

On 12 October 2006, the French General Assembly adopted a proposal for a law intending to penalise the denial of the existence of the Armenian genocide (*Proposition de Loi tendant à réprimer la contestation de l'existence du génocide arménien*).¹ While the law remains currently submerged in the French decision-making process, and will need the approval of the Senate and the final signature by the President of the Republic before its formal adoption,² it has already provoked a cascade of reactions at national and EU level.

The draft law is a follow-up to a previous law from 2001 which publicly declared France's recognition of the Armenian genocide in 1915.³ The new initiative, however, goes much further. Art. 1 proposes the criminalisation of the act of denial of the Armenian genocide,⁴ and provides that those

¹ Retrievable from <http://www.assemblee-nationale.fr> and reproduced in Annex 1.

² According to the electronic journal *Turkish Daily News*, President Chirac has expressed some regrets about the draft law to his counterpart Prime Minister Recep Tayyip Erdoğan, but it is not clear yet whether this sentiment is strong enough to lead him to refuse to sign the bill. See "*Chirac says sorry to Turkey for 'Genocide Law'*", 16 October 2006 (www.turkishdailynews.com.tr).

³ Loi no 2001-70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915, J.O. n° 25, 30 January 2001.

⁴ Art. 1 of the proposal states that « La loi n° 2001-70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915 est complétée par un article ainsi rédigé: « Art. 2. - Sont punis des peines prévues par l'article 24 bis de la loi du 29 juillet 1881 sur la liberté de la presse ceux qui auront contesté, par un des moyens énoncés à l'article 23 de ladite loi, l'existence du génocide arménien de 1915. » « Les modalités de poursuite et de répression de l'infraction définie par l'alinéa précédent sont soumises aux dispositions du

France's Draft Law on the Armenian Genocide: Some Legal and Political Implications at EU Level

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denying the existence of the genocide would be subject to a punishment of one-year imprisonment and/or a fine of €45,000.⁵ What are the political and legal implications of this *Proposition de Loi* at EU level? In fact, the French proposal may raise a number of politically sensitive questions related to the European integration processes of enlargement, and particularly the current status of negotiations with Turkey. Further, the draft law might also present some legal transnational issues concerning the progressive establishment of a European Area of Freedom, Security and Justice (AFSJ) in the EU.

Implications for Enlargement and Turkey

Although the initiative can be interpreted as being motivated solely by

chapitre V de la loi du 29 juillet 1881 précitée. » « L'article 65-3 de la même loi est applicable. »

⁵ Art. 24 of the Loi sur la Liberté de la Presse, says that « Ceux qui, par l'un des moyens énoncés à l'article 23, auront provoqué à la discrimination, à la haine ou à la violence à l'égard d'une personne ou d'un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance à une ethnie, une nation, une race ou une religion déterminée, seront punis d'un an d'emprisonnement et de 45000 euros d'amende ou de l'une de ces deux peines seulement ».

domestic French political considerations prior to the upcoming national elections, its repercussions clearly go beyond France to involve the whole of the EU and its relationship with Turkey. This point was made in fact by Olli Rehn, European Commissioner for Enlargement, when he remarked in the wake of the vote in the French Parliament that "the French law on the Armenian genocide is of course a matter for French lawmakers, but there is a lot at stake for the European Union as well, and the decision may have very serious consequences for EU-Turkey relations".⁶

It should be noted first of all, that France is not the only country to have placed this issue on its internal political agenda. A similar trend is also recently observed in the Netherlands prior to its national elections. In a similar vein, the European Parliament has not been aloof from the debate. The recent attempt to make the recognition of Armenian genocide an official criterion for Turkey's accession to the EU in the European Parliament's Eurlings Report was only averted in the last minute prior to the report's adoption.⁷ Similarly, a

⁶ "Rehn warns France against adopting Armenian genocide law", *EU Observer*, 10 October 2006.

⁷ European Parliament, Report on Turkey's Progress towards Accession, 13.9.2006, Rapporteur: Camiel Eurlings.

legal challenge was undertaken before the European Court of First Instance in Luxembourg by two individuals seeking compensation for the harm caused to them by recognition of Turkey's status as a candidate for accession to the EU, although that State had refused to acknowledge the Armenian genocide. Without getting deep into the real discussion behind the case, the Court found the claims for compensation manifestly unfounded.⁸ This decision was later reconfirmed by the European Court of Justice on 29 October 2004.⁹

The fact that this highly sensitive issue is now being used both in the domestic and in the European sphere for political purposes is in fact having severe repercussions not only for the EU's relations with Turkey, but also for the EU's own reputation as a credible international institution that stands by its own Kantian ideals of 'doing as you would be done by'. The EU has long been applying a strict policy of 'conditionality' to Turkey, and rightly so, regarding its record of democratisation with a particular emphasis on freedom of expression, which remains one of the major soft spots in the reform trajectory of the country. Freedom of expression is now one of the core areas over which there is the most intense struggle between the reformers and the conservative forces in the country. Through loopholes in the legal system (such as the infamous Article 301 of the Penal Code) and in coalition with certain veto-players in the judicial establishment, the reform resistant forces are struggling to reverse the democratic tide in Turkey. The struggle becomes fiercer as the democratic sphere widens in the country. One incident in which this struggle was clearly manifested concerned the holding of a conference in Turkey on the Armenian question in 2005. What seemed to be unthinkable in the Turkish context just a few years ago was realised, despite the attempts to stop it. Hence the issue recently began

to be discussed openly in the public sphere with dissenting voices questioning the official legacy of 'forgetting' the past initiated in the 1920s.

While Turkey is still far from having reached a societal consensus based on a full-fledged debate on the issue, the fact that there is an ongoing discussion suggests that there is indeed a strong possibility for a closure of this issue in the longer run with the deepening of the democratic process in Turkey. Actions such as the French draft law or the attempts to make recognition of Armenian genocide a formal EU criterion for Turkey's membership only hamper the reformists' power vis-à-vis the conservative and nationalist establishment in Turkey by blocking a healthy progress of societal reconciliation in its early stages. Moreover, it strengthens the already-rising levels of euroscepticism in the country by giving the impression that freedom of speech is a matter for candidate states only, whereas it can be curtailed by the state in the member countries. This helps to further damage the credibility of the Union in its enlargement policy which is already clouded by debates over the 'absorption capacity' and the final frontiers of the EU.

Implications for the European Area of Freedom, Security and Justice

a. National solo-runs in criminal law and the European arrest warrant

The French initiative will potentially raise some open questions as to practicalities linked with judicial cooperation in criminal matters in the EU. In the event that the proposal becomes formally 'law', it will then provide an interesting case for the applicability of one of the most famous and first outcomes of the nascent common European judicial area, i.e. the European Arrest Warrant (EAW).¹⁰

Would, for example, Spain be obliged to surrender a Spanish national to face trial in France for questioning the Armenian genocide in a private discussion during a trip to Paris?

According to Art. 2 of the Framework Decision on the European Arrest Warrant 2002/584,¹¹ there are some 32 offences that shall lead to surrender *ipso facto*, without the need to check the existence of double criminality. The principle of double criminality means that for the legal surrender of a suspect, the alleged crime needs to be considered 'punishable' in both the issuing and the executing state. Among this list of serious crimes there is one qualified as "racism and xenophobia". Whether the public denial of the Armenian genocide by the Spanish national could fall within this category is very much open to interpretation.

However, even if the seriousness of such an act could potentially be qualified as "racism and xenophobia", the principle of double criminality would still apply. Art. 24 *bis* of the Law on Freedom of Press (*Loi Gayssot or Loi sur la liberté de la presse*, 29 July 1881) stipulates that the punishment would consist of *one year* imprisonment and/or a fine of €45,000. According to the Framework Decision on the EAW, the double criminality check is excluded only if the criminal offence is punishable with imprisonment of at least *three years*. Therefore, as long as no other member state introduces similar legislation or the French legislature significantly increases the punishment, it is unlikely that the surrender of a suspected criminal according to the potential new French law would ever happen.

b. Fundamental rights and the aim to punish an opinion

The initiative has been subject to criticism based on its potential lack of compatibility with fundamental rights as enshrined in European human rights laws, in particular, Art. 10 of the

⁸ Case T-346/03, *Krikorian et al. v. European Parliament et al.*, Order of the Court of First Instance, 17 December 2003,

⁹ Case C-18/04 P, *Krikorian et al. v. European Parliament et al.*, European Court of Justice, 29 October 2004. See also Case C-18/04, P(R), *Krikorian et al. v. European Parliament et al.*, European Court of Justice, 13 September 2004.

¹⁰ For more information about the European Arrest Warrant, see Elspeth Guild (ed.), *Constitutional Challenges to the European Arrest Warrant*, Series on A Challenge for European Law: The Merging of Internal and External Security Centre for Migration Law, Nijmegen: Wolf Legal Publishers, and Radboud University of Nijmegen, 2006.

¹¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal L 190, 18.07.2002.

European Convention of Human Rights:¹²

Everybody 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.

Some would argue that the proposal undermines freedom of expression because the mere act of *contesté*, or denial of the existence of the genocide will be penalized by this law. In addition, the legal term *contesté* as used in the proposal may be qualified as leaving too much room for interpretation as to the nature of the violation. This flexibility may lead to confrontations about the exact demarcation of the right to freedom of expression and the denial of the genocide as criminal act.

Does the initiative – if turned into law – violate freedom of expression? The question cannot be answered as easily as it might seem at first sight. As with nearly all human rights, freedom of expression is also subject to certain limitations. Moreover, the French draft on the Armenian genocide is not the first law penalising a specific opinion standing in reference to certain historical facts. Several European countries have adopted criminal laws that punish denial of the Holocaust. This is the case not only in Germany and Austria, but also in Belgium, the Netherlands, Spain, Switzerland, Poland, Czech Republic, Slovakia, Lithuania, Romania and also in France. This finding shall not imply that the Holocaust and the Armenian genocide are similar or even comparable, but it demonstrates that the criminalisation of a specific opinion is nothing new or revolutionary, neither in France nor in quite a number of other member states.

With regard to the laws against denying the Holocaust, there is furthermore a large consensus among juridical bodies and courts – at national, European and UN levels – that they are consistent with fundamental rights. In a long-established line of cases, the former European Commission of Human Rights considered Holocaust denial an abuse of freedom of expression.

¹² And also Art. 19 of the International Covenant on Civil and Political Rights.

Denying the Holocaust – in the Strasbourg-based Commission's view – aims at promoting ideas contrary to the text and the spirit of the European Convention. Consequently it denied the protection provided for in Art. 10.¹³ The European Court of Human Rights in Strasbourg has subsequently followed this approach.¹⁴ At the UN level, the Human Rights Committee in 1996 considered the application of the French law criminalising Holocaust denial in one specific case as compatible with Art. 19 of the International Covenant on Civil and Political Rights.¹⁵

Again, there exist significant differences between the Holocaust and the Armenian genocide. Whether these differences are significant enough to come to a different conclusion on the compatibility of the French draft law with human rights obligations will eventually be for the courts to decide. A first and preliminary conclusion on the legal implications of the draft, however, is that the criminalisation of a certain opinion towards historical facts as such does not *per se* and automatically constitute a violation of fundamental rights, and in particular the freedom of expression.

Nevertheless, should the draft eventually become law, it might not take too long before the European Court of Human Rights will find itself in the dilemma of deciding on this highly sensitive issue. It has to be kept in mind that according to the Convention, not only a sentenced individual would be able to bring the matter before the Court, but also any other of the High Contracting Parties, including Turkey. It seems unlikely that the French General Assembly is aware of the political impact and damage that could be inflicted from a potential case of *Turkey vs. France* on the Armenian

¹³ See, inter alia, *F.P. v. Germany*, no. 19459/92, Commission decision of 29 March 1993; *Honsik v. Austria*, no. 25062/94, Commission decision of 18 October 1995; *Marais v. France*, no. 31159/96, Commission decision of 24 June 1996; *Nachtmann v. Austria*, no. 36773/97, Commission decision of 9 September 1998.

¹⁴ *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; *Witzsch v. Germany* (dec.), no. 7485/03, decision of 13 December 2005.

¹⁵ *Faurisson v. France*, Communication No. 550/1993, views adopted on 8 November 1996, UN Doc. CCPR/C/58/D/550/1993, 16 December 1996.

genocide law being brought before the Court in Strasbourg – regardless of what the Court's final decision might be.

Conclusions

The French draft proposal illustrates how national measures of this type can have substantial political and legal implications at EU level. A legislative initiative, carried out by a relatively small number of local politicians and quite obviously launched to serve domestic strategic and political interests, turns out to have direct repercussions in the European dimension.

Although the mere legal consequences for the European Area of Freedom, Security and Justice would – so far – not be as significant as some would say, the political impact and negative consequences on the enlargement process and EU relations with Turkey cannot be underestimated.

Regarding the EU's enlargement policy, it strengthens the perception that there exist double standards of morality in Europe, one for candidate countries and another for the EU member states where their own controversial history is – only too often – consensually buried without ever becoming a subject of any substantial debate in any of these countries. Regarding relations with Turkey, the problem is two-fold: One is the strengthening of the belief in the country that Europe significantly lacks the amount of goodwill towards Turkey, fuelling nationalist reactions; and the other perhaps even more important is its weakening effect on the power of the reformist and progressive forces in the country, in a way that could endanger the EU's very own success in fostering democratic change in Turkey.

Annex 1

PROPOSITION DE LOI

ADOPTÉE PAR L'ASSEMBLÉE NATIONALE
EN PREMIÈRE LECTURE,

tendant à réprimer la **contestation de l'existence**
du **génocide arménien**.

Article 1^{er}

La loi n° 2001-70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915 est complétée par un article ainsi rédigé :

« *Art. 2.* - Sont punis des peines prévues par l'article 24 *bis* de la loi du 29 juillet 1881 sur la liberté de la presse ceux qui auront contesté, par un des moyens énoncés à l'article 23 de ladite loi, l'existence du génocide arménien de 1915.

« Les modalités de poursuite et de répression de l'infraction définie par l'alinéa précédent sont soumises aux dispositions du chapitre V de la loi du 29 juillet 1881 précitée.

« L'article 65-3 de la même loi est applicable. »

Article 2 (*nouveau*)

La loi n° 2001-70 du 29 janvier 2001 précitée est complétée par un article 3 ainsi rédigé :

« *Art. 3.* - Toute association régulièrement déclarée depuis au moins cinq ans à la date des faits, qui se propose, par ses statuts, de défendre les intérêts moraux et l'honneur des victimes du génocide arménien peut exercer les droits reconnus à la partie civile en ce qui concerne l'infraction prévue par le premier alinéa de l'article 2. »

Article 3 (*nouveau*)

Dans le premier alinéa de l'article 24 *bis* de la loi du 29 juillet 1881 sur la liberté de la presse, le mot : « sixième » est remplacé par le mot : « huitième ».

Annex 2

LOI du 29 juillet 1881

Loi sur la liberté de la presse, version consolidée au 19 avril 2006 (Loi Gayssot)

Article 24 bis :

Modifié par Loi n°92-1336 du 16 décembre 1992 art. 247 (JORF 23 décembre 1992 en vigueur le 1er mars 1994).

Seront punis des peines prévues par le sixième alinéa de l'article 24 ceux qui auront contesté, par un des moyens énoncés à l'article 23, l'existence d'un ou plusieurs crimes contre l'humanité tels qu'ils sont définis par l'article 6 du statut du tribunal militaire international annexé à l'accord de Londres du 8 août 1945 et qui ont été commis soit par les membres d'une organisation déclarée criminelle en application de l'article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction française ou internationale.

Le tribunal pourra en outre ordonner: 1° L'affichage ou la diffusion de la décision prononcée dans les conditions prévues par l'article 131-35 du code pénal.

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