
AN OVERVIEW OF CRIMINAL PROVISIONS RESPONDING TO HATE SPEECH IN TURKISH LAW

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Abstract: There are several reports and cases that demonstrate the clear increase of hate speech in Turkey through media and especially on social media against some national and religious minorities, asylum seekers, refugees, and LGBTQ. This was also reported by the European Commission which pointed out that there is no effective prosecution of incitement to hatred, including by the media. In addition hate speech is not clearly regulated, expressions that can be considered hate speech are interpreted sometimes through provisions that regulate the crime of defamation against a person or the crime of defamation against a part of people. Although tidy legislation which defines and regulates hate speech through media, the internet and, social media is not yet available in the Turkish Penal Code. Major provisions that can be associated with hate speech are available in the Turkish Penal Code in a scattered manner. There are also related regulations in the law governing internet broadcasting and the law governing radio and television broadcasting. Expressions that can be considered hate speech are, in some cases interpreted through provisions that regulate the crime of defamation against the person. The most important problem pertains to the fact that hate speech and hate crimes have not been prescribed under a single title in Turkish Law.

Keywords: Defamation; hate speech; media, criminal law; Turkish law.

1. Introduction

There have been reports in Turkey in recent years that demonstrate the clear increase in hate speech in media and especially in social media (IHD Report, 2018, p. 2). Non-Muslim minorities, Jews, Armenians, asylum seekers and refugees, and LGBTQ are the most targeted groups (IHD Report, 2020, p.3). Although legislation that directly regulates hate speech through the internet and social media tidily is not yet available in the Turkish Penal Code. The matters of hate speech and hate crimes are new debates in terms of Turkish criminal law. There is yet no clear regulation that defines hate speech and hate crimes. This reality was also reported by the

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European Commission which pointed out that there is no effective prosecution of incitement to hatred, including by the media. Turkey has not made progress in introducing legislation regarding hate speech and hate crimes as recommended by the Council of Europe (EU Report, 2012, p.35). In addition hate speech is not clearly regulated, expressions that can be considered hate speech are interpreted sometimes through provisions that regulate the crime of defamation against a person or the crime of defamation against a part of people.

2. Provisions potentially applicable to hate speech in Turkish Penal Code

Although information on hate speech and hate crimes is also reflected in OSCE reports in Turkey, no official data is available regarding the existence of hate crimes. It is not quite possible to obtain accurate data and statistical information about hate crimes (Karan, p. 234; Boyle, p. 66). This is mainly caused by the reluctance of many victims to report these kinds of assaults, the difficulties experienced in proving hate crimes, the insensitivity of public officials on this matter, and disbelief in the performance of the required legal proceedings (IHD Report, 2020, p. 2).

Main provisions that can be associated with hate speech are available in the Turkish Penal Code (TPC- Türk Ceza Kanunu, N. 5237) in a scattered manner (Çelik, p. 225 et. al; Demirbaş, p. 2700; Sinar, p. 1289). But the most important problem pertains to the fact that hate speech and hate crimes have not been prescribed under a single title in Turkish Law. For instance, Article 122 of the Turkish Penal Code (TPC) regulates "hate and discrimination" as an offense, while Article 125 proscribes "insult,". Article 115 prohibits "prevention of the exercise of freedom of belief, thought and conviction," Article 153 regulates the offense of "damaging places of worship and cemeteries," and Article 216 proscribes "inciting the public to hatred, hostility and degrading" [1]. In addition to this, there are also related regulations in the law governing internet broadcasting and the law governing radio and television broadcasting.

Turkish Penal Code no. 5237 entered into effect in 2005 did not address the matter clearly. However, art. 122 that address the "crime of discrimination" changed into "hatred and discrimination" in 2014 and the perpetrator was required to act out of "hatred" in order to commit the crime of discrimination. The limited amendment was made in art. 122 and hatred was rendered as a subjective element of discrimination. Art. 122 (TPC) "Hatred and Discrimination" is as follows [2]:

"Any person who

- (a) Prevents the sale, transfer or rental of a movable or immovable property offered to the public,
- (b) Prevents a person from enjoying services offered to the public,
- (c) Prevents a person from being recruited for a job,

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(d) Prevents a person from undertaking an ordinary economic activity on the ground of hatred based on differences of language, race, nationality, colour, gender, disability, political view, philosophical belief, religion or sect shall be sentenced to a penalty of imprisonment for a term of one year to three years.”

The article governs the crime of discrimination, not hate speech (Sınar, p. 1297; Özar, p. 102-103). The existence of crime requires obstruction of a certain service or economic activity. It is obvious that in its current form, the article does not pertain to hate speech or hate crimes (Öztürk, p. 97; Bulut et. al., p. 169). The article, which is ambiguous in terms of the area it protects, fell behind universal standards and OSCE definition in the fight against hate crime by not including the categories of "ethnic identity" and "sexual orientation" as definitions in its declared new form. The European Commission stated that gender-based violence, discrimination, hate speech against minorities, hate crimes, and violations of human rights of lesbian, gay, bisexual, transgender, and intersex persons are still a matter of serious concern in Turkey (EU Report, p. 6).

It is possible to apply the crime of defamation for statements that may constitute religious hate speech. If this offense is committed about religion, political view or philosophical belief of the victim, to statement of opinions and thoughts or values that are considered sacred according to his/her faith, it is deemed as an aggravating factor of the crime (İnceoğlu, p. 116).

Art. 125 (TPC) “Defamation” is as follows:

“(1) Any person who attributes an act, or fact, to a person in a manner that may impugn that person's honor, dignity or prestige, or attacks someone's honor, dignity or prestige by swearing shall be sentenced to a penalty of imprisonment for a term of three months to two years or a judicial fine. To be culpable for an insult made in the absence of the victim, the act should be committed in the presence of at least three further people.

...

(3) Where the insult is committed:

...

b) because of declaring, altering, or disseminating, his religious, political, social, or philosophical beliefs, thoughts, or convictions, or practicing in accordance with the requirements and prohibitions of a religion he belongs to; or

c) where the subject matter is deemed sacred to the religion the person belongs to the penalty to be imposed shall not be less than one year.”

While this article is not effective in terms of hate speech, it also paves the way for punishing opponent statements about common religious beliefs and value judgments in Turkey. In practice, statements that are against religion or common religious beliefs are made subjects of investigation even if they do not target a person’s dignity and honor.

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Another article that is contained in TPC that can be handled about hate speech is art. 216. "Provoking the Public to Hatred, Hostility or Degrading" is 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.

(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."

This article addresses "insulting a section of people based on social class, race, religion, sect, regional difference or gender" while art. 216/3 regulates the crime of overtly insulting "the religious values embraced by a section of people (İnceoğlu, p. 118). In the past, this article was deemed as a major obstacle to freedom of expression however, implementation of this article is conditioned on "the action suitable for disrupting public peace". This article regulates certain remarks containing hate as hate speech under certain circumstances (Bulut, p. 173).

Although par. 2 and 3 of art. 216 of the TPC pertains to hate speech, it has not been used effectively to date and rather than preventing hate speech, it has paved the way for practices that restrict freedom of speech and cause opponents to be tried. The case against Fazıl Say in 2013 who is a worldwide famous pianist was an example (Altıparmak, 2011) [3]. Having been amended a series of times to date, this article has been considered a serious obstacle in front of freedom of speech and has been the subject of criticism frequently. The effectiveness of the article in punishing hate speech is controversial in terms of enforcement. In practice, action is taken to protect "sensitivities of the common religious group" in this regulation as it is in the case of the offense of defamation.

In Turkey, no investigation is conducted for insulting expressions for non-believers or members of religions other than the common one based on the claim that the condition of "disrupting public peace" is not satisfied.

3. Provisions potentially applicable to hate speech in media and the internet

Another regulation where the sanction is imposed on hate speech apart from the TPC is Law No. 6112 on the Establishment of Radio and Television Enterprises and their Broadcasting Services. Article 8/e entitled "Broadcasting services principles" of this law states, "cannot include and encourage broadcasts that perform discrimination

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due to race, color, language, religion, nationality, sex, disability, political and philosophical thought, sect and similar reasons." Although the regulations in this law appear to be essentially positive, judicial statistics on law enforcement indicate that hate speech is far from evaluated in the interpretation of the paragraphs concerned. Although Law No. 5651 on Regulation of Broadcasts on the Internet and Combating Crimes Committed by Such Broadcasts adopted in 2007 brought restrictions on several matters, it does not contain a clear regulation on hate speech and hate crimes (Akdeniz/Altıparmak et. al., 2008, p. 13). In Turkey, where a lot of debate is going on regarding internet censorship, access ban due to hate speech is quite limited.

4. Prosecution of crimes related to hate speech

The criminal procedure code (n.5271, Ceza Muhakemesi Kanunu) has been in force since 2005 [4]. This new law incorporates many institutions of Continental criminal procedure tradition. The criminal procedure system, the structure of criminal courts, and the number of courts and judges have changed many times in recent years in Turkey depending on different political developments (ICJ Report, 2018). As of 2019, criminal courts with general duties are divided into two Assize courts (Ağır ceza mahkemesi) and criminal court of first instance (Asliye ceza mahkemesi). Assize courts operate in the form of a board, consist of three judges and handle lawsuits that require imprisonment for over 10 years and a life sentence, and, at least one prosecutor should be present during hearings. On the other hand, criminal courts of first instance have a single judge and they hear lawsuits that require less than 10 years of imprisonment (Aksel, p. 59) According to a provisional regulation, no prosecutor may be present in hearings performed in criminal courts of first instance [5]. As a penalty for crimes that can be associated with hate speech is less than 10 years, the criminal court of first instance provides the service.

Public prosecution offices within the jurisdiction of Assize courts must conduct all investigations in the place concerned and file a lawsuit in Assize courts or criminal court of first instance when all conditions are fulfilled. The indictment prepared by the public prosecutor is addressed to the court that has subject matter jurisdiction and venue (Exum, p.3).

In the event that the suspect or defendant declares that he/she is in no position to assign him/herself an attorney and requests one, an attorney from the bar is assigned upon the court's request [6]. If the suspect or defendant with no attorney is a child, deaf or mute, if has a mental weakness to defend him/her or if accused with a claim for imprisonment for over 5 years, an attorney is assigned obligatorily. The expenses of this attorney, who is designated within the scope of judicial aid, are covered by the state. As the bottom threshold of penalty is not more than 5 years, this guarantee does not exist in case of crimes associated with hate speech. For this reason, there is a risk that the incident be reviewed and concluded by a single judge without any

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prosecutor or attorney in a hearing of a lawsuit that is not tried in assize court (TBB Report, 2012)

5. Conclusions

The main provisions regarding hate speech in Turkish law are contained in the Criminal Code. Art. 122 that addresses "hatred and discrimination." But this article governs the crime of discrimination, not hate speech. Also, the article, fell behind universal standards and the definition in the fight against hate speech by not including the categories of "ethnic identity" and "sexual orientation." If "the crime of defamation" is addressed in art. 125 is committed about religion, political view or philosophical belief of the victim, statement of opinions and thoughts or values that are considered sacred according to his/her faith, it is deemed as an aggravating factor of the crime. While this article is not effective in terms of hate speech, it also paves the way for punishing opponent statements about common religious beliefs and value judgments in Turkey in practice. Art 216, the crime of "Provoking the Public to Hatred, Hostility or Degrading" addresses "insulting a section of people based on social class, race, religion, sect, regional difference or gender" while art. 216/3 regulates the crime of overtly insulting "the religious values embraced by a section of people. But this article was deemed as a major obstacle to freedom of expression however, implementation of this article is conditioned on "the action suitable for disrupting public peace." This article regulates certain remarks containing hate as hate speech under certain circumstances. Having been amended a series of times to date, this article has been considered a serious obstacle in front of freedom of speech and has been the subject of criticism frequently.

In the recommendation of the Council of European Committee of Ministers (Rec. N. R 1997/20), it is stated that "the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin." As it is seen the national legal provisions discussed in the study do not meet the scope of the recommendation text and, current legal regulations are both incomplete and technically problematic. People who are exposed to hate speech are not limited to minorities of different ethnic, racial origins and religions, but may also include people with different sexual orientations, disabled people, immigrants, refugees, asylum seekers and political opponents. On the other hand, both the Law on Radio and Television Broadcasting nor the Law on Regulation of Broadcasts on the Internet does not contain a clear regulation on hate speech and hate crimes so there is a need

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for specific and clear legislation and prosecution unit to fight against hate speech on social media.

Although the clear increase in hate speech against minorities, non-Muslim minorities, asylum seekers, and refugees in media and especially in social media is reported by national and international institutions, there is no tidy and, specific regulation on hate speech legislation yet in Turkish law. Legal provisions that require penal sanction for hate speech and hate crimes are not clear and adequate under Turkish law. As indicated also by European Commission Turkey Reports in 2012, 2016, and 2018, 2020 the legislation on hate speech is not in line with international standards and ECtHR case law. Consequently, hate speech and, hate propaganda may remain unpunished in many cases.

The national legislation should be revised and protective mechanisms and specific bodies that will combat hate speech should be established by the criteria set out in the ECHR decisions. "Jersild v. Denmark" on racist speech; "Leroy v. France", relating to hate speech in support of acts of terrorism and violence; "Féret v. Belgium" on hate speech against minorities; "The Vejdeland v. Sweden" regarding hate speech targeted at sexual orientation; "Aksu v. Turkey" decision concerning statements containing hate speech towards the gypsy minority in Turkey are key examples.

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Notes:

[1] The full text of the Code no. 5237 is available at "www.mevzuat.gov.tr." The English version is available at <http://www.wipo.int/edocs/lexdocs/laws/en/tr/tr171en.pdf>

[2] The title of "Discrimination" was amended to "Hatred and Discrimination" and "hatred" was required as an element of the crime, on 2 March 2014 by article 15 of Law no. 6529.

[3] Sentence of pianist Fazıl Say to 10-month imprisonment by İstanbul 19th Criminal Court of Peace due to the posts he shared and directed on the social media website Twitter in line with paragraph 3 of article 216 of the Turkish Penal Code divided the country into two as it did in many other matters. He was not sentenced because of retweeting Omar Khayyam's (1048 – 1131) quatrains on divinity and god but something became clear when the grounds were read. Say was sentenced not because he violated the rights of believers but because he insulted the values considered sacred by religion.

[4] Fulltext of the Code no. 5271 is available at "www.mevzuat.gov.tr" English version is available at "www.unodc.org/cld/document/tur/2005/turkish_criminal_procedure_code.html?"

[5] Fulltext of the Code no. 5235 that provides the form and *ratione materiae* of the courts is available at "www.mevzuat.gov.tr"

[6] Art. 150 (CPC) Appointment of a defense counsel "(1) The suspect or the accused shall be asked to choose a defense counsel on his behalf. In cases where the suspect or accused declares that he is not able to choose a defense counsel, a defense counsel shall be appointed on his behalf, if he requests such. (2) If the suspect or the accused who does not have a defense counsel is a child, or an individual, who is disabled to that extent that he cannot make his own defense, or deaf or mute, then a defense counsel shall be appointed without his request. (3) During the investigation or prosecution for crimes that carry a punishment of imprisonment at the lower level of more than five years, the provision of subparagraph two shall be applied."