

Turkey on Trial:

The Prosecutions of Orhan Pamuk & Others

Trial Observation Report

July 2006

Kurdish Human Rights Project
Bar Human Rights Committee

Kurdish Human Rights Project
KHRP
Established 1992

**Bar Human
Rights
Committee**
OF ENGLAND AND WALES

TURKEY ON TRIAL:

THE PROSECUTIONS OF ORHAN PAMUK
& OTHERS

TRIAL OBSERVATION REPORT

JULY 2006

KURDISH HUMAN RIGHTS PROJECT
BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES

Acknowledgements

This report was written by barrister Stuart Kerr, a member of the Bar Human Rights Committee of England and Wales and board member of Kurdish Human Rights Project (KHRP), edited by Rochelle Harris, Anna Irvin, Rachel Bernu and Mustafa Gündoğdu (KHRP).

KHRP gratefully acknowledges the financial support of:

The Sigrid Rausing Trust (UK), Netherlands Ministry of Foreign Affairs (Netherlands), European Action Council for Peace in the Balkans (Netherlands), Finnish Ministry for Foreign Affairs (Finland), Oak Foundation (USA), Bishop's Subcommission for Misereor (Germany), ACAT Suisse- Action des Chrétiens pour l'Abolition de la Torture (Switzerland), Oakdale Trust (UK), Rowan Charitable Trust (UK), Sticing Cizera Botan (Netherlands), The Bromley Trust (UK), and UN Voluntary Fund for Torture (Switzerland).

Layout & Design: Torske & Sterling Legal Marketing www.torske.co.uk

Keywords: *Turkey, trial observation, fair trial, freedom of expression, censorship, exile, author*

*Printed in Great Britain
June 2006
Published by KHRP (London)
ISBN 1900175967
All rights reserved*

Kurdish Human Rights Project



Established 1992

Kurdish Human Rights Project

11 Guilford Street

London

WC1N 1DH, United Kingdom

Tel: +44 (0)20 7405-3835

Fax: +44 (0)20 7404-9088

khrp@khrp.org

www.khrp.org

Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people.



Bar Human Rights Committee of England and Wales

BHRC

Garden Court Chambers

57-60 Lincoln's Inn Fields

London, WC2A 3LS, UK

Tel 020 7993 7755

Fax 020 7993 7700

bhrc@compuserve.com www.barhumanrights.org.uk

The Bar Human Rights Committee is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world. It is also concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial. The remit of the Bar Human Rights Committee extends to all countries of the world, apart from its own jurisdiction of England & Wales.

Contents

	Foreword	11
1.	Introduction	13
2.	Turkey's Obligations under International Law	15
3.	Turkey's Domestic Law and Article 301 of the Penal Code	21
4.	Orhan Pamuk	25
	<i>a. The Charge against Orhan Pamuk</i>	26
	<i>b. The Hearing of 15th December 2005</i>	28
	<i>c. The Conclusion of the Criminal Proceedings</i>	31
	<i>d. Conclusions</i>	32
5.	Other Writers, Journalists and Publishers	35
	<i>a. Fatih Taş</i>	35
	<i>b. Hrant Dink</i>	36
	<i>c. Professors Aran and Kaboğlu</i>	37
	<i>d. The 'Armenian Genocide Conference' Journalists</i>	38
	<i>e. İrfan Uçar</i>	40
6.	Conclusion	43

Appendix A	The Indictment against Orhan Pamuk	45
Appendix B	Press Release of Altemur Kılıç	47

Abbreviations

ICCPR	International Covenant on Civil and Political Rights
CRC	United Nations Convention on the Rights of the Child
DGM	State Security Courts
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
İHD	<i>İnsan Hakları Derneği</i> (Human Rights Association of Turkey)
JİTEM	Gendarmerie Intelligence Service
TCK	Turkish Penal Code
TİHV	<i>Türkiye İnsan Hakları Vakfı</i> (Human Rights Foundation of Turkey)
UDHR	Universal Declaration of Human Rights
UN	United Nations

Foreword

On 1 June 2005, the new Turkish Penal Code came into force, and with it the controversial Article 301 on the denigration of Turkishness, the Republic, and the foundation and institutions of the State. Since the article was introduced, it has been used on numerous occasions to prosecute human rights defenders, journalists and other members of civil society.

This report deals in particular with the trial of the writer Orhan Pamuk, which began in İstanbul on 16 December 2005 and was subsequently dropped by the court in January 2006. It describes the trial in the context of Turkey's recent penal reforms and its obligations under international law. The report also looks briefly at the trials of other writers, journalists and publishers in Turkey who have been prosecuted under the article.

KHRP sent a member of its legal team, Stuart Kerr of Karis Law, to observe the trial and monitor compliance with international rule of law standards. Whilst in Turkey, he also met with journalist and editor Hrant Dink, publisher Fatih Taş and Professor Ibrahim Kaboğlu. The trial lasted 45 minutes before the court was adjourned until February 2006 and the case referred to the Ministry of Justice for approval. On 22 January 2006 Justice Minister Cemil Cicek refused approval of the prosecution on the basis that he had no authority to do so under the new Penal Code and referred the case back to the court. The court inferred from this decision that the case should be dropped, and subsequently did so a few days later.

Since this report was written have been further developments in the case against Hrant Dink, who was facing 'insult' charges under Article 301 of the new penal code for comments made at a conference in December 2002. He was acquitted of this charge on 9 February 2006, but still faces a charge under Article 288¹ for his criticism of a previous sentence, given under the old penal code, for an article in

1 Article 288 of the Turkish Penal Code reads: 'A person who makes an explicit declaration influencing the public prosecutor, judge, the court, expert witness or witnesses until the final judgment is given about an investigation or prosecution will be imprisoned for a term from six months to three years. If this offence is committed through press or media, the penalty to be imposed shall be increased by one half.'

which he discussed the impact on present day Armenian Diaspora of the killings of hundreds of thousands of Armenians by the Ottoman army in 1915-17.

According to a recent report from The Turkish Publishers Union's (TYB) Publication Freedom Committee, in the last year, 22 publishers, 47 authors and 49 books were subject to trial. Since February 2006 alone, eight writers, journalists and publishers have been prosecuted under Articles 301 and 288 of the new Turkish Penal Code and if found guilty, face lengthy prison terms. KHRP feels that it is as important as ever to make its presence felt and hopes that this report contributes to the debate regarding the Turkish Penal Code to ensure that interpretation of the Code is not in contravention of the European Convention on Human Rights.

Kerim Yildiz
Executive Director, KHRP

Mark Muller
President, BHRC

1. Introduction

“Thirty thousand Kurds and a million Armenians were killed in these lands and nobody dares to talk about it. I do.”

Orhan Pamuk, *Das Magazin* February 2005

In spite of the overwhelming evidence, the Turkish government continues to deny the human rights violations and genocide committed against Kurds and Armenians in Turkey during the twentieth century. Orhan Pamuk, the acclaimed Turkish novelist now living in Switzerland, was referring to this evidence in an interview with a Swiss newspaper in February 2005. Although he now lives in exile, his comments nonetheless attracted the attention of a Turkish prosecutor, who brought an indictment against Pamuk for ‘publicly insulting Turkish national identity’ under article 301 of the Turkish penal code, a crime which for him could carry a penalty of four years imprisonment.

The EU Commission for Enlargement Olli Rehn’s response typified that of many in the international community. “The trial of a novelist who expressed a non-violent opinion,” he said, “casts a shadow over negotiations for Turkey’s entry into the EU. It is not Orhan Pamuk who will stand trial... but Turkey.”

By the time of the first hearing in the trial of Pamuk on 16 December 2005 in İstanbul, the issue of freedom of expression in Turkey and the outcome of the trial had become, once again, a key issue which was a litmus test for commentators, analysts and observers to gauge the pace of progress.² For while Pamuk’s case attracted the most attention, because of the celebrity of the accused, it was also becoming evident that new laws introduced in June 2005 were being widely utilised in an apparently over-zealous fashion.³

2 Freedom of expression has been a key issue for Turkey throughout its EU accession process, and particularly following the 1980 military coup and throughout the 1990s.

3 For example, Article 159 of the old Turkish Penal Code, which criminalises acts that “insult or belittle” various state institutions, reappears as Article 301 of the new TPC in the section entitled “Crimes against symbols of the state’s sovereignty and the honour of its organs” (Articles 299-301); and Article 305 of the new TPC criminalises “acts against the fundamental national interest”, examples of which would be to, “make propaganda for the withdrawal of Turkish soldiers from Cyprus or for the

As a result, KHRP sent a mission not only to observe and report on the trial of Orhan Pamuk, but also to exchange information with others in the same plight. The mission's findings therefore not only concern Pamuk's case, but also bear relevance to the trials of publisher Fatih Taş, Professor Ibrahim Kaboğlu and Professor Baskin Oran, editor Hrant Dink and columnist İrfan Uçar, and indeed all those who face trial in Turkey for their peaceful expression of non-violent opinions.

acceptance of a settlement in this issue detrimental to Turkey... or, contrary to historical truths, that the Armenians suffered a genocide after the First World War.”

2. Turkey's Obligations under International Law

Aside from her commitments under EU accession standards, Turkey is also a party to many international declarations, conventions and treaties, several of which are binding. The most significant regarding the rights to freedom of expression and association are the Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and the UN Convention on the Rights of the Child (CRC).

A. Universal Declaration of Human Rights

On 10 December 1948 the General Assembly of the UN adopted the UDHR. Turkey accepted the UDHR in 1949. The objective of the Declaration was to provide a:

'...common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.'⁴

Since the UDHR was not a binding convention, technically there are no signatories, but Turkey was one of the 48 member states that voted to approve and abide by the Declaration, and to implement its provision in their respective nation states.

There are many provisions of the UDHR that have implications for the protection and promotion of freedom of expression and freedom of association, however, the foremost provisions are Article 19 and Article 20. Article 19 pertains to freedom of expression and states:

4 Universal Declaration of Human Rights, Dec 10, 1948 (UDHR), preamble.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’

Article 20 addresses Freedom of Assembly by stipulating that:

- 1) Everyone has the right to freedom of peaceful assembly and association, and
- 2) No one may be compelled to belong to an association.’

B. European Convention on Human Rights

Turkey ratified the European Convention on Human Rights (ECHR) in 1954. The right for individual applications from Turkish citizens to the European Commission of Human Rights was recognised in 1987, and the compulsory jurisdiction of the European Court of Human Rights (ECtHR) was recognised in 1989. Turkey filed reservations to the rights to liberty and security of person, to a fair hearing, to respect for private and family life, to an effective remedy and to freedoms of expression and of association (Articles 5, 6, 8, 10, 11 and 13). In response to perceived threats to its national security, Turkey implemented legislation under Laws No. 424 and 425 and instituted a State of Emergency in the provinces of Elezîz (Elazığ), Bingöl (Bingöl), Dersîm (Tunceli), Wan (Van), Diyarbekir (Diyarbakır), Mêrdîn (Mardin), Sêrt (Siirt), Hekarî (Hakkari), Batman (Batman) and Sernex (Şırnak). Turkey continually modified and reduced these reservations in 1991, 1992, and 1993. The State of Emergency was lifted completely in 2002. The Turkish government then removed their one remaining reservation to Article 5 on 29 January 2002.

The Convention is legally binding on members who sign and ratify. In the past six years there have been 764 judgments from the European Court of Human Rights finding Turkey in breach of at least one of its human rights obligations.

Cases regarding freedom of expression and association are frequently brought before the Court. Under the ECHR, Article 6 pertains to the right to a fair trial and Article 10 relates to freedom of expression. These articles are set out below.

Article 6 - The Right to a Fair Trial

Article 6 of the ECHR states,

- ‘1. In the determination of his civil rights and obligations or of any criminal

charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.’

Article 7 – No punishment without law

Article 7 of the ECHR stipulates,

‘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.

This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.’

Article 10 – Freedom of Expression

Article 10 of the ECHR stipulates,

‘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.

2. 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 interests 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.’

C. International Covenant on Civil and Political Rights

The ICCPR is the legal mechanism which embodies many of the civil and political rights and ideals enshrined in the UDHR. The ICCPR was adopted and opened for signature on 16 December 1966, but did not enter into force until 23 March 1976. Turkey signed the ICCPR on 15 August 2000, and ratified it on 23 September 2003.

Article 14

Article 14 of the ICCPR stipulates,

‘1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at

law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result

of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'

Article 19

Article 19 stipulates,

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

3. Turkish Domestic Law and Article 301 of the Penal Code

It is essential for the implementation of international human rights and responsibilities that they are 'brought home' to domestic legislation and courts. In the instance of Turkey, Article 90 of the Turkish constitution establishes that international treaties ratified by Government and approved by the Grand National Assembly have the force of law.

Since 2002, the Turkish Government has passed a series of domestic laws, the Harmonisation packages, designed to bring Turkey's substantive and procedural laws in line with EU standards. There have been many developments that have gained the approval of the international community, perhaps most notably the abolition in 2004 of the State Security Courts (DGM). The DGM were heir to the martial law courts and allowed military influence over the judiciary by mandating the presence of a military judge.

On 1 June 2005, the latest Turkish Penal Code came into force, having been twice delayed first from 1 January 2005, then from 1 April 2005 owing to concern from the EU that the attempts to make progress on the issue on freedom of expression had not been achieved. Many of the provisions of the new Penal Code, while less severe than its predecessor, still provide prosecutors and the courts the tools to limit fundamental concepts of a free society and freedom of expression.⁵

One of the main changes to the justice system to have come out of the new penal and procedure codes was to provide independence to each public prosecutor. Previously, public prosecutors conducted themselves under the auspices and control of the Ministry of Justice, and there were widespread concerns that they were susceptible to executive influence in how and why prosecutions were brought, undermining the democratic principle of a separation of powers. Granting prosecutors independence was considered to be a way of defeating that problem. However the numerous prosecutions that have been brought which appear to have been politically-motivated, including the present case, have led many observers to

5 KHRP, 'Freedom of Expression and of Association in Turkey' (KHRP: London) November 2005

question whether adherence to the separation of powers has been helped or hindered by this prosecutorial independence. The indictment against Pamuk, for instance, could be interpreted either as a symptom of an individual prosecutor asserting his independence; or of the remaining influence of relationships with the Ministry of Justice; or perhaps as an example of how unelected nationalist groups may have become a source of influence to prosecutors.

The particular provision of the new Turkish Penal Code employed in the trial of Orhan Pamuk, and in the criminal proceedings initiated against others facing the same fate, is Article 301:

‘Public denigration of Turkish character, the Republic or the Grand National Assembly shall be punishable by imprisonment of between six months and three years.

Public denigration of the Government of the Republic of Turkey, the judicial institutions of the State, the military or security structures shall be punishable by imprisonment of between six years and two years.

In cases where denigration of Turkish character is committed by a Turkish citizen in another country, the punishment shall be increased by one third.

Expressions of thought intended to criticise shall not constitute a crime.’

What is immediately apparent from the text is the difficulties which may arise from inconsistent interpretations; what to one prosecutor may be considered as ‘public denigration’, to another may equally be deemed an ‘expression of thought intended to criticise’. The line drawn between the two is indistinct, but the consequences are significant, direct and insidious.

It is of course of great concern that those wishing to express their disquiet in a critical fashion of the national character or its institutions, may find themselves criminalised as a consequence, merely because of their own misjudgement, or the subjective view of the prosecutorial bodies and the judiciary. However, the possibility of the ‘chilling effect’ – the self-censorship of people wishing to avoid the risk of prosecution by simply remaining silent – is another great concern. Both undermine the development of a healthy, flourishing democracy.

Another pernicious feature of article 301 is paragraph 3, which makes Turkish citizens who make allegedly publicly denigrating comments abroad liable to an increased sentence of one third, for supposedly bringing the nation into international disrepute. This was relevant in Pamuk’s case. It is of great concern that at a time when Turkey’s character, its institutions and its government are being subjected to

the level of scrutiny demanded by the EU accession process, its own citizens should be fettered in the way they participate in this process, for fear of facing a criminal charge.

4. Orhan Pamuk

Ferit Orhan Pamuk was born on 7 June 1952 in İstanbul. He is Turkey's leading contemporary novelist attaining both critical and popular acclaim. He has written short stories, a memoir and eight novels, and his work has been translated into more than forty languages. He is also the recipient of major Turkish and international literary awards, such as the International IMPAC Dublin Literary Award and the *Prix Medicis Étranger*. His memoir, *İstanbul*, is currently shortlisted for a number of awards.

As Pamuk's popularity grew, he also became a high-profile figure in Turkey, partly due to his support for Kurdish political rights. His increasing politicisation became most evident in his fiction in 2002, with the publication of *Snow (Kar)*, a political thriller which explores the conflict between Islamism and Westernism in modern Turkey. Set in the eastern city of Kars, the novel is populated by Islamists, secularists, political Kurds, disenfranchised Kurds and the shadows of absent Armenians, who are forced to face the political complexities and contradictions of modern Turkish society.

In February 2005, Pamuk gave an interview to *Das Magazin*, a Swiss publication which is a supplement to the daily newspapers: *Tages-Anzeiger*, *Basler Zeitung*, *Berner Zeitung* and *Solothurner Tagblatt*. In the course of his interview, he stated: "Thirty thousand Kurds and a million Armenians were killed in these lands and nobody dares to talk about it. I do."

Pamuk has said in subsequent interviews that after the Swiss interview was published, he was subjected to a hate campaign which forced him to leave Turkey. Yet, he remained steadfast in his views, stating to the BBC, "What happened to the Ottoman Armenians in 1915 was a major thing that was hidden from the Turkish nation; it was a taboo. But we have to be able to talk about the past."⁶

Reaction to his remarks was characterised by widespread disdain and anger. For

6 Rainsford, S. 'Author's trial set to test Turkey', BBC <http://news.bbc.co.uk/1/hi/world/europe/4527318.stm>. (Last accessed 30 May 2006)

example, Kemal Keriñsiz, leader of the nationalist group the Union of Lawyers, said, “Pamuk is a literary figure, but he made political comments that were ill-informed, untrue and anti-Turkish. We acted on behalf of all society. Orhan Pamuk should not have played with history, and with the sentiments of Turks.”⁷

a. The Charge against Orhan Pamuk

On 30 June 2005, Orhan Pamuk was indicted by the Chief Public Prosecutor, of Şişli, a district of İstanbul, under Article 301 of the Penal Code, for publicly denigrating Turkish national character.

The indictment read, ‘On 9 February 2005, in an interview with a Swiss journalist, the suspect who is a fiction writer made statements such as “We have killed 30,000 Kurds and one million Armenians. Nobody in Turkey dares to say this. I do.” Two months later this interview was published in Swiss newspapers and Turkish newspapers reported it consequently. His statements and the evidence included in the case file prove that the suspect publicly insulted Turkish national identity with his words. Thus the trial and punishment under law number 5237’s article 301 which related to his actions is demanded and claimed.’

The indictment makes no mention of the final qualification of article 401 in paragraph 4, which suggests that expressions amounting to ‘criticism’ rather than ‘public denigration’ are not punishable. The attempt to draw a distinction between criticism and denigration is highly problematic and lacks legal certainty.

If charged, in theory Pamuk faced a possible four-year prison sentence – three years for the primary offence, and a further year for having committed the offence while abroad. In reality, because he had no previous criminal convictions, he was unlikely to have been imprisoned in any event. However, many of the authors, writers, journalists and artists indicted under the article have frequently been the subject of judicial enquiry or criminal conviction before for similar expressions.

More pertinent, however, is the *prima facie* case against the indictment being brought at all. The initiation of the prosecution in itself was not compliant with Turkey’s obligations under international law, in particular the right to freedom of expression and protection from retrospective application of the law (Articles 7 and 10, ECHR). Orhan Pamuk’s comments to *Das Magazin* were made in February 2005, but article 301 of the Turkish Penal Code did not come into force until June of that year. The act of bringing the charge itself therefore breached the ECHR’s protection from

7 *ibid*

retrospective application of the law.

Moreover, article 7 also, 'embodies, more generally, the principle that only the law can define and prescribe a penalty ... and the principle that the criminal law must not be extensively construed to the accused's detriment...; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision, and if need be, with the assistance of the Court's interpretation of it, what acts and omissions will make him liable.'⁸

The wording of Article 301 is so vague and open to such wide interpretation, that it is extremely difficult for the individual to know which expressions will be viewed as criminal, rendering it impossible to know how best to modify behaviour to prevent a criminal charge. There is barely a scintilla of distinction between 'public denigration' and legitimate 'criticism', the terms used to describe the offence and its statutory defence. The lack of clarity of the Ministry of Justice and the prosecutor on how and in which circumstances this article could be applied serve as a practical indicator that the language in Article 301 falls foul of the ECHR principle of certainty.

Freedom of expression is not an absolute right, and carries with it duties and responsibilities. Member states are nevertheless required to justify interference with free expression. In this instance, the charge in itself amounts to an interference with Pamuk's protected human right. Moreover, for the charge to have been justified, it would be necessary to show that that the indictment was laid in accordance with the law, and that it was necessary in a democratic society in the interests 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. It is difficult to see on what basis the interference may be justified.

First, Pamuk's comments were a result of judicious observations of the history of Turkey's human rights record. His right to make remarks of this nature could only be limited or restricted in the most extreme circumstances, and any penalty he faced ought to be justified with utmost scrutiny.

Secondly, the prosecution could not be justified by any of the considerations defined in paragraph of Article 10 ECHR. It is clear that the charge could not be said to be in accordance with the law, falling foul of both the protection of retroactive prosecutions, and the principle of certainty as protected by Article 7.

8 *Kokkinakis v Greece* [1994] 17 EHRR 397

Thirdly, by charging Pamuk, the public prosecutor failed to consider whether the aim of securing a conviction amounted in itself to a breach of the author's human rights. This is particularly disappointing, given the fact that in 2004 the judiciary and public prosecutors have all undergone mandatory training in the law of the European Convention on Human Rights organised by the Turkish Ministry of Justice, in conjunction with the Council of Europe, the UK Department of Constitutional Affairs and the Foreign and Commonwealth Office. The continued prosecution of individuals for innocuous statements clearly demonstrates an inability or unwillingness of public prosecutors to interpret the domestic penal code in conjunction with Turkey's obligations under international law, and in particular the European Convention on Human Rights.

Finally, Pamuk's comments were peaceful and non-inflammatory; they did not encourage or incite violence.⁹ In looking at the Strasbourg Court's approach to so-called provocative statements, it is necessary to analyse whether the language intended to inflame or incite violence; whether there was a risk that it actually might incite violence; whether the author occupies a position of influence which might amplify the impact of his words; whether the publication was given the kind of prominence which would enhance the influence of the statements; and whether the words were spoken near to the epicentre of tension or not.¹⁰

Pamuk's case has similarities with the case of *Ceylan v. Turkey*, where the Court held that the applicant's rights had been violated following his comments that,

"The steadily intensifying State terrorism in Eastern and South-Eastern Anatolia is nothing other than a perfect reflection of the imperialist-controlled policies being applied to the Kurdish people on the international plane... genocide [was] being carried out against Kurds in Turkey... and that an attempt [was] being made to ... gag and suffocate the Kurdish people."¹¹

b. The Legal Proceedings on 16 December 2005 and surrounding events

The first day in the trial of Orhan Pamuk had been listed at the second Criminal Court of First Instance at Şişli, İstanbul on 16 December 2005.

Because of the notoriety of the case, a number of international observers attended,

9 See also *Ceylan v Turkey* [1999] 30 EHRR 73, at paragraph 36.

10 *Ibid* paragraphs 42-46

11 *Ceylan v Turkey*, App.No. 23556/94 European Court of Human Rights, 8 July 1999

including representatives of Human Rights Watch, PEN International, the United Kingdom in the form of Embassy staff and a British MP, a delegation of five members of the European Parliament (including among others, Camiel Eurlings, Feleknaş Uca and Joost Lajendijk) and Embassy staff of a number of other European countries. Additionally, domestic human rights observers including Yusuf Alataş, President of the Human Rights Association [İHD] and representatives of TİHV attended. A number of journalists were also present.

It was noted that the Court made a concerted effort to accommodate the attendance of such a large delegation of international observers and press, by switching the originally designated courtroom to the largest room in the building. This, however, was still too small to accommodate the majority of people who had come to observe and who were compelled to remain in the corridors of the building.

The right to a fair trial includes the right to public proceedings. It is welcomed that the court staff did all that was possible to allow as many as possible into the courtroom to view proceedings, as the public character of criminal proceedings is a crucial means by which confidence in the justice system can be maintained. However, that public confidence emanates first from those whom it affects, namely the people of Turkey. It is regrettable that such was the number of the international delegation, that few members of the general public were able to attend the proceedings. This situation is perhaps mitigated by the fact that members of the press were able to gain access to the courtroom and naturally report to society at large.

The atmosphere outside court before, during and after proceedings was extremely tense and at times extremely volatile. Many people in the crowds, both inside and outside the court building, clearly had nationalist sympathies, and were determined to see that Pamuk was convicted and that ‘justice be done’. The Union of Lawyers, a nationalist group, was represented not only in the proceedings themselves, but also had copious support outside. Altemur Kılıç, a columnist and author on Turkish history, was handing out a press release which purported to be “on behalf of a group of Turkish Nationalists and patriots”.¹²

Inside the courtroom, those representing the Union of Lawyers became involved in volatile arguments with observers, and were clearly intent on using Pamuk’s trial as a means not only of securing a conviction for the author, but also promoting a nationalist agenda. The trial was a forum for a showdown with the EU, and its ‘liberal attitudes’, as lawyers were chanting “Bring in Pamuk, not the European Police”, the term used for the parliamentarians and other observers. By the time Orhan Pamuk himself was led into court by his own lawyers, the atmosphere was extremely intimidating. The observer was informed that as Pamuk made his way

12 See Appendix A

through the crowds assembled outside, a woman stepped forward and struck him with a book.

While in court, the hostile demeanour of lawyers representing a nationalist agenda continued throughout, as they called for the judge to 'protect unity and honour' and to convict Pamuk of the charge.

Effective participation in proceedings lies at the heart of the right to a fair trial. It is incumbent on member states to ensure that those accused of criminal charges are able to participate fully in the proceedings. It is concluded that the behaviour of nationalists both inside and outside the court was designed, among other things, to intimidate the defendant. In this instance, there was grave danger that the accused would have felt extremely intimidated, merely by being present in court. KHRP finds that the judge, court staff and police could have acted with greater authority to quell the hostile atmosphere in which the defendant found himself.

The hearing itself was adjourned after approximately 45 minutes of legal submissions from those acting for Pamuk, those representing nationalist interests, and the public prosecutor.

The defence lawyers had called into question the legality of the indictment, in light of the fact that the offence was alleged to have taken place before article 301 of the Penal Code had come into force, and that the indictment lacked particularity on other aspects of the charge, such as the scene of the offence. The defence argued that the deficiencies in the procedure were clear enough that it was not necessary to adjourn for any clarifications. They called for the charge to be dismissed.

The public prosecutor submitted that the trial be adjourned, arguing that if it were correct that Article 301 could not be applied to the current offence, then it would be necessary to obtain permission to prosecute the defendant from the Ministry of Justice.

The judge acceded to the submission of the public prosecutor and adjourned the trial until 7 February 2006.

After the hearing, the hostile atmosphere continued. A crowd had begun to demonstrate outside the court building, and were vociferous in their chants against Pamuk, calling for him to exile himself from Turkey. Some missiles were thrown.

As various members of the international delegation gave interviews to television news teams, they were jostled. Dennis MacShane, a British MP, was kicked as he spoke to cameras. This observer noted that the perpetrator, clearly identifiable, was allowed by the police to run away from the scene without any attempt being taken

to apprehend him.

Further scuffles occurred. As Pamuk himself emerged from the court building, he was pelted with eggs and his car's windshield was smashed by demonstrators.

It was noted that for an event which had attracted such international and domestic attention, provoking widespread heated debate, it seemed that it was easy to have predicted that the demonstrations would spill over into violence. Yet, the numbers of police deployed to the Şişli Court seemed inadequate. This was striking, given that there are frequently disproportionately large numbers of police and gendarmes at other significant trials in Turkey, compared with relatively few attendees.

Member states have a duty to ensure that everyone has a right to a public hearing. That right is undermined if it is permitted for those attending to observe a trial to be subjected to intimidation tactics by other members of the public. While it is accepted that protection from this type of behaviour cannot be guaranteed, in this instance it is believed that the authorities failed in their duty to prevent intimidation and assaults taking place.

c. The Resolution of the Criminal Proceedings

After the trial had been adjourned on 16 December, the next hearing was due to be heard on 7 February 2006. In the interim, the public prosecutor had stated that he was going to seek permission to prosecute Orhan Pamuk from the Minister of Justice, Cemil Çiçek.

It was widely reported that the adjournment provided officials of the European Parliament and other institutions of the EU an opportunity to put political pressure on the Minister of Justice, in order to ensure that the criminal charges against Pamuk would be brought to a halt.¹³

Çiçek made no comment until 7 January 2006, when he publicly criticised Pamuk for not making timely conciliatory remarks, and hinted that such a move would have prevented his prosecution in the first place. He was quoted as saying, "Why didn't he come out and say 'I never meant such a thing'. He should have said 'I apologise to my nation'. I would do it. I would say 'I am sorry'. I wish he would."¹⁴

It is of great concern that Çiçek made these remarks. Such a stance reveals a

¹³ *Turkish Daily News*, 7th January 2006

¹⁴ *Ibid*

wholesale misunderstanding as to why Pamuk ought not to have been prosecuted in the first place; it demonstrates a disregard for the human rights of the individual; a misunderstanding of the right to freedom of expression; and as it was coming from a position of authority, showed an irresponsible attitude to the modernisation of the justice system.

However, significant progress was made on 22 January 2006. The Justice Ministry announced they had no authorisation to open a case in the frame of the new Turkish Penal Code (TCK).¹⁵ The Ministry reportedly sent a notice of permission on the Pamuk case to the Şişli Court of Second Instance. In the notice, the Ministry stated they no longer have the authorisation in such instances in accordance with the TCK. As a result, the Ministry left the decision of whether to proceed with the trial to the court and the following day, Pamuk's lawyer, Haluk İnanıcı, subsequently confirmed that charges had been dropped.¹⁶

While KHRP welcomes the fact that the charges were dropped, it is regrettable that such a result appeared only to be achieved by significant pressure from the EU and other elements of the international community; coerced resignation on the part of the Turkish judicial system.

d. Conclusions

The trial of Orhan Pamuk revealed some worrying socio-political and legal trends which may hinder the aspirations of the Turkish Republic as she attempts to gain momentum towards accession to the EU.

The first concerns a continued deep-seated reluctance in society to tolerate dissonant points of view. Discussions of the Kurdish issue or the Armenian issue, in particular, remain taboo topics, which present major obstacle to proper and full debate. The fact that Pamuk's remarks were not only seen by some quarters as insulting but also as 'morally wrong' shows how difficult it is for those holding different points of view to engage in any kind of useful dialogue.¹⁷

Second, while the granting of independence to prosecutors in order that they can conduct their role outside the control of the Ministry of Justice should in the main be welcomed, it is important to recognise that decades of institutional dependence cannot be unravelled overnight.

15 www.zaman.com/?bl=national&alt=&trh=20060123&hn=28943

16 www.guardian.co.uk/worldlatest/story/o,-5564250,00.html

17 See Press Release of Altemur Kılıç at Appendix

Articles 12 and 13 of the UN Guidelines on the Role of Prosecutors states,

'12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;'

Clearly, the guideline that prosecutors should uphold human rights must include refraining from charging individuals where such a prosecution in itself would breach that person's freedom of expression.'

There is concern that the prosecutor in this case was not impartial, in particular of the complaints of organised nationalist groups.

Third, further examination is needed of underlying causes which lead to breaches of the European Convention on Human Rights or its non-implementation domestically. KHRP believes Pamuk's indictment to represent a *prima facie* breach of the ECHR.

Fourth and perhaps most pervasively, as the journalist and author Chris Morris has suggested, it may be that Pamuk was targeted for prosecution in order to facilitate a backlash against the EU, which Turkish nationalists perceive as being a meddler in the country's domestic affairs.¹⁸ It was apparent from the proceedings that Turkish nationalists and certain EU officials were utilising the 'international stage' and the celebrity of the accused to further their particular political aspirations. The fact that Pamuk was caught in the middle of this showdown is an unfortunate by-product of the continuing political dance surrounding Turkish-EU accession.

Turkish citizens should feel able to debate the question of joining the EU, in a mature, democratic manner, without facing the risk of criminal prosecution. However, this trial shows that a significant section of Turkish society evidently feels that the accession process is being imposed on them, at their exclusion. Consequently, the question of accession was reduced simply to an issue of sovereignty vs. hegemony, rather than there being an acknowledgement of its true complex and multi-faceted nature.

18 Chris Morris, author of 'The New Turkey', *Granta* 1995, in a lecture given at the Royal Geographic Society, 16th January 2006

5. Other Prosecutions

a. Fatih Taş

Fatih Taş is the owner of Aram Publishing House, a publishing company with a commitment to publishing works representing a pluralistic range of beliefs and opinions that are “necessary for democratisation and which serve the community”.¹⁹

Taş has already attracted some notoriety in 2002 for publishing Noam Chomsky’s ‘American Interventionism’, which offended some quarters. He was prosecuted, but when Chomsky himself appeared as a defence witness, the prosecutor submitted a plea to the judge that Taş be acquitted. However, mere acquittal did not bring an end to his problems. Taş was suspended from university during the proceedings, thus postponing completion of his degree.

Currently, he faces indictments for three books that Aram has published. The first, a memoir of a family whose son was disappeared in 1994 entitled ‘They Say You are Missing’ has already led to a conviction and six months prison sentence. Taş is currently appealing his conviction and sentence at the Court of Appeal (*Yargıtay*). The book, published in April 2004 tells the story of Nazım Babaoğlu who was kidnapped on 12 March 1994 and who subsequently disappeared.

The second is a translation of ‘Spoils of War: The Human Cost of America’s Arms Trade’, by John Tirman (current Executive Director of the Centre of International Studies at the Massachusetts Institute of Technology) which discussed the transfer of weapons to Turkey from the US that were employed in turn against Kurdish civilians in addition to guerrillas. The indictment charges him under article 301, for ‘publicly denigrating Turkish character, the Republic and the Grand Turkish Assembly’, ‘insulting the security forces’ and, under a Statute 5816, for ‘insulting the memory of Kemal Atatürk’.

19 KHRP Interview with Fatih Taş, 16th December 2006, İstanbul

Tirman and Taş describe the book as 'legitimate criticism', a defence that is allowed in paragraph 4 of Article 301, yet the delineation between the critical and the criminal remains an obscure one as far as publishers are concerned. For Taş, there is no way to predict which books are going to invite the opprobrium of the prosecutors office, and which will be allowed to adorn the booksellers shelves. Article 301 lacks any kind of clarity which would help him avoid prosecutions.

The third is 'Confessions of a JİTEM member', which tells of assassinations, intimidating tactics and surveillance employed by JİTEM in the 1990s against politically motivated members of the Kurdish community in the region.²⁰

Aram, as a house policy, is careful not to publish anything which glorifies war or condones violence. Yet, of the war in the Kurdish region for example, it recognises that the mainstream press takes an unquestioningly sympathetic line with the Turkish army. Therefore, Taş considers that it is important to publish a different point of view, without celebrating terrorism.

KHRP considers the multiple prosecutions of Fatih Taş to constitute intimidation and harassment, and a breach of the right to freedom of expression. It urges the authorities to discontinue the outstanding case.

b. Hrant Dink

Hrant Dink is the editor of AGOS newspaper, published in İstanbul in both Turkish and Armenian. He is a Turkish national of, as he puts it, Armenian extraction. AGOS currently has a circulation of approximately 6000 copies per week, of which 2000 reach the Armenian Diaspora. He sees himself as a political moderate.²¹

He currently faces two prosecutions under articles of both the old and new penal codes, which limit freedom of expression, and is subjected to several other investigations.

On 13 February 2004, he wrote an article stating that, 'The fresh blood to replace the poisoned blood the Turk would bleed out, exist in the noble vein of the Armenian that he would form with Armenia,' and as a consequence he was charged under article 159 of the previous Penal Code for 'denigrating Turkish character'. He was convicted and sentenced to a six-month prison sentence, which was suspended on the grounds that he had no previous convictions and the unlikelihood that he would

20 Jandarma İstihbarat Teşkilatı (Turkish Gendarmerie Intelligence Agency)

21 Interview with Hrant Dink at the offices of AGOS Newspaper, 17th December 2006

commit further offences. The appeal against conviction and sentence is ongoing.

However, he is under investigation for an interview he gave to *Star* newspaper, when he was asked to comment on his conviction. He expressed his feeling that, “They did not understand,” what he had been trying to say. This comment led to an investigation of his liability on charges of ‘insulting the judiciary’ under Article 288.

In addition, there is a pending prosecution dating back to events in February 2002. Dink appeared at a conference held in Urfa, named ‘Global Security, Terror and Human Rights, Multiculturalism, Minorities and Human Rights’. At the conference he stated, “I like the ‘I am honest, I am industrious’ part of the national oath and I say it out loud. As for the ‘I am Turk’ part, I try to conceive it as ‘I am from Turkey.’”²²

As a result, he has been charged under Article 301 of the penal code, although the alleged offence took place three years before that article came into force. This charge violates Articles 7 and 10 of the ECHR.

In addition, Dink and other AGOS journalists are facing investigations for their coverage of a controversial conference.²³

What is clear that Dink, as an advocate of human rights and multiculturalism, who aims to promote the civil, political and cultural rights of ethnic Armenians and other minorities, has faced harassment as a result. It was apparent to this observer, that when he attended the Pamuk trial, he was subjected to special and virulent adverse attention from hecklers in the demonstration, who perceive him to be an enemy of the state.

Dink’s experience demonstrates the insidious way in which multiple charges can accumulate and expose journalists to a real risk of imprisonment.

c. Professors Ibrahim Kaboğlu and Baskin Oran

In a bid to deal with Turkey’s ever-criticised record, Prime Minister Erdoğan established the Human Rights Advisory Board, upon which experts would be seconded to report on particular human rights issues. Professor Ibrahim Kaboğlu

22 *Ibid.*

23 Taner Akçam, Aydın Engin, Sarkis Seropayan, Arat Dink and Hrant Dink (Jr). (See section d - Armenian Genocide Conference)

and Professor Baskin Oran were invited onto the Advisory Board in order to report on the vexed question of the status of minorities and cultural rights, a highly controversial area, dating back to the definitions stipulated in the Treaty of Lausanne in 1923 at the inception of the Republic and whose rigidity is at the core of cultural and the political tensions in Turkey.

The Professors reported to the Advisory Board, and in their recommendations, suggested inter alia that the 'Constitution of the Republic of Turkey and all related laws must be rewritten so as to have a liberal, pluralistic and democratic content and with the participations of all organisations of civil society', and that 'the rights of people with different identities and culture to protect and develop their identities (such as the rights of publication, self-expression and education) based on equal citizenship should be guaranteed.'

For their trouble, the scholars were charged under articles of the Penal Code which criminalise 'inciting the people to enmity and hatred' along with the 'open denigration of the judicial organs of the State' under a combination of articles under the old and new penal codes.

At their trial on 9 February 2006 at Ankara 28th Criminal Court of First Instance, the Professors were acquitted of all charges. Nevertheless the charges should not have been brought at all, given the peaceful and non-violent expressions of opinion the professors had made.

d. The 'Armenian Genocide Conference'

The Armenian genocide is fertile ground for writers, historians and journalists. Relations between Turkey and Armenia show no sign of thawing. On the other hand, Armenian lobbyists are being ever more inventive in their attempts to have the world and Turkey formally recognise the wholesale killings of Armenians in 1915 as genocide. For example on 16 January 2006, descendants of Armenians who died in Anatolia in the First World War commenced an action in Los Angeles State Court against Deutsche Bank and Dresdner Bank for retaining funds deposited by their ancestors between 1875 and 1915. Of course, their primary aim is to draw attention to the atrocities.

For much of 2005, academics had attempted to hold a conference at Bilgi University in İstanbul, entitled 'Ottoman Armenians During the Decline of the Empire: Issues of Scientific Responsibility and Democracy', whose self-avowed goal was to debate the official Turkish account of events, which has referred to the scale of killings as an unfortunate fallout of the conflict.

However, Government intervention prevented the conference from proceeding with the Minister of Justice Cemil Çiçek accusing those associated with the conference of treason and 'stabbing Turkey in the back'.²⁴ Days before the Turkey was scheduled to hold talks with EU officials on accession, Prime Minister Erdoğan intervened again, allowing the conference to go ahead in September. On the eve of the conference, the nationalist group the Union of Lawyers successfully brought an injunction preventing the conference from starting, on the grounds that a public university is not an appropriate forum for such a 'partisan' debate.

The ruling provoked another furore in the press. As a result, Bağcılar Public Prosecutor Ali Çakır initiated a prosecution against five notable and well-regarded broadsheet journalists (İsmet Berkan, Murat Belge, Haluk Şahin, Hasan Cemal and Erol Katırcıoğlu of *Milliyet* and *Radikal* daily newspapers) for 'humiliating the judiciary' and 'attempting to influence the judicial process'. Hasan Cemal, for example, had written that, 'this decision has nothing to do with law or democracy ... it is a decision that defies law and academic freedom ... it is a blow to freedom of expression'.²⁵ Murat Belge deplored the fact that, "The one who is defined as serving out justice begins transgressing justice."²⁶

Again the complainant was Kemal Kerinçsiz of the nationalist group the Union of Lawyers. The journalists faced between six months and ten years imprisonment.

The hearing against the five journalists began on 7 February and as with the trial of Orhan Pamuk, the presence of international observers caused one of the plaintiffs, Hanefi Aktas, a nationalist lawyer and member of a jurists' organisation, to accuse presiding judge Muhterem Bulut of being a traitor and of backing European deputies, strongly opposed to the trial. Security forces intervened and removed him from the court. After several hours, the hearing was set for 11 April 2006, on which date the charges against four of the journalists were dismissed, as prosecution had failed to bring indictments within the deadline allowed. The case against the fifth journalist, Murat Belge, who was facing a sentence of 10 years, continued until 9 June 2006 when he was acquitted as the charge exceeded the statute of limitations.

According to the Turkish press freedom organization Bia, the prosecutor who brought the indictment at the prompting of the nationalist Turkish Union of Lawyers is still pursuing charges against all five journalists in the Court of Appeals.

24 'Turks Cause Worldwide Outcry By Canceling Genocide Conference' By Harut Sassounian Publisher, The California Courier, 6 September 2005

25 Picture of Freedom of Expression in Turkey, Initiative for Freedom of Expression, İstanbul

26 *Ibid*

e. İrfan Uçar and Yeniden Ülkede Gündem

A total of 650 issues of the *Yeniden Ülkede Gündem* newspaper (the latest incarnation of *Özgür Gündem*) have been published.²⁷ Out of those there are currently 402 outstanding prosecutions pending. Columnist İrfan Uçar has also been singled out for prosecution.

Uçar has a weekly column in which he discusses events and issues from the Kurdish region in the south-east of Turkey. Many of the prosecutions that Uçar faces relate to the coverage of the instances of human rights abuses which have risen dramatically since hostilities resumed between the PKK and the Turkish army in 2004. For example, *Yeniden Ülkede Gündem* has covered the discovery of mass graves outside Diyarbakır thought to date back to disappearances of Kurds in the 1990s; the revelations of a former officer of the intelligence arm of the JITEM confessing to official assassinations of Kurdish politicians; and the gendarmes' shooting of a father and son, mistakenly believing them to be armed separatists.

Yet, it is not just his coverage of the historical stories which has aggravated the authorities. Uçar has noticed an increase in the frequency that his offices are raided by police arising from his investigations into current state abuses. Uçar attributes this to the newspaper's coverage of the recent tragic events in Şemdinli.

On 7 November 2005, a scandal of proportions not known since the height of hostilities in the mid-1990s hit the headlines. In Şemdinli, a town in the Hakkari district close to the Iraqi border, a bookshop was firebombed, and the owner of the bookshop, alleged by the authorities to be a former PKK operative, was killed. As the perpetrator attempted to run for his getaway car, he was mobbed by passers by in the crowded street. It was soon discovered that the driver and passenger in the car were gendarmes and bomber was a former PKK guerrilla. The boot of the car was filled with documentary intelligence that JITEM hold on suspected terrorists. The episode generated fresh pessimism of the Kurdish issue ever being resolved if the authorities were still resorting to such dirty war tactics.

Uçar has been covering the official investigation, instigated by Prime Minister Erdoğan himself, and has been critical of its leisurely progress. On 14 December the offices of *Yeniden Ülkede Gündem* had been raided, itself not an unusual occurrence. However, it is extremely telling that the material which the police had been searching for was information that Uçar and his colleagues had collected about the Şemdinli

²⁷ *Özgür Gündem* was the first Kurdish language newspaper ever to be published in Turkey. Journalists, owners, publishers and even newspaper boys involved with the newspaper faced frequent human rights abuses, including extra-judicial killings, torture and harassment. KHRP successfully took a case on behalf of the newspaper to the European Court of Human Rights. For further information see KHRP, 'Özgür Gündem v. Turkey: Violations of Freedom of Expression' (2001)

Incident²⁸

These events portray the tight synthesis between the rise of hostilities, sensitivities about the manner in which State actors attempt to quell violence in the region and greater restrictions on freedom of expression. As Professor Kabođlu says, “The two issues are bound together. Where violence rises, freedom of expression is suppressed, and when freedom of expression is suppressed, this in turn breeds violence.”²⁹

28 Interview with İrfan Uçar, 15th December 2005

29 Interview with Professor İbrahim Kabođlu, Marmara University, 16th December 2006

6. Conclusion

In the past four years, the Turkish government has introduced a raft of legal reforms designed to assist in the harmonisation of its laws with those of the EU. KHRP and the international community at large have welcomed those reforms.

However, as has been seen by the recent prosecutions which have severely restricted the freedom of expression of writers, publishers, academics and journalists, not to mention countless others against cartoonists, poets and singers, the amendment to the statute book alone will not lead to a fundamental change in a legal culture.

The use and abuse of Article 301 of the new Penal Code has undoubtedly demonstrated how even a combination of factors, such as new laws, human rights training, independence of prosecutors may not in themselves bring about a sufficient shift in attitude which will allow views and counter views to be debated, without fear of criminalisation. KHRP urges the immediate repeal of Article 301, and for it to be replaced with an article limiting prosecution to expressions which incite, condone or promote violence. The law should be drafted with sufficient clarity that citizens are able to modify their behaviour accordingly.

Further, it is one of the hallmarks of a mature democracy that it can come to terms with its own history, however recent or distant. The constant thread which has run through all of the prosecutions referred to in this report has related to a tension between those seeking to preserve the notion of the Turkish Republic and those people or peoples who may seek to challenge it, whether they be Armenians seeking recognition for the 1915-17 genocide, Kurds wanting recognition of cultural and political identities, or those legitimately questioning the rigidity of a Constitution drafted over eighty years ago. Until discussion of these issues, amongst many others, is allowed to flourish, then there will continue to be very real, practical impediments to Turkey's democratisation (including a return to a peaceful, political process in the Kurdish region) and ultimately to its aspirations to accede to the EU.

The trial of Orhan Pamuk demonstrates just how necessary continuous efforts are to democratise the country.

Appendix A:

The Indictment against Orhan Pamuk

REPUBLIC OF TURKEY
SISLI CHIEF PUBLIC PROSECUTOR'S OFFICE
PREPARATION NUMBER: 2005/29817
BASIC NUMBER: 2005/8059
INDICTMENT NUMBER: 2005/5436

INDICTMENT
2nd. CRIMINAL COURT of FIRST INSTANCE- SISILI

PLAINTIFF : PUBLIC LAW

INFORMANTS : 1- SEBAHATTİN ZORLU, convict in Kırklareli Central F Type
Prison
2- MEHMET ÖZET, Address: Hacı Saki Mah. Hastahane Cad. Tekbir
Apt. Kat 1 Kayseri

INFORMANTS' COUNSEL : LAW. GÜLSER ÜÇÖK, MEHMET ÜÇÖK, İstasyon Cad.
Fazlı İş Merkezi 7. Kat No: 701 Kayseri

SUSPECT : FERİT ORHAN PAMUK, descendant of Ali Gündüz and Emine
Şeküre Gültekin, born in 1952, in Istanbul. Registered in Istanbul, Şişli,
Harbiye registration office. Teşvikiye Cad. No. 35/17 Şişli

CRIMINAL OFFENCE : PUBLICLY INSULTING TURKISH NATIONAL
CHARACTER

DATE OF CRIME : 09.02.2005

LOCATION OF CRIME : Teşvikiye Cad. No: 35/17 Nişantaşı Şişli

LAW NUMBER. : NUMBER 5237 ARTICLE 30/1

PREPARATION DOCUMENT EXAMINED.

On the day of the event, in an interview with a Swiss journalist the suspect who is a fiction writer made statements such as "We have killed 30.000 Kurds and 1 million Armenians. Nobody in Turkey dares to say this. I do." Two months later this interview was published in Swiss newspapers and Turkish newspapers reported it consequently. His statements and the evidence included in the case file proves that the suspect publicly insulted Turkish National identity with his words thus his trial and punishment under the law number 5237 article 30/1 which relates to his actions is demanded and claimed. 30.06.2005

Appendix B:

Press Release of Altemur Kılıç

1

FOR RELEASE AFTER 10 A.M.
DECEMBER 13, 2005
THE ORHAN PAMUK CASE

Today, Friday 16 December 2005, the trial of Orhan Pamuk, the famous, best selling novelist, starts in Istanbul, Sisli, at the Criminal Court of First Instance. The Public Prosecutor of Republic, in his indictment, has accused him, of “publicly denigrating the Turkish identity”, because of his statement in an interview with a Swiss newspaper last February, when he said that “a million Armenians and 30.000 Kurds, were killed” presumably by Turkey. Although Mr. has tried since to obfuscate his statement, he has not withdrawn his claims, on the contrary he has tried to justify them.

At a time when both the Armenian arguments that Turkey had committed the crime of genocide in 1915, and when terrorist attacks killing innocent Turks, soldiers and police daily, for the purpose of disintegrating our country= a Turkish writer’s scratching these open wounds is morally wrong, especially when his expertise and knowledge about history and these issues are at best doubtful.

What ever the foreign criteria and liberal attitudes , concerning freedom of expression etc., according out traditional value judgments Orhan Pamuk’s statements are unacceptable and has rightly drawn public anger, Under the Turkish Penal Code , “ debasing e and denigrating the Turkish identity”, is a crime , punishable by imprisonment for 3 to 6 years. The public Prosecutor has done his judicial duty by opening the case.

Furthermore he should also be tried for aiding and abetting terrorism.

Being a “best selling, world famous author”, should not give Pamuk or any other person, special a Turk, immunity from prosecution. Especially when Pamuk says that he stands behind his original claim and even says that it is

shameful to live "in such a country" he should be duly tried and punished according to the spirit and letter of the law.

The trial which we hope to start today will be the trial of Orhan Pamuk and not the trial of Turkey or the Turkish people. Turkey and its people are much more valuable than Pamuk.

On behalf of a group of Turkish nationalists and patriots, both on the left and the right = ALTEMUR KILIC – Columnist, author of books on Turkish history and the Kurdish problem – Phone [REDACTED] – GSM [REDACTED]

ISBN 1900175967



9 781900 175968