



Policy Department

The revised Turkish Penal Code

NOTE

Abstract:

This note reviews the new Turkish Penal code, in particular those provisions with effect to the freedom of media and freedom of expression.

The note is intended for European Parliament Members of the Subcommittee on Human Rights.

This note was prepared in view of a visit of the European Parliament's Subcommittee on Human Rights to Ankara and Van (Turkey) from 5 - 8 October 2005.

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The revised Turkish Penal Code

The revised Turkish Penal Code was approved by the Turkish parliament in June 2005.

Following strong criticism from the EU on the initial draft in 2004, already the revision of the code in autumn 2004 did not mention the criminalisation of adultery any more.

The new Penal Code in 2004 envisaged life imprisonment for crimes against life that are motivated by "tradition and customs" and it is clearly foreseen that this provision will be applied in cases of so-called "honour killings". Sexual assault within marriage can lead to legal investigation and prosecution if the victim lodges a complaint. The code foresees slight increases in prison sentences for polygamy and non-registration of religious marriages. As regards virginity testing, the new Code foresees a prison sentence for those ordering and conducting such tests in the absence of a court order. However, contrary to the request of women's NGOs, the consent of the woman on whom the test is to be conducted is still not required.

Criticism continued however on provisions of the penal code, including further draft revisions in early 2005 that would pose real or potential threats to the **freedom of expression and the freedom of media**.

The OSCE Representative on Freedom of the Media, Miklos Haraszti, submitted in May 2005 a legal review of 23 relevant provisions of the draft penal code¹.

Following another major revision of the penal code and the final adoption in the Turkish Parliament, Mr. Haraszti praised the Turkish authorities in early July 2005² for introducing important further changes to the new Penal Code. He noted however, that *"despite some improvements, the amendments do not sufficiently eliminate threats to freedom of expression and to a free press."*

Out of the 23 changes the OSCE Representative suggested in May 2005, seven provisions have been brought into line with media freedom principles.

A welcome improvement was, according to Mr. Haraszti the deletion of most of the provisions which assumed stronger sanctions when the media was involved. Turkish lawmakers acknowledged that information about crimes could be in the interest of free discussion of public affairs.

Relating to Article 305 on "offences against fundamental national interests", the OSCE Representative "noted with satisfaction" that two examples in the explanatory "Reasoning Document" - making it a crime to demand the withdrawal of Turkish troops from Cyprus or to claim that Armenians were exposed to genocide - have been removed.

However, in practice the remaining text of the revised penal code seems still "sufficient" to cover precisely these "crimes": World-famous Turkish writer Orhan Pamuk will be brought before an Istanbul court on 16 December 2005 facing up to three years in prison for a comment published in a Swiss newspaper earlier this year. The charges stem explicitly from an interview given by Orhan Pamuk to the Swiss newspaper "Tages Anzeiger" on 6 February 2005, in which he is quoted as saying that "thirty thousand Kurds and a million Armenians were killed in these lands and nobody but me dares to talk about it."

¹ http://www.osce.org/documents/rfm/2005/03/14223_en.pdf

² <http://www.osce.org/item/15572.html>

Orhan Pamuk will be tried under Article 301(1) of the Turkish Penal Code, which states, “*A person who explicitly insults being a Turk, the Republic or Turkish Grand National Assembly, shall be imposed to a penalty of imprisonment for a term of six months to three years.*” To compound matters, Article 301(3) states, “*Where insulting being a Turk is committed by a Turkish citizen in a foreign country, the penalty to be imposed shall be increased by one third.*” Thus, if Pamuk is found guilty, he faces an additional penalty for having made the statement abroad.

Accordingly, OSCE Representative on Freedom of the Media, Miklos Haraszti already in July 2005 observed three major areas where media freedom remains endangered: ³

- the right of journalists to report and discuss on public-interest issues is not secured;
- restrictions on access and disclosure of information have not been lifted;
- defamation and insult provisions remain a criminal rather than a civil offence, thereby leaving the free discussion of public affairs at risk.

The OSCE Representative expressed his hope that modernisation of the Turkish Penal Code would continue in the spirit of improving the freedom of public scrutiny, while the provisions promoting self-censorship would all be removed.

Assessment by the International Publishers Association (IPA)

The International Publishers Association (IPA) issued on 30 June 2005 a number of specific comments on the new penal code, which are reflected below:⁴

1. Offences against dignity:

In line with international experts and the ECHR case law, the IPA judges that defamation cases are better handled by civil law than by criminal law. Criminal handling of defamation inhibits freedom of expression, including freedom to publish.

The IPA recommends in particular the deletion of Article 125 Paragraph 3:

Defamation

Article 125

...

- (3) *If the offence of defamation is committed:*
- a) against a public official or a person performing a public service and the allegation is connected with his public status or the public service he provides*
 - b) due to expression, changing, efforts for expansion of one's religious, political, social, philosophical beliefs, thoughts and opinions, one's compliance with the rules and prohibitions of his religion,*

³ see <http://www.osce.org/item/15572.html>

⁴ N.B. that not all changes in the text of the penal code between May and June seem to have been taken account of by the IPA

- c) *through mentioning the holy values of the religion the person is a member of,*
the minimum length of the penalty cannot be less than one year.

Defamation of the memory of a dead person

Article 130

- (1) *A person who commits under the testimony of at least three persons, the offence of defamation of the memory of a dead person shall be imprisoned for a term of three months to two years or imposed a judicial fine. If the offence of defamation is committed explicitly it shall be increased by one sixth.*
- (2) *If the remains of the deceased or his/her body is taken or his/her corpse or bones are subjected to defamation he/she will be subjected to an imprisonment of 3 months to 2 years.*

The IPA recommends that this be either deleted or there be included a provision that secures the right of journalists, writers, publishers and others to freely discuss issues raised by and surrounding persons now deceased, especially public figures.

2. Offences against society:

The IPA notes that misconceived interpretations of patriotism or national security are obstacles to freedom to publish and freedom to write.

Offences against public peace

Inciting the population to breed enmity or hatred or denigration

Article 216

- (1) *A person who openly incites groups of the population to breed enmity or hatred towards one another based on social class, race, religion, sect or regional difference in a manner which might constitute a clear and imminent danger to public order shall be sentenced to imprisonment for a term of one to three years.*
- (2) *A person who openly denigrates part of the population on grounds of social class, race, religion, sect, gender or regional differences shall be sentenced to imprisonment for a term of six months to one year.*
- (3) *A person who openly denigrates the religious values of a part of the population shall be sentenced to imprisonment for a term of six months to one year in case the act is likely to distort public peace.*

According to the IPA, it should be made explicit that only “open and evident calls for violence” should be considered under this Article. This would stop Article 216 of the New Turkish Penal Code (ex- Art. 312) from being used to penalise writers and publishers who comment on minority issues.

Common provision

Article 218

(1) *Where the offences defined in Articles above are committed through media and press, the penalty to be imposed shall be increased by half.*

IPA recommends the deletion of this Article.

Establishing organisations for the purpose of committing crimes

Article 220

- (1) *Those who establish or direct organisations for the purpose of committing crimes shall be sentenced to imprisonment of 2 to 6 years if the structure of the organisation, number of members, equipment and supplies are sufficient to commit the crimes aimed.*
- (2) ...
- (6) *The person who commits a crime on behalf of the organisation although he is not a member of the organisation shall also be punished for being a member of the organisation.*
- (7) *A person who aids and abets the organisation knowingly and intentionally although he does not belong to the hierarchical structure of the organisation shall be punished as a member of the organisation.*
- (8) *A person who makes propaganda for the organisation or its objectives shall be punished of one to three years of imprisonment. If the said crime is committed through media and press the sentence will be increased by half.*

Article 220 remained unchanged. According to the IPA, it should be made explicit that book chain stakeholders (and/or creators of content) should not be caught by the new Article 220/8 (ex-Article 169). This would stop the prosecution of writers and publishers on the grounds of "advocating terrorist propaganda" for having produced commentary on the often controversial issues raised in the debate on terrorism.

3. Offences against Public Ethics:

According to ECHR case law, criminal prosecution of artistic activities is a violation of Human Rights. According to the IPA, it would therefore be fundamental to include a definition of "obscenity" in **Article 226** of the Penal Code to better guide judges as well as artists, journalists, writers, publishers and others.

4. Offences against Symbols of State Sovereignty and Reputation of its Organs:

The IPA believes that some laws relating to the concept of "insult" are obstacles to freedom to publish and freedom to write. Defamation laws cannot be justified if their purpose or effect is to protect the "reputations" of entities other than those which have the right to sue and to be sued. Following a number of decisions by the European Court of Human Rights (ECHR), defamation laws cannot be justified if their effect or purpose is to prevent legitimate criticism of officials or the exposure of official wrongdoing or corruption.

The IPA recommends that provisions whose only goal is apparently to ban criticism should be deleted.

Insulting the President of the Republic

Article 299

- (1) *A person who defames the President of the Republic shall be imprisoned for a term of one to four years.*

The IPA recommends the deletion of this Article (following ECHR Case Law).

Insulting the Symbols of State Sovereignty

Article 300

- (1) *A person who denigrates through tearing, burning or likewise way and publicly the Turkish flag shall be sentenced to imprisonment for a term of one to three years. This provision is applicable to any kind of signs bearing the white crescent and star on red basis as stipulated in the Constitution that are used as the indicators of the sovereignty of the State of the Republic of Turkey.*
- (2) *A person explicitly insulting the National Anthem shall be imposed a penalty of imprisonment for a term of six months to two years.*
- (3) *If the crime defined in the present paragraph is committed by a Turkish citizen in a foreign country, the penalty shall be increased by one-third.*

Article 300 remains unchanged. The IPA continues to recommend its deletion under reference to ECHR Case Law. At least the inclusion of a waiver for public interest debate, opinion, reporting, artistic or academic expression was necessary.

Insulting being a Turk, the Republic, the organs and institutions of the State

Article 301

- (1) *A person who explicitly insults being a Turk, the Republic or Turkish Grand National Assembly, shall be imposed a penalty of imprisonment for a term of six months to three years.*
- (2) *A person who explicitly insults the Government of the Republic of Turkey, the judicial bodies of the State, the military or security organisation shall be imposed a penalty of imprisonment for a term of six months to two years.*
- (3) *Where insulting being a Turk is committed by a Turkish citizen in a foreign country, the penalty to be imposed shall be increased by one third.*
- (4) *Expression of opinions with the purpose of criticism does not require penalties.*

The discretion enjoyed by a judge when determining the difference between criticism and insult continues to leave room for further abuse vis-à-vis public debate.

5. Offences against Fundamental National Interests: Article 305:

There is concern that this Article may be used as a restriction on freedom of expression, in particular two of its subsets, freedom to write and freedom to publish.

- (1) *A citizen who either directly or indirectly accepts from a foreign individual or organisation pecuniary benefits for himself or for another person in return for engaging in activities against fundamental national interests or for that reason shall be sentenced to imprisonment for a term of three to ten years and to a judicial fine of up to ten thousand days. The same penalty shall be imposed on the person who provides the benefit or makes the promise.*
- (2) *If the act is committed during wartime or benefit has been given or promised in order to spread propaganda through the medium of the press and media, the penalty shall be increased by half.*
- (3) *Except in cases where the act is committed during wartime, the prosecution of the offence shall be subject to the authorisation of the Minister of Justice.*
- (4) *Within the meaning of the present Article, fundamental national interests shall mean independence, territorial integrity, national security and the fundamental qualities defined in the Constitution of the Republic.*

The IPA called for the scope of this Article criminalising acts against the fundamental national interests to be rigorously tightened. However, **while the second part of paragraph 2 was deleted** (on the increase of the penalty if propaganda is spread through media), **a new provision stipulating that foreigners living in Turkey should also be considered under Article 305 was included**. The IPA sees this as a “step forward and a step backward” movement on this Article, which continues to represent a major potential threat to freedom of expression in Turkey.