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(VENICE COMMISSION)

COMMENTS

ON THE COMPATIBILITY OF ARTICLE 301 OF THE CRIMINAL CODE OF ARMENIA WITH EUROPEAN STANDARDS

by

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The Request

1. The Venice Commission has received a request from the Human Rights Defender of the Republic of Armenia for an opinion on the compatibility of Article 301 of the Criminal Code of Armenia with Article 10 of the European Convention on Human Rights.

2. Article 301 of the Criminal Code provides as follows

> *"Public calls for seizing state power by force, changing the constitutional order of the Republic of Armenia by force are punished with a fine in the amount of 300 to 500 minimal salaries, or with arrest for the term of 2 to 3 months, or with imprisonment for the term of up to 3 years"*

The Law

3. Article 10 of the European Convention on Human Rights provides as follows

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

4. The request to the Venice Commission was made by the Human Rights Defender of Armenia following representations made to him by a member of parliament. Among other matters the member of parliament argued that the law of Armenia was insufficiently clear and that therefore the restriction on the right of freedom of expression contained in it could not be regarded as being properly "prescribed by law" within the terms of Article 10 (2) of the European Convention on Human Rights. In particular he argued that the term "public call" was itself unclear and that the term " seizing state power by force" was also vague.

5. I cannot express any opinion on the meaning of this clause in the Armenian language. However, its meaning in English seems to me to be reasonably clear. A public call for something in my opinion means advocacy of something, whether by the written or spoken word. Clearly something more than a private communication by one individual to another is required in order to come within the definition of "public". Similarly, the clause would not appear to cover a communication made in a private letter. Nor would it appear to cover a statement made at a private meeting to which members of the public were not admitted. While it might not be possible to give a complete definition of all the circumstances in which a call might be public, it would clearly include statements in newspapers or magazines which were circulated outside some private group or statements made at meetings to which the public have access. It would also include communications made by means of posters, placards, the broadcast media, or the use of the Internet.

6. Nor can I see that the term "seizing state power by force" is vague. Clearly it does not include such matters as advocating the removal of a Government by democratic means, that is to say by voting for the opposition at an election. Similarly, the term "changing the constitutional order of the Republic of Armenia by force" also seems to me to be clear and does not include advocacy of a change in the constitutional order brought about by democratic means, that is to say by amending the constitution in the lawfully approved manner.

7. The next question which arises is whether the provisions of Article 301 can be regarded as necessary in the democratic society in the interests of national security, territorial integrity or public safety, or for the prevention of disorder or crime.

8. In interpretating Article 10 of the Convention (together with the related Article 11 which protects freedom of association) the European Court of Human Rights has consistently interpretated this provisions in a strict manner allowing a very limited margin of appreciation to states. It has consistently maintained the proposition that: "there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb…."[1]

9. However, in the *Refah Partisi* case the Court stated that there were two conditions subject to which a political party might promote a change in the law or the legal and constitutional structures of the state; -

> *"….the court considers that a political party may promote a change in law or the legal and constitutional structures of the state on two conditions; firstly, the means used to that end must be legal and democratic, secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy can not lay claim to the Convention's protection against penalties imposed on those grounds"*[2]

10. It may be noted that permitted freedom of expression also includes calls for autonomy or even advocacy of secession of part of a country's territory provided that this is to be brought about by peaceful and democratic means. The court has held that

> *"The mere fact that a political party calls for autonomy or even requests secession of part of the countries territory is not a sufficient basis to justify the dissolution on national security grounds.*
>
> *The fact that the applicant party's political programme was considered incompatible with the current principles and structures of the Bulgarian state does not make it incompatible with the rules and principles of democracy"*[3]

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[1] Case of Refah Partisi, Judgment 13 February 2003 para 89, Judgment 31 July 2001, para 44.

[2] Ibid para 98

[3] Case of United Macedonian organisation Ilinden-Pirin –v- Bulgaria (judgment of 20 October 2005, para 61)

11. It is quite clear from the case law that public calls for seizing state power by force or for changing the constitutional order of the state by force may be prohibited in accordance with the exceptions provided for by Article 10 paragraph 2 of the European Convention on Human Rights.

12. However, the fact that a law may on its face not be incompatible with the Convention does not preclude the possibility that it could be abused. For example, if such a law were used as a pretext to arrest and charge persons with its breach where the evidence was not sufficient to establish that in fact a public call for seizing state power by force or for changing the constitutional order of the republic had been made, then clearly that would amount to harassment by the authorities. In this connection I have been given no information that the law in question has been used in such a manner. I have not been provided with any information concerning the use of the section in practice. I note, however, that there have been criticisms made of the general state of freedom of expression in Armenia from time to time. For example, in its report of 26 July 2006 on the state of media freedom in Armenia the OSCE was critical of the fact that at that time criminal libel and insulting a representative of the authorities remained criminal offences attracting severe penalties. However, the OSCE also pointed out that criminal libel cases had not been initiated for several years. In a press release on 12 September 2006 the OSCE office in Yerevan expressed concern about violence against and intimidation of journalists.[4] In a report in January 2007 the NGO Human Rights Watch was also critical of incidents of harassment against journalists including the Institution of criminal proceedings for insulting the authorities.

Conclusion

13. On its face the provision in question does not appear to be incompatible with the European Convention on Human Rights provided that it is properly interpreted and used. However, the fact that a legal provision itself is acceptable does not mean that it cannot be abused by wrongful decisions to detain or prosecute persons against whom sufficient evidence of a breach of the provision in question does not exist.

[4] http://www.osce.org/item/20457