Turkey: Article 301: How the law on "denigrating Turkishness" is an insult to free expression

Introduction

The prosecution of the internationally acclaimed novelist, Orhan Pamuk, for "denigrating Turkishness" has been instrumental in bringing public attention to a restrictive law which muzzles peaceful dissenting opinion in Turkey. Amnesty International has called for the repeal of Article 301 of the Turkish Penal Code on the grounds that it poses a direct threat to the fundamental right to freedom of expression. This right is enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), to which Turkey is a State Party. The Turkish authorities are therefore obligated to ensure that freedom of expression is upheld and observed for all those under their jurisdiction. Yet Amnesty International remains concerned about the steady flow of prosecutions that continue to be brought against a number of individuals in Turkey across the political spectrum. They include writers, journalists, publishers and human rights defenders. What characterizes all of them is that they have peacefully expressed opinions that are deemed to "denigrate" Turkishness, the Republic, parliament, the government, the judiciary or the security services. If imprisoned under Article 301, Amnesty International would consider them to be prisoners of conscience.

What is Article 301 of the Turkish Penal Code?

Article 301, on the denigration of Turkishness, the Republic, and the foundation and institutions of the State, was introduced with the legislative reforms of 1 June 2005 and replaced Article 159 (which Amnesty International also long campaigned against) of the previous penal code. It states that:

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

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

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

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

Why does Amnesty International oppose Article 301?

As a party to the EHCR[1] and the ICCPR[2], Turkey is required to guarantee to all persons within its territory or subject to its jurisdiction the freedom and right to hold opinions and to

[1] Article 10 of the EHCR states,

"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

seek, receive, and impart information and ideas of all kinds, orally, in print or art form or through other media, without the interference of public authorities.

As the European Court of Human Rights has made clear, the right to freedom of expression

"constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10 [relating to lawful restrictions of this right]*, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."*[3]

International human rights law recognizes that freedom of expression is not an absolute right. There are permissible grounds for the imposition of lawful restrictions on the right to freedom of expression. The permissible restrictions, however, are to be strictly construed. Accordingly, any restriction on the exercise of the right to freedom of expression must be prescribed by law, and be necessary in a "democratic society" for one of the expressly set out grounds identified by human rights law which include, *inter alia*, "in the interests of national security… or public safety [and] for the prevention of disorder or crime…".

To qualify as a measure "prescribed by law" any legal provision restricting the exercise of the right to freedom of expression must be "accessible and unambiguous", narrowly drawn and precise enough so that individuals subject to the law can foresee whether a particular action is unlawful.[4] The European Court of Human Rights has clarified that

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reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[2] Article 19 of the ICCPR states:

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

[3] *Sürek and Özdemir v. Turkey*, Judgment of the European Court of Human Rights of 8 July 1999, at para. 57

[4] See Principle 1.1. of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996), which were developed by a group of international experts on human rights and media law from around the world, are considered authoritative on the subject and have been cited and commended by a range of UN and regional bodies and mechanisms.
Principle 1.1. states:
"Prescribed by Law
(a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.
(b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by and independent court or tribunal."

"in the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[5]

In addition, any curtailment of the right to freedom of expression must both pursue one of the prescribed legitimate aims, and must be "deemed necessary in a democratic society" to protect that legitimate aim, such as the prevention of imminent violence. In order to meet the criterion of being "necessary in a democratic society", the restriction must be both rationally connected to the aim for which it is being introduced and must be proportionate. Proportionality in this context refers to the fact that the restriction must do no more than is absolutely necessary to meet the legitimate aim and that the nature and severity of any penalty imposed for a breach of the said restriction must also be proportionate.[6]

Amnesty International further notes jurisprudence of the European Court of Human Rights which states that the limits of acceptable criticism are broader as regards politicians than private individuals (*Lingens v Austria*, 1986); are wider with regard to government (*Castells v Spain*, 1992); and that the authorities of a democratic state must accept criticism even if provocative or insulting (*Özgür Gündem v Turkey*, 2000). Furthermore, Amnesty International notes Recommendation 1589 (2003)1 of the Parliamentary Assembly of the Council of Europe, which urges states *inter alia* to "abolish legislation that makes journalistic freedom of expression subject to criminal prosecution"; "to stop immediately all forms of legal and economic harassment of dissenting media" and "to incorporate the case-law of the European Court of Human Rights in the field of freedom of expression into their domestic legislation and ensure the relevant training of judges".

Amnesty International considers that the provisions of Article 301 of the Turkish Penal Code do not fulfil the requirements of the above-described permissible restrictions on the right to freedom of expression under international law. The organization considers that Article 301 does not meet the requirement of being "accessible and unambiguous" as described above, but rather its wide and vague terms mean that it may be applied arbitrarily to criminalize a wide range of peacefully-expressed dissenting opinion.

Amnesty International is further concerned that the qualification of the Article in paragraph 4 suggests that expressions amounting to "criticism" rather than "public denigration" are not punishable. Amnesty International considers that the attempt to draw a distinction between criticism and denigration is highly problematic. The lack of legal certainty of the crime has and will continue to lead to arbitrary interpretation by prosecutors and judges. Even the Turkish Minister of Justice himself, Cemil Çiçek, has reportedly stated that "the whole issue comes down to how the laws are interpreted".

Who has been prosecuted under Article 301?

Article 301 has been used to prosecute a wide range of individuals peacefully expressing their dissenting opinion. Amnesty International considers that none of the statements made by these individuals for which they are under prosecution can be considered to fall within the possible legal restrictions to freedom of expression outlined above. The article became internationally notorious when it was used to prosecute the well-known Turkish novelist **Orhan Pamuk** for comments he made during an interview he gave to a Swiss newspaper

[5] *Sunday Times v. United Kingdom*, Judgment of 26 April 1979, Series A, No.30; 2 EHHR 245 (1979-80).
[6] See, e.g. the Judgments of the European Court of Human Rights in the cases of *Sener v. Turkey*, Judgment of 18 July 2000 and *Arslan v. Turkey*, Judgment of 8 July 1999.

(*Tages Anzeiger*) on 5 February 2005. In the interview, Orhan Pamuk stated, "30,000 Kurds and a million Armenians were murdered. Hardly anyone dares mention it, so I do. And that's why I'm hated." Since Orhan Pamuk made his comments prior to the entry into force of Article 301 on 1 June 2005, his case was subject to the previous Article 159. Therefore the Şişli Court of First Instance No. 2 requested the authorization of the Ministry of Justice to proceed with the case, but threw it out on 23 January 2006 after the Ministry wrote to the court declaring itself legally incompetent to intervene.

The case under Article 301 against Professor **İbrahim Kaboğlu** and Professor **Baskın Oran**, respectively former head and committee member of the Human Rights Advisory Board (HRAB) under the auspices of the Prime Minister's Office, has been suspended on the same technicality, while the court awaits a decision from the Ministry of Justice on whether or not to proceed. While awaiting to hear whether their prosecution under Article 301 will go ahead, the two are also being prosecuted under Article 216 ("inciting enmity or hatred among the population"). Both charges relate to the publication of a report on minority and cultural rights authored by Baskın Oran, which allegedly "publicly denigrates Turkishness" by *inter alia* referring to "people from Turkey" rather than "Turks". Baskın Oran has reportedly stated, "The report I authored was nothing more than an academic contribution to the fight to improve human rights as part of my role at [HRAB]. The charges against me are ludicrous. My freedom of expression is being ambushed for strategic reasons."[7] The case against the two is due to continue on 10 April 2006 at Ankara Court of First Instance No.28.

Amnesty International considers the dropping of Orhan Pamuk's case, and the possible dropping of that of the former members of the HRAB, arising from a technicality and not on any point of substance, to be a further indicator of the inadequacies of Article 301. Case-by-case requests for intervention from the Ministry of Justice are clearly both undesirable and untenable. Bouncing cases between the courts and the Ministry contravenes the fundamental principle of maintaining the independence of the judiciary, as enshrined in the UN Basic Principles on the Independence of the Judiciary, especially Article 3, which states, "The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law." Furthermore, Amnesty International considers this may be a tactic employed by the Turkish authorities to avoid passing judgment in cases brought under Article 301, especially against high-profile individuals such as those mentioned above whose cases have drawn international scrutiny.

The fact that Orhan Pamuk's case was dropped on a technicality is small consolation to the many other lesser-known individuals who have been prosecuted under Article 301. Amnesty International notes that these individuals are not drawn solely from the circles that frequently find themselves targeted by prosecutors in Turkey for being leftist or pro-Kurdish; they are individuals from a wide variety of backgrounds and opinions – from liberal to conservative, secularist to religious – across the political spectrum. In some cases there would appear to be no clear political content to the statement which has been targeted for prosecution. The cases here demonstrate the fact that Article 301 can be used arbitrarily to prosecute anyone who expresses a view that may be construed as "denigrating Turkishness" or state institutions and public officials. Amnesty International fears that a climate of intolerance of dissent and punitive sanction of free speech may discourage wide public participation in civil society and stifle its growth. A sample of ongoing cases is given below.

[7] Statement from Minority Rights Group International, *Baskin Oran on Trial: Freedom of Expression threatened in EU hopeful Turkey*, 13 February 2006.

Publishers

A trial began in May 2005 at the Beyoğlu Court of First Instance No. 2 in Istanbul against publisher **Ragip Zarakolu** for his publication of a Turkish translation of a book by Dora Sakayan entitled *Experiences of an Armenian Doctor: Garabet Hacheryan's Izmir Journal* (*Bir Ermeni Doktorun Yaşadıkları: Garabet Haçeryan'ın İzmir Güncesi*; İstanbul: Belge 2005). Ragip Zarakolu had been charged under Article 159 of the TPC for "denigrating Turkishness and the security forces", and then under Article 301 after the new TPC came into effect. Another case had been opened against him in March 2005, in which Ragip Zarakolu was charged with "denigrating the state and the republic" under Article 159 (also converted to Article 301) and "insulting Atatürk's memory" under Law No 5816 for publishing a Turkish translation of a book by George Jerjian entitled *The Truth Will Set Us Free: Armenians and Turks Reconciled* (*Gerçek bizi Özgür Kılacak;* İstanbul: Belge 2004). His case will continue on 19 April 2006.

The Beyoğlu Public Prosecutor has also brought a case against **Abdullah Yıldız**, chief editor of Literatür Publishing House under Article 301, after the publication of a translation of a book entitled *The Witches of Smyrna* [*İzmir'in Falcıları*] by Greek author Mara Meimaridi. The book is alleged to portray the Turkish people in a bad light. The case is due to be heard on 6 April 2006.

Fatih Taş is a 26-year-old student of Communications and Journalism at Istanbul University and the owner of Aram publishing house. He is currently being tried under Article 301 because he published a Turkish translation of a book by the American academic John Tirman, entitled *The Spoils of War: the Human Cost of America's Arms Trade* (*Savaş Ganimetleri: Amerikan Silah Ticaretinin İnsan Bedeli* (İstanbul: Aram, 2005)), that reportedly includes a map depicting a large section of Turkey as traditionally Kurdish and alleges that the Turkish military perpetrated a number of human rights abuses in the south-east of the country during the 1980s and 1990s. Fatih Taş argues that the book contains nothing that has not previously been discussed in the Turkish Parliament or media, and was not intended to insult Turkey or Turkishness. The prosecutor reportedly demanded that each "insult" in the book should be tried as a separate charge and called for Fatih Taş to be given a prison sentence of ten and a half years. The next hearing of his case will take place on 18 April 2006 at the Court of First Instance No. 2 in Istanbul. In relation to other statements made in the book, Fatih Taş also faces charges under Articles 1/1 and 2 of Law 5816, which prohibits publicly insulting the memory of Atatürk.

In a separate case, on 9 December 2005 the Istanbul Court of First Instance No. 2 sentenced Fatih Taş to a prison term of six months for the publication of another book *They Say You are Missing* (*Kayıpsın Diyorlar*) by Ali Aydın. The book is a collection of articles and poems about a journalist who went missing during the 1990s. Fatih Taş is currently appealing the decision.

Ahmet Önal, the owner of Peri Publishing House, has had in total 26 cases brought against him in connection with various books he has published. One of the books, *The Language of Pain: Woman* (*Acının Dili:Kadın*), by M. Erol Coşkun, has led to Ahmet Önal's trial under Article 301 (old Article 159) at the Beyoğlu Court of First Instance No. 2 because it is deemed to "denigrate the state security forces".

Journalists

Hrant Dink is a journalist and the editor of the Armenian-language weekly newpaper *Agos*, which is published in Istanbul. On 7 October 2005, Hrant Dink was given a six-month suspended prison sentence by the Şişli Court of First Instance No. 2 in Istanbul for "denigrating Turkishness" in an article he wrote on Armenian identity. According to the

prosecutor in the case, Hrant Dink had written his article with the intention of denigrating Turkish national identity. The court suspended the sentence as the journalist had no previous convictions, on condition that he does not repeat the offence. The Court of Appeal overturned this decision on 24 February 2006.

Amnesty International, however, welcomes news that in another case brought against him under Article 301, Hrant Dink was acquitted by Şanlıurfa Court of First Instance No. 3 on 9 February 2006. He had been charged under Article 159 of the previous Turkish penal code (now Article 301) for a speech he made during a conference organized by the non-governmental organization Mazlum Der's Urfa branch on 14 December 2002 entitled "Global Security, Terror and Human Rights, Multi-culturalism, Minorities and Human Rights".

A case against **Murat Belge**, **İsmet Berkan**, **Hasan Cemal**, **Erol Katırcıoğlu** and **Haluk Şahin** opened at Bağcılar Court of First Instance No. 2 on 7 February 2006. All five are prominent journalists who write in mainstream Turkish daily newspapers. They all face trial on charges under Article 301 in relation to newspaper articles they wrote about a judicial decision to ban a conference on the situation of Armenians during the Ottoman Empire. If convicted they each reportedly face prison terms of between six months and 10 years under Article 301, as well as on charges under Article 288 ("attempting to influence the judicial process"), which Amnesty International considers is in this case also being used as an unnecessary restriction on their freedom of expression. Their case will continue to be heard on 11 April 2006.

Abdurrahman Dilipak is a writer and journalist who has published 38 books and over 10,000 articles, writes a column in the daily newspaper, *Vakit*, and is well-known in Islamic religious circles. He was one of the founders of the human rights organization, Mazlum Der. He currently has 57 cases pending against him, seven of which are on charges under Article 301. Hearings in his cases are scheduled to take place at the Bağcılar Court of First Instance No. 2 on 11 and 18 April and 2 May 2006. Amongst his alleged "crimes" are the statements voiced in articles such as "My country is something other than this" ("Bir başkadır benim memleketim") and "If we cannot trust justice" ("Yargıya güvenemeyeceksek").

Birol Duru is a journalist. He has been charged with "denigrating the security forces" under Article 301 because he reported for the Dicle news agency the issuing of a press release by the Human Rights Association (İHD) Bingöl branch which stated that the security forces were burning forests in Bingöl and Tunceli.

Erol Özkoray, publishing director of *İdea Politika* magazine, faces a trial under Article 301 on charges brought under the previous Article 159 in connection with two articles on the magazine's website, "The new barbarians and the Taliban in epaulettes" ("Yeni Barbarlar ve Apoletli Talibanlar") and "What's the point of the army?" ("Ordu ne işe yarar?"). Separate prosecutions against each article resulted in conviction, but the cases were combined when they were sent to the Court of Cassation. The next hearing of the case is due to take place on 2 June at the Şişli Court of Second Instance.

Writers and Artists

The trial of singer **Ferhat Tunç** under Article 301 is reportedly scheduled to continue on 31 May 2006 at Beyoğlu 2nd Criminal Court of First Instance. He is charged with "denigrating the judicial organs of the State" after a 2004 article entitled "A revolutionary Leyla and a song" in *Özgür Gündem* newspaper in which he had commented critically on the judiciary for the decision not to release Leyla Zana and another three former DEP parliamentarians on bail pending the outcome of their retrial. The charges were originally brought under Article 159 of

the previous Turkish Penal Code. The newspaper's editor, **Mehmet Çolak**, is also prosecuted in connection with the same article.

On 22 December 2005, Istanbul Penal Court of First Instance No. 2 sentenced author **Zülküf Kışanak** to five months' imprisonment on charges of insulting the Turkish Republic in his book *How the Inheritance of Thousands of Years was Burned: Lost Villages* (*Bin Yılların Mirası Nasıl Yakıldı: Yitik Köyler*). The sentence was commuted to a fine of 3000 YTL [c. US$ 2,260].

The trial of **Halil Altındere**, organizer of the 9th Istanbul Biennale, a festival of the arts, is due to begin at Beyoğlu Penal Court of First Instance on 13 April 2006. He is charged under Article 301 in connection with a photographic exhibition which allegedly "insults" the army.

Human Rights Defenders

Amnesty International welcomes the acquittal of **Şehmus Ülek**, Vice-President of the Turkish human rights NGO Mazlum Der, who along with Hrant Dink (see above), was cleared by the Şanlıurfa Court of First Instance No. 3 of charges under Article 159 of the previous Turkish Penal Code (now Article 301) for speeches he made during a conference organized by Mazlum Der's Urfa branch on 14 December 2002 entitled "Global Security, Terror and Human Rights, Multi-culturalism, Minorities and Human Rights". Şehmus Ülek referred in his speech to the nation-building project of the Turkish Republic as it had affected, in particular, the southeastern area of the country; Hrant Dink discussed his own relationship to official conceptions of Turkish identity.

Nevertheless, the organization remains concerned that the president of the Bingöl branch of the Human Rights Association (İHD), **Rıdvan Kızgın**, faces charges under Article 301 for "denigrating the state" following a letter he sent to the Turkish authorities which had on its letterhead the word "Cewlik" (the Kurdish name for Bingöl). Since Rıdvan Kızgın has had over 47 cases opened against him since 2001, Amnesty International considers that this case is another form of judicial harassment against him, intended to hinder him in his work defending the human rights of others.

On 14 March 2006, **Eren Keskin**, a lawyer and president of the Istanbul branch of İHD, was sentenced to 10 months' imprisonment, commuted to a fine of YTL 6000 [c. US$4,475], under Article 301. She was convicted on charges brought under the previous Article 159 after a speech she made at a conference in Germany in 2002, which was deemed to be denigrating to the Turkish armed forces. In her speech, Eren Keskin allegedly accused Turkish soldiers of sexually abusing women. Press reports on 20 March 2006 state that Eren Keskin is intending not to pay her fine, and will therefore go to prison.

The former soldier

Murat Pabuç was a lieutenant in the Turkish army who retired on grounds of disability. Whilst still serving, he witnessed the massive earthquake that hit Turkey in August 1999, as well as the institutional corruption that he alleges followed it. He became disillusioned with his military duties, seeing soldiers as being alienated from ordinary people, and began to refuse orders. He eventually began undergoing psychiatric treatment. In June 2005 he

published his book *Boyalı Bank Nöbetini Terk Etmek*[8]. He believes that this was the only way for him to express what he had experienced in the army. As a result he faced a trial on charges of "public denigration of the military" under Article 301. On 7 March 2006, the Kadıköy Court of Second Instance decided to drop his case. Nevertheless, Murat Pabuç still faces charges under Article 301 for allegedly "denigrating the armed forces" in articles published in *soL* magazine, entitled "The change in the social role of the Turkish armed forces" ("Türk Silahlı Kuvvetleri'nin Toplumsal Rolündeki Değişim") and "Nato-ists keep themselves in work"(NATO'cular işlerini sağlama alıyorlar).

Political party

On 14 March 2006 Amnesty International received news that Beyoğlu Criminal Court of Peace had banned a poster under Article 301, because it was allegedly denigrating to the Turkish armed forces. The poster read "General, General, you will be tried!", and referred to the possible investigation then pending against the head of the land forces of the military in connection with the events around the bombing of a bookshop in Şemdinli on 9 November 2005.[9] The posters were produced by the Socialist Democracy Party.

Conclusions

Amnesty International welcomes many of the changes introduced in the new Turkish Penal Code that came into force on 1 June 2005. However, the organization believes that the breadth and frequency of the cases cited above illustrates the threat that Article 301 poses to the principle of freedom of expression and calls for it to be repealed. Human rights activists, writers, publishers – in fact potentially anybody – who express views which run counter to "official history" or the dominant ideology may find themselves prosecuted. That such prosecutions rarely end in imprisonment and more often in fines or acquittal or the dropping of charges is small consolation. The initiation of these legal proceedings is a form of judicial harassment and a means of silencing opposition voices, and should be addressed immediately. As noted in paragraph 4 of the European Union Guidelines on Human Rights Defenders, "The principle of allowing room for independence of mind and free debate on a government's policies and actions is fundamental, and is a tried and tested way of establishing a better level of protection of human rights". Domestic human rights organizations, most notably in this regard the Initiative for Freedom of Expression,[10] have for many years bravely and persistently campaigned for an end to restrictions on peaceful free speech across the political spectrum. These organizations themselves cannot function fully in an environment where the threat of prosecution under Article 301 or also under other laws used to silent dissenting voices is omnipresent. Amnesty International considers Article 301 to be at odds with Turkey's international legal obligations, and therefore calls on the Turkish authorities to terminate without delay all prosecutions against individuals under it, and to abolish the article in its entirety.

[8] The literal translation of this title is "Abandoning the Duty of the Painted Bench". It alludes to a Turkish anecdote which portrays a pastiche of a soldier following orders unquestioningly.
[9] Amnesty International has previously issued a public statement on this case: *Bombing in Şemdinli: How high up does it go?* (AI Index: EUR 44/033/2005) 18 November 2005.
[10] http://www.antenna-tr.org