



# TURKEY'S JOURNALISTS IN THE DOCK

Judicial Silencing of the Fourth Estate

JOINT INTERNATIONAL PRESS FREEDOM MISSION TO TURKEY  
(SEPTEMBER 11-13, 2019)

**MISSION REPORT**

**#FreeTurkeyJournalists**



Funded by the European Union



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## MISSION REPORT

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The report has been prepared by the International Press Institute (IPI) and each section authored by organizations participating in the mission. Each organization is responsible for the content of its respective section only. Thanks go to Sarah Clarke, ARTICLE 19; Faith Miyandazi, ECPMF; Aurelia Dondo, PEN International; Caroline Stockford, Norwegian PEN; Erol Önderoğlu, RSF; and Tom Gibson, CPJ.

### The mission consisted of the following organizations:

- International Press Institute (IPI)
- ARTICLE 19
- European Federation of Journalists (EFJ)
- Committee to Protect Journalists (CPJ)
- PEN International
- Norwegian PEN
- Reporters without Borders (RSF)
- European Centre for Press and Media Freedom (ECPMF)



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## The mission held meetings with the following:

- Turkish Constitutional Court
- Supreme Court of Cassation (Yargıtay)
- Turkish Ministry of Justice
- Delegation of the European Union to Turkey
- Foreign diplomatic missions in Turkey
- Roundtable of Turkish civil society and journalism groups

## Agenda:

### September 11

Roundtable of Turkish civil society and journalism groups

### September 12

Foreign diplomatic missions in Ankara

Turkish Constitutional Court

Delegation of the European Union to Turkey

### September 13

Supreme Court of Cassation (Yargıtay)

Justice Ministry

Press conference hosted by the Ankara Journalists Association

On behalf of the mission we would like to thank the general secretary of the Constitutional Court, Murat Şen; the deputy first president of the Supreme Court of Cassation Mehmet Kürtül; and the head of the human rights department at the Ministry of Justice, Hacı Ali Açıkgül, and their colleagues for their time and their readiness to engage in a constructive exchange over the performance and challenges facing the country's judicial system.

## Useful acronyms:

- ECtHR: European Court of Human Rights
- ECHR: European Convention on Human Rights
- TCC: Turkish Constitutional Court
- SCC: Supreme Court of Cassation (Yargıtay)
- HSK: Council of Judges and Prosecutors
- SOE: State of emergency
- JRS: Judicial reform strategy
- RTÜK: Radio and Television High Council
- TGS: Journalists Union of Turkey
- TRT: Turkish Radio and Television

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# 1. Introduction

The International Press Institute (IPI) led a mission of eight international freedom of expression and journalists' rights groups to Turkey from September 11 to 13, 2019.

The mission was organized in response to the continued and profound crisis of press freedom, democracy and rule of law in the country that has persisted since the failed coup of July 2016.

Central to this crisis are the 120-plus journalists behind bars and the hundreds more facing prosecution on terrorism-related charges.

While the names in jail have fluctuated over the past three years, the overall figures have barely declined since a high of over 160, marking Turkey out as the undisputed leading jailor of journalists worldwide – a title it has held for almost a decade.

Behind those figures lies a story of egregious violations of fundamental rights, with dozens of journalists held on the most serious terrorism-related charges for months, sometimes years, pending trial, in many cases without an official indictment. When their day in court eventually arrives the prosecution's case invariably hangs on the flimsiest of evidence where legitimate critical journalism has been conflated with terrorist propaganda, part of a campaign to silence opposition voices and close down free speech.

Three years later, the shocking extent of what has unfolded can often be lost in efforts to understand the range and complexities of the different cases and status of prosecutions. Technical discussions about pre-trial detention; rights of appeal; thresholds for investigation and conviction; the right to a fair trial; the revolving door of acquittals and releases followed by new charges; the failings of appeal courts or the TCC to handle cases speedily, efficiently and consistently; the question of exhausting domestic remedies; and disrespect for ECtHR jurisprudence and findings of the Venice Commission are all pieces of the same puzzle which, when examined from a distance, reveals a cold and brutal picture of a judiciary cowed before a presidential system acting without restraint.

Nevertheless, it was the task of this unique coalition of press freedom organizations to attempt to unpick this web of legal proceedings and lay bare where we are today, how we got here and what action needs to be taken for Turkey to escape this cycle of systemic rights abuse.

The mission brought together the International Press Institute (IPI), ARTICLE 19, the Committee to Protect Journalists (CPJ), the European Centre for Press and Media Freedom (ECPMF), the European Federation of Journalists (EFJ), Norwegian PEN, PEN International and Reporters without Borders (RSF).

Over three days the mission met with local journalists, activists and freedom of expression organizations. It met with the Constitutional Court, the Supreme Court of Cassation, and the Ministry of Justice. It also met with representatives of up to a dozen diplomatic missions who are coordinating trial monitoring and engaging with the authorities on judicial reform.

The mission also requested permission to visit several journalists convicted as part of the Cumhuriyet trial in Kandira Prison east of Istanbul. That request was denied the day before the intended visit despite initial positive signs from the Ministry of Justice.

Nonetheless, the mission was able to celebrate a significant breakthrough when the Supreme Court of Cassation unexpectedly overturned the convictions of all journalists except two involved in the Cumhuriyet trial, resulting in the immediate release of all five still behind bars. The court announced the decision on Thursday, September 12, on the eve of a meeting with the mission.

That ruling came just one day after an Ankara court's acquittal of Max Zirngast, an Austrian journalist jailed and tried on charges of membership in a terror organisation that does not appear to exist. IPI had previously campaigned for Zirngast's release.



**While the names in jail have fluctuated over the past three years, the overall figures have barely declined since a high of over 160, marking Turkey out as the undisputed leading jailor of journalists worldwide – a title it has held for almost a decade.**

Three issues clearly stood out from our discussions during the mission:

- The endemic weaknesses and contortions of a judiciary submerged by a wave of tens of thousands of cases while simultaneously suffering the removal and prosecution of a third of its own judges, all the while being presided over by a nominating body under effective executive control, render it unfit for the task. Even the best and most dedicated of judges, of which the country's system is doubtless full, will struggle to deliver justice and due process under such extreme conditions. This is particularly evident in freedom of expression cases where the right to a fair trial is persistently breached and critical journalism routinely presented as terrorist propaganda.
- The judicial reform strategy (JRS), launched with some fanfare earlier in the year, does not currently address any of the substantial issues and obstacles to an effective and independent judiciary, suggesting that its real purpose is to give the impression of reform while in fact normalizing state-of-emergency-style justice.
- The approach of Turkish officials and courts toward fundamental rights remains highly problematic, particularly concerning the conflation of critical journalism with support for terrorist groups. In particular, ECtHR jurisprudence with regards to the scope of protection for freedom of expression is not being observed, which is further reflected in the dozens of cases brought against journalists for insult of the president. Our discussions did not reveal any significant shift in these attitudes.

## 2. Executive Summary:

# Findings and Recommendations

### Findings

- The press freedom environment in the country has not improved since the lifting of the state of emergency in July 2018. Scores of journalists remain behind bars or under travel bans as a consequence of an extended, politically motivated crackdown against the media.
- A subsequent wide-ranging capture of the judiciary has progressively and severely damaged the rule of law and the public's right to access information.
- The removal of up to one-third of judges and a wave of cases resulting from the post-coup-attempt crackdown has placed a burden on the judiciary but cannot be used as an excuse to fail to offer redress to ongoing, systemic and severe violations of fundamental rights.
- The judicial reform strategy (JRS), announced in May 2019 by the Turkish government to address flaws in the justice system, will not be credible unless it guarantees judicial independence in both law and practice and ends the arbitrary persecution of journalists.
- The Constitutional Court has made inconsistent rulings on freedom of expression cases. Where it has found in favour of journalists in line with ECtHR standards, rulings have been met with resistance and obstruction in the lower courts. These developments evidence political interference in the judiciary.
- The mission recognizes the terrorist threat in Turkey but rejects arguments made by the Supreme Court of Cassation that this justifies exceptional measures outside ECtHR jurisprudence and that fundamental freedoms need to be compromised in the name of security. The state's actions clearly demonstrate that the existence of a terrorist threat is being instrumentalized to serve an indiscriminate crackdown on critical voices. The continued conflation – by the Turkish government, prosecutors and courts – of journalistic work with terror propaganda underscores this fact and was a consistent theme in the mission's meetings with the authorities.
- The delegation welcomed the Supreme Court of Cassation's ruling to overturn convictions for defendants in the Cumhuriyet trial, but noted that it cannot reverse the personal damage done to those defendants as a result of their extended imprisonment. It further condemned the court's decision to bring new, more serious, charges against Ahmet Şık.



- The delegation was profoundly alarmed by the new powers of Turkey's audio-visual regulator, the Radio and Television High Council (RTÜK), that extend the agency's control to online broadcasters, threatening their existence through a costly and opaque licensing regime. The lack of a narrow definition of online broadcasting potentially empowers the state to regulate all online activity.
- The accreditation of journalists and system of issuing press cards is in need of substantial reform. In the past three years it has seen the refusal of thousands of applications and removal of hundreds of press cards on security grounds and has been further abused to restrict the work of foreign correspondents in the country.



People hold symbolic press cards during a rally in front of the Istanbul Courthouse, July 28, 2017. EPA/ERDEM SAHIN

## Recommendations

- Turkey must urgently revise all anti-terror and defamation laws, repeatedly abused to silence critical press. In particular it must end the deliberate conflation of public criticism with terrorism propaganda.
- It should take immediate steps to end the arbitrary prosecution of journalists, characterized by baseless indictments, politically driven judgments and severe violations of the right to a fair trial. All jailed journalists should be freed without delay. It should likewise end the misuse of travel bans that needlessly perpetuate the punishment of journalists.
- It should end political interference of the judiciary, including repealing the April 2017 amendment to article 159 of the Constitution, which allowed for direct political control over the nomination procedure to the Council of Judges and Prosecutors, affecting the independence of the entire judicial system.

- RTÜK regulation of online broadcasters must be reviewed to clearly define and limit the scope of regulation to commercial broadcasters to avoid it being used against any government critic.
- A new transparent and open system of press accreditation that is independent of government should be introduced that puts journalist organizations at the centre of the process. Foreign journalists must also be able to attain accreditation and to work free of harassment.
- The persistent refusal of the authorities to allow prison visits is a humanitarian issue that must end. Human rights and solidarity organizations for journalists should be enabled to visit detained journalists.
- Turkish authorities should closely and genuinely involve independent civil society, journalists and international experts in freedom of expression, judicial independence and the rule of law to guide reforms that bring the independence of the judiciary in line with Turkey's commitments under international human rights law.
- The TCC must give priority to applications regarding detained journalists and administrative measures blocking websites, including Wikipedia, banned in Turkey for two-and-a-half years. The delays in these cases seriously harm the public's fundamental right to access information.
- The TCC should improve its consistency of rulings involving journalists to end any ambiguity as to whether journalism can be used as evidence of terrorist propaganda.
- The rulings of the TCC should be respected by lower courts and implemented without delay in line with article 153 of the Constitution.
- TCC rulings that set precedents emphasizing that freedom of expression is a fundamental right and that journalism is not evidence of terrorism must be followed by lower courts.



**Turkey must urgently revise all anti-terror and defamation laws, repeatedly abused to silence critical press. In particular it must end the deliberate conflation of public criticism with terrorism propaganda.**

A clear overview of the reform package that needs to be carried out can be drawn from the submission to the U.N.'s Universal Periodic Review (UPR) that was drafted and submitted by a coalition led by ARTICLE 19 and including many of the mission members in July 2019. The submission is annexed to this report.

## 3. Background Overview and Summary of Key Issues

In the months following the failed military coup of July 2016 and the launch of the state of emergency the crackdown against journalists and media was widespread and merciless. Within weeks over 160 journalists were behind bars, hundreds more facing prosecution, over 170 media had been closed and over 3,000 journalists were out of work.

The broad media crackdown targeted not only journalists whom authorities identified as being associated with the movement led by the exiled preacher Fethullah Gülen, which the Turkish government blames for the coup attempt, but also those with leftist, secular, Kurdish and a range of alternative media, including many that had been critical of the Gülen movement.

While it is correct to identify July 15, 2016 and the attempted coup as the trigger for the recent crackdown, the roots of today's media crisis in Turkey go back much further. Prior to the coup attempt, the AKP government had gradually tamed the media by pushing a trend toward media ownership in government-friendly hands, through the misuse of government contracts to reward friendly outlets, and through punitive investigations into the finances of independent media such as those belonging to the Doğan group.

By 2011, even as Turkey remained for some of its international partners a positive model of democracy in the region, authorities had launched a first wave of arrests of scores of journalists as part of an alleged plot by the so-called "deep state" to organize a military coup, in what became known as the Ergenekon and Oda TV cases. Combined with prosecutions of other outspoken critics such as Füsün Erdoğan and the normalized targeting of Kurdish-language media, by 2012 Turkey had up to 80 journalists in jail.

The Gezi Park protests of 2013 were a watershed in redefining the view of the AKP government both at home and abroad when environmental protests to save a green park from being bulldozed into a commercial centre were met with extreme violence. The level of political pressure on the media became apparent as the main news cameras were turned off and in one famous incident that came to symbolize the media's performance, a penguin documentary was broadcast instead.

At the end of 2013 the alliance between the AKP and the Gülen movement cracked as Gülen-linked prosecutors started investigating and probing corruption among the closest associates of President Recep Tayyip Erdoğan, including Erdoğan's own son. Soon, investigations into the Ergenekon and Oda TV cases were dropped as judges who had led these prosecutions were removed.

By 2015 many of the journalists had been released save a group of approximately 20 to 30 Kurdish journalists accused of affiliation with the banned PKK (Kurdistan Workers' Party). The June 2015 national elections that threatened to unseat the AKP then led to a new period of tension.

During this period Can Dündar and Erdem Gül of the secular daily Cumhuriyet were prosecuted for exposing the military's role in arming rebels in Syria, spending 92 days in jail before being released by the Constitutional Court in February 2016. They were later sentenced to five years in prison for attempted violent overthrow of the government. Gül was eventually acquitted in 2018, while Dündar remains in exile in Germany.

Meanwhile the judiciary's attention had also turned to media considered to be associated with the Gülen movement, including the daily Zaman. The first arrests of journalists at Zaman took place in December 2014 and the company was eventually seized by court order in March 2016.

The July 2016 failed coup attempt then ushered in the current crackdown. A state of emergency (SOE) was immediately declared that saw tens of thousands of people arrested including some 2,745 judges accused of membership of the Gülen movement<sup>1</sup>. A further 170,000 people are estimated to have been fired from their jobs.

Claiming to be seeking to bring those responsible for the coup to justice, the government cracked down on critics of all stripes. Hundreds of journalists from a wide range of media types and backgrounds were arrested, detained and then prosecuted, mostly under anti-terror laws. Those that were released pending trial more often than not had their passports confiscated, internal travel restrictions imposed, and no job to return to after their media were closed by executive order. Over 160 journalists were held in pre-trial detention.

Decrees issued under the SOE saw the immediate closure of 170 media organizations of which only 21 later reopened. It is estimated that over 3,000 journalists lost their livelihoods with the closures.

The SOE finally ended in July 2018 but not before key provisions were translated into law including powers to:

- Extend detention without charge up to 12 days;
- Ban individuals from travelling outside of their cities/provinces;
- Forbid public assemblies without explanation;
- Dismiss individuals from academic, public and judicial service; and
- Relax judicial review of pre-trial detention from every 30 days to every 90 days.

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<sup>1</sup> <https://www.hrw.org/news/2016/08/05/turkey-judges-prosecutors-unfairly-jailed>

## Summary of key issues

Three years of prosecutions and trials of Turkey's journalists have exposed systemic failings in the judicial system and key issues in need of radical reform. The reform priorities are set out in detail in the joint submission to the U.N.'s Universal Periodic Review of Turkey submitted in July 2019, which can be found in the annex to this report. Key elements taken up by the mission include:

**Judicial independence** was seriously undermined by the April 2017 constitutional reforms, which created a presidential system with wide-ranging law-making powers that bypass parliament. Critically for the judiciary, the changes included a new selection process for the Council of Judges and Prosecutors (HSK), which oversees the appointments, promotions and disciplinary matters of judges. A system of election by membership to the 13-person council was replaced by direct appointments by the president (six of 13) and the parliament (seven of 13), opening the judiciary to direct political interference. The lack of judicial independence has seriously negatively impacted journalists' access to a fair trial.

**Pre-trial detention** for hundreds of journalists has lasted for months and sometimes years before investigations are completed and the trials can begin. The state of emergency enabled judges to hold defendants without sufficient justification. The appeals process for individual cases has been exceedingly slow, with the Constitutional Court taking years to eventually take up and rule on individual cases.

**Anti-terrorism legislation** is for the most part poorly defined, leaving room for prosecutors to conflate criticism of government with terrorist propaganda. Moreover, there is no defined threshold of evidence that needs to be obtained in order for the courts to first launch prosecutions and then for judges to assess when a terrorist act has been committed. Evidence presented in journalist cases has invariably been based on the defendants' professional work, revealing perhaps inadvertently the desire to silence journalism as the true motivation for the prosecution.

**Defamation and insult** contained in articles 299 (of the president) and 301 (of the state) have been used to excess since long before the state of emergency in order to tie up critical journalists in expensive and withering legal cases. Between 2014 and 2017 an astonishing 12,300 cases were filed under these two articles<sup>2</sup>. To date the Constitutional Court has failed to take up any of the appeals against conviction which might otherwise provide an opportunity to set a precedent against such abuse of the laws. The ECtHR and the Venice Commission have both criticized Turkey's libel laws as violating international standards on freedom of expression.

The **Radio and Television High Council (RTÜK)** expanded its powers and reach this summer when new legislation came into force on August 1 extending its oversight to online broadcasters, one of the most important remaining areas of free speech in Turkey. Online broadcasters were given one month to

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<sup>2</sup> <https://ahvalnews.com/recep-tayyip-erdogan/record-increase-insulting-erdogan-cases-2014-deutsche-welle>

apply for a licence, which in some cases costs up to 100,000 Turkish liras (16,000 euros) annually, a figure that poses an existential threat to many small and medium-sized broadcasters. The extent of the new powers is still to be determined as there is no clear definition of what constitutes an online broadcaster, nor are there published guidelines on what content the council monitors and how. The potentially boundless scope of the law leaves the system open to enormous abuse.

The **right to a fair trial** has been the subject of extensive monitoring by a number of organizations across the country. A monitoring programme currently being implemented by IPI in cooperation with the Media and Law Studies Association (MLSA) has revealed numerous violations of European and Turkish human rights law with respect to a fair trial – including presumption of innocence, the right to a fair hearing before an independent tribunal, the right to adequate preparation of defence, the right to a lawful judge and even the right to appear personally in court – often combined with violations of rights to liberty and security guaranteed under the European Convention on Human Rights.

The monitoring has revealed, for instance, that in 30 percent of free expression cases at least one member of the three-panel judiciary is replaced during the course of a case. In 47 percent of cases deliberations by the judges are conducted in open court despite judicial impartiality principles requiring private deliberations. There is also an unhealthy and extensive use of SEGBIS, a video conferencing system connecting defendants to the courtroom, resulting in the denial of journalists' right to be present in court. These findings reveal a judicial system unable to fulfil often the most basic principles of fair trials<sup>3</sup>.

**Prison visits** to jailed journalists have been restricted by the government, increasing the journalists' isolation. IPI applied for permission to visit the Cumhuriyet journalists held in Kandira Prison on the first day of the mission and received a positive initial response. However, when the official decision eventually came on the eve of the planned visit IPI was informed that foreign nationals could not attend, and that if Turkish nationals were to apply separately permission could be granted. There was no time to re-apply.

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<sup>3</sup> <https://freeturkeyjournalists.ipi.media/trial-monitoring/>

## 4. Focus Chapters

### a. Judicial independence and the judicial reform strategy

In May 2019 the Justice Ministry launched its judicial reform strategy<sup>4</sup> in the form of a 90-page brochure outlining its aims and objectives. While presented as a major effort to improve and deepen the judicial performance, in reality it side-steps all of the urgent areas of reform that have been identified by international bodies including the Council of Europe's Venice Commission.

In this light, the mission urged representatives of the Turkish government to ensure that the reform strategy addresses the specific changes necessary to protect journalists' fundamental rights. Until such changes are addressed, it is essential for Turkey's international partners to avoid conferring legitimacy on the reform project in terms of a serious shift in human rights policy.

A central aspect of any reform must be judicial independence. In April 2017 constitutional reforms changed the process for selecting the members of the Council of Judges and Prosecutors (HSK) moving from an electoral process by judges to an appointment-based process empowering the president to select six and parliament seven of HSK's 13 members. This system enables the government to effectively handpick the body that oversees the work, selection, promotion and disciplining of judges.

Judicial independence is fundamental to a judiciary's ability to deliver justice. The trial monitoring project conducted by IPI and MLSA in the past year has revealed that in up to 30 percent of freedom of expression cases at least one member of the judicial panel has been replaced during the course of the trial.

When the mission met with the Justice Ministry concerns over judicial independence were dismissed, with ministry representatives stating that the Venice Commission had also criticized the previous system of direct election by the judges. The ministry also stated that the previous system had been criticized by judges, prosecutors and the general public as adversely affecting the labour peace in the judiciary and leading to political polarization. It insisted that each country adapts democratic systems based on its own cultural and political traditions.

Instead, the Justice Ministry explained that the judicial reform strategy would meet the stated aim of "Improving Independence, Impartiality and Transparency of the Judiciary" by introducing more objective criteria for the appointment, transfer and promotion of judges including geographical guarantees that enable judges to refuse transfers to other locations. Ministry representatives claimed this would help reinforce the principal of immovability of judges and reduce scope for pressuring judges

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<sup>4</sup> <https://www.yargireformu.com/>



by strengthening the predictability of their careers. They said the changes were aimed at addressing what they claimed was merely a “perception” of political interference. Despite that commitment, the reforms around immovability of judges were absent from the first reform package (see below).

On October 1, 2019 the government presented the first set of legislation as part of the judicial reform strategy. It included the following

**Anti-terrorism law:** In response to criticism that the wording of the legislation was too vague allowing courts to prosecute journalists for propaganda or membership of a terror organisation just on the basis of their journalism the following amendment was made to article 7 paragraph 2 of the Anti-Terrorism Law regulating the crime of spreading terrorist propaganda [via the press]: “statements made within the limits of providing information or made with the purpose of criticism cannot be criminalized”.

While the change appears to acknowledge the problem, the effect is likely to be limited. The term “terrorist propaganda” remains undefined and open to misuse. There is no reference to international standards. The persistent conflation of terrorist propaganda and journalism by the government, courts and prosecutors is such a defining factor in Turkey’s crackdown that the re-wording of a single article, which itself continues to leave ample room for interpretation, is unlikely to have a significant impact. This is all the more so given the abiding political pressure on courts.

**Pre-trial detention:** The ECtHR has consistently condemned pre-trial detention in freedom of expression cases as a “real and effective constraint” that leads to self-censorship and can only be justified in cases of hate speech or incitement to violence. Moreover, this position has been backed by Turkey’s Constitutional Court in its own rulings against pre-trial detention. Despite these rulings lower courts continue to uphold the detention of journalists without sufficient justification according to international standards.

The new legislation sets the following time limits for pre-trial detention for different crimes:

- Cases under the lower criminal courts: maximum pre-trial detention of six months
- Cases under high criminal courts: maximum detention one year
- Anti-terror legislation: up to 18 months and extendable for another six months.

This reform, however, will do little to improve the situation of journalists, who are targeted most often under anti-terror laws and is in reality a step backwards as it legislates a practice that has been criticized in the Constitutional Court’s rulings<sup>5</sup>. Moreover, it fails to stop prosecutors bringing the most serious charges, without supporting evidence, in order to maximise the length of detention.

The problem is best addressed by improving the definition and scope of terrorism offenses and identifying a clear threshold of evidence before charges are brought and journalists arrested.

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<sup>5</sup> <https://freeturkeyjournalists.ipi.media/turkeys-constitutional-court-gives-contradictory-decisions-on-cumhuriyet-journalists-applications/>



## b. Upholding the rule of law: in conversation with the Turkish Constitutional Court (TCC) and the Supreme Court of Cassation (SCC)

As the law in Turkey has been used to criminalize critical journalism and dissenting expression as acts of terrorism, many judges and prosecutors – themselves under threat of being dismissed or demoted to regional courts – have acted with ruthless efficiency in ordering the prolonged detention of journalists, denying their basic freedoms and often incarcerating them in intolerable conditions. Acting under intense pressure, the lower courts have for the most part convicted without hesitation, while the higher courts have generally confirmed convictions on appeal. Only in the past 18 months, after certain high-profile cases have reached Turkey's Constitutional Court (TCC) and even the European Court of Human Rights (ECtHR), have the higher courts started ruling in favour of individual applicants. Since then there has been a revolving door of journalists winning appeals only to be promptly faced with new charges, travel bans and renewed detention either for the same acts or for hitherto undiscovered crimes committed years earlier.

During the international mission's three meetings with the Ministry of Justice, the TCC and the Supreme Court of Cassation (SCC), we raised concerns about the arbitrary detention of at least 200 journalists since July 2016 and the judiciary's role in the sentencing of journalists on terror-related charges solely on the basis of their reporting.



*Meeting at the Supreme Court of Cassation (SCC), September 13, 2019.*

The delegation pressed for an end to prolonged pre-trial detention of journalists, the arbitrary application of pre-trial detention by the courts and the harsh conditions under which journalists are detained and for the release of all jailed journalists in the country.

This chapter first looks at the role of the SCC and the TCC, the issue of pre-trial detention and emblematic cases of detained journalists. It then deals with the key issues arising from the mission's meetings with the courts, which call into question the effectiveness of the domestic legal system in providing an effective remedy to human rights violations facing journalists.

### **i. The role of the Supreme Court of Cassation (SCC)**

Until the Judicial Reform Package was introduced in October 2019, the SCC was responsible for evaluating appeals of sentences with more than five years upheld by the regional appeals court. Previously, those with lower sentences could not appeal higher than the regional appeals courts. This created a situation in the *Cumhuriyet* case whereby defendants with longer convictions were released following successful appeals to the SCC, while those with sentences under five years remained in jail. The Judicial Reform Package lifted the limitations on appeals in certain types of cases, including defamation and anti-terrorist propaganda, both of which commonly feature in journalist cases, which in theory should resolve this problem<sup>6</sup>.

During the state of emergency, one-third of the SCC's 380 members were dismissed and replaced with new graduates. On August 21, 2019, weeks before the mission met with the court, 20 SCC judges, and 42 city bars across Turkey had boycotted the opening ceremony of the judicial year, which took place in the palace of President Erdoğan, citing concerns over political influence on the judiciary<sup>7</sup>.

### **ii. The role of the Turkish Constitutional Court (TCC)**

Turkey ratified the European Convention of Human Rights (ECHR) in 1954, and the Convention is incorporated into the country's domestic legal system. The TCC was established by the 1961 Constitution and is the highest court upholding the rule of law in the country. The TCC is charged with examining remedies for alleged rights violations under the Constitution. Important to the context of the journalists' cases discussed in this report, the TCC can decide on whether a violation of a journalist's liberty or freedom of expression has taken place and can order the journalist's release. The TCC is also vested with the power to examine the constitutionality of presidential decrees, both as it relates to form and substance.

The TCC has also been affected by dismissals of judges following the imposition of the state of emergency. In July 2016, two judges of the TCC, Alparslan Altan and Erdal Tercan, were accused of having ties to an organization deemed by the Turkish government to be a terrorist organization. They were arrested and placed in detention. The TCC dismissed these two judges from their posts, noting that "information from the social environment" and the "common opinion emerging over time" among

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<sup>6</sup> <https://dokuz8haber.net/english/ipi-analysis-turkey-judicial-reform-proposals-fall-far-short-of-needed-change/>

<sup>7</sup> <http://www.diken.com.tr/42-barodan-sonra-20-yargitay-uyesi-de-sarayi-boykot-ediyor/>

the members of the TCC suggested that the two judges had links to the organization in question<sup>8</sup>. A few weeks after these dismissals, two new judges directly appointed by President Erdoğan took office.

One of the dismissed judges took his case to the TCC but his complaints were dismissed. When he appealed before the ECtHR, that court ruled that his pre-trial detention violated the Convention. The ECtHR explained that there was “insufficient” evidence that he had committed the alleged offence to justify his detention. The same unsupported accusation was the basis on which he was removed from the TCC<sup>9</sup>.

The tenure of judges is a crucial part of the independence of the judiciary. The dismissal of two of the TCC’s judges without reasonable basis has undermined the TCC’s independence. The erosion of the judiciary’s independence was then compounded by the constitutional amendments passed in April 2017 modifying the procedure of appointment of members to the Council of Judges and Prosecutors (HSK), which is the body responsible for the admission, appointment, transfer, promotion, disciplinary proceedings and supervision of judges (including the TCC judges)<sup>10</sup> and prosecutors. Whereas the HSK was previously functionally independent, under the new rules, Turkey’s president has the power to directly appoint six of its 13 members.

### **iii. Pre-trial detention (including emblematic cases)**

International standards on the application of pre-trial detention require that the courts provide justification by reference to (a) danger of absconding; (b) obstruction of proceedings (e.g. intimidation of witnesses); (c) repetition of offences; and/or (d) preservation of public order. However, according to our trial observations in Turkey, while the courts do provide justification citing one of these, they fail to provide adequate reasoning for their assessment. The Turkish courts also frequently detain individuals with the justification that they are charged under one of the “catalogue crimes”, such as terrorism or sedition. While this could be considered a preservation of public order issue, the argument would need to be justified with specific reference to the facts of the case. It is hard to see how this could ever be justified with reference to the journalistic activities of an individual.

During the meetings, the delegation highlighted its concerns that in trials of journalists, pre-trial detentions are usually justified on the grounds that they are held for terrorism-related crimes, but that when the case comes to court the evidence produced is largely or solely based on their journalism or other activities which on the face of it do not appear to be evidence of a criminal act. After a journalist has been detained, indictments are frequently not produced for many months, and in some cases years. Once completed, they are invariably of very poor quality: failing to establish the basis of charges

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<sup>8</sup> *Alparslan Altan v. Turkey*, no. 12778/17, § 23, 16 April 2019.

<sup>9</sup> *Alparslan Altan v. Turkey*, no. 12778/17, §§ 29-42, 148, 16 April 2019. Tercan’s application before the Court is still pending (*Tercan v. Turkey*, no. 6158/18, Communiqué, 9 September 2019).

<sup>10</sup> Venice Commission, *Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017*, 13 March 2017, paras 121-123, available at <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e)>.

and the most basic *prima facie* evidence; at times running to hundreds of pages of conflicting information; and in some cases including evidence cut and pasted from separate cases involving different defendants.

Journalists charged with terrorism offences have family visits and phone calls heavily restricted, and access to letters and books prohibited. The removal of procedural safeguards relating to access to lawyers in police detention through the decrees passed during the state of emergency from 2016 to 2018 has led to rising numbers of allegations of torture and other cruel, inhumane or degrading treatment in pre-trial detention<sup>11</sup>, most notably in the southeast, including against journalist Nedim Tüfent<sup>12</sup>.

The following emblematic cases of journalists, which members of the delegation have monitored throughout, were raised by the mission in our meetings with the SCC and the TCC:

### **Ahmet Altan, Mehmet Altan and Nazlı Ilıcak**

- Writers Ahmet Altan and Nazlı Ilıcak in effect each spent over three years in pre-trial detention on manifestly groundless charges, between their arrests in August and September 2016 to their conviction and conditional release on November 4, 2019<sup>13</sup>. Ahmet Altan was re-arrested on November 12 after a prosecutor appealed against the release. Writer Mehmet Altan was arrested alongside his brother Ahmet and Ilıcak in August 2016. The three were tried together. Despite similar facts, Mehmet Altan was released in June 2018 (see case details below under implementation and inconsistencies sections). From the time of their arrest and until the end of the state of emergency in July 2018, both Altan brothers and Ilıcak were subjected to particularly harsh restrictions in their access to lawyers<sup>14</sup>. Upon arrest, Ahmet and Mehmet Altan were refused access to legal counsel for five days. Subsequently, they were allowed to meet just once a week for an hour, while under surveillance<sup>15</sup>. Moreover, although the accused were informed of the general nature of the allegations against them, it was not until shortly before the trial commenced that they were apprised of the indictment and the prosecutor's case. This late disclosure impeded the ability to effectively challenge the lawfulness of their detention<sup>16</sup> until after the court had approved the indictment on May 3, 2017, more than eight months after their arrests and detention.

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<sup>11</sup> In Custody Police Torture and Abductions in Turkey', Human Rights Watch, 12 October 2017; Available at: <https://bit.ly/2ydO8Um>.

<sup>12</sup> Office of the United Nations High Commissioner for Human Rights, Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, January – December 2017, March 2018, para. 4, available at: [https://www.ohchr.org/Documents/Countries/TR/2018-03-19\\_Second\\_OHCHR\\_Turkey\\_Report.pdf](https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf)

<sup>13</sup> <https://www.article19.org/resources/turkey-ahmet-altan-and-nazli-ilicak-released-but-judicial-harassment-continues/>

<sup>14</sup> <http://www.barhumanrights.org.uk/wp-content/uploads/2017/09/Turkey-Report-June-2017.pdf> pp. 21-22.

<sup>15</sup> Authorities must respect the confidentiality of communications and consultations within the professional relationship between lawyers and their clients (see UN Basic Principles on the Role of Lawyers, Principle 22), and Governments must ensure that detainees can consult and communicate with counsel without delay, interception or censorship (see UN Human Rights Committee (HRCttee), General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 32-34).

<sup>16</sup> <http://www.barhumanrights.org.uk/wp-content/uploads/2017/09/Turkey-Report-June-2017.pdf>

- In July 2019, the SCC quashed their convictions for “attempting to overthrow the constitutional order through violence and force”, and their sentences of aggravated life imprisonment<sup>17</sup>. The appeals decision stated that no causal link had been established between the evidence presented and the crime. They should have been released pending a retrial but were kept in detention. The case of the three writers was then referred back to the lower court for a retrial on reduced terrorism-related charges. At the opening hearing, which took place on October 8, 2019 and after the time of this mission, the judge could have ordered the release of Ahmet Altan and Ilıcak, given the clear lack of grounds for their continued detention. However, this did not take place and they remained in prison until their conviction on November 4, 2019, when they were given outrageous convictions of “aiding” a terrorist organization. The two journalists were sentenced to 10 years, six months and eight years, nine months, respectively. The court ruled to release them under travel bans during the appeals process, considering time served<sup>18</sup>.

## Cumhuriyet

- Between October 31, 2016 and April 18, 2017, a total of 17 journalists and staff members of the newspaper Cumhuriyet were arrested and held in pre-trial detention at Silivri prison on clearly unfounded charges<sup>19</sup>.
- Despite almost identical facts in the cases, over the course of the proceedings, some defendants were released on bail, while others were not, despite their circumstances being nearly identical. The last to be released after more than 500 days detention was Akin Atalay, president of the newspaper’s executive board. The presiding judge had earlier justified his continued detention by saying that “captains are the last to leave the ship”, a poor legal argument for prolonged pre-trial detention.
- During the detention of the Cumhuriyet journalists, family visits were restricted to once every two months, and their right to telephone restricted to once every 15 days for a maximum of 10 minutes. Letters and books were banned<sup>20</sup>.
- Ahmet Şık, one of the defendants in the Cumhuriyet case was singled out by the authorities for particularly harsh treatment. Detained on December 29, 2016 Şık was held in Metris prison until January 2, 2017 in solitary confinement and was refused drinking water by the authorities on the grounds that “the café was closed”<sup>21</sup>. He was kept in solitary confinement for one week and thereafter detained for 435 days between December 29, 2016 and his release on appeal on March 9, 2018<sup>22</sup>.

<sup>17</sup> <https://www.article19.org/resources/turkey-aggravated-life-sentences-in-altans-trial-confirm-absence-of-rule-of-law/>

<sup>18</sup> <https://www.article19.org/resources/turkey-ahmet-altan-and-nazli-ilicak-released-but-judicial-harassment-continues/>

<sup>19</sup> <http://pen-international.org/news/cumhuriyet-verdict-huge-blow-to-freedom-of-expression>

<sup>20</sup> See UN Working Group on Arbitrary Detention (WGAD), Opinion No. 41/2017 concerning 10 individuals associated with the newspaper Cumhuriyet (Turkey), A/HRC/WGAD/2017/41, 26 July 2017, paras 68-69.

<sup>21</sup> <http://bianet.org/english/human-rights/182452-no-drinking-water-given-to-journalist-ahmet-sik-in-prison-for-3-days>.

Pursuant to Rule 22(2) of the Nelson Mandela Rules, drinking water shall be available to every prisoner whenever he or she needs it (UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc A/RES/70/175, 17 December 2015).

<sup>22</sup> <https://ipi.media/turkeys-ahmet-sik-nears-500-days-behind-bars/>



- The U.N. Working Group on Arbitrary Detention found the detention of ten of the Cumhuriyet journalists to be arbitrary in a decision of July 26, 2017<sup>23</sup>, but their findings were ignored.
- In an unexpected development, the evening before the mission’s meeting with the SCC, its 16th Criminal Chamber overturned<sup>24</sup> the convictions against Cumhuriyet journalists Atalay, Erinç, Sabuncu, Engin, Çetinkaya and Şık, having found that the elements of the “aiding a terrorist organization without being its member” charge were not present in the case. Further, it ruled to suspend the execution of the sentences of Gürsel, Utku, Çelik, Öz, Kart, Kara and Güngör and ordered the release of the latter five journalists. The chamber upheld the appellate court’s ruling concerning the conviction against Cumhuriyet accountant Emre İper, who remained in prison until October 25, 2019<sup>25</sup>.



*Judicial Reform Strategy published by Turkish Justice Ministry in May 2019.*

- While welcoming these decisions, the mission raised profound concerns with the court’s decision, in the same ruling, to charge Ahmet Şık, with “legitimizing the acts of a terrorist group” and “denigrating the bodies and organs of the state of the Turkish Republic”. These are new charges relating to alleged

<sup>23</sup> [http://www.un.org.tr/humanrights/images/pdf/A\\_HRC\\_WGAD\\_2017\\_41\\_EN.pdf](http://www.un.org.tr/humanrights/images/pdf/A_HRC_WGAD_2017_41_EN.pdf)

<sup>24</sup> <https://expressioninterrupted.com/tr/wp-content/uploads/2019/02/CUMHURIYET-DAVASI-ISTINAF-KARARI.pdf>.

<sup>25</sup> E.g., <https://cpj.org/2019/09/five-staffers-of-turkeys-cumhuriyet-newspaper-rele.php/> / <http://bianet.org/english/media/212978-cumhuriyet-journalists-released-after-supreme-court-of-appeals-judgment>

incidents from 2014. They also appear to fail to implement the TCC ruling in the case of Deniz Yücel, which involved similar facts. The mission stressed its concern at what appears to be another politically motivated cycle of judicial harassment of Şık, which will result in further delays of justice until the case reaches the TCC.

- The re-trial in the Cumhuriyet case is due to commence on November 21, 2019.

### Deniz Yücel

- Journalist Deniz Yücel spent a year in pre-trial detention, including ten months in solitary confinement<sup>26</sup>. A decision by the TCC found his detention to have been unlawful, to have violated his right to liberty and right to freedom of expression<sup>27</sup>.

### İdris Sayılğan

- Journalist İdris Sayılğan was held in pre-trial detention from October 24, 2016 to January 2019, when he was sentenced to eight years and three months on charges of membership of a terrorist organization. All the accusations against the journalist were based on Sayılğan's journalistic work, including communication with his sources. When it handed down its verdict, the trial court refused to grant a reduction in the sentence it had imposed on Sayılğan on the grounds that his "defence statement went beyond the limits of defence" and "was accusatory against the court".

#### *Response from the Turkish Constitutional Court (TCC)*

The TCC recognized the problem of the time it takes before it rules on pre-trial detention cases but blamed the delays on the sheer volume of cases before the court (*for further details see section on Delays in Justice below*). The TCC noted that it gives priority status to pre-trial detention and freedom of expression cases but that this status is lost in pre-trial detention cases once the defendant is convicted or released.

In response, the mission noted its grave concern that in practice the court has routinely delayed decisions until journalists have either been convicted – losing their priority status – or released by lower courts. The TCC is therefore failing to provide a remedy for the individual journalist's application regarding violation of the right to liberty until after the journalist is sentenced and a violation decision regarding pre-trial detention is no longer relevant and does not result in their release on bail.

#### *Response from the Supreme Court of Cassation (SCC)*

While SCC representatives conceded that there was a problem with over-use of pre-trial detention, the judges of the SCC pointed out that under the state of emergency, one-third of the court's judges had been dismissed and that the newly graduated judges who had been appointed in their place require

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<sup>26</sup> <https://ecpmf.eu/news/threats/jailed-journalist-deniz-yuecel-no-longer-in-solitary-confinement>

<sup>27</sup> 'Turkey's Constitutional Court gives contradictory decisions on Cumhuriyet journalists' applications' IPI, June 28, 2019. <http://bit.ly/2ZacOHF>

training. They acknowledged that this situation means there can be errors in procedure and decisions as the newly appointed judges lack experience.

However, they also emphasized their view that Turkey faces exceptional security challenges that set it apart from other Council of Europe member states subject to the European Convention on Human Rights. This, they argued, made their task of balancing rights and freedoms with security particularly difficult. Despite this, the judges of the SCC insisted that they strive to apply Article 10 of the ECHR on freedom of expression. The mission, however, noted its concerns that the SCC fails to implement the relevant case law of the ECtHR, in particular in relation to states' positive obligation to create an enabling environment for freedom of expression.

#### **iv. Lack of implementation of decisions of the TCC and the ECtHR by lower courts**

Article 153 of the Turkish Constitution states that TCC decisions are binding on the lower courts. Therefore, cases where lower courts fail to implement TCC decisions raise serious concerns regarding the rule of law and the effectiveness of the Turkish legal system in providing an effective remedy to rights violations.

In its meeting with the TCC, the mission welcomed a number of important decisions relating to the cases of journalists. In particular, the mission welcomed the TCC's finding violations relating to pre-trial detention in a number of journalist cases including Turhan Günay<sup>28</sup>, Mehmet Altan, Şahin Alpay, Deniz Yücel and Kadri Gürsel. While these rulings are welcome in principle, in practice the lower courts have not consistently implemented these decisions, particularly in cases which are high profile and subject to clear political pressure.

For example, in January 2018, the TCC ruled that the fundamental rights of Mehmet Altan and Alpay had been violated by their pre-trial detention and that they should be released from custody. After Prime Minister Binali Yıldırım claimed the TCC's ruling was "not the final decision", the High Criminal Court subsequently defied the TCC's decision, calling it a "usurpation of authority". In March 2018, the ECtHR endorsed<sup>29</sup> the January 2018 ruling of the TCC and sharply criticized the lower courts for refusing to implement the January decision. Despite both the TCC and ECtHR rulings, Mehmet Altan was only released from prison on June 27, 2018 by the Istanbul Regional Court.

#### *Response from the TCC*

In response to the concerns relating to non-implementation of decisions, the TCC excused the behaviour of the lower courts by suggesting that they "did not understand the judgments and as a

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<sup>28</sup> <http://www.constitutionalcourt.gov.tr/inlinepages/press/PressReleasesofJudgments/detail/108.html>

<sup>29</sup> Also see *inter alia*: Dilek Kuban, 'A Love Letter from Strasbourg to the Turkish Constitutional Court', 27 March 2018, available at: <https://verfassungsblog.de/a-love-letter-from-strasbourg-to-the-turkish-constitutional-court/> (last accessed 12 September 2019); Senjem Gurol, 'Resuscitating the Turkish Constitutional Court: The ECtHR's Alpay and Altan Judgments', 3 April 2018, available at: <https://strasbourgothers.com/2018/04/03/resuscitating-the-turkish-constitutional-court-the-ecthrs-alpay-and-altan-judgments/> (last accessed 12 September 2019).



result failed to release Mehmet Altan". They went on to outline to the mission a new four-year training programme to train the lower courts on how to implement decisions of the TCC.

Given the clarity of the TCC decisions in *Altan* and *Alpay*, and the public comments of senior political figures on the case, the mission noted its scepticism that training the lower courts would provide an effective means of addressing what is in reality a constitutional crisis. Training programmes are plainly insufficient to have any meaningful impact on restoring the independence of the judiciary.

#### **v. Inconsistency of the decisions of the TCC**

Part of the role of the TCC is to assess individual applications challenging rights violations in accordance with the ECHR, and to assess the compatibility of the lower courts' decisions with the jurisprudence of the ECtHR. As the highest court upholding the rule of law in Turkey, cases of detention of journalists, concerning similar facts, should have consistent outcomes at the TCC. Indeed, the principle of legal certainty is "implicit in all Articles of the Convention and constitutes one of the basic elements of the rule of law"<sup>30</sup> and requires "consistent practice [...] within the highest court in the country"<sup>31</sup>.

However, in a number of cases involving high-profile journalists, the TCC has issued conflicting decisions. The mission raised concerns about inconsistent decisions in the *Cumhuriyet* and *Altans* cases, which are emblematic of this problem.

On May 2 and 3, 2019, the TCC issued decisions involving 14 journalists, nine of whom were prosecuted together in the *Cumhuriyet* case, and the remainder in other cases. These journalists had all been convicted. The court in its ruling on May 2, 2019, found no evidence of fundamental rights violations in the case of 11 defendants. In the case of three others, however, including IPI Executive Board member Kadri Gürsel, the court found violations of the rights to liberty and security and of freedom of expression in connection with unjust long-term detention of journalists pending trial<sup>32</sup>.

These decisions were inherently contradictory because the journalists had been detained prior to trial for comparable periods of time and the nature of the evidence used against them was the same. Moreover, in the *Cumhuriyet* case, all 10 journalists were prosecuted jointly in the same set of proceedings.

Similar inconsistency was demonstrated in the *Altan brothers'* trial. While the TCC ruled in January 2018 that the rights of Mehmet Altan had been violated, in May 2019 it declined to find a violation of the rights of Ahmet Altan and Nazlı Ilıcak, despite the fact that the circumstances of their cases were nearly identical. Five judges dissented from that opinion, including the president of the TCC, who argued in his dissenting opinion that Ahmet Altan's right to freedom of expression had been violated.

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<sup>30</sup> *Brian v. Romania* (no. 1), no. 30658/05, § 39, ECHR 2007-V.

<sup>31</sup> *Lupin Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 134, 29 November 2016.

<sup>32</sup> <https://freeturkeyjournalists.ipi.media/turkeys-constitutional-court-gives-contradictory-decisions-on-cumhuriyet-journalists-applications/>.

## *Response from the TCC*

The TCC's response was to insist that all the rulings were made in line with ECtHR standards and that where rulings differed it was because the evidence differed. They would not be drawn on the details of the individual cases.



*Meeting at the Turkish Constitutional Court (TCC), September 12, 2019.*

However, members of the mission delegation have closely monitored both cases and are very familiar with the facts of the cases and the evidence presented at trial. It is extremely hard to see how differing decisions could be justified since in both cases the nearly identical evidence presented related to the defendants' journalistic activities and gave no legitimate justification for prolonged pre-trial detention. More generally, the TCC's contradictory decisions in these cases raise significant concerns of legal certainty.

## **vi. Delays in rulings**

In order for a remedy provided by the TCC for a breach of the ECHR to be effective, it must be dispensed in a timely manner<sup>33</sup>.

The mission criticized the failure of the TCC to address individual applications related to ongoing rights violations in a timely manner. Since the imposition of emergency rule in July 2016, the number of individual applications filed with the TCC has significantly increased, resulting in a greater backlog of cases and a corresponding delay in their consideration and resolution. In 2016, the number of applications filed with the TCC quadrupled compared to 2015, to 80,756 cases. Approximately 40,000

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<sup>33</sup> *Atanasov and Apostolov v. Bulgaria*(dec.), nos. 65540/16, 22368/17, § 52, 63, 27 June 2017; *Neshkov and Others v. Bulgaria*, nos. 36925/10 and 5 others, §§ 183-184, 281, 27 January 2015; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §195, ECHR 2006-V; *Smatana v. the Czech Republic*, no. 18642/04, § 144-145, 27 September 2007; *Kudła v. Poland*[GC], no. 30210/96, § 152, ECHR 2000-XI; *Bączkowski and Others v. Poland*, no. 1543/06, § 83, 3 May 2007; *De Souza Ribeiro v. France*[GC], no. 22689/07, § 81, ECHR 2012; *Öneryıldız v. Turkey*[GC], no. 48939/99, § 152, ECHR 2004-XII.

cases were filed in each of 2017 and 2018<sup>34</sup>. The volume of the TCC's unresolved cases has also continued to grow. By the first half of 2019, the number of unresolved individual applications before the TCC had increased to 46,629 cases, of which nearly 1,500 are applications that were filed in 2016 and that remain unresolved<sup>35</sup>.

The mission highlighted the cases of İdris Sayılğan and the blocking of the website Wikipedia as illustrative of these concerns:

- In July 2018, lawyers for Sayılğan, a Kurdish journalist who at the time was in pre-trial detention since October 2016, filed an individual application to the TCC. The TCC has not yet acted on the application. In January 2019 Sayılğan was sentenced to eight years and three months in prison by a lower court.
- Wikipedia has been blocked in Turkey since April 2017, despite the obvious ongoing nature of this violation in preventing the Turkish public's access to a critical source of information. We compared it with the speed (10 days) with which the TCC had dealt with a block on Twitter and YouTube prior to the imposition of the state of emergency.
- Both the Wikipedia and Sayılğan cases are now pending before the ECtHR, which will have to address the question of whether the TCC offers an effective remedy, particularly in light of its failure to deal with cases in a timely manner.

#### *Response from the TCC*

The TCC recognized the problem of the time it takes before it can rule on a case but explained the delays on the sheer volume of cases before it and insisted that its record was within the time delay considered reasonable by the ECtHR. The TCC said it had 44,000 cases in front of it, compared to what it said were 5,000 before the German Constitutional Court. The TCC noted that it currently takes an average of 15 to 16 months to rule on a case, which it said was in line with ECtHR standards. The court told the mission that it was trying to reduce this waiting time to eight months. The TCC noted that it does have a system to prioritize cases that includes freedom of expression-related cases and that the TCC's General Assembly also has the authority to fast track particular cases. Furthermore, the TCC said that the ECtHR has stated its full support for the TCC regarding the manner in which they are dealing with freedom of expression cases.

In response, the mission reiterated the ECtHR judgment in the case of Mehmet Altan, in which the ECtHR considered the issue of delays in rulings, stating that it was not possible to consider the TCC's review of the case, which took 14 months and three days, as "speedy", but made an exception given the workload

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<sup>34</sup> Constitutional Court of the Republic of Turkey, 2019 Statistics, p 1 available at [https://www.anayasa.gov.tr/media/6136/bb\\_statistics\\_2019-2.pdf](https://www.anayasa.gov.tr/media/6136/bb_statistics_2019-2.pdf).

<sup>35</sup> Constitutional Court of the Republic of Turkey, 2019 Statistics, available at [https://www.anayasa.gov.tr/media/6136/bb\\_statistics\\_2019-2.pdf](https://www.anayasa.gov.tr/media/6136/bb_statistics_2019-2.pdf).

of the court following the failed coup attempt. However, the ECtHR essentially put the TCC on notice, stating that the TCC did not have a “carte blanche” to take its time in future cases.

In response to the TCC’s claim that it gives priority status to those in pre-trial detention, the mission noted that in practice the court has routinely delayed decisions until journalists have either been convicted – losing their priority status – or released, in which case the impact of the TCC’s ruling is blunted and the devastating consequences of pre-trial detention have unfolded.

## **vii. Conclusion**

The mission noted to the TCC that these issues significantly undermine the effectiveness of the individual application mechanism before the TCC. In the context of the severe erosion of judicial independence in Turkey, the lack of implementation of TCC judgments, the inconsistencies of TCC decisions on similar facts and the severe delays in dealing with cases underpin the mission’s assessment that the TCC is failing to provide an effective domestic remedy for journalists in Turkey.

The mission believes that the ECtHR should rule on cases from Turkey without requiring the exhaustion of such remedy.

### c. Anti-terror legislation: the urgent need for meaningful reform

Prosecutions aimed at silencing journalists without evidence of criminal wrongdoing are frequently brought under anti-terrorism laws in Turkey. At the end of 2018, a total of 44,690 people were in prison on “terrorism”-related charges, including journalists, political activists, lawyers, human rights defenders and others caught up in the crackdown following the 2016 coup attempt that has vastly exceeded the legitimate purpose of investigating those responsible and bringing them to justice<sup>36</sup>. As highlighted in the preceding section on the rule of law, the majority of the 230 journalists detained in Turkey since the July 2016 imposition of the state of emergency are charged with, or convicted on, terrorism offences.

Turkey's loosely written, overbroad anti-terror legal framework – which long pre-dates the imposition of the state of emergency – has been extensively criticised by the United Nations, the Council of Europe and the European Union<sup>37</sup>. The state of emergency decrees (2016 to 2018) supplemented an already dense network of antiterrorism laws and proscriptions on expression, while reducing channels for judicial review and appeal. While the state of emergency was lifted in July 2018, a number of key emergency powers were transposed into the ordinary legal framework and made permanent under Law no. 7145. These laws have had a severe impact on journalists and their families. Despite sustained international and domestic criticism, Turkey has failed to reform its anti-terror legal framework to bring it into line with international standards. This reform is urgently required to protect journalists from baseless prosecutions on terrorism charges.

The government has a critical duty to protect against terrorist threats, but international law mandates respect for human rights in the fight against terrorism. In keeping with these dual requirements, criminal offences should be narrowly defined and applied according to strict implementation of the standards of necessity and proportionality<sup>38</sup>.

Under international human rights law, offences such as “encouragement of terrorism”, “extremist activity”, as well as offences of “praising”, “glorifying”, or “justifying” terrorism must be clearly defined to

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36 <https://www.amnesty.org/download/Documents/EUR4411612019ENGLISH.PDF>

37 See, *inter alia*, UN Human Rights Committee, Concluding Observations on the initial report of Turkey, UN Doc CCPR/C/TUR/CO/1, 13 November 2012, para. 24; UN Special Rapporteur on freedom of expression, Report on his mission to Turkey, UN Doc A/HRC/35/22/Add.3, 21 June 2017, para. 14; European Commission for Democracy through Law, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002, 15 March 2016, para. 27; Parliamentary Assembly of the Council of Europe (PACE), Resolution 2121 (2016) on the functioning of democratic institutions in Turkey, 22 June 2016, para. 28. Also see PACE, Resolution 2141 (2017) on attacks against journalists and media freedom in Europe, 24 January 2017; and PACE, Resolution 2156 (2017) on the functioning of democratic institutions in Turkey, 25 April 2017; Commissioner for Human Rights, Memorandum on freedom of expression and media freedom in Turkey. CommDH(2017)5, 15 February 2017, para. 12; Commissioner for Human Rights, Report following his visit to Turkey from 27 to 29 April 2011, CommDH(2011)25, 12 July 2011; Commission staff working document: Turkey 2019 report, <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-turkey-report.pdf>

38 See, for example, General Assembly resolution 57/219, Human Rights Committee general comment No. 29 and A/HRC/6/17 and Corr.1.

ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression<sup>39</sup>.

In the meetings with the Ministry of Justice, SCC and TCC, the mission highlighted that the provisions of the Criminal Code, the Code of Criminal Procedure and the Anti-Terrorism Law (outlined below) limit constitutional guarantees for the right to free speech.

The mission also highlighted the concern that prosecutors and the lower courts are failing to set an appropriate, reasonable threshold of evidence to be met before arrests are made and charges brought on the grounds of terrorism. The experience of monitoring hundreds of hearings of journalists on trial on terrorism charges has led participating organizations to conclude that the judicial practices of the past few years have effectively destroyed the line between crimes of terrorism and expressions of thought<sup>40</sup>.

### **i. Vague terrorism offences**

In relation to anti-terror legislation, the mission noted our particular concerns with:

- **Anti-Terrorism Law (Law no. 3713):** Several provisions of Law no. 3713 concern membership in and propaganda supporting terrorist organizations, yet the law does not define acts that would constitute terrorism, and other key terms are left undefined. Article 7(2) of the Anti-Terrorism Law prescribes one to five years' imprisonment for those who make "propaganda of a terrorist organization by justifying or praising or inciting the terrorist organizations". The provision is particularly harsh on the media: "Propaganda" expressed via press and publication also increases the punishment by half. Journalist Ertuğrul Mavioglu and documentary filmmaker Çayan Demirel, the co-directors of the documentary *Baku (North)*, were convicted of "disseminating propaganda for a terrorist organization" on July 18, 2019 for their 2015 documentary about PKK militants' withdrawal during the short-lived Kurdish-Turkish peace process. ARTICLE 19 reviewed the documentary and believes that it amounts to legitimate reporting and expression of opinions on political events, in particular the ongoing conflict in southeast Turkey. The court initially sentenced each to three years in prison. The sentences were increased on the grounds that "the crime had been committed through the press."<sup>41</sup>

The Turkish Penal Code punishes membership in a criminal organization. According to article 6, membership in criminal organisation includes "any person who establishes, controls or joins a criminal organisation".

- **Article 220(8)** provides for one to three years' imprisonment for anyone who makes "propaganda for an organization in a manner which would legitimize or praise the terror organization". The article

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39 General Comment No. 34, Human Rights Committee, 12 September 2011, para. 46

40 See, *inter alia*, <http://www.barhumanrights.org.uk/wp-content/uploads/2017/09/Turkey-Report-June-2017.pdf>;  
<http://www.barhumanrights.org.uk/wp-content/uploads/2017/11/Turkey.Altan-trial.part-2.v1-.pdf>;

41 See ARTICLE 19's expert opinion on the Bakur case and article 314 here: <https://www.article19.org/resources/turkey-charges-against-filmmakers-violate-right-to-free-expression/>

increases the penalty by half if the propaganda is expressed through the press or broadcasting. Individuals' posts and shares on social media have been relied on as evidence of terrorist propaganda, among other offences. The wording of the article is so vague that legitimate commentary or criticism of the government can lead to prison. For example, journalists Hayri Demir and Sibel Hürtaş were detained for their social media posts reporting on a military operation in Syria and convicted of spreading "terrorist propaganda" online.

- **Article 220(7)** criminalizes committing an offence on behalf of a proscribed group and sets out that any individual who commits such an act be automatically classified as a member of the proscribed organization, making them liable to five to 10 years' imprisonment under article 314. This provision has allowed the authorities to vastly expand the concept of membership in terrorist groups, often without credible evidence, targeting persons for the exercise of their right to freedom of expression. Simply working, or having previously worked for, newspapers aligned, or perceived to be aligned with the Gülen movement has been used to label journalists as "members". Similarly, working for media outlets considered pro-Kurdish has seen journalists charged with membership of a terrorist organization or proscribed organization under Turkish law such as the PKK. Ahmet Altan and Nazlı Ilıcak were charged under this article in their retrial.
- **Article 220(6)** criminalizing committing crimes in the name of a terrorist organization despite not being a member of it. The Cumhuriyet defendants were charged under this article.
- **Article 314** criminalizes membership of armed groups. It is punishable by five to 10 years' imprisonment. Six journalists previously working with Zaman newspaper were sentenced under this article<sup>42</sup>.

The ECtHR has considered many applications related to the Turkish criminal code provisions on membership of, and aiding and abetting of, an armed organisation<sup>43</sup>. In particular, the Court has found an interference with the right to freedom of expression when the only evidence that led to the criminal convictions of the applicant was forms of expression<sup>44</sup>.

Commenting on these provisions, the Venice Commission has noted "when publications are treated under the heading of "membership" of a terrorist organization, "aiding and abetting" it, or acting "on behalf of" it, the risk of unjustified interference in the freedom of speech is much higher." They note that a judge applying those specific provisions should be aware of their dimension under Article 10 of the ECHR. This awareness reduces the risk that acceptable forms of expression would be suppressed by means of the criminal law.

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42 <https://www.article19.org/resources/turkey-unjust-verdicts-in-trial-of-zaman-journalists/>

43 See, inter alia, European Court, *Sirin v Turkey* (admissibility decision), App. No. 47328/99, 27 April 2004; *Kılıç v Turkey* (admissibility decision), App. No. 40498/98, 8 July 2003; *Siz v Turkey* (admissibility decision), App. No. 895/02, 26 May 2005; *Turan v Turkey* (admissibility decision), App. No. 879/02, 27 January 2005; *Arslan v Turkey* (admissibility decision), App. No. 31320/02, 1 June 2006; *Kızılöz v Turkey* (admissibility decision), App. No. 32962/96, 11 January 2000.

44 European Court, *Yılmaz and Kılıç v Turkey*, App. No. 68514/01, 17 July 2018, para. 58.



As noted above, although the state of emergency was lifted on July 2018, several emergency powers set out in Decrees no. 667 and 668 were effectively made permanent when Law no. 7145 was adopted on July 25, 2018 and introduced several amendments to several laws, including to the Anti-Terror Law no. 3713. Law no. 7145 transposed the emergency powers below into the ordinary legal framework. These laws have had a severe impact on journalists and their families.

- **Decree No. 667 (July 23, 2016)** enabled the confiscation of passports of anyone under investigation of terrorism or posing a threat to national security, and, following the issuance of Decree no. 672 of October 24, 2016, their spouses and partners. It further allowed for communications between detainees and their legal counsel to be monitored at the request of prosecutors, and for legal counsel to be replaced by the authorities. The increased use of travel bans to harass journalists and activists, including their families is a further area of concern. After the lifting of the state of emergency in 2018, the authorities have continued to seize and hold the passports of individuals that oppose, or are perceived to oppose, the government. The wife of exiled Turkish journalist Can Dündar, former editor of Cumhuriyet, Dilek Dündar, was denied her passport in September 2016 and for three years was unable to leave Turkey to reunite with her husband.
- **Decree No. 668 (July 27, 2016)**, extended the period under which individuals could be detained without charge from 48 hours to 30 days and restricted detainees' access to legal counsel, including by extending the period before which they must have access to a lawyer to five days. It granted law enforcement extensive powers to search properties, including law firms, without prior judicial authorisation, and to confiscate broadly defined suspicious materials. Amendments introduced by Decree Law no. 684 (January 23, 2017), reduced the maximum period in custody without bringing the suspect before a judge to seven days (with a possible extension to 14 days) and removed the possibility to restrict access to a lawyer for five days.

## ii. Evidence threshold test

The terrorism cases against journalists lack credible evidence, meaning that charges should never have been brought and these cases should never have come before the courts.

The test to bring a prosecution is “whether there was sufficient evidence to provide a realistic prospect of conviction”. The key ECHR principle governing the application of Article 6 is fairness<sup>45</sup>. When determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration<sup>46</sup>.

The Venice Commission in its opinion has noted that Turkish prosecutors and courts must ensure that where journalists are prosecuted essentially because of their publications, courts must not impose pre-trial detention on the sole ground of the gravity of the charges which are derived from the content of their publications. The authorities should be able to demonstrate “relevant and sufficient” reasons for

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<sup>45</sup> Gregačević v. Croatia, § 49.

<sup>46</sup> [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_criminal\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf) §3.



the detention of journalists, in line with the case-law of the ECtHR on the matter, and such detentions should remain an exception<sup>47</sup>.

The mission highlighted major concerns to the TCC and SCC that from our close monitoring of journalist cases in Turkey, we have noted a systematic failure of prosecutors to provide enough evidence to charge journalists and put them on trial. Furthermore, courts at all levels fail to throw out baseless prosecutions.

While there is a rich case law of the SCC in which the court developed the criterion of “membership” in an armed organization, which would allow for the narrower application of the anti-terror framework, this case law is rarely applied by the prosecutors or lower courts in the trials of journalists. The SCC has examined different acts of the suspect concerned, taking account of their “continuity, diversity and intensity” in order to see whether those acts prove the suspect has any “organic relationship” with the organization or whether the suspect’s acts may be considered as committed knowingly and wilfully within the organization or whether the suspect’s acts may be considered as committed knowingly and wilfully within the “hierarchical structure” of the organization. However, these criteria are rarely considered by the lower courts in the cases of journalists on trial on “membership” charges. Moreover, the mission expressed the concern that the domestic courts, in many cases, decide on the membership of a person in an armed organization on the basis of very weak evidence, raising questions as to the “foreseeability” of the application of article 314.

The Venice Commission has highlighted that the “prosecution of individuals and convictions in particular by lower-courts, which have a chilling effect on the freedom of expression in Turkey, must cease. This is not sufficient if individuals are in some cases finally acquitted by the Court of Cassation after having been subject of criminal prosecution for several years. Moreover, the Commission underlines the importance of States’ positive obligation to create a favourable environment where different and alternative ideas can flourish.”<sup>48</sup>

#### *Response of the TCC and SCC*

The TCC and the SCC both conceded that Turkey’s vague and broad terror laws lack precision and are difficult to apply. However they stressed the unique terrorist threat facing the country, in particular in relation to the “new terror structure” they believe to be responsible for the July 15, 2016 coup attempt and that the judiciary in Turkey is therefore in an exceptional position when balancing terrorism and freedom of expression.

Unfortunately, the conversation with the SCC did not assuage the mission’s doubts regarding the obligation to apply the freedom of expression jurisprudence of the ECtHR in respect to journalists on trial for offenses under the anti-terror laws. On the contrary, comments made by representatives of the SCC during this meeting suggested a continued conflation of critical journalism and acts of terrorism

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<sup>47</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2017\)006-e §92](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2017)006-e §92).

<sup>48</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)002-e para 124](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)002-e para 124).

stating, for example, that “when a journalist writes bad things about us, where they glorify terrorism, we cannot have this”.

### iii. Judicial reform strategy

The only amendment proposed in the package in this area adds “statements made within the limits of providing information or made with the purpose of criticism cannot be criminalized” to article 7/2 of the Anti-Terrorism Law, which criminalizes “making propaganda for a terrorist organization.” However, this vague wording is unlikely to remedy the current practice of article 7/2 being routinely used to prosecute verbal and written statements, participating in peaceful protests or other similar activities that do not amount to incitement to violence, leaving the prosecuting authorities the margin to interpret what falls outside the remit of the article.

We note that ensuring individuals are not criminalized for exercising their freedom of expression in Turkey requires a wider overhaul of the anti-terrorism legislation and cannot be remedied by amending one provision. The definition of terrorism in Turkey’s anti-terrorism law is overly broad, vague and lacks the level of legal certainty required by international human rights law. Fundamentally, it defines terrorism broadly, and by its political aims, leaving the definition rife for misuse.



**We note that ensuring individuals are not criminalized for exercising their freedom of expression in Turkey requires a wider overhaul of the anti-terrorism legislation and cannot be remedied by amending one provision.**

### iv. Conclusion

The mission reiterated the very serious impact of the decisions of the TCC and SCC on the lives of journalists who are detained, charged and tried under terror offenses. We noted that the international community is closely monitoring the behaviour of the judiciary at all levels in Turkey. We pressed for reform of the anti-terror legislative framework to bring it into line with international standards on freedom of expression and information.

## d. Trial monitoring

Trial monitoring has been an essential means of providing moral support to journalists in the dock, to demonstrate they have not been forgotten and that their colleagues will not stay silent about their plight. This show of solidarity sends a message to the authorities that the judiciary is being closely watched to ensure due process is carried out and justice is delivered.

An impressive array of actors is engaged in trial monitoring ranging from senior diplomats and embassy staff to local and international journalist rights and press freedom groups, enabling a comprehensive insight into the action in the courtrooms.

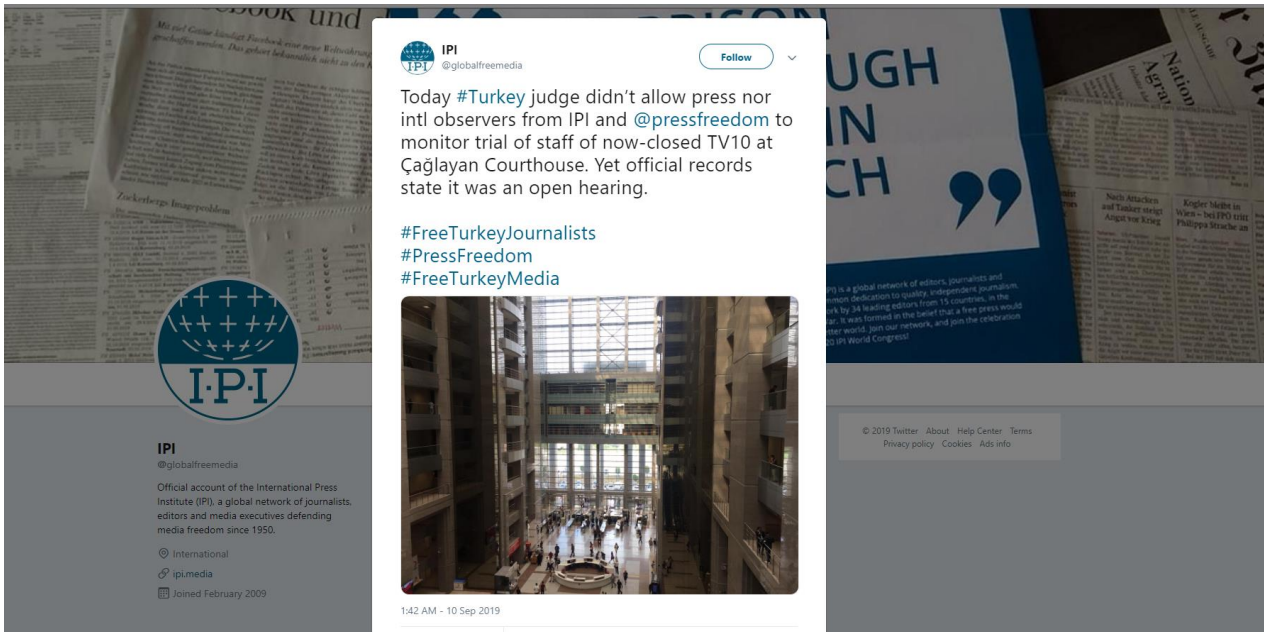
The military coup and state of emergency put unprecedented pressure on the judicial system. Logistically, it has been inundated with tens of thousands of terrorism-related cases involving defendants from across the public institutions, the military, the education system, the media, etc. The courts themselves lost a third of their judges in the purges, devastating their ability to provide efficient and effective judicial remedy. This was consistently cited by the Constitutional Court, the Supreme Court of Cassation, and the Justice Ministry as an explanation for the inability of the judiciary to deal effectively with cases and their appeals to the higher courts, why pre-trial detention has lasted so long, and even why the lower courts have failed to apply the law correctly.

The other explanation is that the courts have been subjected to intolerable political pressure, facilitated by the direct presidential appointments to the Council of Judges and Prosecutors (HSK), but driven by the fear of judges that a sympathetic ruling towards a government critic would put them under immediate suspicion.

Indeed, the overwhelming evidence shows that Turkish courts are no longer functioning as independent tribunals capable of delivering a fair hearing within a reasonable timeframe. Despite this evidence, the European Court of Human Rights, the last judicial bulwark for journalists in Turkey, has thus far declined to loosen its requirement that claims must first have exhausted all domestic remedies. Meanwhile, journalists whose rights have been violated are left in an intolerable legal limbo.



**The provisional results of the monitoring suggest that there are systematic and endemic failures within the trial procedures denying defendants the right to a fair trial.**



*IPI and CPJ representatives were refused permission to observe a trial ahead of the mission, Sept. 10, 2019.*

IPI and the Media and Law Studies Association (MLSA) have been co-operating on a trial monitoring programme of free expression-related trials (primarily involving journalists) launched in June 2018. MLSA runs a team of trial monitors using a reporting form based on those used by the Organization for Security and Co-operation in Europe (OSCE). The data that emerge provide the basis for the concluding analysis, carried out by IPI. A total of 218 hearings have been attended by over 30 different monitors across the country since the programme's start. The programme will continue until April 2020 when the full results will be published, but provisional statistics already confirm perceptions of a court system that is failing to live up to the requirements of European and Turkish human rights law regarding the right to a fair trial as well as the rights to liberty and security, most notably under the European Convention on Human Rights. The latest report published in September<sup>49</sup> on 42 hearings from June 1 to July 21, 2019 include the following findings:

**Range of charges:** 85 percent of hearings involved terrorism-related offences, primarily conducting propaganda for a terrorist organization (19 of 42 hearings) or being a member of a terrorist organization (12 out of 42 hearings). Other common charges included defamation-related offences such as insulting the president and humiliation of the Turkish nation.

<sup>49</sup> <https://freeturkeyjournalists.ipi.media/turkey-free-expression-trial-monitoring-report-september-2019/>

**Pre-trial detention:** Of the 157 journalists tried, 34 of them were held in pre-trial detention of whom 18 had been held for over one year and nine of them faced terrorism-related charges.

**Quality of evidence:** Evidence used to justify pre-trial detention and the terrorism-related charges consisted primarily of journalistic work including articles and photos published, contacts with sources and social media posts.

**The right to a lawful judge:** In 13 percent of cases (five of 38) at least one member of the panel of three judges had been replaced during the trial. This is down from 33 percent in the June report and from 41 percent in the December 2018 report. But it still underlines serious concerns about the arbitrary removal of judges. For example, in a case related to the 2013 Gezi Park protests the presiding judge was removed by the Council of Judges and Prosecutors (HSK) after the judge had expressed an opinion in favour of the defendants. Since 2017 the members of the HSK are appointed directly by the president and parliament.

**Judicial deliberations:** The report also confirmed the disturbing trend of judicial panels failing to deliberate in private. In 47 percent of cases (consistent with previous reports) judges deliberated in open court in the presence of defendants, prosecutors and the public, which constitutes a clear breach of article 227 of Turkey's Criminal Procedural Code.

Both the regular removal of judges and the lack of private deliberations, as well as the highly problematic treatment by courts of defendants and their lawyers, seriously call into question the capacity of Turkish courts to act as independent tribunals as required by the European Convention on Human Rights.

**SEGBIS:** Courts have commonly required defendants to testify via a video-conference system known as SEGBIS. Denying defendants the right to be present in court is a clear violation of their rights. Since the beginning of the trial monitoring programme SEGBIS has been used in 60 hearings out of 218 (27 percent).

## Conclusions

The provisional results of the monitoring suggest that there are systematic and endemic failures within the trial procedures denying defendants the right to a fair trial. It is not reserved to occasional or prominent cases and cannot be explained away as the consequence of inexperienced junior judges. Rather, it reveals a dysfunctional judicial system acting in disregard of basic principles of due process.

## e. Regulation of online broadcasters by the Radio and Television High Council (RTÜK)

Since March 2018, the Turkish government has put in place several measures that undermine media independence and provide opportunities for politically motivated censorship.

Presidential Decree no. 14, of July 2018, established the Directorate of Communications (DoC), which brought the Turkish Radio and Television Corporation (TRT) under its executive control. The DoC is a presidential institution currently led by Fahrettin Altun, who previously worked for the pro-government think-tank SETA Foundation, which recently “profiled” journalists working for foreign media and accused them of biased<sup>50</sup> reporting. (See chapter on Harassment of foreign journalists).

At the same time the Radio and Television High Council (RTÜK) was brought under direct control of the Ministry of Culture and Tourism. The RTÜK Board consists of nine members elected for six years by the Grand National Assembly, Turkey’s parliament.

In March 2018, RTÜK, in charge of monitoring, regulating and sanctioning radio and television broadcasts, was authorized to control online broadcasters as well<sup>51</sup>. The Regulation on Radio, Television and Voluntary Online Broadcasts, entered into force on August 1, 2019. It requires online broadcasters to obtain transmission authorization and a broadcast license from RTÜK. At present, the license fees amount to 10,000 liras (1,600 euro) for radio broadcasting and 100,000 liras (16,000 euro) for TV broadcasting and on-demand platforms such as Netflix, to be renewed annually. In the absence of a license, a court can deny access to specific content within 24 hours after a complaint is filed by RTÜK.

However, article 29/a also states that media service providers who already hold a valid broadcast license from RTÜK can broadcast their content online with their existing license, thereby exempting mainstream broadcasters (largely pro-government) of a cost that is to be imposed exclusively on more independent online broadcasters. Moreover, according to a recent news report, RTÜK is not monitoring pro-government broadcasters, reportedly per the instructions of RTÜK’s chair<sup>52</sup>.

A primary concern of the process is that one of the conditions for a license is to pass a “security check” by the National Intelligence Organization (MIT) and the police, a requirement that is clearly open to misuse.

These excessive license fees and transmission regulations pose a severe threat to media pluralism. The regulation gives RTÜK the power of censorship and allows it to close unlicensed broadcasters. Small media operators in economically difficult times can be easily put out of business. It remains to be seen

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<sup>50</sup> <https://www.ecpmf.eu/news/ecpmf/turkish-think-tank-report-escalates-harassment-of-journalists>

<sup>51</sup> Article 29/a under the amendment Law no. 6112

<sup>52</sup> <https://twitter.com/globalfreemedia/status/1186288277952716801>

whether Turkey's audio-visual regulator will impose sanctions on personal broadcasters that use platforms like Facebook or YouTube that form a significant portion of Turkey's "alternative media". But the vaguely worded legislation clearly leaves open the possibility for this to be selectively wielded against social media in the future even if it is not the official intended purpose.

In a recent example within two days of the launch of Turkey's military incursion into northeast Syria in October 2019, RTÜK announced that it will silence broadcasters<sup>53</sup> that speak out against the action.

The regulation on online broadcasters was taken to Turkey's highest administrative court, the Council of State (Danıştay), in August 2019 by lawyers from the Media and Law Studies Association (MLSA)<sup>54</sup>, arguing that it is a violation both of the European Convention on Human Rights and Turkey's constitution.

In September 2019, RTÜK Chair Ebubekir Şahin stated that 600 organizations had applied for broadcasting licences.

The mission expressed profound concern over the independence of press and media regulatory boards. It stated that the new regulations were a threat to the existence of independent online broadcasters, in particular through the implementation of costly and opaque licensing regimes. It also strongly urged legal reform to improve transparency in the decision-making of these boards, in line with international standards.

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<sup>53</sup> <https://bianet.org/english/militarism/214317-radio-and-television-supreme-council-broadcasts-against-syria-operation-silenced>

<sup>54</sup> <https://bianet.org/english/law/211567-radio-and-tv-supreme-council-regulation-on-internet-media-taken-to-council-of-state>



## f. Prison visits

Prison visits are regularly refused to both Turkey-based and international journalist support groups. In recent years, Dunja Mijatović, Council of Europe commissioner for human rights, has been one of very few to be permitted to visit jailed journalists. Harlem Désir, the OSCE representative on freedom of the media was denied permission during his mission to Turkey in June this year.

IPI applied for permission to visit the Cumhuriyet journalists held in Kandıra prison on the first day of the mission and the positive response of the justice ministry initially encouraged us to expect approval. However, when the decision eventually came on the eve of the planned visit we were informed that foreign nationals could not attend, and that if Turkey nationals were to apply separately permission could be granted. There was no time to re-apply and test the offer.



*Discussion on how to react to denied request to visit jailed Cumhuriyet journalists, September 10, 2019*

During the meeting with the justice ministry the mission raised the question of prison visits and why our request had been denied despite early encouragement. The delegation asked for the rules to be reviewed and relaxed and said that granting access to journalists in prison for civil society and freedom of expression organizations would be “a very positive sign”.

The head of the department of human rights, Hacı Ali Açıkgül, explained that requests were decided by the prison administrations and are often refused on security grounds to protect visitors from violent criminal gangs. The delegation was told that the ministry did not want “to put them at risk”.

The Journalists Union of Turkey (TGS) reported that it had made 26 requests to visit jailed members of the union in the last two years and all have been denied. RSF Turkey representative Erol Önderoğlu has had a similar experience.

Restrictions on prisoner's rights, including those of visitation, have increased since 2017, with political prisoners and those in F-type prisons only granted visits from relatives and legal representatives<sup>55</sup>.

Local human rights organizations and NGOs can gain access to the prison through lawyers intervening when their clients provide special requests from prison. But human rights organizations cannot make "prison observation visits" in order to report on general detention conditions in prisons.

Although the justice ministry extended the possibility of applications by foreign visitors<sup>56</sup> in December 2018, the regulation does not establish a clear right to foreign NGOs to conduct prison visits but provides that requests by "foreign visitors" should be sent for approval to the justice ministry.

While foreign visits are not precluded by law, practice shows that regardless of whether the decisions are taken by the justice ministry or the prison administrations, prison visits are heavily restricted, increasing the isolation of prisoners and limiting opportunities for solidarity actions for jailed journalists.

The delegation requested that access to visit journalists in prison for civil society groups and freedom of expression organizations be included in the judicial reform package.

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<sup>55</sup> <https://cisst.org.tr/wp-content/uploads/2019/08/Freedom-of-Speech-in-Prison.pdf>

<sup>56</sup> Regulation Number 30616 on Prison Visits to Detainees, Official Gazette  
<https://www.resmigazete.gov.tr/eskiler/2018/12/20181205-1.htm>

## g. Press cards and accreditation

Press cards and the accreditation of journalists have been an increasing problem especially since the 2016 attempted coup. In December 2018, a new regulation introduced changes to the issuance and cancellation of press cards, which attracted grave criticism from both local and international press freedom and journalist groups<sup>57</sup>.

The General Directorate of Press and Information was closed in July 2018 and replaced by the new Communications Directorate under the Presidential Office. In December 2018 the Communications Directorate was empowered to issue press accreditation. It wasn't until August 2019 (13 months after the previous directorate was closed) that the Communications Directorate re-established a new press cards commission<sup>58</sup>.

The new regulations have made it easier for the authorities to revoke cards on spurious grounds. Furthermore, journalists facing criminal charges can be denied a press card. Article 6 of the regulation states that "engaging in acts that are contrary to national security or the public order or making a habit of such acts" would be grounds for annulment of press cards.<sup>59</sup>

Similarly, articles 29 and 30, which regulate the cancellation of press cards, state that press cards of those who have been sentenced on terror charges will be revoked and not re-issued. A new clause (h) in article 29 extends the right to revoke press cards to include journalists who "behave against the national security and public order", enabling the government to cancel cards of those they consider, but no court has condemned, of acting against the national security.

This is particularly worrying in view of the large number of prosecutions against journalists primarily on terrorism-related charges. According to IPI and MLSA's trial monitoring programme, up to 80 percent of the charges brought against journalists were terrorism-related.<sup>60</sup>

Reporting to parliament, Vice President Fuat Oktay stated in March 2019, that 22,202 press card applications out of 44,417 had been rejected in the previous three years. He later reported that 2,397 press cards had been cancelled in the last three years and that between January 1 and May 29, 2019, 403 press cards had been cancelled on "national security" grounds.<sup>61</sup>

The appointment process for members to the press cards commission is another concern. Out of nine commission members, two were appointed by the presidential office, while three were appointed from the media outlets ATV, Star and Daily Sabah, which all belong to the pro-government Turkuaz Media

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<sup>57</sup> <https://freeturkeyjournalists.ipi.media/ipi-condemns-new-regulation-on-press-cards-in-turkey/>

<sup>58</sup> <https://t24.com.tr/haber/chp-li-cakirozer-basin-karti-komisyonu-nun-9-uyesinin-ikisi-cumhurbaskanligi-ndan-3-u-atv-star-ve-sabah-tan,833372>

<sup>59</sup> <https://www.evrensel.net/daily/368535/government-changes-press-card-regulation-makes-cancellations-easier>

<sup>60</sup> <https://freeturkeyjournalists.ipi.media/trial-monitoring/>

<sup>61</sup> <https://bianet.org/bianet/ifade-ozgurlugu/212265-basin-kartini-gazeteci-orgutleri-verir-devlet-degil>

Group. Two members are selected from the state-run Anadolu Agency and Turkish Radio and Television (TRT).<sup>62</sup> The remaining two members should have been provided by journalist unions. However, due to the decision of the unions not to participate in the new commission, these members were appointed from pro-government Doğuş Media Group and Anadolu Publishers Associations.



**According to Vice President Oktay, 2,397 press cards had been cancelled in the last three years and that between January 1 and May 29, 2019, 403 press cards had been cancelled on “national security” grounds.**

The Journalists Union of Turkey (TGS), Basın-İş Syndicate and the Press Council jointly denounced the new regulation, stating that journalist unions independent from the state should issue the press card, as is the case in many other European countries.<sup>63</sup>

Disturbingly, one of the new members of the commission was part of the research team that produced a widely criticized report by the Political, Economic and Social Research Foundation (SETA) “profiling” nearly 150 foreign media correspondents in Turkey.<sup>64</sup>

On August 23, the independent newspaper Evrensel claimed there was an embargoed list of reporters to be denied press cards by the Communications Directorate<sup>65</sup>. Evrensel also reported that seven colleagues’ press card applications had gone unanswered for two years. The head of the Communications Directorate, Fahrettin Altun, later attacked this news as “defamatory” and the product of “political engineering”.

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<sup>62</sup> <https://t24.com.tr/haber/chp-li-cakirozer-basin-karti-komisyonu-nun-9-uyesinin-ikisi-cumhurbaskanligi-ndan-3-u-atv-star-ve-sabah-tan,833372>

<sup>63</sup> <https://m.bianet.org/bianet/medya/211310-basin-is-tgs-basin-konseyi-basin-kartini-kim-versin>

<sup>64</sup> <https://freeturkeyjournalists.ipi.media/ipi-joins-international-press-freedom-groups-to-condemn-seta-report/>

<sup>65</sup> <https://journos.com.tr/sari-basin-karti-evrensel>

## h. Harassment of foreign journalists

The mission delegation denounced mounting pressure on foreign journalists in Turkey, following numerous arrests, prosecutions and deportations in recent years. Examples of the harassment and persecution of foreign journalists range from refusing the renewal of press cards to deportations and prosecutions under anti-terror laws.

The delegation met with the Foreign Media Association<sup>66</sup>, established in December 2018 to organize and represent journalists working for foreign media in Turkey and help them deal with the growing obstacles and to improve their situation.

Press cards act as work permits and are necessary to obtain or renew residency permits. Press card credentials expire every December, and in some instances it has taken months for the authorities to issue them, leaving affected journalists in limbo.<sup>67</sup>

The authorities have used press cards to pressure foreign journalists, with several correspondents compelled to leave Turkey in recent months after their press accreditations were not renewed. On March 10, 2019, long-term German correspondents Jörg Brase and Thomas Seibert had to leave after the authorities refused to renew their press credentials without explanation.<sup>68</sup> The decision was subsequently reversed following a national and international outcry.

Vaguely worded anti-terror laws are also used against foreign journalists and dual nationals. In September 2018, the authorities detained Austrian journalist Max Zirngast at his home in Ankara and charged him with being a member of an unknown leftist terrorist organization, based on his writing.<sup>69</sup> He spent three-and-a-half months in pre-trial detention before being released from jail with a travel ban imposed until the conclusion of the trial. He was eventually acquitted of all charges in September 2019.<sup>70</sup>

German-Turkish journalist Deniz Yücel was held for over a year on espionage charges before being released in February 2018. In May 2019, Turkey's Constitutional Court found that the pre-trial detention had violated Yücel's right to personal liberty and security, and his right to freedom of expression and freedom of the press.<sup>71</sup> Nevertheless, Yücel remains on trial in absentia on charges of "terrorist propaganda" and "provoking the public to hatred and animosity" carrying up to 18 years in prison.<sup>72</sup>

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<sup>66</sup> Foreign Media Association (Yabancı Medya Derneği), available at: <http://fmatrueky.org/>

<sup>67</sup> <https://www.reporter-ohne-grenzen.de/tuerkei/alle-meldungen/meldung/korrespondenten-ohne-akkreditierung/>

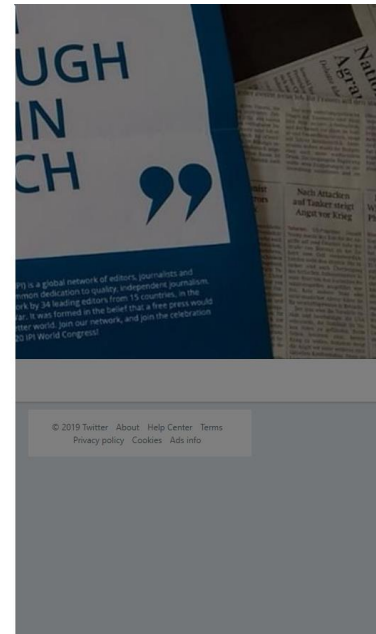
<sup>68</sup> <https://www.ecpmf.eu/news/threats/joint-alert-turkey-needs-to-respect-foreign-media-outlets-independence>

<sup>69</sup> <https://www.dw.com/en/turkey-charges-austrian-journalist-max-zirngast-with-terrorism/a-45593035>

<sup>70</sup> <https://uk.reuters.com/article/uk-turkey-austria-security/turkish-court-acquits-austrian-activist-lifts-travel-ban-lawyer-idUKKCN1VW0ZZ>

<sup>71</sup> <https://www.anayasa.gov.tr/tr/haberler/bireysel-basvuru-basin-duyurulari/gazeteci-olan-basvurucuya-uygulanan-tutuklama-tedbirinin-hukuki-olmamasini-nedeniyle-kisi-hurriyeti-ve-guvenligi-hakkinin-ihlal-edilmesi/>

<sup>72</sup> <https://www.mlsaturkey.com/en/journalist-deniz-yucels-trial-adjournalled-until-october/>



*IPI reacts after the authorities refused to renew press credentials to German correspondents.*

Dozens of foreign journalists have been expelled from Turkey following the breakdown of a fragile peace process between the PKK and Turkish state forces in July 2015. French journalist Olivier Bertrand was deported in November 2016 after being arrested while reporting in Gaziantep province. Italian journalist Gabriele Del Grande was arrested in April 2017 near the Syrian border and deported three weeks later. French journalist Mathias Depardon was arrested in May 2017 while taking pictures in Batman province and deported the following month.<sup>73</sup>

Turkish journalists living in exile also reported being subject to verbal abuse, including death threats on social media. Can Dündar, former editor-in-chief of Cumhuriyet, said he is being routinely insulted while pictures and videos of him walking in the streets of Berlin have been uploaded online. A Turkish TV crew even visited his office, filmed him and put his address on the internet. He currently lives under police protection.<sup>74</sup>

Finally, the delegation condemned a July 2019 report by the Foundation for Political, Economic and Social Research (SETA), a pro-government think-tank, which accuses international media of bias and lists personal details of their employees, singling them out for attack. The report names dozens of Turkish and foreign journalists working for international media outlets in Turkey and details their professional background and social media activities, in an attempt to establish their political affinities, question their journalistic ethics and even suggest links with terrorist organizations.<sup>75</sup>

<sup>73</sup> <https://rsf.org/en/news/turkey-joint-call-french-photographers-immediate-release>

<sup>74</sup> <https://cpj.org/blog/2019/07/for-turkish-journalists-in-berlin-exile-threats-re.php>

<sup>75</sup> <https://rsf.org/en/news/turkish-think-tank-report-escalates-harassment-journalists>



## i. EU-Turkey relations

Turkey has long sought to join the EU, first applying for membership of the (then) European Economic Community in 1987. Accession negotiations with the EU were formally opened in 2005.

Accession is a lengthy process and requires candidate countries to reform institutions, standards and infrastructure in order to meet the Copenhagen criteria, which set out eligibility for EU membership. The 2016 coup attempt and the subsequent invocation of the state of emergency stalled this process, as the EU cited concerns around fundamental rights and the rule of law (including the mass imprisonment of journalists) as clear failures of meeting such criteria.

As relations between Brussels and Ankara soured from 2016, points of potential EU influence dried up. Discussions on modernizing the EU-Turkey Customs Union, proposed with the aim of enhancing trade relations, have been halted (the EU remains Turkey's chief import and export partner). Negotiations on visa liberalization for Turkish citizens travelling to the EU are not progressing, in part because Turkey has not met benchmarks on guaranteeing data protection and reforming anti-terrorist legislation.

As Turkey backslides on human rights and the rule of law, the EU still, however, needs to ensure continued cooperation on migration, counterterrorism and security. This exerts considerable pressure on bilateral relations.

When EU leaders hosted President Erdoğan in Varna, Bulgaria in March 2018, they were unequivocal in their condemnation of Turkey's rule of law failings, yet praised Turkey's support in managing migration flows and combatting terrorism. Divergent comments<sup>76</sup> from European Council President Tusk after Varna epitomize the uneasy position of Brussels to, on the one hand, maintain dialogue with Turkey in order to advance EU geopolitical priorities, whilst on the other being critical about the ongoing clampdown in Turkish society. This juxtaposition is the status quo for EU-Turkey relations.

Ensuring the success of the EU-Turkey migration deal, set up less than four months before the failed 2016 coup d'état, seemingly provides Erdoğan with a point of leverage over Brussels. Furthermore, President Erdoğan's hostile, anti-western rhetoric underlines that Turkey does not need to take criticism from the EU seriously. Critical journalism is met with the same hostility.

In March 2019, a call to formally suspend negotiations (unlikely to materialize) was made by the European Parliament. Then in May, a European Commission country report provided, amongst other things, a detailed and robust assessment of Turkey's dismal press freedom record. Conclusions from the General Affairs Council in June voiced clear language in relation to backsliding: "Turkey has been moving further away from the European Union. Turkey's accession negotiations have therefore

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<sup>76</sup> <https://www.consilium.europa.eu/en/press/press-releases/2018/03/26/remarks-by-president-donald-tusk-after-the-eu-turkey-leaders-meeting/>



effectively come to a standstill and no further chapters can be considered for opening or closing and no further work towards the modernisation of the EU-Turkey Customs Union is foreseen."



**As Turkey backslides on human rights and the rule of law, the EU still, however, needs to ensure continued cooperation on migration, counterterrorism and security. This exerts considerable pressure on bilateral relations.**

The Delegation of the European Union in Ankara continues to monitor and assess Turkey's legal system, including trials of journalists, as part of the accession process. Its coordination of local trial monitoring by EU member state diplomatic missions is important, yet the caseload is high, given the number of journalists in detention. The EU noted the adoption of the judicial reform strategy, and the reconvening of the Reform Action Group, but has emphasized securing "tangible results"<sup>77</sup>. Press freedom groups have expressed concern to the Delegation (as well as other EU institutional bodies) that the judicial reform strategy could alleviate some pre-trial detention concerns, but is unlikely to actually open up the space for press freedom.



*Meeting foreign diplomatic missions in Ankara, September 12, 2019.*

European elections have brought a change of the Brussels institutions, including a pending confirmation of a new Enlargement Commissioner. Recent EU condemnation<sup>78</sup> of Turkey's military

<sup>77</sup> <https://www.consilium.europa.eu/media/35863/st10555-en18.pdf>

<sup>78</sup> <https://www.consilium.europa.eu/en/press/press-releases/2019/10/14/council-conclusions-on-north-east-syria/>

incursion in Syria is a pressing focus in the meantime, with the European Parliament recently calling<sup>79</sup> for targeted sanctions and visa bans on Turkish officials, adopting economic measures against Turkey, as well as suspending agricultural trade preferences and the EU-Turkey Customs Union.

Developments in Syria, as well as domestic repression, will further push EU officials to take stock of exactly where the EU-Turkey partnership is – and where its current course is likely to take it.

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<sup>79</sup> <https://www.europarl.europa.eu/news/en/press-room/20191017IPR64569/meps-call-for-sanctions-against-turkey-over-military-operation-in-syria>

## 5. Annexes

### a. Post-mission press release, published on September 13



*Press conference at Ankara Journalists Association, September 13, 2019.*

The mission concluded with a press conference hosted by the Ankara Journalists' Association where it issued the following statement:

#### **Press freedom in Turkey remains in crisis, despite some room for very cautious optimism**

Ankara, Istanbul, 13 September 2019 – International press freedom groups reported today that press freedom and the rule of law in Turkey remain in crisis despite grounds for very cautious optimism, such as yesterday's ruling releasing several former Cumhuriyet journalists.

Over three days this week, the international press freedom delegation held meetings with journalists, civil society, the judiciary and the authorities to assess planned reforms and the continued crackdown facing journalists in Turkey. Convened by the International Press Institute (IPI), the delegation also comprised representatives from Article 19, the European Federation of Journalists (EFJ), the Committee to Protect Journalists (CPJ), PEN International, Norwegian PEN, the European Centre for Press and Media Freedom (ECPMF) and Reporters Without Borders (RSF).

A judicial reform strategy, announced in May 2019 by the Turkish government to address flaws in the justice system, will not be credible unless it guarantees judicial independence in both law and practice and ends the persecution of journalists, the press freedom delegation said today.

The delegation said it welcomed the intention of the authorities to undertake reform. However, the delegation highlighted in meetings with officials how the press freedom environment in the country has not improved since the lifting of the state of emergency in July 2018, how scores of journalists remain behind bars or under travel bans as a consequence of an extended, politically motivated crackdown against the media, and how a subsequent wide-ranging capture of the judiciary has progressively and severely damaged the rule of law and the public's right to access information.

As part of any judicial reform strategy, Turkey should urgently revise anti-terror and defamation laws, repeatedly abused to silence critical press. It should take immediate steps to end the arbitrary prosecution of journalists, characterized by baseless indictments, politically driven judgments and severe violations of the right to a fair trial. It should reverse moves that allow disproportionate political interference into the operations of the judiciary, including the April 2017 amendment to Article 159 of the Constitution, which allows for political control over the nomination procedure to the Council of Judges and Prosecutors, affecting the independence of the entire judicial system.

As proposed changes are discussed and examined, the delegation urged Turkish authorities to closely involve independent civil society, journalists and international experts in the fields of freedom of expression, judicial independence and the rule of law and to enact reforms to bring the independence of the judiciary in line with Turkey's commitments under international human rights law.

The delegation met with local civil society groups and journalists in Istanbul and then travelled to Ankara, where it met with the Constitutional Court, the Court of Cassation, representatives of the Ministry of Justice, and the EU and other foreign diplomatic missions. The delegation regrets that a long-planned meeting with Justice Minister Abdulhamit Gül was cancelled one day in advance.

In its meeting with the Constitutional Court, the delegation said Turkey's highest judicial body must give priority to applications regarding detained journalists and administrative measures blocking websites, including Wikipedia, which has been banned in Turkey for two-and-a-half years. The delays in these cases seriously harm the public's fundamental right to access information. It also expressed concern over recent inconsistent rulings involving journalists.



**A judicial reform strategy, announced in May 2019 by the Turkish government to address flaws in the justice system, will not be credible unless it guarantees judicial independence in both law and practice and ends the persecution of journalists.**

The delegation strongly welcomed a ruling on Thursday evening by the Court of Cassation to overturn convictions for seven defendants in the Cumhuriyet trial, concerning cases of journalists detained because of their work. The ruling led to their release. While that decision marks belated but significant

justice, it cannot reverse the personal damage done to those defendants as a result of their extended imprisonment. In addition, Cumhuriyet's former accountant, Emre Iper, remains behind bars and journalist and MP Ahmet Şık is set to be retried under a new set of more serious charges. The delegation had been denied permission at the last minute to visit the Cumhuriyet journalists in prison on Wednesday, in a decision illustrative of a systematic denial of prison visits to observers.

In addition, the delegation is profoundly alarmed by the implementation of new rules from Turkey's audiovisual regulator, the Radio and Television High Council (RTÜK), that extend the agency's control to online broadcasters, threatening their existence through a costly and opaque licensing regime.

The delegation is concerned about the system of issuing press cards, which has been taken over by the presidential office and is profoundly affecting the capacity of national and international media to operate in the country.



*International press freedom delegation, September 12, 2019.*



## b. Submission to the Universal Periodic Review on freedom of expression in Turkey

Several of the organizations that joined the mission also signed on to a joint submission to the Universal Periodic Review on freedom of expression in Turkey. The submission, reproduced below, outlines key priorities and recommendations for the Turkish state.

### **Executive Summary**

1. The submitting organisations<sup>80</sup> welcome the opportunity to contribute to the third cycle of the Universal Periodic Review (UPR) of Turkey. This submission focuses on Turkey's compliance with its international human rights obligations with respect to freedom of expression and freedom of information.<sup>81</sup> In particular, it details concerns relating to:
  - The rule of law and the State of Emergency
    - State of Emergency
    - Independence of judges and lawyers
    - State of Emergency Inquiry Commission
  - Legal framework for freedom of expression
    - Restrictions in the Turkish Penal Code (TPC)
    - Misuse of counter-terrorism measures to target expression
  - Media freedom
    - Forced closure of media outlets
    - Reforms to regulatory framework and media pluralism
    - Arrests, trials and harassment of journalists, civil society and academics
  - Freedom of expression online
    - Blocking and filtering
    - Takedown requests
2. During the second UPR cycle, Turkey accepted 19 recommendations to improve freedom of expression online and offline.<sup>82</sup> However in the period under review, the human rights situation has

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<sup>80</sup> ARTICLE 19, P24, PEN International, English PEN, Reporters Sans Frontiers (RSF), International Press Institute (IPI), Freemuse, European Centre for Press and Media Freedom (ECPMF), IFEX and Norsk PEN.

<sup>81</sup> Turkey has ratified the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), both of which provide broad protection to the right to freedom of expression in Article 19(2) and 10(1) respectively.

<sup>82</sup> 148.115 (Lebanon); 148.116 (Luxembourg); 148.117 (United States of America); 148.118 (Austria); 148.119 (France); 148.120 (Switzerland); 148.121 (United Kingdom of Great Britain and Northern Ireland); 148.122 (Sweden); 148.123 (Costa Rica); 148.124 (Botswana); 148.125 (Finland); 148.126 (Angola); 148.127 (Angola); 148.14 (Latvia); 148.36 (Italy); 149.10 (Hungary); 149.34 (Norway); 149.37 (France); 150.16 (Republic of Korea). See: 'Report of the Working Group of the Universal Periodic Review on

deteriorated severely, in particular for freedom of expression. A crackdown on civic space, media freedom, and a purge of dissenting voices, which escalated in the aftermath of the failed attempted coup in 2016, is ongoing. Changes to the counter-terrorism framework, first introduced under the State of Emergency (SoE) and later made permanent in law, have had far-reaching impacts on the rule of law, and facilitated the arbitrary targeting of journalists, activists, and opposition voices, particularly in the Southeast.

### ***The Rule of Law and the SoE***

3. Following the failed coup attempt of 15 July 2016, a three-month SoE was declared on 21 July, which the government renewed seven times until 18 July 2018. Under the auspices of the SoE, the government introduced a series of legal amendments through emergency decrees, bypassing ordinary legislative procedure which resulted in sweeping permanent changes to the legal framework and the model of democratic governance.
4. A constitutional referendum in April 2017, brought forward by the ruling AKP party and held under the highly restrictive conditions of the SoE, resulted in a shift from a parliamentary to a presidential system, concentrating power in the executive. In removing guarantees of political and judicial oversight over the executive, the amendments have severely undermined democratic checks and balances,<sup>83</sup> and placed Turkey at risk of “degeneration into an authoritarian presidential system,” according to the Venice Commission.<sup>84</sup>
5. The adoption of Presidential Decrees have profoundly restructured the system of government, bringing ministries and public agencies within the purview of the President’s office, thus empowering the President to appoint heads of regulatory bodies and gravely undermining their independence from political interference. While the majority of the amendments came into effect in 2019, one change which empowered the President to directly appoint members of the judiciary was implemented immediately (para 7).

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Turkey: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/29/15/Add.1’, Human Rights Council, 10 June 2015; Available at: <https://bit.ly/2GvaiEp>.

<sup>83</sup> Turkey: Concerns for freedom of expression deepen after referendum’, ARTICLE 19, April 18 2017; Available at: <https://bit.ly/2OiqDmo>.

<sup>84</sup> ‘Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017, CDL-AD(2017)005’, Venice Commission, 13 March 2017; Available at: <https://bit.ly/2rzWd0A>.



### ***Independence of judges and lawyers***

6. While Turkey supported 10 recommendations related to judicial independence,<sup>85</sup> the government has systematically eroded judicial independence, particularly since July 2016. This has serious implications for the rule of law, and the right to a fair trial for the hundreds of journalists, civil society members and academics who have been judicially harassed since the SoE was enacted. The Turkish Constitution enshrines the principles of the rule of law (Article 2) and independence of the courts (Article 138), establishes the security of tenure of judges and prosecutors (Article 139), and outlines that judges must discharge their duties in accordance with the abovementioned principles (Article 140).
  
7. These guarantees were undermined by the amendment to Article 159 of the Constitution - passed through the April 2017 constitutional referendum - relating to the membership of the Council of Judges and Prosecutors (CJP) which is responsible for the admission, appointment, transfer, promotion, disciplinary proceedings and supervision of judges and prosecutors, and was previously functionally independent. The amendment empowered the President to directly appoint six of 13 members of the CJP, and Parliament to appoint the remaining seven. This has facilitated undue political interference in the judiciary and is contrary to international standards. The Venice Commission has described the development as placing the “the independence of the judiciary in serious jeopardy”.<sup>86</sup>
  
8. At least 3,673 judges and prosecutors were dismissed in the aftermath of the failed coup,<sup>87</sup> following the adoption of Emergency Decree Law No. 667 on 22 July 2016.<sup>88</sup> This Decree paved the way for the government to label individuals perceived to support the opposition as members of the Fethullahist Terrorist Organization (*FETÖ*), the movement deemed responsible for the attempted coup, without credible evidence. Very few of those dismissed have been reinstated, with limited recourse for appeal or remedy (para 10).

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<sup>85</sup> United States of America (148.106), Slovakia (148.105), Hungary (149.10), Luxembourg (149.22), Denmark (149.23), Switzerland (149.24), Namibia (149.25), Uruguay (149.26), Australia (149.28), Austria (149.29).

<sup>86</sup> ‘Opinion on the Amendments to the Constitution’, Venice Commission, 13 March 2017, para. 119; Available at: <https://bit.ly/2rzWd0A>.

<sup>87</sup> This figure is cited by the Venice Commission, based on statistics obtained on 15 November 2016 from the High Judicial and Prosecutorial Council of Turkey. According to the Human Rights Joint Platform, as of March 2018, 4,279 judges and prosecutors were dismissed and 166 subsequently reinstated. See: ‘Threats to the independence of the legal profession in Turkey - systematic arrests and detention of lawyers/dismissals of judges and prosecutors’, Bar Human Rights Committee of England & Wales, IBAHRI and Law Society of England and Wales, 18 September 2018, para. 28; Available at: <https://bit.ly/2GsvhYG>.

<sup>88</sup> ‘Opinion on Emergency Decree Laws Nos 667-676 Adopted Following the Failed Coup of 15 July 2016, CDL-AD(2016)037’, Venice Commission, 12 December 2016, para. 147; Available at: <https://bit.ly/2Mjk3ZU>.

9. The judiciary has effectively been purged of any perceived government opponents, and replaced with pro-government appointees in contravention of international standards.<sup>89</sup> This has had a chilling effect, with those still in post fearing reprisals, particularly for failing to find in favour of the government in clearly politically motivated cases.<sup>90</sup> The assault on the independence of the judiciary has contributed to hundreds of arbitrary arrests, detentions, and unfair trials of journalists and civil society actors.

### **SoE Inquiry Commission**

1. In May 2017, the government established an SoE Inquiry Commission (Commission) to review appeals related to the over 130,000 dismissals of civil servants and public officials that followed the attempted coup, as recommended by the Council of Europe.<sup>91</sup> As of May 2019, 126,600 applications had been made, of which 70,406 had been reviewed and only 5,250 had led to a reinstatement. 65,156 complaints were rejected and 55,714 applications were pending.<sup>92</sup> The submitting organisations are deeply sceptical that the Commission represents a genuinely independent or effective judicial remedy. It is our opinion that no effective remedy exists in Turkey against dismissals based on emergency decrees, contrary to Turkey's obligations under international law. This is exacerbated in light of decisions of the Turkish Constitutional Court (TCC) and European Court of Human Rights (ECtHR) recognising the Commission as a domestic remedy that must be exhausted before cases are accepted by those courts.
2. Against this backdrop, President Erdoğan's announcement on 30 May 2019 of a new judicial reform package raises serious concerns that this will further entrench political interference in the judiciary, rather than restore its independence.

### **Recommendations:**

- Fully restore the independence of the judiciary, including by repealing constitutional amendment 159, to prevent political interference in the CJP;

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<sup>89</sup> Among others: 'UN Basic Principles on the Independence of the Judiciary', United Nations, 6 September 1985, Principle 12; Available at: <https://bit.ly/2JfeGrC>; 'European Charter on the Statute of Judges', Council of Europe, 10 July 1998, Article 3.4; Available at: <https://bit.ly/2YjeZay>; 'Opinion No. 1 on Independence of Judges', Consultative Council of European Judges, 23 September 2001, para. 60; Available at: <https://bit.ly/2QNdzGh>; 'Recommendation on Judges: Independence, Efficiency and Responsibilities, CM/Rec(2010)12', Council of Europe Committee of Ministers, 17 November 2010; Available at: <https://bit.ly/2y7pLGe>; 'Campbell and Fell v UK, Application Nos. 7819/77 and 7878/77', European Court of Human Rights, 28 June 1984, para. 80; Available at: <https://bit.ly/2SEgNd6>.

<sup>90</sup> 'Key Findings of the 2019 Report on Turkey', European Commission, 29 May 2019; Available at: <https://bit.ly/2JQHisL>; '2018 Report on Turkey', European Commission, 17 April 2018; Available at: <https://bit.ly/2HaRBZ6>.

<sup>91</sup> 'Turkey: Events of 2018', Human Rights Watch, 2019; Available at: <https://bit.ly/2W2P1bl>.

<sup>92</sup> See: 'Resolution on ineffective legal remedy for Turkey's journalists', European Center for Press Media and Freedom, 12 February 2019; Available at: <https://bit.ly/2LCWUm1>; '2019 Report', European Commission, 29 May 2019; Available at: <https://bit.ly/2JQHisL>; 'Resolution: Turkey: The myth of domestic legal remedy', International Press Institute, 18 February 2019; Available at: <https://bit.ly/2tnWUa>.

- Ensure the separation and independence of governmental branches and to ensure that no political pressure is exerted to any part of the state system;
- Provide all those dismissed under the SoE decrees with an effective appeals mechanism which is in compliance with due process guarantees, full legal representation, access to all files, the opportunity to have a hearing with an adversarial procedure, and access to effective remedies. Reinstate all those arbitrarily dismissed from their jobs.

### ***Legal framework for freedom of expression***

3. The government supported 14 recommendations related to strengthening the legal framework on freedom of expression,<sup>93</sup> and 5 recommendations specifically related to bringing terrorism legislation in line with international human rights standards.<sup>94</sup> However, in the period under review, the government has weaponised the legal system and terror legislation to restrict free expression.
4. The right to freedom of opinion and expression is guaranteed by Article 26 of the Turkish Constitution.<sup>95</sup> Through Act no. 4709, on 3 October 2001, Parliament amended Article 26 to permit restrictions, including vague concepts such as “safeguarding the basic characteristics of the Republic”, “preventing crime”, and “punishing offenders” - which are not recognised as legitimate aims for limiting expression under Article 19(3) of the ICCPR.<sup>96</sup> Furthermore, there are no requirements that any such restrictions be proportionate measures to achieve those aims, only requiring that they be “prescribed by law”. It further broadly restricts the dissemination of information classified as a “state secret”, without providing for public interest exemptions.

### ***Turkish Penal Code (TPC) - Defamation and Insult***

5. The TPC retains numerous content-based restrictions on freedom of expression against international human rights law. Article 125 criminalises insult, such as defamation against public officials or against beliefs, including religious ones, with penalties of at least one year in prison. Part

<sup>93</sup> Botswana (148.124), Lebanon (148.115), Luxembourg (148.116), Nicaragua (148.8), Austria (148.118), Italy (148.36), Finland (148.125), France (148.119), Switzerland (148.120), United Kingdom (148.121), United States of America (148.117), Latvia (148.14), Angola (148.127), Norway (148.34).

<sup>94</sup> France (149.43), Lithuania (149.11), United States of America (148.117), France (150.22), Netherlands (150.52).

<sup>95</sup> Article 26 in full reads: ‘Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing. Withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary. Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented. (Paragraph added on October 3, 2001; Act No. 4709) The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law’. See: ‘Constitution of the Republic of Turkey’, 7 November 1982, Amended on October 3 2001; Available at: <https://bit.ly/20DX3BB>.

<sup>96</sup> *Ibid.*

3 criminalises insult of the President, national anthem, flag and the institutions and organs of the state, and increases the penalty by one-sixth if made in public. Article 267 criminalises calumny, defined as knowingly spreading false information, with sentences of one to four years. Article 299 criminalises defamation of the President, with sentences of one to four years in prison.

6. Though the Minister of Justice must formally initiate proceedings under these provisions, prominent officials, including the President, frequently bring criminal defamation cases against journalists, artists, and academics. These provisions are widely misused to silence criticism of the President and government officials: between 2010 and 2017, 12,893 cases were filed under Article 299, 12,305 of which were filed during Erdoğan's presidential term.<sup>97</sup> Fines levied following conviction have increased substantially in recent years.<sup>98</sup>
7. International human rights standards are clear that defamation should be decriminalised, as it is a disproportionate measure to protect reputation. Greater protections should not be provided in law to the reputations or feelings of public figures, since they should be expected to withstand a greater degree of criticism than others.<sup>99</sup>

#### ***Misuse of counter-terrorism measures to target expression***

8. The Turkish government rejected two key recommendations<sup>100</sup> aimed at curbing the use of the Anti-Terrorism Law against journalists, stating that “no Turkish legislation includes any provision that would lead to imprisonment of journalists on account of their journalistic work”.<sup>101</sup> However, the TPC, Code of Criminal Procedure, and Anti-Terrorism Law limit Constitutional guarantees.

#### ***Anti-Terrorism Law (Law no. 3713)***

9. Several provisions of Law no. 3713 concern membership in and propaganda supporting terrorist organizations, yet the law does not define acts that would constitute terrorism, and other key terms are left undefined.<sup>102</sup>

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<sup>97</sup> ‘Record increase in insulting Erdoğan cases since 2014’, Ahval, 8 December 2018; Available at: <https://bit.ly/2y8BVi1>.

<sup>98</sup> ‘On the rise in the cases of ‘insulting the President’ (in Turkish), Deutsche Welle, 8 December 2018; Available at: <https://bit.ly/2JPkgT2>.

<sup>99</sup> ‘General Comment No. 34 on freedom of expression and opinion, CCPR/C/GC/34’, Human Rights Committee, 12 September 2011, para. 38; Available at: <https://bit.ly/2Qe9G9A>.

<sup>100</sup> France (150.22) and Netherlands (150.52).

<sup>101</sup> *Ibid.*

<sup>102</sup> Anti-Terrorism Law, Article 1(1) reads: ‘Any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat’. See: ‘Anti-Terrorism Law Act No. 3713’, 12 April 1991; Available at: <https://bit.ly/2YgCLnt>.

10. Article 7(2) of the Anti-Terrorism Law prescribes one to five years' imprisonment for those who make 'propaganda of a terrorist organization by justifying or praising or inciting the terrorist organizations'. The provision also increases the punishment by half for "propaganda" expressed via press and publication. Concepts of "propaganda", "justification", or "praising", where this falls short of actual incitement to terrorist acts, should be protected forms of expression.<sup>103</sup>

### **Turkish Penal Code – Counter Terror**

11. Article 6 of the TPC punishes membership in criminal organisations, including "any person who establishes, controls or joins a criminal organisation". Many journalists have been charged with membership of a proscribed group, criminalised under Article 314, and punishable by 5 - 10 years' imprisonment. Simply working, or having previously worked for, newspapers aligned, or perceived to be aligned, with the Gülen movement has been used to label journalists as "members". Similarly, working for media outlets considered pro-Kurdish has seen journalists charged with membership of the Kurdistan Workers Party (PKK).<sup>104</sup>

12. Article 220(7) criminalises committing an offence on behalf of a proscribed group and sets out that any individual who commits such an act be automatically classified as a member of the proscribed organisation, making them liable to 5 - 10 years' imprisonment under article 314. This provision has allowed the authorities to vastly expand the concept of membership in terrorist groups, often without credible evidence, targeting persons for the exercise of their right to freedom of expression.

13. Article 220(8) provides for 1 - 3 years' imprisonment for anyone who makes "propaganda for an organization in a manner which would legitimize or praise the terror organization's." The article increases the penalty by half if the propaganda is expressed through the press or broadcasting. Individuals' posts and shares on social media have been relied on as evidence of terrorist propaganda, among other offences.<sup>105</sup> For example, journalists Hayri Demir and Sibel Hürtaş were detained for their social media posts commenting on a military operation in Syria and convicted of spreading "terrorist propaganda" online.<sup>106</sup>

### **SoE Decrees**

14. Various SoE Decrees radically undermined safeguards against torture and ill treatment in detention, and fair trial guarantees, for individuals investigated in relation to terrorism or threats to national security, including:

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<sup>103</sup> 'General Comment No. 34', Human Rights Committee, 12 September 2011, para. 46; Available at: <https://bit.ly/2Qe9G9A>.

<sup>104</sup> 'State of Emergency in Turkey: The Impact on Freedom of the Media', ARTICLE 19, September 2016; Available at: <https://bit.ly/2hWulr4>.

<sup>105</sup> 'Turkey Country Report', Freedom House, 2018; Available at: <https://bit.ly/2JRP3ih>.

<sup>106</sup> *Ibid.*

- Decree No. 667 (23 July 2016) enabled the confiscation of passports of anyone under investigation of terrorism or posing a threat to national security, and, following the issuance of Decree No. 672 of 24 October 2016, their spouses and partners. It further allowed for communications between detainees and their legal counsel to be monitored at the request of prosecutors, and for legal counsel to be replaced by the authorities.<sup>107</sup>
  - Decree No. 668 (27 July 2016), extended the period under which individuals could be detained without charge from 48 hours to 30 days (later reduced to 12 days) and restricted detainees' access to legal counsel, including by extending the period before which they must have access to a lawyer to five days. It granted law enforcement extensive powers to search properties, including law firms, without prior judicial authorisation, and to confiscate broadly defined suspicious materials.<sup>108</sup>
15. The removal of procedural safeguards following the failed coup has led to rising numbers of allegations of torture and other cruel, inhumane or degrading treatment, including against journalist Nedim Turfent, most notably in the Southeast.<sup>109</sup> Although the SoE was lifted on 18 July 2018, the abovementioned powers were effectively made permanent when Law No. 7145 introduced amendments to several laws, including Anti-Terror Law 3713. These amendments were enacted by Parliament on 25 July 2018, for a period of three years, transposing them into the ordinary legal framework.<sup>110</sup>

#### **Recommendations:**

- Decriminalise defamation, including specific offences to protect the reputation of the President, by repealing Articles 125, 267 and 299 of the TPC.
- Align counter-terrorism laws with international and European human rights standards, in particular to ensure "terrorist acts" are narrowly defined, and to ensure expression is only restricted under such laws where it poses a genuine threat to national security, reforming Article 7(2) of the Anti-Terrorism Act and Article 220(8) of the TPC to focus only on cases of intentional incitement to terrorist acts, and reforming provisions on membership in a terrorist organisation (Articles 314 and 220(7)) so they are not applied to target persons for the legitimate exercising of their rights to freedom of expression.

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<sup>107</sup> The increased use of travel bans to harass journalists and activists, including their family, is a further area of concern. After the lifting of the State of Emergency in 2018, the authorities have continued to seize and hold the passports of individuals that oppose or are perceived to oppose the government. The wife of exiled Turkish journalist Can Dündar, Dilek Dündar, was denied her passport in September 2016 and for three years was unable to leave Turkey to reunite with her husband and son.

<sup>108</sup> 'Opinion on Emergency Decree Laws Nos 667-676, Venice Commission, 12 December 2016; Available at: <https://bit.ly/2Mjk3ZU>.

<sup>109</sup> 'In Custody Police Torture and Abductions in Turkey', Human Rights Watch, 12 October 2017; Available at: <https://bit.ly/2ydO8Um>.

<sup>110</sup> <https://www.tbmm.gov.tr/kanunlar/k7145.html>

## **Media Freedom**

16. Despite accepting a recommendation to ensure media independence, the government has dismantled free and independent media in the country, with grave consequences for public access to pluralistic viewpoints and sources of information, including at key political moments such as the constitutional referendum of 2017, and recent parliamentary and presidential elections.<sup>111</sup>
17. Articles 28 and 29 of the Constitution safeguard the freedom of the press. Nonetheless, several grounds are provided for restricting press freedom, including inciting a criminal offence or threatening national security or integrity.<sup>112</sup> Article 28 (6) (7) and (8) and Article 29 provide conditions for the suspension and seizure of publications which do not comply with international human rights law.

## **Forced closure of media outlets**

18. Under nine separate SoE Decrees,<sup>113</sup> at least 170 media outlets – including publishing houses, newspapers and magazines, news agencies, TV stations and radios – were closed without judicial authorisation, on charges that they spread “terrorist propaganda”. As a result, at least 3,000 media workers and journalists were dismissed without access to an effective domestic remedy (see para 10).<sup>114</sup> Just 21 media outlets have been re-opened.<sup>115</sup> Many independent mainstream media outlets have been permanently silenced, following their liquidation and expropriation of all their assets.<sup>116</sup>
19. The crackdown has not only affected media outlets affiliated with, or perceived to have affiliations with, the Gülen movement, such as *Zaman*, which was subjected to a government takeover in March 2016.<sup>117</sup> The 2016 temporary closure of *Özgür Gündem* and 2016 police operation on

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<sup>111</sup> Sweden (148.122).

<sup>112</sup> The full text reads: ‘Anyone who writes or prints any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified State secrets and anyone who prints or transmits such news or articles to others for the above purposes, are held responsible under the law relevant to these offences’. See: ‘Constitution of the Republic of Turkey’, 7 November 1982, Amended on October 3 2001; Available at: <https://bit.ly/20DX3BB>.

<sup>113</sup> Emergency Decrees 668 (Jul 2016); 675 (Oct 2016); 677 (Nov 2016); 683 (Jan 2017); 689 (Apr 2017); 693 (Aug 2017); 695 (Dec 2017); 697 (Jan 2018); 701 (Jul 2018).

<sup>114</sup> ‘2016: Journalism Gripped by State of Emergency’, Bianet, 17 February 2017; Available at: <https://bit.ly/2K2JRXB>.

<sup>115</sup> A detailed list of closed media outlets. See: ‘Journalists in Prison (Google Doc); Available at: <http://bit.ly/2Zdn1CW>.

<sup>116</sup> In its March 2017 opinion, the Venice Commission questioned the lawfulness and necessity for these permanent liquidations, finding them to be incompatible with Article 10 of the European Convention on Human Rights. See: ‘Draft Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media’ Venice Commission, 24 February 2017; Available at: <http://bit.ly/2LEPfdn>.

<sup>117</sup> Former *Zaman* journalists would later be tried in one of the first mass trials of journalists following the coup. On 6 July 2018, former *Zaman* journalists including Şahin Alpay, Mustafa Ünal, İbrahim Karayeğen, Ahmet Turan Alkan, Mümtazer Türköne and Ali Bulaç were sentenced to between eight years and nine months’ imprisonment, and ten years and six months’ imprisonment, following their conviction for “membership of a terrorist organization” (article 314). The case against them was manifestly unfounded, as the weak evidence presented – focused entirely on their connection to *Zaman*, and their journalistic work, a



*Cumhuriyet* are examples of how the SoE was deployed against critical or independent media outlets..<sup>118</sup>

20. The Venice Commission has noted that ‘such measures as mass liquidations of media outlets on the basis of the emergency decree laws, without individualised decisions, and without the possibility of timely judicial review, are unacceptable in light of the demands of international human rights law, and extremely dangerous.’<sup>119</sup>

### **Reforms to media regulatory framework**

21. Government interference in the media landscape has increased. The public broadcaster TRT was brought under the oversight of the Directorate of Communications, which is under executive control following the issuing of Presidential Decree No.14. This development compromised its impartiality and independence, just ahead of the 2018 presidential and parliamentary elections.<sup>120</sup> The television and radio broadcast regulator (RTÜK), has also been brought under the direct control of the Ministry of Culture and Tourism, further undermining media independence.<sup>121</sup>
22. Since 2017, the Directorate of Communications has been responsible for issuing press cards. 682 press cards were cancelled in the subsequent four months.<sup>122</sup> New press card regulations introduced on 14 December 2018 made it easier for the authorities to revoke cards on spurious grounds.<sup>123</sup> Up to March 2019, 14,759 permanent press cards and 5,691 temporary press cards have been cancelled.<sup>124</sup>

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significant proportion of which had been written several years before FETO/PDY was designated as a proscribed terrorist group - demonstrated.

<sup>118</sup> ‘Turkey Country Report’, Freedom House, 2018; Available at: <https://bit.ly/2JRP3ih>. On 16 August 2016, the newspaper *Özgür Gündem*, which extensively reported on the conflict in the Southeast, was temporarily shut down following a court order and more than twenty journalists, editors and publishers of the newspaper were accused of terrorist related charges. A digital version of the newspaper, *Özgürlükçü Demokrasi*, was subsequently launched, although the website has been blocked.

<sup>119</sup> ‘Draft Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media’ Venice Commission, 24 February 2017; Available at: <http://bit.ly/2LEPfdn>.

<sup>120</sup> ‘International referendum observation mission Republic of Turkey – Constitutional Referendum: Statement of preliminary findings and conclusions’, OSCE, 16 April 2017; Available at: <http://bit.ly/2Y49Xn8>.

<sup>121</sup> Ibid. Turkey’s Radio and Television Supreme Council (RTÜK) regulates and supervises radio, television and on-demand media services.

<sup>122</sup> ‘DW: Turkish gov’t cancels press credentials of 682 journalists in 4 months’, Turkey Purge, 9 May 2019; Available at: <http://bit.ly/2YeneVn>.

<sup>123</sup> ‘Government changes Press Card Regulation: Makes cancellations easier’, Evrensel Daily, 15 December 2018; Available at: <http://bit.ly/2SCCcDe>; ‘IPI condemns new regulation on press cards in Turkey’, IPI, 18 December 2018; Available at: <http://bit.ly/2Oizuo8>

<sup>124</sup> ‘DW: Turkish gov’t cancels press credentials of 682 journalists in 4 months’, Turkey Purge, 9 May 2019; Available at: <http://bit.ly/2YeneVn>.

23. Major media mergers and acquisitions have further undermined media pluralism and entrenched state control over the media and the public's access to information.<sup>125</sup> An estimated 90 percent of the country's media are currently owned by pro-government groups.<sup>126</sup>
24. The independent media's ability to operate has been further impacted by the public advertising regulation of 5 October 2016, barring public advertising in media outlets that failed to dismiss employees charged with terror-related offences. Although the Press Advertising Authority is required to distribute public advertising based on circulation figures, it is reported that independent media receive less than they are due.<sup>127</sup>
25. On 21 March 2018, Parliament enacted an amendment to Law No. 6112 on the Establishment and Broadcasting Services of Radio and Television Enterprises ("RT Law"). Under Article 29(a) of the RT Law, service providers that broadcast online are now required to obtain transmission authorization and a broadcast license from RTÜK.<sup>128</sup> Those that fail to obtain a licence face having their content removed within 24 hours of a complaint by RTÜK to a competent magistrate. The RTÜK is empowered to reject requests on the grounds of national security, and to subject content to prior-censorship. The new licensing model affects all Turkish media providers operating outside the country and foreign media operating inside Turkey. Article 29(A) also extends to online video on demand platforms.<sup>129</sup>

#### **Recommendations:**

- Reverse closures of media outlets, permit independent operation of closed media outlets, the return of all seized assets and halt executive interference with independent news organisations. Any powers to suspend media should be limited to the broadcast sector, administered by an independent regulatory body, ensure proportionality (i.e. suspension is only permissible for the most severe and repeated violations of broadcasting license conditions), and be subject to judicial review.
- Reinstate press cards to all journalists, and ensure that the process for granting, reissuing, and revoking press cards is independent of political influence or interference.

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<sup>125</sup> 'Joint statement: Turkey: statement on today's raid at Özgürlükçü Demokrasi' Pen International, 29 March 2018; Available at: <http://bit.ly/2YsWQuM>.

<sup>126</sup> Figures from 2016 found that four holding groups held 71% of the audience share: Turkuvaz / Kalyon Group (30%), Ciner Group (15%), Demirören Group (15%), and the Doğu Group (11%). The Doğan Group sold all its media outlets to Demirören Holding, a pro-government conglomerate whose top management has strong personal ties to President Erdoğan. See: 'Subscribe Campaign', International Press Institute, 2019; Available at: <http://bit.ly/2Oi9Srq>.

<sup>127</sup> 'Media ownership monitor Turkey', RSF and Bianet, 2019; Available at: <http://bit.ly/2LH7F6y>.

<sup>128</sup> 'The age of Internet restrictions in Turkey', Hurriyet Daily News, 24 March 2018; Available at: <http://bit.ly/2YjxY4y>.

<sup>129</sup> *Ibid.*

- Amend Law No. 6112 on the Establishment and Broadcasting Services of Radio and Television Enterprises ("RT Law") to bring into line with international standards, in particular to ensure the independence of the RTÜK.

### ***Arrests, trials and harassment of journalists, civil society, and academics***

26. The government accepted a recommendation to ensure that journalists can work without fear of reprisals, and 13 recommendations related to ensuring freedom of association.<sup>130</sup> However, it has pursued an unprecedented crackdown against the media and civil society.<sup>131</sup> For the last three years, Turkey been the world's most prolific jailor of journalists. While figures vary, at the time of writing there are at least 140 journalists and media workers in detention, and at least 300 have been detained since the imposition of the SoE. Hundreds more are on trial.
27. Between 2016 - 2018, seven journalists were sentenced to five life sentences and 45 years in prison in total for "attempted coup" and "targeting the security of the state"; 64 journalists were sentenced to 480 years and 2 months in prison in total for "managing a terrorist organization", "being a member of a terrorist organization" and "aiding a terrorist organization"; 52 journalists were sentenced to prison for 122 years, 6 months and 3 days (14 years, 10 months and 7 days of sentences deferred) under the Anti-Terror Law.<sup>132</sup>

### ***Right to a fair trial***

28. The wholesale dismantling of the independent judiciary, and suspension of fair trial rights and procedural guarantees, has enabled the government's pursuit of dissenting journalists and civil society. Trial monitoring in the cases of journalists and human rights defenders conducted by the coalition members has exposed serious violations of fair trial rights.
29. Indictments have lacked credible, individualised, and convincing evidence required to justify prosecution, often containing factual inaccuracies and objectively absurd claims. As many as 50,000 people were arbitrarily detained with the use or download of the encrypted Bylock app given as evidence, and many thousands more dismissed or subject to disciplinary procedures on the same grounds.<sup>133</sup> Prosecutors routinely fail to disclose evidence of defendants or their legal counsel, and

<sup>130</sup> 148.118 (Austria).

<sup>131</sup> 148.78 (Greece); 148.120 (Switzerland); 148.121(United Kingdom); 148.123(Costa Rica); 148.124 (Botswana); 148.125 (Finland); 148.128 (Norway); 149.39 (Czech Republic); 149.41(France); 149.42 (Australia); 149.36 (Germany); 149.35(Austria); 150.23 (Ireland).

<sup>132</sup> 'Media Monitoring Report 2018: One Year of the Journalist and the Media', Bianet, 20 February 2019; Available at: <http://bit.ly/2ZackBl>.

<sup>133</sup> 'Turkey Country Report', Freedom House, 2018; Available at: <https://bit.ly/2JRP3ih>.

evidence obtained through torture has been deemed admissible.<sup>134</sup> The vast majority of cases have relied exclusively on individuals' legitimate journalistic work, or human rights work, as evidence of membership or promotion of a terrorist organisation, or involvement in the coup attempt. The composition of courts often changes throughout the hearings, raising serious questions of fairness. An increase in the use of the video conference system SEGBIS has also limited the right of individuals to appear physically in court.<sup>135</sup> Nevertheless, cases premised on such weak indictments and flimsy evidence have often resulted in successful convictions.

30. The treatment of individuals facing trial in custody has raised serious human rights concerns. Lengthy pre-trial detention has been used punitively, for periods of several years.<sup>136</sup> In many cases, pre-trial detention has been repeatedly extended in the absence of any credible evidence, or without disclosing evidence before the courts. Prolonged solitary confinement is common and used punitively, amounting to torture.<sup>137</sup> Journalists charged with terrorism offences have family visits and phone calls heavily restricted, and access to letters and books prohibited.

31. The following emblematic cases of prosecutions of journalists for their work are illustrative of these trends:

### **Altans**

32. Nazlı Ilıcak (journalist for *Özgür Düşünce*), Ahmet Altan (former editor of *Taraf* newspaper and writer) and Mehmet Altan (economics professor) were convicted of "attempting to overthrow the constitutional order" (Article 309(1)) for their alleged involvement in the coup attempt. They were given "aggravated" life sentences without parole on 16 February 2018, having spent more than 2 years in pre-trial detention.<sup>138</sup>

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<sup>134</sup> 'Nedim Türfent: One trial, countless injustices' IPI, 16 April 2018; Available at: <http://bit.ly/32Q9FPh>.

<sup>135</sup> 'Turkish courts violate journalists' right to fair trial, new report finds', IPI, 28 January 2018; Available at: <http://bit.ly/2Gu99Ni>; 'Analysis: Use of courtroom video link violates Turkey journalists' rights' IPI, 2 August 2018; Available at: <http://bit.ly/30ZdVtV>.

<sup>136</sup> Osman Kavala spent 2 years in pre-trial detention. Deniz Yücel spent a year in pre-trial detention. A decision by the constitutional court found this to have violated his right to liberty and security, and right to freedom of expression. See: 'Turkey's Constitutional Court gives contradictory decisions on Cumhuriyet journalists' applications' IPI, June 28, 2019; Available at: <http://bit.ly/2ZacOHF>.

<sup>137</sup> Journalists Deniz Yücel and Nedim Türfent spent months in solitary confinement. See: 'Turkey: journalist on trial after more than a year in solitary confinement', Pen International, 13 June 2017; Available at: <http://bit.ly/2Y4NSEF>. Prolonged (of more than 15 days) or indefinite solitary confinement contravenes the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment. See: 'United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) A/RES/70/175', United Nations, 8 January 2016, Rules 43 to 45; Available at: <http://bit.ly/2LFkYVf>.

<sup>138</sup> 'Joint statement: Life sentences in the landmark case on journalists at the heart of the Constitutional Crisis in Turkey', ARTICLE 19, 19 February 2018; Available at: <http://bit.ly/2LFTTeh>.

33. The prosecution's evidence centred on the writers' joint television appearance the night prior to the coup attempt – during which the defendants allegedly sent “subliminal messages” to the government's opposition – as well as their news articles and opinion pieces, which commented on the political situation in Turkey and include criticism of the government.<sup>139</sup> The trial was marred by profound violations of the journalists' right to a fair trial.
34. The case also demonstrated the disintegration of the rule of law in Turkey. In January 2018, the lower courts ignored a TCC decision effectively ordering the release of Mehmet Altan, in breach of Article 153 of the Constitution. A ruling by the ECtHR in his case and that of journalist Şahin Alpay was similarly ignored,<sup>140</sup> demonstrating Turkey's failure to implement binding decisions of the court.<sup>141</sup> On July 2018, Mehmet Altan was released pending the outcome of his appeal against his conviction and sentence. On 2 October 2018, an appellate court upheld the verdict of “aggravated life sentence” for Ahmet and Mehmet Altan despite the rulings of the TCC and the ECtHR.
35. On 5 July 2019 the Supreme Court of Appeals overruled the life sentence in the case of Ahmet Altan, Mehmet Altan and Nazlı Ilıcak and a new trial will begin in October 2019. Ahmet Altan and Nazlı Ilıcak remain in detention, while Mehmet Altan released under judicial control measures and cannot travel abroad.

### ***Cumhuriyet***

36. On 26 April 2018, 17 staff and board members of the opposition newspaper Cumhuriyet – including journalists Murat Sabuncu, Akın Atalay, Kadri Gürsel, Aydın Engin, Musa Kart and Ahmet Şık– were convicted of ‘assisting a terrorist organisation whilst not being a member’ under Article 220(6) of the Criminal Code. The only evidence introduced in the proceedings was their journalistic writings. Collectively, the defendants served approximately 9.5 years in pre-trial detention.
37. The defendants were sentenced to between two years and six months' imprisonment, and eight years and one month imprisonment.<sup>142</sup> Their sentences were upheld on appeal in February 2019, and six of the journalists who had been released pending appeal were returned to prison on 25 April 2019.<sup>143</sup>

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<sup>139</sup> ‘Altans: Expert Opinion’, ARTICLE 19, 5 June 2017; Available at: <http://bit.ly/30W1gbq>.

<sup>140</sup> ‘Turkey: Free expression cases trigger constitutional crisis’, ARTICLE 19, January 22 2018; Available at: <http://bit.ly/2JOCaf4>.

<sup>141</sup> ‘European Convention on Human Rights (ECHR)’, Council of Europe, 1 June 2010, Article 26(1); Available at: <http://bit.ly/32RQLaX>.

<sup>142</sup> ‘Joint statement: Cumhuriyet Verdict Huge Blow to Freedom of Expression’, ARTICLE 19, 26 April 2018; Available at: <http://bit.ly/2Za7xzz>. The sentences were upheld on appeal on 19 February 2019 – six of the defendants have since seized the Court of Cassation.

<sup>143</sup> ‘Turkey: Cumhuriyet convictions strike a further blow to the rule of law’, ARTICLE 19, 20 February 2019; Available at: <http://bit.ly/2K2SIIP>.

38. The defendants' right to fair trial was violated through restrictions on their access to lawyers and interference with their right to communicate confidentially with counsel, as prison officials attended and monitored consultations. The prosecutor in the case, Murat İnam, was himself on trial on charges of being a member of FETÖ and taking part in the coup attempt, a charge carrying a life sentence compromising the defendant's right to an independent and impartial tribunal.
39. The UN Working Group on Arbitrary Detention found the detention of ten of the *Cumhuriyet* journalists to be arbitrary in a decision of 26 July 2017, but their decision was not implemented.<sup>144</sup>
40. On 3 May 2019, the TCC found that Kadri Gürsel's rights to liberty, security and freedom of expression had been violated by his extended pre-trial detention but did not find violations in five other identical cases of his former colleagues.<sup>145</sup> The cases of *Sabuncu & Oths. v Turkey* and *Şık v Turkey* are still pending before the ECtHR.

### **Özgür Gündem**

41. When the pro-Kurdish daily *Özgür Gündem* was shuttered, 56 people took part in a solidarity campaign. Of these, 49 have been subjected to criminal proceedings on charges including "making propaganda for a terrorist organisation" under Article 7(2). Of the 36 people whose trials have concluded, 27 have been convicted, receiving a total of 24 years in prison. Many have been held in pre-trial detention for extended periods, including RSF representative, Erol Önderoğlu who was arrested in June 2016, and detained for ten days.<sup>146</sup> On 17 July 2019, he was acquitted of all charges. In a second trial due to start on 7 November 2019, Önderoğlu is again accused of "terrorist propaganda" along with 16 other activists for expressing their solidarity with hundreds of university academics prosecuted in connection with a peace petition (para 59).

### **Physical attacks**

42. The hostile environment for the media, created by the government's own pursuit of journalists through the criminal law and its depiction of journalism as a national security threat, has contributed to physical attacks against journalists.

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<sup>144</sup> 'Opinion No. 41/2017 concerning 10 individuals associated with the newspaper *Cumhuriyet* (Turkey), A/HRC/WGAD/2017/41', UN Working Group on Arbitrary Detention, 26 July 2017, para 67; Available at: <http://bit.ly/2Y3bhqn>.

<sup>145</sup> 'Turkey's Constitutional Court fails to uphold journalists' rights', IPI, 3 May 2019; Available at: <http://bit.ly/2y6t94b>.

<sup>146</sup> 'RSF's Turkey representative is facing up to 14 and a half years in prison', RSF, 27 February 2019; Available at: <http://bit.ly/2ZgCX7K>.

43. On 6 May 2016, then-editor-in-chief of *Cumhuriyet*, Can Dündar, survived an assassination attempt after President Erdoğan repeatedly called him a traitor for publishing evidence of Turkey's arming of Islamic militants in Syria. In May 2019, five journalists - Selahattin Önkbir, Yavuz Selim Demirağ, İdris Özyol, Ergin Çevik and Hakan Denizli were brutally attacked in separate incidents which appear to be in retaliation for their work.<sup>147</sup>

### **Arbitrary arrests and judicial harassment of civil society**

44. Members of civil society and human rights defenders have been targeted as part of the crackdown on freedom of expression, the majority under counter-terrorism provisions.
45. Taner Kılıç, Honorary Chair of Amnesty International Turkey, was arrested in June 2017 and spent more than fourteen months in pre-trial detention. Subsequently, eight human rights defenders were detained in July 2017 while holding a digital security workshop.<sup>148</sup> All were charged with 'membership of a terrorist organisation'. Trials were ongoing at the time of writing.<sup>149</sup>
46. In March 2019, leading civil society figure Osman Kavala, professor Yiğit Aksakoğlu and 14 other prominent human rights defenders including journalists Can Dündar and *Çiğdem Toker* were indicted on charges of "attempting to overthrow the government" or "preventing the government from doing its duty" (TPC 312/2).<sup>150</sup> Kavala had already spent 400 days in pre-trial detention ahead of the indictment being issued.
47. The indictment relates to the defendants' involvement in the peaceful Gezi Park protests in 2013, which the authorities are seeking to retrospectively rewrite as an "insurrection attempt" and, as such, a precursor to the coup attempt of 2016.<sup>151</sup> If convicted, the defendants face aggravated life sentences without parole. The trial began in June 2019 and is ongoing. It sets an alarming precedent in enabling the government to draw ever more tenuous connections between the coup attempt of 2016, and any displays of dissent.

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<sup>147</sup> 'Turkey Crackdown Chronicle: Week of May 26, 2019', Committee to Protect Journalists, 30 May 2019; Available at: <http://bit.ly/2MfbWgX>.

<sup>148</sup> 'Turkey: Amnesty International, Helsinki Citizens' Assembly representatives and other activists detained during digital security training', ARTICLE 19, 6 July 2017; Available at: <http://bit.ly/2YeYrR2>.

<sup>149</sup> 'Turkey: Judicial farce must end with acquittal of human rights defenders', Amnesty International, 20 March 2019; Available at: <http://bit.ly/2OjNQVh>.

<sup>150</sup> Can Dündar, Mücella Yapıcı, Memet Ali Alabora, Ali Hakan Altınay, Ayşe Pınar Alabora, Çiğdem Mater Utku, Gökçe Yılmaz, Handan Meltem Arıkan, Hanzade Hikmet Germiyanoğlu, İnanç Ekmekçi, Mine Özerden, Can Atalay, Tayfun Kahraman and Yiğit Ali Ekmekçi.

<sup>151</sup> The Gezi Park protests saw hundreds of thousands of protesters across Turkey calling for the preservation of ecological areas and for the respect, protection and promotion of fundamental rights of freedoms in Turkey. See: 'Turkey: Gezi Park trial seeks to rewrite narrative on failed coup attempt', ARTICLE 19, 20 June 2019; Available at: <http://bit.ly/2YnINqE>.



48. In October 2018, the ECtHR admitted the application of *Mehmet Osman Kavala v. Turkey*.<sup>152</sup> In May 2019, the TCC rejected an application to end Osman Kavala's prolonged pre-trial detention filed on the grounds that it violated his human rights.

### ***Judicial harassment of academics***

49. More than 5,800 academics have been dismissed from their public university posts on alleged terrorism charges in the aftermath of the coup.<sup>153</sup>

50. On 10 January 2016, a group of 1,128 academics – which later grew to 2,212 – signed a peace petition calling for peace in the Southeast titled “We will not be a party to this crime”.<sup>154</sup> Currently over a thousand of them have been charged, including with “making propaganda for a terrorist organisation” (7/2). More than 200 of them have been sentenced, while 581 trials are ongoing.<sup>155</sup>

### **Recommendations:**

- End the arbitrary arrest and detention of journalists, human rights defenders, and academics for the exercise of their rights to freedom of expression, and/or for supposed connections to proscribed organisations, and immediately release all those currently arbitrarily detained;
- Ensure the right to a fair trial, including by ensuring an independent and impartial judiciary, effective, impartial and fair prosecutions, and respect for the right of access to counsel;
- Investigate all allegations of torture and ill-treatment in detention, ensure the prosecution of perpetrators, and provide remedies to victims;
- Investigate cases of physical attacks against journalists and bring those responsible to justice, and ensure that measures are put in place to prevent and protect against such attacks, to create a safe and enabling environment for the media;
- Guarantee full implementation of ECtHR rulings in relation to freedom of expression and journalism cases and ensure that judges take into consideration all ECtHR rulings when reaching decisions;
- Provide all journalists, media workers and academics dismissed under the SoE decrees with an effective appeals mechanism which is in compliance with due process guarantees, full legal representation, access to all files, the opportunity to have a hearing with an adversarial procedure, and access to effective remedies. Reinstate all those arbitrarily dismissed from their jobs.

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<sup>152</sup> ‘Commissioner Mijatović intervenes before the European Court of Human Rights in the case of Mehmet Osman Kavala v. Turkey’, Council of Europe, 10 January 2019; Available at: <http://bit.ly/30T4Y5t>.

<sup>153</sup> ‘Turkey: Government Targeting Academics’, Human Rights Watch, 14 May 2018; Available at: <http://bit.ly/2OircMI>.

<sup>154</sup> ‘Hearing Statistics as of 25.07.2019’, Academics for Peace, 25 July 2019; Available at: <http://bit.ly/2GGIRZJ>.

<sup>155</sup> ‘Turkey: Nobel laureates and renowned professors call for freezing collaborations amid mass trials of academics’, ARTICLE 19, 28 March 2019; Available at: <http://bit.ly/2Gvck7t>.

## ***Freedom of Expression Online***

51. Despite accepting recommendations to improve access to information and the internet, the government has tightened its grip on the free flow of information online.<sup>156</sup>

## ***Blocking and filtering***

52. The 2007 Internet Law No. 5651 enables the government to restrict access to online content and telecommunications networks.<sup>157</sup> Amendments in March 2015 set out four blocking procedures, vastly broadening the state's censorship powers.<sup>158</sup> Of particular concern is the expedited procedure set out in Article 8A, "Removal of content and/or blocking of access in circumstances where delay would entail risk", extending the powers of the Presidency and Telecommunications Authority (Telekomunikasyon İletişim Başkanlığı - TiB) to order the removal and blocking of content, within four hours of a complaint by the Prime Minister. The entire website is blocked until the content at issue is removed, in a wholly disproportionate measure.

53. Emergency Decree No. 671 transferred the powers previously granted to TiB to the Information and Communications Technologies authority (BTK) and authorised the BTK to take "any necessary measures" to protect "national security, public order, prevention of crime, protection of public health and public morals, or protection of rights and freedom".<sup>159</sup> This provided carte blanche to the BTK, which is under executive control, to authorise the removal, without judicial oversight, of content that is lawful under international human rights law, that may be critical of the government or express oppositional viewpoints. The BTK was tasked with ensuring the implementation of blocking orders; any ISP was obliged to enforce an order by the BTK within two hours.<sup>160</sup> As of December 2018, more than 10 VPN services, 220,000 sites and more than 150,000 URLs were subject to blocking orders.<sup>161</sup>

54. Wikipedia has been blocked since April 2017, after it refused to remove content alleging the Turkish government supported militant groups in Syria. YouTube was temporarily banned in 2015 for the

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<sup>156</sup> Austria (148.118), United States of America (148.117), Latvia (148.14), Republic of Korea (150.16), Hungary (149.10), Luxembourg (148.116), Norway (149.34), Costa Rica 148.123), Netherlands (150.52).

<sup>157</sup> Article 8 ("The decision to deny access, and implementation thereof"); Article 8A ("Removal of content and/or blocking of access in circumstances where delay would entail risk"); Article 9 ("Removal of content from publication, and blocking of access"); Article 9A ("Blocking access to content on grounds of the confidentiality of private life").

<sup>158</sup> Opinion on Law No. 5651 on Regulation of Publications on the Internet and Combating Crimes Committed By Means of Such Publication ("The Internet Law") CDL-AD(2016)011, Venice Commission, 15 June 2016; Available at: <http://bit.ly/2OrCwGK>.

<sup>159</sup> 'Turkey's Internet Policy after the Coup Attempt: The Emergence of a Distributed Network of Online Suppression and Surveillance', Yeşil, B.; Sozeri, E.K.; Khazraee, E., Internet Policy Observatory, February 2017; Available at: <http://bit.ly/2YoAOJO>.

<sup>160</sup> 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, A/HRC/35/22/Add.3', Human Rights Council, 21 June 2017, para. 21; Available at: <http://bit.ly/2LIghFd>.

<sup>161</sup> 'Turkish activists battle internet censorship in court', Ahval News, 4 December 2018; Available at: <http://bit.ly/2YeBjL>.

same reason. In July 2019, the ECtHR awarded priority status to the petition filed by Wikimedia to lift the blocking order.<sup>162</sup>

55. Content blocking and broadcasting restrictions have been most widespread in relation to coverage of the conflict in the Southeast.<sup>163</sup> At times these restrictions have amounted to a complete blackout on coverage of the conflict, severely restricting the public's right to information.

### **Takedown requests**

56. Turkey issues the highest number of legal content removal requests from Twitter globally and a comparatively high number of takedown requests to Facebook.<sup>164 165</sup>

57. Online expression on social media has also been more aggressively investigated, and prosecuted, since 2016. In just the second half of 2016, 3,847 people were subject to criminal investigation for social media posts deemed to be inciting, praising or spreading propaganda for terrorist organisations or insulting to state officials.<sup>166</sup> 1,729 of them were imprisoned.<sup>167</sup> In total, from the latter half of 2016 to end of May 2019, approximately 93,351 social media accounts were investigated and 43,387 individuals subject to criminal investigations for their social media posts. This trend has prompted self-censorship.

### **Recommendations:**

- Refrain from all measures to intentionally disrupt access to the Internet or mobile networks - including Internet shutdowns, blocking and filtering measures - in particular during protests, and elections;
- Lift the blocking order on Wikipedia;
- Take all necessary steps to guarantee freedom of expression and information online, including by ceasing the harassment of individuals exercising their right to freedom of expression online.
- Enact clear laws to ensure online content is only blocked on the basis of judicial decisions, and only where it is strictly necessary and proportionate to a legitimate objective.

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<sup>162</sup> 'Wikimedia Foundation petitions the European Court of Human Rights to lift the block of Wikipedia in Turkey', Wikimedia Foundation, 23 May 2019; Available at: <http://bit.ly/2JOHuZw>.

<sup>163</sup> 'Turkey Country Report', Freedom House, 2018; Available at: <https://bit.ly/2JRP3ih>.

<sup>164</sup> 'Transparency Report "Turkey"', Twitter, 2018; Available at: <http://bit.ly/2Mc2xqx>. Turkey's takedown requests amount to 45% of global take-down requests and 8.5% of all account information requests

<sup>165</sup> 'Transparency - Turkey', Facebook, 2018; Available at: <http://bit.ly/2LHqwPa>.

<sup>166</sup> 'Republic of Turkey Ministry of Interior', 2019; Available at: <http://bit.ly/2JYhKc8>.

<sup>167</sup> *Ibid.*

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