

FREEDOM OF EXPRESSION IN TURKEY

The Current Status

KHRP | Last Updated: July 2006

Contents

Summary

- I. What is freedom of expression?
- II. Why is freedom of expression important?
- III. Freedom of Expression and the Turkish State
 - A. The Republic of Turkey
 - B. The Kurds in Turkey
- IV. EU related reforms
 - A. Turkey and the EU
 - B. Content and nature of the reforms
- V. The current situation
 - A. Progress made
 - B. Continuing violations of the right to freedom of expression



Kurdish Human Rights Project

11 Guilford Street

London WC1N 1DH

Tel: +44 20 7405 3835

Fax: +44 20 7404 9088

Email: khrp@khrp.org

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

Under international law, Turkey is committed to securing the right to freedom of expression. Yet despite instituting numerous related reforms and the abundance of new legislation vis-à-vis the EU accession process, there remain serious concerns that the law continues to emphasise the protection of the state at the expense of the individual. In recent months publishers, journalists and satirists have continued to be prosecuted and convicted for non-violent expression, giving credence to this widespread apprehension.

If Turkey is to adequately protect the right to freedom of expression, additional reforms are needed to bring legislation in line with international standards. Furthermore, legal reform must be accompanied with a fundamental shift in the attitudes of the Turkish authorities.

I. What is freedom of expression?

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

Article 19 of the Universal Declaration of Human Rights

In its first session, the UN General Assembly adopted resolution 59(1) stating that 'Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.'¹

¹ United Nations General Assembly (14 December 1946) Resolution 59(1) *Calling of an international conference on freedom of information*. Available from <<http://www.un.org/documents/ga/res/1/ares1.htm>>.

Since then, the right to freedom of expression been enshrined in numerous human rights instruments, the most significant being the Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR), and the International Covenant on Civil and Political Rights (ICCPR). As a signatory to each of these conventions, Turkey is duty-bound to uphold the right of freedom of expression.

However, *the right to freedom of expression is not an absolute right*. Drafters of the major human rights instruments recognised that freedom of expression can be limited in some circumstances, but only in order to protect certain legitimate aims. These include the protection of an individual's reputation, public order, national

security, health and morals.² Yet without further qualification these exceptions are vague, and have often been used to censor just criticism of the authorities and stifle public debate. For example, defamation laws designed to protect individuals, are often cited to justify silencing the political opposition in the name of national security and public order.

These interests must be carefully balanced if freedom of expression is to be effectively protected. As the European Court of Human Rights has reiterated time and again, limitations must be construed strictly and the need for any restrictions must be convincingly established.³

II. Why is freedom of expression important?

“Government measures to control the media, either directly or indirectly, have many motivations but ultimately they have a common outcome, namely, democracy as a practice or an aspiration is undermined.”

Koïchiro Matsuura, Director-General of UNESCO⁴

² See Article 10 (2) European Convention of Human Rights and Fundamental Freedoms; Article 19 (3) of the International Covenant on Civil and Political Rights.

³ See for example ECtHR, Appl. No. 23472/03, *Grinberg v. Russia*, , judgement of 21 July 2005

⁴ Mr Koïchiro Matsuura, Director-General of UNESCO ‘Media and Good Governance’, speaking on World Press Freedom Day, 3 May 2005, available from <<http://www.un.org/events/pressday/2005/>>

Freedom of expression has a crucial role to play in a democracy; enabling participation and thus more equal representation in political life. Conversely, limiting the spread of information allows governments to control their populations, while serving to thwart self-governance, obscure truth and spread intolerance.

Ensuring the right to freedom of expression also allows people and groups to realise their full human potential, by allowing them to express themselves intellectually and culturally.

III. Freedom of expression and the Turkish State

A. The Republic of Turkey

Modern Turkey emerged in 1923 from the break-up of the Ottoman Empire. Led by Mustafa Kemal Atatürk, the new nation was meant to be secular, nationalist, unified, and centralised; its population homogenous, both ethnically and culturally.

Atatürk attempted to control freedom of expression to create the semblance of national unity. Turkey rejected liberal democratic measures and instead enacted authoritarian legislative provisions, favouring the protection of the state against the individual. Legislative restrictions on publishing and the media, designed to prevent criticism of state institutions and the discussion of politically taboo subjects, have

long been employed in an effort to preserve the *status quo* as well as repress minorities.

B. The Kurds in Turkey

The diversity of Turkey's population was a major obstacle to the nationalist vision of a unified, homogenous nation. The Kurds, having recently been denied their own state, were absorbed into the new nation of Turkey, as well as into Iraq, Iran, and Syria. The Kurds' distinct identity was thought to be the basis of separatist movements, particularly in Turkey, where the Kurds constitute around 23 percent of the population. State policies targeting the Kurds immediately commenced and have since persisted with varying degrees of intensity. Even the mere acknowledgment of Kurdish issues in the media has been met with repressive action by the Turkish state.

IV. EU related reforms

The last few years have seen some notable improvements in Turkey's human rights related legislation. The progressive reform of Turkey's domestic law has been largely associated with Turkey's prospective membership into the EU.

A. Turkey and the EU

The process of Turkey's accession to the EU has been a slow one. Turkey applied for associate membership into the former

European Economic Community in 1957 and entered into an Association Agreement in 1963. Economic instability and internal strife stunted the process and it was not until October 2005 that the later named 'EU' agreed to accession negotiations. In the lead up to this agreement, the EU set certain conditions for membership, known as the 'Copenhagen Criteria'. 'Protecting legal and constitutional guarantees for the right to freedom of expression' in accordance with Article 10 of the ECHR was one of the short term priorities in the 2000 accession plan.⁵

B. Content and nature of the reforms

In response to the EU's demands, Turkey has made numerous legislative amendments including reforming the Constitution, the Penal Code and Press Law, and instituting several 'harmonisation laws', amending a broad spectrum of domestic legislation.

2001 saw several constitutional reforms relevant to freedom of expression. Article 26 on Freedom of Expression and Dissemination of Thought was amended, removing the prohibition on minority languages. The amendment to Article 28 on Freedom of the Press did the same for written publications. The amendment to

⁵ Council Decision of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Ascension Partnership with the Republic of Turkey, (2001/235/EC)

Article 31 on the Right to Use Media Other Than the Press Owned by Public Corporations, included similar minor changes. However, like the Article 28 amendment, it expanded the grounds upon which restrictions could take place, incorporating national security, public order, morals, and the protection of health.

The first harmonisation package of 6 February 2002 in many respects broadened the scope of provisions which threaten freedom of expression. Whilst it eliminated some fines and reduced imprisonment terms, it elevated other fines significantly.

The second harmonisation package, approved on 26 March 2002, removed the prohibition against 'language forbidden by law' from Article 16 of the Press Law, and limitations on the production of publications by the local authorities were reduced.

The third Harmonisation Law, adopted on 3 August 2002, had a significant impact on freedom of expression. It added to Article 159 of the Turkish Penal Code 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, which had been forbidden. Amendments were also made to the Press Law, reducing fines and abolishing prison sentences.

The fourth Harmonisation Law, adopted on 2 January 2003, again relaxed restrictions, particularly regarding the use of foreign languages and the protection of journalistic sources; *protecting owners of publications from being forced to reveal their sources was a significant step forward for freedom of expression.*

The sixth Harmonisation Law enacted on 15 July 2003, eased restrictions on broadcasting, particularly in languages other than Turkish. The most significant change in this package was the annulment of Article 8 of the Anti-Terror Law, which had prohibited the dissemination of separatist propaganda and had commonly been used to silence political criticism.

The seventh harmonisation package passed on 30 July 2003, eased penalties for 'insulting Turkishness'. Although this reduced the minimum prison time served, no adjustment was made to the maximum penalty length; this was ultimately left to the courts' discretion.

A new Press Law was passed in June 2004 containing some improvements and allowances for increased freedom of expression. The right of journalists to protect their sources was strengthened and the 'right to reply' and right to correction of mistakes were reinforced. Prison sentences were mostly replaced by fines. However, Article 19 subjects those who publish information about

ongoing court proceedings to heavy fines. This provision allows authorities to silence dissenters pending litigation and has been widely criticised as excessive.

In September 2004 the new Penal Code was adopted, which has proved to be the most controversial of the new legislation. Whilst it did narrow the scope of some Articles related to freedom of expression, it has generally been condemned as a retrogressive development.

According to the European Commission, the new Code 'provides limited progress on freedom of expression', and some offending articles 'have been maintained or changed only slightly'.⁶ Article 301 on 'insulting being a Turk, the Republic, the organs or institutions of the state', has been a focal point for critics and is almost identical to the controversial Article 159 in the old Penal Code.

In May 2005, several provisions of the new Code were amended, improving freedom of expression to some degree. Aggravated sentences for many of the media-related articles were abolished. The scope of defamation under Article 125 was narrowed and acts aimed at providing information or criticism, were no longer criminalised. However, a number of the widely-criticised Articles, in particular Article 301, remained largely unchanged.

⁶ Commission of the EC 2004 Regular Report on Turkey's Progress Towards Ascension p.38

V. The current situation

A. Progress made

Evidence suggests that there has been some progress on freedom of expression in Turkey. Turkish official statistics stipulate that there was a decrease in the number of prosecutions and convictions under relevant articles of Turkish law between 2001 and 2003,⁷ and this trend has reportedly continued.⁸ As of April 2004, 2204 people had been acquitted following amendments to State Security Court provisions, and the Turkish authorities have reported that people serving sentences under the old Penal Code have been released from prison.⁹ According to the Turkish Publishers Association, it is now easier to publish materials covering controversial subjects such as Kurdish issues.¹⁰ There is also some evidence to suggest an increased awareness of the right of freedom of expression amongst the Turkish judiciary.¹¹

B. Continuing violations of the right to freedom of expression

Despite these achievements, the current situation remains

⁷ Commission of the EC 2004 Regular Report on Turkey's Progress Towards Ascension p.37

⁸ EU Commission Turkey 2005 Progress Report p.25

⁹ EU Commission Turkey 2005 Progress Report p.25

¹⁰ EU Commission Turkey 2005 Progress Report p.26

¹¹ KHRP fact finding mission report on *Dissenting Voices: Freedom of Expression and Association in Turkey*, September 2005 p.20

troubling. The reforms have failed to sufficiently address the issue of freedom of expression and seem to be aimed at token reductions in the severity of punishments, rather than instituting more fundamental change in legislative norms and praxis. Serious concerns remain about existing legislation and over the prevailing attitudes of the Turkish authorities.

According to Reporters Without Borders' 2005 annual report 'the [Turkish] media is still the victim of courts that arbitrarily imprison and heavily fine journalists.'¹²

Meanwhile the US Department of State's February 2005 report, stated that in 2004, individuals still could 'not criticize the State or Government publicly without fear of reprisal, and the Government continued to restrict expression by individuals sympathetic to religious, political, and Kurdish nationalist or cultural viewpoints.'¹³

The present situation stands in contrast to the commitments of the Turkish Government and Prime Minister Recep Tayyip Erdogan. Despite the ruling Justice and Development Party's (AKP) supposed commitment to an open and democratic Turkey, the Prime Minister has routinely used defamation proceedings against cartoonists and satirists. Judicial penalties inflicted on Musa Kart

¹² Reporters without Borders, Turkey - 2005 Annual report, available from <http://www.rsf.org/archives_euro-uk05.php3>

¹³ USDOS "Country Report on Human Rights Practices" 28 February 2005

and his newspaper, *Cumhuriyet*, for publication of a cartoon portraying the Prime Minister as a cat entangled in a ball of wool, representing the difficulties he faced in passing certain legislation, is one such case.



Musa Kart's cartoon portraying Prime Minister Erdogan as a cat tangled in a ball of wool

As a result of the action, Musa Kart was ordered to pay a £1,880 fine for 'publicly humiliating the prime minister'. According to the Initiative for Freedom of Expression, 57 such compensation claims have been made by the Prime Minister and out of the 31 of these cases which have been concluded, 21 were found in favor of Prime Minister and 10 against him.¹⁴ The attitude of the Prime Minister is indicative of the authorities' negative attitude towards legitimate dissent and the disproportionate significance still afforded to public representatives and state institutions.

¹⁴ Initiative for Freedom of Expression, (15 December 2005) '2005, Picture of Freedom of Expression in Turkey', available in English and Turkish from <<http://www.antenna-tr.org/>>

Ertuğrul Kürkçü, coordinator of bianet.org, a network established to monitor and report on media freedom, says 'the new Penal Code, particularly those articles related to the media, is only superficially concerned with the rights of the individual...it protects the right of the state functionaries and members of the government, not those of ordinary people.'¹⁵ Her concerns are shared by KHRP and many other organisations involved with freedom of expression, and the new Penal Code to which she refers is a particular focal point of this criticism.

A joint press release issued on 16 December 2004 by the International Publishers' Association (IPA) and International PEN, commented that 'it is rather frightening that the New Turkish Penal Code provides virtually no progress on freedom of expression.'¹⁶

Reviewing the draft of the new Penal Code, Miklos Haraszt, the OSCE Representative on Freedom of the Media, stated that, 'in many chapters...there is an automatic punishment for media involvement, and all of them are missing the needed extra protection for the public role of the media. No known forms of protection of public interest debates in society are present.'¹⁷

¹⁵ KHRP fact finding mission report on *Dissenting Voices: Freedom of Expression and Association in Turkey*, September 2005 p.22

¹⁶ Home Office Country Information & Policy Unit, 'Turkey Country Report, April 2005' para 6.104

¹⁷ OSCE Representative on Freedom of the Media Miklos Haraszt, Review of the Draft

Mr. Haraszt recommended that Article 301 'be deleted from the Criminal Code since its only function is to ban criticism' adding that 'it does not even refer to any inaccuracy or violation of privacy.'¹⁸

Speaking in November 2005, Oli Rehn of the EU Commission Responsible for Enlargement, added his voice to the criticism, urging that the Turkish government closes 'loopholes that give too much room of discretion for anti-European interpretations of freedom of expression'.¹⁹

According to Mr Rehn 'the recent prosecutions of novelists such as Orhan Pamuk...and publishers such as Fatih Tas and Ragıp Zarakolu, are of particularly serious concern in this context.'²⁰

Orhan Pamuk is a popular author in Turkey and has built an international reputation for his accomplished works. He has been at the hub of the freedom of expression debate since being targeted for remarks he made to Swiss newspaper *Tages Anzeiger*. Orhan Pamuk said that 'thirty thousand Kurds and a million Armenians were killed in these lands and almost nobody but me

Turkish Penal Code: Freedom of the Media Concerns, May 2005 available from <<http://www.osce.org/documents/>> p.2

¹⁸ Ibid. p.10

¹⁹ Speech by Olli Rehn, 'Accession negotiations with Turkey: fulfilling the criteria' to the European Economic and Social Committee EU-Turkey JCC, 28 November 2005, available from

<http://europa.eu.int/comm/commission_barroso/rehn/index_en.htm>

²⁰ Ibid.

dares to talk about it'.²¹ Whilst most of the world recognises that a genocide of Armenians took place between 1915 and 1917, the subject remains a taboo in Turkey, where only a few hundred are officially acknowledged as having been killed. Orhan Pamuk was charged under Article 301 of the new Penal Code, and faced up to three years if convicted.

The trial of Orhan Pamuk began on 16 December 2005 to widespread international and media scrutiny. Although Turkish officials accommodated foreign observers to the best of their abilities, the atmosphere outside the court was more hostile. Turkish authorities made little attempt to control the crowd and at times seemed to assist in the harassment and intimidation of Orhan Pamuk. On 7 January 2006 – during an adjournment of the proceedings to determine the sufficiency of the charges – Minister of Justice Cimek made comments to the *Turkish Daily News* stating that Orhan Pamuk should have apologised for his remarks that he suggested were insulting to Turkey. His commentary reflects a misunderstanding among many in the Turkish government of how a modern judicial system should function.

At the end of January, the Ministry of Justice dropped the charges against Orhan Pamuk, saying that the amended Penal Code did not authorise a criminal proceeding. More disturbing, is that Turkey still

²¹ Observer, 23 October 2005

seems unwilling to tolerate dissent and to bring its legal system into line with the ECHR and other international conventions to which it is bound. Despite claiming to have made reforms to modernise its judiciary, Turkey's laws are still being used to stymie dissent and its prosecutors remain dependent on the Ministry of Justice. It is likely that any true progress will be hampered for years to come.

Orhan Pamuk's is a prominent case, but he represents only one of scores of authors who have been targeted. According to bianet.org, 16 journalists were put on trial in the first nine months of 2005, 12 of whom were found guilty. The Publishers Association says that in the 18 months until summer 2005, 37 authors were tried for criminal offences in connection with 47 publications.²²

Publishers as well as authors continue to be persecuted by the authorities. Ragip Zarakolu has been continually targeted by the authorities since he began publishing in the 1970s. On 8 March 2003, he was charged under Article 159 of the Turkish Penal Code (the precursor to 301) and then under Article 301 when the new Code came into effect. Another case was opened against him in March under Article 301 and also Law No. 5816, which prohibits publicly insulting the memory of Atatürk. Both the relevant publications concerned the Armenian issue.

²² *Guardian* 16 December 2005

Fatih Tas, owner of the Aram Publishing House, was convicted in absentia under Article 301 to six months imprisonment on 20 October 2005, only receiving the ruling on 5 December 2005. The conviction was for publishing '*They Say You are Missing*', which tells the story of Nazým Babaođlu who was kidnapped on 12 March 1994. Under a separate indictment, he also faces further charges under Article 301 and Law 5816. This indictment concerns a translation of John Tirman's '*Spoils of War - The Human Cost of America's Arms Trade*'. The book details the large scale US supply of arms to the Turkish military and describes the suppression of the Kurds by the Turkish Government in the 1980s and 1990s.

Prominent academics have also been targeted. Baskın Oran, Professor of International Relations at Ankara University, and Ibrahim Kabođlu, Professor of Law at Istanbul's Marmara University, have both been charged in relation to their involvement in a report published by the Human Rights Advisory Board (IHDK), a committee set up by the Turkish Prime Minister. The controversial report entitled '*Minority and Cultural Rights*' was published in 2003 and analysed the Lausanne Treaty, and EU and Turkish law. In proposing recognition for Turkey's minorities, it was charged that the report conflicted with Article 3 of the Constitution, which defines the Turkish state as being indivisible and to which any

proposed amendment is forbidden by Turkish law.

Professors Baskın Oran and Ibrahim Kabođlu were indicted under Article 216 for inciting enmity and hatred, and Article 301 for insulting state institutions. Investigations are carried out by prosecutors in Turkey and can commence after the filing of a complaint by any individual. Judges rarely involve themselves in the process to filter out those investigations without merit. Despite a defence that challenged the sufficiency and jurisdiction of the charges, the judge in this case merely adjourned the proceedings after ruling that the needed permission to prosecute was not obtained from the Ministry of Justice. The substantive issues of the indictment relating to freedom of expression were skirted.

There were two further hearings of the case against the professors. At the first hearing on 11 April 2006, in reply to the court's request, a report from the Ministry of Justice stated that there was no need for permission to be granted to investigate charges of '*public humiliation of the courts authority*'. The trial on Article 301 was halted but the trial continued under Article 216. At the second hearing on 10 May 2006, the judge formally dropped the charges against the defendants under Article 301 and acquitted them of the charges under Article 216. Prosecutors in Ankara have recently opened an investigation claiming that Professor Oran's

defence papers were improperly disseminated to media agencies before the commencement of his trial, and that their publication unduly tampered with judicial procedure. Professor Oran has

been asked for a defence statement after which the prosecutors' office will decide whether to proceed with the charges.
