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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON
ARTICLES 216, 299, 301 AND 314
OF THE PENAL CODE
OF TURKEY

on the basis of comments by:

Ms Veronika BILKOVÁ (Member, Czech Republic)
Ms Sarah CLEVELAND (Member, United States of America)
Mr Jorgen Steen SORENSEN (Member, Denmark)
Ms Herdis KJERULF-THORGEIRSDOTTIR (Member, Iceland)
Mr Pieter VAN DIJK (Expert, Former Member, the Netherlands)

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I. Introduction

1. In its Resolution 2035 (2015) on the Protection of the safety of journalists and of media freedom in Europe, adopted on 29 January 2015, the Parliamentary Assembly of the Council of Europe requested the Venice Commission to “*analyse the conformity with European human rights standards of Articles 216, 301 and 314 of the Turkish Penal Code as well as their application in practice*”. During its meeting on 3 November 2015, the Monitoring Committee of the Parliamentary Assembly asked the Venice Commission to extend the analysis to Article 299 of the Penal Code and its application in practice.

2. The Venice Commission appointed Ms Veronika Bílková, Ms Sarah Cleveland, Mr Pieter van Dijk, Mr Jorgen Steen Sorensen and Ms Herdis Kjerulf Thorgeirsdottir to act as rapporteurs.

3. On 13-14 January 2016, a delegation of the Venice Commission visited Ankara and held meetings with the representatives of the Ministry of Justice, the Office of the Chief Public Prosecutor and the Presidency of the Court of Cassation, representatives of the Turkish Bar Association, of the Ombudsman office, of the Constitutional Court, the political parties represented in the Parliament, representatives of the Presidency of the Republic of Turkey as well as representatives of a number of civil society organisations.

4. The Venice Commission is grateful to the Turkish authorities and to other stakeholders for their excellent co-operation during the visit.

5. *This Opinion, which was prepared on the basis of the comments submitted by the experts above, was adopted by the Venice Commission at its (...) Plenary Session, in Venice (...).*

II. Relevant Provisions

6. The Constitution of Turkey contains a catalogue of rights and duties of the individual (Articles 17-40). This catalogue includes, *inter alia*, the freedom of communication (Article 22), freedom of religion and conscience (Article 24), freedom of thought and opinion (Article 25), freedom of expression and dissemination of thought (Article 26), freedom of the press (Article 28), freedom of association (Article 33) and the right to hold meetings and demonstration marches (Article 34).

7. The present Penal Code of Turkey (Law No. 5237)¹ was adopted by the Turkish Grand National Assembly (“the National Assembly”) on 26 September 2004 and entered into force on 1 June 2005. It is a complex piece of legislation with more than 340 provisions.

8. Article 216 criminalises public incitement to hatred or hostility and degrading sections of the public, and reads as follows:

(1) *A person who publicly provokes hatred or hostility in one section of the public against another section which has a different characteristic based on social class, race, religion, sect or regional difference, which creates an explicit and imminent danger to public security shall be sentenced to a penalty of imprisonment for a term of one to three years.*

(2) *A person who publicly degrades a section of the public on grounds of social class, race, religion, sect, gender or regional differences shall be sentenced to a penalty of imprisonment for a term of six months to one year.*

¹ CDL-REF(2016)011 Penal Code of Turkey.

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(3) *A person who publicly degrades the religious values of a section of the public shall be sentenced to a penalty of imprisonment for a term of six months to one year, where the act is capable of disturbing public peace.*

9. Article 299, as amended on 29 June 2005 by Law No. 5377 (Article 35), provides for criminal liability for insults against the President of the Republic. The provision reads as follows:

(1) *Any person who insults the President of the Republic shall be sentenced to a penalty of imprisonment for a term of one to four years.*

(2) *Where the offence is committed in public, the sentence to be imposed shall be increased by one sixth.*

(3) *The initiation of a prosecution for such offence shall be subject to the permission of the Minister of Justice.*

10. Article 301, as resulting from the amendment adopted on 29 April 2008 (Law No. 5759)², makes it a crime to degrade the Turkish Nation, the State of the Turkish Republic or the organs and institutions of the State. The provision reads as follows:

(1) *A person who publicly degrades the Turkish nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the judicial bodies of the State, shall be sentenced to a penalty of imprisonment for a term of six months to two years.*

(2) *A person who publicly degrades the military or security organisations of the State shall be sentenced to a penalty in accordance with paragraph 1 above.*

(3) *The expression of an opinion for the purpose of criticism does not constitute an offence.*

(4) *The conduct of an investigation into such an offence shall be subject to the permission of the Minister of Justice.*

11. Article 314 criminalises the establishment, command or membership of an armed organisation. The provision reads as follows:

(1) *Any person who establishes or commands an armed organisation with the purpose of committing the offences listed in parts four and five of this chapter, shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years.*

(2) *Any person who becomes a member of the organisation defined in paragraph one shall be sentenced to a penalty of imprisonment for a term of five to ten years.*

(3) *Other provisions relating to the forming of an organisation in order to commit offences shall also be applicable to this offence.*

12. Article 220 of the Penal Code ("Establishing Organisations for the Purpose of Committing Crimes") is of particular importance for the application of Article 314. In a number of recent judgments of the Court of Cassation, Article 314, because of the reference made in its third paragraph to "other provisions relating to the forming of an organisation", was

² The 2008 amendment replaced the expression "Turkishness", present in the previous version of Article 301, by the "Turkish nation", reduced the maximum length of imprisonment, excluded considerations of aggravating circumstances and made the prosecution of the offence conditional on the prior authorisation of the Ministry of Justice.

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applied in conjunction with Article 220 (in particular its paragraphs (6) and (7), which reads as follows:

(1) *Any person who establishes or manages an organisation for the purposes of committing offences proscribed by law shall be sentenced to imprisonment for a term of two to six years provided the structure of the organisation, number of members and equipment and supplies are sufficient to commit the offences intended. However, a minimum number of three persons is required for the existence of an organisation.*

(2) *Any person who becomes a member of an organisation established to commit offences shall be sentenced to a penalty of imprisonment for a term of one to three years.*

(3) *If the organisation is armed, the penalty stated in aforementioned paragraphs will be increased from one fourth to one half.*

(4) *If an offence is committed in the course of the organisation's activities, then an additional penalty shall be imposed for such offences.*

(5) *Any leaders of such organisations shall also be sentenced as if they were the offenders in respect of any offence committed in the course of the organisation's activities.*

(6) *(Amended on 2/7/2012 - By Article 85 of the Law no. 6352) Any person who commits an offence on behalf of an organisation, although he is not a member of that organisation, shall also be sentenced for the offence of being a member of that organisation. The sentence to be imposed for being a member of that organisation may be decreased by half. (Additional Sentence: 11/4/2013 - By Article 11 of the Law no. 6459). This provision shall only be applied in respect of armed organizations.*

(7) *(Amended on 2/7/2012 - By Article 85 of the Law no. 6352) Any person who aids and abets an organisation knowingly and willingly, although he does not belong to the structure of that organisation, shall also be sentenced for the offence of being a member of that organisation. The sentence to be imposed for being a member of that organization may be decreased by one-third according to the assistance provided.*

(8) *A person who makes propaganda for an organisation in a manner which would legitimize or praise the organisation's methods including force, violence or threats or in a manner which would incite use of these methods shall be sentenced to a penalty of imprisonment for a term of one to three years. If the said crime is committed through the press or broadcasting the penalty to be given shall be increased by half.³*

III. International and European Human Rights Standards

A. Freedom of Expression

13. Turkey is a State party to all major international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

14. Freedom of expression is guaranteed by Article 19 of the Universal Declaration of Human Rights, Article 19 ICCPR and Article 10 ECHR.

³ By Article 11 of Law no. 6459, dated 11 April 2013, the phrase included in this article "or aim of" was amended as "in a manner which would legitimize or praise the terror organization's methods including force, violence or threats or in a manner which would incite use of these methods".

15. The exercise of the right to freedom of expression may be subject to restrictions. Such restrictions have to meet the requirements foreseen in Article 10(2) ECHR and in subparagraphs (a) and (b) of paragraph 3 of Article 19 ICCPR. a) Legality: the restriction has to be “prescribed by law” (Art. 10(2) ECHR and 19(3) ICCPR). The Law has to be adequately accessible and foreseeable, i.e. “*formulated with sufficient precision to enable the citizen to regulate his conduct*”⁴. There must be “*a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention*”⁵. b) Legitimacy: the restriction has to pursue a legitimate aim. The exhaustive list of such legitimate aims is provided in Article 10(2) ECHR and 19(3) ICCPR. c) Necessity in a democratic society: the restriction has to respond to “*a clear, pressing and specific social need*”⁶ and be “*proportionate to the legitimate aim pursued*”⁷.

16. The European Court of Human Rights and the UN Human Rights Committee have a very rich case-law on the interpretation and application of Article 10 ECHR and Article 19 ICCPR respectively. In this context, the ECtHR has repeatedly assessed the provisions of the Penal Code of Turkey (both in their current and their former reading), including the four provisions discussed in this opinion.⁸

17. The Parliamentary Assembly of the Council of Europe has adopted several instruments relating to defamation, including Recommendation 1805 (2007) of 29 June 2007 on *Blasphemy, religious insults and hate speech against persons on grounds of their religion*; and Resolution 1577 (2007) and Recommendation 1814 (2007) of 4 October 2007 *Towards Decriminalisation of Defamation*. It has also dealt with the protection of journalists, for instance in Resolution 1438 (2005) and Recommendation 1702 (2005) of 28 April 2005, *Freedom of the press and the working conditions of journalists in conflict zones*; Resolution 1535 (2007) of 27 January 2007, *Threats to the lives and freedom of expression of journalists*; and Resolution 2035 (2015) and Recommendation 2062 (2015) of 29 January 2015, *Protection of safety of journalists and of media freedom in Europe*.

18. The Venice Commission has adopted two opinions pertaining to the legislation on defamation⁹ and a general study on the relationship between freedom of expression and freedom of religion.¹⁰

B. Resolutions, Reports and Statements on Freedom of Expression in Turkey

19. The OSCE Representative on Freedom of the Media reviewed the Draft Penal Code of Turkey already in 2005.¹¹ The report criticised the three provisions on verbal act offences assessed in this opinion (Articles 216, 299 and 301).

20. In his 2011 report focusing specifically on the Freedom of expression and media freedom in Turkey,¹² the Commissioner for Human Rights of the Council of Europe noted

⁴ ECtHR, *Sunday Times v. United Kingdom*, Application No. 6538/74, 26 April 1979, par. 49.

⁵ ECtHR, *Malone v. the United Kingdom*, Application No. 8691/79, 2 August 1984, par. 67.

⁶ ECtHR, *Vajnai v. Hungary*, Application No. 33629/06, 8 July 2008, par. 51.

⁷ ECtHR, *Parti Nationaliste Basque – Organisation Régionale d'Iparralde v. France*, Application No. 71251/01, 7 September 2007, par. 45. See also, General Comment 34 on Article 19: Freedoms of opinion and expression, Human Rights Committee (2011), paras. 22 and 34.

⁸ See, for instance, ECtHR, *Incal v. Turkey*, Application No. 22678/93, 9 June 1998; *Pakdemirli v. Turkey*, Application No. 35839/97, 22 February 2005; *Sirin v. Turkey*, Application No. 47328/99, 15 March 2005; *Artun and Güvener v. Turkey*, Application No 75510/01, 26 June 2007; *Siz v. Turkey*, Application No. 895/02, 26 May 2005; *Altuğ Taner Akçam v. Turkey*, Application No. 27520/07, 25 October 2011.

⁹ Venice Commission, CDL-AD(2013)024, *Opinion No. 692/2012 on the Legislation Pertaining to the Protection against Defamation of the Republic of Azerbaijan*, 14 October 2013; CDL-AD(2013)038, *Opinion No. 715/2013 on the Legislation on Defamation of Italy*, 9 December 2013.

¹⁰ Venice Commission, CDL-AD(2008)026, Study No. 406/2006, *Report on the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*, 23 October 2008.

¹¹ OSCE, *Review of the Draft Turkish Penal Code: Freedom of Media Concerns*, Vienna, May 2005.

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that “*the various amendments to the Turkish Criminal Code (...) have not been sufficient to effectively ensure freedom of expression*”.¹³ Articles 216 and 301 are expressly referred to among those provisions of the Penal Code that serve as a legal basis for criminal proceedings that “*continue to be brought against journalists, writers and human rights defenders*”.¹⁴

21. In the same report, the Commissioner also expressed concern about the lack of proportionality in the interpretation and application of the existing statutory provisions by courts and prosecutors, the excessive length of criminal proceedings and remands in custody, the problems concerning defendants’ access to evidence against them pending trial, and the lack of restraint on the part of prosecutors in filing criminal cases which create a distinct *chilling effect* on freedom of expression in Turkey and which has led to *self-censorship* in Turkish media¹⁵.

22. Following the arrest of journalists and media workers in December 2014 for, *inter alia*, having allegedly established a terrorist organisation and for membership in a terrorist organisation (Art. 314), the Commissioner issued a statement that: “*(...) media freedom has been a long-standing problem in Turkey and such measures carry a high risk of cancelling out the progress Turkey has painstakingly achieved in recent years. They send a new chilling message to journalists and dissenting voices in Turkey, who have been under intense pressure, including facing violence and reprisals. They are also likely to polarise Turkish society further and to increase public mistrust in the state’s ability to uphold human rights. I urge the authorities to stop the crackdown on press freedom and to act in compliance with the rule of law and human rights.*”¹⁶

23. The UN Committee on the Elimination of Racial Discrimination (CERD) noted in 2009: “*While noting that following an amendment made to the Turkish Penal Code, article 301 now criminalises public denigration of “the Turkish nation” instead of “Turkishness” and that prosecution of this offence is made conditional on the prior authorisation of the Minister of Justice, the Committee remains concerned at the possibility that the new article may lead to action being taken against persons advocating their rights under the Convention.*”¹⁷

24. In its concluding observations on Turkey, issued in November 2012, the UN Human Rights Committee expressed concern about a number of provisions of the criminal code that could adversely impact freedom of expression, including Articles 216 and 314. The Committee expressed concern that “*human rights defenders and media professionals continue to be subjected to convictions for the exercise of their profession, (...) thereby discouraging the expression of critical positions or critical media reporting on matters of valid public interest, adversely affecting freedom of expression in State party*”. Consistent with its general approach under Article 19 of the ICCPR, the Committee recommended that Turkey, *inter alia*, “*should ensure that human rights defenders and journalists can pursue their profession without fear of being subjected to prosecution and libel suits,*” and “[c]onsider decriminalizing defamation and, in any case, it should countenance the application of the

¹² CommDH(2011)25, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Following his visit to Turkey, from 27 to 29 April 2011*, 12 July 2011. See also, for instance, CommDH(2012)2, *Report by the Council of Europe Commissioner for Human Rights on his visit to Turkey. Issues reviewed: Administration of justice and protection of human rights in Turkey*, 10 January 2012; CommDH(2013)24, *Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to Turkey, from 1 to 5 July 2013*, 26 November 2013.

¹³ CommDH(2011)25, p. 2.

¹⁴ *Ibidem*, para. 16.

¹⁵ *Ibidem*.

¹⁶ Commissioner concerned about the arrest of journalists in Turkey:

<http://www.coe.int/en/web/commissioner/-/commissioner-concerned-about-arrest-of-journalists-in-turkey?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fcountry-report%2Fturkey>

¹⁷ UN Doc. CERD/C/TUR/CO/3, Concluding observations of the Committee on the Elimination of Racial Discrimination, 24 March 2009, par. 16. See also, UN Doc. A/HRC/15/13, *Report of the Working Group on the Universal Periodic Review. Turkey*, 17 June 2010.

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*criminal law only in the most serious cases taking into account that imprisonment is never an appropriate penalty*¹⁸.

25. The European Commission recently assessed the human rights record of Turkey in its Progress Report of 2015. It noted, *inter alia*, that “no revision of the relevant provisions limiting freedom of expression of (...) the Criminal Code [had] taken place. A number of provisions still need to be amended, such as on defamation or Article 314 of the Criminal Code on membership of an armed organisation used to prosecute journalists”.¹⁹

26. On 14 January 2016, the Police reportedly detained 27 academics for having signed a petition together with more than 1,000 others, calling for an end to the military campaign in South-Eastern Turkey and accusing the government of breaching international law²⁰. According to the press, an instruction has been opened against those academics for spreading “terrorism propaganda” and for insulting the State (art. 301 of the Penal Code)²¹. The Council of Europe Secretary General issued, on 15 January 2016, a statement expressing his concern for the arrest of academics²².

IV. Analysis

A. Preliminary Remarks

27. States are under an obligation to create a *favourable environment* where different and alternative ideas can flourish, allowing people to express themselves and to participate in public debates without fear²³. This obligation also imposes on States the obligation to refrain from taking measures which can have a *chilling effect* on society in general by discouraging the legitimate exercise of free speech due to the threat of legal sanctions²⁴.

28. During the visit of the Venice Commission in Ankara, the authorities provided a number of judgments rendered by the Court of Cassation and the Constitutional Court which apply the international human rights standards on freedom of expression with a principled approach to the cases. For instance, in a judgment of 4 June 2015 within the framework of an individual application, the Constitutional Court found that the lower court’s decision that the applicant (a well-known columnist and journalist) was guilty under Article 125 of the Penal Code, for insulting public officials in his column, was in breach of the applicant’s right to freedom of expression. The Constitutional Court stressed, in line with the ECtHR case-law, that the boundaries of acceptable criticism against politicians are wider than those regarding criticism against private citizens. Additionally, the Constitutional Court noted that in a healthy democracy, the government should not only be checked by legislative or judicial powers, but also by institutions such as the media/press or other political actors²⁵.

¹⁸ UN Doc. CCPR/C/TUR/CO/1, Concluding observations on the initial report of Turkey, 13 November 2012, para. 24.

¹⁹ SWD(2015)216Final, *Turkey: 2015 Report*, 10 November 2015, pp. 63-64.

²⁰ <http://www.theguardian.com/world/2016/jan/15/turkey-rounds-up-academics-who-signed-petition-denouncing-attacks-on-kurds>

For the full text of the petition, see: <http://www.ibtimes.co.uk/turkish-dons-arrested-full-text-declaration-criticising-military-campaign-against-kurdish-1538161>

²¹ http://www.nytimes.com/2016/01/16/world/europe/turkey-kurds.html?_r=0

<http://www.lefigaro.fr/flash-actu/2016/01/15/97001-20160115FILWWW00042-turquie-des-signataires-d-une-petition-arretes.php>

²² “Reports from Turkey about arrests of several academics and intellectuals today are very worrying. In this difficult time when Turkey is facing an immense challenge due to terrorist attacks, I call on all to join forces against violence and terrorism and to respect human rights including freedom of expression. No efforts must be spared to deescalate the situation”.

²³ ECHR, *Dink v. Turkey*, Application nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010, para. 137.

²⁴ See the Declaration of the Committee of Ministers of the Council of Europe on the protection of journalism and safety of journalists and other media actors, adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers’ Deputies.

²⁵ Judgment of the Constitutional Court, no. 2014/12151, 4 June 2015, Official Gazette of 1 July 2015.

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29. Article 216 of the Penal Code (former Article 312) has recently been frequently used to penalise expressions that are deemed to insult or offend religious values. In 2012, the renowned composer and pianist Fazıl Say was charged under Article 216(3) for having tweeted several lines from a poem attributed to Omar Khayyam, an 11-12th century poet. He was sentenced in September 2013 to 10 months in prison for insulting religious beliefs. In a judgment of 12 October 2015, the Court of Cassation quashed the first instance court's judgment, considering that *"the words of the accused which constitute the subject of crime did not reveal a clear, imminent or serious danger in terms of public security, nor was it a call for violence and that the accused exercised his freedom of expression"*²⁶.

30. The authorities also provided a number of written opinions from the Principal Public Prosecutor of the Court of Cassation, which were submitted to the competent chambers of the Court of Cassation in currently pending cases on the freedom of expression²⁷. In many of these opinions, the Public Prosecutor recommended that the competent chamber of the Court of Cassation acquit the case because the forms of non-violent expressions which were the subject of these cases were guaranteed by the freedom of expression and the authorities of a democratic State must tolerate such criticism.

31. The Venice Commission welcomes those examples of application of the ECHR requirements by higher domestic courts to cases of non-violent speech and the principled approach of the Public Prosecutor of the Court of Cassation in his written opinions. The highest courts' guidance is very important for the lower courts in the interpretation and implementation of human rights standards in their case-law. However, given the high number of investigations and prosecutions under the provisions subject to the present opinion, in particular against journalists, the Venice Commission considers that the chilling effect on the expression of views on matters of public interest and the consequent self-censorship is not necessarily created by final judgments of the highest courts restricting rights, but by all kinds of measures taken by the authorities, including investigations, prosecutions and drastic custodial measures such as detentions, which thus constitute interference with the right to freedom of expression.

32. In a number of cases, the ECtHR has held that criminal proceedings²⁸ or criminal investigation²⁹ under Article 159 (former Article 301) against the applicants, or the continued detention on remand of an applicant with no relevant and sufficient reasons for its length³⁰, constituted interference with the right to freedom of expression of the applicants, despite the absence of final convictions against them at the end of the proceedings. The Court has recognised that those measures, in particular the custodial measures, themselves created a chilling effect on the applicants' willingness to express their views on matters of public interest and that such measures were liable to create a climate of self-censorship.

33. Consequently, the following analysis should also be read in the light of the State's obligation to prevent any chilling effect on legitimate expressions of non-violent speech. In this respect, not only the judgments rendered by the highest courts are important, but the number and content of criminal investigations, prosecutions and detentions under these provisions are also relevant.

B. Article 216 (Provoking the Public to Hatred, Hostility or Degrading)

34. Each paragraph of this provision regulates a separate crime: provoking/inciting hatred or hostility between groups of the population (Art. 216(1)); public degrading of a section of the

²⁶ Court of Cassation, E. 2014/35434, K. 2015/22535, 12 October 2015.

²⁷ In the Turkish legal system, when a judgment of a first-instance court is appealed against, the case file is first sent to the Office of the Principal Public Prosecutor at the Court of Cassation. The Principal Public Prosecutor submits an opinion (tebliğname) on the case to the competent division of the Court of Cassation.

²⁸ ECtHR, *Dilipak v. Turkey*, Application no. 29680/05, 15 September 2015 (not yet final).

²⁹ ECtHR, *Taner Akçam v. Turkey*, Application no. 27520/07, 25 October 2011.

³⁰ ECtHR, *Nedim Sener v. Turkey*, Application no. 38270/11, 8 July 2014.

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population (Art. 216(2)) and public degrading of religious values of a section of the population (Art. 216(3)). In order for the crimes in the first two paragraphs of this provision to be committed, “degrading” must be grounded on social origin, race, religion, sect, gender or regional differences.

35. According to an explanatory note provided by the authorities, “Provoking hatred” in the first paragraph, should be “beyond discrete disrespect and objection and should be objectively suitable to inciting a hostile attitude towards sections of the population”. The terms “hatred” and “hostility” are explained as a “psychological state that forms the foundation of feelings based on grudge, designed to harm and aim at defeating”. Further, in order for the crime in the first paragraph to be committed, “provoking hatred or hostility” should create an explicit and imminent danger to public security. The judge should decide in a given case, on the basis of concrete facts, whether the danger to public security is explicit and imminent enough in order for the crime in the first paragraph to be considered committed. The explanatory note also invokes Article 218 of the Penal Code, which provides that the expression of thought in the form of criticism and the expression of thoughts which do not go beyond news reporting do not constitute an offence. In this framework, the note concludes that only forms of expressions which incite to violence may be considered as in breach of paragraph 1 of Article 216.

36. Article 216(1)(2) of the current Penal Code replaced Article 312 of the former Penal Code³¹. The ECtHR has examined many cases of persons criminally convicted under Article 312 of the former Penal Code.³² In these cases, the ECtHR found violations of Article 10 on account of the convictions of the applicants for having published articles or books that allegedly incited to hatred or hostility or praised a crime or a criminal. The Court stated that although such articles and books contained harsh criticism of public policies (especially of the measures taken within the fight against terrorism), they either did not incite to hatred and violence, or the sanction applied was clearly disproportionate to the legitimate aim pursued by the interference.

37. Criticising state policies in the fight against terrorism, even if containing polemical passages, as in the *Dicle v. Turkey*³³ case and “painting an extremely negative picture of the Turkish State and thus giving the narrative a hostile tone”, is not considered by the ECtHR to constitute hate speech which encourages violence, armed resistance or insurrection. Forms of expression in the context of the fight against terrorism, such as “*It is a State terror against Turkish and Kurdish proletarians!*”³⁴, “*(...) Special war being conducted in the country at present against the Kurdish people*”³⁵; “*You kill Kurds in the name of Islam (...); those are poor sons of Anatolia, their villages are forcibly evacuated, they are tortured (...) and they are victims of murders of unknown perpetrators, those who fill up the prisons are all Kurds (...)*”³⁶ or the use of a virulent style in the criticism, such as “*State terrorism*” and “*genocide*”³⁷, which were the basis of convictions under Article 312 of the former Penal Code

³¹ Which provided in its relevant paragraphs:

“(1) A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months’ and two years’ imprisonment and a heavy fine of from six thousand to thirty thousand Turkish liras.

(2) A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years’ imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one-third to one-half.

(...)”

³² See ECtHR, *Incal v. Turkey*, Application No. 22678/93; *Birdal v. Turkey*, Application No. 53047/99; *Ceylan v. Turkey*, Application No. 23556/94; *Dicle v. Turkey*, Application No. 34685/97; *Gümüş and others v. Turkey*, Application No. 40303/98; *Gündüz Müslüm v. Turkey*, Application No. 35071/97; *Yarar v. Turkey*, Application No. 57258/00.

³³ ECtHR, *Dicle v. Turkey*, 10 February 2005.

³⁴ ECtHR, *Incal v. Turkey*, para. 10.

³⁵ *Ibid.*

³⁶ ECtHR, *Varlı and others v. Turkey*, para. 11.

³⁷ ECtHR, *Ceylan v. Turkey*, para. 33.

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by domestic courts, were considered by the ECtHR as criticism protected under Article 10 ECHR. So far, the ECtHR has not considered any case against Turkey that would relate to the application Article 216 of the new Penal Code.

38. In reaction to the ECtHR judgments concerning Article 312 of the former Penal Code, Turkey adopted a new Penal Code. Yet, as the Committee of Ministers noted in its 2008 report on the execution of the ECtHR judgments by Turkey, although the problematic Article 312 was replaced by several new provisions, including Article 216, *“these new provisions modified the wording of the old text while keeping its contents intact, in that the provisions concerning “the insulting of public bodies” and “incitement to hatred and to break the law” remain in the new code”*.³⁸

39. The Venice Commission observes from the outset that in paragraphs (2) and (3) of Article 216 respectively, denigrating a section of the public and denigrating religious values are made punishable separately from provoking hatred and hostility in the first paragraph. Those two additional paragraphs are problematic since “denigrating” may be given a very broad meaning, while expressions of opinions that offend, shock or disturb, are in principle protected by Article 10 ECHR. On the other hand, the condition that the expression should *“create an explicit and imminent danger to public security”* in paragraph (1) of Article 216 is not included in paragraphs (2) and (3). Paragraphs (2) and (3) accordingly should be formulated much more restrictively, or be integrated into paragraph (1).

40. Having said this, the Venice Commission considers that, in the light of the above case-law, beyond its wording, the serious problems concerning Article 216 stem from its interpretation and application by domestic courts and law enforcement agencies. It should be recalled that there is little scope under Article 10(2) ECHR for restrictions on political speech or on debate on matters of public interest. The Venice Commission does not disregard the problems and difficulties that occur in the context of the fight against terrorism. However, in a democratic society, the actions and omissions of the government must be subject to close scrutiny not only by the legislative and judicial authorities, but also by public opinion. Thus, even in relation to expressions containing very harsh criticism against government policies and which are hostile in tone, or offend, shock or disturb, resorting to criminal proceedings (including on the basis of Article 216) should only be possible if those expressions amount to intentional, explicit and open incitement to violence, armed resistance, or a violent uprising. Those are the essential factors to be taken into consideration when examining the “necessity” of an interference with the right to freedom of expression in a democratic society.

41. Further, in its fourth monitoring cycle report on Turkey (2011), the European Commission against Racism and Intolerance (“ECRI”) considered that Article 216 (1) and (2) has continued to be used to prosecute and convict journalists, writers, publishers, members of human rights NGOs and other personalities advocating rights or expressing non-violent opinions with respect to issues concerning minority groups, and especially Kurdish issues. This report also underlined that according to civil society actors, Article 216 is rarely, if ever, used to prosecute persons making racist statements against members of minority groups³⁹. During the meetings in Ankara, the authorities provided a decision of the Istanbul 41st first instance court. In this case, the defendants who made “racist statements” against the Armenian minority during a public demonstration were sentenced to prison terms, later converted into a fine⁴⁰. The Venice Commission stresses that the provision should be used only in the context of “racist statements”⁴¹ that create an explicit and imminent danger to public security, and not to punish harsh criticism of government policies.

³⁸ CM/Inf/DH(2008)26, *Freedom of expression in Turkey: Progress achieved - Outstanding issues* 23 May 2008.

³⁹ CRI(2011)5, adopted on 10 December 2010, published on 8 February 2011, para. 25.

⁴⁰ Istanbul 41st First instance court, E. 2012/312, K. 2012/884, 26 December 2012.

⁴¹ See, ECRI, General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, adopted on 13 December 2002, point 18.

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42. **Article 216(3)** pertains to the offence of “publicly degrading the religious values of a section of the public”. In its Recommendation 1805(2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion, the Parliamentary Assembly considered that “*national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence*”.

43. The Venice Commission’s 2008 Report on the Relationship between Freedom of Expression and Freedom of Religion noted that: “[I]n] a true democracy imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme. Ensuring and protecting open public debate, should be the primary means of protecting inalienable fundamental values such as freedom of expression and religion at the same time as protecting society and individuals against discrimination. It is only the publication or utterance of those ideas which are fundamentally incompatible with a democratic regime because they incite to hatred that should be prohibited.”⁴²

44. The Venice Commission, in its Report, recommended that incitement to hatred, including religious hatred, be the object of criminal sanctions, as is the case in almost all European States. The Commission, however, further stressed that it is neither necessary nor desirable to create an offence of religious insult (i.e. insult to religious feelings) *simpliciter*, without the element of incitement to hatred as an essential component, and recommended that the offence of blasphemy be abolished.⁴³

45. In the *Aydın Tatlav v. Turkey* case, the ECtHR found that the right to freedom of expression had been violated for an applicant sentenced to one year’s imprisonment under Article 175 of the former Penal Code for having criticised Islam as a religion legitimising social injustice by portraying it as “God’s will”⁴⁴.

46. According to statistics provided by the Turkish authorities to the Committee of Ministers of the Council of Europe, the number of bills of indictment drawn up by prosecutors under Article 216(3) have increased: 10 bills of indictment in 2010, 10 in 2011, 26 in 2012, 42 in 2013 and 32 in 2014, though the numbers may be higher⁴⁵. Further, it is also reported that, whereas in the 1980s and 1990s, most anti-free-speech prosecutions were for insulting Atatürk, Turkishness and the indivisibility of the country, these have been replaced in recent years by prosecutions for insulting religion (Article 216(3)) and the President (Article 299)⁴⁶.

47. When applying Article 216(3), law enforcement agencies and domestic courts should bear in mind that, as the ECtHR emphasised in the *Otto-Preminger Institute v. Austria* case⁴⁷, those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, or to any faith. Thus, Article 216(3) should be interpreted in such a way as to apply only to extreme cases of religious insults which *intentionally and severely disturb public order and call for public violence* as a consequence. In this respect, the Venice Commission generally supports the approach of the Court of Cassation in its judgment of 12 October 2015 in the case concerning Fazıl Say⁴⁸ (see para. 29 of the present Opinion). However, it would be important that this approach also be adopted not only by the first

⁴² CDL-AD(2008)026 Report on the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, para. 46.

⁴³ *Ibidem*, para. 89.

⁴⁴ ECtHR, *Aydın Tatlav v. Turkey*, Application No. 50692/99, 2 May 2006.

⁴⁵ DH-DD(2015)447rev. According to a different statistic cited by Yaman Akdeniz, Kerem Altıparmak (*The silencing effect on dissent and freedom of expression in Turkey*, in *Journalism at Risk. Threats, challenges and perspectives*, Council of Europe publishing, October 2015, p. 159), these numbers are: 66(2012), 107(2013) and 47(2014).

⁴⁶ Yaman Akdeniz, Kerem Altıparmak, *op. cit.*, p.147.

⁴⁷ Application No. 13470/87, 20 September 1994.

⁴⁸ E. 2014/35434, K. 2015/22535, 12 October 2015.

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instance courts, but also by the prosecutors, since investigations and prosecutions themselves, even if ultimately unsuccessful, may discourage the legitimate exercise of free speech in particular in controversial areas.

48. **In conclusion**, paragraphs (2) and (3) of Article 2016 should be formulated more restrictively as to the definition of the term “degrading”, since expressions that offend or shock, which are protected under Article 10 ECHR, can fall under the term “denigrating” in paragraph (1) which may be given a very broad meaning. The Turkish authorities may also consider integrating those two paragraphs into paragraph (1). As regards its application, all of Article 216 should be interpreted by domestic courts in line with the above-mentioned case-law of the ECtHR relating to Article 312 of the former Penal Code. The Article should not be applied to punish non-violent but harsh criticism of government policies, but rather to prevent racist statements in particular against national minorities that create an explicit and imminent danger to public security. As to Article 216(3), this provision should not be applied to punish blasphemy, but limited to cases of religious insult that intentionally and severely disturbs public order and calls for public violence.

C. Article 299 (Insulting the President of the Republic)

49. Article 299 of the Penal Code criminalises insulting the President of the Republic. It replaces Article 158 of the former Penal Code. The offence is regulated under Part III, entitled “Offences against the Symbols of the State Sovereignty and the Reputation of its Organs” of Chapter IV- “Offences against Nation and State and Final Provisions” of the Penal Code.

50. According to an explanatory note provided by the authorities, the President of the Republic has important duties and powers under the Turkish Constitution, such as safeguarding the implementation of the Constitution and the regular and harmonious functioning of State organs, and within this capacity he/she represents the State. Therefore, the offence of insulting the President is considered in the Penal Code as an offence against the “State forces”. Moreover, although “insult” is not defined in Article 299, the definition provided in the general provision on “insult” in Article 125 (under the title “offences against dignity”) is used when applying Article 299. According to Article 125, insult is the attribution “of an act, or fact, to a person in a manner that may impugn that person’s honour, dignity or prestige, or attacks someone’s honour, dignity or prestige by swearing”.

51. According to paragraph 3 of Article 299, “[t]he initiation of a prosecution for such offence shall be subject to the permission of the Minister of Justice.” This provision is similar to paragraph 4 of Article 301, which states “The conduct of an investigation into such an offence shall be subject to the permission of the Minister of Justice.” This specific provision for authorisation by the Ministry of Justice for prosecution (art. 299) or investigation (art. 301) has been discussed by the ECtHR in the context of Article 301⁴⁹. The authorisation procedure therefore is examined in this Opinion under Article 301, but the considerations set forth there concerning the authorisation procedure are valid also for Article 299(3) of the Penal Code⁵⁰.

52. As is the case for Article 216(3) (degrading religious values), there appears to be a significant increase recently in the number of investigations and prosecutions under Article 299. According to the Ministry of Justice, during former President Abdullah Gül’s seven year term in office, 1359 lawsuits were filed, but only 545 of them were prosecuted and no one was arrested. In only the first seven months of Erdoğan’s presidency (between August 2014 and March 2015), 236 people were investigated, with 105 indicted and 8 formally arrested

⁴⁹ *Altuğ Taner Akçam v. Turkey* (Application No. 27520/07, 25 October 2011) and *Dink v. Turkey* (Application Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010).

⁵⁰ See paragraphs 90 *et seq.* of the present Opinion.

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under Article 299.⁵¹ Furthermore, the number of files submitted to the Ministry of Justice for permission to launch a prosecution on insult to the President increased from 397 in 2014 to 962 in the first six months of 2015 alone. The Ministry of Justice authorised prosecution in 486 files in the first six months of 2015, as compared to 107 in 2014.⁵²

53. Article 299 of the Penal Code (and Article 158 of the former Code) has been considered in numerous instances by lower-level domestic courts. In 2009, the Court of Cassation⁵³ examined the case of a columnist sanctioned for insults against then president Mr. Ahmet Necdet Sezer, whom the columnist held responsible for the ban on wearing Islamic headscarves in public buildings. The Court held that, whereas the criticism of a decision by a president falls under the protection of freedom of expression, the use of the expressive words “*He can now apply henna on his butt*”⁵⁴, “*the Guy in Cankaya*”⁵⁵ is the leader of *incredible policies which dynamite the social peace in Turkey*” was not protected.

54. The ECtHR considered the application of Article 158 of the former Code in the 2007 *Artun and Güvener* and *Güzel* cases.⁵⁶ In the 2005 *Parkemirli* Case, it dealt with *civil* liability for insults against the President.⁵⁷ In all three cases, it found a violation of Article 10 ECHR, due to the failure by Turkey to meet the requirement of “necessity in a democratic society”.

55. Historically, the offence of insulting the Head of State appeared in the penal codes of various European countries. Yet, the past decades have witnessed a clear tendency to refrain from applying the relevant provisions or removing them altogether. Insult of the Head of State has been decriminalised, for instance, in Hungary (1994) and the Czech Republic (1998). In Germany, although the Penal Code provides for the offence of defamation of the President, in 2000, the Federal Constitutional Court stated that even harsh political criticism, however unjust, does not constitute such an offence⁵⁸, and the provision is rarely, if ever, used. In the Netherlands, although it remains a crime to intentionally insult the King and certain members of the royal family, the most recent conviction for this offence dates back to the 1960s. A similar situation exists in Belgium, Greece, Portugal, Romania or Spain. In still other countries, such as Poland and Italy, although the criminal provision on defamation of the Head of State has been applied occasionally, the courts have restricted penalties to a fine. In France, the Press Law was formally amended in 2000 to remove the option of imprisonment.⁵⁹

56. In the case of *Artun and Güvener v. Turkey*, the ECtHR held that conferring a privilege or special protection to Heads of State, shielding them from criticism solely on account of their function or status, cannot be reconciled with modern practice and political conceptions. In the case of *Cumpana and Mazare v. Romania*⁶⁰, the Court held that a “*classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest presents no justification whatsoever for the imposition of a prison sentence*”. The Venice Commission, in its Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, indicated that if the criminal provision on “discreditation or humiliation of the honour and dignity of the Head of the Azerbaijani State” were maintained, imprisonment as a sanction should be confined to exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate

⁵¹ Ministry of Justice, General Directorate of Criminal Affairs, doc. no. 76608343-622-03-0079-2015/155/18839, 17 March 2015 (<http://meldaonur.net/?p=5434>).

⁵² SWD(2015)216Final, p. 64.

⁵³ E.2009/9-190 K. 2009/253, 3 November 2009.

⁵⁴ The expression in Turkish “to apply henna on the butt” means being excessively pleased.

⁵⁵ Former residency of the presidents of the Republic in Turkey.

⁵⁶ ECtHR, *Artun and Guvener v. Turkey*, Application No. 75510/01, 26 June 2007; and *Güzel v. Turkey*, no. 6586/05, 24 July 2007.

⁵⁷ ECtHR, *Pakdemirli v. Turkey*, Application No. 35839/97, 22 February 2005.

⁵⁸ Germany: A positive environment for free expression clouded by surveillance, online: <https://www.indexoncensorship.org/2013/08/germany-a-positive-environment-for-free-expression-clouded-by-surveillance/>

⁵⁹ See Also PEN, *Defamation And ‘Insult’: Writers React*, October 2007.

⁶⁰ No. 33348/96, 17 December 2004, para. 106.

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speech or incitement to violence⁶¹. Under Article 19 ICCPR, the United Nations Human Rights Committee has also urged that “States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious cases and *imprisonment is never an appropriate penalty*”⁶².

57. The developments in Europe indicate that there is an emerging consensus that states should either decriminalise defamation of the Head of State, or limit this offence to the most serious forms of verbal attacks against heads of States while at the same time restricting the range of sanctions to those not involving imprisonment. The wording of Article 299 of the Penal Code is not in line with this emerging European consensus, since it provides for a prison term from one (minimum) to four years; moreover according to para.2, where the crime is committed in public, the punishment is increased by one-sixth, although it may be reduced, converted into a fine or postponed by the judge. However, in order to assess the compatibility of this provision with international standards and the emerging European consensus, concrete instances of its application, especially when relating to journalists, should also be considered.

58. During the visit to Ankara, the authorities explained that, since the constitutional reform of 2007, the President of the Republic was elected by popular vote and, as a consequence, he is much more involved in politics than his predecessors. This situation reportedly also increases the intensity and quantity of attacks against the President. Thus, according to the authorities, the primary reason for the recent increase in the number of prosecutions under Article 299 is the increase in the number of unjustified insults uttered against the Head of State.

59. Otherwise, according to the authorities, a more liberal approach has been adopted by the Court of Cassation and other courts in the implementation of this provision than in the past. In this respect, the authorities provided a Court of Cassation judgment and a number of written opinions of the Principal Public Prosecutor of the Court of Cassation submitted to the competent chambers of the Court of Cassation in currently pending cases⁶³. In a judgment of 6 October 2015, the Court of Cassation annulled the decision of the Antalya 15th assize court (31 May 2013) sentencing the accused to ten months’ suspended imprisonment for having posted on an Internet news site: “*They pulled all kinds of tricks on his back and now they will participate to his funeral shamelessly, one should have slightest dignity*”⁶⁴ (apparently criticising the participation of the then President in the funeral of a former President). The Court of Cassation held that the expression fell under the scope of freedom of expression.

60. The examples provided by the authorities of written opinions of the Principal Public Prosecutor of the Court of Cassation concern mostly allegations of insult against the then Prime Minister (current President of the Republic) and are related to Article 125 of the Penal Code. A slogan stating “*Ampoule Tayyip*”⁶⁵, carrying a banner on which was inscribed “*Some people die at the age of 15 and become an eternity, some become corrupted at the age of 60!*” or “*I don’t care what has been said, I care about the murder*” were considered to involve protected exercise of free expression by the first instance courts, which acquitted the defendants⁶⁶. It appears that those cases are pending before the Court of Cassation, and the Principal Public Prosecutor, in his written opinions, recommended that the chamber of the

⁶¹ CDL-AD(2013)024 Opinion on the Legislation Pertaining to the Protection against Defamation of the Republic of Azerbaijan, adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013), paras. 50 and 51.

⁶² General Comment 34 on Article 19: Freedoms of opinion and expression, Human Rights Committee (2011) para. 47 (emphasis added).

⁶³ In the Turkish legal system, when a judgment of a first-instance court is appealed, the case file is first sent to the Office of the Principal Public Prosecutor at the Court of Cassation. The Principal Public Prosecutor submits an opinion (tebliğname) on the case to the competent division of the Court of Cassation.

⁶⁴ Court of cassation, E. 2015/2678, K. 2015/2921, 6 October 2015.

⁶⁵ Ampoule is the symbol of the AKP.

⁶⁶ Bursa First instance criminal court, E. 2014/558, K. 2015/562, 15 September 2015 and Niğde First instance criminal court, E. 2014/499, K. 2015/477, 11 September 2015.

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Court of Cassation uphold the acquittals pronounced by the first instance courts⁶⁷. However, the expression “*Thief and Murderer*” on a banner, despite the acquittal decision given by the Niğde first instance court, was considered by the Public Prosecutor of the Court of Cassation as falling outside the scope of the freedom of expression, and the Public Prosecutor recommended that the Court of Cassation annul the acquittal rendered by the first instance court⁶⁸.

61. The explanatory note provided by the authorities gives a list of examples of expressions in the files submitted by prosecutors to the Ministry of Justice for authorisation of prosecutions (according to Article 299(3)). These expressions, according to the explanatory note, “*exceed the tolerance level, have the characteristics of disgraceful swearing at the sacred values of a person*” and cannot be considered within the scope of freedom of expression. These expressions (many of which were probably posted on the Internet) contain swear words against the President of the Republic and the members of his family. The authorities stressed that, when assessing those swear words, with sometimes sexually explicit content and with no quality of criticism, the cultural and moral specificities of the country should be taken into account.

62. In this respect, the authorities provided two recent judgments of the Court of Cassation: in a judgment of 21 October 2015, the Court of Cassation annulled the decision of the Istanbul 3rd Juvenile Court (4 November 2014) which had acquitted the accused (a 17 year old boy at the time of the events)⁶⁹. In reply to the statement of the then President of the Republic that “*Internet freedoms will not be restricted in Turkey*”, the boy posted on an Internet site: “*the statement that makes you say f... off pimp!*”. The Court of Cassation considered that this statement containing profanity directed at the President of the Republic was in breach of Article 299⁷⁰. In another judgment of 15 January 2014, the Court of Cassation upheld the judgment of the first instance court, which had sentenced the accused to 11 months and 20 days of imprisonment converted into a fine⁷¹. The convicted person, in reply to a post on Facebook that he considered to insult Atatürk, had posted a photo of the then President of the Republic accompanied by a series of swear words.

63. The authorities also emphasised that the President of the Republic should also be protected against media coverage conveying deliberately false information about the President and his family, such as allegations that there are “gold-plated toilets” in the presidential palace, in order to tarnish the reputation of the President.

64. In the view of civil society organisations, the excessive use of Article 299 stems from the fact that, in practice, no distinction is made between criticism and defamation/insult and the provision is used in order to silence dissenting voices and to intimidate political opponents in the country. Representatives of civil society reported that self-censorship is rampant, in particular in the media, and Article 299 is an active deterrent. The NGOs claimed that, just in recent months, 42 journalists had been investigated or prosecuted on the basis of Article 299.

65. In the light of the above information, **firstly**, the Venice Commission observes that the investigations, prosecutions, arrests and detentions on remand based on allegations of insult against the President of the Republic, are not only limited to expressions merely containing profanity. The investigations and prosecutions of journalists in particular, for having insulted the President in press articles related to the December 2013 corruption probe⁷², to the Syrian

⁶⁷ Opinion of the Public Prosecutor of the Court of cassation, no. 2015/380064, 29 December 2015.

⁶⁸ *Ibidem*.

⁶⁹ Istanbul 3rd Juvenile Court, E. 2014/445, K. 2014/820, 4 November 2014.

⁷⁰ Court of cassation, 16th Criminal chamber, E. 2015/906, K. 2015/3278, 21 October 2015.

⁷¹ Court of cassation, 9th Criminal chamber, E. 2013/5019, K. 2014/551, 15 January 2014.

⁷² The investigation against the editor in chief of the Daily *Cumhuriyet*. This investigation was terminated by a decision of the public prosecutor not to prosecute. <https://cpi.org/blog/2015/07/erdogan-vs-the-press-president-uses-insult-law-to-.php>
http://www.cumhuriyet.com.tr/haber/turkiye/227225/Can_Dundar_in_yazi_dizisine_takipsizlik.html

refugee crisis⁷³, and against an opposition party leader, who protested against government policies in the context of the fight against terrorist propaganda⁷⁴, are all related to debates on important matters of public interest. Examples, in particular recent ones, are abundant in press reports: on 10 December 2015, the Daily *Birgün*'s Managing editor, responsible manager and a journalist were sentenced to a prison term of 11 months and 20 days each, for a headline of the Daily on 17 February 2015, which read "*Thief Killer Erdoğan*" and "*We are one of the 35 million people you hate. We committed the same crime as well*"⁷⁵. It appears that the headline was published to criticise the prosecution of several people for insulting the President, who chanted the same slogan during a demonstration. In September 2015, the police raided the weekly magazine *Nokta* pursuant to an investigation for insulting the President and disseminating terrorist propaganda, and the last edition of the magazine was banned from being distributed. The cover of the magazine, on a photo-shopped picture, had depicted the President smiling and taking a selfie while in the background a coffin draped with a Turkish flag was carried by soldiers. The section editor of the magazine, who was detained for several hours, explained that the photo was a reference to escalating violence between the security forces and the PKK in South-Eastern Turkey⁷⁶. In March 2015, two cartoonists from *Penguen* magazine were sentenced to 11 months and 20 days imprisonment for drawing a cartoon depicting Erdoğan's access to the Presidency⁷⁷. On 25 January 2016, an investigation for insulting the President was launched against the TV Channel CNN-Türk, which used the expression "Dictator on trial" while reporting about the lawsuit opened by Erdoğan against the leader of the main opposition party for his recent remark about the President as "sham dictator"⁷⁸.

66. The Venice Commission notes with concern the large number of investigations, prosecutions or convictions reported by the press, for insulting the President. It recalls that the European Commission, in its 2015 report on Turkey, underlined that: "*there is a widened practice of court cases for alleged insult against the President being launched against journalists, writers, social media users and other members of the public, which may end in prison sentences, suspended sentences or punitive fines*".⁷⁹ According to the same report, this intimidating climate leads to increased self-censorship. In addition, according to recent press reports, on 6 January 2016, the National Police Department issued a circular in which it asked all police departments to take immediate legal action against individuals who uttered insults against senior state officials, including the President of the Republic⁸⁰.

67. The Venice Commission recalls that the use of offensive, shocking and disturbing words especially within the context of a debate on matters of public interest, are guaranteed by the freedom of expression. Expressions that may be perceived in the abstract as denigrating, such as "Thief" (in relation to corruption probe) or "Murderer" (in relation to demonstrators who lost their lives during the Gezi event), "Dictator" etc., must be evaluated in their public debate context. There is little scope under Article 10(2) ECHR for restricting political speech or debate on matters of public interest, broadly defined⁸¹. Besides, the use of vulgar phrases in itself is not decisive as it may simply serve stylistic, including sarcastic purposes, which

⁷³ The prosecution of a Daily *Hürriyet* columnist for having referred to the President as a "dictator" who though his country was his "father's property" in writing about the Syrian refugee crisis. <http://www.hurriyetdailynews.com/hurriyet-columnist-faces-up-to-five-years-in-prison-for-insulting-president-erdogan-.aspx?pageID=238&nID=91776&NewsCatID=339>

⁷⁴ Investigation against the leader of the main opposition party (CHP) who stated that "*Academics who express their opinions have been detained one by one on instructions given by a so-called (or sham) dictator*". <http://www.reuters.com/article/us-turkey-president-idUSKCN0UW1FR>

⁷⁵ http://www.cumhuriyet.com.tr/haber/turkiye/446146/BirGun_e_acilan_Erdogan_davasinda_hapis_cezasi.html

⁷⁶ <http://www.theguardian.com/world/2015/sep/15/turkish-magazine-nokta-raided-and-copies-seized-for-mock-erdogan-selfie>

⁷⁷ <http://www.hurriyet.com.tr/2-karikaturiste-11-er-ay-hapis-28545792>

⁷⁸ <http://www.hurriyetdailynews.com/how-turkish-cnn-insulted-erdogan-and-got-sued.aspx?PageID=238&NID=94373&NewsCatID=411>

⁷⁹ http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf (SWD(2015) 216 final).

⁸⁰ <http://dcr.coe.int/Wires/WiresLectureF.asp?WiresID=277192>

⁸¹ ECtHR, *Wingrove v. the United Kingdom*, 25 November 1996, Reports 1996-V, pp. 1957-58, § 58.

are protected as freedom of expression⁸². The Commission emphasises that there must be room for a robust public debate in a democratic society and that the value placed by the ECtHR case-law on political speech, including criticism of public figures, is particularly high. The United Nations Human Rights Committee has also underlined that “*the mere fact that forms of expression are considered insulting to a public figure is not sufficient to justify the imposition of penalties. Public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition*”. Indeed, “*in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high*”⁸³. The Venice Commission underlines the following passage of the *Artun and Güvener* case: “[t]he limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance”⁸⁴.

68. **Secondly**, as to the insults containing profanity uttered against the President of the Republic and the members of his family are concerned, with – according to the authorities – no critical content, a clear distinction should be made between criticism and insult. If the sole intent of any form of expression is to insult the President, amounting to wanton denigration or gratuitous personal attack, a proportionate sanction would not, in principle, constitute a violation of the right to freedom of expression⁸⁵. Nevertheless, the Venice Commission is struck by the prison sentences and the arrests and detentions on remand of individuals for having insulted the President. Although the expressions may contain swear words, the arrest of a 16 years old boy at his school for insulting the President⁸⁶ and the prison sentences pronounced by courts (see paras. 62 and 65) are very likely to create a chilling effect on society as a whole and cannot be considered proportionate to the legitimate aim pursued, i.e. protecting the honour and dignity of the President.

69. In the *Eon v. France* case, the ECtHR found that a fine of 30 euros inflicted on the applicant in criminal proceedings was likely to have a chilling effect on satirical forms of expression relating to topical issues. This conclusion is *a fortiori* valid for harsh prison sentences. In this respect, the minimum sanction of one-year imprisonment in Article 299 appears completely disproportionate and even more so since even insults made in private conversations are in principle –if reported or otherwise discovered– subject to a minimum sanction of one-year imprisonment (Article 299(2)). As the United Nations Human Rights Committee has stated with respect to Article 19(3) ICCPR, “*restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected*.”⁸⁷ Moreover, “[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”⁸⁸

70. In case of unjustified attacks on the President, civil proceedings or only in the most serious cases, criminal proceedings based on the general provisions of the Penal Code

⁸² ECtHR, *Tuşalp v. Turkey*, Application nos. 32131/08 and 41617/08, 21 February 2012, para. 48. In its General Comment no. 34 on Article 19 ICCPR, the UN Human Rights Committee also considered that “*the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties*”.

⁸³ Human Rights Committee, General Comment No. 34 (2011), para. 38.

⁸⁴ ECtHR, *Artun and Güvener v. Turkey*, para. 26.

⁸⁵ See, *mutatis mutandis*, ECtHR, *Skalka v. Poland*, no. 43425/98, 27 May 2003, para. 34, *Pakdemirli v. Turkey*, para. 46.

⁸⁶ <http://www.bbc.com/news/world-europe-30602250>

⁸⁷ Human Rights Committee, General Comment No. 34 (2011), para. 34.

⁸⁸ *Ibidem*, para. 35.

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concerning insult (art. 125 of the Penal Code) should be preferred to criminal proceedings based on Article 299. The proportionality of the awarded damages in such civil proceedings⁸⁹ or of criminal sanctions on the basis of the general provision on insult remains in such cases of utmost importance in view of the conformity of the restrictions to Article 10(2) ECHR.

71. **Thirdly**, as to media conveying, according to the authorities, deliberately false information about the President and his family, it should be emphasised that Article 10 ECHR protects journalists' right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism⁹⁰. However, the distinction made by the ECtHR in its case-law related to defamation cases, between "value judgments" and "statement of facts"⁹¹ should be taken into account. If an expression is a "value judgment" rather than a "statement of fact", the requirement in defamation proceedings that the defendant prove the truth of a value judgment will violate his/her freedom of expression⁹². Value judgments cannot be considered as an "attribution of an act or fact to a person"⁹³, but should rather be analysed as a matter of opinion, a subjective assessment of a person, behaviour or policy, etc. The determination whether an expression is a value judgment or a statement of fact is not always easy. In the case of *Feldek v. Slovakia*, the ECtHR considered referring to a politician's "fascist past" to be a "value judgment". Similarly, the Venice Commission observes that civil lawsuit pursued by the President of the Republic against an opposition leader for having falsely alleged that there were "gold-plated toilets" in the Presidential palace was dismissed by a first instance civil court, which held that the allegation should be considered political criticism of the public expenses for the construction of the Palace⁹⁴.

72. A statement of facts, on the other hand, is susceptible of proof and it is reasonable to require the defendants in defamation proceedings to prove the truth of the factual statements made in order to protect the rights and reputation of others⁹⁵. However, first, the defendant should be given the opportunity to prove the truth of his/her factual statements in defamation proceedings⁹⁶. As the UN Human Rights Committee stated in its General Comment No. 34 "All [defamation] laws, in particular penal defamation laws, should include such defences as the defence of truth"⁹⁷. Secondly, in discharging the burden of proof, a defendant to a libel action should not be expected to act like a public prosecutor in proving the truth of a statement⁹⁸. In *Flux v. Moldova (no.6)*⁹⁹, the ECtHR stressed that it would be incompatible with Article 10 ECHR to require a newspaper to limit allegations of serious misconduct levelled against officials to matters that have first been proved as such in criminal proceedings¹⁰⁰.

73. Article 127 of the Criminal Code, entitled "Proof of accusation" provides that "*Where an accusation, the subject matter of which constitutes a criminal offence, is proven, the person shall receive no penalty.*" (first sentence). Where there is a final verdict against the insulted person concerning the accusation, the accusation shall be assumed as proven (second sentence). "*Otherwise, where there is an application to prove the accusation is true the acceptance of such will depend upon whether there is a public interest to determine whether*

⁸⁹ See, ECtHR *Pakdemirli v. Turkey*.

⁹⁰ See, for example, ECtHR, *'Vesti' and Ukhov v. Russia*, Application No. 21724/03, 30 May 2013, para. 60.

⁹¹ ECtHR, *Lingens v. Austria*, Application No. 9815/82, 8 July 1986, para. 46.

⁹² Jacobs, White and Ovey, *The European Convention on Human Rights*, 2010, p. 435.

⁹³ See, Art. 125 of the Turkish Penal Code (General provision on Insult).

⁹⁴ <http://www.internethaber.com/mahkemededen-erdogana-altin-klozet-reddi-1555538h.htm>

⁹⁵ Jacobs, White and Ovey, *op. cit.*, p. 435.

⁹⁶ See, among others, *Colombani and others v. France*, no. 51279/99, 25 June 2002, para. 66.

⁹⁷ Human Rights Committee, General Comment No. 34 (2011), para. 47.

⁹⁸ ECtHR, *Kasabova v. Bulgaria*, Application no. 22385/03, para. 46.

⁹⁹ no. 22824/04, 29 July 2005, para. 31.

¹⁰⁰ See, Lawrence Early, *Article 10: Issues of Fairness, Proof and Evidence*, in *Freedom of Expression, Essays in honour of Nicolas Bratza*, 2012, p. 561 and s.

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the accusation is true or whether the complainant consents to the process of proving the accusation" (third sentence).

74. It is not clear whether Article 127 (regulated under Chapter II - Offences against Person) of the Penal Code is also applicable in the context of Article 299 (regulated under Chapter IV – Offences against Nation and State). However, in light of Article 39 of the Constitution (Right to prove an allegation)¹⁰¹, the Commission assumes that the right to prove in Article 127 is also applicable to Article 299. In addition, the condition in Article 127 (third sentence), that there should be a public interest to determine whether the accusation is true or the complainant should consent that the defendant proves the truthfulness of his/her allegations, is not applicable in the context of defamation cases against public officials in connection with their service (Article 39 of the Constitution), including thus defamation cases against the President of the Republic. If this interpretation is correct, this constitutional provision is in line with the above-mentioned case-law of the ECtHR.

75. **In conclusion**, the Commission reiterates that according to the emerging European consensus and international standards, States should either decriminalise defamation of the Head of State or at least limit this offence to the most serious forms of verbal attacks against them while at the same time restricting the range of sanctions to those not involving imprisonment. The Commission notes that, by contrast, the practice in Turkey indicates an increased use of this provision, including in cases of statements that are protected under Article 10 ECHR. The sanctions imposed, including imprisonment, also are clearly excessive. While some attempts have been made by the Court of Cassation and the Public Prosecutor to limit the excessive use of this provision, these attempts are insufficient. Under these conditions, the Commission considers that the only solution to prevent further violations of Article 10 ECHR is the complete abrogation of this Article. This will still leave the possibility to protect the Head of State from extreme forms of defamation by using the civil and criminal law procedures that are meant to protect any citizen. The principle of proportionality and the need to restrict the range of sanctions to those not involving imprisonment also apply in this latter case.

D. Article 301 (Degrading Turkish Nation, State of Turkish Republic, the Organs and Institutions of the State)

76. Article 301 of the Penal Code criminalises acts of insulting the Turkish nation, the State of the Turkish Republic or the Organs and Institutions of the State. Article 301 replaced Article 159 of the former Penal Code. Article 159 and the original version of Article 301, until the amendments introduced to the Penal Code in April 2008, referred to "Turkishness" (*Türklük*). With the amendments of April 2008, the term "Turkishness" was replaced by "Turkish Nation".

77. Further, with the 2008 amendments the maximum prison sentence of three years in the first paragraph of Article 301 was reduced to two years. Paragraph 3 of the former version of this provision, which provided that "*In cases where denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third*" was deleted. Paragraph 4 of the former version of Article 301, which stated that "*the expression of an opinion for the purpose of criticism does not constitute an offence*" has been maintained in the third paragraph of the new version of Article 301.

78. According to the data submitted by the Turkish Government to the ECtHR in 2008,¹⁰² between 2003 and 2007 the number of criminal proceedings instituted under Article 301 (or Article 159(1)) was 1,894. Of those, 744 cases resulted in convictions and 1,142 in

¹⁰¹ Which states "*In libel and defamation suits involving allegations against persons in the public service in connection with their functions or services, the defendant has the right to prove the allegations. A plea for presenting proof shall not be granted in any other case, unless finding out whether the allegation is true or not would serve the public interest, or unless the plaintiff consents.*"

¹⁰² See ECtHR, *Altuğ Taner Akçam v. Turkey*, paras. 27-29.

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acquittals; 193 cases were still pending following the Court of Cassation's decisions to quash the first-instance courts' judgments. The Government also reported that, following the amendments made in 2008, there had been a significant decrease in prosecutions under Article 301.

79. In the supplementary observations submitted in 30 October 2009 to the ECtHR, the Government noted that between 8 May 2008 and 30 September 2009 the Ministry of Justice had received 955 requests for the authorisation to institute criminal proceedings under Article 301. The Ministry had refused 878 of these requests, but granted 77. The Government further noted that in 244 cases, where the Ministry of Justice refused authorisation to institute criminal proceedings, the criminal complaints mainly concerned publications in the press. There is no similar set of data available for the post-2009 period. Reportedly, there has been a certain decline in the use of Article 301 (replaced by Articles 216(3) and 299), but the provision is still occasionally applied.

80. In 2005, Orhan Pamuk, the famous novelist and the first Turkish Nobel laureate (2006) was charged on grounds of Article 301 after he gave an interview to the Swiss newspaper *Tages Anzeiger* during which he stated: "*Thirty thousand Kurds and a million Armenians were killed in these lands, and nobody but me dares to talk about it.*" The case provoked an outcry from international NGOs, including Amnesty International and PEN American Center. In January 2006, the charges were dropped on the ground that the requisite permission to press charges against the accused had not been obtained from the Ministry of Justice¹⁰³.

81. Another well-known prosecution was that of the Armenian-Turkish journalist Firat (Hrant) Dink. In a series of Articles published in 2003 and 2004, Dink expressed his views, among other things, on the identity of Turkish citizens of Armenian origin. Dink was charged in 2006 for breach of Article 301 of the Penal Code and received a six-month suspended sentence of imprisonment. In June 2007, he was murdered by a young nationalist.

82. Article 301 has been repeatedly criticised internationally and domestically. During the 2010 Universal Periodic Review of Turkey, five States (Armenia, Cyprus, France, Spain, and the United States of America) explicitly recommended that Turkey remove or revise Article 301.¹⁰⁴ The OSCE Representative on Freedom of Media noted that Article 301 (in its original wording) was open to various interpretations and could be used to chill public debate.¹⁰⁵ Amnesty International in its recent report, wrote that even after the 2008 amendment, "*Article 301 continues to constitute a direct and impermissible limitation to the right to freedom of expression despite some cosmetic reform. (...) The only conclusion compatible with Turkey's international obligations is (...) its repeal.*"¹⁰⁶ Freedom House, in its 2015 Report on Freedom of Press in Turkey, added that "*very few of those prosecuted under Article 301 receive convictions, but the trials are time-consuming and expensive, and the law exerts a chilling effect on speech.*"¹⁰⁷

83. In *Dink v. Turkey*, the ECtHR also dealt with the question of the positive obligations of the Contracting Parties to create a favourable environment for participation in public debate by all persons concerned, enabling them to express their opinions without fear. In light of the authorities' failure to protect Dink against attack by members of an extreme nationalist group and the guilty verdict handed down in the absence of a "pressing social need", the Court concluded that Turkey's "positive obligations" with regard to Dink's freedom of expression had not been complied with.¹⁰⁸

¹⁰³ See, ECtHR, *Altuğ Taner Akçam v. Turkey*, para. 26.

¹⁰⁴ UN Doc. A/HRC/15/13, pp. 20-22.

¹⁰⁵ OSCE, *Review of the Draft Turkish Penal Code: Freedom of Media Concerns*, Vienna, May 2005, p. 10.

¹⁰⁶ Amnesty International, *Article 301: End it, don't Amend it*, 3 April 2013.

¹⁰⁷ Freedom House, *Turkey: 5-Year Decline in Press Freedom*, December 2015.

¹⁰⁸ ECtHR, *Dink v. Turkey*, para. 137.

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84. With respect to the foreseeability of Article 301, and thus compliance with the principle of legality¹⁰⁹ the Court of Cassation in its judgment of 11 July 2006 (in the *Dink* case) defined the concept of Turkishness. According to the Court of Cassation, this term includes « *the entirety of national and moral values which is composed of human, religious and historical values as well as of national language, national feelings and traditions* »¹¹⁰. In the *Dink* Case, the ECtHR suggested that serious doubts could arise as to the foreseeability of the offence due to its reference to the concept of “Turkishness”, but declined to examine the question further.¹¹¹

85. In the *Taner Akçam* Case, the ECtHR conducted such an examination. It started by noting that “*despite the replacement of the term “Turkishness” by “the Turkish Nation”, there seems to be no change or major difference in the interpretation of these concepts. (...) [T]he legislator’s amendment of the wording in the provision in order to clarify the meaning of the term “Turkishness” does not introduce a substantial change or contribute to the widening of the protection of the right to freedom of expression*”.¹¹² It then concluded that “*the scope of the terms under Article 301 of the Criminal Code, as interpreted by the judiciary, is too wide and vague and thus the provision constitutes a continuing threat to the exercise of the right to freedom of expression. In other words, the wording of the provision does not enable individuals to regulate their conduct or to foresee the consequences of their acts*”.¹¹³

86. In line with the ECtHR’s findings, the Venice Commission considers that the first paragraph of Article 301, in the absence of a well-developed case-law, is not specific enough to meet the requirements of predictability. Apart from the specification that the degrading must have a public character, the term “degrades” lacks any specification. The definition given in the explanatory note provided by the authorities that “*denigration consists of acts and actions aiming at decreasing the respect towards values mentioned in the article*” does not solve the problem of foreseeability either, since this definition simply replaces the expression “degrading” with “decreasing the respect” without adding any clarification on how this provision should be applied in practice. The problem is partly, but not wholly, solved by the fact that paragraph (3) determines that the expression of an opinion for the purpose of criticism does not constitute an offence. The dividing line between “degrading” and “criticism” is not clear and seems to be left totally at the discretion of the courts. As long as there is no well-developed case-law clearly defining the meaning of “degrading”, possible prosecutions and punishments are not predictable. This is particularly serious in view of the harsh sanction provided in the provision: six months to two years. In addition, like the ECtHR, the Commission considers that it is not clear in what way the “Turkish Nation” may be “degraded”, despite the explanation given by the Court of Cassation in its judgment of 11 July 2006 about the content of the term Turkishness (para. 84) and what the difference is between the “Turkish Nation” and the “State of the Turkish Republic”.

87. Consequently, unless sufficient specification of the terms “Turkish Nation” etc. and “degrades” has been made through the case-law of the higher courts, the conclusions of the ECtHR still apply and Article 301, due to its vague wording, remains incompatible with Article 10 ECHR. This may lead individuals, and especially the media, to applying self-censorship, which may have a very serious impact on the free flow and exchange of information and opinions.

88. Secondly, what was observed in relation to paragraph 1 concerning the ambiguity of the term “degrades”, equally applies to paragraph 2, which uses the same term. Moreover, it is not clear without further explanation, why the military and security organisations require a

¹⁰⁹ Art. 7 ECHR, Art. 15(1) ICCPR.

¹¹⁰ Cited in ECtHR *Dink v. Turkey*, para. 28.

¹¹¹ *Dink v. Turkey*, para. 116.

¹¹² *Taner Akçam v. Turkey*, para. 92.

¹¹³ *Ibidem*, par. 93. See also Human Rights Committee, General Comment No. 34, para. 25 (“a norm, to be characterized as la ‘law’, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution”).

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separate provision, since the protection provided in paragraph 1 may also be extended to those bodies.

89. Thirdly, in the *Dink* Case, the ECtHR expressed doubts as to whether the protection of State organs against discredit could be considered as pursuing the legitimate aim of protecting the public order, in the absence of incitement to violence by the perpetrator.¹¹⁴ The Court recalled that Article 10(2) ECHR did not allow States to restrict the exercise of the right to freedom of expression in the area of political speech and questions of general interests. It also recalled that the tools of criminal law should be used with restraint by the State in this area and that in the absence of incitement to violence, the imposition of an imprisonment sentence might fail to meet the requirement of the necessity in a democratic society (as was the case for Hrant Dink¹¹⁵). These conclusions remain valid.

90. Finally, concerning paragraph 4 of Article 301, which subjects the conduct of an investigation under Article 301 to the authorisation of the Minister of Justice, the explanatory note provided by the authorities emphasises that this should be considered a positive development, “*as the Minister of Justice shall use his discretion for the benefit of the country and shall not delegate this authority*”. In addition, according to the explanatory note, this amendment decreased the workload of the judiciary and a significant decrease has been witnessed in the number of cases initiated on charges of committing this crime.

91. Şişli (İstanbul) second criminal court of first instance sought review in the Constitutional Court regarding paragraph 4 of Article 301, claiming that this provision was contrary to the principle of the independence of the judiciary and separation of powers in that it gives to the Ministry of justice as the executive power, the possibility of interfering with the functioning of the judiciary. The first instance court also claimed that the requirement of authorisation by the Ministry of Justice in order to open a prosecution under Article 301 was creating an inconsistency in the criminal code, since other provisions relating to defamation against public officers do not require such an authorisation. In a ruling of 7 May 2009¹¹⁶, the Constitutional Court dismissed the appeal concluding that “*the power given to the Minister of Justice in paragraph 4 of this Article does not concern a judicial review by the Minister, but, rather a political discretionary power that should be used in the interests of the State and society.*”

92. The ECtHR concluded in the *Taner Akçam* case that “*safeguards put in place by the legislator to prevent the abusive application of Article 301 by the judiciary do not provide a reliable and continuous guarantee or remove the risk of being directly affected by the provision because any political change in time might affect the interpretative attitudes of the Ministry of Justice and open the way for arbitrary prosecutions*”¹¹⁷. Similarly, the Commissioner for Human Rights in his report of 12 July 2011 also stated that “*the amendment adopted in 2008, which subjects prosecution to a prior authorisation by the Ministry of Justice in each individual case, is not a lasting solution which can replace the integration of the relevant ECHR standards into the Turkish legal system and practice, in order to prevent similar violations of the Convention.*”

93. During the meetings in Ankara, the authorities underscored that, when examining the requests for authorising a prosecution introduced by prosecutors, the Ministry of Justice relies on the case-law of the ECtHR in cases concerning Article 10 ECHR. This is positive. However, by virtue of Article 90(5) of the Constitution¹¹⁸, the ECHR is already an integral part

¹¹⁴ *Dink v. Turkey*, para. 118. See also General Comment No. 34, para. 38 (“States parties should not prohibit criticism of institutions, such as the army or the administration”).

¹¹⁵ *Ibidem*, para. 133.

¹¹⁶ E. 2009/25, K. 2009/57.

¹¹⁷ *Taner Akçam v. Turkey*, para. 94.

¹¹⁸ “International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”

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of the Turkish legal system and all courts and prosecutors have the legal obligation to apply the Convention and the ECtHR case-law directly in the domestic law. The Venice Commission also considers that the authorisation system is not a lasting solution and the discretion left to the Minister of Justice may be subject to political consideration and that this procedure also may not be sufficient to prevent arbitrary prosecution.

94. In conclusion, first, it is recommended that this provision be redrafted and further amended in order to make all the concepts used in it sufficiently clear and specific to satisfy the principle of foreseeability and legality. Secondly, the Article should be interpreted by the domestic courts in line with the above-mentioned case-law of the ECtHR (*Dink v. Turkey*). As the ECtHR, the Commission has doubts as to whether the protection of State organs against discredit could be considered as pursuing the legitimate aim of protecting the public order, in the absence of incitement to violence by the perpetrator¹¹⁹. The Article should not be applied to penalise harsh criticism of government policies, which would chill public debate, but only in case the statements can be considered as an “incitement to violence or hatred”. The Commission also recalls that the tools of criminal law should be used with restraint by the State in the area of political speech and questions of general interest, and that in the absence of incitement to violence, the imposition of an imprisonment sentence fails to meet the requirement of necessity in a democratic society.

E. Article 314 (armed organisation)

95. Article 314 of the Penal Code criminalises the establishment and command of, as well as the membership in an armed organisation that engages in offences listed in parts four and five of Chapter IV of the Penal Code (Offences against State and Nation).

96. Parts four and five of Chapter IV to which Article 314 (1) refers, contain a list of offences against State security (Part 4 – Disrupting the unity and integrity of the State, alliance with the enemy, incitement to war against the State, benefiting from performing activities against the fundamental national interests, recruitment of soldiers against a foreign State, destruction of military facilities and conspiracy which benefits enemy military movements, material and financial aid to enemy States) and against the constitutional order and its functioning (Part 5 - Violation of the constitution, assassination of and physical attack on the President, offence against a legislative body, offence against the government, armed revolt against the government of the Turkish Republic, supplying arms, agreement to commit an offence -against Nation and State).

97. Paragraph 3 of Article 314 provides that “*Other provisions relating to the forming of an organisation in order to commit offences shall also be applicable to this offence*”. On the basis of this reference to “other provisions” related to forming a criminal organisation, Article 314 has been applied, often in conjunction with Article 220 on “Forming organised groups with the intention of committing crime”. In particular, paragraphs 6 and 7 of Article 220, which provide that any person who commits an offence “on behalf of” an organisation (para. 6) or “aids and abets an organisation knowingly and willingly” (para. 7), shall also be sentenced for the offence of being a member of that organisation *although he is not a member of that organisation*, are frequently applied in conjunction with Article 314.

1. Membership of an armed organisation (art. 314)

98. The Penal Code does not contain a definition of an armed organisation or an armed group. In its judgment E. 2006/10-253 K. 2007/80 of 3 April 2007, the General Criminal Board of the Court of Cassation listed the main criteria that a criminal organisation – for the purposes of Article 220 of the Penal Code – should display. The group has to have at least three members; there should be a tight or loose hierarchical connection between the members of the group and an “abstract link” between the members is not sufficient; the

¹¹⁹ ECtHR, *Dink v. Turkey*, para. 118.

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members should have a common intention to commit crimes (even though no crime has yet been committed); the group has to present continuity in time; and the structure of the group, the number of its members, tools and equipment at the disposal of the group should be sufficient/appropriate for the commission of the envisaged crimes.

99. During the meetings in Ankara, the authorities explained that in order for an organisation to be considered as “armed” under Article 314, the arms at the disposal of the organisation should also be sufficient and appropriate to the commission of crimes concerning offences against Nation and State (Chapter IV – parts 4 and 5 of the Criminal Code).

100. There is a rich case-law of the Court of Cassation in which the high court developed the criterion of “membership” in an armed organisation. The Court of Cassation examined different acts of the suspect concerned, taking account of their “continuity, diversity and intensity”¹²⁰ in order to see whether those acts prove that the suspect has any “organic relationship”¹²¹ with the organisation or whether his or her acts may be considered as committed knowingly and wilfully within the “hierarchical structure”¹²² of the organisation. In case E. 2010/2839, K. 2012/1406 of 6 February 2012, the suspects who were constantly providing shelter to new candidates willing to become members of a terrorist organisation, providing them with falsified identity cards and introducing them to the organisation and looking for other new members for the organisation, were convicted for being members of an armed organisation¹²³. Acquiring a code name (within the organisation) in order to hide his/her real identity and hiding in his/her apartment a bomb delivered by the members of a terrorist organisation¹²⁴; giving courses on the aims and structure of the organisation to the new members¹²⁵, contacting again the organisation after having been released from prison and trying to collect money for the organisation and to find new members¹²⁶, delivering his/her “CV report” to the organisation in order to become its member¹²⁷ or driving new comers willing to become members of the organisation, to the camping place of the organisation¹²⁸, collecting money for the organisation under the guise of collecting tax for the organisation¹²⁹ or organising the medical treatment of the new members before they were sent to the camping place of the organisation¹³⁰, etc. were all considered by the Court of cassation as proving the membership of the defendant to an armed organisation under Article 314 of the Penal Code, as the continuity, diversity and intensity of the acts attributed to the defendants showed that they were acting knowingly and willingly within the hierarchical structure of the armed organisation.

101. If this “organic relationship” with the organisation cannot be proven on the basis of acts attributed to the defendant, which do not present any “continuity, diversity or intensity”, the paragraphs on “aiding and abetting an armed organisation” or “committing crime on behalf of an armed organisation” under Article 220 may be applied (see below)¹³¹. A person who has sympathy for the organisation, but who was arrested while he was trying to cross the border in order to join the organisation¹³² or a person who was trying to contact members of the organisation in order to become its member¹³³ was not considered members of an armed organisation, since the organic relationship was not yet established at the moment of the arrest. Further, acts such as “participating in a public demonstration following a general call from pro-PKK media outlets, making victory sign and shouting slogans to support and in

¹²⁰ 9th Criminal Chamber of the Court of cassation, E. 2012/4191, K. 2013/3971, 14 March 2013.

¹²¹ 9th Criminal Chamber of the Court of cassation, E. 2013/9229, K. 2013/13608, 13 November 2013.

¹²² 9th Criminal Chamber of the Court of cassation, E. 2013/3018, K. 2013/6315, 24 April 2013.

¹²³ 9th Criminal Chamber of the Court of cassation, E. 2010/2839, K. 2012/1406, 6 February 2012.

¹²⁴ 9th Criminal Chamber of the Court of cassation, E. 2007/11916, K. 2009/1340, 4 February 2009.

¹²⁵ 9th Criminal Chamber of the Court of cassation, E. 2007/5744, K. 2007/5430, 20 June 2007.

¹²⁶ 9th Criminal Chamber of the Court of cassation, E. 2008/2010, K. 2009/11270, 11 November 2009.

¹²⁷ 9th Criminal Chamber of the Court of cassation, E. 2010/16588, K. 2011/1626, 09 March 2011.

¹²⁸ 16th Criminal Chamber of the Court of cassation, E. 2015/4767, K. 2015/1862, 16 June 2015.

¹²⁹ 9th Criminal Chamber of the Court of cassation, E. 2009/851, K. 2011/1311, 28 February 2011.

¹³⁰ 9th Criminal Chamber of the Court of cassation, E. 2009/12804, K. 2011/2467, 25 April 2011.

¹³¹ See, the following title “*Application of Article 314 in conjunction with Article 220*”.

¹³² 9th Criminal Chamber of the Court of cassation, E. 2008/9178, K. 2010/3894, 6 April 2010.

¹³³ 9th Criminal Chamber of the Court of cassation, E. 2009/11886, K. 2011/2637, 2 February 2011.

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favour of the leader of a terrorist organisation, clashing with the security forces and forming barricades” are considered crimes committed on behalf of an organisation and not as membership¹³⁴.

102. According to non-governmental sources, in the application of Article 314, the domestic courts, in many cases, decide on the membership of a person in an armed organisation on the basis of very weak evidence, which would raise questions as to the “foreseeability” of the application of Article 314. Similarly, Freedom House in its 2015 Report on Freedom of Press in Turkey noted that “*Article 314 of the Penal Code, with its broad definition of (...)membership in an armed organization, continued to be invoked against journalists, especially Kurds and those associated with the political left*”.¹³⁵ Also, Amnesty International, in its 2013 Report on Turkey¹³⁶, considered that conduct, which is not in itself criminal, as for instance an activity related to the exercise of the rights to freedom of assembly, association and expression, is considered as evidence of membership of the defendants in an armed organisation. The reason for this approach, according to the Report, is that the prosecution services perceive those activities as having the same overall objective as a terrorist group and as a result, “*individuals have been prosecuted for membership of terrorist organisation on charges relating solely to their engagement in peaceful and, in themselves, lawful pro-Kurdish activities*”¹³⁷. The examples of concrete cases provided by Amnesty International in which the evidence was considered to link the defendants to a terrorist organisation included, attendance at six different demonstrations allegedly organised by a terrorist organisation and a speech made at one of those demonstrations, or, in another case, the participation of the defendant in the “Political Academy” organised by the Peace and Democracy Party (BDP – a recognised Pro-Kurdish political party) and his diverse activities in the framework of this Academy.

103. The Venice Commission notes in the first place that, in a number of admissibility decisions concerning applicants who were convicted under Article 168 of the former Penal Code for membership of an armed organisation, the ECtHR observed that the applicants had not been convicted for having expressed their opinions or for having participated in a meeting, but for membership of an armed organisation and concluded that there was no interference with the right of the applicants to freedom of expression¹³⁸. It appears that in these cases, the evidence at the disposal of the domestic courts did not consist only of forms of expression: In the *Kızıllöz* case, for instance, the domestic courts concluded that the applicant was a member of an armed organisation on the basis of the facts that he was collecting money, providing accommodation and business premises to members of the organisation and producing false identity cards, driving licences and stamps for authentication of official documents.

104. However, in the case of *Yılmaz and Kılıç v. Turkey* (68514/01), the Court considered (although in the context of Article 169 of the former Penal Code – concerning aiding and abetting a terrorist organisation) that where the only evidence which lead to the criminal conviction of the applicants under Article 169 was forms of expression (statements by the applicants, content of the slogans they shouted during a public demonstration etc.), it should be concluded that there was an interference with the applicants’ right to freedom of expression (para. 58 of the judgment). Subsequently, the Court examined whether this interference was justified as being necessary in a democratic society. The Court applied the same principle in the case of *Gül and others v. Turkey* (4870/02) and held that the criminal conviction of the applicants on the basis of Article 169 of the former Penal Code constituted

¹³⁴ General Criminal Board of the Court of cassation, E. 2007/9-282, K. 2008/44, 4 march 2008.

¹³⁵ Freedom House, *Turkey: 5-Year Decline in Press Freedom*, December 2015.

¹³⁶ Amnesty International, *Turkey: Decriminalize Dissent. Time to Deliver on the Right to Freedom of Expression*, EUR 44/001/2013, 2013, p. 19 *et seq.*

¹³⁷ *Ibid.* p. 20.

¹³⁸ *Sirin v. Turkey* (admissibility decision), Application No. 47328/99; *Kılıç v. Turkey* (admissibility decision), Application No. 40498/98; *Siz v. Turkey* (admissibility decision), Application No. 895/02; *Turan v. Turkey* (admissibility decision), Application No. 879/02; *Arslan v. Turkey* (admissibility decision), Application No. 31320/02; *Kızıllöz v. Turkey* (admissibility decision), Application No. 32962/96.

an interference with their right to freedom of expression, since the only evidence used against them was the content of the slogans they shouted during a public demonstration.

105. Secondly, the Commission reiterates that conviction on the basis of weak evidence in the application of Article 314 may create problems in the field of Article 7 ECHR¹³⁹ since this provision embodies, *inter alia*, the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy¹⁴⁰. In the cases where the only evidence which lead the domestic courts to convict the defendant for being a member of an armed organisation, are forms of expression, as for instance in the above-mentioned *Yılmaz and Kılıç* case, reliance on weak evidence may also give rise to problems concerning the "foreseeability" of the interference into the right to freedom of expression of the defendant. In the *Güler and Uğur v. Turkey* case, the applicants were convicted for having spread propaganda of a terrorist organisation on the basis of their participation in a religious ceremony in memory of two members of the PKK who had been killed by security forces. The ECtHR concluded that it had not been possible for the applicants to foresee that merely taking part in a religious service could fall within the scope of application of the provision concerning propaganda for a terrorist organisation. The interference in the applicants' freedom of religion could not therefore be regarded as "prescribed by law", because it had not met the requirements of clarity and foreseeability. For the Venice Commission, while this conclusion of the ECtHR is case-specific, it has larger implications also in the field of Article 314 of the Penal Code. Any allegation of membership to an armed organisation must be established with convincing evidence and beyond any reasonable doubt.

106. In conclusion, the Venice Commission recommends, first, that the established criteria in the case law of the Court of Cassation that acts attributed to a defendant should show "in their continuity, diversity and intensity", his/her "organic relationship" to an organisation or they should prove that he/she acted knowingly and willingly within the "hierarchical structure" of the organisation, should be applied strictly. The loose application of these criteria may give rise to issues concerning in particular the principle of legality within the meaning of Article 7 ECHR.

107. Second, the expression of an opinion in its different forms should not be the only evidence before the domestic courts to decide on the membership of the defendant in an armed organisation. Where the only evidence consists of forms of expression, the conviction for being a member of an armed organisation, would constitute an interference with the right of the defendants to freedom of expression, and that the necessity of this interference on the basis of the criteria as set forth in the case-law of the ECtHR, in particular the criteria of "incitement to violence", should be examined in the concrete circumstances of each case.

2. Application of Article 314 in conjunction with Article 220

108. Paragraph (3) of Article 314 provides that "*All other provisions related to the crime of establishing an organization to commit a crime will be applied in conjunction with this provision.*" Article 220 of the Criminal Code is of particular importance, since in many recent judgments of the Court of Cassation, Article 314 was applied in conjunction with paragraphs (6) and (7) of Article 220, on the basis of the reference made in Article 314(3) to "other provisions" related to forming a criminal organisation. According to paragraphs (6) and (7) of Article 220, any person who commits an offence on behalf of an organisation (para. 6) or aids and abets an organisation knowingly and willingly (para. 7), shall also be sentenced for

¹³⁹ According to Article 7(1) ECHR "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

¹⁴⁰ See, ECtHR *Başkaya and Okçuoğlu v. Turkey* (Application Nos. 23536/94 and 24408/94), 8 July 1999, para. 36. See also, Article 14(2) ICCPR ("Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law").

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the offence of being a member of that organisation (art. 314), *although he/she is not a member of that organisation.*

109. In a judgment of 4 March 2008¹⁴¹ the General Criminal Board of the Court of Cassation held that acts such as participating in a public demonstration following a general call from pro-PKK media outlets, making a victory sign and shouting slogans to support and in favour of the leader of a terrorist organisation, and clashing with the security forces, are considered crimes committed on behalf of the terrorist organisation. In this case, although the membership in an armed organisation was not established, the defendant was convicted as a member of a criminal organisation, according to paragraph 6 of Article 220 applied in conjunction with Article 314. By this judgment, the Court of Cassation annulled the decision of the Diyarbakır Assize Court, which had considered that, in order for a court to conclude that a crime was committed on behalf of an organisation, “*the latter must have called for action not to an undefined collective, but rather to an individual person who is capable of directly committing that act*”¹⁴².

110. In a judgment of 24 March 2011¹⁴³, the 9th Chamber of the Court of Cassation also held that participation in an illegal public demonstration following a general call of the armed organisation on its Internet site, covering one’s face during a demonstration in order to hide his/her identity, and shouting slogans in support of the armed organisation were considered as committing crimes on behalf of an armed organisation and the defendant, although his membership was not proven, was convicted also as a member of an armed organisation (Article 220(6) in conjunction with Article 314).

111. Article 220(7), concerning aiding and abetting an organisation knowingly and willingly, was also applied to cases involving freedom of expression. In the *Nedim Şener* case¹⁴⁴, the applicant was prosecuted under Article 314(3) in conjunction with Article 220(7) (aiding and abetting an armed organisation) for having contributed, at the request of the suspected members of a criminal organisation, to the preparation of books criticising the actions of the government. In a judgment of 4 June 2012 of the Court of Cassation¹⁴⁵, the fact that the defendants, in the framework of a campaign instigated by the terrorist organisation on its internet sites, have prepared a declaration which states “*If it is a crime to refer to Öcalan as Mr. Öcalan, I hereby commit this crime [by referring to Öcalan as Mr. Öcalan] and I denounce myself [to the authorities]”* and have collected signatures for this declaration, was considered as “knowingly and willingly aiding the criminal organisation”.

112. Consequently, although the “organic relationship” of the defendant with an armed organisation cannot be proven on the basis of the established criterion developed by the Court of Cassation in its case-law related to Article 314 (paras. 100 and 101), the defendants who are considered to have committed crimes on behalf of an armed organisation (para. 6 of Article 220) or have aided and abetted an armed organisation knowingly and willingly (para. 7 of Article 220) are also sentenced for the offence of being a member of that organisation under Article 314.

113. In his report published on 10 January 2012¹⁴⁶, the Commissioner for Human Rights of the Council of Europe stated that the main concern relating to Article 220 is that it allows “*a very wide margin of appreciation, in particular in cases where membership in a terrorist organisation has not been proven and when an act or statement may be deemed to coincide with the aims or instructions of a terrorist organisation.*” According to the Report of Human Rights Watch of 1 November 2010, “*this legal framework makes no distinction between an*

¹⁴¹ General Criminal Board of the Court of Cassation, E. 2007/9-282 K. 2008/44.

¹⁴² Diyarbakır Assize Court, 31 May 2007, cited in the ECtHR judgment, *Gülcü v. Turkey*, Application No. 17526/10, 19 January 2016, para. 58.

¹⁴³ E. 2011/1012- K. 2011/1879.

¹⁴⁴ ECHR *Nedim Şener v. Turkey*.

¹⁴⁵ E. 2010/15798 – K. 2012/7455. It appears that this case is currently pending before the General Criminal Board of the Court of Cassation.

¹⁴⁶ CommDH(2012)2, following the visit to Turkey on 10 to 14 October 2011.

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armed PKK combatant and a civilian demonstrator". Amnesty International considered, in a report of 27 March 2013, that "Article 220(6) is neither necessary for the prosecution of individuals for genuinely terrorist-related offences, nor, in practice, applied in such a way as to uphold the right to freedom of expression"¹⁴⁷.

114. In reaction to this criticism, a new paragraph has been added to Article 7 of the Anti-Terror Law no. 3713 by an amendment of 11 April 2013. According to this new paragraph, those who committed the crime indicated in the second paragraph of Article 7 (propaganda in support of a terrorist organisation); the crime indicated in the second paragraph of Article 6 (printing and disseminating declarations made by terrorist organisations which legitimise or praise the violent or threatening methods of terrorist organisations or encourage the use of such methods); the crime indicated in the first paragraph of Article 28 of the Public Demonstrations Law no. 2911 (participating to an unlawful demonstration), shall not be sentenced separately under Article 220(6) of the Penal Code. The authorities indicated that with this amendment, the scope of the freedom of expression was broadened in the application of anti-terror legislation.

115. The Venice Commission welcomes the amendment introduced to Article 7 of the Anti-Terror Law, which excluded the above-mentioned crimes from the scope of application of Article 220(6). With this amendment, the suspects accused of having committed such crimes shall not be punished separately as members of an armed organisation under Article 314.

116. Nevertheless, the Venice Commission considers that the scope of this amendment is rather limited and does not provide for sufficient protection to the exercise of freedom of expression and assembly in particular. First, the amendment to Article 7 of the Anti-Terror Law excluded the above-mentioned crimes only from the scope of application of Article 220(6). However, some forms of expression, as indicated in the judgments of the Court of Cassation cited in paragraph 111, may also fall under the scope of Article 220(7) (aiding and abetting an organisation). This may lead to abusive application in practice, since a form of expression considered as being in support of an organisation, may be sanctioned under Article 220(7), instead of Article 220(6), in order to sentence the defendants as if they were members of an armed organisation under Article 314, although their organic relationship with an armed organisation is not established.

117. Secondly, the new paragraph added to Article 7 of the Anti-terror Law refers to the first paragraph of Article 28 of the Law on Public Demonstrations. This paragraph merely criminalises the organisation of or participation in unlawful public demonstrations, while for instance the crime regulated under Article 32(1) of the Law on Public Demonstrations, i.e. "to refuse to obey the warnings of the security forces during a public demonstration to disperse", may still fall under the scope of Article 220(6) (committing crime on behalf of an organisation), in conjunction with Article 314.

118. This situation may create problems in terms of proportionality of the penalties imposed on individuals who are considered to have committed the crimes indicated in the provisions of the Public Demonstration Law, other than its Article 28. In the case of *Gülcü v. Turkey*¹⁴⁸, the ECtHR, after having observed that the applicant participated in a public demonstration allegedly following a general call by an armed organisation and having thrown stones at the security forces, was thus involved in an act of violence, considered that the imposition of a sanction on the applicant would be compatible with the guarantees of Article 11 ECHR. However, the imposition of a harsh prison sentence pursuant to Article 220(6) (committing crime on behalf of an organisation) in conjunction with the Article 314 was not proportionate to the legitimate aim pursued. The Court thus found a violation of Article 11 ECHR.

¹⁴⁷ Amnesty International, Report of 27 March 2013 « Turkey: Decriminalize Dissent/Time to deliver on the Right to Freedom of Expression ».

¹⁴⁸ ECtHR, *Gülcü v. Turkey*, Application No. 17526/10, 19 January 2016 (not final yet).

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119. In the 2014 *Nedim Şener* case¹⁴⁹, the applicant was prosecuted for having allegedly contributed, at the request of the suspected members of a criminal organisation, to the preparation of books criticising the actions of the government and the judicial authorities. He was prosecuted under Article 220(7) (aiding and abetting an organisation) in conjunction with Article 314. In this case, the ECtHR found a violation of the right to freedom of expression under Article 10 ECHR. The conclusion was primarily based on the failure by Turkey to meet the requirement of the necessity in a democratic society (the interference did not respond to a pressing social need and was not proportionate to the legitimate aims¹⁵⁰). At the same time, the Court expressed doubts as to the foreseeability of the prosecution brought under Article 314 combined with Article 220¹⁵¹ as well as with regard to the legitimate aims pursued by the interference.¹⁵² While these two remarks are case-specific, they indicate that Article 314 as applied in conjunction with Article 220 is not completely clear in its wording and that the practice of its application gives rise to difficulties.

120. In conclusion, the Venice Commission recommends that the sentence “*although he is not a member of that organisation, shall also be sentenced for the offence of being a member of that organisation.*” in paragraphs 6 and 7 of Article 220 be repealed. In this case, those who commit the crimes indicated in paragraphs 6 and 7 of Article 220 would not be sanctioned as members of an armed organisation under Article 314, but by other, separate sanctions.

121. Should this sentence in paragraph 6 and 7 be maintained, the Turkish authorities should consider limiting the application of Article 220 in conjunction with Article 314, to cases which do not involve the exercise of the rights to freedom of expression and assembly.

V. Conclusions

122. The Venice Commission, first of all, acknowledges that some progress has been made in Turkey in recent years in particular with respect to the application of Articles 301 and 314 (in conjunction with Article 220) of the Criminal Code. The amendments to Article 301 made in April 2008 and the amendment to Article 7 of the Anti-Terror Law no. 3713 (April 2013) in order to limit the application of Article 314 in conjunction with Article 220(6) of the Penal Code, have reduced the scope for violations of fundamental freedoms by an undue application of these articles. The Court of Cassation has also tried, in particular with respect to Articles 216 and 299, to provide interpretations of the different requirements contained in these articles, which would bring them in line with European standards.

123. The Venice Commission welcomes these positive steps. However, it concludes that the progress made is clearly insufficient. All articles subject to the present opinion provide for excessive sanctions and have been applied too widely, penalising conduct protected under the ECHR, in particular its Article 10 and the related case-law as well as conduct protected under Article 19 ICCPR.

124. All four articles have to be applied in a radically different manner to bring their application fully in line with Article 10 ECHR and Article 19 ICCPR. The Commission underlines that prosecution of individuals and convictions in particular by lower-courts, which have a chilling effect on the freedom of expression, must cease. This is not sufficient if individuals are in some cases finally acquitted by the Court of Cassation after having been subject of criminal prosecution for several years.

125. With respect to **Article 216 (Provoking the Public to Hatred, Hostility, Degrading)**, paragraphs (1) and (2) of this provision should not be used to punish harsh criticism against government policies. Resorting to –proportionate- criminal sanctions is only justified if those

¹⁴⁹ ECtHR, *Nedim Şener v. Turkey*, Application No. 38270/11, 8 July 2014.

¹⁵⁰ *Ibidem*, par. 123.

¹⁵¹ *Ibidem*, par. 102.

¹⁵² *Ibidem*, par. 105.

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expressions amount to open incitement to engage in violence, armed resistance, or an uprising. Paragraph (3) should be interpreted in such a way as to apply only to extreme cases of religious insults that intentionally and severely disturbs public order and calls for public violence. The provision should not be applied to cases concerning mere blasphemy.

126. With respect to **Article 299 (Insulting the President of Republic)**, no progress has been made and its use has recently increased substantially. The Article fails to take into account the European consensus which indicates that States should either decriminalise defamation of the Head of State or limit this offence to the most serious forms of verbal attacks against them, at the same time restricting the range of sanctions to those not involving imprisonment. Having regard to the excessive and growing use of this Article, the Commission considers that, in the Turkish context, the only solution to avoid further violations of the freedom of expression is to completely repeal this Article and to ensure that application of the general provision on insult is consistent with these criteria.

127. With respect to **Article 301 (Degrading Turkish Nation, State of Turkish Republic, the Organs and Institutions of the State)**, the problem of vague wording, despite the amendments made in 2008, has persisted. It is recommended that the provision be redrafted and further amended with the aim of making all the notions used in it clear and specific. Further, the application of this provision should be limited to statements inciting to violence and hatred.

128. With respect to **Article 314 (Membership to an armed organisation)**, the established criterion in the case law of the Court of Cassation that acts attributed to a defendant should show “in their continuity, diversity and intensity” his/her “organic relationship” to an armed organisation or whether his/her acts may be considered as committed knowingly and wilfully within the “hierarchical structure” of the organisation, should have a strict application. In paragraphs 6 and 7 of **Article 220 (Establishing organisations for the purpose of committing crimes)** (in conjunction with Article 314), the sentence “*although he is not a member of that organisation, shall also be sentenced for the offence of being a member of that organisation.*” should be repealed. In case this sentence in paragraph 6 and 7 is maintained, the application of Article 220 in conjunction with Article 314 should be limited to cases which do not involve the exercise of the rights to freedom of expression and assembly.

129. The Venice Commission remains at the disposal of the Turkish authorities for any assistance that they may need.