

# **Publishers on Trial: Freedom of Expression in Turkey in the Context of EU Accession**

## **Trial Observation Report**

**May 2007**

Kurdish Human Rights Project  
**KHRP**  
Established 1992



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







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EXPRESSION IN TURKEY IN THE CONTEXT  
OF EU ACCESSION

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Kurdish Human Rights Project is an independent, non-political human rights organisation founded and based in London, England. A registered charity, it is dedicated to promoting and protecting the human rights of all people in the Kurdish regions of Turkey, Iraq, Iran, Syria and elsewhere, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include Kurdish and non-Kurdish people.



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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 BHRC extends to all countries of the world, apart from its own jurisdiction of England & Wales.





## CONTENTS

FOREWORD.....	9
EXECUTIVE SUMMARY .....	11
PART ONE - FREEDOM OF EXPRESSION IN TURKEY .....	13
A. Background.....	13
B. The Pro-EU Reform Process .....	14
C. The Present Situation .....	15
PART TWO - THE TRIAL AND ITS ORIGINS .....	19
A. The Right to a Fair Trial.....	19
B. The Defendant.....	21
C. Ahmet Kahraman.....	22
D. The Case .....	23
E. The Hearing of 14 <sup>th</sup> February 2007.....	24
F. Analysis of the Trial .....	25
PART THREE - OTHER PUBLISHERS ON TRIAL.....	27
A. Fatih Taş, Aram Publishing House .....	27
B. Ahmet Önal, Peri Publishing House.....	28
C. Ali Rıza Vural, Doz Publishing House .....	29
PART FOUR - FREEDOM OF EXPRESSION WITHIN THE FRAMEWORK OF TURKEY'S CANDIDATURE FOR EUROPEAN UNION MEMBERSHIP.....	31
CONCLUSION AND RECOMMENDATIONS.....	35
APPENDIX A: The indictment against Songül Özkan .....	39
APPENDIX B: Turkey's Obligations Under International Law.....	41



## FOREWORD

*‘Open debate has increased in recent years in Turkish society on a wide range of issues. Notwithstanding this trend, freedom of expression in line with European standards is not yet guaranteed by the present legal framework.’*

The European Commission,  
Turkey 2006 Progress Report, November 2006

Throughout Turkey’s journey towards membership of the European Union, the right to freedom of expression has proven to be a key issue in the relationship between Turkey and the European Union. The Union has repeatedly stressed the importance of freedom of expression, calling for Turkey to bring its legislation in line with European standards. In response, the Turkish government has continuously stressed its commitment to reforms, instigating a series of legislative amendments intended to liberalise the legal system so as to allow non-violent expression of opinion.

Despite these developments, concern remains in relation to freedom of expression in Turkey. Writers, publishers, intellectuals and others expressing dissenting opinions continue to be subjected to harassment and persecution. To this end the Penal Code has been used to suppress legitimate debate.

In the light of these developments, KHRP and BHRC sent a mission to observe the trial against publisher Songül Özkan. Özkan faces charges relating to the former Penal code for ‘openly inciting people to hatred’ by publishing the book *Kürt İsyanları* (Kurdish Uprisings), written by Kurdish journalist and author Ahmet Kahraman.

The trial began in İstanbul on 17 November 2003, and remains ongoing. The report places the trial in the context of Turkey’s accession process to the European Union. In this regard the mission members Rajesh Kumar Rai and Morten Thorsted met with and interviewed publishers facing similar charges and civil society representatives in order to exchange information and assess the present situation of freedom of expression in Turkey in the wider perspective of the EU accession process. The mission further requested a meeting with the presiding judge but it was declined.

Unfortunately, the findings of the mission only reconfirmed the concerns of KHRP and BHRC about the current situation of freedom of expression in Turkey. The initiation of the trial is illustrative of the generally repressive atmosphere which publishers are currently facing in Turkey, and the court proceedings revealed violations of Turkey's obligations under international law, including the right to a fair trial.

Kerim Yildiz  
Executive Director, KHRP

Mark Muller  
President, BHRC

## EXECUTIVE SUMMARY

Part one of this report provides a background analysis of the situation surrounding freedom of expression in Turkey. It outlines the present situation in Turkey, details the EU accession process and provides the framework for the analysis which follows.

Part two contains a narrative of the background of the trial of publisher Songül Özkan including the hearing of 14 February 2007 together with an analysis of the court's decision.

Part three examines information received during mission meetings with publishers facing similar charges and civil society representatives. It places the trial in a wider context of recurring attacks against freedom of expression in Turkey. In this regard the report analyses the situation of publishers in Turkey and outlines the factors which impede their right to free speech.

Part four examines the present situation in Turkey regarding freedom of expression in the context of the EU accession process and contains the mission's preliminary findings. Worrying information received during the mission indicates that, as a result of the EU accession process, a trend has emerged under which ultra-nationalism, racism and ethnic hatred is on the rise in Turkey. This part contains an analysis of the situation in which publishers, writers, human rights defenders, and others representing dissenting opinion, find themselves subjected to campaigns of harassment and intimidation instigated by anti-democratic forces operating from within the Turkish state apparatus.

Part five contains the mission's conclusion and sets out recommendations for Turkey, the EU and the Organization for Security and Co-operation in Europe (OSCE). It is important that the integrity of the principle of freedom of expression is upheld throughout the accession process, and is not corrupted through an insidious application of freedom of expression laws by anti-democratic forces within the Turkish state apparatus. Turkey must honour the obligations which follow from the accession procedure and its membership of the OSCE in order to guarantee freedom of expression and independence of the media. In this regard it is vital that the EU and the OSCE closely monitor the reform process in Turkey and the situation surrounding freedom of expression. Thus, the report concludes by recommending that the EU and the OSCE must act accordingly if and when

violations of the principle occur, in order to ensure that the right to freedom of expression, including the independence of the media, is safeguarded in Turkey.

## PART ONE - FREEDOM OF EXPRESSION IN TURKEY

### A. Background

The modern Turkish state was founded in 1923 on the principles of secularism and nationalism. This strong legacy of nationalism and secularism has bred widespread adherence to the overarching idea of an ethnically homogenous Turkish nation in which all citizens are ‘Turks’ and where the expression of identities conflicting with this notion are not tolerated. Any action appearing to question, criticise or denigrate this notion of a unified Turkey has therefore been vigorously suppressed by an authoritarian regime dominated by the Turkish military and the country’s reactionary elite, favouring the protection of the state against the individual, thus rejecting liberal democratic ideas.

Further, evidence collected by KHRP and BHRC over the last 15 years during numerous trial observations and fact-finding missions show that ‘deep state’ actors operating from within the Turkish state apparatus have continuously attempted to sabotage any democratic initiative or reform.<sup>1</sup> The trial against publisher Songül Özkan represents yet another example of this trend. Legislative restrictions on freedom of expression, including publishing and the media, designed to prevent dissenting opinion, discussion of politically ‘taboo’ subjects, and criticism of state institutions, have frequently been utilised in an effort to preserve *status quo*.

Provisions of the former Turkish Penal Code and the former Anti-Terror and Press Laws accordingly imposed limitations on press freedom and publishing, and established penalties for ‘crimes’ including insulting the state, its institutions or the military; aiding and abetting an illegal organisation; and inciting people to enmity or hatred based on class, racial, religious, confessional or regional differences.<sup>2</sup> These provisions were employed unremittingly by the Turkish authorities in order to prosecute and penalise non-violent and dissenting opinions, including pro-

1 The term ‘deep state’ (Turkish: *derin devlet*) refers to an influential and informal anti-democratic coalition within the Turkish political system, composed of high-level elements within the Turkish military, security and intelligence services, the judicial branch, and key leaders of organised crime movements. The notion of ‘deep state’ is similar to that of a ‘state within the state’, and the phenomenon has been observed in Turkey since the early 1970s.

2 The former Penal Code, initially adopted in 1926 and subsequently amended several times, was replaced by a revised code as of 1 June 2005. The former Press Law was amended in 2004 and the former Anti-Terror Law in 2005. Songül Özkan stands trial under Article 312 of the former Penal Code for ‘inciting people to hatred’.

Kurdish advocacy. Further, the anti-democratic legislation has overseen the closure of publishing houses and journals, and the imprisonment of dozens of journalists, writers, publishers and academics airing views on subjects considered by the state as being contentious.

## **B. The Pro-EU Reform Process**

In 1993, at the Copenhagen Council, the European Union took a decisive step towards enlargement, agreeing that ‘the associated countries in Central and Eastern Europe that so desire shall become members of the European Union.’ The membership criteria, also known as the *Copenhagen Criteria*, require of the candidate country that it must achieve the ‘the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’ before a decision to open accession negotiations can be reached.<sup>3</sup> Thus, the Criteria comprise the rules which define whether a country is eligible to join the European Union.

At the 2002 Copenhagen summit, EU leaders agreed to open accession talks with Turkey ‘without delay’, provided that the country was deemed to have made sufficient progress on democracy, human rights and legal reform. Hence, in October 2004 the European Commission concluded that Turkey had ‘sufficiently fulfilled’ the criteria set out by the Copenhagen Council in 1993, and on the basis of this assessment, the European Council decided to formally open accession negotiations with Turkey. Formal accession negotiations were opened on 3 October 2005.<sup>4</sup>

The Council’s decision to open accession negotiations with Turkey was heralded by an unprecedented programme of reforms designed to bring Turkey’s domestic laws in line with relevant EU legislation. Restrictions on freedom of expression have proven to be one of the EU’s principal concerns regarding Turkey’s human rights record, and consequently a series of political reform packages relating to this area have been introduced since 2001. Of particular importance in this regard were the amendments of the articles of the Turkish Constitution relating to freedom of expression (Articles 28-31), removing prohibitions relating to minority languages; the adoption in 2004 of a new Press Law replacing prison sentences for ‘press crimes’ with fines and restricting the power of the authorities to close down media outlets and publishing establishments; the amendment of the Anti-Terror Law and

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3 The political criteria set by the Copenhagen Council in 1993 have subsequently, for the most part been enshrined in article 6 (1) of the Treaty of the European Union and proclaimed in the Charter of Fundamental Rights.

4 For the Commission’s conclusion see European Commission, ‘Regular Report on Turkey’s progress towards accession’, Brussels, 6 October 2004. For the Council’s decision to open negotiations with Turkey see Brussels European Council 16-17 December 2004, Conclusion of the Presidency.



the revision of the Penal Code. The reform process remains ongoing and to date nine harmonisation packages have been enacted by the Turkish Parliament.

### **C. The Present Situation**

The harmonisation packages have reduced the formal role of the military in the Turkish administration by abolishing the military-influenced State Security Courts. Consequently, the reforms introduced since 2001, and the abolition of the State Security Courts in 2004, have heralded a reduction in the number of prosecutions and convictions in cases related to freedom of expression. The positive developments are, however, marred by continued examples of Turkey's failure to tolerate the expression of non-violent dissenting viewpoints. In particular the new Penal Code is illustrative of the problems which remain in relation to freedom of expression, despite reforms.<sup>5</sup>

The revised Penal Code came into force on 1 July 2005, having been delayed twice owing to concern from the EU that the attempts to make progress on the issue of freedom of expression had not been achieved. Despite having been amended as part of the EU access process, some of the most controversial Articles of the former Penal Code, for example Articles 159 [insult of 'Turkishness'] and 312 [incitement to hatred], reappear in almost identical form in the revised Penal Code as Articles 216 [incitement to hatred] and 301 [denigration of 'Turkishness'].

Hence, despite revision, the Penal Code continues to provide prosecutors and the judiciary with the tools necessary in order to limit fundamental concepts of a free society and freedom of expression. Consequently, trials are repeatedly launched against journalists, writers, publishers and academics, who air dissenting opinion or engage in advocacy for minority rights.<sup>6</sup>

Cases relating to freedom of expression are mainly brought under the following Articles of the new Penal Code:

Article 216 [former Article 312] which states that:

1. Anyone who openly incites sections of the population to enmity or hatred towards another group on the basis of social class, race, religion, or sectarian or regional difference, in a manner which may present a

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5 Mission interview with Şaban Dayanan, General Rapporteur, Human Rights Association of Turkey (IHD), 13 February 2007, İstanbul.

6 Mission interview with Kamil T. Sürek and Devrim Avcı, human rights lawyers, 14 February 2007, İstanbul.

clear and imminent danger in terms of public safety shall be sentenced to imprisonment of from one to three years.

2. Anyone who openly denigrates a section of the population on grounds of their social class, race, religion, sectarian, gender or regional differences shall be sentenced to imprisonment of from six months to one year.

3. Anyone who openly denigrates the religious values of a part of the population shall be sentenced to imprisonment of from six months to one year, where the act is sufficient to breach public peace.

Article 216 of the revised Penal Code appears almost identical in its formulation to that of the Article 312 of the former Penal Code. Article 312 was one of the most widely used of the panoply of legal tools available to the Turkish state for silencing dissenting opinion. Article 312 was problematic less as a result of its content but rather because of its illogical and arbitrary application by the Turkish judiciary.<sup>7</sup>

Article 312 was amended in 2002 as a result of the EU accession reform process. The 2002 amendment mandated that an act would only amount to a violation of Article 312 if it caused 'a clear and direct danger to public order'. This condition, which was reiterated in Article 216 when the Penal Code was amended in 2004, has seen a growing number of acquittals in cases brought under Article 312, subsequently Article 216. However, article 216 [312] remains problematic as the myriad of prosecutions in violation of freedom of expression, which have been and continue to be brought under it, point to its interpretation by the Turkish authorities and judiciary in a way which does not accord with human rights principles.

Article 301 [former Article 159] states that:

1. Public denigration of Turkishness, the Republic or the Grand National Assembly of Turkey shall be punishable by imprisonment of between six months and three years

2. 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 months and two years.

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

4. Expressions of thought intended to criticize shall not constitute a

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<sup>7</sup> Ibid.

crime.

Upon reading the Article it immediately becomes clear that difficulties may arise from inconsistent interpretations by prosecutors and the judiciary. As pointed out by Hüsni Tuna, Chairman of Lawyers Association, during a mission interview; what to one prosecutor or judge may be considered as ‘public denigration’, to others may equally be deemed ‘expressions of thought intended to criticize’. This potential inconsistency of the application of the Article fails to meet the precision and clarity requirements governing criminal law, most notably the rule of law and the principles of legality and certainty.<sup>8</sup>

The 3<sup>rd</sup> harmonisation package introduced an addition to Article 159, providing that ‘written, oral or visual expressions of thought made only for criticism, without the intention to insult or deride the bodies or institutions...do not require a penalty’. This, in theory, allowed for criticism of the state and its institutions, something which had previously been forbidden. When the Penal Code was amended in 2005, and Article 159 was replaced by Article 301, a section was included, stating that ‘expressions of thought intended to criticize shall not constitute a crime’. This was in order to bring Article 301 in line with the Jurisprudence of the European Court of Human Rights (ECtHR). However, despite being amended so as to allow criticism, the provision remains badly drafted leaving the parameters of criminal liability under the offence unclear. Further, the judiciary has adopted a restrictive interpretation of the article, rarely applying the new paragraph, and thus article 301, despite amendments, continues to represent a major impediment to freedom of expression in Turkey.<sup>9</sup>

The European Union has continually criticised Turkey on this account, most recently in November 2006, when the European Commission concluded that ‘the prosecutions and convictions for the expression of non-violent opinion under certain provisions of the new Penal Code are a cause for concern and may contribute to create a climate of self-censorship in the country’.<sup>10</sup> The Commission has repeatedly called for the provision to be ‘amended in order to safeguard freedom of expression in Turkey’<sup>11</sup> just as it has required of Turkey that the Article, together with other provisions of the Penal Code, is ‘brought in line with relevant European Standards’.<sup>12</sup> In October 2006 European Commissioner for Enlargement, Mr Olli Rehn, stated that ‘those opposing repealing the unjustified restrictions of free speech in Article

8 Mission interview with Hüsni Tuna, Chairman of Lawyers Association, 13 February 2007, İstanbul.

9 Ibid.

10 European Commission, ‘Turkey 2006 Progress Report’, Brussels, 8 November 2006, p. 14.

11 European Commission, ‘Turkey 2005 Progress Report’, Brussels, 9 November 2005, p. 26.

12 2006 Progress Report, op. cit., p. 14.

301 and other parts of the Turkish Law, are effectively opposing a key condition of EU membership.<sup>13</sup>

The criticism voiced by the European Commission regarding Article 301 has motivated the Turkish government to soften its approach towards Article 301. Recently, the government has been engaged in debate with civil society organisations in order to discuss amending the article, apparently by dealing with its most ambiguous points. This includes replacing the concept of denigrating ‘Turkishness’ with denigrating the ‘Turkish nation’, and through similar changes narrowing down the scope of the law.<sup>14</sup> In response, civil society organisations have emphasised that a change in the way prosecutors and judiciary interpret legal provisions is more important in relation to improving freedom of expression than making changes to the law itself.<sup>15</sup>

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13 Olli Rehn, European Commissioner for Enlargement, ‘Turkey’s best response is a rock-solid commitment to reforms’, International Symposium on ‘European Social Model and Trade Union Rights within the EU negotiations’, Ankara, 3 October 2006.

14 Zaman Newspaper, ‘AKP Prepares Draft Changes to Controversial Article 301’, 9 November 2006, <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=38105> (last accessed 24 April 2007).

15 Mission interviews with Şaban Dayanan, General Rapporteur, Human Rights Association of Turkey (IHD), 13 February 2007, İstanbul, and Şanar Yurdatapan, founder of Initiative for Freedom of Expression, 14 February 2007, İstanbul.

## PART TWO - THE TRIAL AND ITS ORIGINS

### A. The Right to a Fair Trial

The right to a fair trial is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms, and the right is provided for in various international and regional treaties. The right was set forth in the UDHR (Universal Declaration of Human Rights) in 1948, and it has since been elaborated on and recognized by several international and regional human rights standards. This includes the ICCPR (International Covenant on Civil and Political Rights) and the ECHR (European Convention on Human Rights), both of which are binding on Turkey.

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 judgment 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 6 of the ECHR stipulates:

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 by 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 the private life of the parties so require, or 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 the 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.

## **B. The Defendant<sup>16</sup>**

Songül Özkan is the owner and director of the *Evrensel Basım Yayın* Publishing House, which she founded in 1988. The first material to be published by the establishment was a magazine titled 'World of Freedom' (*Özgürlük Dünyası*). The magazine was launched as a response to the situation created in Turkey by the military coup of 1980, the objective of the magazine thus being the achievement of social-democracy in Turkey through peaceful means. The oppression of the Kurds

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<sup>16</sup> The following section is based on mission interview with Songül Özkan, 13 February 2007, İstanbul.

in Turkey further motivated Özkan, of Kurdish origin herself, to focus on freedom of expression-related issues.

Since its establishment in 1988 *Evrensel Basım Yayın* has gradually developed into an enterprise focusing on freedom of expression and the Kurdish issue, something which is reflected in the type of books published. Hence many of the books have an emphasis on Kurdish identity and poetry, the history of the Kurdish cause and the importance of reaching a democratic and peaceful solution to the Kurdish question. *Evrensel Basım Yayın* publishes around 35 books per annum.

Consequently, a number of court cases have been launched against Özkan, as the owner and director of *Evrensel Basım Yayın*. In 1994, by publishing an article about the Kurdish language in the ‘World of Freedom’ Magazine, she was charged under Article 8 of the then Anti-Terror Law for spreading terrorist propaganda. She was convicted and sentenced to six months and eight days imprisonment. The sentence was suspended and converted to a fine. The publishing house was, as a result of the verdict, ordered to close down for 40 days.

In 1999 Özkan was indicted under Article 159 of the former Penal Code regarding the ‘insult of Turkishness’ for publishing a booklet advocating a democratic solution to the Kurdish issue. She was convicted and sentenced to six months imprisonment. As in 1994, the prison sentence was suspended and converted to a fine.

Özkan has recently been accused under Article 7 of the amended Anti-Terror Law on charges of spreading terrorist propaganda. The charges relate to the publication of the memories of a socialist worker. The publication in question is a third edition of the book, and the previous two editions have not resulted in indictments.

The present case against her refers to *Evrensel Basım Yayın*’s publication of *Kürt İsyânları* (Kurdish Uprisings), written by Kurdish journalist and writer Ahmet Kahraman, describing the Kurdish uprisings of the 20th Century.

### **C. Ahmet Kahraman**

Ahmet Kahraman is one of present-day Turkey’s most distinguished political journalists and writers. He has written extensively, so far more than 20 books, seeking to address issues relating to the oppressive and anti-democratic ideologies and methods of the Turkish state apparatus. Hence, many of his books have been about ‘deep state’ actors, such as military figures, and his books often have as their main subjects the 1980 military coup, state terror and oppression, torture and extrajudicial killings, freedom of expression, and the Kurdish question.



Prior to the 1980 military coup Kahraman worked as a journalist for the *Vatan* (Country) and *Akşam* (Evening) newspapers, just as he acted as editor of a number of magazines and newspapers. However, being in opposition to the military, Kahraman's career as a political and investigative journalist was affected negatively subsequent to the 1980 coup, when the press fell under military control. Kahraman therefore turned to writing books, since he found it increasingly difficult to find employment as a journalist.

Apart from *Kürt İsyanları*, his most important books include *Paşa* (The General) about the leader of the 1980 military coup, *Suçlu Ayağa Kalk* (Guilty Stand Up!) focusing on torture in Diyarbakır prison and elsewhere in the wake of the 1980 military coup, *Üç Asılannın Hikayesi* (The Story of Three Hanged People) which investigates the circumstances surrounding the extrajudicial killings of three revolutionary leftist student leaders, and *Bir Dönemin Türk Büyükleri* (Great Turkish leaders of One Era) which reveals the murderous and unethical connections between Turkish politicians and far-right Turkish death squads.

As a result of this authorship, Kahraman has repeatedly been subjected to harassment and intimidation, just as court cases have been launched against him, including for authoring *Kürt İsyanları* and *Bir Dönemin Türk Büyükleri*. This campaign of persecution led Kahraman to leave Turkey in 1998 and he is currently residing in Germany.

#### D. The Case <sup>17</sup>

Özkan has been charged under Article 312 of the former Penal Code (Law No. 765) for 'openly inciting people to resentment and enmity with regard to differences of race and religion'. As the 'offence' is committed 'by way of printed matter', she is further indicted under the former Press Law (Law No. 5680). According to the indictment the charges are justified as *Kürt İsyanları*, published by Özkan, portrays the Kurdish uprisings of the 20<sup>th</sup> Century as 'just'. In this regard the indictment states that the articles of the book 'praise' the uprisings, and that the book indicates that Turkish state officials perceive all Kurds as potential offenders, thus openly 'inciting people to resentment and enmity'.

Özkan maintains that the book represents a piece of historical research regarding the Kurds, not intended to incite hatred, and she therefore denies the charges.

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<sup>17</sup> The following section is based on mission interview with Songül Özkan and her defence lawyers Devrim Avcı and Kamil T. Sürek, 14 February 2007, İstanbul.

The case was opened on 17 November 2003, under the jurisdiction of the İstanbul State Security Court. However, following serious criticism from the ECtHR and the European Union questioning the impartiality and independence of the State Security Courts, in 2004 the 8<sup>th</sup> harmonisation package heralded the abolition of the State Security Courts, and, as a consequence, the cases pending before the State Security Courts were referred to the jurisdiction of the Criminal Courts of First Instance. In 2005 the case was referred to the 2<sup>nd</sup> Criminal Court of First Instance at Beyoğlu, İstanbul. The İstanbul State Security Court did not reach a decision on the merits before the case was referred in 2005.

Under Article 16 (1) of the former Press Law, liability for offences committed under the Law is shared by the author and the publisher of the ‘printed matter’. However, the Article provides that only the author will be liable for imprisonment, as the publisher’s sentence shall be converted to a fine. This is modified by the second paragraph of Article 16, which states, that in cases where the person responsible for the authoring remains unknown to the Court, or has not been named by the publisher, full liability under the Law, regardless of paragraph (1), falls on the publisher.

Hence, upon referral of the case to the Beyoğlu 2<sup>nd</sup> Criminal Court of First Instance, the Court, in order to determine the liability of Özkan under Article 16 of the Press Law, asked the Defence to produce a statement from Kahraman, authenticating his authorship of the book. Kahraman, residing in Germany, provided the defence with a statement. However, when presented in Court at a subsequent court hearing, the statement, originally drafted in German, was rejected, as the Turkish translation had not been authenticated by a Turkish notary.

### **E. The Hearing of 14<sup>th</sup> February 2007**

A number of observers attended the hearing, including representatives of the Turkish Labour Party, journalists from the *Evrensel* Newspaper, and associates of the *Evrensel Basım Yayın* Publishing House. The KHRP Mission members were the only international observers. In total, around 20 people attended the trial as observers.

It was noted that the judge appeared to be uneasy about the number of observers, noticing that there were too many observers present in the court room but that he ‘could not decide on who to deny access [*sic*]’. As a result, all observers were admitted to observe the trial. However, the court room, approximately 6 x 7 meters in size, had difficulties accommodating the number of observers, and, as a result, some had to observe the trial from the hallway corridor, through an open door. Further, the windows of the court room were all open during the hearing, the noise

from outside making it very difficult to hear the judge, who, in addition, addressed the court room and the defendant in a low voice.

The court proceeding took approximately 10 minutes. Özkan made a brief statement asking the Court to complete the case, noticing that it had already been pending for more than 3 years. She pointed out that the lengthy court proceeding had been the cause of problems for her personally and for the *Evrensel Basım Yayın* Publishing House. She then presented the aforementioned statement from Kahraman, now authenticated by a Turkish notary, and thus it was anticipated that the Court would proceed to deliver a decision on the merits of the case.

Instead of ruling on the merits of the case the judge started to look at the issue of whether the Beyoğlu Criminal Court of First Instance had in fact jurisdiction to hear the case. He concluded, despite the fact that the case was referred from the İstanbul State Security Court in 2005, that uncertainty remained as to which court had jurisdiction to hear the case. He ruled that the case be referred to the Court of Appeal for a decision on this jurisdictional issue.

The judge relied on a provision contained in the 2004 law on the abolishment of the State Security Courts which provided that the State Security Courts be allowed to complete the cases pending before them, before abolishment takes effect. As the case against Özkan was opened in 2003 before the İstanbul State Security Court, the Judge reasoned that the case should not have been referred to the Beyoğlu Criminal Court in the first place, but completed under the jurisdiction of the İstanbul State Security Court.

Further, as the Beyoğlu Criminal Court is inferior to the İstanbul State Security Court, the Judge concluded that he did not have the authority to remand the case to the State Security Court. He thus referred the case to the Court of Appeal for a decision on this jurisdictional issue.

It is anticipated by Özkan's defence lawyers that the Court of Appeal will not deliver a decision on the jurisdictional matter for at least another year.

## **F. Analysis of the Trial**

The trial against Özkan raises a number of concerns. First, the initiation of the prosecution itself appears to be non-compliant with Turkey's obligation under international law, in particular the right to freedom of expression as enshrined in treaties and conventions and established in the jurisprudence of the ECtHR. The right to freedom of expression is not an absolute right, but carries with it duties and responsibilities. The right can be restricted but only in accordance with narrowly

defined criteria. This includes sanctions ‘for the prevention of disorder or crime’ and ‘for the protection of the reputation or rights of others,’ as prescribed by Article 10 ECHR.

In accordance with Article 10 of the ECHR many liberal legal systems apply provisions allowing for the limitation of the right to freedom of expression in order to prevent incitement to hatred and enmity where this would threaten public order. However, as explained above, the ECHR has established in its jurisprudence, that any curtailment of the right of freedom of expression must be justified as a measure ‘necessary in a democratic society’, it must be ‘construed strictly’, and the need for any restrictions must be ‘established convincingly’.

The trial against Özkan illustrates how the application and interpretation of Article 312 by the Turkish prosecutors and judiciary constitute a violation of the right to freedom of expression; instead of applying article 312 in accordance with the principles established by the ECtHR in order to protect individuals and groups from incitement to hatred and discrimination, the Turkish judiciary has used the Article to prosecute and penalise writers and publishers airing non-violent opinion and advocating and representing pro-Kurdish expression. In the present case the Turkish prosecutor has failed to ‘establish convincingly’ the need to restrict the right of freedom of expression, indicting Özkan on charges on ‘incitement to hatred’, but failing to produce evidence of any *intent* on her part.

The procedure of the trial further violates the right to a fair trial. Article 6 ECHR stipulates that ‘everyone is entitled to a fair and public hearing *within a reasonable time*’. Article 14 (3) (c) ICCPR further states that anyone has the right to be ‘tried *without undue delay*’. The present case, however, has been ongoing since November 2003, and still no decision has been reached on the merits of the case, nor is it likely to reach a conclusion soon. As a result of the tactical manoeuvres performed by the courts dealing with the case, Özkan has not been tried *within a reasonable time* or *without undue delay*. The court proceedings therefore constitute a clear violation of the right to a fair trial, as enshrined in both the ECHR and the ICCPR.

## PART THREE - OTHER PUBLISHERS ON TRIAL

### A. Fatih Taş, Aram Publishing House<sup>18</sup>

Fatih Taş is the owner and former editor of *Aram* Publishing House, which he founded in 1997. The publishing house has a commitment to publishing works representing a pluralistic range of beliefs and opinions that are necessary for democratisation and serve the community. *Aram* has published more than 20 books in Kurdish. Taş has a history of trials and convictions against him, and he attracted some notoriety in 2002 for publishing a Turkish Translation of Noam Chomsky's book *American Interventionism*. Taş was prosecuted as a result of the publication but was subsequently acquitted. Currently he faces indictments for a number of books published by *Aram*, some which have already resulted in conviction and one now on appeal.

On 9 December 2005 Taş was convicted and sentenced to imprisonment for 6 months under charges relating to Article 301 of the revised Penal Code for the publication of the book *Kayıpsın Diyorlar* (They Say You are Missing) by Ali Aydın. The book was published in 2004 in memory of Nazım Babaoğlu, who was kidnapped and killed by paramilitaries engaged in suppressing the Kurdish insurgency in the early 1990s. Taş has appealed the verdict and remains free while the case is pending before the Beyoğlu Court of Appeal. No date has yet been set for the court hearings.

On 17 November 2005 a case was launched against Taş under Article 301 (2) of the revised Penal Code for 'insulting the Turkish military' by publishing a Turkish translation of the book *Spoils of War: The Human Costs of America's Arms*. The book, written by American author John Tirman, claims that US weapons were used to carry out human rights abuses by the Turkish military against Kurds in the 1990s, and it paints a highly critical picture of the Turkish military, nationalism and Kemal Atatürk, the founder of the modern Turkish nation. Taş was acquitted of the charges on 29 November 2006.

In relation to the publication of the Turkish translation of Tirman's book, Taş further faces trial under Articles 1 (1) and 2 of Law No. 5816, which prohibits publicly

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18 The following section is based on mission interview with publisher Fatih Taş, 13 February 2007, İstanbul, and International Pen, 'Half-Yearly Caselist to 31 December 2006', <<http://www.internationalpen.org.uk/images/newsItemDownload/Caselist.pdf>> (last accessed 16 April 2007).

insulting the memory of Atatürk. The Law was passed by the Turkish Parliament in 1951. Despite having been acquitted on the charges brought under Article 301 (2), this trial remains ongoing on charges relating to Law No. 5816. The Law carries sentences of up to 3 years, which can be increased by one half if the insult is committed by way of 'printed matter'.

On 17 October 2006 a case was launched against Taş under Article 216 and 301 (1) of the revised Penal Code for 'inciting to hatred' and 'insulting Turkishness'. The charges relate to the publication of a Turkish translation of Noam Chomsky's book *Manufacturing of Consent: The Political Economy of the Mass Media*, in which Chomsky analyses news coverage regarding the Kurdish conflict. Taş was acquitted on all counts on 19 December 2006.

## **B. Ahmet Önal, Peri Publishing House<sup>19</sup>**

Ahmet Önal is the owner of *Peri* Publishing House. It was founded in 1992 and has published more than 50 books in Kurdish. Since its establishment in 1992, Önal has had a total of 26 cases pending against him as a result of his publishing activity, 13 of which have subsequently been dropped due to statute of limitation provisions. Nevertheless, he has spent nearly 7 years in prison as a result of his publishing business. In 2001 he was the recipient of the Turkish Publishers' Association Freedom of Expression Award. At present there are eight cases pending against him, including the following examples.

In June 2001 he was indicted for publishing a book containing a collection of interviews with people in exile, compiled by author Evin Aydar Çiçek and entitled *Tutkular ve Tutsaklar* (The Passions and the Prisoners). The interviews were seen to 'insult the memory of Atatürk' as proscribed under Law No. 5816, and Önal was convicted and sentenced to 12 months imprisonment in December 2003. He appealed the verdict but was again found guilty by the Beyoğlu Appeal Court, İstanbul, in June 2006. The Appeal Court sentenced him to 18 months because it asserted that since the offence was committed by 'way of printed matter' it merited a heftier sentence. The Court, however, reduced the length of sentence to 13 months because of good behaviour. Önal has appealed the sentence and the case remains ongoing.

In August 2003 a trial was opened at the Beyoğlu Criminal Court of First Instance

19 The following section is based on mission interview with publisher Ahmet Önal, 14 February 2007, İstanbul, and International Pen, 'Half-Yearly Caselist to 31 December 2006', <<http://www.internationalpen.org.uk/images/newsItemDownload/Caselist.pdf>> (last accessed 16 April 2007).

against Önal under Article 301 of the revised Penal Code. The trial relates to the publication of the book *Acının Dili: Kadın* (The Language of Pain: Women) by author M. Erol Coşkun, which is seen by the authorities to ‘denigrate the State security forces.’ Önal was sentenced and heavily fined in August 2003, whereas the author Coşkun was sentenced to 15 months imprisonment. They have both appealed the verdicts and the case remains ongoing.

Önal further stands trial for publishing the book *Dersim’de Alevilik* (Alevis in Dersim) by the author Hüseyin Beysülen under Law No. 5816 regarding the insult of the memory of Atatürk. The case remains ongoing.

Recently, he has further been convicted under charges relating to Article 312 of the former Penal Code for publishing the book *Hüseyin Baybaşın, A Kurdish Businessman* by author Mahmut Baksi. Önal was fined 1600 YTL (equivalent of £ 600) for the publication of the book.

### C. Ali Rıza Vural, Doz Publishing House<sup>20</sup>

Doz Publishing House was established in 1990 and Vural has been the owner since 2003. The publishing house specialises in publication of material on Kurdish culture, history and language, and aims at promoting Kurdish culture, history and the revival of the Kurdish language. Since its foundation Doz has published around 150 books, 38 of which are in Kurdish. Since 2000 it has also been publishing the *Serbestî* magazine.

Vural stands trial on charges brought under Article 301 of the revised Penal Code for ‘insulting the Republic’ by publishing a Turkish translation of the two volume book *Barzani and the Kurdish National Movement*, written by Massoud Barzani, the President of The Kurdistan Regional Government in Northern Iraq, and the leader of the Kurdistan Democratic Party. The book was initially published in February 2003 and subsequently a trial was launched against then editor of Doz Publishing House, Ahmet Zeki Okçuoğlu, under Article 312 of the former Penal Code regarding ‘incitement to hatred’. After an eight month trial, Okçuoğlu was acquitted.

The present case against Vural was motivated by a 2005 second edition printing of the book. The charges refer to a section of the book which states that Atatürk made promises to the Kurdish community in return for their assistance in creating

20 The following section is based on mission interview with publisher Ali Rıza Vural, 13 February 2007, Istanbul, and International Pen, ‘Half-Yearly Caselist to 31 December 2006’, <<http://www.internationalpen.org.uk/images/newsItemDownload/Caselist.pdf>> (last accessed 16 April 2007).

a Turkish state, and then, once that aim had been achieved, ordered the suppression of the Kurds. It further makes references to Turkey's repression of its Armenian community. If convicted, Vural faces up to three years in prison.

*Doz Publishing House* has further faced court cases as a result of articles published in the *Serbestî* magazine on Kurdish culture and language issues. Since 2000 cases have been taken against the magazine under Article 159 and 312 of the former Penal Code and, more recently, under Article 301 of the revised Penal Code. Twenty-four issues of the magazine have been published since 2000.



## PART FOUR - FREEDOM OF EXPRESSION WITHIN THE FRAMEWORK OF TURKEY'S CANDIDATURE FOR EUROPEAN UNION MEMBERSHIP

The mission found that the cases against publishers such as Songül Özkan and others reveal the lack of real democracy that persists in Turkey despite the enactment of accession reforms. The cases further reveal two worrying trends in relation to freedom of expression.

Firstly, the cases demonstrate how the accession process has heralded little change in relation to freedom of expression. In fact, according to what was reported to the mission, the right to freedom of expression in Turkey continues to be curtailed by anti-democratic legislation combined with its restrictive interpretation by the authorities and judiciary. This has resulted in the continuing prosecution and harassment of people exercising their right to freedom of expression. Any amendments made to legislation intended to further freedom of expression rights have in fact done the opposite due to the manner in which they have been applied and interpreted.

The mission received information which indicates that since the opening of accession negotiations there has actually been an increase in cases brought against people expressing non-violent dissenting opinions.<sup>21</sup> This is further corroborated by the 2006 Annual Report from BIA (Independent Communications Network) which concluded that the number of journalists, publishers and activists prosecuted for freedom of expression 'offences' in Turkey, rose from 157 in 2005 to 293 in 2006.<sup>22</sup> According to information from Initiative for Freedom of Expression, an İstanbul-based NGO, 172 trials were opened against publishers in Turkey in 2006.<sup>23</sup>

The mission is concerned that these figures reveal a worrying trend under which

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21 Mission interviews with Şaban Dayanan, General Rapporteur, Human Rights Association of Turkey (İHD), 13 February 2007, and human rights lawyers Kamil T. Sürek and Devrim Avcı, 14 February 2007, İstanbul.

22 BIA News Centre, 'Freedom of Expression Under Nationalist Siege', 16 February 2007, <[http://www.bianet.org/2006/11/01\\_eng/news92115.htm](http://www.bianet.org/2006/11/01_eng/news92115.htm)> (last accessed 16 April 2007).

23 Mission interview with Şanar Yurdatapan, founder of Initiative for Freedom of Expression, 14 February 2007, İstanbul.

investigations and cases are opened against writers and publishers who represent opinions in opposition to those of the authorities. Many of these cases do not result in convictions; however, as illustrated by the case against Songül Özkan, the tactical manoeuvres employed by the courts unduly delay the proceedings, thereby causing problems for the people standing trial. While cases are pending against publishers and writers, the authorities are known to actively employ measures intended to stigmatise and criminalise material associated with the writer or publisher in question.

Throughout the course of the mission, it heard several credible stories that lead it to conclude that the authorities are pursuing censorship measures through administrative means; initiating court proceedings against publishers in order to frustrate them out of business. As a result of these disruptions the publishing houses find it very difficult to grow and develop as businesses. By collecting and confiscating material associated with the concerned writer or publisher, the authorities promote a regime of self-censorship under which it becomes increasingly difficult for publishers standing trial to distribute their material. The longer a case is pending the more severe are the consequences, and many publishers face financial ruin as a result of the actions taken by the authorities.<sup>24</sup>

The new Press Law (Law No. 5187) further adds to the woes of publishers. Article 11 provides that if the writer cannot be tried in Turkey, or already has a life imprisonment sentence, the publisher will be charged for *both* authorship and publication.

Secondly, the pro-democratic reforms enacted in Turkey as a result of the ongoing accession process have elicited a strong reaction from 'deep state' actors. The elite, fiercely opposed to the pro-democratic progress heralded by the accession process, has sought to preserve the *status quo* by launching a counter campaign in order to hinder democratic reform. Such moves have encouraged the rise of racism, nationalism and hatred against minorities within the polity. The campaign appears to have been launched in order to facilitate a setback in the accession negotiations between Turkey and the EU.

The information received during mission interviews has led the mission to conclude that a situation has arisen in Turkey which has seen two divergent groups engaged in political struggle; on the one hand intellectuals and civil society organisations in favour of the move towards democracy and reform, and on the other the reactionary elite spearheaded by the military, opposed to such developments. Both groups are using the principle of freedom of expression as a mechanism with which to advocate

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24 Mission interviews with publishers Ali Rıza Vural, 13 February 2007, İstanbul, and Ahmet Önal, 14 February 2007, İstanbul

their aims. It has been suggested by Şanar Yurdatapan, the founder of Initiative for Freedom of Expression, that the Turkish military appears to be launching a campaign of ‘psychological warfare and intimidation’, intended to undermine the reform process by provoking and promoting hatred and nationalism.<sup>25</sup>

This strategy was most recently applied in February of 2007, when the Turkish military’s Chief-of-Staff, General Yaşar Büyükanıt, on a visit to Washington, warned ‘regime change seekers’ in Turkey that the Turkish military would not tolerate any initiatives which attempted to change the unity and secular structure of the Turkish state. Büyükanıt was quoted as saying: ‘As long as the dynamic forces [the military] protecting Turkey remain in place, no one can divide Turkey. Those who have such dreams will only wake up with the worst of nightmares.’<sup>26</sup>

This statement raises the mission’s concern as it is indicative of the campaign of intimidation which has been initiated by the reactionary elite in Turkey. Although the statement appears to target religious fundamentalism and separatist movement, it carries a veiled message intended for Turkey’s pro-reformist intelligentsia, warning them that initiatives aimed at ‘regime change’ [through democratic reforms] will not be tolerated by the military. In this regard the Penal Code plays a significant role. It was repeatedly reported throughout the course of mission that the Penal Code represents the most effective method of intimidation, as is also illustrated by the myriad of court cases brought against writers, publishers, academics, intellectuals and human rights defenders.

Previous KHRP and BHRC trial observations and fact-finding missions have illustrated and detailed the powerful position which the Turkish military occupies within the Turkish state apparatus. The recent statement from general Büyükanıt confirms the significant political influence which the Turkish military, despite recent democratic reform, continues to exercise within Turkish society. The mission finds this to be highly problematic in relation to the EU accession process, as the military’s opposition to any reform threatens to facilitate a setback of accession negotiations and bypass the fragile reforms already enacted in Turkey.

As a result of the conflict between the diametrically opposed groups in Turkish society an insidious application of the principle of freedom of expression has materialised. This has seen the state apparatus protect expression that is of a violent and intimidating nature, while allowing the persecution of non-violent dissenting

25 Mission interview with Şanar Yurdatapan, founder of Initiative for Freedom of Expression, 14 February 2007, İstanbul.

26 Turkish Daily News, ‘Büyükanıt warns separatists, Iraqi Kurds and ‘regime change seekers’, 15 February 2007, < <http://www.turkishdailynews.com.tr/article.php?enewsid=66254>> (last accessed 16 April 2007).

opinion. This has been facilitated through the anti-democratic provisions of the former and present Penal Codes, most notably Article 301.

The consequences of this worrying trend were demonstrated in the most brutal way when the Armenian journalist and intellectual Hrant Dink, a Turkish Citizen, was assassinated in January 2007. This has seen levels of repression and self-censorship increase further in what was already a tense climate of intimidation and fear. Since the assassination of Dink fear has prevailed among intellectuals. Thus, publisher Ahmet Önal told the mission that since Dink's assassination he 'never knows if it is a reader or a murderer who walks through the doors' of his publishing house.<sup>27</sup>

The Turkish government's latest initiatives to amend Article 301 are welcomed. The proposed amendments include replacing the concept of denigrating 'Turkishness' with denigrating the 'Turkish nation', and narrowing down the scope of the law.<sup>28</sup> Turkey's Foreign Minister has been quoted for saying that the problems concerning the article stem from its interpretation by the judiciary, and that the Turkish government will amend Article 301 in consultation with regional NGOs. Further, in November 2006 the Turkish Prime Minister Erdoğan met with representatives from leading trade unions and NGOs in order to consult them on how to change Article 301.<sup>29</sup>

It is encouraging that the Turkish government shows willingness to debate Article 301, thus challenging the influence of the 'deep state'. However, in the mission's opinion the signals coming from the government leave much to be desired, as the government's proposal to exchange 'Turkishness' with 'Turkish nation' appears to be nothing more than superficial. By retaining the concept of a unified, centralised and homogeneous 'Turkish nation' in need of protection from 'denigration', the *raison d'être* of the article remains unchanged. Consequently, the mission believes it highly unlikely that the amendments will result in any real progress in relation to the right to freedoms of expression, as the draconian nature of Article 301 remains unchanged.

Further, it is the judiciary which will have the ultimate say on the interpretation and application of future amendments. The European Commission has repeatedly criticised the Turkish judiciary for its restrictive interpretation of Article 301 and the aforementioned cases clearly demonstrate how the judiciary has so far shown little will to alter its dubious application and interpretation of the laws. Viewed on this background the mission finds it unlikely that the judiciary will apply future amendments of Article 301 so as to give them the effects envisaged by the *Copenhagen Criteria*.

27 Mission interview with publisher Ahmet Önal, 14 February 2007, İstanbul.

28 Zaman Newspaper, op. cit.

29 Turkish Daily News, 'Gül says Article 301 to be changed soon', 27 November 2006, <<http://www.turkishdailynews.com.tr/article.php?newsid=60256>> (last accessed 16 April 2007).

## CONCLUSION AND RECOMMENDATIONS

It has become evident that freedom of expression, more than ever, has moved to centre stage in Turkey. The trial against publisher Songül Özkan is illustrative of the way freedom of expression, despite reforms, continues to be curtailed in Turkey. The initiation of the prosecution appears to be non-compliant with Turkey's obligation under international law, in particular the right to freedom of expression as enshrined in treaties and conventions and established in the jurisprudence of the ECtHR. Further, the trial itself represents a violation of the right to a fair trial, and it reconfirms that inefficient due process and non-compliance with international legal standards continue to tarnish court proceedings in Turkey, despite recent reforms.

The trial further mirrors the campaign of harassment and intimidation which has been launched against writers, publishers, academics and human rights defenders expressing dissenting opinion. The campaign has been launched by anti-democratic forces operating from within the Turkish state apparatus, and appears to have been designed in order to strike against Turkey's candidature for membership of the European Union. This campaign has created a climate of repression and persecution against intellectuals and reformists, and consequently, a climate of fear and self-censorship has prevailed among these groups.

It is of vital importance that the focus of the European Union in relation to Turkey's potential accession stays on freedom of expression, in particular that the integrity of the principle is upheld. The past years have seen the manifestation in Turkey of an insidious application of freedom of expression laws under which anti-democratic provisions of the Penal Code, including Article 301, have been used as a 'Trojan horse' for the promotion of harassment and intimidation. The trial against Songül Özkan illustrates how the application of freedom of expression laws in Turkey has been 'reversed' by prosecutors and the judiciary.

What is needed in Turkey in order to facilitate the arrival of democratic reform is a change of attitude. The trial against Songül Özkan demonstrates just how necessary continuous efforts are to democratise the country. So far, full implementation of the reforms enacted has been hindered by Turkey's reactionary elite spearheaded by the military. However, the presence of a strong civil society in Turkey could prove a counter-balance to the influence of the elite, thus driving through democratic reform.

Turkey and the European Union should actively support the struggling civil society groups in the country in order to facilitate a climate of political and cultural dialogue. This could eventually lead to a change of attitude which would be likely to facilitate the elimination of trials such as those brought against Songül Özkan and others. The recent involvement of civil society representatives in the proposed amendment of Article 301 may indicate that such a change of attitude is indeed emerging in Turkey.

## Recommendations

This report urges the Republic of Turkey to;

- Uphold its commitment to reform and to honour the obligations which follow from the EU accession negotiations, including the *Copenhagen Criteria*, in order to guarantee the right to freedom of expression and to facilitate the arrival of political and cultural dialogue in Turkey.
- Repeal any anti-democratic provisions which impede upon the right to freedom of expression, in particular Article 301 of the Penal Code, and to bring its legislation in line with relevant European standards through full implementation of the EU accession reforms.
- Honour the obligations which follow from the country's membership of the Organization for Security and Co-operation in Europe (OSCE), including the obligation to play a positive role in order to contribute to the facilitation of freedom of expression, and to guarantee the independence of the media, including publishers, as envisaged in the 1989 *Vienna* and 1991 *Moscow Documents*.
- Ensure more generally that all non-violent expressions of dissenting or alternative opinion are free from censure, harassment or criminal prosecution and that any unjustified restrictions imposed on the right to freedom of expression are not tolerated.
- Introduce further training for the judiciary, prosecutors and state officials regarding international human rights standards in order to ensure that judges and prosecutors are aware of, and implement the principles of freedom of expression as established in the jurisprudence of the ECtHR.
- Actively support and encourage civil society organisations in Turkey in order to promote a climate of political and cultural dialogue which could herald the arrival of democratic reform.

- Recognise the important role that civil society organisations play in a democratic society, and in this regard adopt policies in accordance with EU and OSCE strategies in order to guarantee the involvement of civil society organisations in Turkish society.

This report urges the European Union to;

- Continue to closely monitor the reform process in Turkey, including the situation regarding freedom of expression, and to exert considerable influence in order to ensure that Turkey stays committed to reform and complies with the *Copenhagen Criteria*.
- Uphold its commitment to the reform process in order to ensure that the integrity of the principle of freedom of expression is upheld throughout the accession reform process.
- Continue its criticism of the Turkish Penal Code, including Article 301, and to continue to closely monitor all trials in Turkey related to freedom of expression ‘offences’.
- Take into account that there are provisions of the Turkish legislation other than Article 301, including in the Press and Anti-Terror Laws which impose restrictions on the right to freedom of expression.
- Actively support and encourage civil society groups in Turkey in order to promote a climate of political and cultural dialogue which could herald the arrival of democratic reform.

This report urges the OSCE to;

- Exert its influence in order to direct Turkey towards a liberalisation of its views on freedom of expression so as to guarantee the right to free speech and the independence of the media, as envisaged in the principles of the OSCE.
- Closely monitor the number of investigations opened in Turkey in relation to freedom of expression ‘offences’.
- Closely observe trials in Turkey related to freedom of expression ‘offences’, and in this regard remind Turkey of its obligation, as a member of the OSCE, to recognise and uphold the right to free speech and the independence of the media.

- Criticise the Turkish legislation, including Article 301, which impede upon the right to freedom of expression and the independence of the media.
- Encourage Turkey to repeal any provisions which contradict the OSCE obligations to guarantee the right of everyone, including publishers, to enjoy the right to freedom of expression without interference by public authority, as agreed upon in the 1990 *Copenhagen Document*.



## APPENDIX A

### The Indictment against Songül Özkan

**T. R.  
Istanbul  
State Security Court  
Prosecutor's Office**

**Preliminary No. 2003/2234  
Principal no. 2003/1219  
Indictment no. 2003/1219**

#### **Indictment To the Istanbul No. ( ) State Security Court**

Plaintiff : Public Law

Accused : Songül Özkan, daughter of Memet and Zehra, born in 1960, registered in Ağılbaşı village, Darende district, Malatya province. Currently resident at Kamer Hatun Mah, Al Hatun sokak no. 27, Beyoğlu.

Offence : Inciting the people to resentment and enmity with regard to differences of race and region.

Date of offence: 30.10.2003

#### **Preliminary Documents Examined**

It has been established that the accused is the owner and responsible editor of the Doğa Basım Publishing House operating in İstanbul. In the book 'Kurdish Rebellions', written by Ahmet Kahraman and published by the Doğa Basım Publishing House, of which the accused is the owner and director, Kurdish rebellions, in particular the Sheikh Said revolt, against the Turkish Republic are explained. The rebellions are described as just and articles written praising the rebellions, citizens of Kurdish origin are described, as if by others, as being seen as potential offenders by the State, as being subjected to bad treatment, their villages and houses being burnt, their

being exiled, beaten and insulted. It has also been established that the revolts are praised as just and that it is suggested that citizens of Kurdish origin are a potential threat to public order in opposition to the state and other people, thus openly inciting enmity and resentment, the owner of the Doğa Basım Publishing House thereby committing the offence in question by printing and publishing the book 'Kurdish Rebellions'.

It is therefore requested that the accused be tried in your court in accordance with article no. 20 of law no. 2845 and that the accused be found guilty and sentenced in accordance with the final clause of paragraph 2 of article 312 of the Turkish Penal Code, supplementary article 2 paragraph 1 of law no. 5680 to be implemented.

**17.11.2003**

**Ahmet Kelebek 26233**  
**Istanbul State Security Court Prosecutor**

## APPENDIX B

### Turkey's Obligations under International Law

The right to freedom of expression has been enshrined in a number of international conventions, most notably the Universal Declaration of Human Rights (UDHR), the International Covenant of Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). As a state party to these conventions Turkey has a duty to respect and uphold the right of freedom of expression. Turkey further has to comply with international human rights standards rising from the country's EU membership candidature. This includes the right of freedom of expression.

#### 1. The Universal Declaration of Human Rights

The UDHR was adopted by the UN General Assembly in 1948 and Turkey accepted the Declaration in 1949. The UDHR was proclaimed by the General Assembly as a 'common standard of achievement for all peoples and all nations' towards which individuals and societies should 'strive by progressive measures, national and international, to secure their universal and effective recognition and observance'.<sup>30</sup> The Declaration was conceived as a statement of objectives to be followed by governments, and thus it is not legally binding nor are there any signatories to the Declaration. The UDHR does, however, comprise a broad range of rights which subsequently have inspired more than 60 human rights instruments, including the ICCPR, and thus it commands considerable influence and reaffirms the principles considered to be legally binding by all states under customary international law. Further, when the UN member states, including Turkey, voted to approve and abide by the Declaration, they also agreed to implement its provisions into their domestic legislation, thus giving legal effect to the provisions of the Declaration within the jurisdiction of their respective nation states.

In relation to freedom of expression Article 19 of the Declaration states that:

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.

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30 Universal Declaration of Human Rights (UDHR), 10 December 1948, preamble.

## 2. International Covenant of Civil and Political Rights

The ICCPR expands upon the civil and political rights articulated in the UDHR, and thus the legally binding ICCPR is one of the most important international treaties regarding the protection of fundamental rights. The Covenant was adopted by the UN General Assembly and opened for signature on 16 December 1966, but it did not enter into force until 23 March 1976. Turkey signed the ICCPR on 15 August 2000 and ratified it on 23 September 2003.

In relation to freedom of expression Article 19 of the Covenant states that:

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 reputation of others;
  - (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

## 3. The European Convention on Human Rights

The ECHR was adopted under the auspices of the Council of Europe on 4 November 1950 as a regional treaty for the protection of human rights and fundamental freedoms. The Convention further established the European Court of Human Rights (ECtHR). All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity. Once the Convention has been signed and ratified it is legally binding on the signatories.

Turkey ratified the Convention 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 ECtHR was recognised in 1989. As a result of the security situation in the country Turkey filed reservations to the rights

to liberty and security of persons, to a fair hearing, to respect for private and public life, to an effective remedy and to freedoms of expression and association (Articles, 5, 6, 8, 10, 11 and 13). During the 1990s Turkey gradually modified and reduced its reservations to the ECHR and in January 2002 the last remaining reservation was removed. In the period 1999-2006 the ECtHR found that Turkey had violated its obligations under the ECHR in 1076 cases, 123 of which related to the right to freedom of expression.<sup>31</sup>

In relation to freedom of expression Article 10 of the Convention states that:

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.

The ECtHR has reaffirmed and defined the scope of the principle of freedom of expression in its jurisprudence. Hence, in *Sürek and Özdemir v. Turkey*<sup>32</sup> the Court established that the right to freedom of expression:

constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10 [relating to lawful restriction of the right], it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.<sup>33</sup>

31 European Court of Human Rights, Survey of Activities - Table of violations 1999-2006, 25 January 2007.

32 Application Nos. 23927/94 and 24277/94 [1999] ECHR 50 (8 July 1999).

33 Ibid, paragraph 57.

It becomes clear from the ECHR and the jurisprudence of the ECtHR that freedom of expression is not an absolute right but that it can be restricted by measures ‘prescribed by law’. However, to qualify as a measure ‘prescribed by law’, any legal provision restricting the exercise of the right to freedom of expression must be accessible, unambiguous, narrowly drafted and precise enough as to guarantee that the individuals subject to the law can foresee whether a particular action is unlawful. Further, the law prescribing restrictive measures should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restrictions by an independent court or tribunal.<sup>34</sup>

The ECtHR reaffirmed these principles in *Sunday Times v. United Kingdom*<sup>35</sup> when it stated that:

in the Court’s opinion, the following are two of the requirements that flow from the expression “prescribed by law”. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>36</sup>

Hence, any curtailment of the right to freedom of expression must be justified as a measure ‘necessary in a democratic society’, it must be ‘construed strictly’, and the need for any restrictions must be ‘established convincingly’. Further, the measure curtailing freedom of expression must be ‘prescribed by law’, and the law must be ‘adequately accessible’ and formulated with ‘sufficient precision’.

The ECtHR has further defined the scope of the principle, finding that the limits of acceptable criticism are broader as regards politicians than private individuals (*Lingens v. Austria*<sup>37</sup>), that the principle is wider with regard to governments (*Castells v. Spain*<sup>38</sup>), and that the authorities of a democratic state must accept criticism even if this criticism is provocative or insulting (*Özgür Gündem v. Turkey*<sup>39</sup>).

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34 The principles are enshrined in paragraph 1.1. of the Johannesburg Principles on National Security, Freedom of Expression and Accession to Information, UN Doc. E/CN.4/1996/39 (1996).

35 Application No. 6538/74 [1979] ECHR 1 (26 April 1979).

36 Ibid, paragraph 49.

37 Application No. 9815/82 [1986] ECHR 7 (8 July 1986).

38 Application No. 11798/85 [1992] ECHR 48 (23 April 1992).

39 Application No. 23144/93 [2000] ECHR 104 (16 March 2000).

#### 4. Organization for Security and Co-operation in Europe (OSCE)

The OSCE, originally known as the Conference for Security and Co-operation in Europe (CSCE), was established in 1973 as a security organisation. However, it does not deal exclusively with issues of military security, disarmament or border issues. Based on a broad concept of security, it deals equally with human rights. Thus, the founding document of the Organisation, the Helsinki Final Act, acknowledges as one of its 10 guiding principles the ‘respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief’.<sup>40</sup> Turkey was admitted to the OSCE in 1973 and signed the Helsinki Final Act in 1975.

Unlike many other human-rights documents, OSCE human dimension commitments are politically, rather than legally, binding. This is an important distinction, since it limits the legal enforceability of OSCE standards; **however**, the distinction is between *legal* and *political* and not between *binding* and *non-binding*. This means that the OSCE commitments are more than simple declarations of will or good intention; by signing the Helsinki Final Act the member states promise to respect the guiding principles of the OSCE, and comply with the standards of the Organisation.

The OSCE has a strong reputation for norm-setting and for formulating collective expectations as to the behavior of states. The standards of OSCE have been reinforced by numerous follow-up documents, and are, as a result, well established internationally and beyond question. There is no hierarchy among these principles, and no member state government can claim that it has to establish political or economic security before addressing human rights and democracy.

As a member of the OSCE and a signatory to the Helsinki Final Act, Turkey has politically committed itself to comply with the principles established by the Organisation. This includes the principles relating to freedom of expression and the independence of the media. The most important OSCE freedom of expression-standards are found in the 1989 Vienna Document<sup>41</sup>, the 1990 Copenhagen

40 OSCE, ‘Final Act of the Conference on Security and Co-operation in Europe’, paragraph 19, Helsinki 3 July 1973.

41 OSCE, ‘Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of CSCE’, Vienna, 19 January 1989.

Document<sup>42</sup>, the 1991 Moscow Document<sup>43</sup> and the 1999 İstanbul Document<sup>44</sup>.

Under paragraph 26 of the 1989 Vienna Document the member states confirm that they will 'take effective measures' in order to 'facilitate the free expression of views'.<sup>45</sup>

Paragraph 9 of the 1990 Copenhagen Document states that:

The participating States reaffirm that  
(9.1) — everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards. In particular, no limitation will be imposed on access to, and use of, means of reproducing documents of any kind, while respecting, however, rights relating to intellectual property, including copyright.<sup>46</sup>

The OSCE member states reiterated this statement in 1991, further recognizing that independent media [print and broadcast] are 'essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms'.<sup>47</sup> In 1999 the member states further committed themselves to 'ensuring the freedom of the media as a basic condition for pluralistic and democratic societies', and underlined 'the need to secure freedom of expression, which is an essential element of political discourse in any democracy'.<sup>48</sup>

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42 OSCE, 'Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE', Copenhagen, 29 June 1990.

43 OSCE, 'Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE', Moscow, 4 October 1991.

44 OSCE, 'İstanbul Document' İstanbul, 19 November 1999.

45 1989 Vienna Document, op. cit., paragraph 26.

46 1990 Copenhagen Document, op. cit., paragraph 9.

47 1991 Moscow Document, op. cit., paragraph 26.

48 1999 İstanbul Document, op. cit., paragraph 27.





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