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Constitutional amendments: Still a long way to go



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SUMMARY

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On 3 October 2001, the Turkish Parliament adopted a law amending 34 articles of the Constitution (Law No. 4709), which entered into force on 17 October 2001. The amendments included the introduction of equality of men and women, an increase in the number of civilian members in the National Security Council and some welcome steps to an improvement of human rights in Turkey. These include the shortening of detention periods before being brought before a judge; the abolition of the death penalty for criminal offences; the introduction of the right to a fair trial into the constitution; and the lifting of the ban on statements and publications in Kurdish and of the ban on amnesties and pardons for politically motivated offences committed after the amendment entered into force. While some restrictions on fundamental human rights were lifted, however, new restrictions were introduced that fall short of Turkey's international human rights obligations. Also, the death penalty was not abolished for war times and "terrorist" crimes. Amnesty International (AI) is especially concerned that the amendments did not include significant guarantees for freedom of expression and safeguards against torture. Following the constitutional amendments several laws will have to be changed accordingly. AI will continue to monitor the legal changes and implementation after the constitutional amendments.

This report discusses some aspects of the constitutional amendments which relate to concerns in the mandate of Amnesty International: torture, fair trial issues, death penalty, freedom of expression and the situation of human rights defenders.

AI welcomes some aspects of the constitutional reform, but at the same time urges the Turkish authorities to follow up these first steps with further constitutional amendments and the necessary law reforms in order to fully comply with international human rights standards. Furthermore, these reforms must be applied in practice. The report concludes with a detailed list of recommendations, the implementation of which would help rectify the human rights situation in Turkey regarding the concerns stated in this paper. AI urges

the Turkish authorities to implement these recommendations in a form compatible with its international human rights obligations.

KEYWORDS: CONSTITUTIONAL CHANGE1/ IMPUNITY1 / LEGISLATION / DEATH PENALTY / FREEDOM OF EXPRESSION / CONFESSIONS / TORTURE/ILL-TREATMENT / INCOMMUNICADO DETENTION / HUMAN RIGHTS DEFENDERS / HARASSMENT / RECOMMENDED ACTIONS

This report summarizes a 16-page document : TURKEY Constitutional amendment (AI Index: EUR 44/007/2002) issued by Amnesty International in January 2002. Anyone wishing further details or to take action on this issue should consult the full document. An extensive range of our materials on this and other subjects is available at <http://www.amnesty.org> and Amnesty International news releases can be received by email: <http://www.web.amnesty.org/web/news.nsf/thisweek?openview>

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

TURKEY

Constitutional amendments: Still a long way to go

Turkey's current constitution had been adopted in 1982 when the country was under military rule. It contains numerous restrictions on fundamental rights and freedoms. Since then, there have been several amendments, but no comprehensive reform. In the process of preparing for the accession of Turkey to the European Union (EU) the European Commission suggested Accession Partnership priorities for Turkey to the European Council in Nice in December 2000. The Accession Partnership priorities were formally adopted by the Council on 8 March 2001.¹ The Accession Partnership can play a crucial guiding role for the improvement of human rights because it breaks down the Copenhagen political criteria - the precondition for accession negotiations to start - into a set of short and medium term priorities. Turkey is expected to complete the short term priorities or take them substantially forward within one year.² On 19 March 2001 Turkey outlined a national program of steps to be taken to meet the Copenhagen political criteria. In the context of the related human rights reform process, Turkey announced that it was giving priority to a review of the Constitution.

After a parliamentary debate and several revisions, the Turkish Parliament adopted a law amending 34 articles of the Constitution on 3 October 2001 (Law No. 4709). The law entered into force on 17 October 2001. Following the constitutional amendments several laws will have to be changed accordingly. The amendments included the introduction of equality of men and women, an increase in the number of civilian members in the National Security Council and some welcome steps to an improvement of human rights in Turkey. These include the shortening of detention periods before being brought before a judge; the abolition of the death penalty for criminal offences; the introduction of the right to a fair trial into the constitution; and the lifting of the ban on statements and publications in Kurdish and of the ban on amnesties and pardons for politically motivated offences committed after the amendments entered into force. While some restrictions on fundamental human rights were lifted, however, new restrictions were introduced that fall short of Turkey's international human rights obligations. Also, the death penalty was not abolished for war times and "terrorist" crimes. Amnesty International (AI) is especially

¹ The Accession Partnership is the key feature of the enhanced pre-accession strategy, mobilizing all forms of the assistance by the EU to the candidate country within a single framework. It sets out the financial means available to help implement the Copenhagen Criteria and provides the basis for a number of policy instruments to help Turkey in this process.

² The short term objectives for Turkey include: the right to freedom of expression; the right to freedom of association and peaceful assembly and development of civil society; fight against torture practises; alignment of legal procedures concerning pre-trial detention with European standards; maintaining the *de facto* moratorium on executions; mother tongue broadcasting.

concerned that the amendments did not include significant guarantees for freedom of expression and safeguards against torture. AI will continue to monitor the legal changes and implementation after the constitutional amendments.

Restrictions on fundamental rights and freedoms remain too broad

The restrictions and prohibitions of abuse of fundamental rights and freedoms (Article 13 and 14 of the Constitution) have been reworded to a large extent. The principle of proportionality has been introduced. Previous explicit restrictions which refer to the indivisible integrity of the state have been removed from Article 13, but retained in Article 14. Article 13 now reads: *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality."* Article 14 now reads: *"None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights. No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution. The sanctions to be applied against those who perpetrate these activities in conflict with these provisions shall be determined by law."*

AI considers that this wording is still too broad, does not add to the substance, allows the legitimization of rights violation and falls short of Turkey's international obligations. AI urges the Turkish authority not to use these broad restrictions to violate the human rights that the Constitution purports to guarantee. Any restrictions on fundamental human rights must conform to Turkey's obligations under international law. Restrictions permitted under the Constitution to rights and freedoms should not be applied for any purpose other than those for which they have been prescribed. In addition, the restrictions must not go beyond the margins allowed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) to which Turkey is a state party: they must be prescribed by law and necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others. However, numerous articles of the Turkish constitution still retain rights restrictions not compatible with these provisions and fall short of the requirement that any restrictions on fundamental rights "must be necessary in a democratic society".

The constitutional amendments do not incorporate effective steps and mechanisms to prevent torture

In spite of Turkey's obligations under national and international law, torture has continued unabated. AI has documented in a recent report that torture is widespread and practised systematically in Turkey.³ AI considers that the recent constitutional amendments fall short of introducing effective steps against torture, because it did not, *inter-alia*, abolish incommunicado detention for detainees suspected of certain political offences.

Turkey's international obligations to prohibit torture have been incorporated in the Constitution. Article 17 of the Turkish Constitution provides that no one shall be subjected to torture or ill-treatment. Article 90 provides that "International agreements duly put into effect carry the force of law." Turkey is a state party to most of the important instruments for the prohibition of torture including the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the European Convention on Human Rights and the European Convention for the Prevention of Torture. Finally, in November 2000, the EU identified the strengthening of legal provisions and the undertaking of all necessary measures to reinforce the fight against torture practices as a short-term priority for Turkey in the process of accession to the EU.

The maximum length of police and gendarmerie custody

In Turkey, torture mainly occurs in police and gendarmerie detention before the detainees are presented to a prosecutor and a judge. Hence, one of the factors contributing to the persistence of torture in Turkey is the length of police detention which does not comply with international standards of fairness: Article 5 (3) of the European Convention on Human Rights provides the right to be brought promptly before a judge. The European Court of Human Rights has ruled that detaining a person for four days and six hours constitutes a failure to allow prompt presentation to a judge.⁴ The European Court of Human Rights has established in numerous applications involving Turkey that in violation of Article 5 (3), detainees had not been brought promptly before a judge. As one of the short-term priorities the EU has asked Turkey to "further align legal procedures concerning pre-trial detention with the provisions of the European Court of Human Rights and with recommendations of the Committee for the Prevention of Torture."

³ Turkey: *An end to torture and impunity is overdue!*, October 2001, AI Index: EUR 44/072/2001.

⁴ *Brogan et al. v. United Kingdom*, 1988.

The UN Special Rapporteur on torture has also urged the Turkish government that “(a) *The [Turkish] legislation should be amended to ensure that no one is held without prompt access to a lawyer of his or her choice as required under the law applicable to ordinary crimes or, when compelling reasons dictate, access to another independent lawyer. (b) The legislation should be amended to ensure that any extensions of police custody are ordered by a judge, before whom the detainee should be brought in person; such extensions should not exceed a total of four days from the moment of arrest or, in a genuine emergency, seven days, provided that the safeguards referred to in the previous recommendation are in place.*”⁵

The right of access to a lawyer and to be brought promptly before a judge is frequently violated in Turkey for people detained on suspicion of crimes which fall within the jurisdiction of State Security Courts. Before the amendment of the Constitution, for such detainees police detention before being presented to a judge could be increased to seven days - or to 10 days in the four provinces under state of emergency (Diyarbakır, Hakkari, Şırnak and Tunceli). The detainees were normally not seen by a prosecutor before the end of the custody period.⁶

The amendment of the Constitution’s Article 19 on “Personal Liberty and Security” has been said to be a reduction of the maximum period for police and gendarmerie custody to four days. But the wording of the amended paragraph appears to allow different interpretations. Article 19/5 of the constitution now reads: “*The person arrested or remanded to prison shall be brought before a judge within 48 hours and in cases of offences committed collectively within four days [previously seven], excluding the time it takes to send them to the court nearest to the place of detention.*”⁷ No one can be deprived of their

⁵ UN Doc. E/CN.4/ 1999/61/ Add.1, para. 113, 27 January 1999.

⁶ The Turkish Criminal Procedure Code as amended in 1997 provides that if a person apprehended for crimes committed by one or two persons is not released, he/she must be arraigned before the competent judge within 24 hours. If the crime falls under the scope of the State Security Courts, this period is 48 hours. This period may be extended by written order of the public prosecutor to a total of four days in the case of collective crimes, including crimes falling under the jurisdiction of the State Security Courts. Further, if the investigation is still not completed after the four days, the prosecutor may request the judge to extend the custody to seven days before the suspect is arraigned before the judge. For such crimes committed in regions under state of emergency and falling under the scope of the State Security Courts, the seven-day period may be extended to 10 days upon request of the prosecutor and the decision of the judge.

⁷ Retaining the formulation “excluding the time it takes to send them to the court nearest to the place of detention” falls short of the recommendation of the Special Rapporteur on torture that “extensions should not exceed a total of four days from the moment of arrest...”. E/CN.4/1999/61/Add.1, para. 113 (b), emphasis added. AI has received numerous reports about detainees being beaten while being driven around in police cars after arrest.

liberty without the decision of a judge after the expiry of these periods. These periods may be extended under state of emergency, martial law or in times of war.”

Since the current Criminal Procedure Code foresees maximum periods for detention of up to seven days for offences in the jurisdiction of State Security Courts and up to 10 days for such offences in the region under the state of emergency, it must be amended to conform with the constitutional amendment. On 21 December the Justice Minister sent a circular to the prosecutors reminding them of the supremacy of the constitution which overrides other legislation. He requested that procedures involving detention periods should be implemented in line with the new constitutional provisions until the implementation laws on this issue are passed.⁸ AI will continue to monitor the implementation in practice and Turkey's compliance with its international human rights obligations.

Despite the constitutional amendment, however, AI has received reports that four men and a woman in Diyarbakır were brought to gendarmerie custody after having been brought before a judge and remanded in prison; another man was released by the judge but detained again by gendarmerie four days later. The four men and the woman were reportedly tortured in detention apparently to obtain “confessions”.⁹ In these cases Article 3/c of Legal Decree Number 430 was applied. This article grants the State Prosecutor - following a proposal from the Governor of the Region under the State of Emergency - permission to ask a judge to return a person already in remand or imprisoned to police or gendarmerie custody for up to ten days. This is applicable in cases related to crimes that caused the declaration of state of emergency. This article had already been applied to people suspected of membership in the Islamist illegal armed organization Hizbullah. After the constitutional amendment it has also been applied to members of the legal pro-Kurdish party HADEP and people suspected of support for the armed opposition group Kurdistan Workers' Party (PKK). Turkey's State President reportedly criticised this practise on the occasion of the Human Rights Day and suggested that the decree be subject to revision by the Constitutional Court. AI recommends that the decree be amended in such a way as to reflect Turkey's international human rights obligations.

⁸ According to press reports he repeated, however, that under the state of emergency the periods could be extended. Human Rights Foundation of Turkey, 24 December 2001.

⁹ UA 280/01 on Emrullah Karagöz, Mustafa Yaşar and others on 5 November 2001 (AI Index: EUR 44/079/2001) with updates on 20 November 2001 (AI Index: EUR 44/085/2001) and 3 January 2002 (AI Index: EUR 44/001/2002); and UA 284/01 on Şefik Yıldırım on 7 November 2001 (AI Index: EUR 44/081/2001). The decree was even applied to Fehime Ete, although she was detained outside the region under state of emergency. See update to UA 271/01 on 14 January 2002, AI Index: EUR 44/003/2002.

Informing relatives about the detainees' place of detention

The Turkish Regulation on Apprehension, Police Custody and Interrogation provides clear guidelines for the registration of people taken into custody and their right to inform their relatives "unless informing the relatives will harm the investigation". In the amendment of Article 19 of the Constitution such a restriction was lifted.¹⁰ Yet guidelines for the prompt and proper registration of detainees and for notification of their families are often ignored.¹¹ AI has documented such cases before and after the constitutional amendment.¹² Unfortunately, this situation is extremely distressing for the families of detainees, who often spend days trying to establish the whereabouts of their loved ones. Failure to register detainees properly and promptly creates conditions in which there is an increased risk of torture, and "disappearance" or death in custody can occur.

Incommunicado detention

A fundamental legal change required for an effective fight against torture, namely the abolition of incommunicado detention, is neither among the constitutional amendments nor among the short-term measures promised by Turkey in its National Program for the Adoption of the Acquis [of the EU]¹³, but might be implied in Turkey's mid-term measures which are formulated in very general terms.

Incommunicado detention (detention without access to the outside world) deprives detainees of access to lawyers, family and friends, and doctors. The UN Special Rapporteur on torture has stated quite categorically that incommunicado detention should be abolished: "*Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal and persons held incommunicado should be released*"

¹⁰ Article 19/6 now reads: "*The next of kin of the arrested or remanded person shall be notified immediately.*"

¹¹ See also the report of the UN Special Rapporteur on torture, E/CN.4/1999/61/Add.1, paras. 50-51, and Amnesty International: *Turkey: The duty to supervise, investigate and prosecute*, April 1999, AI Index: EUR 44/24/99, p. 25.

¹² Amnesty International: *Turkey: An end to torture and impunity is overdue!*, October 2001, AI Index: EUR 44/072/2001, pp. 11-12, as well as UA 280/01 on Emrullah Karagöz and Mustafa Yaşar on 5 November 2001, AI Index: EUR 44/079/2001.

¹³ The *acquis communautaire* or Community patrimony is the body of common rights and obligations which bind all the Member States together within the European Union.

without delay. Legal provisions should ensure that detainees should be given access to legal counsel within 24 hours of detention.”¹⁴

Following the amendment of Article 136 of the Turkish Criminal Procedure Code (TCPC) in 1992, detainees may benefit from the assistance of legal counsel at any stage and level of the investigation. One lawyer can be present during the interrogation by police officers and up to three lawyers during the prosecutor's questioning. However, people suspected of offences under the jurisdiction of State Security Courts can still be held in police custody in incommunicado detention for up to four days.¹⁵ Only during the extended detention period do these detainees have the right of access to a lawyer.¹⁶ In many cases this right is denied. For the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has stated that *“the information gathered during the July 2000 ad hoc visit clearly indicates that even after the first four days of police custody, access to a lawyer for persons suspected of State Security Offences is in practice*

¹⁴ Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1995/434, 12 January 1995, para. 926. In reports on its visits to Turkey in 1997, 1999 and 2000 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has repeated similar recommendations. The European Court of Human Rights has further acknowledged that the failure to grant access to counsel during the first 48 hours after arrest was also a violation of Article 6 of the European Convention. *Murray v. United Kingdom*, (41/1994/488/570), 8 February 1996.

¹⁵ The legal basis for incommunicado detention in Turkey is Article 31 of Law No. 3842 amending the TCPC in 1992, which has become a footnote to the current TCPC and provides that a number of amendments “shall not apply for offences within the jurisdiction of State Security Courts. For these, the provisions of TCPC No. 1412 [the old version of the law] are implemented with the provisions before the amendment.”

In the *Response of the Turkish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Turkey from 16 to 24 July 2000*, Paragraph 61 (Recommendation), published in Strasbourg on 8 November 2001, CPT/Inf (2001) 26, the Turkish government argued that offences under the jurisdiction of State Security Courts “fall within the scope of a ‘public emergency threatening the life of the nation’ within the meaning of Article 15 of the European Convention on Human Rights.” Amnesty International does not share this opinion. Article 15 of the European Convention on Human Rights reads: *“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law.”* (emphasis added) The denial of access to a lawyer for four days restricts the detainee's right to adequate time and facilities to prepare a defence and is incompatible with the object and purpose of the Convention. In fact, prompt and regular access to a lawyer for a detainee is an important safeguard against torture, ill-treatment and coerced confessions. The right to life and prohibition against torture are among the non-derogable rights listed in the European Convention.

¹⁶ The right to access to a lawyer after the extension of police custody by a judge is provided in Article 16 of Law 2845 on the State Security Courts, as amended in 1997.

the exception rather than the rule."¹⁷ Even if lawyers are given access to their detained clients, the meeting generally takes place in the presence of police officers and can only last five to 10 minutes. Since incommunicado detention facilitates torture and ill-treatment, AI recommends that it should be abolished in law and clear guidelines should be introduced to ensure that all detainees have in practice immediate access to legal counsel.

Use of statements elicited under torture as evidence

Article 15 of the Convention against Torture obliges the states parties to "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." With the amendment of the Turkish Criminal Procedure Code in 1992, torture and ill-treatment were declared "prohibited interrogation methods". With an amendment of Article 38 of the Constitution this ban has now been given constitutional status. This is a welcome step, yet it remains to be translated into practice.

In nearly all torture reports received by AI, the victims allege that at the end of their interrogation in custody they were made to sign a statement in which they "confessed" their own guilt or blamed others for the offence. Detainees are frequently remanded to prison on the basis of statements declared by them to have been extracted under torture. Such testimony is still frequently read out in court and placed in the court file. AI has received reports that in most of these cases prosecutors and courts do not investigate the related torture allegations. The failure of Turkish officials to investigate allegations of torture not only allows torturers to go unpunished, but contributes to the unfair trial of the victims, and in some cases is the direct cause of miscarriages of justice.

Number of crimes which carry the death penalty reduced

With the amendment of the Constitution, the death penalty has been abolished for criminal acts. AI warmly welcomes this step. It gives psychological relief to those included in the amendment who have been sentenced to death and thus exposed to a cruel, inhuman or degrading punishment. However, the death penalty has been retained for war times and "terrorist" crimes. Article 38 of the Constitution now reads: "*The death penalty cannot be passed except in the situation of war, imminent threat of war and terror crimes.*"¹⁸ In the Turkish Criminal Code (TPC) only one of the 13 articles which carry the death penalty

¹⁷ Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 24 July 2000, Strasbourg, 8 November 2000, CPT/Inf (2001) 25, para 61.

¹⁸ Protocol 6 to the European Convention calls for the abolition of torture. It does allow exceptions for acts committed in time of war or of imminent threat of war, yet not for "terrorist" crimes. Turkey has not yet signed or ratified Protocol 6.

refers to criminal crimes, the other 12 refer to "crimes against the state". Of these, six are related to war situations. The other six articles in the TPC which carry the death penalty are considered as "terror crimes": the two most frequently used being Article 125 on separatist acts and Article 146 on attempts to forcibly overthrow or alter the Constitution or the Parliament as well as incitement to such a crime, even if it does not go beyond an attempt.¹⁹ Also, according to Article 4 of the Anti-Terror Law, specified acts committed with the intention of terror as defined very broadly in Article 1 of this law are also considered terror crimes. These acts might then also be excluded from the constitutional amendment.

There has been a *de facto* moratorium on executions since 1984, but death sentences continue to be passed. In the year 2000 at least 81 death sentences were passed: 29 of them were commuted to prison terms. In 2001 at least 24 death sentences were passed: four of them were commuted to a prison sentence, one quashed and one upheld by the Appeal Court. At least a further 31 death sentences passed in previous years were upheld by the Appeal Court and together with 11 more death sentences sent to parliament for confirmation. As of 8 October 2001, reportedly a total of 61 files concerning 117 people sentenced to death were held at the parliament. Of these 73 (62%) were passed under Articles 125 and 146.²⁰ If the law is not changed, these death sentences could be carried out should parliament decide to confirm them. In addition, the file with the death sentence on Abdullah Öcalan, leader of the armed opposition group Kurdistan Workers' Party (PKK), is being held at the Office of the Prime Minister. It is this prominent case²¹ that is believed to be the main reason for Turkey to retain the death penalty in spite of repeated calls on Turkey from international bodies for its abolition. AI continues to call for the full and immediate abolition of the death penalty for all crimes.

Freedom of expression and pressure on human rights defenders

Several amended articles might have an impact on the right to freedom of expression. The amendment of Article 14 on the prohibition of rights abuse introduced a reference to "acts". The word "act" is still too broad to inhibit restrictions on the right to freedom of expression, because it might well be interpreted as including delivering a speech, writing or publishing an article or a book.

¹⁹ The death penalty is also foreseen in 26 articles of the Military Penal Code, one article in the Law against Smuggle and one article in the Forest Law. See: Kamil Ateşoğulları: *Ölüm Cezası - Bir İnsanlık Suçu*, İstanbul, 2000, pp.110-111.

²⁰ Human Rights Foundation of Turkey, 8 October 2001.

²¹ See Amnesty International: *Turkey - Death Sentence after unfair trial: The case of Abdullah Öcalan*, August 1999, AI Index: EUR 44/40/99.

A positive step is the abolition of Article 26 (3) on freedom of expression and article 28 (2) on freedom of the press which had banned statements and publications "in a language prohibited by law". These provisions had apparently been targeted at the Kurdish language without mentioning the latter. The law which had allowed the ban on Kurdish had already been lifted in 1991.

It is, however, problematic that the amended Article 26 introduced further restrictions to the exercise of the right to freedom of expression "*for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary*". Such wording can be - and has been in the past - used to penalize peaceful statements on the Kurdish issue or the role of Islam in politics and society. Contrary to Article 10 of the European Convention of Human Rights the Turkish Constitution incorporates too elaborate restrictions and falls short of the requirement that such restrictions must be "necessary in a democratic society."

Several provisions in Turkish law have been applied to suppress the right to freedom of expression. For example, Article 8 of the Anti-Terror Law carries prison terms of between one and three years for so-called "separatist" propaganda without advocating violence. Under this article, for example, the assistant professor of economics Dr Fikret Başkaya was imprisoned in June 2001 after having been sentenced in June 2000 to 16 months' imprisonment for an article he published in the pro-Kurdish newspaper *Özgür Bakış* on the trial of PKK leader Abdullah Öcalan. AI adopted Fikret Başkaya as a prisoner of conscience, as the organization had done previously when he was imprisoned in 1994-1995 to serve a sentence under the same article for a book in which he had dealt with the Kurdish issue in one chapter.²² AI has been calling for Article 8 to be amended in such a way as to ensure that nobody is sentenced solely for peacefully expressing their views and to reflect Turkey's international human rights obligations.

Since this article has come under criticism from the EU and other international partners of Turkey, it has been less often applied in recent years. However, human rights defenders, politicians, writers, journalists and many others who referred to Kurds or Islam have increasingly faced trials and convictions under Article 312/2 of the Turkish Penal Code, which carries prison terms of between one and three years for incitement to hatred based on religious or ethnic difference. One of them is Akın Birdal, President of the Human

²² Turkey : *Dissident voices jailed again*, June 1994 (AI Index: EUR 44/45/94), and *Dr. Fikret Başkaya: prisoner of conscience for the second time*, 16 July 2001, AI Index: EUR 44/042/2001.

Rights Association (IHD) until he was forced to resign due to his convictions. He had to serve two one-year sentences in the years 1999-2000. His only crime was to call for a peaceful solution to the armed conflict which had continued between the Turkish security forces and the PKK since 1984, in speeches related to World Peace Day 1995 and 1996.²³

Another article that has frequently been used to prosecute human rights defenders is Article 159 of the Turkish Penal Code. On 21 March 2001 a trial was opened in which women and men who had denounced rape in custody at a conference held in June 2000 were charged with having insulted the security forces. Some of them were also charged with separatist propaganda under Article 8 Anti-Terror Law in a second trial. Among the defendants in the first trial are alleged rape victims. Similarly Eren Keskin, head of the IHD Istanbul branch and one of the founders of the Legal Aid Project for sexually tortured women, has been standing trial under Article 159 for having insulted the army. Her description of the sexual torture which the "Peace Mothers" had reportedly been exposed to in detention in early October 2000²⁴ had been published in the newspaper *Yeni Gündem*. There are presently a number of trials opened against her because of her human rights activities. It appears that the reference to such articles in legal prosecutions aims to silence people who publicize human rights violations and try to ensure that perpetrators are brought to justice.

AI considers that legal and constitutional guarantees for the right to freedom of expression must be strengthened so that they are compatible with the provisions of Article 10 of the European Convention of Human Rights. It must be ensured that the law can no longer be interpreted in such a way as to restrict this right. This requires a basic change of attitude on the part of the government and the judiciary which would lead to a revision of both law and practice. AI believes that any peaceful expression of views, even regarding the political structure of the state and possible secession should be permitted, and in this regard finds the constitutional amendments insufficient. The European Court has interpreted restrictions to Article 10 very narrowly. Peaceful advocacy of reform, including in relation to matters affecting territorial integrity, may not be restricted even if there is domestic concern about violent separatism. Therefore AI continues to call for a thorough reform of law and practice to fully ensure freedom of expression in Turkey.

The amendment of the Constitution's Article 33 on freedom of association introduced the same restrictions as for freedom of expression. Further restrictions have been retained.

²³ Turkey: "Creating a silent society": Turkish Government prepares to imprison leading human rights defender, February 1999 (AI Index: EUR 44/05/99).

²⁴ See AI Index: EUR 01/001/2001.

²⁵ Together with the existing Law on Associations this provision has been used to seriously impede the activities of associations. This even included an impediment of human rights organizations in Turkey contrary to the UN Declaration on Human Rights Defenders. For example, in May 2001 AI filed an application for permission to open a branch in Turkey under Article 12 of the Law on Associations. This permission requires the signatures of all members of the Council of Minister. AI's application was rejected in November 2001. AI believes that this contradicts Turkey's obligations to guarantee freedom of association under international human rights law and is a missed opportunity to demonstrate commitment to human rights standards.

Local human rights defenders continued to face harassment and intimidation throughout the year 2001. On 7 September the authorities raided the Diyarbakır office of the Human Rights Foundation of Turkey (TIHV), one of five treatment and rehabilitation centres for torture victims around the country. In violation of longstanding medical ethics items including all patient files, computers and details of doctors who supported the Foundation were confiscated and held for a month. A trial was opened against the representative of the office. It was suspected that the reason for the raid was the work carried out by the Foundation into preparing documentary evidence of torture.

On the morning of 30 November 2001 police raided the IHD Bingöl branch and confiscated documents including application forms completed by victims of human rights violations in the province. Rıdvan Kızgın, head of the branch, was reportedly threatened and insulted by the police. He was suspended from chairmanship by decision of the Governor of Bingöl under Article 45 of the Law on Associations Law, because he had apparently denied access to police officers who wanted to follow and video-tape a training program in the IHD branch on the occasion of the International Day against Violence

²⁵ The article now reads: "Everyone has the right to form associations, or become a member of an association, or withdraw from membership without prior permission. No one shall be compelled to become or remain a member of an association. Freedom of association may only be restricted by law on the grounds of protecting national security and public order, or prevention of crime commitment, or protecting public morals, public health. The formalities, conditions, and procedures governing the exercise of freedom of association shall be prescribed by law. Associations may be dissolved or suspended from activity by the decision of a judge in cases prescribed by law. In cases where delay endangers national security or public order and in cases where it is necessary to prevent the perpetration or the continuation of a crime or to effect apprehension, an authority designated by law may be vested with power to suspend the association from activity. The decision of this authority shall be submitted for the approval of the judge in charge within twenty-four hours. The judge shall announce his decision within forty-eight hours, otherwise this administrative decision shall be annulled automatically. Provisions of the first paragraph shall not prevent imposition of restrictions on the rights of armed forces and security forces officials and civil servants to the extent that the duties of civil servants so require. The provisions of this article are also applicable to foundations."

against Women on 25 November. The decision was revised in early January 2002, but Rıdvan Kızgın will have to stand trial.

In Turkey, prominent human rights defenders risk their lives by pursuing their important work. Eren Keskin, head of the IHD Istanbul branch, had been part of a delegation who travelled to Silopi to investigate the "disappearance" of two HADEP representatives. Immediately afterwards, the governor of Şırnak reportedly said on TV that "This woman from the IHD came and stirred everything up". After this, telephone death threats she had been receiving for a while increased. Osman Baydemir, IHD vice chair and head of the Diyarbakır branch, had also received death threats. Upon AI campaigning the threats ceased, at least temporarily. On 15 November 2001 a gunman who alleged that he was "working in the name of the state" entered the IHD Istanbul office and threatened to shoot the people working there, but was finally disarmed by human rights defenders. The same man had attacked offices of the legal party HADEP the previous day and escaped unhindered in spite of the usual police presence outside such offices.

With the protest against new high-security "F-Type" prisons the pressure on civil society has increased enormously since late 2000. Representatives of human rights organizations, political parties or trade unions have been charged with and some of them convicted of support of illegal organizations for having criticized the "F-Type" prisons.²⁶ The branches of IHD in Gaziantep and Malatya have been closed indefinitely and the branches in Van, Konya, Izmir and Bursa were closed temporarily. Other branch offices were raided and their members temporarily detained. Several trials were opened in which IHD representatives have been charged in relation to protests against the "F-Type prisons". On 25 January 2001 the IHD headquarters were raided upon unfounded allegations that the association had received funding from the Greek Foreign Ministry. Many documents were confiscated and subsequently a trial opened in which the prosecution demands the closure of the IHD. AI has observed several of these trials and campaigned on behalf of the human rights defenders.

Recommendations

AI welcomes some aspects of the constitutional reform, but at the same time urges the Turkish authorities to follow up these first steps with further constitutional amendments and the necessary legal reforms in order to fully comply with international human rights standards. Furthermore, these reforms must be applied in practice. Turkey is a state party

²⁶ See Amnesty International: *Turkey: "F-Type" prisons - Isolation and allegations of torture or ill-treatment*, April 2001, AI Index: EUR 44/025/2001.

to the European Convention on Human Rights and other important human rights standards. However, bodies created under these human rights treaties, including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the UN Committee against Torture, as well as the UN Special Rapporteur on torture, a thematic expert appointed by the UN Commission on Human Rights, have repeatedly called upon Turkey to bring both domestic law and its implementation in line with international standards. AI repeats previous recommendations, the implementation of which would help rectify the human rights situation in Turkey regarding the concerns stated in this paper:

1 End torture, “disappearance”, extrajudicial executions and the impunity of those responsible²⁷

- **Shorten periods of custody:** All people deprived of their liberty should be brought promptly before a judge. Prosecutors and judges should only extend the custody period after having seen the detainees in person and making sure that they are not being tortured or ill-treated.
- **Incommunicado detention:** Incommunicado detention should be abolished in law and practice, and clear guidelines should be introduced to ensure that in practice all detainees have immediate access to legal counsel.
- **Define torture in line with international standards:** The definition of torture in Turkish law should at a minimum incorporate the definition in the Convention against Torture.
- **Investigation of complaints:** Turkish authorities should ensure that complaints and reports of torture or ill-treatment, “disappearance” and extrajudicial execution are promptly, impartially and effectively investigated. Even in the absence of an express complaint, an investigation should be undertaken whenever there is reasonable ground to believe that torture or ill-treatment might have occurred. The investigators should be competent, impartial and independent of the suspected perpetrators and the agency they serve. They should have access to, or be empowered to commission, investigations by impartial and independent medical or other experts. The methods used to carry out such investigations should meet the highest professional standards, and the findings should be made public.
- **Medical reports:** Detainees should have immediate access to independent, impartial and competent medical experts. Independent medical or psychiatric reports should be admissible to the investigation. Appropriate equipment for the medical investigation of different forms of torture and ill-treatment should be provided. Medical examinations should be conducted in private under the control

²⁷ For a comprehensive list of recommendations against torture and impunity please refer to AI Index EUR 44/072/2001.

of the medical expert and outside the presence of security or other government officials. In the case of rape and other forms of sexual abuse, the examining health personnel should be of the same sex as the victim unless otherwise requested by the victim.

- **Witness protection:** Alleged victims, witnesses, those conducting the investigation and their families should be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in human rights violations should be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.
- **Prosecution:** Those responsible for human rights violations, including those who order it, should be brought to justice in accordance with international standards of fairness. As recommended by the UN Special Rapporteur on torture after his visit to Turkey, "prosecutors and judiciary should speed up the trials and appeals of public officials indicted for torture and ill-treatment. Sentences should be commensurate with the gravity of the crime."
- **Suspension of officers suspected of torture:** Police officers or gendarmes under investigation or trial for ill-treatment, torture, "disappearance" or extrajudicial executions should be suspended from active duty pending the completion of investigations and if convicted they should be dismissed from the force.
- **Independent decisions on whether to prosecute:** The Law on Prosecution of Civil Servants and similar laws should be amended in order to ensure that any decision as to whether or not to prosecute a government officer for ill-treatment, torture, "disappearance" or extrajudicial execution, or for abuses of authority which might lead to such human rights violations, is taken exclusively by prosecutors and judges.
- **Statements elicited under torture:** Article 15 of the UN Convention against Torture obliges states parties to "ensure that any statement which is established to have been made as a result of torture should not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." A body should be established to review previous convictions based on evidence alleged to have been extracted under torture and, where appropriate, to arrange for prompt retrial or release.

2 Death penalty and executions

- The existing moratorium on executions should be continued.
- The death penalty should be fully abolished from all laws.
- Turkey should sign and ratify Protocol No. 6 to the European Convention of Human Rights.

3 Ensure Freedom of Expression

- All prisoners of conscience should be immediately and unconditionally released and their rights reinstated.
- Article 312 and Article 159 of the Turkish Penal Code and Article 8 of the Anti-Terror Law should be amended or repealed in order to prevent them being used to restrict freedom of expression.
- A thorough review of Turkish law and the constitution should be conducted in order to lift any restrictions on the right to peacefully express opinions, form associations and assemble in public and in order to prevent the law being interpreted in such a way as to extend such restrictions.

4 End repression against Human Rights Defenders

- Human rights defenders should be allowed to pursue unhindered their lawful role of monitoring and reporting human rights matters as set out in the UN Declaration on Human Rights Defenders Resolution of 9 December 1998.
- Charges against human rights defenders for peacefully expressing their views or for carrying out their role of monitoring and reporting human rights abuses should be dropped.
- Offices of human rights organizations that have been legally closed should be allowed to reopen immediately.
- Effective action should be taken to ensure all public servants, including the security forces, recognize the legitimacy of the work of human rights defenders and abstain from making unsubstantiated allegations against human rights defenders. Statements of this nature must be publicly countered and appropriate measures applied to sanction those responsible.
- Integrated programs should be adopted for the protection of human rights defenders that include thorough criminal investigations into attacks and threats against human rights defenders, preventive measures such as education for security agents on the rights of human rights defenders to carry out legitimate activities, as well as security measures to assist with immediate safety issues. Such programs should ensure that all measures to protect human rights defenders are adopted in consultation with members of human rights organizations.

5 Ratify Human Rights Standards

- Turkey should ratify the International Covenant on Civil and Political Rights with its Optional Protocols, the International Covenant on Economic, Social and Cultural Rights, the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women and the Statute of the International Criminal Court and lift any restrictions to conventions to which it is a state party.