

Dissenting Voices: Freedom of Expression and Association in Turkey

Fact-Finding Mission Report



September 2005

DISSENTING VOICES: FREEDOM OF EXPRESSION AND
ASSOCIATION IN TURKEY

FACT-FINDING MISSION

SEPTEMBER 2005

KURDISH HUMAN RIGHTS PROJECT
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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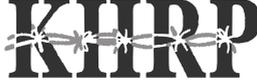
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Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights 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.



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The Bar Human Rights Committee is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world. It is also concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial. The remit of the Bar Human Rights Committee extends to all countries of the world, apart from its own jurisdiction of England & Wales.

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Abbreviations

BHRC	Bar Human Rights Committee of England and Wales
DEHAP	<i>Demokratik Halk Partisi</i> (Democratic People's Party)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EMEP	<i>Emeğin Partisi</i> (Party of Labour)
FFM	Fact-Finding Mission
İHD	<i>İnsan Hakları Derneği</i> (Human Rights Association of Turkey)
NGO	Non-Governmental Organisation
OSCE	Organisation for Security and Cooperation in Europe
RTÜK	<i>Radyo ve Televizyon Üst Kurulu</i> (Radio and Television Higher Board)

Foreword

In April 2005, the Kurdish Human Rights Project (KHRP) and Bar Human Rights Committee of England and Wales sent a fact-finding mission (FFM) to İstanbul, Diyarbakir (Diyarbakır), Dersim (Tunceli) and Batman in south-east Turkey. The mission's aim was to investigate the rights of certain groups fundamental to the protection of civil and political rights, who have nonetheless frequently faced violations of freedom of expression and of association. The mission accordingly investigated the protection currently afforded to journalists, writers, artists and human rights defenders, particularly since the introduction of wide-ranging pro-EU reforms recently enacted in Turkey. This report presents the mission's findings and assesses the extent to which the Turkish government's public pronouncements are consistent with the practice as experienced by some of the most marginalised groups in Turkey.

The new Penal Code, which came into force on 1 June 2005 in Turkey, has united Turkey's journalists from all political backgrounds in protest against this new wave of legislative conservatism on freedom of expression. Although the Turkish army's influence on the RTÜK (Radyo ve Televizyon Üst Kurulu - Radio and Television Higher Board) has been removed since 2004 and broadcasting of programmes in languages other than Turkish is now permitted, these improvements have been overshadowed by serious allegations of ongoing human rights violations. For instance, RTÜK appears to be ignoring democratic reforms undertaken in connection with Turkish accession to the EU and continues censoring at will. Moreover the mission revealed that prosecution is still used as a means to harass human rights defenders and journalists who exceed – in the eye of the Turkish government - the acceptable levels of discussion and investigation.

Journalists are being arbitrarily imprisoned and heavily fined as authorities continue to silence news stories about Kurds or the activities of the Turkish army. Article 305 of the new Penal Code, whereby journalists face up to fifteen years imprisonment for disseminating “propaganda” against “fundamental national interests”, in particular, is of grave concern. Out of fear of fines and imprisonment, journalists are believed routinely to self-censor their work and work in an atmosphere in which investigative journalism is inhibited. Interviewees were concerned that the new Penal Code introduces prison sentences for offences that were previously subject

to fines under the Press Law. The vagueness in terminology in the new legislation allows Turkish authorities to decide arbitrarily when it is applicable. Rather than protecting the rights of people and the media, the rights of state organs and its members are given preference.

State institutions continue to view media that publish in the Kurdish language and members of the media who are sympathetic to the Kurdish issue as a threat to Turkish state integrity. The recent escalation in the fighting between the Turkish state and the guerrillas in the Kurdish area of Turkey also led to a parallel increase in Turkish state intimidation against journalists and owners of Kurdish newspapers, as well as human rights defenders.

Although state reforms, introduced in 2002 and 2003, were intended to eradicate completely the torture or ill-treatment of human rights defenders, Turkey remains hostile towards the activities of human rights defenders. In fact, the level of intimidation that these activists experience appears to have increased dramatically in recent years. As with journalists, many human rights activists seem to be harassed because of their efforts in protecting the rights of Kurdish people. The historic conflict in the south-east and the continued perception by state institutions that all Kurds are hostile to Turkey are believed to remain the underlying motivation for intimidation of human rights defenders.

Most human rights defenders face frequent prosecutions that constitute judicial harassment. Most alleged offences concern 'insulting of the state and state institutions' under Article 159 (old Article 302) of the new Penal Code under which one can be imprisoned for between six months and three years. This law curbs human rights defenders' freedom of expression and pressures them to refrain from publicly criticizing state institutions. Other forms of harassment include threats to their safety and well-being or that of their friends or family. Human rights defenders reported an infringement of their right to freedom of assembly when their press conferences, demonstrations and public meetings were observed to be monitored and even filmed by the police. Police presence on the premises of human rights associations and surveillance of their movements and communication is ongoing.

The Turkish judiciary, security forces and governorship lack training on the aims and intent of the new state reforms for media organizations and human rights associations. Turkey needs to take a more active role in implementing the reforms, especially in the south-east, to ensure a shift in attitude of state institutions to human rights defenders and journalists. KHRP urges Turkey to revise the Penal Code's Article 159 and Article 305 that heightened judicial harassment and acknowledge the public interest criteria in all legislation relating to the media in accordance with international standards.

This report also shows that the EU's efforts have been to date rather docile. The mission calls upon the EU to take on a more active role in emphasising the importance of genuine implementation of the right to freedom of expression and of association in Turkey. Moreover EU representatives are urged to become better informed about the human rights situation on the ground, since divisions within Europe over Turkey's future accession seem to have provided Turkey with enough leeway to simply window-dress for the EU. It is therefore crucial that the EU investigates the application of Turkish state reforms to ensure that reforms are implemented in a genuine, consistent and committed manner, encouraging the development of a healthy civil society-government dialogue structure that allows constructive engagement and criticism.

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Vice-President, BHRC

I. Introduction

The Kurdish Human Rights project (KHRP) and Bar Human Rights Committee of England and Wales sent a fact-finding mission (FFM) to İstanbul and a number of cities in the Kurdish region of Turkey, but principally to Diyarbakir (Diyarbakır) and Dersim (Tunceli), between 27 April 2005 and 5 May 2005. The mission's task was to assess the intimidation of human rights defenders and to gauge improvements in human rights, including freedom of expression.

The mission members were Emma Brown, barrister and Conor de Lion, freelance journalist.

The mission met with the journalists, broadcasters, artists, İHD (İnsan Hakları Derneği - Human Rights Association of Turkey), the Bar Association of Diyarbakir (Diyarbakır), Dersim (Tunceli) and Batman, lawyers defending human rights cases and members of DEHAP (Demokratik Halk Partisi - Democratic People's Party) and EMEP (Emeğin Partisi - Party of Labour). The following topics were discussed with interviewees:

1. Intimidation of human rights defenders
2. Freedom of expression
3. Freedom of association

The Turkish Government has, in recent years, introduced a number of reforms to protect the human rights of its citizens. In accordance with the requirements of the European Union, legislative reform has been enacted to prepare for accession talks.

All those the mission met with were quick to state there have been improvements in the level of human rights enjoyed by those living in south-east Turkey.

However, implementation and training at the local level has been inadequate. Members of the police, gendarmes and judiciary continue to ignore reforms and openly intimidate human rights defenders, imposing restrictions on the freedom of

expression of journalists, lawyers and politicians alike.

It is clear from the information obtained by the mission that the Kurdish population continues to be singled out for intimidation and that the treatment they receive fluctuates with the state of the security situation in the region.

A lot of journalists found the reforms, intended to improve their situation, to be inadequate and, in many cases, constituting retrograde steps for freedom of expression. Journalists are now more likely than ever to face prison for publishing material critical of the state or its institutions.

The mission remains concerned that the only motivation for the reforms introduced by the Turkish government is accession to the EU. This concern is compounded by the obvious lack of implementation of the reforms in south-east Turkey and the obvious impunity which high ranking officials of the state enjoy.

II. Freedom of Expression

Despite Turkey's stated and binding commitments to freedom of expression and reform of press regulation, the country's new Penal Code, which came into force on 1 June 2005, has been widely criticised for its negative and repressive attitude to freedom of expression. It is difficult for most commentators to accept the government's claims that democratisation of all aspects of Turkish life, including press and other media, heads the agenda in the run-up to EU accession.

The private actions of Prime Minister Recep Tayyip Erdoğan in this regard are indicative of Turkey's double standards on reform and have given journalists and artists cause for concern. In March, Erdoğan successfully sued cartoonist Musa Kart for depicting him as a cat in the daily newspaper *Cumhuriyet*. Kart was fined the equivalent of USD 3,800 for portraying Erdoğan as a cat tangled in a shredded headscarf, a reference to the political debate regarding Islamic high schools in Turkey. The situation reached the level of farce when humorous magazine *Penguen* responded to the case by depicting the Prime Minister as a series of cartoon animals, under the heading of 'Tayyip's Kingdom'. Erdoğan responded to this clear act of solidarity with Kart by issuing additional proceedings against the magazine and demanding USD 35,000 in compensation. Press freedom organisations around the world protested against the actions demanding that journalists in Turkey should be permitted to, "make satirical comments about the authorities without fear of being systematically dragged before the courts".¹

Despite the unfavourable reaction to these suits, both at home and abroad, the Prime Minister has not been dissuaded from suing his critics. On 5 April, artist and commentator Fikret Otyam, was ordered to pay damages of USD 3,200 to Erdoğan for a satirical article he wrote in the weekly *Aydınlık*, which poked fun at the Prime Minister's stance on adultery. The offending sentence read: "Recep has successfully lowered the debate [on Turkish entry to the European Union] to the level of the crotch". According to Reporters Without Borders, this was at least Erdoğan's fourth suit against a critic so far this year.

The attitude of the Prime Minister illustrates how far Turkey's establishment still has

1 Reporters Without Borders, 'Over-Sensitive Premier Urged to Stop Legal Hounding of Opposition Journalists,' Press Release 7 April 2005 [http://www.rsf.org/article.php3?id_article=13137]

to travel before claims to respect freedom of expression can be believed. Erdoğan justified his position in suing his critics by asserting his right to “protect (the dignity of) the post of Prime Minister”. However, this year Erdoğan also lodged a defamation complaint against the cartoonist Sefer Selvi, who depicted prime ministerial adviser Cüneyt Zapsu perched on Erdoğan’s back, for the leftist daily *Günlük Evrensel*.

The Prime Minister’s attitude is indicative of a retrograde establishment attitude to press freedom and freedom of expression in general. In its visits to İstanbul and the south-east of the country, the mission found an environment in which reforms are often ignored in practice and where arbitrary treatment and harassment of journalists is the norm. Despite surface legislative reform, there is clear evidence of continued harassment and state interference with the fundamental right of freedom of expression. Cases continue to be brought against writers, journalists, broadcasters and publishers.

There have been some recent positive developments in the area of freedom of expression in Turkey. In 2004, there was a lifting of the Army’s influence on the RTÜK, the body charged with monitoring and sanctioning private radio and television. A further improvement in 2004 was the introduction of regulations permitting the broadcasting of programmes in languages other than Turkish. Initially the rules prevented the broadcasting of programmes in Kurdish by local and regional media organisations.

However, after Diyarbekir (Diyarbakır)-based GÜN TV challenged this, the regulations were amended to permit regional and local organisations to broadcast programmes in languages other than Turkish. It is a requirement, though, that a feasibility study is conducted to establish a need for the language in the local area where broadcasting is proposed. This requirement is not required for the national broadcasters.

Until 1991 use of the Kurdish language by media organisations was prohibited in Turkey and even after reforms in 2000, broadcasters continued to face prosecution and closure if they broadcast songs in Kurdish. GÜN TV, for example, faced twenty prosecutions between 2000 and 2004 for broadcasting Kurdish songs. Ninety-five per cent of the cases concluded with an acquittal. All of the cases were opened by RTÜK following police investigations.

The mission found that journalists of all political shades feel threatened by the government’s legislative attitude and methods of enforcement. The new Penal Code has united the country’s journalists, both establishment and dissident, in protest at the retrograde attitude of Turkey’s state organs toward freedom of expression. The mission found that the Turkish media remains the victim of courts that arbitrarily imprison and heavily fine journalists, “forcing them into routine self-censorship over

sensitive topics, such as the role of the army and the country's Kurdish minority".²

A. Mainstream Protest

The dismay felt by journalists over the dangers posed to freedom of expression by Turkey's new Penal Code is not confined to the leftist or 'dissident' press. "Many in the mainstream media may have believed that the dangerous articles of the Penal Code were aimed at Kurdish and leftist reporters and that they were untouchable, but that attitude has changed sharply," says Ertuğrul Kürkçü, coordinator of *bianet.org* - a countrywide network established to monitor and report on media freedom and independent journalism.³

The mission met with the Chairman of the TGC (Türkiye Gazeteciler Cemiyeti - Turkish Journalists' Association), Orhan Erinç. His organisation represents 'establishment' journalists working in the mainstream press. Erinç and his colleagues have been lobbying for amendments to the Penal Code since May 2004, when it was first published in draft form. In his view, the time allotted for discussion and debate on the new legislation was far too limited. He points out that several senior legal figures, including the Chairman of Turkey's Supreme Court, the Chief Public Prosecutor and Turkey's representative at the European Court of Human Rights, expressed concerns over the new code.⁴

Lobbying by the TGC and its sister organisation, the Turkish Journalists' Union, succeeded in postponing the new code's implementation for two months. The Minister for Justice responded to journalists' concerns by establishing a working group to discuss possible amendments. The body met with the Minister on 13 April and 16 April 2005. As a result of discussions, representatives of the Justice Ministry agreed to amend six of the thirty or so articles relating to freedom of expression. Erinç describes them as the "least offensive"⁵ articles listed by the journalists' representatives. When the code came into force on 1 June 2005, only these minor amendments had been agreed.

Erinç told the mission that he had earlier that day attended a briefing with fourteen members of parliament from İstanbul. This was an informal meeting without official sanction. He described that meeting as positive. The deputies attending had agreed

2 Reporters Without Borders, 'Turkey', *Annual Report 2005*

3 KHRP interview with Ertuğrul Kürkçü, *Bianet* headquarters, İstanbul, 2 May 2005

4 KHRP interview with Orhan Erinç, Turkish Journalists' Association headquarters, İstanbul, 2 May 2005

5 *Ibid*

that in addition to the six amendments suggested by the Ministry, other articles should be amended or eliminated. All those at the 2 May meeting believed that Article 305 should be removed.

Journalists in Turkey are deeply concerned that the new Penal Code introduces prison sentences for offences that were previously subject to fines under the Press Law. Erinç points out that the new legislation covers all forms of media, including radio and television - areas formerly overseen by RTÜK.⁶ Again, the threat of imprisonment, as opposed to fines and suspension of broadcasting, is felt to add a new, sinister dimension to attempts to control broadcast journalists: “Although politicians claim that under the new legislation there will not be any journalists in prison in Turkey, it seems that with this law the numbers in prison can only be doubled.”⁷

Erinç believes that the main danger to journalists from the new Penal Code is the vagueness of terminology in many of its articles: “This leaves the legislation open to arbitrary interpretation by prosecutors and judges.”⁸ He believes that decisions of the Supreme Court (*Yargıtay*) will define the parameters of the legislation over time, but that this approach to applying and defining criminal law is unacceptable.

On a positive note, Erinç told the mission he had discerned a recent change in the mentality of many members of the judiciary when dealing with freedom of expression issues: “Recently [in İstanbul], judges and prosecutors have been seen to take note of Article 10 of the ECHR, and are referring to decisions of the European Court when deciding a case.”⁹ He notes positively that several cases against members of his organisation have been dropped with reference to European law. However, the approach of the judiciary as a whole remains arbitrary and dependent on the particular judge or the nature of the case.

Erinç welcomes the right of individuals to apply for redress to the European Court of Human Rights (ECtHR) but believes that internally, the Turkish authorities have a long way to go before fully accepting the principle of freedom of expression: “Obviously decisions of the *Yargıtay* have defined some crimes more clearly, but new concepts have been added to the penal code, which are very ambiguous.”¹⁰

Erinç expressed his annoyance with the seemingly contradictory attitude of the EU

6 RTÜK is Turkey’s Radio and Television Higher Board, responsible for regulating and monitoring radio and television broadcasts.

7 KHRP interview with Orhan Erinç, 2 May 2005

8 *Ibid*

9 *Ibid*

10 *Ibid*

to reform in Turkey: “When the new [Penal Code] was published, the EU applauded it as a tool for reform. However, we pointed out at the time that certain articles would severely restrict freedom of expression and the rights of journalists to report in a fair way. When we successfully lobbied for a two-month period to discuss amendments to the Code, the EU criticised the delay.”¹¹ Erinç is concerned that the EU is failing Turkey by not placing sufficient emphasis on the right to freedom of expression.

During this Government’s tenure, Turkey has signed up to two international accords relating to freedom of expression. The European Commission’s Ministerial Committee on Freedom of Expression drafted eight articles expanding on Article 10 of the ECHR. Turkey, along with the EU and other accession states, agreed to implement the essence of the enhanced Article 10 on 12 February 2004. On March 11 2005, Turkey’s representative to the European Council’s Ministerial Meeting in Kiev signed up to the group’s resolutions regarding freedom of expression. Recommendations included the decriminalisation of insult and defamation. “Despite signing these documents,” says Erinç, “the new Penal Code, which Europe has applauded, contravenes what was agreed at both meetings. Unfortunately it seems their implementation in Turkey depends on the political contingencies here and in Europe.”¹²

Erinç believes that the EU agenda for Turkey, and divisions within Europe over Turkey’s future accession, give the government leeway to avoid true, meaningful reform: “It seems the EU representatives do not know Turkey well enough and do not make the effort to know Turkey well enough.”¹³ He cites the example of a speech given by the EU Deputy Representative for Turkey at a panel discussion on the new Penal Code held recently in Ankara, which held that journalists in Turkey would no longer be forced to reveal sources or give evidence. This, says Erinç, is untrue and displays an ignorance of the seriousness of the situation for journalists in Turkey.¹⁴

Erinç cites examples of potential hazards arising from the new Penal Code for journalists:

- Article 133 – *Recording of communications between persons*. For example, a journalist who records a newsworthy conversation between two parliamentarians faces imprisonment of up to three years. There is no public interest defence.

11 *Ibid*

12 *Ibid*

13 *Ibid*

14 *Ibid*

- Article 134 – *Violation of privacy*. The old Press Law contained a public interest defence. This is absent in the new Penal Code.
- Article 213 – *Threatening to incite fear and panic among the population*. This severely hampers a journalist’s ability to report on events and discussions, both national and international. An offender faces up to four-and-a-half years imprisonment.
- Article 220/8 – *Providing propaganda for an organisation founded to commit crime*. A journalist writing about such an organisation faces up to three years imprisonment.
- Article 229 – *Insulting the President of the Republic*.
- Article 301 – *Insulting being a Turk, the Republic, the Turkish Grand National Assembly, the Government of the Republic, the judiciary, the military or security organisations*. This Article, in effect, ensures that open criticism or discussion of the state and its organs carries the risk of imprisonment for journalists.
- Article 305 – *Acting against fundamental national interests and receiving benefits from foreign persons or institutions*. This could be held to cover journalists in the employ of foreign media companies who criticise the Turkish state.
- Articles 329-336 – *Disclosure of “information relating to the security and political interests of the state” and disclosure of “prohibited information”*. Neither concept is defined. Officials can arbitrarily decide what is secret and what is not. A journalist or publisher who discloses ‘state secrets’ is liable to be imprisoned for up to ten years. The onus is not on state officials to protect defined state secrets.

Kürkçü at Bianet says: “The new Penal Code, particularly in those articles related to the media, is only superficially concerned with the rights of the individual and the protection of human rights violations. Rather it protects the rights of state functionaries and members of the government, not those of ordinary people.”¹⁵

At the conclusion of the meeting with Erinç, the Journalists’ Association Chairman noted that the following day was International Press Freedom Day: “Yet in Turkey, basic freedoms continue to be eroded by government and the courts.”¹⁶

15 KHRP interview with Ertuğrul Kürkçü, 2 May 2005

16 KHRP interview with Orhan Erinç, 2 May 2005

B. Living with Censorship

1. Print Media

In Turkey, the vagueness of much legislation regarding the press and other media and the arbitrariness with which it is applied means that dealing with authorities on censorship matters is an unpredictable and time-consuming business. *Yeniden Özgür Gündem* (Free Agenda Again) is a daily Turkish language newspaper published in İstanbul which has gone through several incarnations since its foundation in 1992. The newspaper's leftist, pro-Kurdish stance has made it a focus for scrutiny by the Turkish authorities and has led to its closure on several occasions. On this visit, the mission met with the newspaper's editor, İrfan Uçar, to discuss cases running against *Yeniden Özgür Gündem* and the methods used by the authorities and individuals close to the state, to bring the newspaper to court. Uçar began by revealing that some 304 of the newspapers 425 most recent editions had had court proceedings issued against them. According to Uçar, "Regardless of the outcome, the mere existence of these cases constitutes a violation of the right to free expression".¹⁷

Nine of the cases mentioned were taken by individuals whose names appeared in the newspaper. According to Uçar, they are all state personnel of some description – army members, village heads or members of the police. Fifty-four of the cases were opened in ordinary civilian courts, while another 241 were opened in the former State Security Court, now renamed the Specialised High Criminal Court. Some 54 of the cases against *Yeniden Özgür Gündem* have been taken under Article 312 of the old Penal Code (equivalent to Article 216 in the new Penal Code), which prohibits instigating hatred or hostility in one part of the people having different social class, race, religion, sect or region, against another part of the people, in a way that is dangerous to public security. As Uçar points out: "This is a necessary law in any democratic society. Instigating racism or denying the existence of a community should indeed be prohibited."¹⁸ However, in Turkey the article has been used as a tool to suppress the opinions of those who are perceived to be opponents of the state such as Islamists, the left and Kurds. It is not just the content of legislation that affects freedom of expression, it is also the interpretation of articles by prosecutors and judges that has an adverse impact on journalistic freedom.

In general, Uçar objects to the fact that Turkish journalists cannot decide for themselves whether something is publishable or not: "In Europe, statements by the PKK or Al Qaida or the IRA may be published as part of the service of informing

17 KHRP interview with İrfan Uçar, *Yeniden Özgür Gündem* offices, İstanbul, 29 April 2005

18 *Ibid*

the public. In Turkey, this is not possible.” He notes the fact that all statements by banned organisations, or reports on their manifestos for action are prohibited from being reported on, regardless of their content. He cites the example of reforestation of the Kurdish region, a stated policy of Kongra-Gel: “There is no incitement to violence in that part of Kongra-Gel’s manifesto,” says Uçar, “yet if we report on it, we are liable for prosecution under Article 220 of the new Penal Code, which carries a three-year prison sentence.”¹⁹ This was formerly covered by Article 7.2 of the Anti-Terror Law (1991), and prohibits propaganda for an organisation founded for committing crime.

Article 6.1 of the Anti-Terror Law has also been transferred directly to the new Penal Code. It prohibits journalists from naming or showing images of security and anti-terror personnel. In the late 1990s, *Yeniden Özgür Gündem* carried a story regarding the confession of a soldier named Abdulkhadir Aygan to one of its reporters. The soldier’s statement disclosed details of the political murder of writer Musa Anter. The text of the confession included the names of the military personnel involved in the murder, including Aygan himself. On publication of the confession in *Yeniden Özgür Gündem*, an İstanbul prosecutor opened a case under Article 6.1 of the Anti-Terror Law, for disclosure of the identities of security personnel.

“Not only do the authorities use legislation in a perverse way,” says Uçar, “but they avoid leaving a gap in their powers. If one piece of legislation is removed or amended, another is brought into play or directly copied.” The Anti-Terror Law itself was brought in to replace Articles 141, 142 and 163 of the old Penal Code. “The roll-over process continues with the new Penal Code,” says Uçar. He cites the example of the now defunct Article 8 of the Anti-Terror Law, which prohibited, “written and oral propaganda and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the State of the Turkish Republic, its territory and nation, irrespective of the method, intention or the ideas behind such activities”. “The language used by the legislators is so vague that prosecutors can easily transfer their actions to other pieces of legislation. The new Penal Code is merely another example of the authorities attempting to deceive on reform while maintaining a grip on power.”²⁰

Penalties for journalists’ misdemeanours are often excessive and completely disproportionate to any alleged wrong-doing. In Uçar’s experience, even attempts to satisfy complainants or the authorities can result in even harsher penalties being imposed. He cites the example of a short, 350-word piece carried by the newspaper in 2004 regarding a member of parliament who had resigned from office, ostensibly over differences of opinion with his AKP party colleagues on the Kurdish issue.

19 *Ibid*

20 *Ibid*

Yeniden Özgür Gündem reported that the real reason for his departure was an allegation of corruption against him in a recent state bidding procedure. The MP sent a 500-word letter denying the allegations. This letter was published in full by *Yeniden Özgür Gündem*, yet the MP pressed ahead with a compensation claim of YTL 50 billion against the newspaper. In a preliminary hearing, an İstanbul judge ruled that this amount should be paid in full, otherwise a case would be opened against the newspaper: “This was despite the fact that our apology was even longer than the original piece and that the same story appeared in several other Turkish publications and in much more direct and harsher terms.”²¹ Uçar sees this as yet another example of the arbitrary use of the statute books by the governing and judicial elite to victimise publications which they see as undesirable: “In this case, Article 18 of the Press Law was used to facilitate the action, but the vagueness of so much of Turkey’s legislation regarding press and the media means that various other pieces of legislation could just as easily have been used to secure the required result.”²²

Uçar expects the high rate of suits against his newspaper to continue under the new Penal Code: “New avenues will be pursued by litigants and prosecutors and depending on the make-up of the court on a particular day these cases are likely to succeed in ways that we cannot foresee.” Like most publishers and broadcasters in Turkey, *Yeniden Özgür Gündem* operates a system of self-censorship simply to survive. Yet the newspaper continues to report in what Uçar describes as, “a fair and balanced way that would seem inoffensive in any normal democracy.”²³ However, in a country where journalists face fines and possible imprisonment for reporting critically or reasonably on the state and its judicial and legislative organs (for example Article 301 of the new Penal Code, formerly Article 159 of the old Penal Code), the job of reporting fairly is a challenging, if not impossible one.

In common with all of the journalists interviewed, Uçar sees the new Penal Code as a continuation and, in some ways, a tightening of the state’s attempts to control the output of journalists. He believes the abolition of State Security Courts in July 2004 was another exercise in deception. The impression that Turkey is moving closer to a democratic and free press environment was belied by the fact that cases against *Yeniden Özgür Gündem* continued apace albeit in a newly-named court: “The abolition of the old Press Law and the introduction of the new Penal Code were parts of this window-dressing procedure that sought to appease those in Europe who demanded proof of reform, while in fact the authorities keep a tight leash on the Turkish Press.”

21 *Ibid*

22 *Ibid*

23 *Ibid*

Uçar concluded: “We have inherited a culture of censorship first designed to keep the communist threat out. After the fall of the Soviet Union, interpretation and focus was changed to suppress the Kurdish issue.” He now believes that all red lines are drawn around this single issue: “If the Kurdish question were resolved then life for all journalists would be very much easier.”²⁴

The situation of judicial harassment of journalists was also experienced in south-east Turkey. The mission met with representatives from *Azadiya Welat*, a local newspaper published in Kurdish, and DİHA, a news agency operating in the region. The mission representative here also found that the state continues to punish individuals who criticise its policies or institutions. Again, many of the prosecutions brought against newspaper owners, journalists and news agencies were brought under Article 312 (now Article 216) – ‘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 to public security’ - of the Turkish Penal Code.

Any stories published in *Azadiya Welat* that discuss the state of the conflict between the guerrillas and the Turkish army, minority rights of the Kurds, claims by villagers against the State for its conduct during the 1990s, any coverage of the trial and treatment of Abdullah Öcalan or the coverage of press conferences held by lawyers representing Öcalan are likely to result in a prosecution under Article 216 of the new Penal Code.

However, other newspapers reporting on the same stories are exempt from prosecution - for example *Hürriyett* and *Milliyet Evrensel*. It is widely believed that this is because *Azadiya Welat* is sympathetic to the Kurdish issue and is published in Kurdish. State institutions view the newspaper as a threat to the integrity of the State.

DİHA currently faces a prosecution under Article 159 of the old Turkish Penal Code after reporting on the forest fires of the summer of 2004 in the area surrounding Dersim (Tunceli) province. It is widely believed that the Gendarme were responsible for the fires. DİHA wrote an article indicating that responsibility for the forest fires rested with the Gendarme. Subsequently the story was investigated and the state prosecutor brought a criminal case against the news agency for portraying the Gendarme as criminals.

The mission is concerned by the apparent correlation in south-east Turkey between the heightened conflict between the state and the guerrillas and the curb on basic human rights such as freedom of expression. Many Kurdish journalists and human rights defenders believe that state institutions view them and their activities

24 *Ibid*

as a threat to the state based solely on the fact that they challenge government institutions.

Further, the frequency with which broadcasters, newspaper owners and journalists face prosecution under the Penal Code for articles sympathetic to the Kurdish issue demonstrates the disparity which exists between the reforms supposedly introduced by the state to promote greater freedom of expression and the attitude of the state to criticism of its policies. For example, journalists working for DİHA often face harassment from the police or the Gendarmerie when attempting to investigate news stories. In the last three months, there has been a notable increase in the amount of harassment journalists have experienced. Those that the mission met with believed this was due to an increase in the military operations throughout the south-east.

2. Broadcast Media

Private radio and television broadcasts are regulated separately to other media and monitored by the RTÜK. The direct influence of the army on this body was lifted in 2004, but harsh and arbitrary decisions against leftist and pro-Kurdish broadcasters continue to be meted out. In the first nine months of 2004, RTÜK reported that it had closed six radio stations for periods of thirty days.²⁵ Reasons given for penalties included the use of offensive language, libel, obscenity, instigating separatist propaganda and broadcasting programmes in Kurdish.

Özgür Radyo is a local station which has been broadcasting to İstanbul and its environs for almost 11 years. In that period, the station has suffered forced closures for an aggregate of four years, by orders of RTÜK. The station broadcasts news, discussion and music programmes. The mission spoke to Füsun Erdoğan, *Özgür Radyo*'s Chief Coordinator. The first example given by Erdoğan of a cessation of broadcasting ordered by RTÜK was the 30-day ban, imposed to run from 18 August 2004. On that occasion, the station was accused of "incitement to violence, terror, and discrimination on the basis of race, region, religion, language or sect or broadcasting to give rise to hatred in society", under RTÜK's Law No 3984. The language is similar to that of Article 216 of the new Penal Code.

The material cause of the sanction was a reference by one of *Özgür Radyo*'s broadcasters to a front-page headline in Turkish left-wing daily, *Gunluk Evrensel*, to a plain clothes police "massacre" of members of DEHAP. The reference was made during a newspaper review slot broadcast on 27 August 2003. The station appealed

25 KHRP FFM Report, *Freedom of Expression at Risk: Writers on Trial in Turkey* (KHRP, London, March 2005)

to the Ankara administrative court but RTÜK's ruling was upheld on 9 June 2004. In relation to this particular ban, Reporters Without Borders reported *Özgür Radyo* as stating that: "RTÜK appears to be ignoring democratic reforms undertaken in connection with Turkish membership of the EU. It carries on censoring at will those media it does not like."²⁶

Erdoğan argues that RTÜK does not appear to feel any compulsion to alter its censorship practices as a result of Turkey's commitments to liberalise restrictions in preparation for EU accession. She believes the policy of RTÜK towards 'undesirable' broadcasters has crystallised to a practice of closing operations down for a month on two occasions, and to shut down operations completely on the third alleged breach of RTÜK regulations.

Özgür Radyo's first case against RTÜK concerned their three-month closure in 1999 for comments regarding an article in *Evrensel* concerning the deceased Turkish general, Mugliali Pasha. In the 1950s, the General had been tried and found guilty of ordering the shooting of some 33 Kurdish peasants. The General, who died in prison, was posthumously acquitted in a retrial. An *Özgür Radyo* presenter commented that while in those days only generals could order such massacres, now even low-ranking officers have the power to do so. RTÜK ordered the closure on the grounds of incitement to hatred.

Özgür Radyo has also been closed down for playing undesirable songs in its broadcasts. In theory, the lyrics of any recording made in Turkey should be acceptable for broadcasting as all recordings made in the country must be sent to the Ministry of Culture for vetting. Once approval has been granted, a fee is paid and the record is given a tax stamp. "Despite this," says Füsün, "we have had two separate closures of one year each for playing songs from albums with the official tax stamp."²⁷ The first offending example was an Austrian workers' march, while the second was a ballad recorded by the group Kızılırmak. The first was deemed offensive and prone to incite hatred for its use of the word 'freedom', in the chorus, while the second celebrated a group of revolutionaries killed by the Turkish army in the mountains of the south-west of the country in the 1970s. Each alleged breach of the RTÜK regulations was punished with a one-year closure order. These ran almost consecutively, with a gap of only four days, so that the station was off air almost constantly from 2000 until early 2003.

Those sanctioned closures were followed by a six-month shutdown for allegedly insulting Rauf Denktaş, the former President of Cyprus. In this case RTÜK found

26 Reporters Without Borders, 'One Month Suspension Against Local Radio,' Press Release 24 August 2004 [http://www.rsf.org/article.php3?id_article=11227]

27 KHRP interview with Füsün Erdoğan, *Özgür Radyo* offices, İstanbul, 29 April 2005

that a member of the station's broadcast staff had caused offence by pointing out that prostitution in Cyprus was centred around the island's large hotels, which were owned by a small number of families, including Denктаş's. The comment came on the back of a review of an interview with Denктаş in the national daily *Hurriyet*, in which the politician commented that Cyprus had become a haven for prostitution and money laundering.

The final example given by Erdoğan of RTÜK's targeting of *Özgür Radyo* was the station's closure for a year for broadcasting a headline in the national newspaper *Hurriyet* related to a statement made by İstanbul's security chief on the occasion of Abdullah Öcalan's capture by Turkish security forces in 1999. The official had asserted that anyone found demonstrating on the streets of the city would be shot. Despite the fact that this story appeared in a national daily and related to a direct press statement given by the security chief, *Özgür Radyo* was accused of incitement to violence and closed for another period of one year.

Özgür Radyo's most recent sanction by RTÜK came in April 2005, when Erdoğan was issued with a four billion Turkish Lira fine for continuing to broadcast over the internet after RTÜK had ordered radio broadcasts to cease.

The powers of censorship given to RTÜK under its governing regulations have had a serious impact on the freedom of expression of many Turkish broadcast journalists. However, the arbitrary nature in which RTÜK conducts the monitoring of broadcasters and the extreme and disproportionate nature of the sanctions it imposes add to the atmosphere of insecurity under which journalists operate.

"The constant scrutiny and victimisation by RTÜK is incredible," says Füsün. "There are over 1,000 private radio and TV stations in Turkey. RTÜK lacks the resources to monitor all of them, so they focus on some and harass them." She believes that *Özgür Radyo*'s name ('Free Radio'), and the fact that it broadcasts to İstanbul, made it a prime candidate for the attentions of RTÜK. She also quotes an RTÜK representative in Ankara who said that much depends on who owns a particular station.²⁸

The victimisation of *Özgür Radyo* has not eased, despite the station's pending cases at the ECtHR. Two days before the mission's visit to *Özgür Radyo*, Erdoğan received a telephone call from the local RTÜK representative, warning her to be careful what she broadcast on May Day, three days later. In what she described as "a chilling 'Big Brother' moment" she was told that RTÜK would be listening particularly closely to statements made and lyrics played on the day.

The regulations governing RTÜK's decisions allow broadcasters 15 days to appeal closure orders. In Erdoğan's experience, postponements of closure orders to allow time to prepare an appeal are never granted. The station presently has two appeals running in Turkish courts but, as Erdoğan points out, the sentences (suspension of broadcasting) have already been served. Erdoğan doubts that compensation will be forthcoming in the event that their appeals against RTÜK's decisions succeed.

Özgür Radyo also has eight cases running at the ECtHR, with more appeals due to be filed. The applications, which date back as far as the 1999 closure, are due to be rolled into one hearing before the court. The Turkish government has been asked to prepare its defence and once this is complete, the final hearing will commence.

Even if a licence is not revoked, RTÜK's closure strategy has a severely negative impact on broadcasters' economic viability. "Constant closures mean a loss of listeners and, consequently, advertisers," says Erdoğan. *Özgür Radio* has survived as a result of rental income from a radio broadcasting tower owned by the station's five partners. The tower is situated on a hill behind the radio's offices in Kadıköy, on İstanbul's Asian side. Most operators, however, have little hope of surviving constant closures.

Füsün maintains that broadcasters like her will continue to challenge the rulings of RTÜK because of, "a sense that injustice must not prevail and because this is part of the struggle for real democracy in Turkey." However, she has imposed a system of self-censorship at the station and now spends much of her time listening to the lyrics of songs that might be played on air in an effort to avoid playing into the hands of RTÜK's monitors.

Like most of the mission's interviewees, Erdoğan believes that the problem with reforms for EU accession is the lack of real intent on the part of the old guard to lose control. Legislation is imposed from the top down and is felt to be an empty exercise for foreign consumption. Her dealings with RTÜK on a local level indicate that a will to change is very much absent in circles of authority.

In Diyarbakır (Diyarbakir), the mission was told that RTÜK's policy of closures has changed in 2005. Now, instead of blanket periods of closure, broadcasters face rulings by RTÜK on specific programmes. Failure to comply with RTÜK's rulings may lead to permanent closure and the decisions are not open to appeal.²⁹ GÜN TV, a local television station which was first established in 1994 under the name Metro TV, broadcasts to Diyarbakır (Diyarbakir) and the surrounding towns. It changed its name to GÜN TV in 2000. The station's programmes enjoy high ratings. The most recent closure of GÜN TV was for a month in September 2004. Its broadcast

29 KHRP interview with Cemal Doğan, owner of GÜN TV, 30 April 2005

policy is to define and discuss the city's problems for the benefit of its listeners. Its programming covers health, legal and cultural issues, while its news programme focuses on local issues. This distinguishes GÜN TV from other channels: "Even though we look like a local television channel we are actually more like a non-governmental organisation."³⁰

Because of its broadcasting policies, GÜN TV has also faced a number of problems in broadcasting and has been closed on several occasions by RTÜK. During the period between 2000 and 2004 the station faced twenty cases opened against it by RTÜK because the station broadcast Kurdish songs. According to the owner of the station, 95 per cent of the cases resulted in an acquittal, yet the harassment continues.

Anadolunun Sesi Radyosu (Radio Voice of Anatolia) has been broadcasting from the centre of İstanbul for ten years. Pressure from the authorities and forced closures by order of RTÜK have led the station to change its name several times during its lifespan. Unlike *Özgür Radyo*, *Anadolunun Sesi Radyosu* has no source of income other than advertising revenue and private investment. Nail Yolu, a member of the station staff who met with the mission in İstanbul, described the broadcast content as, "alternative, pro-democracy and with an underlying theme of protest."³¹ The station tries to reflect the concerns of ordinary people. Broadcasters intersperse news and discussion programmes with light entertainment mainly consisting of folk music. Like other stations caught in the gaze of RTÜK, *Anadolunun Sesi Radyosu* imposes a system of self-censorship to minimise interference from the watchdog organisation: "In effect, that means we cannot broadcast most ordinary folk songs because RTÜK will find some element of protest or anti-state meaning in the lyrics," says Yolu. One recent run-in with RTÜK came as a result of playing a song by Turkish singer Ahmet Kaya. For this, the station was closed for a month.

At the interview with the mission, Yolu produced two large over-filled ring-binder folders of correspondence with RTÜK, dating back almost four years. From one bundle of files, Yolu cites correspondence from RTÜK concerning separate programmes broadcast on 7 October, 9, 14, 15, 16 and 25 December 2003. The programmes named by the censors range from music and poetry to what Yolu describes as "objective news". The programmes' titles include 'Voice of the People', 'News Bulletin' and 'Traces of the Day'.

In its correspondence with *Anadolunun Sesi Radyosu*, RTÜK claimed that the radio had violated their laws 3984 and 4756, Art 4, Sec A: "It is prohibited to broadcast against the existence of the Turkish state, its independence or integrity, Atatürk's

30 *Ibid*

31 KHRP interview with Nail Yolu, *Anadolunun Sesi Radyosu* offices, İstanbul, 30 April 2005

principles and his revolution,” and, “it is prohibited to instigate violence, terror or discrimination among people.” These complaints from 2003 led to the station’s most recent closure. The radio was ordered to stop broadcasting for one month from 12.00 a.m. on 18 October 2004. As is normal procedure with such closures, a statement from RTÜK was ordered to be read out on air one hour before broadcasting was terminated. The order came from Fatih Karaca, district manager of RTÜK.

However, the radio station’s involvement with the authorities has gone beyond its broadcasting. In April 2004, the station organised a concert entitled ‘Our Sons in Iraq’. The police attended and filmed the performers and the audience members, despite the fact that the police are legally prohibited from filming meetings and concerts. As a result of the evidence gathered by the police at the concert a case was issued against the radio station by RTÜK on 13 May 2004, despite the illegal method used by the police in gathering evidence. On 26 December 2004, the station’s management informed the public prosecutor that the police had overstepped their authority by recording the concert. However, the court demanded that the station should deposit a sum of money with the court before they would hear the case against the police. The management could not afford the deposit and so lost their right to appeal against the decision of RTÜK. The prosecution then opened a case against *Anadolunun Sesi Radyosu* on the grounds of songs played and statements made at the concert. They successfully used the recorded police evidence despite the fact that it had been obtained illegally.

In view of the interviews conducted by the representatives, it is difficult for the mission to accept Turkey’s claims that reform and acceptance of international standards for freedom of expression are top of the reform agenda. The actions of state organs such as RTÜK show the contrary. In view of ongoing harassment, it is apparent that RTÜK shows no signs of easing restrictions. In İstanbul and Diyarbakir (Diyarbakır), the mission was informed by *Anadolunun Sesi Radyosu* that RTÜK no longer brings cases against broadcasters in the courts, where there is always the possibility of an acquittal. Instead, RTÜK attempts to control what an organisation broadcasts by issuing a broadcast ban on specific programmes. The mission asked the owner of GÜN TV whether this was a step forward as it avoided the complete closure of the station. Cemal Doğan replied that this change in approach was worrying as a broadcast organisation could not appeal against such a decision by RTÜK, and would not be consulted by RTÜK prior to the imposition of a broadcast ban.

The managers of *Anadolunun Sesi Radyosu* expect to lose their broadcasting licence as a result of the most recent case against the station: “The law is aimed at forcing broadcasters to concentrate on light entertainment and pop music,” says Yolu, “and if you don’t play strictly by those rules, RTÜK will do everything it can to close you

down.”³²

Yolu doesn't believe that it would be possible to get a new licence if the current one was revoked. He believes that once a licence is withdrawn, the licence-holder's broadcasting equipment cannot be sold or re-used. In addition, members of the management team can never re-apply for a broadcasting permit: “This is part of the economic armoury of RTÜK,” he says. “Radio equipment is a big investment so its loss can mean bankruptcy for owners.”

Yolu is very pessimistic about the future of the radio station and its employees: “The new Penal Code is certainly undemocratic with regard to freedom of expression, but considering RTÜK and judicial authorities don't even implement current, positive legislation – for example, the right to attend a meeting without the threat of being filmed by the authorities, or the right to demonstrate without having to face police truncheons – the worst part of the new code will be its arbitrary implementation.”

3. Culture and Performing Artists

Ferhat Tunç is a recording artist from the province of Dersim (Tunceli). He has been a performer of pop music for 24 years and sings mainly in Turkish, although some of his lyrics are written in Zaza and Kurmanci. He is also a member of İHD and a campaigner for democratisation in Turkey. In addition, Tunç contributes a weekly column to the daily newspaper, *Özgür Gündem*.

Tunç has suffered almost constant harassment from the authorities over the course of his career. Of the numerous cases opened against him over the years, mainly under Article 159 of the old Penal Code (new Article 302) and Article 312 (new Article 216), most have been dropped at an early stage. Some, however, were carried through to a full hearing, despite the absence of hard, credible evidence.

One such charge arose out of a performance given by Tunç at the second annual Doğubeyazıt Culture, Art and Tourism Festival on 22 June 2003. Tunç was arrested following his performance at the concert, accused of having greeted his 40,000-strong audience with the words “Good day PKK”. Despite numerous recordings of the concert, which clearly demonstrate that Tunç's greeting was, “Hello, once again”, the Doğubeyazıt public prosecutor prepared an emergency indictment against Tunç, using uncorroborated written police evidence.

An arrest warrant was issued and, although the authorities were aware of his home

32 *Ibid*

address, Tunç was not informed of the proceedings. On 7 July, he travelled to Milas in the district of Muğla, to perform at another concert. At the end of this performance he was arrested by “dozens of police”, transported to a local police station and held in custody for one night. The following day he was rearrested in accordance with the Erzurum State Security Court’s warrant and placed in Muğla’s E-type prison. He was held there for eight days before being released pending trial.³³

Tunç’s lawyers secured his release pending trial by raising objections to the police evidence based on video recordings of the first concert. In the presence of a court delegation, it was clearly demonstrated that Tunç’s greeting to the Doğubeyazıt crowd was, “Hello, once again”, with no mention of the PKK. Despite this, the Erzurum State Security Court determined to continue the case against the singer. Tunç believes the affair was a conspiracy by the local police, which had the acquiescence of the prosecutor and court.

Tunç was charged with providing propaganda for a separatist organisation, under Article 169 of the former penal code (new Article 220.8). On 11 December 2003, he applied to the ECtHR for redress for false imprisonment and the right to a fair trial. The case is ongoing.

On 27 September 2004, Tunç received a further charge under Article 159 of the former Penal Code (new Article 302) on the grounds that comments in an article he had written for the daily newspaper *Özgür Gündem* “flagrantly insulted and derided the moral personality of the judicial court in print.” In the newspaper article, which appeared on the newsstands on 19 January 2004, Tunç used the term ‘deep judiciary’ in relation to the trials of Leyla Zana. The singer expects to be banned from publishing his column, and possibly to receive a jail sentence.

According to Tunç, systematic attempts to censor him have been made for the length of his career. Over the past fifteen years or so he has been detained for a period of days after almost every concert he has given. He says dozens of cases have been opened against him, and he was acquitted in the vast majority of them.

These cases, however, throw a dangerous spotlight on Tunç and he regularly receives threats by mail. He is concerned for his personal safety and has asked for protection from the authorities. This was refused: “When members of the partisans of the far-right ‘Grey Wolves’ movement (MHP) were increasing their threats against me, I made an application for personal security. Although the threats to kill me were made in public, with witnesses, my application was rejected.”³⁴ He believes the recent demonstrations of Turkish nationalism have heightened tensions and placed

33 KHRP interview with Ferhat Tunç, İstanbul, 30 April 2005

34 *Ibid*

artists and performers like him at greater risk from the authorities and extreme nationalists.

Tunç believes that elements within the Turkish army are spreading resentment of the Kurds for their own purposes. He foresees that as the democratisation process continues, and elements within the army begin to lose a grip on power, tensions will increasingly be stirred: “Events such as the alleged flag-burning incident are being used to create a sense of threat to a ‘Turkish way of life’. I believe in the concept of ‘deep state’ in Turkey and of a ‘deep judiciary’ operating behind the scenes. This is an uneven system and there is not enough accountability.”³⁵

Tunç believes that as a result of legislation like Article 159 of the old Penal Code (transferred to the new Penal Code as Article 305 in relation to “fundamental national interests”), many artists impose a system of self-censorship to avoid falling foul of the authorities. “And in addition to the legislative issues, a policy of outcasting and isolation is practised by the mainstream media on artists and performers who are seen as dissident.”³⁶ Until recently, Tunç had seen an improvement in his situation over a course of five years or so. He notes positively that he is now permitted to perform in his home town in Tunceli and Kurdish music can now be broadcast on the radio. Music videos, however, remain banned. He says his own music is banned from the four state channels.

He is optimistic about Turkey’s EU accession moves and sees Europe as a force for good in the Turkish democratisation process. However, he believes that Europe often applies a double standard to the Turkish situation and overlooks much that is wrong with the system: “For example, the main issue here is the Kurdish one and unless Europe acknowledges this, there will be no democracy.” In the meantime, he believes that the state and its organs have no intention of allowing artists and performers to have a guaranteed right to freedom of expression.

C. The New Penal Code

The new Turkish Penal Code has met with widespread criticism from journalists and media freedom organisations in Turkey and elsewhere. It is widely believed that the new legislation will have an adverse impact on the already difficult situation for journalists in the country. The dangers of vague wording and heavy weighting of the rights of public representatives are compounded by an absence of provisions to protect free and public debate.

35 *Ibid*

36 *Ibid*

In its original format, those provisions of the Penal Code which were applicable to the media stipulated increased penalties for offences committed through print or other media. The stipulation epitomised a hostile attitude towards freedom of expression. Some increased penalties for crimes committed through media have been removed while others remain. In addition, the provisions of the Penal Code which are applicable to the work of journalists ignore the public interest criteria, a fundamental aspect of the rules regulating Europe's media.

The European Court of Human Rights has been unequivocal in its interpretation of Article 10 of the European Convention on Human Rights, and in its construal of that article's breadth of application. In *Thoma v Luxembourg*, 1997 the ECtHR found that:

“Freedom of Expression constitutes one of the essential foundations of a democratic society...[and] 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.”

Further, the press play a “vital role of ‘public watchdog,’” and “journalistic freedom also covers possible recourse to exaggeration, or even provocation.”³⁷

A closer look at the wording of provisions of the new Turkish Penal Code reveals how much at odds the Turkish legislators are with the aims and clearly defined aspirations of European standards.

1. Offences Against Fundamental National Interests:

Article 305:

- 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... . The same punishment 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.*

37 ECtHR, Appl. No. 38432/97, *Thoma v Luxembourg*, judgement of 29 March 2001, para. 43, 45 & 46

- 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 interest shall mean independence, territorial integrity, national security and the fundamental qualities defined in the Constitution of the Republic.*

Concerns expressed by NGOs and media over the articles include the lack of definition of ‘fundamental national interest’; the lack of exception for journalists receiving salary as a ‘pecuniary benefit’; and the lack of a public interest criteria exception.

2. Offences Relating to Privacy

The right of access to information held by public authorities is a fundamental human right. The European standard is that full effect should be given to that right through dedicated and comprehensive legislation. The principle of maximum disclosure should underpin all related legislation. This basic right should be circumscribed only where the potential harm is greater than the overall public interest. However, “the burden to show that the information falls within the scope of the system of exceptions should be on the public authority seeking to deny access”³⁸.

Article 132:

“Violation of confidentiality of communications” – Offences under this article carry prison sentences of six months to two years, but where the offending content is published in the press or broadcast through other media, the penalty is increased by half.

Article 133:

Wiretapping and recording of communications between persons is prohibited.

Article 134:

Violation of the right to privacy

38 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, on Access to Information and Secrecy Legislation, adopted on 6 December 2004 [www.osce.org/documents/rfm/2004/12/3945_en.pdf]

“Where it occurs as a result of recording of images or voice/sound, the minimum level of the penalty shall not be less than one year. A person who discloses the images or voices/sounds of others’ private lives shall receive a penalty of imprisonment for a term of one to three years. Where the offence is committed through the press or media, the penalty shall be increased by half.”

Among other concerns include the lack of a public interest defence. The wording of the Articles is weighted towards the protection of public officials and the suppression of newsworthy material

3. Protection of Judicial Procedures

Article 285:

Publishing or broadcasting images of persons during an investigation or prosecution in a way that might identify them as criminals will carry a prison sentence of six months to two years.

Article 288:

“A person who explicitly makes a verbal or written declaration for the purpose of influencing the public prosecutor, judge, the court expert witness or witnesses until the final judgement is given about an investigation or prosecution will be imprisoned for a term from six months to three years.

If this offence is committed through press or media the penalty shall be increased by one half.”

Among other concerns is the lack of a public interest criteria exception. The provisions severely hinder the ability to report on judicial proceedings.

4. Articles Protecting State Secrecy

Article 329:

Relating to disclosure of information on state security and political matters -

- 1) *“A person who discloses information whose nature requires it to be kept secret for reasons relating to the security, or internal or external political interests of the*

State shall be sentenced to imprisonment for a term of five to ten years.”

Article 336:

- 1) *“A person who discloses information whose disclosure has been prohibited by the competent authorities through laws or regulatory procedures and whose nature requires it to be kept secret shall be sentenced to imprisonment for a term of three to five years.”*

Article 329 is particularly vague and open to arbitrary interpretation. There is no definition of either “*interests of the State*” or information “*whose nature requires it to be kept secret*”. Article 336 makes ordinary citizens liable for dissemination of state secrets rather than government or state officials. Article 329 makes ordinary citizens liable for dissemination of information “*relating to the security, or internal or external political interests of the State*”. In a democratic state, only state officials should bear responsibility for the protection of material defined as confidential for reasons of state security. The articles do not allow for a public interest waiver.

5. Articles Relating to Defamation

Defamation is a criminal offence in Turkey and is punishable by fines and imprisonment. The ECtHR has stated on several occasions that libel should be legislated for in the civil domain.

The Penal Code identifies two types of defamation:

- a. Offences against Dignity
- b. Offences against Symbols and Reputation of the State and its Organs
 - a) Offences against Dignity

Article 125:

- 1) *“A person who makes an allegation of an act or concrete fact about another person’s honour, reputation, dignity or prestige shall be sentenced to imprisonment for a term of three months to two years or a judicial fine will be imposed. In order to punish the insults in the absence of the victim the act should have been witnessed by at least three persons.*

- 2) *If the act is committed by means of a voiced, written or visual message addressing the victim, the perpetrator shall be sentenced to the penalties set out above.*
- 3) *If the offence 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 beliefs, political, social, philosophical beliefs thoughts and opinions, one's compliance with the rules and prohibitions of his religion*
 - 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.

- 4) *Where the defamation is committed explicitly, the penalty shall be increased by one sixth; if it is committed through the press and media, then the penalty shall be increased by one third.*

Defamation remains a criminal offence in the new Penal Code. Section 3, above, increases protection for public officials thereby discouraging investigation and criticism. In most democracies it is accepted that public officials should enjoy less, or at best equal protection, from defamation, due to the nature of their positions.³⁹

Article 130

“A person who commits under 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 a judicial fine will be imposed. If the offence of defamation is committed explicitly it shall be increased by one sixth.”

This effectively limits the ability to discuss historical events or discussion of commentary on such events. Again, the term ‘explicitly’ has not been defined. There is no public interest criteria exemption.

39 “The limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual. The former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large...” – ECtHR, Appl. No. 6/1990/197/257, *Oberschlick v. Austria*, judgement of 23 May 1991

b) Offences against Symbols and Reputation of the State and its Organs

Article 299:

Insults to the President of the Republic

- 1) *A person who defames the President of the Republic shall be imprisoned for a term of one to four years.*
- 2) *The penalty to be imposed shall be increased by one sixth if the offence is committed publicly; and by one third if it is committed by way of press or media.*

This can only stifle discussion of issues relating to the President. The Article is vague and does not even refer to inaccurate criticism or violations of privacy

Article 300:

Insulting Symbols of the State

- 1) *A person who denigrates through tearing, burning or by similar means, 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 background as stipulated in the Constitution that are used as the indicators of the sovereignty of state of the Republic of Turkey.*
- 2) *A person explicitly insulting the national anthem shall receive 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.*

This is likely to have an adverse effect on artists, satirists, performers and academics as well as journalists. Again, no public interest waiver is included and the phrasing allows for much scope of interpretation

Article 301:

Insulting the notion of the ‘Turk’, insulting the Republic, state institutions and organs.

- 1) *A person who explicitly insults being a Turk, the Republic or the Turkish Grand National Assembly, shall receive 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 receive 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.*

Criminalisation of insults to state symbols and authorities is undemocratic and stifles debate. Section (4) may constitute a public interest waiver but the vagueness of the Article leaves it open to interpretation by prosecutors and the judiciary. There is no definition of the term ‘*explicitly*.’

III. Freedom of Association

This section of the report constitutes the findings of the mission on intimidation experienced by human rights defenders in Turkey. The mission conducted visits to İstanbul and south-east Turkey during which it met with lawyers, journalists, politicians and representatives of NGOs involved in protecting human rights and in particular the rights of the Kurdish population.

It is obvious from the mission's interviews with various individuals and organisations that Turkey's attitude to human rights defenders does not comply with international standards. Despite reforms at the national level, the political will of state institutions in south-east Turkey remains hostile to the legitimate activities of human rights defenders. Police, gendarmerie and the local government continue to perceive those involved in promoting and protecting human rights as a threat to the integrity of the state.

Lawyers, politicians, human rights activists and media organisations operating in south-east Turkey continue to be subjected to significant intimidation by the state. The level of intimidation that human rights defenders experience appears to have increased dramatically in recent months. It is of great concern that lawyers, politicians, media organisations and human rights activists seem to be singled out for harassment because of their involvement in protecting the rights of Kurdish people. There is evidence that the reforms introduced by the state, have not been implemented in south-east Turkey.

The frequency with which prosecutions are brought against human rights defenders is of grave concern to the mission. Such prosecutions clearly represent judicial harassment. Although the majority of cases end in an acquittal, they not only restrict the legitimate activities of human rights defenders but intimidate the individual, their families and the people the defenders work to help.

Many interviewees acknowledged improvements as a result of the reforms Turkey has introduced in its application for EU accession. However, the mission's experience and the experience of local human rights defenders would suggest that reforms have not been implemented in that part of the country. Interviewees generally provided the same reasoning when asked the reasons for this: "Because we are

Kurds.” It appears that both the historic conflict in the south-east and the continued perception by state institutions that all Kurds are hostile to Turkey, remain the underlying motivations for the intimidation to which human rights defenders are subjected. It is widely believed that in order for the reforms to have the maximum effect, the government needs to take a more active role in implementing the reforms throughout the country.

A representative of the mission experienced her own intimidation from gendarmes when visiting Dersim (Tunceli). The mission was stopped by a gendarme after crossing the Munzur river, two hours from Dersim. There, the representative’s passport details were taken, and she was questioned about her reason for visiting Turkey, where exactly she was visiting and who she was meeting in Dersim.

When the mission informed the Gendarme that she was visiting Diyarbakir (Diyarbakır) and Dersim, she was then asked if she held sympathies towards the PKK. The interview ended with the soldiers saying that she was expected to report to them on her return to Diyarbakir, to confirm she had left.

A. Human Rights Defenders - Intimidation

1. A ‘Threatened’ State

Without exception, all human rights defenders interviewed acknowledged improvements as a result of the human rights reforms introduced by the Turkish Government in 2002 and 2003 in advance of its EU accession application. None of the human rights associations met stated that its members have experienced torture or faced physical attempts on their lives by state officials since the 2002-2003 reforms were made, although many continue to receive threats against their safety.

Both bar associations and human rights associations confirmed that no lawyers or human rights defenders had experienced torture in recent years. None of the associations, news agencies, politicians or lawyers interviewed stated that its offices are subjected to raids by the police or other branches of the state. The associations spoke confidently of the fact that the police were no longer allowed entry into their premises without the permission of a judge and on the occasions when the police had attempted to enter offices of the associations, members refused to permit entry and the police did not use force to enter.

There were no reported incidences of material being seized by the police. The NGOs and human rights associations said that their offices no longer faced closure.

However, all the human rights defenders interviewed indicated that legitimate human rights activities continued to be perceived by the state as a threat and, as a result, all involved in protecting human rights continued to face state intimidation. The *modus operandi* of intimidation has shifted. Intimidation is now more pernicious and more weighted towards judicial harassment, damage to reputations in the press, state governors publicly casting aspersions on motives and intentions, and threats to safety made either in person to defenders directly or to friends and family or threats received over the telephone.

All of the human rights defenders interviewed drew a direct correlation between the recent escalation in the fighting between the Turkish state and the *guerrillas* in the Kurdish area of Turkey and the intimidation they experience.

Despite carrying out peaceful and legitimate work in defending human rights in Turkey, all the lawyers, associations and political parties with whom the mission spoke in Dersim (Tunceli) and Diyarbekir (Diyarbakır) said that the state continued to view their activities with suspicion and considered them to be a threat to the Turkish state. The defenders and associations the mission met with all reported that their phones, faxes and e-mails, including private home and mobile numbers were monitored and that their premises and their movements were constantly under police surveillance.

İHD in Batman reported that, when investigating a case where an entire village had been destroyed by state security personnel, they were aware that the police followed their group as they travelled to the village. The police surveillance team made sure that the association representatives were aware they were being followed.⁴⁰

The offices of the İHD in Diyarbekir (Diyarbakır) reported constant police surveillance. The Chair of the İHD told the mission representative that it was rare for members of the İHD to experience physical restrictions but psychological restrictions remain common place: “The pressure we experience is that the police attempt to criminalise the association. The police presence makes people think we are criminals and people fear that they will be tainted with police if they are associated with us.”⁴¹

On one occasion the İHD reported that it was due to hold a press conference at its offices. Prior to the start of the conference, a police car appeared opposite the entrance to the association building. The association therefore sent an urgent fax to the Governor requesting the police to leave. They did not get a response until 15 days later. In the response, the governor stated that there were a number of bars

40 KHRP interview with İHD representative, Batman, 1 May 2005

41 KHRP interview with Selahhatin Coban, Chairman of the İHD, Diyarbakır, 30 April 2005

and pubs in the street and therefore there were always many problems and that was the reason why there was always a police presence in the street. However, many of the pubs and bars are not open at 10.00 a.m., the time the meeting started, or if they are open they are empty.⁴²

The İHD informed the mission that their meetings and press conferences are routinely attended by the police and filmed in their entirety. In particular, it was reported that police filming focused intrusively on the individual reading out the statement. This is very intimidating for the defenders and also deters members of the public from attending and associating with the İHD.⁴³

Members of the İHD reported being followed routinely when on official business, as are the individuals who apply to İHD for assistance. Plain clothes police often appear at the cafes and shops opposite the entrance to the İHD offices in Diyarbakır (Diyarbakır) so the members and applicants see them and know that they are under surveillance. Those interviewed by the mission, were of the opinion that the police want them to know that they are under police surveillance.

In December, the İHD held a week of activities in Diyarbakır (Diyarbakır) and the surrounding province to promote awareness about fundamental human rights. Activities included visiting the neighbourhoods in and around Diyarbakır to distribute brochures promoting awareness about basic human rights, and guidance on what to do in the event of police arrest. The İHD also held public meetings in cafes and teahouses.

All activities were monitored and attended by the police. The police attempted to gain entry to the meetings held at the İHD offices - something which is no longer permitted under the new laws. The association refused the police entry to the meetings, but this did not prevent the police from standing at the entrance and filming from the door, recording information about the identity of all those who attended the meetings. Invariably, between three and seven police attended the events, normally in plain clothes.

Activities aimed at promoting knowledge of basic internationally recognised human rights, continue to incur police hostility. When İHD workers distributed brochures in the streets, entitled 'Know Your Rights', they were followed by police.

On one occasion, a manager of the İHD was approached by three policemen in plain clothes as he made his way to a meeting where he was due to hold a seminar on human rights and the law relating to identity cards. The police asked him to produce

42 *Ibid*

43 *Ibid*

his identity card. He responded by asking to see their identity cards first. The police refused and then tried to arrest him. As he said no, more police appeared from cars, and started to shout at him and physically assault him, one of the policemen took his arm and placed him in an arm lock behind. Another member of the İHD, who was present, filmed the majority of the incident despite repeated attempts by the police to prevent her.⁴⁴ The police acted aggressively throughout the incident. By the end of the incident, there were at least five plain-clothes police officers present, to deal with two peaceful members of the İHD.⁴⁵

Police intimidation of those involved in the protection of human rights extends to their private businesses. A manager at the Diyarbakir (Diyarbakır) branch of the İHD told the mission that he used to run a small kiosk in Diyarbakir selling cigarettes, alcohol and other goods. Once he became involved with the İHD, he had his licence to run the kiosk revoked for no reason at all. When asked why he thought his licence had been revoked, he said that he believed it was nothing other than police pressure, ultimately because of his involvement with İHD.⁴⁶

All the NGOs, associations and political parties confirmed that when they held public meetings or press conferences in locations other than their offices, the police attended and the number of police present often exceeded the number of human rights defenders. Filming constitutes normal practice, although the police do not necessarily intervene in the conduct of the meeting. Filming is often very intrusive and not only intimidates the human rights defenders but acts as an obstacle to public participation at events. The police will often seize and record by filming, the identity cards of those attending meetings.⁴⁷

A police presence is also noted on occasions when the police have not been informed of any meetings or press conferences taking place leading many to suspect that all telecommunications are monitored.⁴⁸ The Coalition for Wronged Persons, a national NGO which has recently opened an office in Diyarbakir (Diyarbakır) told the Mission that police have attended their offices and asked to sit in on training seminars held by the Coalition. When the Coalition refused the police remained outside the premises and monitored events.

When the police attend press conferences held by human rights defenders, they continue to take steps to restrict their freedom. For example, a coalition of human rights groups held a joint public press conference in Ofis, a neighbourhood of

44 This film was watched by the mission during their visit to the İHD in Diyarbakır, 29 April 2005

45 KHRP interview with İHD, Diyarbakır, 29 April 2005

46 *Ibid*

47 KHRP interview with EMEP, Tunceli, 28 April 2005 and with İHD, Diyarbakır, 29 April 2005

48 KHRP interview with Mazlum-der, Diyarbakır, 30 April 2005

Diyarbakir on 20 April 2005. Those attending included the İHD and the Coalition for Wronged Persons. The conference was organised in the wake of the flag incident when nationalist sentiments had been stirred up throughout the country by allegations that a group of juveniles had attempted to burn a Turkish flag at the Newroz celebrations in Mersin on 20 March 2005. The group read out a text calling for calm, an end to social conflict and requesting dialogue to find a solution to the problems. Once again, the number of police attending outnumbered the human rights defenders. The police also attempted to reduce any contact the representatives had with passers-by, by parking a large bus between the human rights defenders and the public.⁴⁹

The holding of demonstrations still remains subject to location restrictions and prior permission from the State Governor. The NGOs, associations and political parties interviewed were planning to hold demonstrations on 1 May 2005. Permission from the Governor had been sought to hold a demonstration in the centre of Diyarbakir (Diyarbakır). Permission was not granted. Instead the Governor ordered that the demonstration could only take place at a location some 13 kilometres away from Diyarbakir. There is no public transport to this location. The two associations interviewed (İHD and the Bar Association) in the demonstration all said such regulation is equivalent to banning the demonstration.

The representative in İstanbul attended the May Day rally there, which was allowed to take place in the city for the first time in a number of years. However, permission to hold the rally in Taksim Square had been denied. The rally was held in Kadıköy, on the Asian side of the city. Hundreds of armed police formed cordons around a peaceful demonstration.

In Dersim, the mission heard an account of the police actively warning senior school children that they would face school disciplinary measures, were they to attend a meeting organised by EMEP.⁵⁰ The police also warned teachers that they too could face disciplinary action if they attended the meeting. In spite of the organiser's predictions that between 600 and 700 people would attend the event, only 300 in fact did so – believed to be a direct result of the police warnings.

The state distinguishes between demonstrations held by associations which do not criticise the state and those which do or are sympathetic to the Kurdish issue. After the flag protests in Diyarbakir, a pro-state coalition was permitted to hold a demonstration in the main square, something other human rights groups and political parties are never permitted to do.

Circular No. 2004/100 dated 11 May 2004 instructs State Governors and security

49 *Ibid*

50 KHRP interview with EMEP, Tunceli, 28 April 2005

personnel at local levels to discontinue recording, photographing or filming by security forces of demonstrations, general assemblies and meetings of NGOs held 'in accordance with the Law on Associations.' Press conferences and seminars must not be interfered with unless there is serious and concrete information indicating the possible committing of a criminal act during such events, in which case prior written approval to record such events is needed from the competent authority.⁵¹

It is obvious that the security forces and the State Governors in Dersim, Diyarbakir and İstanbul pay little regard to the requirements of this circular.

2. Threats to the Safety of Individuals

In addition to the harassment by official state security personnel, as discussed above, the FFM also received worrying reports of threats to the lives and well-being of human rights defenders from individuals and groups with apparent associations with the security forces.

The mission's representative in İstanbul met with Şaban Dayanan, a board member of the İstanbul branch of İHD İstanbul. Dayanan has been involved with the organisation for eighteen years and is responsible for the preparation of reports for his branch. As such, he is often quoted in the press and is well-known to the public.

Dayanan and three of his colleagues (Eren Keskin, a prominent human rights defender and head of İstanbul branch, Dogan Genç and Kiraz Biçici, both board members) received intimidatory letters all posted on 13 April 2005, from the same post office at Bakırköy, İstanbul. His letter and that of one of his colleague's were sent to the İHD İstanbul office, while the other two were sent to the recipients' home addresses.

The identical, printed letters accused the human rights defenders of being agents, spies and pro-Kurdish traitors. It accused them of defending those who were responsible for the deaths of "40,000 sons of the Motherland" in the Kurdish conflict. It referred to the alleged flag-burning incident at Mersin and to the İHD's defence of "traitors like Orhan Pamuk" who had made comments earlier that Turkey should face up to unpleasant aspects of its recent past such as acknowledging the Armenian genocide.

51 Hina Jilani, Special Representative of the Secretary-General on Human Rights Defenders UN-HCR, report on *Promotion and protection of Human Rights Defenders*, 18 January 2005, p. 6 para. 14

The letters were signed by an organisation calling itself TİT (*Türk İntikam Tugayı* - Turkish Revenge Brigade).

Dayanan, who is used to receiving threats, both verbal and written, was visibly shaken by this one. The letter also referred to a failed attempt to assassinate the İHD Chair in Ankara and said the recipients of these letters would not be so lucky.

Previously, Dayanan experienced real violence from what he believes to have been a TİT member, with links to the police or security service. On 15 November 2001, he found a letter under the İHD office's doormat stating that, "A friend of ours will come and kill all of you." A week later, a man burst into the office carrying a gun and a knife. Members of the staff managed to overcome him, but Dayanan was injured. The man was arrested but during the course of a preliminary hearing against him, the attacker was "accidentally released".⁵² He was never recaptured.

Dayanan believes TİT to be a very dangerous organisation. It was formed in the late 1970s to "save the Turks from enslavement". According to the interviewee, the group organised assassinations of intellectuals in the 1980s and 1990s and maintains links with the army. He cites evidence gathered relating to one attempted assassination. The individual who planned the assassination was a low-ranking officer while financing for the operation was provided by a retired colonel. Dayanan believes that TİT's interest in the İstanbul branch of İHD is proof that elements within the army wish to silence them.

According to Dayanan, the fear among many army officers of a loss of power due to continuing reform and increasing demand for accountability in the ongoing reform process for EU accession is causing elements in the army and other state organs to fight back. He believes the recent wave of nationalist demonstrations were a part of this process as those with a vested interest in the *status quo* sought to incite members of the public by alleging instances of threats to the "Turkish way of life".⁵³

Like other interviewees, Dayanan refers to the economic interests of the army in a state where central control by a 'deep state' heavily influenced by three generations of generals has led to the development of a powerful military-economic complex. He mentions Oyak, one of Turkey's largest conglomerates, which started life in 1961 as the army forces pension fund. The company has a sizeable presence in Turkey's financial services' sector and is also an important manufacturer. A thirty-year partnership with Renault has made Oyak one of the country's largest car manufacturers.

52 KHRP interview with Şaban Dayanan, İHD Board Member, İHD İstanbul Branch office, 29 April 2005

53 *Ibid*

Dayanan's suspicions of the involvement of elements of the army and security services in TİT were confirmed by security service sources. One week before the letters were received by him and his colleagues, an agent from the security services had visited the Chair of the İHD in Ankara to warn of rumours that some individuals were bent on halting EU integration moves.

In addition, the addresses on the two envelopes sent to the homes of the İHD staff members could only have come from the state security service database in Ankara. The addresses contained specific mistakes made by the two staff members when providing their addresses to the security authorities. The security chief in Ankara denied any direct involvement in the incident but said those who sent the letters must have hacked into their official records.

Dayanan believes that the current transition phase in Turkey, with EU integration becoming a closer reality, may be very dangerous for human rights defenders. As vested interests become threatened, those with much to lose may resort to violent tactics: "This is not a question of nationalism; it's a question of economics and influence."⁵⁴

B. Judicial and Legal Harassment

A common form of harassment experienced by all the human rights defenders interviewed is through arbitrary investigation and trial. Lawyers, associations and NGOs involved in the legitimate promotion and defence of human rights in the south-east continue to face investigation and prosecution by the state. Further, the number of investigations and prosecutions has increased dramatically in 2005. Many believe this can be attributed to the increase in the state of the conflict between the security forces and the *guerrillas*. The most common offence alleged is 'Insulting the state and state institutions', under Article 159 (new Article 302) of the Turkish Penal Code.

Under legislative reform, the maximum prison sentence for an offence under Article 159 was reduced from six to three years and the minimum sentence was reduced from one year to six months. The scope of the offence has also been narrowed by excluding opinions intended only to criticise but not to 'insult' and 'deride' state institutions.⁵⁵ Although widely criticised, this offence is preserved under Article 302 of the new Turkish Penal Code.

54 *Ibid*

55 For discussion of Article 159, see KHRP FFM report, *Freedom of Expression at risk: writers on trial in Turkey* (KHRP, London, March 2005) and *Turkey's Implementation of Pro-EU Reforms* (KHRP, London, November 2004)

Article 302 of the new Penal Code is widely considered to pose a grave threat to the work of human rights defenders.⁵⁶ Press conferences or statements made at meetings which criticise the State Governor, police or the gendarme trigger an investigation by the state prosecutor under Article 302, as does involvement in the promotion or defence of internationally recognised human rights. Those involved in the protection of human rights are convinced that this Article was used as a tool to curb their freedom of expression, and as a means to put pressure on them not to publicly criticise state institutions.⁵⁷

The mission was shocked to learn of the significant increase in prosecutions brought against those involved in the legitimate protection of human rights. The İHD in Diyarbakır (Diyarbakır) indicated that this year alone it has faced 62 investigations, twelve of which resulted in prosecutions under the old Article 159 but all concluded in an acquittal.⁵⁸

It is not just human rights defenders who have experienced an increase in state investigations. According to figures recorded by the İHD in Diyarbakır, in 2004 2,642 people in south-east Turkey had investigations opened against them by the Public Prosecutor. In 2003 the figure was 1,199 and in 2002 it was 101. After reforms, the İHD has seen a tenfold increase in the number of investigations. The Chair of the İHD in Diyarbakır believes there are two reasons for this: first, the resistance of the legal system to national reform, and secondly, that people believe the laws have changed so they are talking more freely than in the past.

Privately, some associations indicate their belief that prosecutions are brought against them to affect their reputation, membership and the public perception of them. Other human rights defenders that the mission interviewed mentioned that professionals engaged in the protection of human rights were prosecuted for offences of misconduct. The Chair of the Bar Association of Diyarbakır (Diyarbakır) was prosecuted under Article 240 of the Turkish Penal Code. This article outlines professional misconduct and abusing legal responsibility.⁵⁹ The prosecution was brought after the Chair of the Bar Association represented villagers in a claim against the state for loss of property during the state of emergency in the 1990s when their village had been burnt by soldiers.

After the case was concluded, the Commander of the Gendarme complained to the Public Prosecutor. The Commander accused the Chair of the Bar Association of making up the allegation to embarrass the state and in abuse of his position as a

56 KHRP interview with İHD, Diyarbakır, 30 April 2005

57 KHRP interviews with EMEP, İHD and the Bar Association in Diyarbakır, 29-30 April 2005

58 KHRP interview with the Chair of the İHD, Diyarbakır, 30 April 2005

59 Hina Jilani, Special Representative of the Secretary-General on Human Rights Defenders UNHCR, report on *Promotion and protection of Human Rights Defenders*, 18 January 2005, p. 18 para. 83

lawyer. The chairman was acquitted of the allegations. However the case dragged on for a year.

The Chair believes it was no coincidence that he was targeted with this claim - as Chair of the Bar Association it is his job to ensure that lawyers do not abuse their position. The case was widely reported by the local newspapers loyal to the military, and many stories were printed about him abusing his position. Indeed the intimidation operates on an additional level: as a lawyer and chair of the Bar Association he attends at court and must interact professionally with the same judge who tried him on an accusation of abuse of position.

The mission met with Hüseyin Aygün, a lawyer working in Dersim (Tunceli). He is a former Chair of the Bar Association in Dersim and also owns a local newspaper *Munzur Haber*. He is currently involved in a case representing the families of seven people who 'disappeared' from Mink village in Dersim while Turkish army commandos were operating in the area in September 1994.

He informed the mission of a direct threat he had received from the Commander of the Gendarmerie of Dersim province.

The Commander of the Gendarmerie first visited a member of Aygün's family at his workplace and told the relative that Aygün was a traitor to the Turkish state. The commander also alluded to information he had in his possession which would discredit Aygün as a lawyer.

In light of this, Hüseyin Aygün requested a meeting with the Commander of the Gendarmerie. At that meeting, on 7 February 2005 the Commander told the lawyer that he was viewed very negatively by the gendarmes and asked him not to go against them in every incident.

A few days later Aygün received a further visit from three members of the gendarmerie in plain clothes who informed him that the Commander of the Gendarmerie requested a further visit with him. Aygün telephoned the Commander to find out why. During that conversation, the Commander of the Gendarmerie made an attempt to blackmail Hüseyin Aygün by saying that he had in his possession evidence which would ruin Aygün's reputation as a lawyer but that he was hesitant to forward the evidence to the Prosecutor and wondered whether they could come to some sort of agreement.

60

As a result of this clear threat, Hüseyin Aygün publicly announced at a press conference that he had received a direct threat from the Commander of the Gendarmerie

and he named the Commander. The Gendarmerie Commander informed him that he was facing a prosecution under Article 159 of the Turkish Penal Code because of his decision to announce the threat made against him by the Commander. As a result of doing this, he now faces criminal prosecution under Article 159 of the old Turkish Penal Code. The first hearing was due to take place on 13 May 2005. The Commander of the Gendarme has not been suspended from his duties and no one could confirm whether any steps had been taken to investigate Aygün's claim.

Under Circular 2004/139 issued by the Ministry of the Interior on 18 October 2004, Governors are instructed to follow the European Union Guidelines on Human Rights Defenders, to facilitate human rights activities. The mission is concerned that the suggestions in this Circular have not been implemented in Tunceli.

The mission is concerned that the Commander of the Gendarme remains in his position and that there is no proposal to investigate the allegation of misconduct made against him by a professional lawyer. Any lack of investigation appears to be in breach of international law and does not comply with European Union Guidelines.

C. Protection of Human Rights Defenders

1. Training Initiatives

In October 2004, the Special Representative of the UN Secretary-General on Human Rights Defenders, Hina Jilani conducted a visit to Turkey and submitted a report to the Secretary General. In her report, she called for "increased training of the judiciary, security forces and governorship on the aims and intent of the new laws."⁶¹ Circular No. 2004/139 of 18 October 2004 issued by the Ministry of the Interior, instructs district governors to follow the European Union Guidelines on Human Rights Defenders, to use the guidelines to train security personnel and other relevant administrative authorities, and encourage efforts to establish regular dialogue with NGOs.⁶²

Training is essential for the effective implementation of state reform. Unfortunately, based on the mission's discussions with local human rights defenders, it appears that there are no such training initiatives in Dersim (Tunceli) or Diyarbakır (Diyarbakır). None of the human rights defenders interviewed was aware of any

61 Hina Jilani, Special Representative of the Secretary-General on Human Rights Defenders UNHCR, report on *Promotion and protection of Human Rights Defenders*, 18 January 2005, p. 25 para. 119(c)

62 Hina Jilani, Special Representative of the Secretary-General on Human Rights Defenders UNHCR, report on *Promotion and protection of Human Rights Defenders*, 18 January 2005, p. 26 note 2

local training initiatives which addressed the implementation of state reforms or which encouraged a change in the perception held by state institutions of human rights defenders.⁶³

Representatives from the Bar Association in Dersim (Tunceli) stated that one of their principles was to work in cooperation with state institutions. The Association however feels that the state institutions view the Bar Association as a criminal association rather than an association working to protect internationally recognised human rights.

The Bar Association approached the newly appointed Chief of Police in Dersim to suggest a series of common seminars on human rights issues, unfortunately the police declined to get involved. There is currently little or no dialogue between the human rights defenders in Dersim and the state institutions.

A similar state of affairs exists in Diyarbakir (Diyarbakır). None of the associations interviewed was aware of training initiatives in either the implementation of the state reforms or international standards of human rights for the local state institutions. Many believed there was not the political will required for such an initiative nor would such training be taken seriously by the institutions at which it was targeted. The same organisations confirmed that they had not been approached to assist in establishing dialogue between the human rights defenders and the state institutions at the provincial level.⁶⁴

Many queried how they could possibly be expected to approach the state institutions to establish dialogue on human rights issues whilst they faced intimidation by the same bodies.

2. Failure of Mechanisms to Protect Human Rights Defenders

The year 2001 witnessed the establishment of the Human Rights Presidency by the Turkish Government. The Presidency's role is to oversee human rights issues including the implementation of reforms and to oversee coordination between state bodies and civil organisations. Another government initiative was to establish Human Rights Boards at the local level with a mandate to conduct investigations into human rights abuses and forward their findings to the national bodies to take any necessary action. Human Rights Boards have been established in both Dersim

63 KHRP interviews with the Mayor of Tunceli and Chair of the Bar Association in Tunceli, 28 April 2005

64 KHRP interviews with the Chair of the İHD Diyarbakır, 30 April 2005 and the Chair of the Bar Association in Diyarbakır, 29 April 2005

(Tunceli) and Diyarbakir (Diyarbakır) in south-east Turkey.

In both Dersim and Diyarbakir, the Governor chairs the board and controls the agenda of the meetings. All the lawyers, association representatives and members of political parties with whom the mission met raised serious concerns about the independence and effectiveness of the Boards. In Dersim, many of the human rights defenders interviewed said that they had received intimidation and threats directly from the Governor, or were currently facing prosecutions which had been initiated by the Governor. Such conduct questions the Governor's commitment to the protection of human rights. The mission recommends that Human Rights Boards and any other intermediate human rights bodies are strengthened to facilitate access to human rights mechanisms.

Many also raised doubts about the public perception of the Boards, whilst the Governor was the chair. No-one imagined the public would have the confidence to refer human rights abuses to the Board given the current hostile climate.

The Mayor of Tunceli also sits on the Board. She questioned the effectiveness of the Boards while the State Governor remains Chair. She told us that she had attempted to raise issues of serious human rights abuses but she was told at the meeting by the Governor that the issues she raised were irrelevant. She made it clear that serious human rights abuses are not discussed at the meetings.⁶⁵

NGOs and individuals involved in the protection and promotion of human rights already feel alienated by the Human Rights Council. The main reason for this alienation is their relationship with the State Governor and chair of the council. The State Governor chairs the council, while at the same time many of the prosecutions opened against human rights defenders are as a direct result of complaints made by the Governor to the Public Prosecutor.

Further, the council does not discuss significant breaches of human rights and other abuses experienced by the Kurdish population. It appears that the only NGOs that attend the council meetings are those involved in issues that are not considered a threat to the state. In Tunceli none of the organisations involved in the protection of the Kurdish population is a member of the Board.⁶⁶

In Diyarbakir (Diyarbakır), similar concerns about the independence of the Board were raised. Many questioned the Board's ability to be involved on the Council while the Governor continues publicly to portray the Board and its activities as a

65 KHRP interview with Songul Erol Abdil, Mayor of Tunceli, 28 April 2005

66 *Ibid*

threat to the state.⁶⁷

D. Overview

At the beginning of 2004, the İHD was the only national association to focus on human rights in south-east Turkey. As a result of the reforms introduced by the Turkish Government during its accession application to the European Union, there are now ten new organisations in Diyarbakir (Diyarbakır) addressing human rights and the rights of minorities.⁶⁸

The police appear to show greater respect for the premises of NGOs and associations than in the past. For example, the police no longer insist on entering offices of associations when they are holding meetings, although it is apparent that the police continue to attend premises when meetings or training is being conducted and request access to meetings held at associations' premises. When access is denied, a police guard will remain outside the offices of the NGOs.⁶⁹

Members of the associations who were interviewed spoke positively about the reforms that the government has introduced. The Chair of the Diyarbakir branch of Mazlum-der spoke positively about the reforms, stating that they meant the Association would enjoy greater freedom and protection from state interference.

In order to found an association, prior permission of the state is no longer required. A minimum of seven legal persons is required and any association must draft a constitution. There is also much less documentation needed to establish an association.⁷⁰

The circumstances in which an association may be investigated by the police or the state is an area which has undergone significant change as a result of the reforms introduced in recent years. Administrative inspections are now carried out by civil servants rather than the police. The state must inform an association at least 24 hours prior to an inspection on administrative grounds. Authorities must notify associations of any irregularities and allow an opportunity to rectify them prior to any prosecution.

67 KHRP interviews with the Chair of the İHD Diyarbakır, 30 April 2005 and the Chair of the Bar Association in Diyarbakır, 29 April 2005

68 KHRP interview with Mazlum-der, Diyarbakır, 30 April 2005.

69 *Ibid*

70 *Ibid*

As a consequence of the reforms, the police may only inspect the offices of an association on the grounds of security. An inspection also requires a warrant issued by a judge but, in urgent cases, may proceed with the permission of the Public Prosecutor.

Even minor breaches of the association laws lead to prosecution: the Governor of Diyarbakir, for example, imposed a fine on the local branch of the İHD because the association applied to renew its licence in order to collect subscriptions a day after its existing licence had expired.⁷¹

1. Political Party Restrictions

Despite the improvements discussed above, political activists sympathetic to the Kurdish question continue to suffer intimidation and excessive control at the hands of the state. As with the associations and NGOs, any press conferences held by political parties sympathetic to the Kurdish issue, are attended by the security forces and filmed by them. Although press conferences can be held without prior approval, the police will often request a copy of any text the party is proposing to read out at the conference. The members of the police who attend are often the same policemen who a few years ago were responsible for torturing political activists. This proves very intimidating for the representatives of the political parties and deters many people from attending.⁷²

The mission was very concerned to learn that the police continue actively to discourage students from joining political parties that are sympathetic to the Kurdish question. According to the activists interviewed by the mission, if students attend any press conferences or meetings held by political parties such as EMEP, the police will visit their homes and warn their parents that their sons or daughters will face trouble if they continue to associate with certain parties.⁷³

State institutions continue to publicly question the credibility and motives of political parties sensitive to the Kurdish issue. The representative of EMEP in Dersim (Tunceli) told the mission that the State Governor often uses press conferences or public appearances as an opportunity to ridicule the party and to question the motives of the party leadership.

71 KHRP interview with İHD, Diyarbakır, 29 April 2005

72 KHRP interview with EMEP, Tunceli, 28 April 2005.

73 *Ibid*

Although DEHAP⁷⁴ is now recognised as an official party, its politicians continue to face state harassment for legitimate activities. Intimidation includes investigation and prosecution under the penal code and the Political Party Code, police surveillance, and restrictions on their freedom to canvass prospective voters. DEHAP candidates are often refused entry by the gendarme or police, to towns where they are standing in elections. When party workers hire cars to travel to locations on official party business, they receive fines shortly afterwards, even if they had not been stopped during the journey.

2. Restrictions in Running for Political Office

The Chairman of the Diyarbekir (Diyarbakır) branch of DEHAP stood for Mayor in the Siirt Municipality elections in 2004. The state restricted his ability to canvass prospective voters. The State Governor only permitted him to talk to voters on a few occasions. Further, every speech he delivered during the campaign sparked investigations under the Political Party Code, the Election Code and the Turkish Penal Code.⁷⁵

When asked whether there was any legitimate basis for the investigations, the Chairman said no. He saw them merely as an attempt by the state to curb his freedom of speech and to intimidate him. Credence is given to his belief, by the fact that the number of investigations opened against him exceeded the number of speeches he made.

DEHAP is currently awaiting judgment in a case heard before the Constitutional Court. The case was brought under the Political Code for giving false details to satisfy the entry conditions for the 2002 general elections. The party vehemently denies the allegation. If the case is proved, the Party faces closure.⁷⁶

74 DEHAP is a legally constituted political party committed to upholding Kurdish and other minority rights.

75 KHRP interview with the Chair of DEHAP, Diyarbakır, 29 April 2005

76 *Ibid*

IV. Conclusion and Recommendations

- Despite legislative reforms to encourage freedom of expression and freedom of association many lawyers, journalists and political activists continue to experience harassment by the state
- Turkey's new Penal Code poses a major threat to the development of a free and fair press and should be amended
- The vagueness of many pieces of legislation leaves the way open for arbitrary prosecutions against journalists
- Articles dealing with the protection of privacy and the secrecy of judicial proceedings severely hamper the function of investigative journalism
- Of particular concern is Article 305 under which journalists face up to 15 years imprisonment for disseminating "propaganda" against "fundamental national interests"
- The state continues to monitor and maintain surveillance of human rights defenders and organisations involved in promoting and protecting human rights
- The state continues to view human rights defenders with suspicion, particularly any defenders involved in the Kurdish issue
- The perception amongst the police, military and local governors is that human rights defenders pose a threat to the state and are enemies of the state
- There has been a dramatic increase in the number of cases brought against human rights defenders in the last eighteen months
- The state continues to control freedom of expression/assembly and association by restricting the right to assemble in public and to hold demonstrations

- The state continues to question publicly the motives and legitimacy of lawyers involved with associations that protect the rights of the Kurdish population
- The government must implement training initiatives for judges, public prosecutors, police and gendarmes, particularly in south-east Turkey to ensure a shift in the attitude of state institutions to human rights defenders
- State surveillance of the legitimate activities of human rights defenders must stop
- The public prosecutors should suspend all cases pending against human rights defenders, so that a thorough review can be carried out as to the legitimacy of such prosecutions
- Further government reform of the Penal Code is required. Specifically, the scope of Article 159 of the Turkish Penal Code must be reviewed and altered so that legitimate criticism of state institutions is not subjected to prosecution
- An independent investigation of police officers, gendarmes, state governors, and any state officials alleged to have threatened human rights defenders is required and those who impede the legitimate work of associations and civil society be brought to justice
- Government is urged to review the constitution of the Human Rights Boards to establish an independent Board with wide powers to investigate allegations of misconduct by the state and where necessary recommend disciplinary or court proceedings.

Recommendations

While the individuals and organisations the mission spoke with acknowledged that the Turkish government has made a number of improvements to basic human rights and the environment in which human rights defenders work, it is clear that further reform is needed to put an end to the continued intimidation experienced by human rights defenders. The government must also commit to genuine press freedom and freedom of expression.

Specifically, the mission urges the Turkey to:

- End the monitoring and surveillance of human rights defenders and, in particular, end the practice of police attending and filming press conferences, meetings and the legitimate activities of human rights organisations.
- Introduce further reforms to establish a Human Rights Commission which is fully independent from the state and which is wholly responsible for the monitoring and protection of human rights in Turkey.
- Ensure human rights defenders are no longer prosecuted under the national security laws for actions in defence of human rights.
- Introduce further training for police, judiciary and state officials to ensure the aim of reforms recently introduced, are fully understood and implemented throughout the country and further, to monitor the implementation of those reforms in south-east Turkey in particular.
- Acknowledge the public interest criteria in all legislation relating to the press and responds to protests from the country's full spectrum of journalists.
- Provide comprehensive training in the relevant international standards for judges and prosecutors to ensure laws are implemented in an even and comprehensive manner.
- End the impunity enjoyed by state officials for human rights violations. In particular, the Turkish government should introduce measures to ensure allegations of misconduct and human rights abuses by state officials are fully investigated and that disciplinary or legal action is pursued when appropriate.
- Amend those articles of the new Penal Code which undermine freedom of expression and involve journalists' associations in a process of drafting a fair and workable press code which encompasses the treaty commitments made by the Turkish state in Europe.

Specifically, the mission urges the EU to ensure:

- Protests are lodged by European observers when vague drafting or arbitrary implementation of legislation is found

- EU representatives develop/maintain contact with a wider section of civil society, and in particular representatives of journalists' associations, to ensure that reforms aimed at freedom of expression function adequately.

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