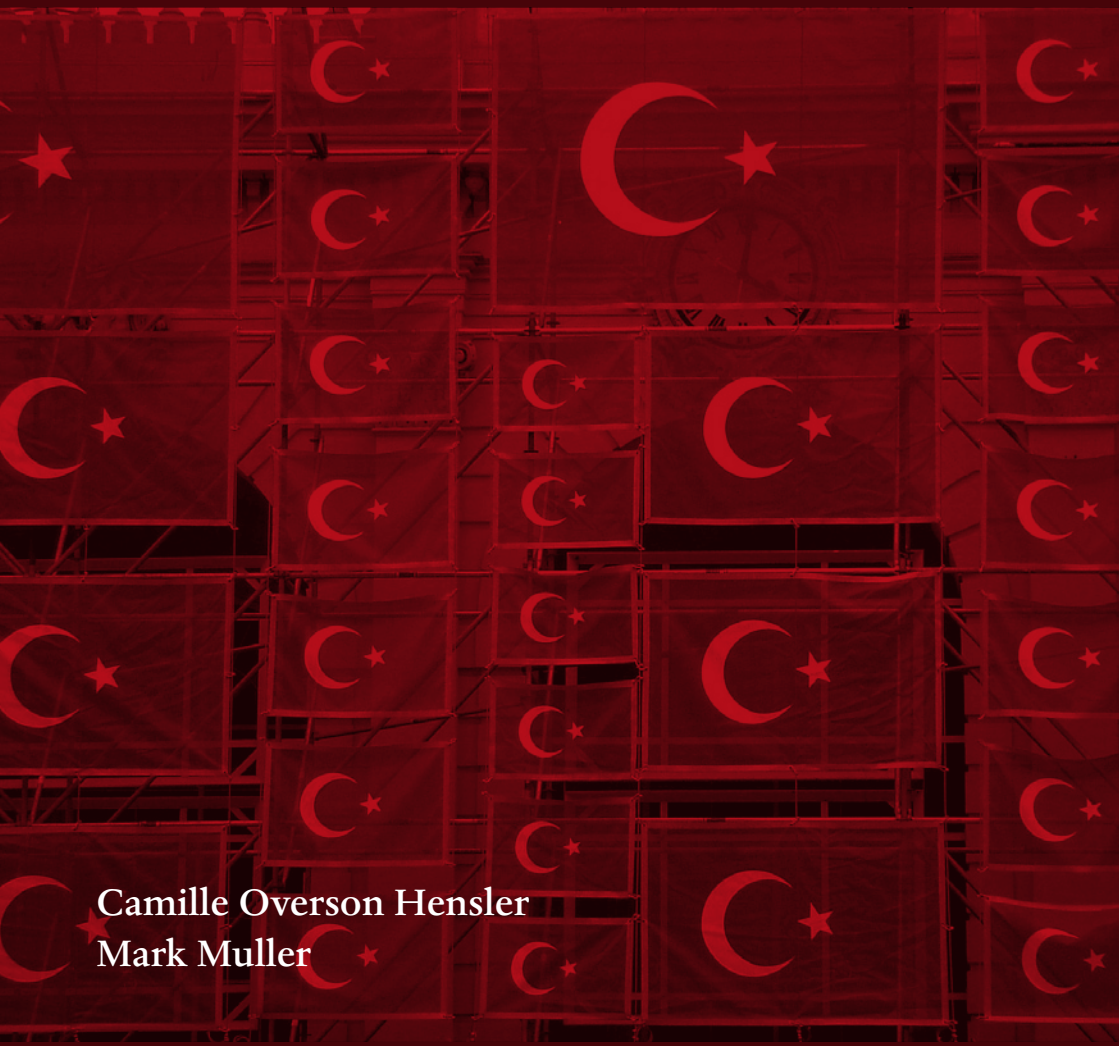
Freedom of Expression and of Association in Turkey



Camille Overson Hensler
Mark Muller

November 2005

Kurdish Human Rights Project
KHRP
Established 1992

BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES

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Note on translation

When dealing with Kurdish issues four different Middle Eastern dialects are encountered, and Kurdish itself has many dialects. The Kurdish spelling has been used where possible, with the Turkish equivalent provided in brackets.

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Kurdish Human Rights Project
2 New Burlington Place
London
W1S 2HP - UK
Tel: +44 (0)20 7287 2772
Fax: +44 (0)20 7734 4927
khrp@khrp.org
www.khrp.org

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

Bar Human Rights Committee of England and Wales
10-11 Gray's Inn Square
London
WC1R 5JD - UK
Tel: +44 (0)20 7405 2575
Fax: +44 (0)207831 2430
bhrc@compuserve.com
www.barhumanrights.org.uk

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Contents

Abbreviations 9

Foreword 11

I. Introduction 13

II. The Kurds : Background 15

A. Region 15
B. Population 16
C. Language 16
D. Religion 17

III. The Kurds in Turkey 19

IV. Turkey's International Obligations 23

A. Universal Declaration of Human Rights 23
B. European Convention on Human Rights 24
C. International Covenant on Civil and Political Rights 26
D. Convention on the Rights of the Child 28

V. Turkey and the EU 31

A. The Accession Process 31
B. The Copenhagen Criteria 32

VI. Turkish Reforms 37

A. Turkish Constitutional Reforms 37
B. Harmonisation laws 41
C. Revised Penal Code 44
D. New Press Law 51
E. New Law on Associations 56

VII. Conclusion 61

VIII. Recommendations 65

Recommendations for the Turkish Government 65
Recommendations for the European Union 65
Recommendations for International Organisations 65

Appendix 1: Comparative Provisions in Turkish Laws 67

A. Constitution 67
B. Turkish Penal Codes 69

Abbreviations

BHRC	Bar Human Rights Committee of England and Wales
BİA	*Bağımsız İletişim Ağı* (Independent Communication Network)
CRC	UN Convention on the Rights of the Child
DEP	*Demokrasi Partisi* (Democracy Party)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
İHD	*İnsan Hakları Derneği* (Human Rights Association of Turkey)
İHDK	*İnsan Hakları Danışma Kurulu* (Human Rights Advisory Board)
KHRP	Kurdish Human Rights Project
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
PKK	*Partiya Karkaren Kurdistan* - Kurdistan Workers' Party
UDHR	Universal Declaration of Human Rights
TÜSEV	*Türkiye Üçüncü Sektör Vakfı* (Turkish Third Sector Foundation)

Foreword

With the opening of formal EU accession negotiations on 5 October 2005, Turkey's human rights record now falls under stricter scrutiny. As the recent trials of novelist Orhan Pamuk, editor Hrant Dink and publisher Fatih Taş make clear, in addition to numerous less well-profile cases, there remain grave concerns about the protection of freedom of expression and association throughout the country.

Universal rights regarding freedom of expression and of association are enshrined in numerous international declarations, covenants and conventions, but in Turkey it is the European Convention on Human Rights (ECHR) that has had the most impact. This report examines the legislative reforms Turkey has introduced in an effort to meet ECHR standards, in particular evaluating their efficacy and implications on Turkey's accession to the EU.

While improvements in numerous areas of civil and political rights are evident in Turkey, these improvements have not been across the board. Disquietingly, the progress made in previous years seems to have been reversed in 2005; possibly signalling an element of complacency within the Turkish government that the measures it has taken are already sufficient to meet accession criteria. To the contrary, this report illustrates the shortfalls that still exist before fully meeting European standards on civil and political rights. For the Kurdish population in Turkey as a whole – an estimated 20 per cent of the population – there is still no democratic representation. While Kurds are free to vote, political parties that have taken up the Kurdish issue remain subject to intimidation and harassment, not to mention bureaucratic restrictions that curtail their rights to operate freely. Without this democratic representation, the electorate as a whole suffers a violation of its right to fair and free elections and to choose freely between political representatives.

Elsewhere, the rights of people and of the media are curtailed even by new legislative enactments, such as the new Penal Code introduced on 1 July 2005. Freedom of speech is diminished by articles including Article 305, which prohibits 'propaganda against the Turkish state', or Article 150, which prohibits 'insults' against the state. No state can be said to be democratic where peaceful and non-violent criticism is prohibited.

This report outlines measures the Turkish government can yet take to meet its ECHR obligations and to fulfil the requirements of EU accession; measures we sincerely urge the government to take. We also welcome the European Commissioner for Enlargement's recent pronouncements highlighting the centrality of civil and political rights to any possible accession to the EU, including his concrete guidance that violations of freedom of expression and association must cease within two years at the latest. We urge the European Commission, Turkish government, civil society organisations and other actors in the accession process to support him in that goal.

Kerim Yildiz
Executive Director, KHRP

Mark Muller
Vice-President, BHRC

I. Introduction

The right to free speech and to associate freely are taken for granted by many people in the world. These rights are thought of as natural rights, imperfectly codified in domestic laws, but respected all the same. For the Kurds of Turkey, these rights cannot be taken for granted, and are often suppressed. This has implications for Turkey's bid to join the EU. On 3 October 2005, Turkey embarked on the next stage of the EU accession process – the opening of formal accession negotiations. Turkey has in recent years been under strict scrutiny from the EU, human rights groups and other interested regional and international organisations with regard to her progress on human rights reform and particularly her compliance with the Copenhagen Criteria: minimum standards which all states must fulfil before they can become recognised as official EU negotiating partners. This report will discuss the status of freedom of expression and freedom of association in Turkey as expressed through various laws, in the context of her fulfilment of the Copenhagen Criteria and with her international treaty obligations. It further includes examples of current cases and issues in Turkey which illustrate the implementation of the newly enacted laws, among them the case brought against novelist Orhan Pamuk. It updates 'Freedom of Association: Law and Practice in Turkey', published by KHRP in 1998.

II. The Kurds: Background

A. Region

> *The Kurds are homeless even at home, and stateless abroad. Their ancient woes are locked inside an obscure language. They have powerful, impatient enemies and a few rather easily bored friends. Their traditional society is considered a nuisance at worst and a curiosity at best. For them the act of survival, even identity itself, is a kind of victory.*[1]

The world has become increasingly aware of the Kurdish people over the past few years, as the integral role they play in the stability of the Middle East and their treatment at the hands of repressive regimes is brought into focus, particularly since the US-led invasion of Iraq. The main concentration of Kurds is in the mountains of the Zagros range where Iran, Iraq and Turkey meet.[2] The Kurds are descendants of Indo-European tribes who settled among the aboriginal inhabitants of the Zagros mountains in various epochs, but particularly during the second millennium BC.[3] This region was first referred to as 'Kurdistan' when the Turkish Saljuk Prince Saandjar created a province by that name in the twelfth century.[4] This distinctive region, marked by rugged and isolated mountain ranges and colourful peoples, has a reputation that extends beyond the contentious borders of the Zagros Mountains. The Arabs term for places like Kurdistan is *bilad es-siba*' - land of lions - or regions inhabited by isolated peoples who listen more to their hearts and traditions than to civilization.[5] This determination to hold on to their distinctive identity has been sorely tried in the history of the Kurdish people.

The Kurdish tribes have inhabited the Zagros Mountains for centuries, with movement of people and power forming an ever shifting wave. Despite the ebb and flow of tribal politics and Kurdish unity, there are certain parts of the area

1 Christopher Hitchens, The Struggle of the Kurds, 182 *Nat'l Geographic* 32, 60 (Aug. 1992).

2 David Mcdowall, *A Modern History Of The Kurds*, (I.B. Tauris, 1996), 6.

3 *Id.* at 7.

4 kerim Yildiz and Georgina Fryer, *The Kurds: Culture and Language Rights*, (Kurdish Human Rights Project, 2004), 13.

5 Christiane Bird, *A Thousand Sighs, A thousand revolts: journeys in Kurdistan*, (Ballantine Books, 2004), 14.

commonly referred to as Kurdistan that have significance for all the Kurds, regardless of whether they now reside in Iraq, Iran, Syria or Turkey. Aside from the geographic area known as Kurdistan, there is also a mythical view of Kurdistan. Occupancy by the Kurds is believed to stretch back into the mists of time, "from time immemorial" to use a resonant phrase, conferring on the Kurdish people a unique association with the land.[6] Moreover, the idea of Kurdistan for many Kurds is also characterized by an almost mystical view of "the mountain", and imaginary as well as real place.[7] Even though many of the Kurds have left their traditional mountain valleys for the villages or towns, the mountain image loses nothing of its potency, or place, in Kurdish identity.[8]

This region was carved up in the aftermath of the First World War and distributed between the states of Turkey, Iraq, Iran and Syria. The Kurds form numerically significant, non-Arab minorities in the strategic border-lands of these countries, and as a result, have faced persecution and discrimination in much of the region. In particular, Turkey views the expression of a distinct Kurdish ethnicity to be a threat to the integrity of the nation-state and Turkish identity, and has systematically repressed the Kurds since the founding of the state.

B. Population

The exact number of Kurds is difficult to determine because they are fragmented throughout four main countries: Turkey, Iraq, Iran and Syria; some of which acknowledge having a substantial Kurdish minority, while others do not admit to their existence. There are believed to be over 20 million Kurds in Turkey (20 per cent of the population); 4 million in Iraq (25 per cent of the population); 7 million in Iran (15 per cent of the population); over 1 million in Syria (9 per cent of the population); 75,000 in Armenia (1.8 per cent of the population) and 200,000 in Azerbaijan (2.8 per cent of the population).[9] These estimates indicate that the Kurds are the fourth largest minority in the Middle East.[10]

C. Language

The Kurdish ethnic or socio-economic identity is not limited to a single racial origin, but includes Arab, Armenian, Assyrian and Persian (later Turcoman) tribes

6 McDowall *supra* note 2 at 3.

7 *Id.*

8 *Id.*

9 Kerim Yildiz, *The Kurds in Iraq: The Past, Present and Future*, (Pluto Press, 2004), 9.

10 *Id.*

which became Kurdish by culture and language.[11] As a result of this mix of ancestry, the Kurds do not have a single systematised written or spoken language, but rather remain divided into dialect groups and sometimes cannot communicate freely with other Kurds in their mother tongue, although most Kurdish dialects share a north-western Iranian linguistic origin.[12] The two most prominent dialects are Kurmanji, which is spoken primarily by Kurds in Turkey, Syria and the Caucasus, the northern part of Iran and down to the Greater Zab river in Iraq, and Sorani which is spoken by Iraqi Kurds living south of the Greater Zab and by Iranian Kurds living in the Kordestan province.[13]

D. Religion

There are wide-ranging religious beliefs among the Kurds, which is indicative of their different regional origins. The majority of Kurds adhere to Sunni Islam.[14] Other religious affiliations include Judaism; Christianity; Alevism – an unorthodox form of Shi'ism; adherents to the "established" faith of Iran – *Ithna'asheri Shi'I Islam*; the *Ahl-I Haqq* (People of Truth) – a small sect found in the south and south-east of Kurdistan; and the Yazidi religion.[15] Given this wide diversity of religious practice, religious belief does not play a part in defining Kurdish distinctiveness. The religious beliefs of the Kurds are not limited to one religion.

The definition of a "Kurd" is difficult, because they do not have a single unifying characteristic since they are an amalgamation of cultures, languages and religions. Nevertheless, the Kurds continue to claim that by race, language, and lifestyle—and perhaps above all geography – they form a distinct community.[16] Put quite simply, they are more like each other than anybody else and they feel it.[17]

11 McDowall, *supra* note 2 at 7.

12 *Id.*

13 Yildiz *supra* note 8 at 8.

14 McDowall *supra* note 2 at 8.

15 Yildiz *supra* note 8 at 8.

16 David McDowall, *The Kurds: A Nation Denied*, (Minority Rights Publications, 1992), 3.

17 *Id.*

III. The Kurds in Turkey

The Turkish state was founded by the Treaty of Sèvres in 1920. However, modern-day Turkey and the present borders are the result of the 1923 revolution led by Mustafa Kemal. Kemal, later known as Atatürk, believed that different minority and ethnic aspirations were to blame for the fall of the Ottoman Empire, and consequently he resolved to create a highly centralised, secular nation-state, the territorial integrity of which was to be ensured by a new, purely Turkish national identity.[18] As a result, while the Treaty of Sèvres specifically recognised the Kurds and the role they would play in a new nation-state envisioned by the Allies, the Treaty of Lausanne, concluded between the Allies and Turkey on 24 July 1923, contained no mention of a Kurdish state nor even acknowledged the existence of the Kurdish people in Turkey.[19] These omissions were the harbinger of future Kemalist efforts to install a homogenous population in Turkey.

A series of Constitutions, laws, decrees and governmental policies subsequently entrenched a Turkish national identity which allowed no room for dissenting minority voices, in direct contravention of Article 39 of the Treaty of Lausanne.[20] For example, the 1924 Constitution established state control of identity, stating that, "[i]n Turkey, from the point of view of citizenship, everyone is a Turk without regard to race or religion."[21] In March 1924, an official decree banned all Kurdish schools, organisations and publications.[22] The use of the words "Kurds" and "Kurdistan" were banned and references to them removed from Turkish history books and publications.[23] The 1924 Act of Unification of the Education System placed all schools under state control. Celebrating the Kurdish New Year of Newroz was illegal and punishable by long-term imprisonment. Kurdish folklore was banned and gramophone recordings of music were destroyed.[24] From 1938 onwards, the

18 Yildiz and Fryer, *supra* note 4 at 18.

19 *Id.* at 19.

20 *Id.* at 21.

21 Yildiz and Fryer, *supra* note 4 at 20.

22 KHRP, *Culture and Language Rights of the Kurds*, (Medico International and KHRP, 1997), 6.

23 *Id.*

24 Yildiz and Fryer, *supra* note 4 at 21.

Kurds were referred to only as "Mountain Turks."[25] This systematic denial of Kurdish language and cultural rights and of Kurdish expression was designed to entrench Atatürk's vision of a secular, homogenous state.

Such repressive measures were met with resistance by the Kurdish peoples, and the first Kurdish rebellion occurred in 1925. It was led by Shaikh Said, members of the Kurdish intelligentsia and religious leaders, as well as members of the military.[26] Such a rebellion on the part of the Kurds coalesced the Turkish authorities' attention on controlling and repressing Kurdish identity. It prompted the formulation of policies specifically aimed at destroying Kurdish identity, and in doing so, catalysed the emerging trend towards an authoritarian style of government which has characterised Turkish/Kurdish relations ever since.[27]

Evidence of this growing dichotomy and repression of the Kurds can be found in the Turkish Penal Code which was first enacted in 1 March 1926. Articles 141 and 142 prohibited organisations and propaganda "seeking to destroy or weaken nationalist feeling". Atatürk's language revolution instigated the passage of the Law on the Adoption and Application of the Turkish Alphabet which was passed in November 1928 and is still in force today. Article 2 obliges all companies, associations, private societies and state run establishments to conduct their written correspondence using the Turkish alphabet. Article 4 provides that all notices, proclamations, advertisements, newspapers, publications and magazines must be printed in Turkish. This had the effect of making the use of Kurdish illegal, because the Kurdish language requires the use of the letters 'q', 'w' and 'x', which are not present in Turkish.[28] Further measures included the passage of Law No. 7267 of 1959 which provided that, "[v]illage names that are not Turkish and give rise to confusion are to be changed in the shortest possible time by the Interior Ministry after receiving the opinion of the Provincial Permanent Committee."[29] The results of this law are still apparent today. Personal names were also regulated by the Surname Regulation of 1934 which was used to prohibit the registration of children under Kurdish names.[30]

There have been, and continue to be, many restrictions on freedom of expression as well, particularly in the media, and particularly for Kurds. The Penal Code, first enacted in 1926, has been interpreted to regulate severely freedom of expression. For instance, paragraphs 141 and 142, mentioned above, prohibited organisations

25 KHRP, *supra* note 20 at 6. As recently as 1989, so called "scientific" reports were circulated, which alleged that the Kurdish languages were in fact crude dialects of Turkish.

26 *Id.*

27 *Id.*

28 Yildiz and Fryer, *supra* note 4 at 22-23.

29 *Id.*

30 *Id.*

and propaganda "seeking to destroy or weaken nationalist feeling". This has been interpreted by the courts as including non-violent expressions of Kurdish identity, such as Kurdish poetry, music and folklore.[31] Paragraph 140 prohibited the publishing in a foreign country of untrue, malicious or exaggerated rumours or news about the internal situation.[32] Paragraph 312 allowed, "no incitement to racial, ethnic, or religious enmity."[33] All of these provisions have been used to suppress the discussion of Kurdish ideals, or enforced as means of harassment or persecution. Such repressive legislation is worse in predominantly Kurdish areas. The mainly Kurdish south-east had been under martial law or state of emergency since 1978.[34] This was lifted in November 2002. The legislation allowed for heavy censorship of newspapers and publications.

The criminalisation of the Kurdish population through legislative enactments and corresponding policy has frequently been met with incidents of Kurdish uprising. This cycle has been perpetuated through increasingly harsh Turkish military and legislative responses. Major Kurdish uprisings took place in 1925, in 1930 and again in 1936.[35] "After the great Kurdish nationalist revolts. . . a systematic policy aiming at detribalization and assimilation of the Kurds was adopted. . . Everything that recalled a separate Kurdish identity was to be abolished: language, clothing, names."[36] Since establishment of the state in 1923, there have been 28 major uprisings.[37] Most recently the *Partiya Karkaren Kurdistan* (PKK – Kurdistan Workers' Party) had from 1984 to 1999 been involved in an armed conflict with the Turkish government which claimed almost 30,000 lives, the majority of which were Kurds.[38] Recent months

31 KHRP, *supra* note 20 at 7.

32 Turkish Penal Code (1926).

33 *Id.*

34 Human Rights Watch World Report 2003, accessed on 7/12/05 at http://www.hrw.org/wr2k3/europe13.html.

35 KHRP, *supra* note 20 at 6.

36 Edip Yuksel, *Yes, I am a Kurd,* 7 J. Int'l L & Prac. 359, **363 (1998).**

37 *Id.* However, Ahmet Kahraman, in his book Kurt Isyanlari, disputes the number of actual rebellions. Kahraman states that "although according to the Turkish official record, there were "no Kurds", yet for whatever reason non-existent Kurdish rebellions of 1920-1940 were made to "exist". They were given numbers, 1, 2, 3 though to 28 with the PKK movement and the tragic effort at resistance in Dersim to the expeditions organised in year 1984 the total reached 29. Those who follow the trail numbered by official history and those who look into the nooks and crannies in an analytical way will see that a great majority of these rebellions were in fact "imaginary." As a result, those fleeing from the bloody whirlwind of "suppression and retribution" were called "rebels." Even if the definition of a rebellion is broadened, the number of real uprisings is 3, not 29." Its publication in English is forthcoming.

38 This conflict has involved atrocities committed by both sides. The PKK attacked Kurds who joined the village guard system as traitors or collaborators. In the late 1980s and early 1990s, the PKK "executed" many captured village guards, and massacred village guard communities, including women and children. When the PKK slipped away into the mountains after an attack, the gendarmerie and village guards would immediately launch brutal operations against any non-village guard communities in the vicinity. Mass detentions and interrogation under torture were commonplace, and

have seen a resurgence of the conflict. It is estimated that around 3,800 Kurdish villages have been evacuated and up to three million people have been internally displaced from the south-east.[39] Such a violent history has resulted in a "race to the bottom" in which Kurds revolt against repressive military and legislative actions, and the Turkish government in turn reacts with even more repressive measures.

This is the backdrop against which Turkey seeks to join the EU. Both Kurds and Turks generally view joining the EU as a positive step, and are in favour of accession; the Kurds because they feel the EU will provide the protection for their culture and lives which they so desperately seek, and the Turks aspire to align themselves more closely with the Europeans and their markets. Accordingly, the Turkish government has taken steps to meet the requirements set out by the EU for membership, including the Copenhagen criteria. An analysis of those criteria and Turkey's progress on those reforms follows.

sometimes there were reprisal massacres. *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons,* 337.

39 **Yuksel,** *supra* note 35 at 374.

IV. Turkey's International Obligations

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

A. Universal Declaration of Human Rights

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

> "common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."[40]

Those nations who accepted the UDHR became party to the ideals enshrined in the Declaration, and committed to implement its provisions in their respective nation-states.

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

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive

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

and impart information and ideas through any media and regardless of frontiers.[41]

Article 20 addresses Freedom of Assembly by stipulating that:

1.) Everyone has the right to freedom of peaceful assembly and association, and
2.) no one may be compelled to belong to an association.[42]

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

B. European Convention on Human Rights

Turkey ratified the European Convention on Human Rights (ECHR) in 1954. The right for individual applications from Turkish citizens to the European Commission of Human Rights was recognised in 1987, and the compulsory jurisdiction of the European Court of Human Rights (ECtHR) was recognised in 1989.[43] Turkey filed reservations to the rights to liberty and security of person, to a fair hearing, to respect for private and family life, to an effective remedy and to freedoms of expression and of association (Articles 5, 6, 8, 10, 11 and 13) on 10 May 1990 in response to, "threats to its national security in South East Anatolia."[44] In response to these "threats", Turkey implemented legislation under Laws No. 424 and 425 and instituted a State of Emergency in the provinces of Elezîz (Elâziğ), Bîngol (Bingöl), Dersîm (Tunceli), Wan (Van), Diyarbekir (Diyarbakir), Mêrdîn (Mardin), Sêrt (Siirt), Hekarî (Hakkari), Batman (Batman) and Şernex (Şirnak).[45] Turkey continually modified and reduced these reservations in 1991, 1992, and 1993. The State of Emergency was lifted completely in 2002. The Turkish government then removed their one remaining reservation to Article 5 on 29 January 2002.[46]

41 UDHR, Article 19.

42 UDHR, Article 20.

43 Protocol No. 11 to the ECHR, which came into force on 1 November 1998, mainstreamed the existing twinned Strasbourg mechanisms (European Court of Human Rights and European Commission on Human Rights) with a single body, the European Court of Human Rights

44 Council of Europe: Conventions and Agreements in the European Treaty series. Last updated on 23/01/02. Accessed on 7/7/05. Found at: http://www.hri.ca/fortherecord2001/euro2001/documentation/conventions/echr.htm.

45 *Id.*

46 Council of Europe, Treaties: List of Declarations made by Turkey. Accessed 7/14/05 <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?PO=TUR&NT=005&MA=999&CV=0&NA=&CN=999&VL=1&CM=5&CL=ENG>

The Convention is legally binding on members who sign and ratify. In 1999, of the cases declared admissible to the court, 15 per cent were against Turkey. In 2004, cases against Turkey which were admitted to the court comprised 23 per cent of the courts caseload.[47] For the years 2003 and 2004, Turkey had the highest applications declared admissible to the Court of all member states.[48]

Cases regarding freedom of expression and association are frequently brought before the court. Under the ECHR, Article 10 pertains to freedom of expression and Article 11 addresses freedom of association and assembly. These articles are set out below.

Article 10 – Freedom of Expression

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.

Article 11 – Freedom of Assembly and Association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the

47 European Court of Human Rights: Survey of Activities 2004. accessed 7/7/05<http://www.echr.coe.int/NR/rdonlyres/461D3893-D3B7-4ED9-AC59-8BD9CA328E14/0/SurveyofActivities2004.pdf>

48 *Id.*

> armed forces, of the police or of the administration of the State.

While cases involving Article 11 have not reached the court as frequently, the Court's finding of violations against Turkey for Article 10 are frequent. In 2004, of 23 cases in front of the court raising Article 10 violations against Turkey, there was one friendly settlement, one finding of no violation and 21 findings of one or more violation(s) of the ECHR.[49]

C. International Covenant on Civil and Political Rights

The ICCPR is the legal mechanism which embodies many of the civil and political rights and ideals enshrined in the UDHR. The ICCPR was adopted and opened for signature on 16 December 1966, but did not enter into force until 23 March 1976.[50] Turkey signed the ICCPR on 15 August 2000, and ratified it on 23 September 2003.[51]

However, while Turkey has ratified the ICCPR, it has also lodged a reservation to the Convention. In relevant part, Turkey states:

> The Republic of Turkey reserves the right to interpret and apply the provisions of Article 27 of the International Covenant on Civil and Political Rights in accordance with the related provisions and rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923 and its Appendixes.[52]

Article 27 of the ICCPR states that:

> [i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own

49 European Court of Human Rights: Subject Matter of Judgments Delivered by the Court in 2004. accessed 7/11/05.< http://www.echr.coe.int/NR/rdonlyres/6FF7A3DB-D885-41A4-9E4C-88DDF7F22C8C/0/MicrosoftWordSUBJECT_MATTER_2004.pdf> Cases finding violation of Article 10 against Turkey in 2004: *Abdullah Aydōn v. Turkey, Mehdi Zana v. Turkey (no. 2), Yurttas v. Turkey, Ayşenur Zarakolu and others v. Turkey, Haydar Yildirim and others v. Turkey, Kürkçü v. Turkey, Okutan v. Turkey, Iprahim Ülger v. Turkey, Feridun Yazar and others v. Turkey, Varli and others v. Turkey, Doğaner v. Turkey, Maraşli v. Turkey, Kalin v. Turkey, Dicle v. Turkey, Odabasi v. Turkey, Ayhan v. Turkey (no. 1), Baran v. Turkey, Ayhan v. Turkey (no. 2), Özkaya v. Turkey, Şahindoğan v. Turkey, Elden v. Turkey*

50 *International Covenant on Civil and Political Rights.* Adopted 16 Dec. 1966, entry into force 23 March 1976 (ICCPR). Accessed 7/11/05 <http://www.ohchr.org/english/law/ccpr.htm,>.

51 *ICCPR: Ratifications and Reservations.* Last updated 29 June 2005. accessed 7/11/05. <http://www.ohchr.org/english/countries/ratification/4.htm>

52 *Supra* note 49 at Declarations by Turkey.

culture, to profess and practice their own religion, or to use their own language.

Turkey's reservation regarding this article means that Turkey will only comply with the Convention regarding minorities in so far as they are recognised under Turkey's own Constitution. As a result, the protections of the ICCPR only pertain to non-Muslim religious minorities that are recognised under the Lausanne Treaty and the Constitution of the Republic of Turkey.

The ICCPR guarantees freedom of expression, association and assembly to all individuals within the territory of signatory states. Article 19 pertains to freedom of expression, and stipulates the extent to which the freedom shall be protected, and the reasons for which the freedom may be curtailed. Article 21 explicates the right of assembly and Article 22 pertains to freedom of association.

Article 19 – Freedom of Expression

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

    (a) For respect of the rights or reputations of others;

    (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 21 – Right of Peaceful assembly

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22 – Freedom of Association

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

All of these provisions allow for the freedoms at issue to be limited when this is:

> necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

This qualification is strictly interpreted; any limitations imposed by states on these rights must be for one of the purposes specified, and must be proportionate to achieving that purpose.

D. Convention on the Rights of the Child

One final international obligation which has implications for this report is the CRC. The international community approved the Convention in 1989, and Turkey ratified the Convention in 1992. The Convention contains similar provisions to the ICCPR regarding freedom of expression, association and assembly. However, as with the ICCPR, Turkey lodged three reservations to articles 17, 29 and 30. Turkey's reservation to these three article states that:

> The Republic of Turkey reserves the right to interpret and apply the provisions of articles 17, 29 and 30 of the United Nations Convention on the Rights of the Child according to the letter and the spirit of the

> Constitution of the Republic of Turkey and those of the Treaty of Lausanne of 24 July 1923.

Article 17 of the Convention recognises the importance of mass media, and children's access to information from a variety of local, national and international sources. Turkey's reservation means that it would interpret this article through the lens of its Constitution, most particularly the sections pertaining to media and international cooperation.

Article 29 of the Convention pertains to the development of the child and respect for their parents and culture. Of particular concern to Turkey in this article would be 29(1)(c) which recognises

> the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own…

As indicated by Turkey's reservation to the following Article 30 as well as to Article 27 of the ICCPR, Turkey is concerned with the implications of Article 29 for cultural identity. As a result of its reservation, Turkey need only recognise the development and identity of religious minorities recognised by the Lausanne Treaty.

Article 30 of the Convention relates to ethnic, religious and linguistic minorities, and is almost identical to Article 27 of the ICCPR. Article 30 states:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.[53]

As with the above articles, since the Treaty of Lausanne only specifically addresses non-Muslim minorities, Turkey's reservation effectively limits the rights of Article 30 to only these recognised minorities.

Of these four international obligations which Turkey is a party to, the ECHR has had the most practical impact on the activities of Turkey, and has afforded the most relief for the Kurds in Turkey. The UDHR, ICCPR and CRC all enshrine universal rights, but do not have the jurisdictional impact and enforcement capabilities of

53 *Convention on the Rights of the Child*. Adopted 20 November 1989, entry into force 2 September 1990 (CRC). Accessed 12 July 2005 <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

the ECHR. These enforcement capabilities are recognised by Turkey in large part because of her desire to become a member of the EU. As a result, Turkey's accession to the EU is a critical component in the continued improvement of freedom of expression and association in Turkey.

V. Turkey and the EU

A. The Accession Process

Modern day Turkey has consistently allied herself with Europe after the Second World War. Turkey was a founding member of the UN and the Council of Europe (1949), and a member of NATO (since 1952), the OECD (1961) and an associate member of the Western European Union (1992).[54] Turkey applied for associate membership of the European Economic Community (EEC) in 1959, and entered into an Association Agreement in 1963 which offered the future possibility of full membership.[55] Article 28 of this agreement contains a carefully worded reference to future membership:

> As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.[56]

On 14 April 1987, Turkey applied for membership of the European Community (EC). The EC issued an opinion in December of 1989 stating that the Commission did not think it appropriate for Turkey to begin immediate negotiations for membership based on the insecurities following the Single European Act, and Turkey's economic and political situation. In particular, "the negative consequences of the dispute between Turkey and one Member State of the Community, and also the situation in Cyprus," meant that the time was not right for such a development.[57] Turkey was excluded from the European Summit in Luxembourg, a result primarily of concerns about Turkey's continued political and economic obstacles to union as well as significant human rights concerns. Nevertheless, the European Council held in Helsinki on 10 and 11 December 1999 concluded that, "Turkey is a candidate

54 EU-Turkey Relations. Published 23 September 2004, Updated: Thursday 7 July 2005. <http://www.euractiv.com/Article?tcmuri=tcm:29-129678-16&type=LinksDossier>

55 **EU Turkey Civic Commission, edited by Mark Muller, Claire Brigham, Kariane Westrheim and** Kerim Yildiz, International Conference on Turkey, the Kurds and the EU, p. 17, European Parliament, Brussels, 22-23 November 2004.

56 European Trade Union Confederation: Turkey's Accession into the European Union. Last updated: 21 February 2005. http://www.etuc.org/a/241.

57 *Id.*

State destined to join the Union on the basis of the same criteria as applied to the other candidate States."[58]

At the 1993 Copenhagen Summit, a set of criteria for accession of member states was developed ("Copenhagen Criteria"). These criteria focus on "the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." In the European Commission's 2004 report and subsequent recommendation, the Commission concluded that while there were still issues to be resolved, Turkey sufficiently met the Copenhagen Criteria to begin the process of accession. The December European Council agreed with the Commission and decided that Turkey sufficiently fulfilled the Copenhagen political criteria. It agreed to open negotiations on 3 October 2005 provided that Turkey brought into force specific pieces of outstanding legislation.[59] It asked the Commission to produce the necessary framework for negotiations to be agreed upon by the Council.[60]

It is unclear upon an objective analysis of the Copenhagen Criteria whether Turkey does in fact sufficiently meet the standards stipulated in the Criteria, and even more unlikely that the appropriate "outstanding legislation" has since been enacted. Turkey has made significant progress towards reform and meeting the Copenhagen Criteria in general, but progress does not equal attainment. KHRP supports the decision to open accession negotiations in October 2005, but is concerned that the EU has not so far been sufficiently robust in enforcing Turkish compliance with her obligations in the accession process. The original idea for the EU was conceived to prevent the killing and destruction of the Second World War from ever happening again, and the EU member states pride themselves on being, "a family of democratic European countries, committed to working together for peace and prosperity."[61] Until Turkey can provide concrete examples of legislation and actual enactment of legislation which allows for freedom of expression and association and lasting peace for all of her peoples, she cannot be judged compliant with accession standards.

B. The Copenhagen Criteria

The political requirements for accession within the Copenhagen Criteria stated that, "[t]he candidates must achieve stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for the protection of minorities."[62] The Treaty

58 *Id.*

59 Prospects for the EU in 2005. Foreign and Commonwealth Office. Accessed on 23 June 2005. <www.fco.gov.uk/Files/kfile/White%20Paper%20Cmnd%206450.pdf>

60 *Id.*

61 Europa: The European Union at a Glance. Accessed 17 June 2005. <http://europa.eu.int/abc/index_en.htm>

62 Patrick R. Huggs, The Republic of Turkey in Europe: Reconsidering the Luxembourg

of Amsterdam 1999, which amended the Treaty on European Union, constitutionally formalised the Copenhagen political criteria by incorporating them, with the notable exception of the language "respect for and protection of minorities," into Article 6(1) as principles common to all Union members; and Article 49 identified these principles as preconditions for application to become an EU member.[63]

Turkey does not meet the Copenhagen Criteria as regards "stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for the protection of minorities". According to definitions of the terms in international jurisprudence and European law, Turkey's laws and the interpretation and implementation of the laws do not meet the standards of protection that are required in the EU accession process.

A "democracy" is a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections.[64] Kurds are free to vote in Turkey; however, political parties that have taken up the Kurdish issue are harassed by the government, and Kurdish parliamentarians have in the past been arrested and imprisoned following public statements about their Kurdish ethnicity.[65] The Kurds do not have democratic representation as Kurdish people, nor are they free to exercise their views and expressions. This inability to speak freely and participate in the democratic election process does not meet the definition of democracy within the EU context.

"Rule of law" is defined as the regular law of the land which predominates over and excludes the arbitrary exercise of power by the government. All people are equally subject to the law administered by the ordinary courts, and law is derived from individual's rights as declared by the courts.[66] As the comparison below will demonstrate, Turkey continues arbitrarily to breach individual rights, such as freedom of expression and association, because the exercise of these rights is perceived as threatening national identity.

Exclusion. 606, 659 Fordham Int'l L.J. (2000).

63 Dilek Kurban, CONFRONTING EQUALITY: THE NEED FOR CONSTITUTIONAL PROTECTION OF MINORITIES ON TURKEY'S PATH TO THE EUROPEAN UNION. 35 Colum. Hum. Rts. L. Rev. 151 (2003).

64 Merriam-Webster Online Dictionary. (2005 Merriam-Webster, Inc.). found at: <http://www.m-w.com/>

65 Kurdish former parliamentarian Leyla Zana was imprisoned in Turkey in 1994 accused of treason, though this charge was eventually reduced to a lesser one. As part of the evidence against her at her trial, such expressions of Kurdish identity and the color of her clothes was used as evidence against her. The prosecutor's statement reads: "The defendant Leyla Zana did on 18 October 1991 wear clothes and accessories in yellow, green and red [colors of the Kurdish flag] while addressing the people of Cizre." She was sentenced to 15 years imprisonment.

66 **Dictionary of Law, 6**th Edition, 244.

"Human rights" are the freedoms, immunities, and benefits that, according to modern values (especially at an international level) all human beings should be able to claim as a matter of right in the society in which they live.[67] These rights are a legal device for the protection of smaller numbers of people (the minority or the individual) faced with the power of greater numbers.[68] Human rights included in the ECHR include the right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, freedom of expression, freedom of assembly and association and prohibition on discrimination to name only a few.[69] The UDHR and the ICCPR provide similar guarantees of rights. While Turkey has improved her record on human rights and fundamental freedoms, there are still cases of torture, violation of rights to freedom of expression and association, fair trial and numerous other rights.[70]

The commonly held view is that a minority is a self-identifying group with a national or ethnic, cultural, religious and linguistic identity. However, Turkey only recognises a narrow definition of minorities, as the Turkish Foreign Ministry states,

> [t]he status of minorities in Turkey has been internationally certified by the 1923 Treaty of Lausanne, according to which there are only non-Muslim minorities in Turkey. It is wrong, according to this definition, to refer to our citizens of Kurdish descent as a "Kurdish minority."

It is clear, however, that the EU's Copenhagen criterion of "respect for and protection of minorities" should be applied not only to the Jewish, Greek and Armenian minorities defined by the Treaty of Lausanne, but also to the Assyrians, Kurds, Laz, Roma and many other minorities that make up Turkey's cultural fabric.[71]

Turkey has made several legislative reforms in the past few years in order to comply with the Copenhagen Criteria. Several of these reforms, which are discussed below, are lacking in either a basic concept of the freedoms they purport to safeguard, or are democratically phrased, but not enforced. These reforms have resulted in marked progress for human rights and basic freedoms in Turkey, but still do not

67 Blacks Law Dictionary, 8th ed., Westlaw, accessed 6/29/05.

68 Henry J. Steiner and Philip Alston, *International Human Rights in Context*, 387 (Oxford Unitersity Press, 2000).

69 Javaid Rehman, *International Human Rights Law: A Practical Approach*, 138 (Pearson Education, 2003).

70 For example, current cases decided by the ECtHR found violations of Articles 3, 10 and 11 pertaining to right to life and torture, freedom of expression and freedom of association. *Abdulsamet Yaman v. Turkey* (Violation of Article 3), Application No. 32446/96; ECtHR 2nd 2 November 2003; *Turhan v. Turkey* (violation of Article 10), Appl No. 48176/99; ECtHR 3rd 19 May 2005; *Guneri v. Turkey* (violation of Article 11) Appl No. 42853/98; ECtHR 2nd 12 June 2005.

71 Ensuring Language Rights. Human Rights Watch Report, 2000. Accessed June 6, 2005. <http://www.hrw.org/reports/2000/turkey2/Turk009-04.htm>

fully comply with the standards of the EU.

VI. Turkish Reforms

Turkey has undertaken several reforms, including reforming the Constitution twice, instituting eight harmonisation laws, and revising the Penal Code, Press Law and the Law on Associations.

A. Turkish Constitutional Reforms

There have been two major constitutional reforms in Turkey, which took place in 2001 and 2004, in an effort to comply with the Copenhagen Criteria. The first constitutional reform in 2001 provided many significant changes to the 1982 Constitution regarding freedom of expression and freedom of association. By contrast the 2004 constitutional reforms only had one relevant provision regarding freedom of expression.

The 2001 constitutional reforms affecting freedom of expression and association modified Article 26 on Freedom of Expression and Dissemination of Thought; Article 28 on Freedom of the Press; Article 31 on the Right to Use Media Other Than the Press Owned by Public Corporations; Article 33 on Freedom of Association; and Article 34 on the Right to Hold Meetings and Demonstration Marches. The 2004 constitutional reforms only affected Article 30 pertaining to Protection of Printing Facilities.

Article 26 on Freedom of Expression and Dissemination of Thought was significantly revised from its 1982 form. The 1982 version of the article allowed restrictions of freedom of expression for the purpose of preventing crime, punishing offenders… protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary. In addition, the article prohibited expression or dissemination of thought in languages prohibited by law. Further, the article held that regulations would not be interpreted as restrictions of freedom of expression and thought unless they prevented the dissemination of information and thought. By contrast, the 2001 amendments removed the prohibition against freedom of expression in languages prohibited by law. The amendments also removed the limiting language stating that a restriction of freedom of expression has only occurred if there is also a restriction on dissemination of information and thought.

However, while removing some restrictions the 2001 version of the Constitution added to permissible restrictions of freedom of expression and thought by including restrictions for purposes of protecting national security, public order and public safety, the basic characteristics of the republic and safeguarding the indivisible integrity of the state within its territory as well as the earlier provisions regarding crime and state secrets

Article 28 relates to Freedom of the Press. The 1982 version of this article was quite similar to the 2001 version, with the exception that the 2001 version omitted the provision which did not allow publication in a language prohibited by law. The article generally holds that the press is free and not censored. However, the article continues to hold that it is illegal to print, write or publish any articles which threaten the internal or external security of the state or the indivisible integrity of the state or its territory and nation, which tend to incite offence… and such a person shall be held liable under the law. Ordinarily this reservation would not overly implicate freedom of expression; however, Turkish authorities have regularly used such reasoning to ban publications in Kurdish.

Article 31 pertaining to the Right to Use Mass Media other than the Press Owned by Public Corporation similarly experienced only minor changes in the 2001 constitutional reforms. The amendment expanded the grounds upon which allowable restrictions on freedoms could take place; to incorporate restrictions for national security, public order, public morals or the protection of public health.

Article 33 on Freedom of Association was also significantly changed in the 2001 amendments. The 1982 version of the article contained guidelines for submitting information in order to obtain approval from the "competent authority," even though the first line declared that everyone has the right to form associations without prior permission. The 2001 amendments expanded the premise of the article by stating that not only does everyone have the right to form associations, but also to become a member of an association, or withdraw from membership without prior permission. Requirements for submitting information and documents were removed from the Constitution, and restrictions "in order to protect national security and pubic order, prevention of the commitment of crime, protection of public morals and public health" were added by the amendments. These permissible restrictions on freedom of association are in accordance with the ECHR.

Article 34 of the Right to Hold Meetings and Demonstration Marches was perhaps the article which experienced the most changes between the 1982 Constitution and the 2001 Constitutional amendments. The 1982 article allowed the administrative authority to determine the site and route for the demonstration and allowed for cancellation or postponement if there was a, "strong possibility that disturbances may arise which would seriously upset public order." Further, the 1982 article

did not allow associations, foundations, labour unions and public professional organisations to "hold meetings or demonstration marches exceeding their own scope and aims."

The 2001 amendments omitted the provisions which required the administrative authority to set the site and route of marches, as well as the language which barred organisations from meetings which exceeded their scope or aims. Restrictions were stated as only allowed on the grounds of national security, public order, prevention of crime, public health, morals or for the protection of the rights and freedoms of others.

The 2004 constitutional amendments had little impact on freedom of expression and association, except for the important relaxation of penalties in Article 30 on Protection of Printing Facilities. The 1982 and 2001 versions of this article stated that printing presses would not be seized, confiscated, or barred from operation on the grounds of being an instrument of a crime *except* in cases where there is a conviction of offences against the indivisible integrity of the state, "with its territory and nation, against the fundamental principles of the republic or against national security."[72] Section 4 of Act no. 5170, Act Amending certain Articles of the Turkish Constitution of 2004, removes the exception. Therefore, under the 2004 amendments, printing houses shall not be seized or confiscated, nor businesses be prevented from operating on the grounds that they have been instrumental in an offence.[73] This omission in the Constitution is a great step forward for freedom of expression in Turkey.

Taken as a whole, the constitutional amendments of 2001 and 2004 made progress in the areas of freedom of expression and freedom of association. The removal of prohibitions and restrictions on language prohibited by law and of the requirement that a restriction on freedom of expression has only occurred if there is also a restriction on the dissemination of information and thought were marked advances in these areas, as were the repeal of restrictions on participating in meetings outside an organisation's aims in 2001, and the 2004 assurances that printing houses would not be seized.

One provision, which was added in 2001 and remained in 2004, is the restriction on freedom of association, "in order to protect national security and public order, prevention of crime commitment, protection of public morals and public health." A similar restriction on freedom of expression and printing presses is allowed for, "offences against the indivisible integrity of the state with its territory and nation, against the fundamental principles of the Republic or against national security."

72 Constitution OF THE Republic of Turkey, as Amended 2001.

73 Act no. 5170. Act Amending certain Articles of the Turkish Constitution, 5 July 2004.

This language is also found in a variety of European Constitutions. Examples of similar European restrictions include articles from the Swedish, German and Spanish Constitutions in the area of freedom of association and assembly:

- The Swedish Constitution: Article 14 restrictions on Freedom of Association, "only out of regard for security of the Realm, or for purpose of combating epidemic."

- The German Constitution, Article 9 Freedom of Association limits, "associations that contravene criminal law, [those] directed against the Constitutional order or concept of international understanding is prohibited."

- The Spanish Constitution, Article 21, Freedom of Assembly restrictions: "can only forbid [assemblies] when there are reasons based on disturbances of public order with danger for persons or property."

However, while the language found in the other European Constitutions is very similar to the provisions in the Turkish Constitution, the applications are different. The Swedish and Spanish restrictions on association for the health and safety of the public seem to be very similar to the Turkish Constitution, which restricts assembly for reasons of public health and public order as well, except that the Turkish state also allows for restrictions for "public morals". The German Constitution likewise provides a limit on freedom of association for acts directed "against the Constitutional order", which are also similar to the Turkish Constitution's restrictions pertaining to the "fundamental principles of the Republic". However, the Turkish Constitutional restrictions additionally implicate broad "principles" of the Republic versus the narrower acts against a specific constitutional order.

An example of prosecution under the Constitution for presenting a threat against the indivisible and unitary nature of Turkey is the case against *Eğitim Şen*, a teachers' union in Turkey. The union has a clause in its constitution defending the right of every individual to be taught in their mother tongue and to observe and nourish their own cultural traditions. This clause, held the Turkish courts, is dangerous to national security under the Constitution and must be removed.[74] As a result, *Eğitim Şen* has removed the provision from its constitution rather than facing closure of the entire teachers union. This example, when compared with Sweden's standard for a national security risk, emphasises the importance of examining not only the words of the Constitution, which appear similar, but the mentality with which such provisions are applied.

74 Translated on 10/8/2005 from Egitim ve Bilim Emekcileri Sendikasi, (21.2.2005), Ankara 2. Is Mahkemesi.

B. Harmonisation Laws

The Turkish government has passed a series of harmonisation laws, beginning in 2002, which amend and revise a broad spectrum of domestic legislation. A harmonisation law may affect one section of a single article or significantly alter or repeal an entire article. There have been a total of eight harmonisation laws since 2002, and the last was to implement the 2004 constitutional amendments referred to above. Many of these harmonisation laws revisit the same article repeatedly, changing provisions back and forth.

The first harmonisation package of 6 February 2002 eliminates some fines and reduces imprisonment terms, but elevates other fines significantly. Further, while the government apparently feels it has made freedom of expression stronger by clarifying elements of crimes contained in the Penal Code, the language it used to make these clarifications may actually broaden the scope of the amended articles.

Article 1 amended Article 159 of the Turkish Penal Code, lessening the terms of imprisonment imposed for conviction under the article and eliminating some fines altogether. Article 2 changed the wording of Article 312 of the Penal Code, so that the act of praising a "crime" was made part of the constituent elements of the crime itself. Previously, praising a crime had only been a factor which could aggravate sentencing. According to the Turkish government, with this amendment freedom of expression, along with social protection, has been strengthened through the clarification of the definition of criminal offences stipulated in Article 312.

Other examples of such "clarification" in defining criminal offences include Article 4 which amended Article 8 of the Anti-Terror Law. In the harmonisation package, the language requiring a specific intent to disrupt the indivisible integrity of the state of the Turkish republic within its territory and nation has been specifically indicated as an element of the crime. While the reasoning of the drafters indicates they think this narrows the clause and thus "extends the boundaries of the freedom of thought" and so recognises "an arrangement that has been sought by the ECHR in this area" (reference to Art 3), interpretations of this language are extremely broad. The impact of the first Harmonisation Law would then seem to be negative with regard to the rights to freedom of expression and association.

The second harmonisation package, approved on 26 March 2002, removes many restrictions on language and lifts restrictions on freedom of association. The prohibition against "language forbidden by law" was removed from Article 16 of the Press Law. In addition, the Act on Associations, Article 5, was amended to remove the prohibition on the establishment of associations for the purpose, "to protect, develop or expand languages or cultures other than the Turkish language or culture or to claim that they are minorities based on racial, religious, sectarian, cultural or

linguistic differences." However, while associations may now use other languages besides Turkish and express other cultures as provided for in the amendments to Article 6 of the Act of Associations, the "official business" of their organisations must still be conducted in Turkish.

The permissible reasons for local officials to limit publication, association or marches were reduced by the package, and some of the activities that used to be prohibited may now be permitted in certain circumstances, or postponed rather than prohibited. In addition, the second harmonisation package repealed Articles 7, 11 and 12 of the Act on Associations which had prohibited international activities, activities abroad of associations established in Turkey, and activities in Turkey of associations established abroad. The Act on Meetings was also amended to reduce the number of exceptions local authorities can use to prohibit or postpone marches. Additionally, Article 19 of this act was amended to change the language from outright prohibitions of certain marches to postponement, and Article 21 was amended to remove prohibitions on meetings and marches not within the purpose of the organisation.

The third Harmonisation Law, adopted on 3 August 2002, had a significant impact on freedom of expression and association within Turkey. The harmonisation package added to Article 159 of the Turkish Penal Code the language: "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 allowed for criticism of the state, which had been forbidden previously.

The Law on Associations was amended in multiple articles, mostly regarding procedural limitations on bookkeeping and inspections of associations which were generally relaxed by the amendments. However, Articles 11 and 12 regarding prohibitions against international associations either based abroad or in Turkey, and which had been repealed by the second Harmonisation Law, were resurrected in the third harmonisation package. Additional language was added to these articles stating that such international associations would be allowed in cases where "international cooperation is deemed to be useful and reciprocal." In addition, such organisations needed permission from the Council of Ministers, and such establishment was conditional upon the organisations engaging in practices, both in Turkey and abroad, which conformed to the national interests of the state. This aspect of the Harmonisation Law did not advance freedom of association.

The Law on Meetings and Demonstrations was amended to allow foreigners to address a crowd so long as the highest governmental authority was notified of the action at least 48 hours beforehand. The advance notice requirement was reduced from 72 hours to 48 hours; however, the signature of the highest official was still required. Amendments were also made to the Press Law, reducing fines and

abolishing prison sentences. Collectively, the third Harmonisation Law improved freedom of expression and associations; however, the new "deemed useful" language added to Articles 11 and 12 of the Law of Associations had the potential to increase oversight and restrictions on associations.

The fourth Harmonisation Law, adopted on 2 January 2003, again loosened restrictions on freedoms, particularly regarding use of foreign languages and protection of journalistic sources. Owners of publications could not be forced to reveal their sources, presumably ensuring increased protection for journalists and their sources, and a significant step forward for freedom of expression. The Law No. 2908 on Associations was amended to state that associations must use Turkish in their official correspondence with the Turkish republic; however, under the new law they could use other languages for international contacts and unofficial correspondence. Additionally, restrictions were reduced on the types of associations which were prohibited by law. Nevertheless, even with the amendments, the law still forbids the establishment of associations that are in violation of the basic features of the Constitution and the provisions on the protection of… national security and public order, general health and general morality are still in force.

The fifth Harmonisation Law, adopted on 23 January 2003, changed the punishments listed in the Law on Associations under Article 82. The amendments replace "prison terms" with "fines" for offences relating to: failure to obtain permission for contacts with foreign associations and organisations as stipulated in article 43; failure to fulfil the obligations concerning audit of associations under article 45; and, failure to declare real estate in possession of associations or failure to liquidate real estate assets determined by the Ministry of the Interior to be not necessary for the association.[75] According to the Turkish government, "these changes reinforce the right to association by replacing imprisonment penalties with fines."[76] Any move away from imposing prison sentences is to be welcomed, but financial penalties can still significantly inhibit free association.

The sixth Harmonisation Law was enacted on 15 July 2003. Its provisions pertaining to freedom of expression and association dealt mainly with easing restrictions on broadcasting, particularly in languages other than Turkish. The added paragraph for the Law on Cinema, Video and Music included limitations, similar to those seen in earlier laws, for protection of the "indivisibility of the State with its territory and nation." The biggest change in this package was the annulment of Article 8 of the Anti-Terror Law, which had prohibited the dissemination of separatist propaganda. This has the potential significantly to increase freedom of expression and association; however, in practice prosecutors have instead relied on provisions

75 Law no. 4793, 5th Harmonisation Law, February 3, 2003.

76 *Id.*

of other laws to achieve similar results.

The seventh harmonisation package was passed on 30 July 2003 and eased penalties for insulting "Turkish-ness", though the reduction was in the minimum prison time served, with no adjustment to the maximum penalty length. Significantly, through amendments to Articles 426 and 427 of the Turkish Penal Code, works of a scientific or artistic nature may no longer be destroyed as part of the punishment for breaching this provision. The amendments reduced restrictions on membership of associations to allow students to form associations on art, culture and science, and allowed associations to establish more than one branch in an area. The Act on Public Meetings and Demonstrations adopted the "clear and present danger" standard for determining when officers may ban demonstrations. As regards education, this has been expanded to allow teaching of languages other than Turkish in existing schools, rather than only new schools.

The eighth Harmonisation Package, implementing the constitutional amendments of May 2004, was passed in June 2004.[77] As part of this package, the government undertook to establish minority bureaus within provincial governors' offices to facilitate minority-related administrative procedures. The government's Reform Monitoring Group made up of Foreign Minister Abdullah Gül, Justice Minister Cemil Çiçek and Interior Minister Abdulkadir Aksu recently agreed to set up these bureaus to help minorities deal with such processes, a responsibility previously held by sections of the Security Forces Directorate General.[78]

C. Revised Penal Code

If you speak the truth, keep a foot in the stirrup.

Turkish Proverb

Overall the new Penal Code provides limited progress on freedom of expression. Though some progress was made, articles that have been frequently used to restrict freedom of expression and have been assessed as potentially conflicting with Article 10 of the ECHR have been maintained or changed only slightly. In addition, the new code inserted several provisions to increase the penalty by half if the "offence" is by means of the media. This has caused concern for journalists and the press in

77 Asli Gurkan, Turkey's Push For Reforms: Moving Beyond Rhetoric. June 2004. Accessed June 7 2005 <http://www.tusiad.us/Content/uploaded/TURKEY-AND-REFORMS-TURKEY-IN-FOCUS-6.PDF>

78 Turkish Directorate General of Press and Information. Turkish Press Review, 05-02-10. Accessed June 6, 2005. <http://www.hri.org/news/turkey/trkpr/2005/05-02-10.trkpr.html>

Turkey, as well as the EU. As a result of this concern, the implementation of the new Penal Code was delayed twice, first from 1 January 2005 to 1 April 2005, and then it finally came into effect on 1 June 2005.

Many of the provisions of the new Penal Code, while less severe on the whole, still conflict with the fundamental concepts of a free society and freedom of expression and association as accepted in the EU. Illustrative examples pertaining to these freedoms are Articles 125, 216, 220, 300-302, 305, 306 and 324 of the new Penal Code.

Article 125 pertains to "insult" and declares that, "an individual who hurts one's honour, dignity and reputation, will be sentenced to three months to two years in prison or handed a fine." This is arguably similar to the provisions many states have for libel and slander. However, section 3(a) of the article states that publications or broadcasts in criticism of a state official because of his/her post demands a minimum sentence of a year in prison. Apparently this also is applicable to retired officials, as indicated by the case against journalist/ writer Abdurrahman Dilipak. Dilipak is on trial for "insulting the military" by criticising the fact that certain retired generals serve as advisors for some holding companies with suspicious activities. Dilipak also has twenty other cases currently filed against him for various writings.[79] Such broad interpretation of "insult" substantially limits how far the actions or positions adopted by individual members of the government can be criticised, and acts as a stifling blanket on democracy and free speech.

Article 216 of the new Penal Code is strikingly similar to old article 312, and makes it illegal to "incite people to hatred." On the face of it, the new article 216 has a reasonable social policy behind it. The article states that it is illegal to "instigate a part of the people having different social class, race, religion, sect or region to hatred or hostility against another part of the people in a way dangerous for the public security." However, the application of this article appears to have been mainly to suppress dissenting viewpoints. For example, the Ankara Prosecutors Office has charged former Human Rights Advisory Board (IHDK - *İnsan Hakları Danışma Kurulu*) President İbrahim Kaboğlu and Sub-commission Chairman Baskın Oran with "inciting people to hatred" and "openly belittling judicial organs." The two academics are charged for passages they wrote in a report entitled "Minority and Cultural Rights." The case file said the redefinition of the concept of "minority" as proposed in the report would result in chaos and would threaten the national integrity of the country. The prosecutor asked the reason behind the proposal of the concept of the supra-national identity of "citizens of Turkey" in the report instead of describing all citizens of Turkey as Turks, noting that all members of all

79 Onderglu, Erol. "Writer to Sell his Flat to pay damages," 13/06/2005. BIA News Center, Accessed on 15/07/05, Found at: <http://www.bianet.org/index_eng_root.htm>

nationalities in France were called French.[80] The application of the article in this manner forecloses any cultural or minority identification in the public sphere.

Article 220 regulates "setting up an organization with the aim of committing a crime" and carries a prison sentence of one to three years, which is scaled up by half if the crime is committed through the means of the media. This article also includes publishing "propaganda" for such organizations. An example of prosecution under this article includes the current case against a journalist and DEP (*Demokrasi Partisi* - Democracy Party) MP. A public prosecutor in Bağcılar (Istanbul) launched a case against Neşe Düzel, writer of the daily Rdikal, and former DEP MP Orhan Doğan, a founder of Democratic Society Party on the allegation of "making propaganda in favour of illegal organization". The indictment was raised against Düzel and Doğan under the Article 7 of the Law on Fight to Terrorism in connection with the interview published on the daily on 15 August.[81]

Articles 300-302, new forms of Articles 145, 158 and 159 of the old Penal Code, suppress "insults" to the President of the Republic, the Turkish flag and symbol, the national anthem, the Turkish national identity, the republic or the Grand National Assembly, the Turkish government, and the judicial organs or military and security organs. Sentences for these offences range from two to four years imprisonment, and are to be increased by a third if committed by a Turkish citizen abroad, or in the case of insult to the President, to be increased by a third if committed by means of the media. The cases against journalists Hrant Dink, Doğan Özgüden and Erzen Korkmaz, and singer Ferhat Tunc, and even novelist Orhan Pamuk, are all examples of litigation under the New Penal Code 301.[82] In the French Press Law a similar provision exists for insulting the President. One of this law's principal purposes was the protection of public institutions through "laws prohibiting insult of the President, and defamation or insult of governmental administrative bodies". However, unlike Turkey, the last recorded instance of this law's enforcement was in the mid 1960s. Such protectionist legislation which is still in use is more associated with repressive regimes of the past rather than modern democracies.

The case against Orhan Pamuk is the most visible of the recent cases brought against journalists and authors. Orhan Pamuk, a novelist of international standing, translated into thirty-five languages, was indicted for saying that "thirty-thousand Kurds and one million Armenians were killed in these lands" in the Swiss magazine Das Bild of February 6, 2005.[83] Pamuk is being charged under Article 301 for "insulting

80 *Academics Oran and Kaboglu charged with incitement.* Turkish Daily News, 16/11/2005. accssed 22/11/2005.

81 *Journalist and DEP MP on Trial,* Zaman. November 14, 2005. Accessed 23/11/05.

82 Onderoglu, Erol. *Court Decisions Justify Journalist Concerns*. BIA News Center, 09/11/2005, accessed 10/11/2005.

83 Turkey: Case Against Novelist Threatens Freedom of Expression, *Letter to the Turkish Justice Minis-*

Turkishness." If he is convicted he could face up to four years in prison. His trial is slated for December 16, in Sisli Primary Court No. 2 in Istanbul. The date of this trial is especially troubling, because the choice of the date of the anniversary of the EU's decision to open membership negotiations with Turkey, appeared not to be a coincidence, but a "provocation." "If that is true," says a recent Human Rights Watch letter to the Turkish Justice Minister, "it is deeply troubling. Prosecutors and judges may well disagree with the government's project of European Union membership—but they are not entitled to express their disagreement by vexatious prosecutions of individual citizens."[84] Ironically, shortly after receiving the Frankfurt Peace Prize in October, Pamuk told the London Observer "That law [Article 301] and another law about 'general national interests' were put into the new penal code as secret guns. They were not displayed to the international community but nicely kept in a drawer, ready for action in case they decided to hit someone in the head. These laws should be changed, and changed fast, before the EU and the international community puts pressure on Turkey to do so. We have to learn to reform before others warn us."[85] This trial will be watched by many to see the course of freedom of expression in Turkey, and its commitment to the principles enshrined in the European Convention of Human Rights, and ultimately its commitment to EU ascension.

A further example of prosecution under article 301 is the case against Fatih Taş, owner of the Aram Publishing House. Taş is accused of publishing the Turkish translation of a book by US academic, John Tirman. The hearing and charges against Taş are for his part in publishing books that state that human rights abuses and killings of Armenians were carried out by the Turkish Ottoman forces in the last century. The action stems from Aram's publication earlier this year of a Turkish edition of the book "Spoils of War: The Human Cost of America's Arms Trade", by the American academic, John Tirman, currently Executive Director of MIT's Center for International Studies. First published in the US in 1997, the book refers to the transfer of weapons, military, political and economic support by the US to Turkey, weapons that Tirman accused the Turkish army of having used against Kurdish civilians as well as the rebel group, the PKK. In a press release protesting the trial, Tirman describes his book as "highly critical of the Turkish military, various government ministers, nationalism, and Atatürk, the founder of the Turkish Republic." The indictment against Taş refers to the accusations of human rights violations, as well as references to Kemal Atatürk's nationalism as being akin to "fascism", and suggestions that the policy in the Kurdish southeast in the early 1990s amounted to "genocide". Taş argues that the book is legitimate criticism. Article 301

ter, September 29, 2005. Accessed on 22/11/2005 at <http://hrw.org/english/docs/2005/09/29/turkey11872.htm>,

84 *Id.*

85 *PEN condems trials against Publishers Fatish Tas and Ragip Zarakolu.* WiPC/IFEX, November 18, 2005. Accessed 23/11/05.

of the Penal Code provides for sentences of 6 months to three years in prison.[86]

Articles 305 and 306 are very similar, and their aim is to protect the basic national interest. According to Article 305 on "acting against the basic national interests" individuals who receive financing from foreign individuals or institutions, either for him/herself or for someone else, with the aim of acting against basic national interests, will be sentenced to three to ten years in prison and a fine. If the "financing is received or promised for disseminating propaganda through the media," the prison sentence is scaled up by half. Similarly, Article 306 of the new Penal Code prohibits acting against fundamental national interests where an individual directly or indirectly receives benefits from foreign persons or institutions, and provides for prison sentences ranging from three to ten years. The reasons for this article, according to the Parliamentary Committee of Justice, were to prosecute citizens who demand the withdrawal of Turkish soldiers from Cyprus or declare that an Armenian genocide actually took place.

Other countries have provisions for crimes that threaten national security. For instance, Sweden's "Crimes against the Security of the Realm" in Chapter 19 of the Penal Code provides for possible life imprisonment. However, the Penal Code spells out specific criteria for what constitutes a threat to the security of the realm. According to the Swedish Penal Code:

> A person who with the intent that the Realm or a part thereof, by violent or otherwise illegal means or with foreign aid, be placed under foreign domination or made dependent on a foreign power, or that a part of the Realm be thus torn loose, *takes action which involves danger that such intent be realized*, shall be sentenced for *high treason* to imprisonment for ten years or for life or, if the danger was slight, for at least four and at most ten years.[87] (emphasis added)

This provision requires a specific intent to employ violent or illegal means to subjugate Sweden, as well as evidence of an action which makes it likely that such an intent be realised. This is a high legal standard to meet including intent, action and likelihood of success for a foreign take-over. Sweden's high standard of what constitutes a threat to national security is illuminating regarding Turkey's interpretation. Turkey equates speaking about possible Turkish involvement in the Armenian genocide with Sweden's interpretation which involves a nearly successful government takeover, and could result in a similar length prison sentence.

86 *Id.*

87 Swedish Penal Code, Part 2, Chapter 19, section 1. emphasis added. Accessed 6 July 2005. <http://www.sweden.gov.se/content/1/c6/01/51/94/add334ba.pdf>

Article 324 of the Turkish Penal Code makes it illegal to "spread unfounded news or information during war," and carries a sentence of up to ten years in prison. If this offence is committed as a propaganda campaign against the military in association with a foreigner, the sentence can be up to twenty years imprisonment. Most alarming to journalists are the new provisions that target the media specifically. According to the International Press Institute, the new Penal Code has thirty articles that threaten press freedom.[88] In the face of these changes, the Turkish Journalists' Association and the Turkish Press Council have heavily criticised the new Turkish Penal Code.

Of concern in Turkish Law in general and the Penal Code in particular is the application of adult punishments to children as young as fifteen, and occasionally as young as twelve. Article 6(b) of the New Turkish Penal Code is a distinct improvement over the old Penal Code which imposed penalties on children aged eleven and above, since it defines a child as any person who has not yet reached the age of eighteen. Further, Article 31 states that at the time of the crime, children who have not reached the age of twelve shall not be criminally liable; no criminal investigation shall take place. However, a "specific safety measure" can be enforced. While this language is slightly better than the old Penal Code, it still allows for punishment of children aged twelve and above in various circumstances. Further, while there are juvenile courts, there is no specific mention of special judicial treatment for children in these Penal Code sections. Thus, while other European countries' Penal Codes, such as the Penal Code of Germany, specifically state that the adult Code is applicable to juveniles and young adults only to the extent that the juvenile Court Law does not otherwise provide,[89] the Turkish Penal Code does not appear uniformly to recognise special treatment for children. The Turkish Parliament adopted the Law Amending the Law on the Establishment, Duties and Trial Procedures of Juvenile Courts on 7 January 2004. With this amendment, juvenile courts are to be established in districts with a population of more than 100,000 inhabitants.[90] However, in areas which have fewer inhabitants, most particularly south-east Turkey, children would perforce be dealt with in adult courts.[91]

Trying children in adult courts would be in contravention of the spirit of the CRC,

88 International Press Institute, Letter to the Prime Minister of Turkey concerning the new Turkish Penal Code, 23 March 2005, accessed 18/7/2005 at: http://www.freemedia.at/Protests2005/Turkey23.03.05.htm.

89 Penal Code of the Federal Republic of Germany. Section 1, Title 1 § 10. Accessed 6 July 2005. <http://wings.buffalo.edu/law/bclc/germind.htm>

90 Republic of Turkey Ministry of Foreign Affairs: *Political Reforms in Turkey*. February 2004. Accessed 5 July 2005. <http://www.turkishembassy.com/II/O/Political%20Reforms%20in%20Turkey.doc>

91 For a more complete analysis of the legal and political situation of children in Turkey, see *The Viranşehir Children: The Trial of 13 Kurdish Children in Diyarbakir State Security Court*, A Kurdish Human Rights Project Report, January 2002; and *Turkey: The Situation of Kurdish Children,* Kurdish Human Rights Project, October 2004.

Article 40, which states in relevant part that every child has a right:

> vii) To have his or her privacy fully respected at all stages of the proceedings. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions *specifically applicable to children* alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
>
> > (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
> >
> > (b) Whenever appropriate and desirable, *measures for dealing with such children without resorting to judicial proceedings*, providing that human rights and legal safeguards are fully respected. (emphasis added).

In the absence of specific provisions for children, the potential application of the penalties of the new Penal Code to children is a significant concern.

Aside from concerns over increased sentences for the press, the new Turkish Penal Code continues to contain marked imbalances regarding the length of other prison sentences in general. For the first time snatch-and-run thieves may be prosecuted under the Turkish Penal Code, and jailed for up to seven years. However, while a thief could receive up to seven years in prison, a person who sexually abuses children or beats a spouse may receive anywhere from three and eight years imprisonment.[92] A further imbalance is the fact that under the new Code individuals who fire bullets into the air during games and/or weddings may receive up to 25 years in prison, where by contrast, security officers convicted of conducting torture would receive a prison term of between three and twelve years. The fact that individuals may now be prosecuted under the Turkish Penal Code for committing acts of torture or spousal abuse is indicative of Turkey's commitment to the EU and to reform. However, the sentencing imbalances indicated above also indicate that there is still the need for more change in Turkey - and for further pressure from the EU to exact this change.

While the new Press Law and Law on Associations were examples of legislation passed in 2004, it was hoped that a revision of the Turkish Penal Code would ease restrictions on freedom of expression and association, and take away alternative avenues for conviction frequently used by prosecutors. Although the new Penal Code, which came into effect on 1 June 2005 after two delays due to protest over

92 *New Turkish Penal Code Goes Into Effect Today*. Turkish Press.com. 6/1/2005, accessed 29/06/2005.

provisions regarding the press, liberalised relatively many provisions, many of the most objectionable clauses have been carried over into the new Penal Code. This is perhaps made most apparent by the number of cases that are still being brought against journalists and others under the "new" provisions of the Penal Code. For example, the third quarterly report for the Media Watch Group found that in the months of July-August-September, there were 37 court cases brought against 62 media organizations and 72 journalists.[93]

One example of the reasoning behind the old Turkish Penal Code being carried over to the new Turkish Penal Code is the case against Doğan Özgüden and Emin Karaca. Özgüden, editor in chief of Info-Turk, and journalist Karaca had been previously charged under the old Turkish Penal Code Article 159/1 for "insult" to the Turkish state. After a six-month suspension in waiting for the modification of the Turkish Penal Code, the case began again on 22 June 2005. Now, Özgüden and Karaca are being charged under new Turkish Penal Code Article 301/2 which criminalises comments which insult or belittle the Turkish nation. The comments which allegedly "insult" the Turkish nation appeared in an article in which Özgüden criticised the stand of the Turkish army as sticking by the side of the ruling classes after sixty years, and against the working class and the progressive youth.[94] From this example it appears that while the article numbers of the new Turkish Penal Code might have changed, the fundamental attitudes and perspectives have not.

D. New Press Law

Keep the tongue in your mouth a prisoner.

Turkish Proverb

The new Press Law (Law No. 5187), passed on 9 June 2004, is striking in its similarity to the old Press Law. The language and organisation of the new Press Law is clearer and has a more legalistic style, but the wording is by and large the same between the old and new press laws. There are some improvements and allowances for increased freedom of expression in the new law. For instance, under the new law the right of journalists not to disclose their sources is strengthened; the right to reply and correction is reinforced; prison sentences are largely replaced by fines; sanctions such as the closure of publications, halting distribution and confiscating printing machines are removed; and the possibility to confiscate printed materials, such as

93 *Supra* note 79.

94 *Turkish Justice insists on the arrest of chief editor of Info-Turk*. 24 June 2005. KurdishMedia. Accessed 29/06/2005.

books and periodicals, has been reduced.[95] Moreover, foreigners will now be able to edit or own a publications company for any Turkish publication.[96] These provisions are encouraging and show Turkey's commitment to freedom of expression and association. However, the unchanged aspects of the law still overwhelm the new liberalised provisions.

Article 12 of the new Press Law regarding news sources is perhaps the strongest article and greatest advance for freedom of expression. The new article states that the owner of the periodical, responsible editor and owner of the publication cannot be forced either to disclose their news sources or legally to testify on this issue.[97] Under the old Press Law, editors need not reveal the names of the producers of articles or pictures or cartoons which were published under a pseudonym or unsigned; however, if their names were not revealed by the editor at the first questioning in court, liability would fall on the editor.[98] The new law therefore takes the pressure of liability off the editor for not disclosing sources.

Other provisions of the two laws remain remarkably similar. The New Press Law perhaps emphasises Correction and Reply options in Article 14 more than under old Article 19, and there are fewer instances when printing presses may be stopped or publications confiscated. However, they still exist under Article 25 on Confiscation and Prohibition of Distribution and Sale. For example, the old Press Law stated in Supplementary Article 1 that:

> the distribution of any periodical or other printed work not entering the definition of periodical….or in contravention of Articles 311 or 312 of the Turkish Penal Code or any secret information pertaining to the State may be stopped by the decision of the justice of the peace.

Further, in the case of conviction under the above articles, the old Press Law allows the confiscation of machines and other printing equipment of the periodical… containing the offence provided that they (the materials) belong to the perpetrators or to some of them.[99]

The New Press law in Article 25 provides that:

> so long as an investigation is launched, all printed matter may be confiscated

95 European Commission: "2004 Regular Report on Turkey's progress toward accession"; Brussels 6.10.2004.

96 *Id.*

97 Press Law No. 5187, Article 12

98 Press Law No. 5680, Article 16(2).

99 Press Law No. 5680, Supplementary Article 1.

> through a judge's order under Law Concerning Crimes Committed Against Ataturk's Principles No. 5816… the Reform Laws stated in Article 174, 146, 153, 155, 311 and 312 of the Constitution, Article 7 of the Anti-Terror Law and Article 312 of the Turkish Penal Code. In addition, notwithstanding their language of publication, if there is strong evidence that periodicals and non-periodicals published outside of Turkey entail crimes stated above, their distribution or sale in Turkey may be prohibited upon the order of the Office of the State Chief Prosecutor through the verdict of the local criminal judge.[100]

The language of the new Press Law does not directly provide for confiscation of the materials or the printing presses, a distinct improvement over the old Press Law. Publications produced outside Turkey covered by the law can only face prohibitions on their distribution or sale.

Other similarities to the old Press Law include provisions requiring the editor to present two copies of each publication to the Prosecutor's office. Old Article 12 states, "it is incumbent on the printer to present two of each copy of the periodical both to the Prosecution and the highest civil service authority in the place of issue on the working day following the day of publication." Likewise, new Article 10 says "the publisher is required to submit two copies of each publication to the local office of the Chief Prosecutor on the same day the periodical is published or distributed." The language is strikingly similar, with the exception that the New Press Law now requires the copies to be submitted to the Prosecutor's office on the day of the publication versus the next working day as the Old Press Law requires. This requirement that publications be submitted to the Prosecutor's office is a subtle limitation on free press, since publishers know their work will be examined for infractions of the law. This is still an example of a state centric control of freedoms, versus allowing individuals to use the courts for recompense of libel and slander.

Further examples of similarity include the articles pertaining to moral and material damages arising from the press. Old Article 17 states that, "in periodicals, the owner, and in non-periodicals, the publisher, are successively liable to pay compensation for spiritual and material damages arising from actions perpetrated by way of the press…" Similarly, new Article 13 provides that, "if material or moral damages are incurred due to the publishing of a periodical, the owner of the periodical and his/her representative if he/she exists shall be held responsible." This verbiage is similar to the provisions many nation-states have for libel and slander. For example, in the German Press Law for the Free and Hanseatic City of Hamburg, last amended 8 May 1998, the responsible editor, journalist or publisher is liable if he/she "knowingly or negligently violates his duty to maintain published matter free of

100 Press Law No. 5187, Article 25.

punishable content, he shall be liable to punishment or imprisonment for up to one year or a fine."[101] However, unlike many states, this provision is not a private right of action between two individuals, but is always brought by the state against the publisher/editor, and it is for the state to determine what constitutes "material or moral damages." In some states libel becomes a criminal offence and an action is brought by the state. However, in those instances, such as the German law above, there is a clear legal standard such as "knowingly or negligently" which the State needs to prove in addition to the occurrence of libel.

The new Press Law was adopted on 9 June 2004 and came into effect on 26 June 2004. However, despite the enactment of this liberalised law, abuses of freedom of expression still took place. Recent reports indicate that the majority of cases against journalists are not brought on the basis of the Press Law. The provisions most commonly used to prosecute the media are still Articles 159, 169 and 312 of the Penal Code (prior to the adoption of the new Penal Code) and Articles 6 and 7 of the Anti- Terror Law.[102]

According to İHD (*İnsan Hakları Derneği* – Human Rights Association of Turkey), in the first nine months of 2004, courts tried 416 persons on charges relating to spoken or written expression,[103] when the new Press law had been in effect for three of those months. For example, in September 2004 an Istanbul prosecutor opened a case against journalist Mehmet Ali Birand and three attorneys for jailed PKK leader Abdullah Öcalan, in connection with an April CNN-Turk broadcast during which Birand interviewed the lawyers. Birand and the attorneys – Irfan Dündar, Mahmut Şakar, and Doğan Erbaş – were charged with aiding the PKK, under Article 169 of the old Turkish Penal Code.[104] In addition, in December 2004 Ragıp Zarakolu was prosecuted for publication of George Jerjian's book: "The truth will set us free/ Armenians and Turks reconciled." He was prosecuted not under the Press law, but under Article 125 of the Turkish Penal Code and the 1951 Law on Crimes Against Atatürk.[105]

Active debates on human rights and government policies continued throughout 2004, particularly on issues relating to the country's EU membership process, the

101 Press Law for the Free and Hanseatic City of Hamburg. Published 9 September 1965, last amended 8 May 1998. Accessed 5 July 2005. <http://www.iuscomp.org/gla/statutes/HmbPG.htm#1>

102 US Department of State, 2004 country report. Released 28 February 2005. <http://www.state.gov/g/drl/rls/hrrpt/2004/41713.htm>

103 *Id.*

104 *Id*. Article 169 of TPC: Whoever, in circumstances other than those prescribed in Articles 64 and 65, knowingly gives shelter, assistance, provisions, arms or ammunition to such a society or band or facilitates their actions shall be punished by heavy imprisonment for three to five years.

105 *Freedom of expression at risk: writers on Trial in Turkey*, 13. Trial Observation Report, Kurdish Human Rights Project (March 2005).

role of the military, political Islam, and the Kurdish question; however, people who wrote or spoke out on such topics risked prosecution.[106] As a result, news items reflected a pro-authority bias.[107] Official sources stress the considerable decrease in the number of cases resulting in sanctions.[108] However, whether or not conviction is likely, the regularity with which cases are filed against members of the press represents a significant deterrent to freedom of expression through the media.

Some particularly high profile examples of the government's lack of tolerance regarding freedom of expression are the cases against cartoonists who lampooned Prime Minister Erdoğan. Mr Erdoğan has successfully sued the political cartoonist of the newspaper *Cumhuriyet* for humiliating him. As a result, Musa Kart, whose sketch made fun of the government's difficulty in passing legislation, was fined approximately 3000 EUR after he was convicted in March of 2005 of "publicly humiliating" the prime minister.[109] Such a flurry of litigation against Kart and other political cartoonists is ironic for a Prime Minister who described himself as a champion of free speech after receiving a jail sentence in 1999 for a reciting a poem that, according to the court ruling against him, "incited hatred".[110] A judge who threw out one of his earlier suits said, "A prime minister who was forced to serve a jail term for reciting a poem should show more tolerance to these kinds of criticisms."[111] In March, the Turkish news agency BİA (*Bağımsız İletişim Ağı* - Independent Communication Network) gave details of eight writers and journalists that had been imprisoned in 28 months of Erdoğan's government.[112]

The Diyarbakır Branch of the İHD has said that a total of 2,262 violations of human rights occurred and 140 people were killed in clashes in the Kurdish-populated provinces in March, April and May of 2005. Pointing out that legal proceedings had been instituted against 2,811 persons for expressing their opinions in the region over the past five months, Selahattin Demirtaş, head of the branch stated, "Those facts indicate that achieving an overall improvement would not be possible before making serious progress regarding all aspects of human rights. Ups and downs observed in human rights violations are an important indication of wavering policies and insincere attitudes."

Selahattin Demirtaş, head of the Diyarbakır branch of İHD, has expressed concern

106 *Supra* note 90.

107 *Id.*

108 *Id.*

109 The Federation of Cartoonists Organizations. Accessed 30 June 2005. <http://www.fecoweb.org/News/07-4-05Turkish%20cartoon%20lawsuit.html>

110 *Id.*

111 Free Republic. *Political Cartoonists Humor lost on Turkish Prime Minister.* 11 May 2005. Accessed 29 June 2005. <http://www.freerepublic.com/focus/f-news/1401248/posts>

112 *Id.*

about the lack of ability to educate children in their Kurdish mother tongue.[113] Denial of this right conflicts with international agreements particularly the Lausanne Treaty. The problems being experienced by the Kurds about their cultural rights have remained unaddressed and there is no sign of improvement.[114]

Taken as a whole, the new Press Law condenses the 41 provisions of the Old Press Law into thirty articles. Most of the same provisions exist in the new law, in different forms and perhaps even different articles. While the new Press Law has more efficient language and phrasing, using broader wording and replicating the old principles in shorter sentences and articles,[115] the old Press Law perhaps gave more direction and indication of what was to be included under various provisions.

E. New Law on Associations

The new Law on Associations (No. 5231) was passed by the Turkish Parliament on 17 July 2004 and has been heralded by TÜSEV (Türkiye Üçüncü Sektör Vakfı – Turkish Third Sector Foundation), a leading Turkish NGO, as, "the most progressive Law on Associations in over 20 years."[116] The new Law on Associations improved upon the changes made by the constitutional amendments of 2001, as well as the liberalising provisions of the second, third, fourth, and fifth harmonisation packages.[117]

Some of the major changes to the new Law on Associations include the following:

113 "*Sharp Increase In Human Rights Abuses in Turkish Kurdistan*" Info-Turk DIHA Ozgur Politika 20 June 2005.

114 *Id.*

115 For example, the provisions applying to Correction and Reply are much more detailed in the old Press Law than in the new Press Law, since the old Press Law's Article 19 contains 9 sub-paragraphs and spans 2 full pages, whereas the New Press law's Article 14 consists of 2 paragraphs and spans half a page. Though the language between the two is by and large the same, the old Press Law states the standards by which the offences are to be judged. For example, old Article 19(III) states that in the case of a complaint regarding a publication, the "justice of the peace shall examine within two days the matters of whether the reply or correction has the qualities of an offence, whether it is relevant to the publication, whether it carries the form and conditions outlined in the Law and whether the application against the periodical was made within two months of the publication and decide on either exact publication of the reply or correction or its publication with alterations which s/he sees fit." By contrast, the comparable language in the new Press Law merely states: "The criminal judge shall render a verdict on this request within three days without any hearing." Both Press laws allow for appeal of this decision; however, by not providing a legal standard by which to adjudge the alleged offence, the new Press Law allows for more arbitrary decisions, especially since there is no hearing allowed.

116 Ergun Ozbudun and Serap Yazici, Democratization Reforms in Turkey, September 2004 (Turkish Economic and Social Studies Foundation) Accessed 22 June 2005. <**http://www.tesev.**org.tr/projeler/demokratiklesme_kitap.pdf>

117 *Id.*

1) Associations are no longer required to obtain prior authorisation for foreign funding, partnerships or activities;

2) Associations are no longer required to inform local government officials of the day/time/location of general assembly meetings and no longer required to invite a government official to general assembly meetings;

3) Audit officials must give 24 hours prior notice and just cause for random audits;

4) NGOs are permitted to open representative offices for federations and confederations internationally;

5) Security forces are no longer allowed on premises of associations without a court order;

6) Specific provisions and restrictions for student associations have been entirely removed;

7) Children from the age of 15 can form associations;

8) Internal audit standards have been increased to ensure accountability of members and management;

9) NGOs will be able to form temporary platforms/initiatives to pursue common objectives;

10) Government funding for up to 50% of projects will be possible;

11) NGOs will be allowed to buy and sell necessary immovable assets.[118]

These important changes have expanded freedom of association in Turkey.

While the new law indicates certain progress, there are still grave concerns about the steep fines and prison sentences which it imposes. For example, a "heavy fine" of five hundred million lira is imposed on executives of an association for convening a meeting at a place other than the head office or places indicated in the statute.[119] This is also an example of government control by ensuring a consistent place for meetings. Other provisions include serious fines for accepting foreign funds not

118 *Id.*

119 Associations Law No. 5253, Section 6, Art. 32(b).

through the intermediary of banks,[120] or for not keeping proper records of the association.[121] Further provisions cause concern as a result of the clause "unless the offences do require heavier punishment," applicable in instances when associations falsify books or records,[122] interfere with voting[123] or counterfeit money.[124] Fines and possible prison sentences exist for failure to accurately report funding,[125] receipts of money,[126] opening associations illegally,[127] engaging in activities other than those set out in the statute,[128] and starting paramilitary associations.[129] The largest fine, at the amount of one billion lira, is imposed on those who do not use the Turkish language for official business.[130] This last provision, and the large fine that accompanies it, is reflective of the still hostile atmosphere towards minority languages, particularly Kurdish. Another example of hostility towards minority languages is Article 31 of the new law which states that associations shall use the Turkish language in their books and records and correspondences with the official authorities of the state.[131]

The new Law on Associations is more liberal regarding children's organisations. With the written permission of their lawful representatives, children (described as "infants") over the age of fifteen may establish children's associations with the purpose of protecting social, spiritual, moral, physical and mental capabilities and sporting educational and training rights, social and cultural existence, family structure and private life.[132] In addition, infants over the age of twelve may become members of children's associations. However, this liberalising article allowing children's associations is tempered by the application of all the penalties set out in Section 6 (Penalty Clauses) to children's organisations where there has been a recurrence of the illegal act despite warnings.[133] This provision causes grave concern, because children as young as 15-years-old, who are able to establish organisations, will encounter the same liability as adults, with penalties that include hefty fines and prison sentences. As with the new provisions of the Penal Code, this violates the spirit of Article 40 of the CRC which ensures state parties provide adequate

120 *Id.* at Art. 32(c).
121 *Id.* at Art. 32(d).
122 *Id.* at Art. 32(e).
123 *Id.*
124 *Id.* at Art 32(f).
125 *Id.* at Art. 32(j).
126 *Id.* at Art. 32(h).
127 *Id.* at Art. 32(g).
128 *Id.* at Art. 32b).
129 *Id.* at Art. 32o).
130 *Id.* at Art. 32(r).
131 Associations Law No. 5253, Section 5, Article 31.
132 Associations Law No. 5253, Section 2, Article 3.
133 Associations Law No. 5232, Section 6, Article 33.

institutional structures to sensitively deal with children.

The status of public benefit associations remains a concern in the new Law on Associations. Article 27 sets forth criteria and administrative requirements for receiving recognition as an association "working for the public welfare". As such, one year after establishment, an association is eligible[134] to apply to the regulating authority (Department of Associations or General Directorate of Foundations respectively) to initiate the process of applying for public benefit status.[135] Whether an association constitutes a public benefit association is up to the determination of the Council of Ministers upon a proposal of the Ministry of Interior, and in consultation with the concerned ministries and the Ministry of Finance. However, there is no definition of what constitutes a public benefit organisation, and as a result there is a mixed array of associations claiming public benefit status. In fact, only approximately 700 out of 80.000 associations and 170 of 4,500 foundations have the status of 'public benefit organisation.'[136]

In addition to conflicting interpretations of what constitutes a public benefit organisation in the opinion of the government, there also appears to be a lack of understanding of the autonomy inherent in non-governmental organisations, or public benefit organisations. A provision inserted in the new Law on Associations provides that, "those who commit offences in a way which damages the properties of the associations are punished as if they have committed offences against the State properties."[137] Property of all organisations should be protected in this manner, regardless of their public benefit status. But the fact that the state has such a proprietary clause regarding public benefit organisations seems to put them in the realm of state appendages, at least in the state's eyes.

The new Law on Associations was adopted in April 2004, but did not enter into force until 23 November 2004. The most high profile example of a breach of freedom of association since the new law's passage is the recent case against teachers' union *Eğitim-Sen*, which is now taking its case to the ECtHR. Turkey's ruling raises questions under Article 11(1) of the ECHR and Article 22 of the ICCPR which provides that everyone shall have the "right to join and form trade unions for protection of his interests." Arguably ensuring the right to mother-tongue education is a protection of Kurdish interests. However, the question for the Court will be whether the test

134 The very basic minimum requirements are that the association or foundation be operating in one of the following fields of activity: education, art/culture, health and scientific research. Compared to international best practice (see section II on Definition of Public Benefit and Qualifying Activities), this is significantly limited.

135 International Center for Not-for-Profit Law, *Comparative Report on Public Benefit Law*, September 2004. Accessed 28 June 2005. <http://www.icnl.org/tools/default.htm>

136 *Id*

137 Associations Law No. 5253, (4/11/04).

set out in Article 11(2) of the ECHR, whereby the right to associate freely can be limited for reasons pertaining to national security and public interest, is met in this instance.

This is an attack not only on citizens' right to associate freely, but also on freedom of expression. As a result, while there is much to commend in the new Law on Associations, it is important to note the persisting fundamental contradictions within the law and the way it is interpreted with the concept of freedom of association, as well as possible violations of international obligations. The structure of the new law, particularly the heavy fines for breaching what are effectively measures of state control, and using a language other than Turkish for official communications, is reminiscent of past laws and attitudes rather than of true acceptance of freedom of association.

VII. Conclusion

In Turkey there is still a gulf between the espoused views on paper in the new Constitution, Press Law, Associations Law, Penal Code and Harmonisation laws, and the interpretation of these laws by the courts, government officials, military and gendarmes. For many of these new laws, old interpretations are still given even though the wording has changed. In addition, public prosecutors have taken to using other laws which have not been revised to prosecute for crimes that the old versions of the Penal Code, Press Law and Law on Associations used to cover. This is indicative of the general frame of mind that still exists in the Turkish government and military, regardless of the new language that has emerged in the laws. It is also telling that many of the "new" laws are actually just modified versions of the "old" laws, when actual fundamental change of the concept behind many of the fundamental provisions is what is needed truly to achieve democratic freedoms. As a result, many of the freedoms enjoyed in EU countries are not available to the citizens of Turkey, be they Turkish or Kurdish in origin.

Turkey has made momentous changes in her legislation in an effort to join the EU. Many would agree that the Turkey of 2005 is light years ahead of the Turkey of the 1980s when pro-EU reforms had not commenced in earnest. These changes and the effort involved are to be commended. However, while these changes are indeed significant progress, many Europeans would also agree that there is still progress to be made before all the citizens of Turkey enjoy the freedoms that other citizens of Europe enjoy. The European Commission's report and recommendation on opening accession negotiations, as well as the Council decision and the subsequent draft negotiating framework all make clear that Turkey's progress on human rights reform will play an important role in informing the course of accession negotiations. This sentiment was reinforced at the end of June 2005 by Olli Rehn, the EU Enlargement Commissioner, when he stated that, "European values need to become a reality in all walks of life, in all corners of the country, before Turkey can join the European Union."[138] It is hoped that the EU will indeed demonstrate a commitment to this principle in its monitoring of Turkish compliance with accession standards

138 "Turkey must embrace EU reforms in "all walks of life" – EU Commissioner". June 30, 2005. Accessed 4 July 2005 <http://news.yahoo.com/news?tmpl=story&u=/afp/20050630/wl_uk_afp/eudisputeenlargeturkeybritain_050630142502>

While Europe appears to view Turkey's reforms as important first steps in the accession process; Turkey, by contrast, views much of the progress as final steps and fulfilments of criteria, or merely the products of Turkey's own separate initiative. This attitude was voiced in a recent interview by Prime Minister Erdoğan upon a question about the implementation of the new Turkish Penal Code and the criticisms it was receiving from the European Community. Prime Minister Erdoğan replied that:

> Turkey's new criminal law is not part of the Copenhagen criteria. Just as the draft legislation for reforms to the regional Courts of Appeal, or the new code for criminal procedure or the penal code, are not a part of the Copenhagen criteria. These are steps we are taking as preparatory measures for moving towards the European Union. And it should not be forgotten that at this point there is only a common European constitution, but the EU has no common code of criminal law. We are undertaking this reform of criminal law on our own initiative.[139]

This would come as a surprise to the drafters of the 2004 EU Commission Report who reported in the recommendations section that Turkey sufficiently fulfilled the Copenhagen Criteria upon implementation of the six specified laws mentioned above.[140]

The full implementation of Turkey's international human rights obligations is still a work in progress, particularly as regards freedom of expression and freedom of association. Turkey has made important progress on the path towards EU integration but she must sustain and intensify her efforts, ensuring both that

139 "A Change in Mentality is Needed" 18 September 2005. Accessed on 29 June 2005. <http://www.dw-world.de/dw/article/0,1564,1332273,00.html>

140 The specific provisions of the report can be found in the Conclusions and Recommendations section. In relevant part the recommendations state:

> (1) Turkey has substantially progressed in its political reform process, in particular by means of far reaching constitutional and legislative changes adopted over the last years, in line with the priorities set out in the Accession Partnership. However, ***the Law on Associations, the new Penal Code and the Law on Intermediate Courts of Appeal have not yet entered into force. Moreover, the Code on Criminal Procedure, the legislation establishing the judicial police and the law on execution of punishments and measures are still to be adopted.***
>
> (2) Turkey is undertaking strong efforts to ensure proper implementation of these reforms. ***Despite this, legislation and implementation measures need to be further consolidated and broadened.*** This applies specifically to the zero tolerance policy in the fight against torture and ill-treatment and the implementation of provisions relating to freedom of expression, freedom of religion, women's rights, ILO standards including trade union rights, and minority rights. **2004 European Commission Recommendations. Emphasis added.** http://europa.eu.int/comm/enlargement/report_2004/pdf/tr_recommandation_en.pdf accessed 7/4/05

legislative provisions meet with her international obligations and that revised legislation is fully implemented, before she can be deemed to be complying with accession standards in the field of human rights. Only with renewed effort from the Turkish government will freedom of expression and freedom of association be fully realised for all citizens of the republic.

VIII. Recommendations

Recommendations for the Turkish Government

- Comply with international human rights treaty obligations and in particular obligations under Article 10 of the European Convention on Human Rights
- Implement and enforce all new laws enacted to comply with the Copenhagen Criteria and the Harmonisation Packages; and
- Address the criticisms outlined in the EU Commission's 2004 Regular Report on Turkey's progress towards EU accession.

Recommendations for the European Union

- Ensure that Turkey intensifies efforts to fully embrace her international human rights obligations; and
- Continue to monitor human rights situation in Turkey and the drafting and implementation of legislation affecting human rights in accordance with accession standards

Recommendations for International Organisations

- Monitor Turkey's implementation of new legislation and compliance with international treaty obligations;
- Initiate and maintain contacts with human rights organisations in Turkey;
- Maintain dialogue with the EU on the issues raised in this report throughout future discussions on accession.

Appendix 1: Comparative Provisions in Turkish Laws

A. Constitution

Article	1982 Constitution	2001 Constitutional Amendments
13 Restriction of Fundamental Rights and Freedoms	Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and also for specific reasons set forth in the relevant Articles of the Constitution. General and specific grounds for restrictions of fundamental rights and freedoms shall not conflict with the requirements of the democratic order of society and shall not be imposed for any purpose other than those for which they are prescribed. The general grounds for restriction set forth in this article shall apply for all fundamental rights and freedoms.	Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality.

26 Freedom of Expression and Dissemination of Thought	Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licencing. The exercise of these freedoms may be restricted for the purposes of preventing crime, punishing offenders, withholding information duly classified as a State secret, protecting the reputation and rights and the private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary. No language prohibited by law shall be used in the expression and dissemination of thought. Any written or printed documents, phonograph records, magnetic or video tapes, and other means of expression used in contravention of this provision shall be seized by a duly issued decision of a judge or, in cases where delay is deemed prejudicial, by the competent authority designated by law. The authority issuing the seizure order shall notify the competent judge of its decision within twenty-four hours. The judge shall decide on the matter within three days. Provisions regulating the use of means of disseminating information and ideas shall hot be interpreted as a restriction of freedom of expression and dissemination unless they prevent the dissemination of information and thought.	Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing. The exercise of these freedoms may be restricted for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary. The formalities, conditions and procedures to be applied in exercising the right to expression and dissemination of thought shall be prescribed by law.

B. Penal Codes

Old/new article	Old Turkish Penal Code (1923)	New Turkish Penal Code (6/1/2005)
145/301	Whoever, with the purpose of insult, removes from its place or tears or damages, or humiliates in any other manner, the Turkish flag or any other sovereign emblem of the State, shall be imprisoned for one to three years.	insult to Turkish flag or to anything having the Turkish State's symbol = up to 3 yrs, increased by 1/3 if a Turkish citizen abroad. 2 yrs for insult to national anthem, same increase for citizens abroad
158/300	Whoever insults the President of Turkey…shall be punished by heavy imprisonment for not less than three years.	insulting the President of the Republic = up to 4 yrs imprisonment, **increase by 1/3 if by means of media**
159/302	Whoever overtly insults or vilifies the Turkish nation, the Republic, the Grand National Assembly, or the moral personality of the Government or the military or security forces of the State or the moral personality of the judicial authorities…shall be punished by imprisonment for **one to six years**. Increase by 1/3 for citizens abroad.	Insulting the Turkish national identity, republic or Grand national assembly of Turkey. = up to **3** yrs, 2 for insulting Turkish Government, the judicial organs, military or security institutions. Increase by 1/3 for citizens abroad
169/220	Whoever, in circumstances other than those prescribed in Articles 64 and 65, knowingly gives shelter, assistance, provisions, arms or ammunition to such a society or band or facilities, their actions shall be punished by **heavy imprisonment for 3-5 years.**	"setting up an organization with the aim of committing a crime"…individuals disseminating propaganda for an organization or its goals =**1-3 years in prison, prison sentence is scaled up by half when propaganda is through the media organs.**

312/216	Whoever openly praises or speaks favourably of an action which, by law, is a felony; or who incites people to disobey laws; or who leads different classes of society to vengeance and enmity in such a way as to constitute danger to public security shall be punished by **imprisonment for 3 months to one year and by a heavy fine of 50-500 liras.** The punishment to be imposed upon anybody who commits the foregoing crimes **through publication shall be doubled**	instigating a part of the people having different social class, race, religion, sect or region to hatred or hostility against another part of the people in a way dangerous for the public security**. 1 to 3 yrs in prison, increase by half if by media.**

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