very strong and untolerable because it was impossible, when you walk not to see it. It was different of the film, you are obliged to pay to go or book obliged to pay. So it was impossible not to see it. On the other part, they said, it is freedom of expression and of creation and the representation is very esthetic, beautiful yes it was very very beautiful., It was photography with real people, but very pretty photography. And they said it is not an insult against Jesus Christ or the faith of Catholic people, it is just a manner of express what some seen different advertising. So first judge said no it is violation of the faith of Christian people, Court of Appeal told the same. Last Tuesday the day as I was preparing my suitcase, cour de cassation decided no. It is not an insult, it is not established that it has no proof that the wanted, intention, to attack the faith of the Christian people. I am not sure perhaps it would have been easier to say, it is not outrageous. It is some thing which is an illustration of advertising with a picture, very well known picture of Da Vinci and declination of this picture, but the intention I do not agree with the raisoning of the "cour de cassation". So you see by this three example we are just like I've heard yesterday and this morning, you have on one side freedom of expression which is one of the fundamental human right, basic for life in a democratic society and you have on the other side you have protection of reputation of privacy, of innocence, of personal behavior and personal faith and this is also one condition of the life in a democratic society. And every time, I saw that in Italy and in Denmark, decision of the judge is a frontier very very thin, between one principle and the other principle. That is why our debate is a debate which is going to perdue during the century but it is decision of one or three men which is always in problems of subjectivity.

So two other cases, these last two cases were not in emergency. First case between two major political men in France, it is Mr. Rocard, who was Prime Minister of France in the beginning of 1990s and Mr. Jean Mary Le Pen who is the leader of extreme right, Front National in France. Mr. Rocard during a tv emission, a debate on the French TV, told "you must know who is Mr. Le Pen and you must remember that in Algeria he tortured" and Mr. Le Pen sued Mr. Rocard. It was complicated because the first judge condamned Mr. Rocard and then the court considered that there was no defamation. After that, the Supreme Court decided that because of the law of amnesty, the problem of proceedings it had to be judged again before another court of appeal which decided there was no defamation. It came back to the Supreme Court. It was interesting I am going to try to translate some lines, it is based on article 10 of the European Convention. "According to the article 10 of Convention, the protection of the reputation of a political man must agree with the free discussion of his ability to exercise the functions for which he wants to be elected". So I believe this is a very important solutionin the frontier. I was speaking. Because you have the interest of public and the fact that the political man who wants to be elected, must be very well known by all the people who is suggested to elect him and that is why the French Supreme Court on the basement of article 10 wants, says that for political man the limit of defamation is higher than for another. It is logic, coherent with Lingens versus Austria, and I do not remember their names perhaps other decisions. But the first time that is was clearly said was in Lingens versus Austria. So it was the first example.

Last one is different but it is important. We have in France we had special law on defamation, special law on privacy and special law on presumption of innocence. But sometimes, judges in many cases said it is not defamation, it is not violation of privacy, it is not violation of presumption of innocence but there are something which is not correct because it case was the adaptation for the French TV

for crime and people in life were representing in bad manner; so the judge said, decided it is no defamation, no privacy but there are something which are faults and these faulta must be sanctioned. Since 2000 and more precisely since this decision which was held in 2005, 27th of September The Supreme court decided very clearly that, abuse of freedom of expression against persons cannot be sued on other text than the special law on defamation, on privacy, on presumption of innocence. It is very important in our system of law cases, because it is security you know what is forbidden and it is a logic, following of the article 6 of the European Convention. These are five cases I wanted to study. Thank you.

SILVIA TELLENBACH: Okay, thank you very much to be back in time. Let us start now with my own brief contribution about the German case. After the first Gulf war, war and refusal of military service became a topic of vivid discussion in many groups of the German society. There were some cases in which the slogan "soldiers are murderers" or at least "soldiers are potential murderers" had been used on stickers, posters and the like. The authors had been punished for having insulted single soldiers who had filed a complaint, or even the Bundeswehr, the German army. The higher courts had confirmed these judgments. But in the German judicial structure every citizen has the right to apply to the constitutional court claiming to be the victim of a violation of the German constitution as soon as all the remedies in the ordinary procedure are exhausted. That means that the German citizen has a right of individual application in the similar way as it exists according to the European Convention of Human Rights. And today more than 95% of the cases judged by the German constitutional court concern cases of individual applications. And the conflict between the right of honor, comprised by the constitutional guarantee of human dignity, and the liberty of expression is a constitutional conflict as both rights are guaranteed the constitution. Therefore the most important decisions fore the development of the established case law are judgments of the constitutional court not so much of the criminal courts.
A number of "soldiers are murderers" (or potential murderers) cases were revised by the constitutional court and the punishing sentences were quashed. The reasons stated by the constitutional court can be put forward in almost all the cases in which persons or public institutions are insulted. Therefore let me explain the most important arguments now.
In its decision, the constitutional court gives first an interpretation of the relevant provisions and in the second part it considers the application in the different cases. At the beginning it comments upon article 5 of the constitution. This provision as I told yesterday guarantees the right freely to express and disseminate one's opinion in speech writing and pictures and to inform oneself without hindrance from generally accessible sources. Opinions mean personal judgments about facts, ideas or persons. They are protected by the constitution regardless whether they are rational or irrational, well founded or unfounded; whether they are regarded by others as useful or useless, valuable or valueless. Even nonsense is protected. Even if an opinion is expressed in a polemic way, or as a cutting remark it does not lose the constitutional protection.
The constitutional right to express one's opinion is however limited by the provisions of general laws, by provision of protection for young persons and by the right to personal honor. § 185 of the criminal code, punishing insult is such a provision but on the other side, it has to be interpreted in a way that takes into account the paramount importance of the right to free expression guaranteed in article 5 of the constitution.
In the first place, § 185 CC protects personal honor; but the lawgiver can not limit the freedom to expression at will to protect personal honor. And this conflict is solved by § 193 CC according to which the safeguarding of legitimate interest is a ground of justification. - In the second place, § 185 § does not protect only persons but also public authorities and other agencies that fulfill public duties. It is true that these institutions do not have a personal honor, but here § 185 of the criminal code, is regarded as a general law in the sense of the article 5 of the constitution. A general law in this sense is a provision that does not forbid the expression of a certain opinion but protects a certain legal value as such regardless of opinions. The value that is protected here is the functioning of state authorities, which is only guaranteed if they are held in esteem in the society. On the other side, the protection

of state authorities must not hinder public criticism even if it is expressed in a sharp manner as this kind of criticism shall be guaranteed by the right of freedom to expression in a special way. But also here the balance between these two protected values is found bye the consideration provided for in §193 CC.
As to the interpretation of §193, it must be taken into account that the freedom of opinions is absolutely fundamental for the democratic system. Therefore, a legitimate interest does not only exist if the person who is insulted provoked the insult or if somebody defended himself against the attacks of others but also if he participates in a public discussion of a social or political interest. This is of especially great importance if it is not a person but a state authority that is insulted. If the right of honor and the right of free expression have to be balanced in such cases, the right to free expression has a particularly high value as it is grounded in the need for protection of criticism against the power of the state. Article 5 of the constitution forbids an interpretation of § 185 Criminal Code that discourages persons from availing themselves of their right to free expression for fear of sanction thus hindering the legitimate expression of criticism. So, a public figure or a state institution has to support a higher degree of insult than the ordinary citizen.
As to the implementation of the provisions, the constitution points out that the aforesaid principles must be thoroughly examined and balanced out at every single case. And of course, to find the right balance is always difficult in every case. There are in practice only two situations in which the limitation of the freedom of expression can be accepted without such a consideration. Firstly it is on a known circumstance allowed to violate the human dignity of another person. Secondly it is the case of disparaging criticism, the so called "Schmähkritik" in German. This condition is not yet fulfilled by a very harsh criticism, but it requires that the criticism is not made with the intention of discussing facts, but merely with the intention of the disparagement of another person. In the first of these cases as we saw, the victim of the insult is always a person. In the second case, it may happen in the extreme situations only that a victim of a disparaging criticism is the state institution but in the vast majority of cases, it is a person.
Apart from that, it is necessary in all the other cases to weigh carefully the right of honor and the right of free expression. If the expression of an opinion is a contribution to the formation of public opinion; there is a presumption of free speech. That means that every judgment that states to the contrary has to give very convincing reasons for that in detail.
The first condition for a judgment however is a correct understanding of the sense of the expression. If an expression can be understood in different ways, the court has to take the sense as a basis for its judgment that does not fulfill the elements of crime. Therefore, if there is any other way of understanding an expression, no conviction can take place. Or the other way round, a person can only be sentenced for insult, if the court excluded any other way of understanding by giving precise reasons. As to the cases of the slogans soldiers are murderers or potential murderers, the court stated that the lower courts had correctly proceeded from the assumption that the persons expressing that soldiers are murderers did not allege that certain soldiers had committed a murder in the past, but that they expressed the opinion about soldiers and the military profession that under special circumstances makes person kill other persons and that the slogans had to be regarded as an opinion and not as an allegation of facts. But the judgment were quashed because the constitutional court stated that the lower courts had not examined thoroughly enough whether it was possible according to all circumstances to understand the slogan as a general criticism of soldiers and the military profession as such, which can not be punished because it was a contribution to a public discussion and thus was justified by legitimate interest. That means that in the eyes of the constitutional court these judgments of the lowers courts contained a violation of article 5 of the German Constitution.
This decision and some similar decisions led to a very vivid discussion in Germany. Many authors approached the constitutional court with disregard for the right of honor, they expressed the opinion that the efforts of the constitutional court to deny an insult of the soldiers and to deny an insult of the German army by a slogan like "soldiers are murderers" are misleading. But in the end, we must realize that also as a result of this decision, convictions for insulting public institutions are extremely

seldom to be found in Germany.

ANDREAS POTTAKİS: I want to talk to you abot two notions. The first one is the understanding of the freedom of expression when it comes to the army. The other one has to do with religious freedom and its conflict with freedom of expression, artistic expression in particular and the third one will also because I remember yesterday you mentioned something about other courts and I see now the German presentation had to do with the armed forces and sort of instance of the army. Principles of the army has to do with this matter, I will talk about this since your presentation was also related to the subject. In 1989, a Greek officer was brought before court criminal, military court for issuing a statement which was considered insulting to the Hellenic army and he was prosecuted under the article 181 as insulting to the state, its authority, etc... I will just briefly mention specific article paragraph 1 point A of this article to remind you, "any persons are defines up to three years who publicly insults the prime minister of the country, the government, parliament, the speaker of the parliament, the ministers of a political party, recognized by the parliament and the judicial authorities". Now, this guy was called Gregory Adis, he actually issued a statement where he just to give you briefly an idea what the statement sort of included, he said that I am hereby obliged to denounce that the army is an apparatus opposed to society and contrary to this there is a whole bunch of violations of human rights, human dignity in the army and during military services and all so forth and therefore I can no longer be a member of a sort of apparatus. He was an army officer. He was obviously convicted. It was 1989 under this law. And eventually he went to the European Court of Human Rights. And he won his appeal. In 1997, the court ruled that this was the articles of military criminal code, penal code but also the disciplinary code for an officer in Hellenic army were in breach of the article 10 of the European Convention of Human Rights and therefore could not stand. There was descending minority which actually based its reasoning on the fact that you can not compare. A person who will do in the army with a person who is civilian, one of minority judges was, I think, I will try to pronounce his name Judge Gölcüklü who basically based his sort of descend his point that you can not treat equally people who were doing in the army because they have sort of extra restrictions from the freedom of expression from the people who are simple civilians. Following this case and that's why I want to mention it, I will mention all the cases just to show the change of the jurisprudence in Greece. Following this case, another case was brought before the court in Greece in 1996 a very similar case in fact. Another officer of the air force was accused for issuing again a statement, I will just make a comment that under the Hellenic procedure, Hellenic disciplinary code for officers, "an officer of the armed forces can not publicly issue a statement unless he has the prior authorization of the minister of defense." For fear that sort of this statement might include insults to the sort of the moral or the status of the army, or perhaps give information that might endanger the security of the state. He actually made again sort of a critique; he presented the critique to the army in one of the newspapers without getting the prior authorization of the minister of justice. And he was actually accused because of that in fact.
In 1996, in the court of first instance, the administrative court of first instance, he lost his case and he was actually because the head of the air force had already punished him forty days of imprisonment. He went to the administrative court to have the decision of the head of the air force but he lost in the first degree, first instance; and then he went to the supreme administrative court of Greece, where the council actually revoked the previous judgment of the administrative court of first instance and facing its judgment in two cases of the European court of human rights. Another case which kind of is a bit bizarre, because Yunanca .. which in fact in this case the court had already ruled that in any case being a member of the armed forces does not mean that you are called by article 10 and so there is no freedom of expression for you; but in any case, specific sort of restrictions applicable only to the military forces can be considered as acceptable restrictions for the freedom of expression. However the Greek Conseil d'Etat considered that it could base its judgment in both cases Yunanca so this case have been tried and now it is permissible for any officer of the Hellenic army to issue any statement he wants or she wants without prior authorization by any sort of superior political or military officer and to criticize in any way or form he wants the armed forces of Greece. I proceed with the point on

insult of the authority in a more strict sense. And I just want to make a brief introduction to make a sort of give you the background of it. I mentioned yesterday that there was a case in 1966 where a person who actually was spitting in the car of minister, he was throwing tomatoes and eggs as a sort of demonstration, he was brought before justice but it was considered that he was actually not insulting the institution as such but he was insulting the honor of the person. Therefore he did not commit sort of the crime of article 181. That was 1966 when the period of political situation and this was really turbulent and really chaotic; it was just before the dictatorship. Another very turbulent period in Greek modern political history was the period around 1989. It was a period eventually led to the bringing of justice of many members of the government including of the prime minister. The one eventually acquitted in the Supreme Court, most of them acquitted in the Supreme Court for the crimes that they faced, but in that period the critic code of the proportion against government. I have some cases just to give you an indication of what went on that period there were again soldiers who were doing their military service which in Greece is still compulsory. Swearing against the prime minister sort of public, there were articles in the newspapers claiming that they are all blind that they are a group of frauds, irresponsible bastard politicians, etc. All these cases were considered in breach of the article 181 by the 1988. There was another case, two more cases, I want to just give an example to please Stefano read because they have to do with the insults against judicial authorities. They were very quick in accepting insults against the judicial authorities. The first insult had to do with a comment that the lawyer made for court ruling which was not insulting at all, in fact he was the most insulting comment that he made was that "the decision was scandalous". But the court was very quick in sort of assessing that he actually breached the article 181. The second one had to do with again an article in the newspaper which was tried in 1993, published in 1993 just before the change of law. And the basic point of the article was the promotion of certain deputy. Prosecutors of the high court was merely done because political situations within the government. Nonetheless there was political pressure to the sort of established that this critique constituted a breach of article 181. The last case it might be a recollection of codes, Greek codes, using article 181 was a very funny one because it was actually against the next minister of justice. He was accused of a breach in the article 181 because he made a sort of supposedly insulting comment against the judiciary. Obviously the case was ridiculed in the end and again a farce because when he presented himself before the court he was actually, he made sort of a speech about the marriage of the judiciary in the way that he protected judiciary and its sort of prestige, his political career and eventually he was acquitted. It was the last case ever brought before the Greek court using article 181 paragraph 1. After that this article should be repeated was in fact therefore we do not have any jurisprudence in this matter. I will conclude with just cases on the religious freedom. There was a, and I just want to make a, to give an indication I just want to jurisprudence of years. One was tried in 1988 and it relates to sort of internal measures, actually seizure of a film which was Temptations of Christ. The other one has to do with the publication of a book which I think we talked about yesterday. It has to do with a book published Magdalene. The case was tried in 2000. In both cases the issue was the seizure of either the movie or the book. In the first case, 1988, when the movie was released in Greece, there were some extreme fundamentalist Christian sort of groups that protested and that this sort of movie because of depiction of Christ with ashes and sort of ..... it was sort of degrading the God and Christ. Therefore it had to be prohibited; it should not be allowed to be shown in Greek cinemas. That was the main argument of these groups. They actually asked for the seizure of the movie a temporary seizure of the movie so that it would not be actually available to the public. I remind you that the seizure in Greece only takes place after sort of the mean the publicizes either press, newspaper, journal or book or whatever, it has to be first published first to be available to the public and then it can be seized and also temporarily not forever. In fact in this case, the court decided that the in fact it seized the movie did not allowed it to play in Greek cinemas for a small period of course a week or so in order to appease let's say the revolting crowd of angry fundamentalist Christians. Now third the other case which was in 2000 to just demonstrate the change, I could also refer to more a recent case, another movie which was also about Christ, in many countries it raised a

lot of criticism "Passions of Christ". In this case in Greece, nothing really happened. Nobody protested nobody cared about it. The movie played normally. There was no sort of descent no sort of problem. It just goes to show the change in the attitude both of the society but also the judiciary in this case. In 2000 now there was this book published which the title was "Magdalene". It was a novel on basic sort of, the protagonist of this book were on the one hand Magdalene and the author. It was presented as a modern woman in our times who was actually communicating via the internet via e-mail with the author and they were exchanging views on certain modern issues like the role of woman in the modern society, etc. and in this book, there were the author was actually sort of arguing with Magdalena about how big influential figures in the history of mankind have treated women over the years. They have discussed about philosophers from Plato and Aristotle to Schopenhauer and Wittgenstein and they discussed about psychiatrist about politicians about all sorts of people. Eventually they reached the point that the conclusion of the book is that perhaps Christ was the person that had more sympathy for women than any other influential figure in history of mankind. It was contrary to what the Christian church did over 2000 years in its history. The Christian church had especially during the period of after the 1000 AD or so became again an institution that was completely disregarding women improperly to the .. etc. his case was brought before the court because it was considered by some Christian groups as insulting the religious beliefs and the religious sentiments. The case was not even, was actually brought before the court of first instance. And the court decided that there was no subject to it, there was no basis and no sort of legal; there was no breach of anything in fact; because it was a novel, it was a novel that depicted certain figures, certain protagonist, but in a very surreal and allegoric way. And therefore there was no, this could not constitute any sort of, violation or insult of any kind of religious or otherwise belief. Thank you.

STEFANO DELSİGNORE: Today I will do a little introduction and then we will discuss the criminal cases. I will give you a leaflet so that you can follow better the description of them. The first one concerns Mr. Silvio Berlusconi, prime minister of Italy at the time of the alleged offense and the second one concerns a famous public prosecutor whose name Giancarlo Casselian was the public prosecutor in Palermo, was an anti-mafia prosecutor at the time of allege defense. You have a brief description of cases, the reference, defendant, the victim, the facts, the charge of the procedure and the reasons why the Supreme Court took its decision. As my colleague Stefano suggested yesterday, the most interesting area for discussion of cases on the freedom of expression in Italy concerns with the crimes of insult and defamation. Those crimes are provided by the articles 594 and 595 of the Italian criminal code. Both articles provide the same conduct, they protect the honor of a person and the only difference between them is that the insult has to be done in the presence of the victim, for the article 594 and the defamation has to be done without the presence of the victim. But the content, the conduct has the same meaning. To consider cases on insult and defamation is important because in the law in action, those are the crimes that mostly limit the freedom of expression in the Italian criminal system. First of all I have to say that in Italy almost all cases on freedom of expression are dealt with by penalty of a fine. Practically imprisonment is never issued. Especially relevant are cases in which the alleged victim for defamation or insult is a public authority a member of parliament, minister, public prosecutor, judge; because as we would see for some of these public authorities, there is a different standard. The judges when they have to value the right to critic and they are in front of a case in which the victim is a prosecutor or a judge as a different approach to the case than what they have in a normal one. As Stefano told yesterday, Italy has not any more the special offense to protect the honor of a public officer. We had the article 341 but it was supressed in 1991. And during the fascist period we also had a special offense for the defamation of a prime minister but it was abolished just in 1947. So the question to be answered is the following one: when a critic against a person who is a public authority amounts to be a defamation or insult?

Or in other words, is the balance between the public interest to critic a public authority and which is the balance between the public interest to critic a public authority and the honor of this person. How should the law find the correct balance between these two interests? Before going to the cases, let me underline that any way as we have seen also in Germany and in France, the right to political critic is wider than the right to scientific critic or historical critic or artistic critic, because in this particular sector, it is considered normal, the use of strong words and polemical expressions. As a result, journalist may invoke the right to critic or to report current events in many cases of defamation. So going through these cases, the first one which concerns Mr. Silvio Berlusconi is quite a recent one, because it has been decided in May 4, 2006. And the facts are the sequent. Berlusconi was waiting for one of his trials, criminal trials; one of them because he had many in these periods. And this one concerned the corruption of a judge a magistrate. And he was waiting in a corridor of a criminal court of Milan in the presence of more than a hundred people and of many tv cameras. While he was entering in a courtroom, Mr. Rica who is a professional journalist also he is quite unknown screamed to him: "let the court try you." "You Buffon" is the Italian word we can translate it as buffoon, clown or something like that but it is quite a strong expression. "You should respect the law, you should respect democracy otherwise, you will end up like Chauzesku and Don Rodrigo. Chauzesku is the famous dictator from Romania and Don Rodrigo is an evil character of "I Promessi Sposi", famous Italian novel written by Alessandro Manzoni, so very evil character. And Mr. Rica was charged for insult, an aggravated insult article 594. And in the first degree, the trial took place in front of, before a lay magistrate. And Mr. Rica was found guilty of insult. But then, the procedure came to the Supreme Court and the conviction was reversed. Now the case is still pending before a lay magistrate but the principle that has been written down by the court is a very strict one and so it is very probable that he will be acquitted. The reasons of the decisions of a supreme court, the arguments, that the court used, are the sequence: in the court Mr. Rica's statements and in particular the use of the word clown may certainly be considered polemical, strong expressions; but they did not on that account constitute a gratuitous personal fact as the author provided an objectively understandable explanation for them, derived from the contentious issues of a famous case pending in Milan against Mr. Berlusconi. The court argued three things that at the time of the statement there was one perception in the public opinion that several decrees and statues passed by the government or the parliament could delay or affect the Berlusconi case. Second, the court argued that the journalist Rica organized in the past debates and conferences on this theme. And the third thing that the court underlined was that each context is good to exercise the right to critic. You do not have a wider right of critic if you write on a newspaper than if you just express your idea in a corridor of a court. This decision has been taken referring directly to famous European Court of Human Rights case. Obercich versus Austria in which the court as we know and as we heard this morning, decided that the use of the word idiot for the governor of Carinsia was not a defamation because it was justified from the context of the opinions expressed by this political man and so it was an exercise of the right to critic done in a very strong way but it was justified by the context in which these word has been used. The second case I leave all opinions and my personal ideas on this case for the discussion and I go directly to the second case. The second case concerns as I told a very famous prosecutor named Giancarlo Cassel and as a defendant concerns the position of a quite famous Italian journalist Giancarlo Perna who wrote an article published in 1993 in national newspaper, a quite known one. In journal which is the same newspaper which we showed to you before. Just a case but it is quite famous one was one in journal. In this article Mr. Perna expressed well it is much more difficult to explain it briefly because it was a long article but anyway, Mr. Perna expressed the view that Mr. Giancarlo Casseli in further grounds for the grand political design edged by the Italian communist party had brought charges against the former Prime Minister Mr. Julio Andrea for aiding and abating the Italian mafia in an attempt to break up by judicial process, the dominant political class at the time; thus favoring the ambitions of a communist party. In particular,

because in the article, there were many parts which were considered as defamation by the Italian court. But in particular, there was a part in which Mr. Perna spoke about a haut of a bibiance done by Mr. Caselli to the communist party. It was quite strong expression to say that there was a strong relation between Mr. Caselli and the communist party. And there was charge for defamation, aggravated defamation and in the first degree, the trial deferred professional magistrate, the district court of Monza. Mr. Perna was found guilty of defamation and then the appeal was dismissed and the conviction was confirmed by the Supreme Court. In the court's view Mr. Perna's statements have not been proved to be true and play no informative role. So first of all, the court argues that Mr. Perna could not invoke the defense of reporting current events. And in the same way, the court said that there was no defense to be invoked in the case to a right to critic because the concern the statements were indeed offensive for Mr. Caselli as an individual and degrading for his function as a state prosecutor. And they decided these also taken in consideration the use of the expression, the haut of obedience to the communist party. I am underlining this point of a decision because this is the only case who has been considered by the European Court of Human Rights against the Italy on the restriction of a freedom of expression. And the crucial issue in this case is that; for the European Court is that Mr. Caselli was indeed at the time affiliated to the communist party. And there was a public interest in knowing the political background of a prosecutor. So they decided, they condemned Italy on this point and they said that this was an exercising of the right to critic. So, the decision of a supreme court on this point was not acceptable. So I do not want to take much more of your time and we will maybe discuss some other points of these cases during the debate.

GÜNAL KURSUN: Well, thank you very much. I'm very happy to be in Bahçeşehir University. So at first, let me thank to Bahçeşehir University for inviting me and especially to the organizers of this round table. For today, I have prepared with the help of Prof. Yeniseyi, seven court decisions and after that I will try to present you the famous Orhan Pamuk case, which was very popular during the recent months. The first decision, it was given in 1990, by the court of cassation, it was dealing with the previous criminal code's article; 159, which change with 301, in this new code. The court of cassation decided that the words that continue the insult, was for the police officers who want to prevent their rioters on the street. So it must be an insult to the public officer, not denigration or degration. I have to say that there is a conflict in the terminology. In 159, in the previous article, the language was, 'tahkir' and 'tezhir' in Turkish which means, 'to see someone under' or I don't know how I can define this, 'to diminish' yeah. But in the trial one, the language is changed and it is 'aşağılama' in Turkish which means, 'to degrade', contrary to human rights in international meaning.

S. MAFFEI: Stronger or less?

G. KURSUN: Well, it is still a debate but most of the academics in Turkey say that it is stronger for now. I mean the conduct must be stronger; it must be a big insult to become a crime.

In this court decision we see that the court of cassation things the insult must target in general. The target is the police department in general. Not the individual police officers. If it is so, it is a crime but it is another crime, an insult to the public officers. Something else. But on behalf of denigration or degration, it must be targeted the police or the security department in general. So in this event, because of it was individual or personal, they did not see the occasion as a denigration. On the second example, the decision was given in 1976, again by the court of cassation, in a street meeting, a walk named 'independence and freedom' the perpetrator of the crime shouted as 'motherfucker sold polices, you dogs, you fascists' and he shouted as 'killer government'. That was the translation of the shout. In the court of cassation's decision, they said that, the perpetrator targeted the government.

He targeted not the polices individually, but he targeted police in general. So it is 159 and it is denigration or diminution. So they said that the first insists court's application 159 is correct.

S. MAFFEI: What was the penalty?

G. KURSUN: Well, it was a short terming prison. But suspended or changed to fine. I mean in the court decision it was not waited so..

In the third court decision, again it is coming from 1976, in a column of a newspaper; a columnist said the government is providing the law of jungle atmosphere, to point out the events in the streets and the attacks to the teachers at that time. This was the sentence. At that time in Turkey in the streets during the end of 70's and the court of the cassation in this occasion said in the column, there is a purpose of criticism to the government and did not intend to insult or denigrate the government so acute.

In the fourth example, the year is 1976, the court of cassation said, to blame the national intelligence agency with killing many people is denigration of state's security forces. So 159 is applicable in this occasion.

The fifth decision is given in '89. Since the insult perpetrator is heavily drunk, the words of him said to the police officer is not denigration of security forces but it is an insult to the government officer. At the same time there won't be a crime by saying the word 'Allah' because of lack of specific intent. He said; please excuse my language; 'I fuck your Allah, I fuck your book' and carried on like this to the police officer and the court of cassation's interpretation is if the insult is directed or targeted individually, 159 is not applicable. But if the insult targets the department as a whole or the government as a whole, the so called article is applicable.

Another decision is given by the grand chamber of the court of cassation. The date was 1987. They say that it is a denigration of public since the perpetrator said the words in a small crowded street where many people can here. So that it is publicly said. And this shows that he has a specific intend. According to the event, a drunken perpetrator came to the bus station to buy a bus ticket and saw some people laying on the sidewalk, some children, some women or somebody. They were sleeping and with that sadness he said 'I fuck this kind of Republic of Turkey!' and carried on. From the court position we can read this. The majority said 159 is applicable in this event but there was a minority report and in the minority report, including the president of the great chamber they said that, a specific intend of insult of the republic is needed in the occasion. He is drunk and with the shock of the scene he spent these words. But we don't think that he has a specific intend to insult the Republic. So accusation is needed. But they were in minority so the majority is taken.

And in the last example, again given by the court of the cassation in 2001, the perpetrator is an imam and in the mosque before the private prayer he said, 'There was a man in Ankara, he has retired. In Ankara he was a Jewish but in Anatolia he is a Muslim. Now there is Koran on this table. These are all Jewish ruins. Those who administer us are donkeys and they are not able to set an order in this country. Only Islam will set an order.' That was the speech. He was talking about the former president Süleyman Demirel. Am I right? The criticism was targeted on the former president.

No, but mainly in the Islamic rhetoric, this kind of words are merely spoken to blame as Jewish ruins. Besides, the former president belongs to quiet rightly in the Turkish inter politics. The court of cassation finds this issue inside 159, so 159 is applied to the situation. Here we see that there is a concrete balance between the decisions. If the insult targets the individual itself, the court of cassation says 'No, there is no denigration of state.' But if the perpetrator targets in general; the security forces in general, the state in general, the parliament in general, not only a single member or a group of parliaments but as a general, there is the violation of law. One another thing is in the new law, because of the wording

has changed. As Prof. Yenisey mentioned yesterday, we haven't seen any examples yet, regarding 301. But there is only one single decision, the Hrant Dink decision, which I believe that cannot be an example at this point because looking at one single decision we are not able to say anything. But on the other hand, I think that, as I said yesterday or before, demolishing completely or erasing 301 doesn't solve the problem. It won't solve the problem as a whole. But a need of interpretation change or a need of wording in the article can be much more appropriate. So we will carry on this discussion in the discussion part but I want to present you the Orhan Pamuk case.
Everything began in February the 6th 2005. We read in the Turkish newspapers that Orhan Pamuk interviewed with a Swiss newspaper and in the Swiss newspaper Orhan Pamuk said: 'Turks have killed thirty thousand Kurds and one million Armenian. Sometimes I feel ashamed to say I'm a Turk.' At that time he was a candidate to the Nobel Prize. That's what we read in the Turkish newspapers. After one week or 10 days later, we again read in the newspapers that the public prosecutor invited Orhan Pamuk and took his statement. In his statement, Orhan Pamuk said: 'I'm a Turk and I'm proud of this. I did not say those words. On May the 17th 2005, the prosecutor requested permission to file a case from the minister of justice. Because according to the provision of 159, the previous criminal code, a permission of minister of justice is needed to file a case. Minister of justice did not say anything at that time. He just waited. Because the date was May 17th and in the 1st of June a new law was entering the force. And in the 1ST of June, new Turkish penalty code entered in the courts and in article 301, permission is not needed anymore. In June 8th 2005, minister of justice answered the request as no permission is needed according to the new Turkish code; the responsibility is on the public prosecutor. This means: 'Do whatever you know.' In June the 13th 2005, public prosecutor filed a case against Orhan Pamuk according to the article 301, 'Denigration of Turkishness'. I'm still insisting on the word 'denigration'. We must explain that.

F. YENİSEY: You must use the word 'violation of the dignity.'

G. KURŞUN: We have to say that this 'turkishness' word, by the court of cassation is interpreted as Turkish nation and the Turkish nation is defined in the constitution as Turkish citizens; the citizenship.

Orhan Pamuk in a foreign country said after some time, 'I'm behind my interview I've given in the Swiss newspaper. I'm saying the same sentence again. 'And again the Turkish newspapers wrote in the columns that 'Pamuk repeats his speech again.' In the court, before the prosecutor.

C. BADSE: So kind of.. He said something to the prosecutor. Something else outside?

G. KURŞUN: Yeah, exactly. On December 17th 2005, the court asked from minister of justice for his permission, because the crime was committed before June the 1st. I'm saying this permission but, is there any other appropriate word for it?

S. MAFFEI: Authorisation maybe.

G. KURŞUN: On December 27, court of cassation decided in general means that those who committed crime during the old code must behave according to the old code. So, it means that the permission is needed and it somehow became a procedural matter.
But on the other hand, criminal procedure law is immediately applicabile. Immediate applicability principle. So, the court of cassation's decision means the permission is needed. At that time the minister of justice is squeezed from the sides. He wanted Orhan Pamuk to apologize. He did not do it in a very open way but he let Orhan Pamuk to apologize somehow. And if he apologized,

this should be covered somehow. I mean he could do something covered or something like that. But Pamuk did not reply this because there was no need for him. At that time the rest of the world was put in pressure over government.
I mean in the western newspapers the columns were full of Orhan Pamuk case and they put pressure till the court date. They were fully giving support to Orhan Pamuk as you will remember. The scene was if Turkey gives respond to the pressure, the case will dismiss and in the other hand, if they commit Orhan Pamuk they knew he will reborn as Mr. Salman Rushdie or many others. In January 13th 2006, minister of justice answered to the court and he said 'The new law has entered into force. There is no need for giving permission.' This was the official answer of minister of justice to the court. He did not take the responsibility against the court of cassation and he left the court of cassation's decisions aside. In January 22nd, the court decided to dismiss the case and the reason was 'permission is needed according to the law and it is not given by the minister of justice'. In accordance to the court of cassation's decision, they dismissed the case.
Here we see that in this solution everybody is free. Neither minister of justice nor the court is taking responsibility and in that case Pamuk is saved from the case. Because its dismissed. Turkey saved the EU candidacy. Minister of justice saved the inner policy because there was two sides before the discussion, one side the EU side or the EU candidacy side and the other one is the nationalist wing. The western world saved Orhan Pamuk. So the white cowboy is always winning. So everybody is happy. In October the 12th, Nobel Prize Committee awarded Orhan Pamuk with the Nobel Prize of Literature

I have a question at this moment. If the name was not Orhan Pamuk but Mehmet Ali Ağca, what will be the result? What would you think if the court dismissed the commission against Mehmet Ali Ağca? I mean, I believe that these situations are legal as much as political.

No no, I'm just making a speculation. Mehmet Ali Ağca has committed the attempt to assassin the Pope, the former Pope. And he is reserved for 22 years in Ancona prison and then they have given him back to Turkey to serve the rest. And he is still in jail.

I just want to say that the name of the person who we are talking about is very important. Because potentially it becomes a political matter. I don't agree that the western world is behaving in a %100 honest way. There is no commission. I'm just making a statement.
So that was the short story of Orhan Pamuk. Well, at this point may I ask you a question?

S. MAFFEI: We ask you!

G. KURŞUN: Ok. I'll answer the question.
I have listened to all of you. When you're telling about your countries criminal code or criticizing your countries impenetration. What would you think that for example in Greece, in Italy, in France, in UK, in Denmark, in Finland, in Germany, in any kind of country in Europe, what kind of provisions regarding in this issue do you wish to see? In your country's criminal code?

S. MAFFEI/ A. POTTAKİS: None..

G.KURŞUN: None, no provisions. So are you for the freedom of insult in this thing.
KURSUN: Sorry can we speak one by one and so that all the countries say what they think on this?
S. MAFFEI: We will give an answer to the sentence of Pamuk, right? He said "sometimes I'm ashamed to be a Turk". Because the Turks have done something.. Whatever.. So I could, you know, write in a newspaper, 'Italians had the Russia laws over the Jews. We killed many people in Ethiopia, how many

I don't know but many for sure. And I'm ashamed to be Italian. There is no problem in Italy on this matter.

A. POTTAKİS: saying the Turcs have killed this and that or what so ever is an offence adresse agianthe state. It's a historical sort of assesment a critical approch to the history for us, it would have been. State is state, history is history. State is not in charge of the protection of the history.

S. MAFFEI: By the way, this is to be clear, regardless of the truth of the state. If there is no crime ther is no prosecution.

G. KURŞUN: So it is the same in Greece.

A. POTTAKİS: We even didn't have a law protecting the State authority. Even some fanatical judge wants to prosecute somebody because he said something about a religious, regarding massacres, there is no law which can allow him to do so.

C. BADSE: I aggree with the Italian perspective. I have one question, What was the insult against turkishness? What was the thing to be asshamed? Was it allrigth or was it considered as an insult if he says I'm ashamed to be a turc and stop without any connection with the history behind it.

G. KURŞUN: With this new law, a new concept is answering to the law. About danger I mean, if they insult, create a danger. It's not applicable in the individual insults. But if the insult coming from the perpetrator is very high that some people would be walking in the streets or if there will be a public disorder, at that time it is a danger because they have changed the place, the systematic place of the article. Put some place and take it from someplace to put some other place. The present systematic part is regarding to the security of this thing or the defense of this thing.

What if he said only, I'm ashamed of being a Turk without making any reference to the past with another sentence, would he be prosecuted?

FERİDUN YENİSEY: The Pope case you mentioned deals with nothing, I think. There was not a case. The words he said, there is not a crime under the new legislation. So to say I'm ashamed to be a Turk doesn't constitute this crime. But when he said the words, it was the old time, old court time. And it was required to have a authorization. And the minister of justice was hesitating to give the authorization or not. So they rested and waited. But when the new law passed and it wasn't a fact. So everybody knew that this doesn't constitute a crime but the courts were not easy to equate him and the minister of justice was afraid of the public pressure. So they formed this solution that nobody complained and it was the old court that once required the complaint but the new court doesn't and the time has been expired for firing a complaint. So the case was dismissed. So this was win and win as you expressed. But the complex was what he said doesn't constitute this crime today and if he says it again there shall not be any prosecution or a similar explanation in Turkey. And in addition to the wording of 'aşağılama' , so this new concept is repeated in another article in 216, and its, ' creating hatred amongst the segments of the population'. So if someone violence the dignity of one group of people living in the country, then he can be prosecuted if this violating the dignity creates a minimum danger. So this is the wording now in the new code. If through the explanation someone makes it creates a minimum danger for one group attacking the other group. And I can give you one example of this. If someone says to you, 'blow the candle', what meaning do you give to this expression?

Participants: Blow the candle.

F. YENİSEY: Doesn't mean to you something? Doesn't create a minimum harm or danger?

Participants: No..

F. YENİSEY: But in Turkey if someone uses this expression, it is really most likely that a big group come together and attack and this happen in a TV show. In a TV show, TV talkmen made a joke. And he just said, 'let's blow the candle.' And this expression means for the Aleviis; it's a joke between the countries and the persons, it's a bad joke, its an allegation that they blow the candle and go to sleep with their daughters. So this is an expression and all the Alevities in Istanbul surrounded the TV station and attacked and tried to kill the showman. So these words create a imminent danger but you can not change the wordings from your perspective of belief. In every country there are some sensitivity points. Some words are sensible for you and some for me, but as a nation if you are going to be offended, then it can be a crime or it can be a case. So this wording violating the dignity occurs in two cases in the new code. One of them is violating the dignity of one portion of the nation and if it creates an imminent danger that's a crime. And the second part is now in the 301. So it is not insult, it is not defamation. But it's taking the dignity. So it is very harsh at the wording. So this is my point of view.

S. MAFFEİ: Personally I don't think you can argue. That the assessment whether something created danger can be informed by the fact that the danger actually occurred later. Because if you do that, then you are...people to group and then take any statement as a pretext that would , you know, justify reaction to that rule. You see whether it is a danger or not, it has to be judged from the wording. It shouldn't be judged from the fact that people group and....Because if you judge it exposed they all feel that it is subject to pretext.

F. YENİSEY: There is a principle of experience. So if in some instances it created danger, it can create again. And now we have seen from the Danish cartoons. At the beginning if you make a cartoon in Finland or in Denmark, the population is not sensitive about it, nobody cares. And I do not care also. I saw those pictures and they didn't offend me. I'm a Muslim but I'm not a very strong Muslim. They don't offend me. But if it is in a place where they are very sensitive and in Afghanistan they may create a problem. Now we heard that in England the press didn't press and they had this experience, they were hesitated. So you can see from experience if something has created a big danger, you hesitate to have it.

E. KHAWAJA: Just a very short comment; because I agree on some of your argumentation. And also, It think it's very interesting, this grouping together. And I think the history of the blasphemy provision if we make a parallel there and also its importance for the European Convention on Human Rights..it says that 'it is a right to have a provision against blasphemy and make an interference in the freedom of speech, it cause a significant consensus of the population was Roman Catholic.' And that actually, its not a very small group. I mean that significant part of the population has very strong .....It is hard to find provision against blasphemy. So provision against blasphemy is not a minority protection or such .It more for securing public order. Context or the pretext of before the actual incidents are illegal from the very start.

A. POTTAKİS: At the beginning of your presentation, you said that you may offend someone, you hesitated someone should, maybe not open to see it. So you were right to do this. I made a mistake in my class. Here at Bahçeşehir University, to give an example about the freedom of speech issues, I gave the same example with the blowing the candle and my student protested me very harshly. He was Alevi. Just two words, saying the words. But it was my mistake to repeat the words. So sometimes

its very difficult to get this reaction but anything else, if you are in a football match and you are sitting in one group but you are supporting another group so you will risk .

F. YENİSEY: It depends to the social needs, understanding and the reactions of the society. So as for today the society is very sensitive about this issue; 'the Turkishness.' And if the law change anything in this regard, it will be a big reaction from the society. Because they are sensitive in that matters. But the most important thing in this article 301, from my perspective is the limitation on the government critic. So this can be abolished or this can be taken away from the law. That if you are going to insult the government's honor then it's a crime so it shouldn't be a crime. This, I can agree on but on the other point it's a sociological approach and I'm not sure about what is the outcome.

S. TELLENBACH: OK. So I think we better continue to discuss on the dinner. Thank you all for your participation. It was a pleasure to work in this very important subject during 2 days. Thank you.

Bitirirken...

YTCK 301. madde Değişiklik Önerisi

29 Kasım 2006 tarihinde Hukuk Fakültesi IGUL'da, Prof.Dr. Feridun YENİSEY, Prof. Dr. Süheyl BATUM, Abdülkadir KAYA, Ar. Gör. Aslıhan ÖZTEZEL, Ar. Gör. Sinan ALTUNÇ, Ar. Gör. Mehmet UZUN, Ar. Gör. Serkan KÖYBAŞI'nın katılımıyla gerçekleşen toplantıda YTCK 301. Madde'ye değişiklik önerisi hazırlanmıştır.

I - Tespitler.

1) Yeni Türk Ceza Kanununun Anayasal organları koruyan maddeleri öncelikle Bayrağı ve İstiklal Marşını "aşağılamayı" suç haline getirmiştir (YTCK 300). Burada kullanılan terim, "aşağılamadır".

2) Devletin Anayasal organlarından olan "Türk halkı (Türklük), Cumhuriyet, TBMM, Hükümet, yargı organları, askeri teşkilat ve emniyet teşkilatı", alenen aşağılandığı takdirde, suç oluşmaktadır (YTCK 301).

3) Devletin Anayasal organlarından olan Cumhurbaşkanına yöneltilen sözlü saldırılar için ise, "hakaret" terimi kullanılmış ve kovuşturma Adalet Bakanı'nın iznine bağlanmıştır.

4) Bu yapılanma içerisinde, maddeler arasında (YTCK 299, 300, 301) bir dengesizlik olduğu görülmektedir. Hazırlanan değişiklik önerisinde, bu dengesizliğin giderilmesi amaçlanmıştır.

5) Mülga TCK 159 ve YTCK 301'deki kavramlar yıllardan beri büyük hukuki ve toplumsal tartışmalar doğuran kavramlardır. Bugün için bunların kaldırılması söz konusu olamaz.

Ancak, mukayeseli hukukta hakaret fiillerinin yaptırımları incelendiğinde şu hususlar tespit edilebilir: i) sadece tazminat ile yetinen Anglo-Amerikan yaklaşımı, ii) kişilere karşı işlenen fiileri suç haline getiren, fakat kurum ve kuruluşlara hakareti cezalandırmayan Avrupa Birliği yaklaşımı ve iii) kurum ve kuruluşlara yönelik hakaretleri cezalandıran Almanya, Avusturya, İspanya ve Polonya düzenlemeleri.

II – Öneriler.

1) Soruşturma ve kovuşturmada kamu yararı bulunması koşulu öngörülmesi. Devletin bütün anayasal organlarının saygınlığının eşit bir şekilde korunması için;

a) Üçüncü bölümde yer alan bütün suçlar bakımından kovuşturma yapılması, Adalet Bakanı'nın iznine bağlanabilir.

b) Kovuşturma yapılması, ilgili organın "istemde bulunması" koşuluna bağlanabilir.

c) CMK md. 171'de değişiklik yapılarak, kovuşturma yapılması Cumhuriyet savcısının takdirine bırakılabilir.

ç) Takdir yetkisi ister savcıya, ister Adalet Bakanı'na verilsin veya ister kişinin istemine bağlansın, yetkinin kullanılmasını keyfilikten kurtarmak için bir ölçüt oluşturulması yerinde olur. Bu ölçüt, "kamu yararı" ölçütüdür. İzin verecek, istemde bulunacak veya takdir yetkisini kullanacak makam, işlenen fiilin doğurduğu toplumsal zarar ile, suçun alenen kovuşturulmasının doğurabileceği kamusal zarar arasında ölçülülük bulunup bulunmadığını araştırmalıdır. Diğer bir ifade ile, burada kullanılan ölçüt, "tehlike" ölçütü olmalıdır.

Aslında, "neticesiz suç" olan hakaret suçlarında olduğu gibi, Anayasal organların saygınlığına karşı suçlarda da, "netice gerçekleşmesine", yani saygınlığın ihlal olmasına gerek yoksa da, YTCK 125'te olduğu gibi, "Anayasal Kurumun saygınlığını rencide edebilecek nitelikte....." kelimeleri, Kanun metnine eklenebilir ve soyut tehlike ölçütü kabul edilebilir.

2) Maddeler arasında uyum sağlanması amacı ile yapılabilecek değişiklikler.

a) Hakaret veya aşağılama teriminin kullanılması. Anayasal organların saygınlığına karşı suçların düzenlenmesinde yeknesaklık sağlanması açısından YTCK m. 299, m. 300, m. 301 bakımından müşterek tanımlama olarak, ya "hakaret", ya da "aşağılama" terimi benimsenebilir.

"Aşağılama" terimi tercih edilmelidir, zira bu terim daha sınırlayıcıdır. İşkence suçunu düzenlenleyen 94. maddede görüldüğü gibi, "bir kişiye karşı insanlık onuruyla bağdaşmayan ve bedensel veya ruhsal yönden acı çekmesine, algılama veya irade yeteneğinin etkilenmesine, aşağılanmasına...." denmek suretiyle, "aşağılama" teriminin ağırlığı belirtilmiştir.

"Aşağılama" terimi "hakaret"ten daha ağır betimlemeler içeren ve hedef alınan kişi veya kurumun onuru bakımından, adeta insanlık onurunu ortadan kaldırabilecek şekilde çok ağır bir fiil olduğundan, Kanunun yukarıda belirttiğimiz maddelerinde müşterek terim, "aşağılama" olmalıdır.

b) Kavramların tanımlanması. Maddeler arasında yeknesaklık sağlanması amacıyla, bazı terimlerin madde içerisinde tanımlanması da düşünülebilir.

"Türklük" terimi, "Türk halkı" olarak değiştirilebilir ve Anayasa esas alınmak suretiyle, kelimenin içeriği madde içinde açıklanabilir. Açıklama yöntemi 300. maddenin birinci fıkrasında bayrak terimi için yapılmış ve "... Anayasa'da belirlenen beyaz ay yıldızlı albayrak..." şeklinde bir tanım kabul edilmiştir. "Türk Devletine vatandaşlık bağı ile bağlı olan herkes Türktür" (Any. 66), ibaresi maddeye eklenebilir

"Halk" kelimesi YTCK m. 216'da kullanılmıştır. Halkın zayıf ve saldırıya maruz kalabilecek nitelikteki kesimlerini koruyan Kanun, halkın bütününü de korumalıdır. YTCK m. 216'daki suç, halkın bir bölümünü korurken, 301. maddenin milleti bir bütün halinde koruyacak şekilde düzenlenmesi uygun olacaktır.

c) 'Soyut tehlike suçu' şeklinde düzenleme yapılması. Anayasal organların saygınlığına karşı suçlar, YTCK m. 216'da olduğu gibi, sadece "açık ve yakın bir tehlike"nin ortaya çıkması ihtimalinin doğduğu hallerde (soyut tehlike suçu şeklinde) oluşabilecek şekilde düzenlenebilir.

Böyle bir düzenleme YTCK m. 216'da düzenlenen "halkı kin ve düşmanlığa tahrik veya aşağılama" suçu ile paralellik sağlar. Halka karşı 301. maddedeki suçun işlenebilmesi için halkın bir kısmının aşağılanması yetmez, bir bütün olarak milleti hedef alan davranışların "açık, yakın bir tehlike" yaratacak nitelikte olması gerekir.

d) Ceza. Anayasal kurumları aşağılama suçuna karşı üç sene hapis cezasının öngörülmesi doğru değildir. Sadece para cezası veya hapis cezası verilse dahi bu cezanın kısa süreli hapis cezası şeklinde veya erteleme kapsamına girecek şekilde düzenlenmesi düşünülebilir.

e) Madde önerisi.

Türk Halkını Cumhuriyeti, Devletin Kurum ve Organlarını Aşağılama

Madde 301. - (1) Türk Halkını, Cumhuriyeti veya Türkiye Büyük Millet Meclisini, bu kurumların saygınlıklarına, rencide edebilecek nitelikte saldırarak, alenen aşağılayan kişi, üç aydan iki seneye kadar

hapis veya 90 günden az olmamak üzere adli para cezası ile cezalandırılır. "Türk Halkı", deyiminden "Türk Devletine vatandaşlık bağı ile bağlı olan herkes" anlaşılır.

(2) Türkiye Cumhuriyeti Hükümetini, Devletin yargı organlarını, askeri veya emniyet teşkilatını, bu kurumların saygınlıklarına, rencide edebilecek nitelikte saldırarak, alenen aşağılayan kişi, üç aydan bir seneye kadar hapis veya 90 günden az olmamak üzere adli para cezası ile cezalandırılır.

(3) Türk Halkını aşağılamanın yabancı bir ülkede bir Türk vatandaşı tarafından işlenmesi halinde, verilecek ceza üçte bir oranında arttırılır.

(4) Eleştiri amacıyla yapılan düşünce açıklamaları suç oluşturmaz.

(5) Bu bölümde yer alan suçlardan dolayı kovuşturma yapılması, Adalet Bakanının iznine bağlıdır.

1 Aralık 2006 tarihinde Hukuk Fakültesi IGUL'da, Prof. Dr. Feridun YENİSEY, Prof. Dr. Süheyl Batum, Abdülkadir Kaya, Ar. Gör. Sinan ALTUNÇ, Ar. Gör. Mehmet UZUN, Ar. Gör. Serkan KÖYBAŞI ve Ar. Gör. Aslıhan ÖZTEZEL'in katılımıyla oluşturulan metin üzerinde görüşmek üzere bir kez daha toplanılmış ve aşağıdaki YTCK 301. maddeye değişiklik önerisi metni oluşturulmuştur.

Değişiklik sebepleri:

1. Değişiklik önerisinde kullanılan "aşağılama" teriminin kullanılması hususunda mutabık kalınmıştır.
2. YTCK m. 301'de ve ilk değişiklik önerimizde iki fıkra olarak düzenlenmiş olan suçlar arasında, organlar arasında önem derecesi yaratılmaması için, her iki fıkrasa sayılmış organların tek fıkra içerisinde ele alınması yerinde görülmüştür.
3. Türklük yerine, Anayasa'da kullanıldığı gibi "Türk halkı" teriminin kullanılması yerinde olacaktır.
4. "...Cumhuriyeti..." olarak YTCK m. 301'de ve değişiklik önerisinde bulunduğumuz maddede yeralan kavramdan anlaşılması gerekenin, genel anlamda cumhuriyet rejimi değil, "Türkiye Cumhuriyeti" olduğundan bahisle, bu terime açıklık kazandırılarak, madde içerisinde "Türkiye Cumhuriyeti" teriminin kullanılması uygun görülmüştür.
5. Devletin tüm organlarının madde korumasının kapsamına alınabilmesi için, "Cumhurbaşkanlığı" da bu maddeye alınmıştır.
6. Değişiklik önerimizdeki açıklamalarımızdan yola çıkarak, "açık ve yakın bir tehlike oluşturması" ölçüt alınarak, "kamu yararı" gördüğü hallerde Cumhuriyet savcısının bu suçların kovuşturulmasının yerinde olacağına karar verilmiş, diğer bir deyişle takdirilik ilkesi öngörülmüştür.
7. Sözkonusu maddenin 3. fıkrasını oluşturan, "Türk Halkını aşağılamanın yabancı bir ülkede bir Türk vatandaşı tarafından işlenmesi halinde, verilecek ceza üçte bir oranında arttırılır" hükmü, uyarınca açılacak soruşturmalar, özellikle Avrupa ülkelerinde mülteci olmak üzere başvuran vatandaşlarımıza bu taleplerinin kabulü için "haklı bir gerekçe" oluşturacağı gibi, benzer şekilde Türkiye'nin suçlu iadesi taleplerini de olumsuz yönde etkileyebilecektir.

YTCK md 301 için değişiklik önerimiz aşağıdaki gibidir.

Türk Halkını, Türkiye Cumhuriyetini, Devletin kurum ve organlarını aşağılama.

TCK 301: a) Türk halkını, Türkiye Cumhuriyeti devletini, TBMM'yi, Cumhurbaşkanlığını, yargı organlarını, Türkiye Cumhuriyeti Hükümetini, askeri veya emniyet teşkilatını, bu kurumların saygınlıklarına, rencide edebilecek nitelikte saldırarak, alenen aşağılayan kişi, üç aydan bir seneye kadar hapis cezası ile cezalandırılır.

b) Bu suçlar hakkında kovuşturma, kamu yararı gördüğü hallerde Cumhuriyet Savcısı tarafından yapılır.

c) Eleştiri amacıyla yapılan düşünce açıklamaları suç oluşturmaz.

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