**ECtHR, Altuğ Taner Akçam v. Turkey, Applic. No. [27520/07](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2227520/07%22]}" \t "_blank), 25.01.2012**

**1. Summary and Outcome**

The European Court of Human Rights (the Court) concluded to the violation of the right to freedom of expression under Article 10 of the Convention because of the vague and dangerously wide wording of Article 301 of the Turkish Penal Code that criminalizes denigration of Turkish nation. The Court held that Article 301 presented a continuous risk for people expressing their opinion on contentious issues since the terms of the provision did not permit to reasonably foresee its effects despite the recent legislative amendment adopted to prevent its arbitrary uses.

**2. Facts**

The applicant who was a professor of history working specifically on the historical events of 1915 had written an article in AGOS, a bilingual Turkish-Armenian newspaper to criticize the prosecution of Hrant Dink under Article 301 of the Turkish Penal Code criminalizing denigration of Turkishness. A complaint was immediately lodged against the applicant for violation of article 301, 214 (incitement to commit an offence), 215 (praising a crime and a criminal) and 216 (incitement to hatred and hostility among the people) of the Turkish Criminal Code. The applicant, in his statement before the Public Prosecutor of Şişli, defended that he did not write the impugned article to denigrate Turkish nation or to incite to hatred or hostility but to support his colleague Hrant Dink and to express his opinion on Armenian issue. The Şişli Public Prosecutor decided to terminate the proceedings on January 30 2007, on the grounds that the article written by the applicant in his capacity as a professor of history was to be considered within the realm of protected expression under Article 10 of the European Convention on Human Rights. The objection against this decision was dismissed by the Third Chamber of the Beyoğlu Assize Court. On October 11 2007, Şişli Criminal Court sentenced Arat Dink (the editor of *AGOS*) and Serkis Seropyan (the owner of *AGOS*) to one year imprisonment under Article 301 of the Turkish Criminal Code for accusing the Turkish nation of genocide via the press. Although the applicant was not a party to those proceedings, the court ordered on its own motion the reopening of the investigation against the applicant. On November 28 2007, another complaint lodged against the applicant by an individual, accusing him to denigrate Turkishness was rejected by a decision of non-prosecution. On January 14 2008 the applicant made a request for interim measure under Rule 39 of the Rules of Court, which was rejected by the Court. No further investigation had been initiated against the applicant after the judgment of the Şişli Criminal Court of October 11 2007. The applicant alleged before the Court the violation of his freedom of expression by the Turkish State. The Government submitted to the Court the samples of decisions of non-prosecution and judgments of acquittal given by criminal courts in cases concerning the prosecution under article 301 of the Penal Code, also provided the statistical information that showed a significant decrease about the prosecutions under Article 301. The applicant submitted the cases where two writers had been convicted under Article 301 for their articles and books published on the Armenian issue and the elements of the intimidation campaign conducted by some individuals and newspapers against him.

**3. Decision Overview**

The Court began by examining whether the applicant had the victim status within the meaning of Article 34 of the Convention and whether there had been an interference with his right to freedom of expression. The applicant argued that even thought the criminal investigation opened against him resulted in a non-prosecution, the mere fact that an investigation could potentially be brought against him under article 301 for his scholarly work on the Armenian issue caused him great stress, apprehension and fear of prosecution and thus constituted a continuous and direct violation of his rights. [para. 53]. He argued that this continuous risk of being prosecuted under Article 301 puts him under a constant pressure, which precluded him from working and writing on the Armenian issue. The government submitted that the applicant did not have the victim status since he was not personally affected by a violation and it contended that the right to petition before the Court could not be used neither to prevent a potential violation of the Convention nor to allege the incompatibility of a national law *in abstracto*. [para. 62-63].

The Court reiterated that in order to claim to be victim of a violation, a person must be directly affected by a measure. In that sense, the Convention does not grant a right to *actio popularis.* [para. 66]. However the Court precised that an applicant could claim to be a victim of a violation even if he/she was not able to submit a concrete interference to support his/her allegation. In this case, the Court would examine whether the impugned legislation was in itself compatible with the Convention. [para. 67]. The Court than added that a person could claim to be victim of a violation in absence of an individual measure of implementation if he/she was required to modify his/her conduct because of a law or risked being prosecuted or if he/she was a member of a class of people who risked being directly affected by the legislation. The Court also noted the chilling effect that the fear of sanction had on exercise of freedom of expression even in the case of an eventual acquittal, taking into account the possible fear discouraging one from expressing similar opinions in the future. [para. 68].

As to the instant case, observing that the applicant was a history professor working and publishing on the Armenian issue, a sensitive subject in Turkey, the Court held that he belonged to a group of people who could easily be stigmatized for their opinions and be prosecuted under Article 301, just as Hrant Dink who had been murdered by extremists after being stigmatized by media and ultranationalist groups. The Court noted that despite the decision of non-prosecution on behalf of the applicant, he continued to risk further investigation of this nature as a result of the criminal complaints by individuals alleging the violation of Article 301. [para. 71-72]. Taking into consideration the intimidation campaign presenting the applicant as a “spy” and a “traitor”, The Court also held that the criminal complaints lodged against him turned into a harassment campaign obliging him to display a self-restraint in his academic work. [para. 75]

The Court also examined the amendment to Article 301 adopted by the Government in order to prevent arbitrary or unjustified prosecutions. Based on the statistics provided by the Government, the Court noted that there was still significant number of prosecutions initiated by public prosecutors under article 301 for which the Ministry of Justice granted authorization. The Court further considered this system of prior authorization not being a lasting solution capable to replace the integration of Convention standards into Turkish legal system and practice. [para. 77]. In Court’s view, prior authorization to prosecution did not constitute an effective safeguard for similar cases since the impugned provision may be applied again at any time in the future, in case of a change of political will by current Government or change of policy by a new Government. [para. 78]. Accordingly, the Court was convinced that in the light of the circumstances of the case, the applicant was under a considerable risk of prosecution and the threat hanging over him was real. The applicant had thus the victim status in the meaning of the Convention. [para. 82].

The Court continued further to determine whether the interference with the applicant’s right to freedom of expression was prescribed by law. The Court first noted that the wording of the Article 301 was amended by the Government to prevent arbitrary applications of the provision. To this end, the term “Turkishness” was replaced by that of “Turkish nation’; the maximum period of imprisonment was reduced and the investigation on the ground of Article 301 was conditioned to an authorization by the Minister of Justice. The Court noticed that despite this amendment, the concepts of Turkishness and Turkish nation were interpreted in the same manner by the Court of Cassation. The amendment of the wording in the provision did not introduce thus a substantial change or contribute to the widening of the protection of the right to freedom of expression. [para. 92] The Court held that the scope of the terms under Article 301 of the Criminal Code, as interpreted by the judiciary, was too wide and vague and did not enable individuals to regulate their conduct or to foresee the consequences of their acts. [para. 93] The Court also concluded that the safeguards adopted to prevent the abusive application of Article 301 by the judiciary did 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. [para. 94]. Accordingly, the Court found that Article 301 of the Criminal Code did not meet the “quality of law” required by the Court’s case-law since the unacceptably broad terms of the Article did not permit to foresee its effects. [para. 95].

Based on the foregoing, the Court concluded that the interference with the right to freedom of expression of the applicant was not prescribed by law and eventually violated Article 10 of the Convention.

**4. Global Perspective: National (ECtHR)**

Ireland v. the United Kingdom, App. no. 5310/71 (1978)

Klass and Others v. Germany, App. no. 5029/71 (1978)

Sunday Times v. the United Kingdom (no. 1), App. no. 6538/74 (1979)

Dudgeon v. the United Kingdom, App. no. 7525/76 (1981)

Johnston and Others v. Ireland, App. no. 22520/93 (1986)

Norris v. Ireland, App. no. 10581/83 (1988)

Open Door and Dublin Well Woman v. Ireland, App. nos. 14234/88, 14235/88 (1992)

Grigoriades v. Greece, App. no. 24348/94 (1997)

Bowman v. the United Kingdom, App. no. [24839/94](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2224839/94%22]}" \t "_blank) (1998)

Association Ekin v. France (dec.), App. no. [39288/98](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2239288/98%22]}" \t "_blank) (2000)

Amann v. Switzerland [GC], App. no.[27798/95](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2227798/95%22]}" \t "_blank) (2000)

Lombardo and Others v. Malta, App. no. [7333/06](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%227333/06%22]}" \t "_blank) (2007)

Aktan v. Turkey, App. no. [20863/02](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2220863/02%22]}" \t "_blank) (2008)

Flinkkilä and Others v. Finland, App. no. [25576/04](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2225576/04%22]}" \t "_blank), (2010)

 Vajnai v. Hungary, App. no. [33629/06](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2233629/06%22]}" \t "_blank) (2008)

Dink v. Turkey, App. nos. [2668/07](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%222668/07%22]}" \t "_blank), [6102/08](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%226102/08%22]}" \t "_blank), [30079/08](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%2230079/08%22]}" \t "_blank), [7072/09](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%227072/09%22]}" \t "_blank) and [7124/09](https://hudoc.echr.coe.int/eng" \l "{%22appno%22:[%227124/09%22]}" \t "_blank) (2010)

**5. Expands expression**

This case ultimately expands freedom of expression since it denies “quality of law” in the meaning of the Convention of a criminal provision that contains dangerously vague and wide notions, which preclude foreseeing the impact of the provision to a sufficient degree. The case is also remarkable since it admits the victim status of the applicant in the absence of any individual incriminating measure, due to the continuous threat of being subject to prosecution under the impugned Article.