



## **International PEN\*, International Publishers Association\* and Index on Censorship**

(\*NGOs in Consultative Status with ECOSOC)

### **Contribution to the 8th session of the Working Group of the Universal Periodic Review**

#### **Submission on Turkey**

**9 November 2009**

*International PEN, Index on Censorship and the International Publishers Association welcome the opportunity provided by the Office of the High Commissioner on Human Rights to comment on the state of free expression in Turkey. This document provides an overview of legislation that allows for the prosecution of writers and print journalists in Turkey in violation of their right to freedom of expression.*

There are today records over 70 trials being held against around 90 writers, journalists and publishers in Turkey under a multiplicity of laws. In some cases the laws themselves directly contravene Article 19 of the United Nations Universal Declaration on Human Rights, in other cases articles that are otherwise reasonable and do not infringe international standards are applied in such a way as to curtail this right. In many cases, these trials end with fines or suspended sentences, and rarely result in imprisonment, even in cases where this can be applied. Yet their very existence remains a threat to free speech. These trials, even if ending in favour of the defendant, often take months, even years, to complete. The process is in itself time consuming and draining of resources, both in terms of time and finances. In some cases, notably that of **Hrant Dink**, assassinated in January 2007, the very application of these charges marks out individuals as “traitors” and attract and “legitimise” extremist attacks.

International PEN, the International Publishers Association and Index on Censorship have long campaigned for an overhaul of Turkish legislation to remove from its remit prosecution of writers, journalists, publishers and others who write on sensitive issues. This campaign became more urgent with the murder of Hrant Dink and increased threats against other writers, which despite the apprehension of Dink’s killers, remains of high concern.

There are numerous legal articles under which writers, publishers and journalists can be indicted. The most commonly used are listed below.

#### **Article 125– Defamation - and Article 299 – Insult to the President**

Article 125 provides prison terms of up to two years for defamation. Article 124 (3) provides increased protection for public officials and 125 (4) increases the penalty by up to a third when defamation is committed through the press and media. Under Article 299, the President is afforded additional protection and a person who defames the President can be given a hefty term up of to four years in prison, increased by a third if carried out in the press. While convictions are rare under both these articles, as recently as 2009 a one year suspended

sentence was passed against a person who had published an “insulting” anecdote about the President.

Defamation laws, in Turkey and elsewhere, have too often been used by public officials to escape legitimate public criticism. The very existence of criminal defamation serves to suppress open debate. It is widely accepted that those in positions of power should expect to face higher than average scrutiny and to therefore afford equal or even less protection from libel than the general public. This is an opinion that has been held in reports of the United Nations Special Rapporteur on Freedom of Expression and in numerous decisions made by the European Court on Human Rights in its consideration of defamation suites initiated by public officials. Criminal defamation laws are inappropriate in a democratic society, where reasonable civil penalties are sufficient remedies for libel, slander or defamation that has proven and tangible harm to public officials.

- **Recommendation: remove criminal defamation from the Turkish Penal Code by abolishing Article 125 or making amendments to remove imprisonment from its remit, and the abolition of Article 299.**

#### **Article 216 - Inciting the population to enmity or hatred or denigration**

Penal Code Article 216 (1) penalises writings that “*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*” and provides imprisonment of up to three years. In addition, Article (2) provides prison terms of up to one year for a person who “*denigrates part of the population on grounds of social class, race, religion, sect, gender or regional differences*”. Religion is further protected under Article 216 (3) that provides imprisonment of between 6 months to a year if the act is “*likely to distort public peace*”.

In recent years, Article 216 has been used to harass and pressurise writers on religious issues. One such case is that of Paris-based author, **Nedim Gürsel** who came to trial in May 2009 for his novel Daughters of Allah although even the prosecutors argued that the book could not be seen as a threat to public security and incitement to hatred. Although the case was subsequently dismissed, there remain other less well known writers charged with similar offences. Among them are the recent, and so far unsuccessful, cases brought against Turkish publisher of **Richard Dawkins' The God Delusion**. There have been no recent cases of writers being imprisoned under this Article, and many do not end with convictions, yet the very existence of legislation that penalises commentary on religion acts as a deterrent. Whatever their outcome, the trials often take many months to conclude, and in some cases years, sapping financial and emotional resources. This is a price that some may not be willing to pay, choosing self censorship instead. There are around eight trials thought to be under way under Article 216 against writers, journalists and publishers at time of this writing.

- **Recommendation: It should be made explicit that only "open and evident calls for violence" should be considered under this Article.**

#### **Article 301 - Denigrating the Turkish Nation, the State of the Turkish Republic, the Institutions and Organs of the State**

This Article revised in 2008, penalises “A person who publicly denigrates Turkish Nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the , judicial bodies of the State” carrying with it a penalty of up to two years in prison. At present, around 30 writers, publishers and journalists

are either being tried or could face trial for writings on issues including on allegations of abuses by the Turkish armed forces, criticism of the judiciary and commentary challenging official versions of history in Turkey relating to the mass deportations and killings of Armenians in 1915.

Article 301 has been subject to intense public scrutiny ever since its enactment in 2005. In its original form, it provided up to three years in prison for acts that “*publicly denigrate Turkishness*” and almost instantly led to hundreds of prosecutions, scores of them against writers, journalists and publishers, who wrote or commented on issues notably on allegations of genocide against Armenians in the early 19th century, and on abuses against Kurds. Most famous was the charge against author and subsequent Nobel Laureate, **Orhan Pamuk**, that led to international outcry and the ending of the case against him. The murder in January 2007 of Turkish Armenian editor, Hrant Dink, who had been convicted to a six months suspended sentence under this Article was directly attributed to the fact that he had been labelled through this conviction as target for the nationalists who ordered his killing. His death heightened the outcry against Article 301, and, in 2008, the authorities responded by amending the law to replace the word “Turkishness” with “Turkish nation”, reducing the maximum penalty from three to two years, and, most importantly, requiring permission from the Ministry of Justice to proceed with prosecution. These measures have led to a reduction in the numbers of cases brought against writers, publishers and journalists under this law.

However the very fact that hundreds of requests, each requiring time and consideration by the Ministry, is a phenomenal waste of public resources, and even those cases which do go to the courts are extremely unlikely to be successful. Should they end in conviction, this would bring Turkey into breach of international protections of free expression to which it is committed.

One of the cases that has been approved by the Ministry is that of **Temel Demirer**, whose case under Article 301 was approved for prosecution by the Ministry of Justice in late 2008 and whose trial is still underway. Demirer is accused of including in an article the statement “Yes, there was an Armenian genocide in this country.” And then urged Turkish intellectuals that if they did not themselves commit “this crime of 301 301 times” they too could be accomplices to the murder of Hrant Dink. Free expression activists were further concerned by a comment reportedly made by the Minister of Justice in announcing that the case would proceed to the effect that Demirer had made statements calling the Turkish state “murderous” and thus should be exempt from freedom of expression protection. Observers are concerned that such statements are tantamount to proclaiming guilt and could bring Demirer to the attention of extremists who threaten and attack those who refer to an Armenian genocide.

Some other recent cases of convictions and trials pending include that of a publisher who was sentenced to five months in prison in January 2009 by an appeal court, converted to a YTL 3,000 fine (c. €2,000). He had been offered a more lenient sentence but had refused to comply with the demand that he promise not to commit a similar crime in future. He was convicted for a book that suggested that the state had links to the mafia and that there had been massacres of Kurds in the past, referring to “fascist dictatorships”.

Mid-2009 saw charges being raised against two police officers under Article 301. They had written a newspaper column in which they had examined the workings of the Turkish intelligence services and referred to Turkey’s application for integration into the EU. They also suggested that the work of police officers who investigate police abuses was not appreciated as much as it should be. They face prosecution for having made comments seen to denigrate the Turkish Armed Forces.

- **Recommendation: International PEN, the International Publishers Association and Index on Censorship see Article 301 as being in contradiction of international standards guaranteeing freedom of expression and call for it to be annulled.**

### **Article 226 – Obscenity**

While not challenging the existence of obscenity laws per se, the submitters see the application of Article 226 in Turkey as heavy handed. Publications that are considered as classics elsewhere have been banned on these grounds. Notable is the case against the publishers of the Turkish edition of Guillaume Apollinaire's *Exploits of a Young Don Juan* and two other books in early 2009. Although convictions are rare, Article 226 does provide a sentence of up to three years in prison, a penalty that is a deterrent to publishers of works about which there is often no commonly held view.

### **Other Penal Code Articles or laws that have been used to penalise free speech include:**

- Anti Terror Law Article 7/2 – propaganda for an illegal organisation
- Law 5816 Insult to the memory of Ataturk
- Article 215 Praising crime or criminals
- Article 318 Discouraging the people from military service
- Article 288 Attempt to influence a fair trial
- Article 220 Helping and harbouring an illegal organisation
- Article 312 Inciting hatred and hostility among the people on the grounds of race
- Article 218 Offences committed against public peace by means of the press

### **The case of Ragip Zarakolu**

Among the writers and journalists on trial is publisher **Ragip Zarakolu** whose name has become synonymous with the struggle for the right to publish. Since the 1980s he has had scores of trials against him, and spent some time in prison, all for the publication of works on minority and human rights issues. Like many others, over time he has been prosecuted under scores of legislation, some of which no longer exist, and others that remain despite positive changes in recent years. Among them is Zarakolu's conviction under Article 301 of the Turkish Penal Code on 17 June 2008 for having published a book entitled: *The Truth will set us Free. Armenians and Turks reconciled* by George Jerjian. This was the first conviction since this Article 301 was amended on 30 April 2008. Today he remains on trial, again under a range of legislation. He is fighting charges of "making propaganda for a terrorist organisation" (Anti Terror Law 7/2), alienating people from the military (Penal Code Article 318) and praising crime and criminality (Article 215). These relate to a book published by his publishing house Belge entitled *Decisions Tougher than Death* by N. Mehmet . Also to articles published in the magazine *Alternatif* of which Zarakolu is also owner and responsible editor, published in August 2008 that included an article by a conscientious objector titled "I Refuse to be a Turkish Soldier" leading to infringement of TPC 318. Another article titled "First Bullet" refers to the Kurdish Workers' Party (PKK) as "the organisation fighting for freedom of Kurdish people", and a third, titled "Fireworks Everywhere" that quoted a speech made by a member of parliament in which it is stated "Kurds would turn their faces to the mountains if a political solution fails" suggesting that there would be a return to guerilla

activities. This last article breaches ATL Article 7 and penal code Article 215. While the views that Zarakolu publishes may be of minority interest and radical, they cannot be seen as a danger to society and endeavours to suppress them breach the right to free expression.

### **Imprisonment of Writers and Journalists – Anti Terror Law**

Fifteen writers and journalists are reportedly in prison, mostly on anti terrorism charges. Many of them are affiliated to, or accused of affiliation with, extremist groups and sparse information on them makes it difficult to conclude that they are held in violation of their legitimate rights, as their supporters suggest. The submitters therefore consider most of them as being “under investigation” until there is conclusive evidence that their detentions breach international law.

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### **Recommendations**

**International PEN, Index on Censorship and the International Publishers Association call on the Turkish authorities to:**

- Refrain from prosecuting writers and publishers who have expressed non-violent opinions as penal prosecution of these writers and publishers may turn them into potential targets in the eyes of the most nationalistic circles.
- Abolish or amend all legislation that penalises freedom of expression in contravention of the Turkish state’s commitments under Article 19 of the International Covenant on Civil and Political Rights, specifically by:
  - Removing criminal defamation from the Turkish Penal Code by abolishing Article 125 or making amendments to remove imprisonment from its remit, and the abolition of Article 299;
  - Annulling Article 301 as being in contradiction of international standards guaranteeing freedom of expression;
  - Clearly defining the notion of obscenity in Article 226
  - Making it explicit that only "open and evident calls for violence" should be considered under Article 216 and others that refer to incitement.