

Organization for Security and Co-operation in Europe

OSCE



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Review of the Draft Turkish Penal Code: Freedom of Media Concerns

Vienna, May 2005

I. RESTRICTIONS ON FREEDOM OF THE MEDIA AND FREEDOM OF EXPRESSION

Many provisions of the new Turkish Penal Code (TPC) stipulate that when an offence is committed through the print press or any mass media, then the penalty shall be automatically increased.

This kind of automatic punishment for media involvement means that when an offence has been committed via the press or the media, this will be considered as an aggravating circumstance. This approach amounts to a general measure against free speech. To automatically assume higher sanctions for the media is illegitimately hostile or threatening to freedom of expression.

In cases of media involvement, regardless whether the criminal provisions are actually dealing with the press or are only applicable to it, European democratic legal standards have enshrined the public-interest criteria.

The European Court of Human Rights in its famous judgments has given an unequivocal explanation of how Article 10 of the European Convention should be understood: Opinion, reporting, debate, and discussion of public issues should always be actively helped by the stipulations, and not even passively chilled by the Penal Code.

In the case *Thoma v. Luxembourg*, 1997, the European Court of Human Rights decided that:

In the sphere of general interest, restrictions on freedom of expression are to be strictly construed.

Freedom of expression constitutes one of the essential foundations of a democratic society and is applicable not only to "information" or "ideas" that were favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offended, shocked or disturbed.

The press plays a vital role of "public watchdog", and journalistic freedom also covers possible recourse to exaggeration, or even provocation.

In many of the chapters of the draft Turkish Penal Code discussed below, there is an automatic punishment for media involvement, and all of them are missing the needed extra protection for the public role of the media.

No known forms of protection of freedom of public interest debates in society are present: Neither general provisions securing the right of journalists to report and discuss on public interest issues, nor specific reasons under which criminal liability of journalists shall be reduced or lifted, are given in the Penal Code.

Because of the lack of such clear guidelines, the following paragraphs, when applied to the media, would work as an infringement on society's freedom to discuss public issues.

Offences against Individuals

- Article 84 on Suicide states:

A person who explicitly encourages another person to commit suicide shall be sentenced to imprisonment for a term of 3 to 8 years. Where death occurs, the perpetrator shall be sentenced to imprisonment for a term of 4 to 10 years. Where such offence is committed through the medium of press and media, the penalty shall be imprisonment for a term of 4 to 10 years.

As the text here does not require a particular person to be targeted, for a publication to be considered as “encouraging others to commit suicide”, there is a risk that even news, interviews or debates on the public-interest issue of suicide could be considered an infringement of Article 84.

Offences against Society

The below provisions are also applicable to the press.

For example, in view of Articles 215 and 216, even ethical discussions of euthanasia or abortion issues in the press could constitute a crime.

In these chapters, clear stipulations securing the right of journalists to freely spread information and discuss public-interest issues should be inserted. Automatic aggravation for media involvement should be repealed (see the underlined):

- In Article 215 a person who “praises a crime or a criminal” is given an imprisonment of up to 3 years;
- In Article 216 a person who “incites groups of the population to breed enmity or hatred towards one another by, for instance, denigrating religious values, shall be sentenced to imprisonment for a term of one to three years but if such offence is committed through media and press, the penalty to be imposed shall be increased by half”;
- According to Article 213 a person who “threatens to incite fear and panic among the population” could be given a prison sentence of 3 to 6 years;
- In Article 214 a person who “incites people to commit crimes” is given a prison sentence imprisonment of 9 months to 7,5 years;
- In Article 217, a person who commits the crime of “inciting people to disobey laws” is given an imprisonment of 9 months to 3 years, but if such an offence is committed through media and press, the penalty to be imposed shall be increased by half”;
- In Article 220, a person who “makes propaganda – through the medium of press and media - about the goals of an organization which has been established in order to commit crimes” can be imprisoned of 3 to 9 years.

Offences against Public Ethics

The problem of ambiguity can also result in free press restrictions.

- Article 226 on Obscenity reads:

A person who broadcasts or publishes obscene images, printed or audio material or who acts as an intermediary for this purpose shall be sentenced to imprisonment for a term of six months to three years [...].

There is obviously a large subjective element in any decision as to whether a matter is obscene. A performance that is “art” to one person, could be “obscene” to another. The European Court of Human Rights recognizes decisions of this sort, but it would find it a violation of human rights if artistic activities result in criminal prosecution. It is important therefore that the law specifies a working definition of obscenity to guide artists, journalists, as well as judges.

Offences against the Judiciary

- Article 278 on Failure to report the offence reads:

(1) A person who fails to inform the competent bodies about the crime being committed shall be imprisoned for a term of up to one year.

(2) A person who does not report to the competent bodies a crime, which has been committed but the consequences of which can still be limited, shall be punished in accordance with the provisions in the paragraph above.

This article is automatically applicable to all journalists, including investigative ones whose job is to collect information on undetected public wrongdoings. While it is questionable whether it is right to oblige all citizens to take on policing duties, the chapter unquestionably denies from journalists any protection of confidential sources of information. That right is growingly seen by democratic legal standards as a countervailing public interest¹.

Offences against National Defence

- With Article 318 on Discouraging people from performing military service, it in fact becomes punishable for journalists to report or debate on the military service:

Persons who give incentives or make suggestions or spread propaganda which will have the effect of discouraging people from performing military service shall be sentenced to imprisonment for a term of six months to two years.

If the act is committed through the medium of the press and media, the penalty shall be increased by half.

¹ The Joint Declaration on Access to Information and Secrecy Legislation by the Freedom of Expression Rapporteurs of the UN, OSCE, and OAS, adopted on 6 December 2004, can be found at http://www.osce.org/documents/rfm/2004/12/3945_en.pdf

Offences against Fundamental National Interests (Article 305)

My Office has already corresponded with the Turkish government on Article 305, because we are worried that it, in fact, would function as a restriction on public speech.

The proposed draft text of Article 305 makes it incontestable that it should be fully cleared from any reference to speech in order to enable free discussion of the involved issues.

- Article 305 on Offences against fundamental national interests states that:

1) A citizen who either directly or indirectly accepts from a foreign individual or organization 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 penalty shall be imposed on the person who provides the benefit or makes the promise.

(2) If the act is committed during wartime or benefit has been given or promised in order to spread propaganda through the medium of the press and media, the penalty shall be increased by half.

(3) Except in cases where the act is committed during wartime, the prosecution of the offence shall be subject to the authorization of the Minister of Justice.

(4) Within the meaning of the present article, fundamental national interests shall mean independence, territorial integrity, national security and the fundamental qualities defined in the Constitution of the Republic.

The underlined part of (2) makes Article 305 a *de facto* censorship provision, given that it can be used to punish any speech that is not in conformity with the views of the Government on the issues listed in (4). These issues (*independence, territorial integrity, national security and the fundamental qualities defined in the Constitution*) are normal topics of political debates in any free country.

Please note that journalists receive money for their work, and Article 305 does not even exclude an interpretation of journalistic salaries as pecuniary benefits for spreading propaganda.

- Also, in Paragraph 7 of the “Reasoning Document” (justification) to Article 305, there is a reference to both “*propaganda on withdrawing Turkish soldiers from Cyprus or on accepting a solution in the island to the disadvantage of Turkey*” and “*making propaganda on the Armenian Genocide after the First World War contrary to historical facts*”. Accordingly, penalties are to be increased if money, benefit or promise is accepted in return for making propaganda through the press and media.

Last March, my Office welcomed the deletion of the two above mentioned examples from a reprint of the Penal Code which was sent to Turkish judges. These changes can help clarify that Article 305 can not be used to restrict speech.

But, for these welcome changes to become law, they should be adopted by Parliament. Therefore Parliament should officially delete both examples from the original text of the “Reasoning Document” deposited with official records.

II. RESTRICTIONS ON ACCESS AND DISCLOSURE OF INFORMATION

In their Joint Declaration on Access to Information and Secrecy Legislation adopted on 6 December 2004, my Office, together with the partner Offices of the UN and the OAS², recalled that the right of individuals to access information held by public authorities is a fundamental human right. This right should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts). It should be based on the principle of maximum disclosure, which establishes the presumption that all information should be accessible, subject only to a narrow system of exceptions.

Exceptions should apply only where there is a risk of substantial harm to the protected interest, and where the possible harm is greater than the overall public interest. 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.

The Turkish Penal Code recognizes three different categories under which access to information restrictions are imposed:

Offences against Privacy

- Article 132: in case of “violation of confidentiality of communications”, the Penal Code foresees a prison sentence of 6 months to 2 years, but where the content of the communication is published via press and media”, the punishment is to be increased by half;
- Article 133 on Wiretapping and recording of communications between persons;
- Article 134 on Violation of privacy:

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 be imposed 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.

The main concern is, again, the lack of a public interest defence available to journalists. Publication of such “restricted” information may well be justifiable in the public interest.

Offences against Justice

- According to Article 285 on Violation of communications, in case of publishing or broadcasting images of persons during the investigation or the prosecution phase in a

² See footnote 1.

way identifies them as criminals, a prison sentence of 6 months to 2 years shall be given.

In such a case, it will become problematic to publish the picture of a person against whom an investigation has been launched, even in a case that is known and is closely followed by the public. This means that reporting of judicial cases will be hindered.

- Similarly, Article 288 reads:

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 judgment 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 to be imposed shall be increased by one half.

Offences against State Secrets

The following chapters suffer from the general lack of public-interest waivers in the draft Penal Code. Such waivers would be especially appropriate here, since both the classified materials, and the very laws defining the rules of classification could be legitimate subjects of public debate.

But these chapters also have a special restrictive feature: that of punishing citizens and among them journalists for obtaining and spreading information that was classified by the authorities.

In democracies, it is the public authorities and their staff who bear sole responsibility for protecting the confidentiality of legitimately secret information. Other individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information.

Criminal law provisions that don't restrict liability for the dissemination of State secrets to official handlers of those secrets should be repealed or amended.

- Article 329 on Disclosure of information relating to the security and political interests of the State reads:

(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 on Disclosure of prohibited information states:

(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.

Actually, only Article 336 is dealing with official State secrets. Article 329 is having the additional problem of arbitrariness. While Article 336 makes ordinary citizens liable for the dissemination of State secrets – which is inadmissible in a free society – Article 329 makes them liable for disseminating any kind of information that the authorities see as concerning “*internal or external political interests of the State*”.

III. RESTRICTIONS ON FREE DISCUSSION OF PUBLIC AFFAIRS VIA DEFAMATION AND INSULT PROVISIONS

Defamation remains a criminal offence in Turkey. It is punished by imprisonment and fines. Criminal defamation laws have been widely recognized as inhibiting free discussion and free flow of information in a 21st century democracy.

International experts and human rights advocates believe that the criminal handling of defamation cases can be fully replaced by adequate civil-law provisions. Civil law offers sufficient protection to the reputation of individuals, while its “chilling effect” on free expression in society is immeasurably lower as the state’s punitive authority is not involved.

My Office has long been calling on all OSCE participating States to follow the clear guidance of the European Court of Human Rights and reform their libel legislation³. The Court has always found imprisonment a disproportionate punishment for protecting honour and dignity.

As all criminal defamation laws can inhibit freedom of the media, we encourage the Turkish legislators to decriminalise defamation and libel; to transfer the handling of those offences to civil law courts; and, as an immediate measure, to support a moratorium on imprisonment for these offences.

In addition, the below provisions of the defamation chapters specifically inhibit the freedom of political debate in society and in the media. Media involvement is even stipulated as an aggravating circumstance.

According to the Turkish Criminal Code, there are two major kinds of defamation: offences against dignity, and offences against symbols of state sovereignty and reputation of its organs.

Offences against Dignity

- Article 125 on Defamation states that:

³ The RFOM *Matrix on Libel and Insult Laws: Where we stand and what we would like to achieve* can be found at http://www.osce.org/documents/rfm/2005/03/4380_en.pdf

(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 of defamation is committed:

a) Against a public official or a person performing a public service and the allegation is connected with his public status or the public service he provides

b) due to expression, changing, efforts for expansion of one's religious, political, social, philosophical beliefs, thoughts and opinions, one's compliance with the rules and prohibitions of his religion,

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.

Apart from criminalizing defamation, this Article (3) establishes increased protection for public officials, punishing with imprisonment for at least one year if defamation is committed “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”.

The evolving international standard is that public officials should enjoy less, and in no case more, protection from libel and insult than ordinary citizens. Government officials should be open to harsher than usual public scrutiny exercised by the press.

In the case of *Oberschlick v. Austria*, 1991, the European Court of Human Rights stated:

The limits of acceptable criticism are 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, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.

A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues.

- Article 130 on Defamation of the memory of a dead person:

Obviously, the great majority of cases when the press scrutinizes the memory of dead people occur vis-à-vis public figures of the past. These comments require the same public-interest protection that any other kind of speech has.

The chapter, even in the case that defamation remains a criminal offence, needs to be outfitted with a public-interest waiver, and an automatic aggravation of the crime for media involvement should be avoided.

Article 130 states:

A person who commits under the testimony of at least three persons, the offence of defamation of the memory of a dead person shall be imprisoned for a term of three months to two years or a judicial fine will be imposed. If the offence of defamation is committed explicitly it shall be increased by one sixth.

It remains unclear what “explicitly” means.

Offences against Symbols of State Sovereignty and Reputation of its Organs

- Article 299 on Insulting the President of the Republic states:

(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 and media.

This chapter is specifically dedicated to elevated protection of state officials, which is inadmissible as it chills criticism and free discussion of important public issues. This article should be deleted from the Criminal Code since its only function is to ban criticism; it does not even refer to any inaccuracy or violation of privacy.

- Article 301 on Insulting being a Turk, the Republic, the organs and institutions of the State reads:

(1) A person who explicitly insults being a Turk, the Republic or Turkish Grand National Assembly, shall be imposed a penalty of imprisonment for a term of six months to three years.

(2) A person who explicitly insults the Government of the Republic of Turkey, the judicial bodies of the State, the military or security organisation shall be imposed a penalty of imprisonment for a term of six months to two years.

(3) Where insulting being a Turk is committed by a Turkish citizen in a foreign country, the penalty to be imposed shall be increased by one third.

(4) Expression of opinions with the purpose of criticism does not require penalties.

At least (4) has a public-interest waiver, but the chapter still uses the vague wording of “explicitly”. Therefore, Article 301 is open to various interpretations, and can be used to chill public debate despite (4).

Most international standards, including those of the European Court of Human Rights, see criminal insult provisions vis-à-vis the State authorities as an infringement of freedom of expression.

- Article 300 on Insulting the symbols of State sovereignty

(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 basis as stipulated in the Constitution that are used as the indicators of the sovereignty of the State of the Republic of Turkey.

(2) A person explicitly insulting the National Anthem shall be imposed a penalty of imprisonment for a term of six months to two years.

(3) If the crime defined in the present paragraph is committed by a Turkish citizen in a foreign country, the penalty shall be increased by one-third.

In free societies, visual presentations of state symbols are often used to express critical views, especially by artists. Even if the Turkish legislators intend to protect the feelings that the Turkish citizens attach to the listed symbols, in order to protect freedom of expression and of the media, a clear waiver should be inserted for public-interest debate, opinion, and reporting, as well as for academic or artistic presentations. Such a waiver is especially needed since the provision contains the vague notion of “*similar means*” and “*explicitly insulting*”.