

# Implementation Gaps in Turkey's Domestic Law

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The 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 with 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 both Kurdish and non-Kurdish people

## SUMMARY

Entry to the European Union is predicated on the state achieving the political elements of the Copenhagen Criteria.<sup>1</sup> Turkey's domestic law, in its pre-accession state, fell short of these requirements and of its obligations under the European Convention on Human Rights. In order to meet the criteria, the Turkish Government began in 2001, a program of legislative reforms designed to harmonize its domestic legislation with the Copenhagen Criteria and set out her progress to Accession.

At the heart of these reforms was a major overhaul of the Turkish Constitution, accompanied by seven packages of legislative reforms amending a number of pieces of legislation including major redrafts of the Turkish Civil and Penal code. These amendments were intended to liberalise the Turkish legal system, advance fundamental rights and freedoms and end years of states restrictions in a number of key areas such as torture and the freedom of expression; to address the security situation in the Southeast of Turkey and to promote the ideals of democracy and the rule of law.

KHRP believes that Turkey's membership of the EU offers the only real and stable viable option for resolution of the Kurdish question. However, it is essential to closely monitor Turkey's progress on both legislative reform and its practical implementation.

Since the opening of official EU Accession negotiations in October 2005, KHRP is concerned that a sense of complacency has pervaded the Turkish government's attitude towards full implementation of the reforms. This concern seems to be echoed at the European level. The European Parliament's draft report on Turkey's progress towards accession<sup>2</sup> released in June 2006 has criticised the pace of change in Turkey, deploring the limited progress on fundamental rights and freedoms, and has stated that there is an urgent need to implement the legislation already in force.<sup>3</sup>

This briefing paper lays out a number of key areas that Turkey must still address if it is to meet with its international human rights obligations. Without pressure from the international community on Turkey to keep the promises it has made, the harmonization packages could become nothing more than Turkey paying 'lip service to EU bureaucrats', and the human rights situation in the country will remain fundamentally unchanged.

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<sup>1</sup> "The stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities."

<sup>2</sup> 2006/2118(INI)

<sup>3</sup>*ibid* Paragraph 1

## 1 Torture

Despite Deputy Prime Minister Abdullah Gül's encouraging statement in 2003 of Turkey's "zero tolerance" policy towards torture<sup>4</sup>, the legal amendments fall short of this goal. Instances of torture in Turkey continue to be widespread in the Southeast region.<sup>5</sup> In June 2006 alone, 34 preparatory investigations were launched against police officers in Diyarbakir alleging torture of children and adults during and after the disturbances in the city at the end of March 2006.<sup>6</sup>

Since 2003, there have been an increase number of women who report incidents of torture or ill treatment as well.<sup>7</sup> Despite the illegality of torture, women detainees are vulnerable to sexual torture and rape while held in the custody of the authorities.<sup>8</sup>

There are three principle areas of concern regarding Turkish domestic law and torture.

- Firstly, Turkish law still permits a long period of pre-charge detention. Article 3(c) of the *Decree Law* (No. 430) was introduced to reduce the permitted period of lawful detention from ten days to four. As most incidents of torture or ill treatment occur in the first 24 hours of detention,<sup>9</sup> this measure does not protect detainees when they are most vulnerable. Section 16 of the State Security Courts Act bolstered the protection of detainees from incommunicado detention by allowing detainees immediate access to a lawyer upon arrest. However, it appears that security agents are finding ways to subvert the legal regime. Reports suggest that lawyers' access to clients has been restricted until a statement is signed, and arrests are often registered at the Police station several hours –and sometimes days– after taking place in order to extend the detention period.<sup>10</sup>

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<sup>4</sup> See Deputy Prime Minister Abdullah Gül's statement to the Grand National Assembly, 10 December 2003.

<sup>5</sup> US State Department Country Report on Human Rights Practices in Turkey, released by the Bureau of Democracy, Human Rights, and Labor March 2006, <http://www.state.gov/g/drl/rls/hrrpt/2005/61680.htm>

<sup>6</sup>Source: <http://www.flash-bulletin.de/>

<sup>7</sup> Kurdish Human Rights Project, "Turkey's Implementation of Pro-EU Reforms: Fact-Finding Mission Report," 15 (November 2005).

<sup>8</sup> *Ibid*

<sup>9</sup> "Turkey: First Steps Toward Independent Monitoring of Police Stations and Gendarmeries" Human Rights Watch Briefing Paper (No.1), March 6 2006

<sup>10</sup> *ibid*

- Secondly, instances of torture are becoming particularly prevalent outside of detention centres.<sup>11</sup> The new *Code of Criminal Procedure* and the *Law on the Execution of Sentences* allows the transfer of detainees from a detention centre to another destination for a certain period of time to aid an investigation<sup>12</sup>, giving the Police justification to take a detainee out of the remit of the law.

Medical examinations during detention and upon release or court appearance are required by Turkish law but KHRP fact finding missions have reported that the security forces are simply changing their methods to avoid detection. 'Traditional' forms of torture have been dropped in favour of methods which do not leave any physical signs such as repeated slapping, exposure to cold, stripping and blindfolding, food and sleep deprivation, threats to detainees or family members, the repeated dripping of water on the head, isolation, and mock executions.<sup>13</sup> Medical examinations of detainees are often brief and informal. What is more, **only 300 out of the 80,000 doctors in Turkey have the forensic skills** to diagnose instances of torture, and there are only **34 of turkey's 81 provinces have forensic medical centres**.<sup>14</sup> There is also evidence that detainees have not been properly examined and have been refused access to a second examination by the authorities.

- Thirdly, little has been done to end the culture of impunity that pervades amongst security personnel in Turkey. Supplementary article 7 has been introduced to the *Code of Criminal Procedure* to prioritise the investigation and prosecution of allegations of torture. Encouragingly, during 2005, courts investigated numerous allegations of torture by state security forces. There were 232 convictions out of the 531 cases that actually went to full verdict. Meanwhile a staggering 1005 were acquitted. Of the convictions, only 37 carried jail sentences, and the rest received fines or other reprimands.

## 2 Minority rights

The rights and freedoms granted to ethnic minorities in Turkey still fall well below that of the standards within other European states. Turkish law does not afford recognition to ethnic groups as a "minority" under law. Under article 39

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<sup>11</sup>According to the Diyarbakir-based Human Rights Foundation of Turkey, out of the 180 torture cases who applied to their rehabilitation centres in 2005, more than half cited that the torture took place outside a detention centre. <http://www.tihv.org.tr/eindex.html>

<sup>12</sup> European Commission, "2005 Regular Report on Turkey's Progress Towards Accession", COM (2005) 561 final, 9 November 2005

<sup>13</sup> See note 4

<sup>14</sup> See note 4

of the Treaty of Lausanne, only the rights of Turkish nationals belonging to “non-Moslem minorities” will be benefit from legal protection as a minority.

This hinders the ability of the Kurds to fully express their own identity in a meaningful way. Modern- day Turkey has built itself on the Kemalist<sup>15</sup> idea that the republic is “indivisible” and its territorial integrity can only be ensured by purely a Turkish national identity. Expression of identity contrary to the accepted notion of “Turkishness” is, therefore, perceived as a threat to national unity.

Under the constitution, articles 14, 26, 27 and 28 allow Turkish authorities to criminalise non-violent expression of ethnic identity simply on the basis that they are contrary to the constitutional definition of “Turkish” and a danger to the integrity of the state. Even commonplace expressions of identity that are taken for granted in other European states are subject to restriction. The Kurds were unable to officially register non-Turkish names for years in Turkey. The Registration Act now allows children to be given names that do not “offend the public” but this has been used in practice to refer to names only using the Turkish language’s alphabet. Kurdish names with the letters “w”, “x” and “q” cannot be officially recognised and used, effectively prohibiting their usage altogether.

### **3 Democracy and the rule of law**

Electoral law in Turkey is discriminatory towards the Kurds and their political representation and remains one of the fundamental impediments to Turkey attaining true democratic status.

Turkey has yet to amend its threshold rule<sup>16</sup> which dictates that political parties have to reach a 10% threshold to enter parliament. This high entry level discriminates against the Kurds as their political parties have a strong regional support but can not achieve the requisite 10% nationally. The Kurds as a minority group, therefore, do not and cannot have any political representation in parliament which can represent their interests and put forward their agenda.<sup>17</sup>

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<sup>15</sup> The founder of the Turkish Republic Mustafa Kemal (later known as Atatürk) believed that minority and ethnic aspirations were to blame for the fall of the Ottoman Empire and resolved to create a highly centralised, secular nation-state.

<sup>16</sup> *Electoral Law* of June 1983 (Law No. 2839)

<sup>17</sup> There are over 100 Kurdish MPs in the Turkish Parliament but they were elected as representatives of non-Kurdish political parties and so can not be relied upon to represent the Kurdish interest.

(See section on Freedom of Expression for further information on Kurds ability to fully participate in government).

There are also concerns regarding the independence of judges and prosecutors in Turkey. Article 140<sup>18</sup> of the Constitution ties the administrative functions of the judiciary to the Ministry of Justice, creating a direct link between the judiciary and the executive, and undermining the former's independence. In the recent trial in May 2006 of three former military agents who were accused of bombing of a bookshop in the Şemdinli district of Van in Turkey, the Ministry of Justice authorized Ministry inspectors to investigate the prosecutor in this case for possible misconduct. Following their recommendation that he be sanctioned, the Higher Council decided to dismiss him from his position as a prosecutor and a lawyer. This clearly breaches UN guidelines that require that prosecutors must be able to perform their duties free from harassment and civil and penal or other liability.<sup>19</sup>

Overall, the decision-making of the Turkish judiciary has been overtly conservative, particularly in cases involving human and minority rights issues. The Turkish government has instigated human rights training for judges, prosecutors and lawyers but the continuing frequency of prosecutions and convictions of writers and journalists in Turkey would suggest that this program needs to be pursued with more vigor as fundamental human rights principals have failed to fully take hold in the adjudication process. It is crucial that international and European human rights instruments are fully assimilated into the Turkish legal consciousness. It is therefore imperative that there is an immediate review of the training process and a monitoring of judicial decisions to fully assess its success.

The judiciary and law enforcement officials are failing to sufficiently protect women from gender based violence. Professor Yakin Ertürk, the Special Rapporteur of the United Nations Commission on Human Rights on violence against women visited Turkey from 22 to 31 May 2006 to investigate suicides of women. Senior justice and law enforcement officials in provinces informed the Special Rapporteur about cases in which "there were reasonable grounds to believe that the suicide was instigated or that a so-called honour killing was disguised as a suicide or an accident."<sup>20</sup> While the legal system provides for equality, the Special Rapporteur found that in practice "authorities too often lack

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<sup>18</sup> Paragraph 6

<sup>19</sup> Paragraph 4, UN Guidelines on the Role of Prosecutors adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

<sup>20</sup> UN Press Release, 31 May 2006

the willingness to implement these laws and protect women from violence.”<sup>21</sup> Furthermore, although there are now 23 state-run domestic violence shelters in Turkey, not one can be found in the Kurdish regions nor are there any government mechanisms in place to support the establishment of private shelters.<sup>22</sup>

A number of provisions of Turkish law regulating the relationship between a lawyer and their client fail to meet internationally accepted standards of due process. Article 5 of the new law reforming the Turkish Penal system (no. 5351) abolishes the basic principle of client confidentiality. Under Turkish law a suspicion of “abetment” is enough to justify the presence of a law enforcement official during meetings between a lawyer and their client, with discussions being taped and documents can be confiscated. The *Law on the Enforcement on Sentences* permits<sup>23</sup> a police officer to be present at meetings between lawyers and detainees.

**Sections 22 and 151 of the Turkish Penal Code also allows a criminal investigation to be instigated against a lawyer who is representing a client on terrorist offence charges based only on a vague suspicion of “assisting”.** The lawyer is then immediately suspended from representing their client and cannot visit or contact them, before any guilt needs to be proved.

The *Code of Criminal Procedure* prevents lawyers who have been prosecuted for an offence from representing clients who have been charged with similar crimes. This has ramifications for human rights defenders in Turkey who are often subject to and specifically targeted for prosecution and may unduly prevent them from representing their clients. **These provisions seem to be designed to unduly frustrate the work of the defence team, placing the principle of “equality of arms” in jeopardy.**

#### **4 Security situation in the southeast of Turkey**

The Council of Europe openly acknowledged in 2004 that the conflict in the south east of Turkey, and how it has been waged by the Turkish government,

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<sup>21</sup> UN Press Release, 31 May 2006

<sup>22</sup> Nadeen El-Kassem, “Conference Report: Women’s Human Rights in Cultural Diversity London School of Economics, Friday 28<sup>th</sup> October, 2005,” unpublished paper (3 November 2005), pp. 2.

<sup>23</sup> at the request of a public prosecutor and with the authorisation of an enforcement judge

has undoubtedly delayed its entry into the European Union.<sup>24</sup> KHRP holds that the resolution of this conflict is central to the establishment of a stable and democratic Turkey and to bringing about an end to human rights violations in the region.

Violent clashes between the PKK and the state security forces are still frequent in the region and there has been a notable resurgence in hostilities, with the deployment of 240,000 Turkish forces beginning to mobilise at the border with Iraq.<sup>25</sup> In May 2006, the International Crisis Group named Turkey as one of the ten conflict situations in the world that had deteriorated significantly during that month.

The continuing of hostilities between Kurdish militants and the Turkish state enables the Turkish security forces to justify a return to counter-terror activity in the southeast. Although the official state of emergency in the region has been lifted, there are still many road blocks and checkpoints in place. The Police have adopted an increasingly hard-line attitude towards unarmed civilians during pro-Kurdish protests. There have been a number of violent clashes between police and civilians in 2006, with reports of police firing on civilians, including children. A fact finding mission sent by KHRP to the southeast region in April 2006 found that the rule of law was clearly put aside during the security forces' handling of the violence that sparked following the funerals of PKK guerrillas at the end of March 2006. Police used indiscriminate and disproportionate force, clearly condoned by their superiors, chillingly reminiscent to many of the Police and security forces behaviour under the state of emergency during the 1990s.

The ongoing conflict has also impacted women severely, leading to the use of sexual violence by state security forces as a means to humiliate and weaken the Kurdish community. The violence in the region also dissuades communities from abandoning traditional practices that violate human rights. The ongoing conflict and continuing spiral of violence can be directly linked to the rise in incidences of domestic violence, honour crimes and the number of female suicides.

The Turkish government continues to determine the parameters of the conflict in the southeast almost exclusively in reference to security considerations. The broad definition of terrorism brings too many crimes under the remit of anti-

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<sup>24</sup> Council of Europe (COE), Parliamentary Assembly, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, 'Turkey: Explanatory memorandum by the co-rapporteurs, Mrs. Mady Delvaux-Stehres and Mr. Luc Van den Brande (Co-rapporteurs)', March 2004, p38

<sup>25</sup> In April, Turkish news agencies reported that the Turkish military was preparing a massive military operation against the PKK



terrorism law and also justifies the government in dismissing Pro-Kurdish politicians with wholly peaceful agendas as terrorists or separatists and refusing to engage in dialogue with them.

There have been some signs of an easing off on the Turkish administration's stance, particularly with Prime Minister Erdoğan's historic acknowledgement in August 2005 of the "Kurdish question". However, the Turkish administration has yet to take the next step forward and begin to open a dialogue with democratic Kurdish representatives. Prime Minister Erdoğan is more concerned that seeming "pro-Kurdish" could adversely affect his chances in the 2007 presidential election.

## 5 Freedom of expression

There have been some noteworthy reforms regarding the development of the right to freedom of expression and thought. The *Turkish Constitution, the Turkish Penal Code and the Press and Broadcasting Law* have all been amended, but the reforms have failed to sufficiently address the continuing criminalisation of legitimate expressions of political dissent and seem to be aimed at token reductions in the severity of punishments rather than instituting more fundamental change.

- *Language Rights:* The amended Turkish constitution maintains some of its most troublesome articles, e.g. articles 1-3 which stipulate that Turkey is an indivisible, secular state whose only official language is Turkish. Article 4<sup>26</sup> was not amended, rendering changes to the preceding articles impossible. Further, article 27 which carries the proviso that the right to disseminate arts and sciences and to study and teach them freely can not be done for the purpose of trying to change articles 1, 2 and 3 of the constitution. Moreover, the controversial article 49(9) continues to maintain that no language other than Turkish can be taught as mother tongue to Turkish citizens at institutions of training or education.
- *Press Laws:* Article 3 of the Press Law places a caveat on the freedom of the press in order to "safeguard the indivisible integrity of its territory". This serves to inhibit the publishing of material which criticises the accepted notion of the Turkish identity. Article 19 continues to subject those who publish information about ongoing court proceedings to heavy fines.

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<sup>26</sup> "The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed."

- *Political Parties*; Article 81 remains in tact forbidding political parties from using any other language other than Turkish in written material, public meetings or in video or audio cassettes. In June 2006 a prosecutor sought the ban of the Pro-Kurdish Rights and Freedoms Party (Hak-Par) for speeches made in Kurdish by party members at its congress last year under article 81(c). The prosecutor has requested for at least six months in prison for the accused, party head Abdulmelik Firat and other party administrators.<sup>27</sup> The pro-Kurdish Democratic Society Party (DTP), which distributed cards including a Kurdish phrase, was also prosecuted under the same article. A court ruled the cards be confiscated.
- *Anti-Terrorism legislation*: Turkish Anti-terrorism legislation continues to be used to suppress freedom of speech, thanks mainly to its broad definition of terrorist activity. On June 8<sup>th</sup> 2006, three Kurdish activists went on trial under anti-terrorism charges for a peaceful protest they held near the Iraqi border. They were charged for “making propaganda for the PKK” for walking towards the border in protest at the recent killings of civilians by security forces in the south east of the region.<sup>28</sup> The new draft Anti-Terror law that is currently before the Turkish Parliament could have a further chilling effect on the right to free expression and undermines reforms which have already taken place. Under article 6 of the draft law, it will be a terrorist offence to spread the “propaganda” of the terrorist organisation or even carry a banner, wear an emblem or even chant a slogan that pertains to a terrorist organisation. This will directly impinge on the pro-Kurdish movement’s right to protest which is guaranteed by articles 10 and 11 of the European Convention on Human Rights.

## **The Penal Code**

The *Turkish penal code* (TCK) was revised again in 2005 but its provisions still carry heavy penalties –including significant prison terms– for writers, journalists and publishers for criticising the Turkish state or for referring to one of the three major sensitive issues in Turkish society: the Armenian genocide; the Kurdish question; and the military. Prosecutions continue to be frequently instigated against writers and journalists, with over 60 being pursued in the last year. In the first week of June 2006 alone, courts in Istanbul heard 6 cases involving the freedom of expression.

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<sup>27</sup> Source: "Kurdish party faces ban for speaking mother tongue" The New Anatolian , 9<sup>th</sup> June 2006

<sup>28</sup>"Turkey's Reform Process at Risk as Three Kurdish Activists Go on Trial" Human Rights Watch Press release, 7<sup>th</sup> June 2006

Turkish prosecutors have already frequently used article 301 to pursue criminal proceedings against writers for peaceful expressions of political opinion. Introduced in June 2005 to replace article 159, it makes it an offence to denigrate the Turkish identity, the Republic or the organs or institutions of the state. In line with the jurisprudence of the European Court of Human Rights on article 10 of the European Convention, paragraph 301(4) explicitly states that expressions of thought intended to criticise will not constitute a crime.

In 2006, the writer Orhan Pamuk appeared before a Turkish court under article 301 for stating that “thirty thousand Kurds and a million Armenians were killed in these lands and hardly anyone dares mention it, so I do”. Professor Baskın Oran and Professor İbrahim Özden Kaboğlu, members of the Turkish Human Rights Advisory Board<sup>29</sup> were charged under article 301 for a report commissioned by the prime minister’s own office in which they argued that "Turk" is an identity of only one ethnic group and that the country also includes other ethnic groups such as "Kurd" or "Arab". This was considered to be sufficient “denigration” of the Turkish state to warrant criminal proceedings under article 301.

The prosecutions were eventually dropped in both these cases after they provoked international condemnation. These prosecutions, though, highlight the arbitrariness of article 301 and the lack of legal certainty that surrounds it. The wording of article 301 is too vague, the difference between “denigration” and “criticism” being impossibly finite so as to safeguard legitimate free expression. Whether the fault lies with the drafters of the TCK or with the restrictive interpretation that the judiciary is currently giving to its provisions is difficult to ascertain. However what is clear is that the lack of certainty of the terms of article 301 will lead to further criminal prosecutions of those seeking to add to political debate in Turkey. The onus is therefore on the Turkish Government to either amend the wording of article 301 or repeal the article all together.

Concerns arise too over the following articles of the TCK;

- Article 215; prohibits anyone from praising a committed crime or a person who has committed a crime. This provision could criminalise those who voice their support of the aims, but not the methods, of Abdullah Öcalan and the PKK or Hak-Par. Imprisoned for up to 2 years.
- Article 300 (formerly 158); up to four years imprisonment for insulting symbols of state sovereignty, such as the Turkish flag.

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<sup>29</sup> Both trials have been observed by members of KHRP’s legal team, the reports will be published by KHRP shortly.

- Article 312; prohibits incitement to racial hatred and continues to be used to found prosecutions against human rights Ngos who put forward support Kurdish issues.
- Article 318; individuals who discourage people from performing military service can be imprisoned for up to 2 years. This prevents journalists and academics from even reporting on or debating military service. In June 2006 the trial began of Perihan Magden charged with turning people against military service after she defended the rights of a conscientious objector in her weekly magazine column.
- Article 323; cites that an individual who spreads unfounded news or information during a war can be imprisoned for up to 10 years.