



TURKEY TRIBUNAL

Because Silence is the Greatest Enemy of
Fundamental Human Rights

Press Freedom in Turkey Today

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in collaboration with



**INTERNATIONAL
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TABLE OF CONTENTS

Executive summary	3
1. Introduction	7
2. International legal obligations	8
3. Decisions by the ECtHR on Article 10, concerning Turkey	13
4. Turkey's Constitutional Obligations	14
5. A history of repression	14
6. Report of the Venice Commission	22
7. The report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, 21 June 2017	25
8. The IPI's report on Turkey 2019	26
9. The annual report of the Platform to Strengthen the Protection of Journalism and the Safety of Journalists – 2020	29
10. The situation of foreign journalists	31
11. Limitations imposed on the digital media	32
12. Insult of the president or the state	34
13. Academic cases of violating the freedom expression and the freedom of the press	35
14. Conclusion and answers to the questions	39

Executive Summary

Press Freedom in Turkey Today

BY PHILIPPE LERUTH

Press freedom is the foundation stone of democracy and is the basic indicator of the health of a functioning democracy. Without the checks and balances guaranteed by a free press, no democracy can survive.

Press freedom is under immense pressure in Turkey. Too many journalists have already faced long convictions for the content of critical articles. The legal framework that has been put in place is imprecise and is open to interpretation and manipulation. Therefore, journalists and other media professionals find themselves being prosecuted under organised crime and terrorism legislation, simply for doing their job. Every critical journalist, by law, is suspected of terrorism. The same can be said about the penal provision that criminalises an insult to the president, the national anthem, the national flag and the institutions and the organs of the state. Based on this provision, between 2014 and 2017, a large number of persecutions took place; 12 300 cases occurred, leading to long prison penalties.

Numerous journalists have been arbitrarily detained, arrested under the terrorism laws and sent to prison. Several received life sentences with no possibility of pardon, while others received draconian penalties. Often, journalists are released only to be re-arrested as a censorship mechanism. At any one time there is a general prison population of journalists and media professionals of at least a hundred people. There is almost no effective legal recourse once a journalist has been convicted as a “terrorist” to appeal their convictions.

The State shut down or expropriated nearly two hundred media outlets that were critical of the regime. A pro-government conglomerate bought Turkey’s largest media group. In Turkey today, there are almost no media platforms or media groups who are critical of the Government and those very few that try are harassed and live under the

constant threat of persecution. Turkey is branded 154th in the World Press Freedom index out of a world ranking of 180 due to this silencing of any journalists or media platforms that do not follow the party line.

Digital media that had maintained some freedom of expression has now been ruthlessly censored and neutered by recent legislative modifications. Even before the introduction of the new media laws in October 2020, over 40,000 websites had been blocked and online social media faces an ever-expanding list of topics that are censored, such as migrants and Turkish militia involvement in Syria.

It is no wonder that the European Court of Human Rights condemned the Turkish state 154 times between 2000 and 2019.

After the failed *coup d'état*, the restrictions and prosecutions intensified. The scope of the limitations and the prosecutions clearly indicate that the fight against terrorism has been the mere justification on the part of the Turkish Government before the ECtHR and the different international commissions and rapporteurs. It is clear that this justification cannot serve valid grounds for all the violations committed by the Turkish Government; some of which have been documented in this report.

The examples given in the report show that the repression of a free media in Turkey started before the failed *coup d'état*. It is clear that many journalists and media outlets were already on the Turkish Government's watch list well before the failed coup, as they were targeted for round up within a matter of days after the coup attempt, which was the catalyst to execute these long-established plans.

As the Venice Commission stated, if the government's intention was to react against a threat of terrorism or to avoid new coup attempts, then another method should have been used. The closure and the expropriation of media outlets can only be seen as a strategy on the part of the Turkish Government to destroy critical voices and further cripple freedom of the press and expression. The Kavala judgment by the ECtHR – although not a press case- is important in this regard. The Court clearly found that the Turkish state abused the judicial prosecution to muffle its critics by limiting their freedoms and rights for ulterior purposes (Article 18 ECHR). In particular, the Court considered it *“to have been established beyond reasonable doubt that the measures complained of in the present case pursued an ulterior purpose, contrary to Article 18 of the Convention, namely that of reducing the applicant to silence”*. Authorities to end his detention.

In January 2020, the United Nations Universal Periodic Review (UPR) cycle revolved around to Turkey. Press Freedom and the protection of journalists was once again raised by many countries as area of concern and in particular the lack of progress following the emergency decrees issued four years after the alleged coup. The submissions to the UN called for reform to enable press freedom to flourish in Turkey and to review anti-terror legislation and to protect freedom of expression online. In response to the UPR, the delegation of Turkey noted that a provision had been added to the anti-terror legislation to ensure that the expression of thoughts did not go beyond news reporting or did not simply amount to criticism should not constitute an offence. It noted, nonetheless, that:

“Freedom of expression was not an absolute right and did not protect terrorist propaganda, incitement to hatred or violence. Freedom of expression could be subjected to restrictions, as provided for in international human rights treaties.” Turkey went on to state that, *“no profession, including journalism, gave persons immunity from prosecution if there was reasonable suspicion that a crime had been committed.”*

Taking into account all these elements, the ultimate, yet unfortunate, conclusion of the present report, is that that the violations of freedom of the press, committed by the Turkish government can no longer be considered a reaction linked to the *“coup d'état”* or aiming at fighting political violence and terrorism. The clear purpose is to silence all critical voices in Turkey as much as possible, whereby prosecution and long-term imprisonment are used as a frequent method to reach that goal.

Turkey has been condemned for violation of article 10 ECHR 154 times since 2000 by the ECtHR. This report shows many prosecutions and severe convictions for insult or defamation of the president or the state. The number of journalists kept in pretrial or convicted for long-term imprisonment, marks Turkey as the worst jailor of journalists worldwide. Closing down around 200 media outlets, having blocked more than 40 000 websites, and organising a strict system of permits for classical radio and for online broadcasters and digital media, again is in clear contradiction with Article 10 ECHR and the basic rules of democracy.

Against this background, it can only be concluded that Turkey currently cannot be considered as a country within which a sufficient degree of freedom of the press and freedom of expression is guaranteed. As result, the conclusion must also be that Turkey is no longer acting in compliance with the standards of a functioning democracy, because a functioning democracy without an effectively guaranteed freedom of the press is impossible. The organisation of the elections, the unequal access to publicity, criminalisation of political opponents, the eviction of a large number of mayors, cast doubt on the electoral process as such. But even if we accept that Turkey still has free and fair elections, we can't say that Turkey still is a real democracy. Democracy does not exist without a press freedom and freedom of speech. The legal restrictions, the administrative measures of blocking and expropriating, the judicial persecutions and the convictions have collectively destroyed the freedom of press in Turkey. At the best we can consider Turkey as a "competitive authoritarian system". But not as a democracy.

1. INTRODUCTION

Freedom of the press in Turkey has been a highly debated topic since the creation of the modern Turkish Republic. During certain periods, notably when the military has exercised power, this freedom has been particularly limited. In retrospect, Kurdish-speaking journalists, (far) left-wing journalists and independent investigative journalists have been particularly targeted. What is the state of freedom of the press in Turkey today? Has the lack of respect for the freedom of the press become a fundamental marker of Turkey's legal and political landscape? Has the state of freedom of the press deteriorated since Recep Tayyip Erdogan took office, first as Prime minister and then as head of State, and especially since the attempted coup of 15 July 2016? This report aims to shed significant light on the current state of freedom of the press in Turkey.

This analysis will allow us to answer two important questions:

- 1. Can Turkey currently be considered a country within which a sufficient degree of freedom of the press and freedom of expression is guaranteed, so it can follow the standards of a functioning democracy?**
- 2. Can the decisions taken by the Turkish government still be considered as a reaction linked to the "*coup d'état*" or do they need to be evaluated as a way to "destroy" the voices and/or organisations critical of the government?**

This report will firstly take a short look at the international legal obligations of Turkey, with a specific focus on those issues that are particularly relevant to the current legal-political situation in Turkey (Section 2). Secondly, it then highlights the number of cases concerning freedom of expression and press freedom before the European Court of Human Rights (ECtHR) in Section 3. Next, a short summary of Turkey's constitutional obligations (Section 4), and an historical overview (Section 5) is given. Comment is then given on the report of the Venice Commission (Section 6), the report of the special rapporteur on the promotion of the right to freedom of opinion and expression (Section 7), the IPI report 2019 (Section 8) and the annual report of the Platform to Strengthen the Protection of Journalism and the Safety of Journalists (Section 9).

Additionally, the situation of foreign journalists (Section 10) is examined, with some analysis of the limitations imposed on digital media (Section 11) and the specific incrimination of insult of the president or the state (Section 12) and gives a number of academic cases of violations of the freedom of the press (Section 13).

Finally, in the conclusion, answers to the two research questions of the present report are given.

In this report the names of journalists and media outlets are in bold. This makes the reading of the report a bit easier, but the reader can see this also as a symbolic gesture towards all these journalists and media outlets who suffered due to violations of their fundamental rights.

2. INTERNATIONAL LEGAL OBLIGATIONS

Freedom of expression and press freedom are “traditional” human rights. Freedom of expression is a right that was declared by the UN as part of the International Human Rights Declaration, that was signed and accepted by Turkey, like many other countries, on 6 April 1949. Turkey signed and affirmed the International Covenant on Civil and Political Rights (Turkey signed the agreement on 15 August 2000 and it was confirmed on 23 September 2013) and signed and accepted the European Convention on Human Rights, which regulates Freedom of Expression at Article 10 and Article 19. Article 10 stipulates:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In addition, Turkey is also signatory to the International Covenant on Civil and Political Rights of 1966 (ICCPR). Article 19(2) of the ICCPR entitles “everyone has the freedom of expression” including “the freedom to seek, receive, and impart information and ideas of all kinds.”

Turkish authorities declared on 21 July 2016 to the European Council’s General Secretary that some of the measures taken after the coup might include derogation of some of obligations predicated by the European Council of Human Rights. However, in terms of ICCPR and European Covenant of Human Rights, the right of freedom of expression is exempt from any limitation of obligations, whether in normal conditions or extraordinary conditions.

The provision is rather straightforward. The jurisprudence is also clear that freedom of the press and expression are of fundamental importance for a fully functioning democratic society. Therefore, it is not only a personal right, but also a functional democratic right:

"In this connection, the Court makes reference to the essential function which the press fulfils in a "reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas, with regard to the print media as well as to the audio-visual media; the public also has a right to receive them"¹.

In line with Article 10/2 ("the exercise of these freedoms, since it carries with it duties and responsibilities") it is evident that journalists carry responsibilities. They are an integral part of a functioning democracy, and therefore enjoy greater protection. For instance, they have the right not to disclose their sources, but must also fulfil their journalistic duty, taking into account the good practices of the profession.

The European Court of Human Rights famously held in the *Handyside* judgement:

"The Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society. – own underlining- "².

While it is impossible to define the exact limits of this time-honoured point of view from the Court, as far as the political or societal discussions are concerned, the Court rarely accepts national decisions that limit freedom of the press and expression. Political discussions must be widespread in a functioning democracy and limitations to them are almost always condemned by the court.

A salient case is the *Castells* judgement. Importantly, the case has clear implications for the current state of freedom of press and expression in Turkey. **Castells** was a Basque lawyer and senator for **Herri Batasuna**, a political movement in favor of Basque independence. He had written an article in a newspaper stating that a lot of Basque killings remain unsolved. Castells clearly stated that everyone knew that extreme right-wing paramilitary groups were responsible for those killings, and added that

¹ Van Rijn, Arjen, Chapter 14. Freedom of Expression. In : Van Dijk, P., Van Hoof, F. and Zwaak, L. (Eds.), Theory and Practice of the European Convention on Human Rights, Intersentia, 2018, p. 767.

² ECtHR., *Handyside v. the UK*, 7 December 1976, §49.

the fact there were no judicial prosecutions was not only the responsibility of the government, but that it was also impossible to think that these paramilitary groups could have acted without the knowledge and support of the government. He was subsequently convicted for insulting state institutions.

The Spanish government tried to justify the conviction:

*"The government stressed that freedom of expression was not absolute, it carried with it 'duties' and 'responsibilities'. Mr. Castells had overstepped the normal limits of political debate. He had insulted a democratic government in order to destabilise it, and during a very sensitive, indeed critical, period for Spain, namely shortly after the adoption of the Constitution, at a time when groups of differing political persuasions were resorting to violence concurrently."*³

The European Court did not accept this justification and considered the conviction a violation of Article 10 and held that:

*"The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings,...Interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny of the Court."*⁴

The European Court issued a similar judgement in the recent case of **Altan v Turkey**:

"The Court is prepared to take into account the circumstances surrounding the cases brought before it, in particular the difficulties facing Turkey in the aftermath of the attempted military coup. The coup attempt and other terrorist acts have clearly posed a major threat to democracy in Turkey. In this connection, the Court attaches considerable weight to the conclusions of the Constitutional Court, which noted, among other things, that the fact that the attempt had taken place at a time when Turkey had been under violent attack from numerous terrorist organizations had made the country even more vulnerable (...). However, the Court considers that one of the principal characteristics of democracy is the possibility it offers of resolving problems through public debate. It has emphasized on many occasions that democracy thrives on freedom of expression (...). In this context, the existence of a "public emergency threatening the life of the nation" must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society. In the Court's view, even in a state of emergency – which is, as the Constitutional Court noted, a legal regime whose aim is to restore the normal regime by guaranteeing fundamental rights (...) – the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the

³ ECtHR, Castells v. Spain, 23 April 1992, §41.

⁴ *Ibid.*, §46.

threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.

In this context, the Court considers that criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organization, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings. Should this not be the case, the national courts' interpretation cannot be regarded as acceptable.

The Court further notes that the pre-trial detention of anyone expressing critical views produces a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty, as in the present case, will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices (...). The Court further notes that a chilling effect of this kind may be produced even when the detainee is subsequently acquitted (...).⁵

Several investigations are initiated on the basis of 'insult', as exemplified by the high number of cases of 'insults' against the President.

On 21 February 2012, in the case of *Tusalp v Turkey*⁶, the European Court was asked to consider whether two defamation actions taken by the Prime Minister against a journalist for protection of his personality rights were compatible with Article 10 of the European Convention. Dirk Voorhoof and Rónán Ó Fathaigh (from Ghent University) penned an excellent analysis on this case⁷, which merits to be quoted *in extenso*:

*"The applicant was **Erbil Tuşalp**, a journalist and author, who had published two articles in the **Birgün** newspaper concerning alleged illegal conduct and corruption in Turkish public life. The articles severely criticized the Prime Minister, Mr. Recep Tayyip Erdoğan, including such statements as "From teachers to judges ... the man uses these posts like the property of his own party"; and "I consider it useful for both his and the public's mental health to investigate whether he had a high-fevered illness when he was young ... I suspect he is suffering from a psychopathic aggressive illness. I wish him quick recovery".*

The Prime Minister brought civil proceedings against the applicant and the publishing company on the ground that certain remarks in the articles constituted an attack on his personality rights. The Turkish courts considered that the remarks went beyond the limits of acceptable criticism and "belittled the Prime Minister in the public and the political arena". According to the domestic courts, the applicant had published "allegations of a kind one cannot make of a Prime Minister", holding that the impugned remarks had alleged

⁵ **Mehmet Hasan Altan** v Turkey, ECtHR, 20 March 2018.

⁶ **Tusalp** v Turkey, ECtHR, 21 February 2012.

⁷ 'Yes Prime Minister!' Strasbourg Observers, 23 February 2012, <https://strasbourgobservers.com/2012/02/23/yes-prime-minister/>

that the Prime Minister had psychological problems and was mentally ill. The applicant and publishing company were ordered to pay 10,000 Turkish liras (€4,300) in compensation.

The European Court of Human Rights however disagreed with the findings of the Turkish courts. The Court considered that the articles concerned the applicant's comments and views on current events, and were very important matters in a democratic society which the public had an interest in being informed about and fell within the scope of political debate.

The Court also considered the balance between the applicant's interest in conveying his views, and the Prime Minister's interests in having his reputation protected and being protected against personal insult. In this regard, the Court held that even assuming that the expressions used in the articles could be classed as provocative, inelegant, and offensive, they were mostly value judgments, and had a sufficient factual basis.

In an important passage, the Court held as a matter of principle that offensive language may fall outside the protection of freedom of expression if it amounts to "wanton denigration", where the sole intent of the offensive statement is to insult. However, the Court added that the use of vulgar phrases in itself is not decisive in the assessment of offensive expression as it may well serve merely stylistic purposes, as "style constitutes part of communication as a form of expression and is as such protected together with the content of the expression".

The European Court held that the Turkish courts had not set the impugned remarks within the context and the form in which they were conveyed, with the European Court holding that the strong remarks in the articles could not be construed as a gratuitous personal attack on the Prime Minister. The Court concluded that the Turkish courts had failed to establish any "pressing social need" for putting the Prime Minister's personality rights above the right to freedom of expression and the general interest in promoting press freedom. There had thus been a violation of Article 10.

While Article 10/1 provides that broadcasting, television and cinema enterprises may be subjected to a license, the European Court explained that this only allows the state "to control the way in which the broadcasting is organized, especially with regard to 'technical aspects', but that otherwise the licensing measures had to comply with the requirements of the second paragraph"⁸. According to this jurisprudence, a state license system cannot be used in a way to introduce censure on these media outlets.

⁸ ECtHR, *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, §53.

3. DECISIONS BY THE ECTHR ON ARTICLE 10, CONCERNING TURKEY.

Year	Judgements on Art. 10	Judgements on Art. 10 against Turkey	Judgements on Art.10 against Turkey, related to journalists or media	Convictions
2000	113	6	4	4
2001	58	3	0	
2002	117	12	4	1 3 transactions
2003	141	16	4	1 3 transactions
2004	190	24	8	7 1 transaction
2005	261	58	24	24
2006	278	44	26	24
2007	354	32	23	23
2008	270	20	8	8
2009	300	14	4	4
2010	198	20	10	10
2011	197	7	4	4
2012	271	9	5	5
2013	224	9	4	4
2014	241	24	19	19
2015	326	10	3	3
2016	251	9	2	2
2017	208	7	1	1
2018	242	12	8	8
2019	100	9	3	2

Since 2000, the European Court has been seized of 164 cases relating to freedom of expression and involving Turkish journalists and/or media. It condemned Turkey in 154 of these cases, i.e. in 93.90% of the cases. In the early 2000s, seven cases were struck off the list following compensatory agreements between the Turkish State and the complainants. This practice subsequently disappeared, and it can be observed that the years 2005, 2006, 2007, 2010, and 2014 registered particularly higher number of cases being decided in Strasbourg. The judgements refer to facts or decisions that happened four to seven

years before. This also means that for facts that happened, or for decisions taken after the 2016 failed coup, only a few decisions have been taken by the European Court. As a matter of fact, the European Court of Human Rights can only be seized of cases once all appeals before the national courts have been exhausted and the procedure before the court itself also takes a lot of time in most cases.

According to data from the European Court of Human Rights (ECtHR) regarding its legal work in 2018, Turkey breached Article 10 of the ECtHR regarding the protection of freedom of expression in 40 court cases. As it stands, Turkey has been delivered the highest number of sentences in trials concerning freedom of expression cases at the European Court of Human Rights. Many of the cases that came in front of the ECHR relate to the legal framework restrictions of deliberate misinterpretation of the Turkish Penal Code (TCK) and the Prevention of Terrorism Act (TMK)

4. TURKEY'S CONSTITUTIONAL OBLIGATIONS

The Constitution of the Republic of Turkey guarantees freedom of thought and opinion (Article 25), freedom of expression and dissemination of thoughts and opinions (Article 26), freedom of press and inadmissibility of censorship (Article 28) and unacceptability of confiscation of printing houses and their annexes on grounds of having been used in a crime (Article 30).

5. A HISTORY OF REPRESSION

5.1. FROM 1980 TILL 2008

Violations of press freedom in Turkey are not new. During the military regime in the aftermath of the 1980 coup freedom of the press was severely limited. Gradually after the restoration of democracy, freedom of press gained momentum. However, violations of press freedom continued to exist.

Since Recep Tayyip Erdogan came into power there has been limited improvement in human rights protections in Turkey. Yet, problems regarding press freedom have never been addressed seriously.

Historically, the journalists prosecuted have mostly been Kurdish, which was in part due to the Turkish state's policy of denial of ethnic or linguistic minorities.

An emblematic case that illustrates this repression is the case of **Hrant (Firat) Dink**, a Turkish-Armenian journalist and writer⁹. Between 7 November 2003 and 17 February 2004, he wrote eight articles devoted to the identity of Turkish citizens of Armenian origin. In his articles he stated that the identity of the Armenians was too heavily built on the desire to see the Armenian genocide recognised by the Turks.

⁹ **Dink** was awarded the 2006 Oxfam/Novib PEN prize for freedom of expression.

Dink thought that this had to change, and that Armenians should build their future independently and replace their blood, "poisoned by the Turks", with blood coming from the link with the Armenians in Armenia. "Poisoned by the Turks" meant the negative impact on the Turkish-Armenian population coming from their unmet desire of recognition of the genocide that dominated the identity of the Turkish Armenians. This phrase however caused a lot of reaction from some Turkish nationalist groups. At a certain moment, the prefect of Istanbul informed **Dink** that if he continued to publish articles of this kind, he could not guarantee his security.

Dink was prosecuted and finally condemned to six months detention in 2006 and was later murdered by a young Turkish nationalist in Istanbul on 19 January 2007, in front of the offices of his bi-lingual weekly newspaper **Agos**.

On 25 July 2011, his killer, **Ögün Samast**, was sentenced to 22 years imprisonment for premeditated murder and illegal possession of a firearm by the Istanbul Children's Criminal Court. Initially, Dink's lawyers stated that the police forces were informed about the plan to kill Dink and even were helping to organize it. The prosecution against a large number police officers however did not lead to any indictment or conviction. The ECtHR condemned Turkey for not guaranteeing the security and the life of **Dink**¹⁰.

His sons, **Arat Dink**, and **Serkis Seropyan**, respectively managing editor and editor of **Agos**, were found guilty of "insulting Turkish identity" on 11 October 2007 and were given a one-year suspended prison sentence by a Turkish court, under Article 301 of the Turkish Penal Code. They were charged for having reproduced, part of the comments made by **Hrant Dink** in the summer of 2007 which had led to his prosecution.

5.2. THE ERGENEKON/ODA TV CASE

Gradually, the repression extended to left-wing or extreme left-wing journalists, nationalist journalists and investigative journalists. An important event in this evolution was the Ergenekon/**ODA TV** case.

Ergenekon was the name of an alleged criminal network, that is said to associate with high-ranking officers of the army and gendarmerie, extreme right-wing and nationalist left-wing activists, mafia groups, academics and journalists, that were allegedly preparing to overthrow the government.

¹⁰ **Dink v Turkey**, ECtHR, 14 September 2010

Between June 2007 and November 2009, some 300 people, including journalists, were arrested and 194 prosecuted in various capacities in this context.

In his opening speech, delivered on 10 January 2011 at the “International Law Congress 2012” organised by the Ankara Bar Association, **Metin Feyzioğlu**, the president of the Ankara Bar Association stated (see Annex 1):

“We no longer have freedom of press in Turkey. Tens of journalists who express their thoughts were taken under custody in open-ended inquiries. The newspapers, televisions, radios are forced to implement self-censor. Implementations of tax audits, penal inquiries and civilian authorities put pressure on the press and media. Local press and media whose screams are not heard in Ankara and Istanbul is left to the following predicament: ‘Obey or perish’. In fact, there is no freedom of expression in a country where there is no freedom of press”.

In this context, the cases of **Nedim Sener** and **Ahmet Sik** are exemplary. Both were investigative journalists of a high level¹¹, they were also very critical towards the government. They were criticising the Ergenekon case as an attempt at the leading party, with the help of members of the Gülen movement in the judiciary, to shut down the opposition against the government. Both were arrested on 3 March 2011 and spent over a year in prison when they were released on 12 March 2012. Worse still, the investigation (indictment) never reached the trial stage. The ECtHR in a judgement of 8 July 2014 stated that there had been a violation of Articles 5 and 10 of the ECHR¹².

By the end of 2012, Turkey held 80 journalists in jail¹³. This number fluctuated in the following years.

5.3. THE REPORT OF THE EUROPEAN COMMISSION OF 10 OCTOBER 2012.

The European Commission addressed a report on Turkey's application for membership of the European Union to the Parliament and the Council on 10 October 2012¹⁴,

The following extract is particularly important:

“As regards freedom of expression, a number of journalists were released pending trial after excessively long periods spent in pre-trial detention. The third judicial reform package prohibits the seizure of written work before publication. It also eases restrictions on media reporting of criminal investigations. There continues to

¹¹ **Nedim Sener** for instance won the award “Hero of the Freedom of the press 2010, decided by the International Press Institute and was awarded the International PEN Price 2011.

¹² **Sener v Turkey**, ECtHR, 8 July 2014 and **Sik v Turkey**, ECtHR, 8 July 2014.

¹³ 2019 Joint International Press Freedom Mission to Turkey – Mission Report, p.10.

¹⁴ https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/pdf/key_documents/2012/package/tr_rapport_2012_en.pdf

be room for debating some topics perceived as sensitive, such as the Armenian issue or the role of the military, and opposition views are regularly expressed.

However, these reforms fall short of a significant improvement regarding freedom of expression. The increasing incidence of violations of freedom of expression raise serious concerns, and freedom of the media continued to be further restricted in practice. The increasing tendency to imprison journalists, media workers and distributors fueled these concerns. The European Court of Human Rights received a large number of applications concerning violations of freedom of expression by Turkey.

A large number of cases were brought against writers, academics and journalists writing and working on the Kurdish issue, but also scholars and researchers. Several left-wing and Kurdish journalists were arrested on charges of engaging in propaganda for terrorism, others remained in prison.

The legal framework on organized crime and terrorism is still imprecise and contains definitions which are open to abuse, leading to numerous indictments and convictions. Moreover, its interpretation by prosecutors and courts is uneven and is not in line with the European Convention on Human Rights or the case-law of the European Court of Human Rights. Turkey needs to amend its penal code and anti-terror legislation to make a clear distinction between the incitement to violence and the expression of nonviolent ideas.

The application of Articles 6 and 7 of the Anti-Terror Law in combination with Articles 220 and 314 of the Turkish Criminal Code leads to abuses; in short, writing an article or making a speech can still lead to a court case and a long prison sentence for membership or leadership of a terrorist organization.

High-level government and state officials and the military repeatedly turn publicly against the press and launch court cases. On a number of occasions journalists have been fired after signing articles openly critical of the government.

All of this, combined with a high concentration of the media in industrial conglomerates with interests going far beyond the free circulation of information and ideas, has a chilling effect and limits freedom of expression in practice, while making self-censorship a common phenomenon in the Turkish media.

(...)

Website bans of disproportionate scope and duration continued. Since May 2009 the Telecommunications Communication Presidency (TİB) has published no statistics on banned sites. Court cases are ongoing against the You Tube video-sharing website and other web portals. The Law on the Internet, which limits freedom of expression and restricts citizens' right to access to information, needs to be revised. An Information Technologies and Communication Board (ICTA) decision introducing optional internet filters entered into force. It is essential that it is implemented in line with European standards with regard to the right to receive and impart information and ideas without interference by public authorities. The Supreme Board of Radio and Television (RTÜK) issued warnings to television stations and imposed fines on them, in particular for representing superstitious beliefs, denigrating morals and national values and the protection of the family, representing obscenity and praising terrorism.

Overall, the increase in violations of freedom of expression raises serious concerns, and freedom of the media was further restricted in practice. The legal framework, especially as regards organized crime and terrorism, and its interpretation by the courts, leads to abuses. Together with pressure on the press by state officials and the firing of critical journalists, this situation has led to widespread self-censorship. Frequent website bans are a cause for serious concern and there is a need to revise the law on the internet.”¹⁵

The report mentioned that according to figures by the OSCE, there were 95 journalists in prison, compared to 57 in April 2011. Twenty of the journalists on the 2012 lists had been released since, 10 of them as a consequence of the entry of the 3rd judicial reform package.

“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 tensions. 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 of Zaman took place in December 2014 and the company was eventually seized by court order in March 2016.¹⁶

5.4. THE SWORD OF DAMOCLES AND THE ABUSE OF PRE-TRIAL DETENTION AS A TACTICAL CHOICE

Some journalists remained in detention for an exceptionally long time and were released without their trials having resulted in an acquittal or dismissal. These suspended trials thus remained like a sword of Damocles hanging over their heads; resuming their activity, they remained at risk of getting arrested again without the slightest notice. For instance, this was the case of **Bariş Terkoğlu** and **Bariş Pehlivan**, working for the OdaTV website (see infra). Both were released on 14 September 2012 after 578 days in detention. Their trial in the Ergenekon case, for revealing that the prosecutor in charge of the case had had lunch with the president of the court, never reached its conclusion. Others suffered a less favorable fate; on 2 November 2013, Turkish-Dutch journalist-writer **Füsün Erdoğan**, and journalists **Baraym Namaz**, **Sedat Senoğlu**, **Ibrahim Çiçek**, **Ziya Ulusoy**, and **Arif Çelebi**, were sentenced to life imprisonment for membership of a terrorist organisation. The founder of Özgür Radyo, **Füsün Erdoğan**

¹⁵ Ibid, p. 21.

¹⁶ 2019 Joint International Press Freedom Mission to Turkey – Mission Report, p.11.

was arrested on September 12, 2006 and prosecuted on 296 charges, including that of being a member of an illegal organization, the MKLP, the Marxist-Leninist Communist Party. Released from prison pending her appeal trial, after nearly eight years of detention, **Füsün** found refuge in the Netherlands.

The systematic use of pre-trial detention has been condemned several times by the ECtHR. In the *Kavala* case the ECtHR was very clear about the abuse of pre-trial detention as a way to silence opponents of the regime.

"This document (the bill of indictment – PL), 657 pages in length, does not contain a succinct statement of the facts. Nor does it specify clearly the facts or criminal actions on which the applicant's criminal liability in the Gezi events is based. It is essentially a compilation of evidence – transcripts of numerous telephone conversations, information about the applicant's contacts, lists of non-violent actions –, some of which have a limited bearing on the offence in question. It is important to note, as emphasized above (...), that the prosecutor's office accused the applicant of leading a criminal association and, in this context, of exploiting numerous civil-society actors and coordinating them in secret, with a view to planning and launching an insurrection against the Government. However, there is nothing in the case file to indicate that the prosecuting authorities had objective information in their possession enabling them to suspect, in good faith, the applicant at the time of the Gezi events (...). In particular, the prosecution documents refer to multiple and completely lawful acts that were related to the exercise of a Convention right and were carried out in cooperation with Council of Europe bodies or international institutions (exchanges with Council of Europe bodies, helping to organize a visit by an international delegation). They also refer to ordinary and legitimate activities on the part of a human-rights defender and the leader of an NGO, such as conducting a campaign to prohibit the sale of tear gas to Turkey or supporting individual applications.

*In the Court's view, the inclusion of these elements undermines the prosecution's credibility. In addition, the prosecution's attitude could be considered such as to confirm the applicant's assertion that the measures taken against him pursued an *ulterior purpose*, namely to reduce him to silence as an NGO activist and human-rights defender, to dissuade other persons from engaging in such activities and to paralyse civil society in the country.*

(...)

In addition, the Court considers it crucial in its assessment under Article 18 of the Convention that several years elapsed between the events forming the basis for the applicant's detention and the court decisions to detain him. No plausible explanation has been advanced by the Government for this lapse of time. Furthermore, and importantly, the bulk of the evidence relied upon by the prosecutor in support of his request for the applicant's pre-trial detention, which began on 1 November 2017, had already been collected well in advance of that date; the Government have not provided any cogent explanation for this chronology of events. Moreover, notwithstanding the lapse of more than four years between the Gezi events and the applicant's detention, the Government have been unable to furnish any credible evidence which would allow an objective observer to plausibly conclude that there existed a reasonable suspicion in support of the accusations against the applicant. Finally, the Court points out that after the applicant's placement in detention, he was not officially

charged until 19 February 2019, that is, five and a half years after the facts, and solely in relation to the Gezi events. The Government have also failed to demonstrate that any investigative acts of significance took place in relation to the Gezi events between the time the applicant was initially detained in November 2017 and subsequently charged in February 2019.

It is also significant that those charges were brought following the speeches given by the President of the Republic on 21 November and 3 December 2018. On 21 November 2018 the President stated: "Someone financed terrorists in the context of the Gezi events. This man is now behind bars. And who is behind him? The famous Hungarian Jew G.S. This is a man who encourages people to divide and to shatter nations. G.S. has huge amounts of money and he spends it in this way. His representative in Turkey is the man of whom I am speaking, who inherited wealth from his father and who then used his financial resources to destroy this country. It is this man who provides all manner of support for these acts of terror..." On 3 December 2018 the President openly cited the applicant's name and stated as follows: "I have already disclosed the names of those behind Gezi. I said that its external pillar was G.S., and the national pillar was Kavala. Those who send money to Kavala are well known..." The Court cannot overlook the fact that when these two speeches were given, the applicant, who had been held in pre-trial detention for more than a year, had still not been officially charged by the prosecutor's office. In addition, it can only be noted that there is a correlation between, on the one hand, the accusations made openly against the applicant in these two public speeches and, on the other, the wording of the charges in the bill of indictment, filed about three months after the speeches in question (...).

(...)

In the light of above-mentioned elements, taken as a whole, the Court considers it to have been established beyond reasonable doubt that the measures complained of in the present case pursued an ulterior purpose, contrary to Article 18 of the Convention, namely that of reducing the applicant to silence. Further, in view of the charges that were brought against the applicant, it considers that the contested measures were likely to have a dissuasive effect on the work of human-rights defenders. In consequence, it concludes that the restriction of the applicant's liberty was applied for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence, as prescribed by Article 5 § 1 (c) of the Convention¹⁷

5.5. THE ATTEMPTED COUP OF 15 JULY 2016 AND THE INCREASING REPRESSION

The number of imprisoned journalists is extremely high in Turkey and many of them remain under threat of prosecution, even after they have been released from prison. Yet, the attempted coup on the night of 15-16 July 2016 and the declaration of a state of emergency on 20 July gave rise to a campaign of increased repression for which journalists and the media were largely victims among others including, lawyers, trade unionists, academics, magistrates). In addition to the traditional targets, Kurdish or Armenian journalists, or those speaking out on Kurdish or Armenian issues, left-wing and far-left

¹⁷ Kavala v Turkey, ECtHR, 10 December 2019, paragraphs 223-232.

journalists, "nationalist" journalists, investigative journalists, "Gülenist" journalists and media outlets were targeted. The Gülen Movement, named after its exiled leader, a Turkish scholar, Fethullah Gülen, is accused by the Turkish authorities of organising the 15 July attempted coup and of having infiltrated the entire Turkish state apparatus.

"On 27 July 2016, on the basis of emergency decrees No. 667 and No. 668, the authorities ordered the closure of over 130 media outlets and publishers. On 28 September 2016, another 12 television and 11 radio stations (owned or operated by members of the Kurdish or Alevi communities) were shut down, without the involvement of the judiciary or any review procedure, on charges that they spread "terrorist propaganda". 28 On 29 October 2016, another 11 Kurdish newspapers, two news agencies and three magazines were shut down on the basis of emergency decree No. 676¹⁸."

As the Mission Report of the Joint International Press Freedom Mission to Turkey states:

"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"¹⁹

Under OHAL (the declared state of emergency), Turkey invented iltisak (coherence) is a form of terrorist activity. Accordingly, "Coherence, i.e. to moving as conjoined to one another, voluntarily submitting, facing the same direction, interpreting circumstances from the same viewpoint, conducting oneself with suggestions, instructions and directions of an organization or structure, and in doing so anticipating worldly or unworldly gains; as well as communication i.e. establishing voluntarily or involuntarily and for personal gains, one's own course of action by taking into account messages one receives either through personal contact or through the press, mass media or social media." (Decision of Ankara Regional Court of Appeals, No: 2019/246, 24 April 2019).

By the end of 2016, 178 media outlets including news agencies, newspapers and television channels were closed by the Executive Decrees.²⁰ A further 30 publishers were closed down and their books banned.²¹ The total number of books banned through these closures reached the thousands and people apprehended while in acquisition of books, magazines and journals faced prison sentences. OHAL decrees closed 19 labour unions, one of which was Ufuk-Haber Sen, one of the largest media workers union and membership to Ufuk-Haber Sen was recognized by the Supreme Court of Appeals as evidence of collaboration with a terror organization.²²

¹⁸ 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, No. 38.

¹⁹ 2019 Joint International Press Freedom Mission to Turkey – Mission Report, p.10

²⁰ Bianet, <https://m.bianet.org/bianet/medya/182458-kapatilan-basin-yayin-radyo-televizyon-ve-haber-ajanslari>

²¹ "OHAL'de 30 yayinevi kapatıldı", Susma, 7 June 2017, <http://susma24.com/ohalde-30-yayinevi-kapatildi/>

²² <https://www.memurlar.net/haber/728893/yargitay-in-bank-asya-ve-sendika-uyeliklerine-dair-kararinin-tam-metni.html>

According to Reporters Without Borders (RSF) The number of journalists detained only in the first year of the state of emergency surpassed 100.²³ Other organizations gave much larger figures, with Free Journalists Initiative claiming that 187 journalists were under arrest by the end of the OHAL on July 2018.²⁴ The discrepancies among numbers given by different organizations underline a more dangerous trend of churn in Turkish jails and lack of information about the fate of journalists in the country.²⁵ By the time this submission was prepared the Free Journalists Initiative's number was 154,²⁶ and of RSF was 34.²⁷ A further 167 journalists were under search warrant and had to flee Turkey to escape arrest according to the Stockholm Centre for Freedom's database.²⁸

6. REPORT OF THE VENICE COMMISSION

On 10 – 11 March 2017 the Venice Commission adopted an opinion on the measures provided in the recent emergency decree laws with respect to freedom of the media.²⁹ The Venice Commission has a tradition of balanced and well thought opinions and in what follows, we will devote extra attention to its findings. The Venice Commission began its report with an important remark:

"During the emergency regime the Government should take only such measures which are connected to the reasons and goals behind the state of emergency. This is of particular importance given the fact that the criteria used to assess the links of concerned individuals and legal entities to the "FETÖ/PDY" (or other organizations which allegedly represent a threat to national security) have not been made public, at least not officially. The "connections" with "terrorist organizations" are loosely defined and not individually substantiated. So far it has not been possible to effectively challenge this lack of verifiable evidence of such "connections" in individual cases before the domestic courts."³⁰

It then focused on the 'permanent' character of the emergency measures:

"In the context of the present opinion the Venice Commission observes that, for example, Decree Law no. 680 introduced several permanent changes to Law no. 6112 on radio and television; in particular it gave to the regulatory authority (the Supreme Council) a right to suspend broadcasting temporarily, or, in cases of repeated violations, permanently (new Article 7, as amended by Article 17 of the Decree Law). It also formulated a new principle of coverage of terrorist attacks, which prescribes that such coverage should not "produce results serving the interests of terrorism" (Article 18 of the Decree Law). Another amendment concerns the examination by the Supreme Council of broadcasting license applications; it gives to the Supreme

²³ <https://rsf.org/en/reports/2016-round-number-journalists-detained-worldwide-continues-rise>

²⁴ <https://jpa.news/tr/2018/09/03/ogi-raporuna-gore-turkiyede-187-gazeteci-tutuklu/>

²⁵ Kerim Balci, "How many journalists are behind bars in Turkey?" 18 February 2019,

https://observatoryihr.org/priority_posts/how-many-journalists-are-behind-bars-in-turkey/

²⁶ http://www.cumhuriyet.com.tr/haber/turkiye/1465423/Ozgur_Gazeteciler_insiyatifi_154_gazeteci_tutuklu.html

²⁷ https://rsf.org/en/barometer?year=2019&type_id=235#list-barometre

²⁸ <https://stockholmcf.org/updated-list/>

²⁹ CDL-AD(2017)007

³⁰ Ibidem, No. 13.

Council quasi-unlimited discretion to reject such applications on the grounds of national security and public order, on the basis of information (provided by the national intelligence bodies) that top executives of the media outlet concerned (and even its “partners”) have “affiliation” or “relation” to a terrorist organization (Article 19 of the Decree Law).³¹

The Commission criticised the Turkish Government’s assertion that these measures were ‘necessary’ to fight against terrorism in the country:

“Many official interlocutors whom the delegation of the Venice Commission met in Ankara argued that the measures taken by the authorities had nothing to do with freedom of expression because the action was taken in the fight against terrorism. To the great regret of the Venice Commission, such rhetoric reflects profound misapprehension of the concept of free speech. Where the authorities take measures against mass media or journalists in connection with their publications, statements, broadcasts etc. a question under Article 10 always arises, even if the authorities pursue a legitimate aim (fighting against propagation of terrorist ideas). Certain types of speech may be legitimately suppressed, but the authorities are always bound to examine those cases through the prism of Article 10 of the ECHR (and similar provisions of Turkish Constitution or of the international human rights law).³²

The Venice Commission was also critical towards the ensuing policy of the Turkish government:

“The Venice Commission is prepared to acknowledge that it could be necessary, in times of emergency, for a State to take preventive measures based on more or less extensive presumptions about future behaviors. Thus, the authorities may wish to avoid a panic reaction among the population, or stop hate speech that foments inter-communal violence. Temporary suspension of broadcasting or a temporary ban on distribution of printed press may be justified in such extreme situations, even though, in normal conditions, such measures are not likely to withstand a (strict) judicial scrutiny.

However, this logic is not applicable in casu. There should be an immediate need for such preventive measures to prevent certain media content. From the text of the emergency decree laws it is not possible to learn what sort of danger the liquidation of media outlets was supposed to address. The formula used by the emergency decree laws (which speak of “connections”, “affiliation” etc. to the “terrorist organizations”) is not specific enough to describe these dangers. Neither the emergency decree laws, nor any other official document develop those terms in more detail. In the Opinion on the Emergency Decree Laws the Venice Commission already expressed concern that such broad definitions imply that any sort of link to the “FETÖ/PDY” (or other “terrorist organizations”) lead to the liquidation of the legal person concerned. Whatever are the exact terms in Turkish, it is clear that these formulas are not specific enough to assess where the line is to be drawn

³¹ Ibidem, No. 15.

³² Ibidem, No. 32.

between potentially dangerous media outlets and those which represent no risk for the public order and security.

The existence of any potential threat, represented by the media outlets at issue, should be demonstrated with reference to some specific facts – for example, be inferred from the content of the specific previous publications of the media outlet concerned. When speaking about the dismissal of public servants, the Venice Commission insisted that such decision should be based on a “combination of factual elements which clearly indicate that the public servant in a way which objectively cast serious doubts on his or her loyalty to the democratic legal order” (§ 131). The Government’s decision to liquidate media outlets did not refer to any such specific factual elements. The allegations that certain mass media were used to pass “encrypted messages” to the members of the illegal networks have never been corroborated by evidence, and have never been seriously examined.

The Venice Commission does not assert that all closures of media outlets were unjustified. Some of those measures might have been justified by the “exigencies of the situation”, but the problem is that the closures were done directly by the decree laws and without individualized decisions based of verifiable evidence.³³

“Another argument speaking against such measures relates to the pre-eminent role of the media in a democratic society. The Venice Commission previously observed that mass dismissals of public servants (especially in the Army and Police) may be legitimate, accepting that public servants have a duty of loyalty towards the State. However, unlike public servants, the journalists, newspapers, TV stations etc. have no such duty. Quite the contrary, one of the journalistic virtues is to keep a critical attitude towards the authorities and the politicians. Due to the role of the media as a “public watchdog” they enjoy a higher level of protection than any other business; in addition, in assessing the impact of those measures the authorities should also take into account a potential chilling effect these measures may have on the media market as a whole, and not only on the particular group of journalists or their readers³⁴.

“In sum, the Venice Commission considers that mass liquidation of media outlets by emergency decree laws (and hence without individualized reasoning) is incompatible with Article 10 of the ECHR, even taking into account the very difficult situation in which the Turkish authorities found themselves after the failed coup³⁵.

The Commission also expressed serious unease regarding the confiscation of the property of media outlets:

“Even if it was the case, instead of definitely confiscating all assets of organizations, it may suffice to temporarily freeze large amounts on their bank accounts or prevent important transactions, to appoint temporary administrators and to allow only such economic activity which may help the organization

³³ Ibid, No. 48 -50.

³⁴ Ibid, No. 53.

³⁵ Ibid, No. 57.

*in question to survive until its case is examined by a court following normal procedures, where the origin of those assets and funds and their possible use will be established with certitude*³⁶.

Finally, the Commission warned that journalistic activities should not be prosecuted nor considered membership of a terrorist organisation.

*“Radical dissidents and fierce critics of the regime may be sanctioned for exceeding the limits of permissible speech, notwithstanding the little scope under Article 10 § 2 of the Convention for restrictions on political debate, but at least they should not be placed on the same footing with the members of terrorists groups. The Venice Commission thus considers that the “membership” concept (and alike) should not be applied to the journalists, where the only act imputed to them is the content of their publications.*³⁷

7. THE REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION ON HIS MISSION TO TURKEY, 21 JUNE 2017

From 14 to 18 November 2016, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression conducted an official visit to Turkey at the invitation of the Government. The visit took place just months after the attempted coup d'état in July 2016.

The report gives a clear overview of the attacks against the press freedom:

“Media outlets subject to the emergency decrees are not limited to media allegedly affiliated to Gülen. The closure of Özgür Gündem and the book publisher Evrensel, and police raids on Cumhuriyet are examples of how the state of emergency has been deployed against critical or independent media outlets and publishers. On 16 August 2016, the daily Özgür Gündem was closed following a decision by the 8th criminal court of peace in Istanbul, on the basis of allegedly publishing terrorist propaganda and serving as a broadcasting organ for the PKK. The same day, the paper’s headquarters in Istanbul were raided and 22 media workers detained on charges of “resisting the police”. They were released after giving testimony before prosecutors.

On 28 August 2016, the central offices of Azadiya Welat, in Diyarbakir, were raided by police and 23 employees were detained. Eight remained in detention as of January 2017.

Several interlocutors commented that the media landscape was dominated by close ties between business interests and political actors. Journalists who were critical of the Government have been gradually fired from these media organs and mild criticism is subject to reprisals through demonization by pro-Government columnists. In addition to the arrest of journalists and police raids on critical media, the use of financial

³⁶ Ibid, No. 61

³⁷ Ibid, No.72.

pressure or economic ties with private media companies has led to a higher concentration of media that is directly or indirectly under government control.

The authorities exert pressure on media outlets to change their editorial policies by threatening journalists with dismissal. News coverage that is perceived as negative to the State may be subject to punishment by the authorities³⁸

The report concludes with a serious warning:

"The situation of the right to freedom of expression in Turkey is in grave crisis and requires immediate steps for Turkey to be compliant with its obligations under international human rights law. The Special Rapporteur is not alone in his assessment. The recommendations that follow are largely consistent with those made by, among others, the Parliamentary Assembly of the Council of Europe, the Council of Europe Commissioner for Human Rights and the OSCE Representative on Freedom of the Media.

(...)

The Special Rapporteur is seriously concerned at the deterioration of media freedom in Turkey, which predates the attempted coup. The state of emergency cannot justify the adoption of disproportionate and arbitrary measures representing a severe blow to freedom of expression, media freedom and access to information in Turkey³⁹

8. THE IPI'S REPORT ON TURKEY 2019

From 11 to 13 September 2019, a joint International Press Mission composed of the International Press Institute (IPI); Article 19, the European Federation of Journalists (EFJ), the Committee to Protect Journalists (CPJ); PEN International; Norwegian PEN; Reporters without Borders; and the European Centre for Press and Media freedom (ECPMF) visited Turkey. They held meetings with the Turkish Constitutional Court, the Supreme Court of Cassation, the Turkish Ministry of Justice; the Delegation of the European Union in Turkey; Foreign diplomatic missions in Turkey; and held a round table meeting with Turkish civil society and journalism groups. Their report⁴⁰ published as part of IPI's "#FreeTurkeyJournalists" campaign, supported by the European Union and the Consulate General of Sweden in Turkey, highlights many structural problems underlying the declining situation of freedom of press and expression in Turkey:

³⁸ 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, No. 41-43

³⁹ Ibid, No. 75-76.

⁴⁰ Turkey's journalists in the dock, Mission Report of the Joint International Press Freedom Mission to Turkey, <https://peninternational.org/app/uploads/Turkey-joint-report-free-expression-2019.pdf>

- *“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 speech⁴¹.*
- *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 authorities⁴².*
- *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 country⁴³.*
- *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. (...). Key elements taken up by the mission include:
(...)*
 - *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*

⁴¹ Ibid, p.5.

⁴² Ibid, p. 7.

⁴³ Ibid, p.8.

withering legal cases. Between 2014 and 2017 an astonishing 12,300 cases were filed under these two articles

- 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 apply for a license, 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.

(...)

- 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 Kandıra 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. (The author of this report had the same experience back in 2011)⁴⁴.

- 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, most notably in the southeast, including against journalist Nedim Türfent .

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

(...)

- Article 220(8) (of Anti-Terrorism Law (Law no.3713) 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 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

⁴⁴ Ibid, p. 12-13.

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 article⁴⁵.

9. THE ANNUAL REPORT OF THE PLATFORM TO STRENGTHEN THE PROTECTION OF JOURNALISM AND THE SAFETY OF JOURNALISTS - 2020.

The “Platform to Strengthen the Protection of Journalism and the Safety of Journalists”⁴⁶, was created by the Council of Europe on April 2, 2015. The platform includes the International and European Federations of Journalists (Brussels), the European Association of Journalists (Brussels), Reporters Without Borders, (Paris), Article 19 (London), the International News Safety Institute (INSI) (London), the Committee to Protect Journalists, Index on Censorship, the International Press Institute (IPI), the Rory Peck Trust, the European Broadcasting Union (EBU), Pen International, the European Centre for Press and Media Freedom, Free Press Unlimited, and the Open Society Institute (OSI-Media) (London).

In its annual Report 2020, the Platform called on the Turkish authorities to stop treating critical journalism as criminal terrorist activity:

“As of 31 December 2019, there were 103 active alerts and 24 resolved alerts on Turkey. These include 91 journalists in detention and four impunity cases. 18 new alerts were submitted in 2019. Turkey has not responded to any of the 2019 alerts. The 2019 alerts included incidents of violent attacks on journalists, the expulsions of four foreign correspondents, arbitrary arrests during attempts to report on demonstrations in southeastern Turkey and criminal investigations for criticism of Turkey’s incursion into northern Syria.

Significant developments took place in some of the most prominent cases, often illustrating the arbitrariness and political interference that characterizes the Turkish justice system. In September, the Supreme Court of Cassation vacated the convictions of 13 former Cumhuriyet journalists convicted in April 2018 of terrorism charges. The case was returned to a lower court, which largely ignored the Supreme Court’s ruling and acquitted only one of the defendants. Previously, in May, the Turkish Constitutional Court delivered

⁴⁵ Ibid, 29-30.

⁴⁶ www.coe.int/en/web/media-freedom/home

contradictory rulings in which it found that the authorities had violated the constitutional rights of only some of the Cumhuriyet defendants despite the identical nature of these cases. In July, the Supreme Court also overturned the convictions of journalists and writers **Ahmet Altan**, **Nazlı Ilıcak** and **Mehmet Altan** on charges of 134 Alert "Impunity in the Case of the Murder of Dada Vujasinovic", posted 28 April 2015. In November, all three were retried on lesser charges of assisting a terrorist organisation. Ahmet Altan was sentenced to ten-and-a-half years and **Nazlı Ilıcak** to eight years and nine months. **Mehmet Altan** was acquitted. **Ahmet Altan** and **Nazlı Ilıcak** were subsequently released for the first time in over three years. Within a week, however, **Ahmet Altan** was re-arrested after the public prosecutor successfully argued that he was a flight risk despite an existing travel ban against him. Judgments in the cases of about 10 journalists remained pending at the European Court at the time of writing. **İdris Sayılığın**, a Kurdish journalist who was held in pre-trial detention for over two years before being sentenced to eight years and three months in prison on charges of membership in a terrorist organisation, was released without advance notice on 27 November. The Court is due to rule on whether Sayılığın was afforded domestic remedy after the Turkish Constitutional Court had failed to take up his case since July 2018.

Journalists in Turkey continue to suffer violations of the rule of law and their right to a fair trial, including insufficient evidence to justify arrest and detention, limits on access to defence lawyers, restrictions on appearing personally in court and extensive pre-trial detention in violation of European Court jurisprudence.

2019 saw a significant effort by the Turkish government to convince international partners that it is engaging in serious reforms of the judicial system. Some elements of a "judicial reform package" have brought relief to some journalists, in particular the lifting of a ban on journalists sentenced to less than five years from appealing to the Supreme Court, a change that has led to the release of a number of defendants pending appeal. However, the package largely fails to address the most significant demands made of Turkey by institutions such as the Venice Commission, including ensuring that journalists are not subject to antiterror charges based on their writing and that the authorities demonstrate "relevant and sufficient" reasons for the detention of journalists.

Meanwhile, the powers of the Radio and Television High Council (RTÜK) have been extended to online broadcasters, which are now required to apply for expensive licenses. The lack of clarity on what is deemed an "online broadcaster" means that RTÜK could potentially begin to police critical social media.

The readiness of the authorities to regulate critical speech and information online was brought into sharp focus in October when, within 48 hours of the launch of the military actions in northern Syria, over 120 investigations had been launched against social media users, including journalists, on terrorist propaganda grounds for publicly criticizing the military intervention. This followed a RTÜK statement warning radio and TV broadcasters "including online media" to be mindful of their reporting, which if determined to contain "anti-operation propaganda sourced by terrorist organizations" would not be tolerated.

Although the number of jailed journalists in Turkey according to Platform figures declined from 110 to 91 in 2019, Turkey remains a highly repressive environment for the press. Turkish authorities and courts continue

*to treat critical journalism as criminal terrorist activity. This pattern can effectively not be challenged until the politicization of the courts is ended*⁴⁷.

As of 29 July 2020, the platform's website⁴⁸ announces that 93 journalists are detained in Turkey and there are four cases of impunity for murder. It showed 117 unresolved alerts and 25 resolved alerts targeting Turkey. Fifty-five alerts were about the detention of journalists; 37 actions having "a chilling effect on press freedom"; 28 harassment or intimidation of journalists; 17 attacks on physical safety and integrity of journalists; and five on impunity.

10. THE SITUATION OF FOREIGN JOURNALISTS

The situation of foreign journalists, reporting on Turkey, is of particular interest for the protections of freedom of the press. The Mission report of the Joint International Press Freedom Mission to Turkey regrets that, "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"⁴⁹.

The report continues highlighting some of the specific cases of foreign journalists in Turkey:

*"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. 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. 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.*

*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. 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.*

⁴⁷ Ibid, p.49-51.

⁴⁸ <https://www.coe.int/en/web/media-freedom/turkey>

⁴⁹ Mission Report of the Joint International Press Freedom Mission to Turkey, p. 43.

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.

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 protection⁵⁰.

11. LIMITATIONS IMPOSED ON THE DIGITAL MEDIA

The mission report of the Joint International Press Freedom Mission to Turkey also devoted an entire section on the regulation of online broadcasters by the Radio and Television High Council (RTÜK), which provides further limitation on digital media:

"In March 2018, RTÜK, in charge of monitoring, regulating and sanctioning radio and television broadcasts, was authorized to control online broadcasters as well. 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.

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 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

⁵⁰ Mission Report of the Joint International Press Freedom Mission to Turkey, p. 43-44.

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 purpose⁵¹.

Meanwhile a new bill has been approved by the Turkish Parliament on 29 July 2020 on media platforms. The new law amends the Turkish Law No. 5651 on the *Regulation of publications on the internet and suppression of crimes committed by means of such publication*. The new regulation compels social media companies with over one million users a day to have representatives based in Turkey who are Turkish nationals. In case of non-compliance, they might impose fines of up to 40 million Turkish Lira (approximately 5 million euros), advertising bans and the reduction of Internet bandwidth by up to 90%, effectively blocking access to their platforms.

Tech companies are forced to store their data locally. This means that it will be easier for the Turkish Government to demand that companies hand over data about their customers that could well lead to their prosecution for what they have said or even just shared online.

Platforms are also obliged to respond to requests to block or remove content within 48 hours or face fines of 5 million Turkish Lira, which could increase to 10 million Turkish Lira if they fail to respond.

It should be stressed that the online freedom of expression was already under threat before the adoption of this new law. An Article 19 report⁵² for example notes that as of the end of 2019, Turkey had blocked access to 408,494 websites.

In the report of the United Nations High Commissioner for Human Rights on the impact of the state of emergency on human rights in Turkey, including an update on the South East, from March 2018, the High Commissioner also notes that:

“Over 100 000 websites were reportedly blocked in Turkey in 2017, including a high number of websites and satellite TVs in Kurdish. Wikipedia was blocked to a content criticizing the involvement of the Government of Turkey in the conflict in the Syrian Arab Republic. Turkey was reportedly the country that submitted te highest number of requests to Twitter to censor individual accounts⁵³

⁵¹ Mission Report of the Joint International press Freedom Mission to Turkey, p. 37-38.

⁵² www.article19.org/resources/turkey-new-internet-law-threatens-freedom-of-expression-online/

⁵³ Report of the United Nations High Commissioner for Human Rights on the impact of the state of emergency on human rights in Turkey, including an update on the South East, No. 95.

12. INSULT OF THE PRESIDENT OR THE STATE

A specific element on the limitation of freedom of the press and expression in Turkey can be found in the provisions of the Turkish Penal Code, that criminalises insult of the President, the national anthem, the national flag and the institutions and organs of the State.

Turkey is not the only country to have this kind of legislation, but what is different from most countries is the over-reliance on these articles.

The Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression expresses serious warnings in this regard:

“The civil and criminal law provide for the suppression of defamation, even of public authorities. Article 125 of the Penal Code criminalizes insult: paragraph 3 concerns defamation against “a public officer due to the performance of his public duty” as well as insults against beliefs, including religious ones, with penalties of at least one year in prison. Part 3 of the Penal Code criminalizes “insult” of the President, the national anthem, the national flag and the institutions and organs of the State and increases the penalty for such crimes by one sixth if made in public. Article 299 of the Penal Code criminalizes defamation of the President, with sentences of one to four years in prison. Although the Minister of Justice must formally initiate cases, prominent officials, including the President, frequently bring criminal defamation cases against journalists, artists and academics. Reports indicate that the Ministry of Justice has initiated up to 2,000 defamation cases for “insult” of the President.”⁵⁴

The mission report of the Joint International Press Freedom Mission to Turkey gives more actual figures:

“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. 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”⁵⁵.

⁵⁴ 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/Add3, No. 18.

⁵⁵ Mission Report of the Joint International press Freedom Mission to Turkey, p.12.

13. ACADEMIC CASES OF VIOLATING THE FREEDOM EXPRESSION AND THE FREEDOM OF THE PRESS.

- On 26 November 2015, at the request of Istanbul prosecutor's office, **Can Dündar**, editor of the daily **Cumhuriyet** and its Ankara representative **Erdem Gül** were taken before a judge and placed in pre-trial detention on charges of membership of a terrorist organization, espionage and divulging state secrets. **Dündar** and **Gül** were investigated in connection with an article published in May 2015 about allegations that Turkey's National Intelligence Organization (MIT) had been delivering arms to rebels in Syria. The newspaper produced a video and photos to support the claim. On 6 May 2016, the Istanbul 14th High Criminal Court convicted **Can Dündar** and **Erdem Gül** --the former for 'obtaining and revealing state secrets', the latter for 'revealing state secrets'. They were respectively sentenced to five years and 10 months and five years in prison. On 16 July 2018, the 14th Heavy Penal Court in Istanbul ruled to acquit **Erdem Gul** of charges of 'publishing state secrets'. He remained on trial in another case over the MIT trucks stories, in which he was charged of 'helping a terrorist organisation'. On 15 May 2019, the Istanbul 14th High criminal court dismissed the case of **Erdem Gül** as it was opened after the 4 months period prescribed in the Press Law regarding statute of limitations.
- One of the most ancient and still unresolved case are the arrest warrants issued by the Istanbul prosecutor for 47 former executives and columnists of **Zaman** newspaper. **Zaman**, a so-called Gulenist newspaper was shut down in July 2016, and in September 2017, the trial began but was split in two as journalists were separated from media workers and business people involved in **Zaman**. On 6 July 2018, six journalists were declared guilty of 'being a member of an armed [terrorist] organization'. **Ali Bulaç, Şahin Alpay, and Ahmet Turan Alkan** were sentenced to 8 years and 9 months in prison; **Mümtaz'er Türköne and Mustafa Ünal** 10 years and 6 months, and **İbrahim Karayeğen** to 9 years.
- On 31 October 2016, the Turkish police detained at least 12 employees of **Cumhuriyet** newspaper, Turkey's largest secular, left-leaning paper, and one of the remaining critical voices towards the Turkish Government. The detained media workers were accused of membership of, and committing crimes on behalf of, two terrorist organizations: the Kurdistan Workers' Party (PKK) and the Fethullah Terrorist Organization (FETÖ), which the government accused of being behind the failed coup attempt. On 21st November 2019, the Istanbul 27th High Criminal Court upheld the conviction of 12 former Cumhuriyet employees (**Akın Atalay, Ahmet Şık, Aydın**

Engin, Bülent Utku, Güray Öz, Hakan Kara, Musa Kart, Hikmet Çetinkaya, Murat Sabuncu, Orhan Erinç, Mustafa Kemal Güngör and Önder Çelik), despite the earlier Turkish Court of Cassation ruling issued in September 2019 that had acquitted the 12 defendants, with the exception of journalist **Ahmet Şik**, who the court had said should be tried for a different crime. The High Criminal Court Court also ruled for the continuation of judicial supervision imposed on the 12 defendants, and acquitted the 13th defendant, journalist **Kadri Gürsel**.

- **Ahmet Şik** was detained before the attempt coup (see here above), mostly for his journalistic investigation work where he denounced the infiltration of the Turkish institutions by the Gülen Movement. After the attempt coup of 15 July 2016, the Turkish Government launched a relentless campaign against the members of the Gülen Movement and Ahmet Şik was detained on 29 December 2016 and held in solitary confinement in Metris prison until 2 January 2017. He was only released on appeal on 9 March 2018. One possible motive for its detention is the investigation work he had produced in-between on corruption cases involving AKP, the ruling party, members. He was later elected as deputy for HDP (People's Democratic Party) on 24 June 2018 but left the HDP in April this year.
- Following the attempted coup, the RTÜK held an extraordinary meeting on 19 July and decided to cancel the broadcasting license of 24 TV channels and radio stations because of their alleged ties with the Gülen Movement. The measure concerned **STV, Samanyolu Haber, Samanyolu Haber Radyo, Can Erzincan TV, Kanal 124, Yumurcak TV, Hira TV, MC TV, Dünya TV, Kanal Türk, Bugün TV, Mehtap TV, Berfin FM, Kanal Türk Radyo, Burç FM, Samanyolu Haber Radyosu, Radyo Mehtap, Haber Radyo Ege, Dünya Radyo, Radyo Küre, Merkür TV, Esra Radyo, Tuna Shopping TV, and Samanyolu Haber Radyo Anadolu**.
- A court in Istanbul ordered on August 16, 2016 the closure of **Özgür Gündem** newspaper for spreading alleged 'propaganda on behalf of the outlawed terrorist organization'. Shortly after the announcement of the newspaper's closure by authorities, police raided its office in Istanbul's Beyoğlu district. During the police raid, the newspaper's editor-in-chief **Zana Kaya**, journalists **Günay Aksoy, Kemal Bozkurt, Reyhan Hacıoğlu, Önder Elaldı, Ender Önder, Sinan Balık, Fırat Yeşilçınar, İnan Kızılkaya, Özgür Paksoy, Zeki Erden, Elif Aydoğmuş, Bilir Kaya, Ersin Çaksu, Mesut Kaynar, Sevdije Gürbüz, Amine Demirkıran, Bayram Balcı, Burcu Özkaya, Yılmaz Bozkurt, Gülfem Karataş, Gökhan Çetin, Hüseyin Gündüz and Aslı Erdoğan** were taken in custody by the investigating authorities. On 10 November 2016, a prosecutor in Istanbul

asked for life sentences for nine journalists and executives from **Özgür Gündem**. All nine defendants in the case, author **Aslı Erdoğan**, linguist **Necmiye Alpay**, journalists **Ragıp Zarakolu**, **Bilge Contepe**, **Filiz Koçali**, editor-in-chief **Bilir Kaya**, the holder of the newspaper's publication rights, **Kemal Sancılı**, the paper's Responsible Managing Editor **İnan Kızılkaya** and lawyer and former co-editor-in-chief **Eren Keskin**, were charged with 'membership in a terrorist organisation', 'damaging the unity of the state', 'conducting propaganda for a terrorist organisation' and 'establishing an organisation for the purpose of committing crime'.

- On Saturday 29 October 2016, the Turkish government issued two decrees (No 675 and 676) shutting down 15 pro-Kurdish media outlets. More precisely, 11 newspapers, two news agencies and three magazines were disbanded. These are **Özgür Gündem**, **Azadiya Welat**, **Batman Çağdaş**, **Cizre Postası**, **Güney Express**, **İdil Haber**, **Kızıltepe'nin Sesi**, **Prestij Haber**, **Urfanatik** and **Yüksekova Haber**; News agencies: **Dicle News Agency (DiHA)** and **Jin News Agency**; Magazines: **Tiroji**, **Özgürlük Dünyası** and arts and culture magazine **Evrensel Kültür**.
- On 28 February 2017, the Turkish-German journalist, **Deniz Yücel**, correspondent of the German newspaper **Die Welt** was arrested on charges of "spreading terrorist propaganda" and "stirring enmity". He was released on 16 February 2018 and subsequently allowed to present his defense statement in a Berlin court. On 16 July 2020, he was sentenced in absentia to 2 years, 9 months and 22 days jail by the Istanbul 32nd Criminal Court for "terror propaganda".

On 16 July 2019, the 3rd Peace Judge at Ankara, Hasan Demirtaş, ordered the blocking of access to 136 internet resources, including "**Bianet**" and "**Gazete Fersude**" news portals, under Article 8/A of the Internet Act relating to grounds of "national security". The ban targeted 15 websites and dozens of social media accounts on Facebook, Instagram, Twitter, Youtube, Pinterest. It prevented access to at least 200,000 news stories on "**Bianet**", which had been broadcasting since November 2000.

- Three German journalists were compelled to leave Turkey on Sunday, 10 March 2019, after their press accreditations were not renewed for 2019 without any explanation. **Thomas Seibert**, reporter at the Tagesspiegel newspaper, was a long-term correspondent in the country. **Jörg Brase** was head of public broadcaster ZDF's Istanbul office. A third journalist, **Halil Gülbeyaz**, with public broadcaster NDR also had his accreditation refused and was not allowed return to Turkey. On 13 March 2019, **Brase's** accreditation was renewed, after 20 freedom of expression

and human rights organizations had urged Turkey to rescind the decisions. On 11 June 2019, the accreditations of all journalists were renewed.

- On 17 January 2019, the journalist **Ans Boersma**, Turkey correspondent for the Dutch financial paper *Het Financieel Dagblad*, was deported from Turkey. **Ans Boersma** was apprehended by Turkish police the day before, following her visit to the migration office to renew her residence permit as a foreign correspondent. Nine days before her arrest, she had received her accreditation and press card from the Turkish authorities for the year 2019. **Ans Boersman** was detained in a police office in Bakırköy for over five hours, before being transferred to another police station close to Atatürk airport, where she spent the night. The police told the journalist that she was posing a threat to Turkey's national security without any formal explanation or evidence. She has not even been provided with any legal document confirming her deportation.
- In March 2020, OdaTV editor-in-chief **Bariş Pehlivan** and news director **Bariş Terkoğlu** were once again imprisoned on charges of "violating intelligence service law". OdaTV reported on the funeral of a KIA secret service member which had already been covered by many publications, and whose identity had already been revealed by İyi Parti MP **Ümit Özdağ** in the National Assembly. Objection filed at the beginning of March was denied. Days before the arrest, in his presidential plane, upon a question about OdaTV, President Recep Tayyip Erdoğan said "Here, I report to prosecutors a criminal offence." The funeral in question had already been reported by many media institutions and had even been broadcasted live on social media. It was one week later that OdaTV covered the event after which certain public figures working in media networks close to the AKP government launched a lynch campaign on the social media against OdaTV. Following the statement of Erdoğan a negative campaign on the social media ensued, and the prosecutors used the funeral report as a pretext to act against the OdaTV. The real motive might be found elsewhere: **Bariş Pehlivan** and **Bariş Terkoğlu** published a book titled *Metastaz* (Metastasis) in 2019. The book shed light on the problem of organizations and religious sects illegally infiltrated into the state bureaucracy. It included corrupted judges who were bribed to give order for release, and prosecutors who closed cases of rich businessmen. The two journalists were about to publish their new book. If they had not been imprisoned, the book would have been out in the market by the beginning of April. In their new book, they would disclose the Pelikan network connected to Berat Albayrak, the Minister of Finance and Treasury, and son-in-law of Tayyip Erdoğan. One of the focuses in the book was the deeds and actions of judicial cadres related to the Pelikan network. In the course of their research for the book, Pehlivan and Terkoğlu made interviews with the people involved in such cases. That is to say, people connected to Pelikan network knew such a book would be published. **Bariş Terkoğlu** was arrested

by police who knocked his door at 4.00 am, on the verbal order of the prosecutor. Both were released in July 2020. OdaTV, which is one of the most popular news websites in Turkey with over 1 million daily readers, was consequently blocked upon the request of the Interior Ministry, following the arrest of **Barış Terkoğlu** and **Barış Pehlivan**. The news site tried to continue its broadcast under different domain names, each of which has subsequently been banned seven times, but it managed to continue its activities under a new domain name. In April 2020, fearing for the life of imprisoned journalists after the outbreak of Covid-19 pandemic, relatives of detained journalists launched a campaign for their release, as the Turkish authorities planned the release of number of detainees in their overcrowded jails. Journalists were not among the beneficiaries of anticipated liberation.

14. CONCLUSION AND ANSWERS TO THE QUESTIONS.

14.1. CAN TURKEY AT THIS STAGE BE CONSIDERED AS A COUNTRY WITHIN WHICH A SUFFICIENT DEGREE OF FREEDOM OF THE PRESS AND FREEDOM OF EXPRESSION IS GUARANTEED, SO IT CAN BE IN COMPLIANCE WITH THE STANDARDS OF A FUNCTIONING DEMOCRACY?

To answer this question the following elements must be considered.

1. Turkey has been condemned for violation of article 10 ECHR by the ECtHR 154 times since 2000. This is a significant number of times.
2. Our report shows many prosecutions and severe convictions for insult or defamation of the president or the state. The Mission Report of the Joint International Press Freedom Mission mentions 12 300 cases from 2014 till 2017 only. As indicated, this is clearly in violation of the guarantees of Article 10 ECHR.
3. The number of journalists kept in pretrial or convicted for long-term imprisonment, making Turkey one of the “undisputed leading jailor of journalists worldwide” is again clearly not in accordance with human rights guarantees.
4. The ECtHR clearly stated that pretrial arrest is abused to silence critical voices in Turkey.
5. Closing down around 200 media outlets, having blocked more than 400 000 websites, and organising a strict system of authorizations for classical radio and for online broadcasters again is in clear contradiction with human rights, in particular Article 10 ECHR.

Against this background, it can be concluded that, Turkey cannot currently be considered as a country within which a sufficient degree of freedom of the press and freedom of expression is guaranteed. Turkey is not acting in compliance with the standards of a functioning democracy, because a functioning democracy without an effectively guaranteed freedom of the press is impossible. Turkey is a country

which conducts democratic elections, but it is no longer a country with a free press. Elections on their own are not sufficient to guarantee democracy.

14.2. CAN THE DECISIONS TAKEN BY THE TURKISH GOVERNMENT (STILL) BE CONSIDERED AS A REACTION LINKED TO THE “COUP D’ÉTAT” OR NEED THEY TO BE EVALUATED AS A WAY TO “DESTROY” THE VOICES AND/OR ORGANISATIONS CRITICAL OF THE GOVERNMENT IN TURKEY?

The failed *coup d’état* and the fight against terrorism has been the mere justification on the part of the Turkish Government before the ECtHR and the different international commissions and rapporteurs. It is clear that this justification cannot serve valid grounds for all the violations committed by the Turkish Government – some of which have been documented in this report.

The second question requires a further discussion that goes much beyond from the content of violations to the ultimate strategies/goals of the Turkish Government. First, the examples given in the report show that the repression did not start after the failed *coup d’état*. The procedures against **Dink** and the procedures, against Cumhuriyet just to name those two, started way before. Also, the timing of targeting a long list of journalists and media outlet (only a few days after the failed coup) shows that that these journalists have been on the Turkish Government’s list well before the failed coup. The failed coup was therefore an excellent opportunity to execute these long-established plans.

As the Venice Commission stated, if the government’s intention was to react against a threat of terrorism or to avoid new coups to occur, then another method should have been used. The closure and the expropriation of media outlets can only be seen as a strategy on the part of the Turkish Government to destroy critical voices and further cripple freedom of the press and expression. To recall from the above section, the case of **Ahmet Sik** is a salient example. He spent years of detention merely on the account of his journalistic activities which were in essence critical of the Turkish Government’s controversial acts. The fact that the constant abuse of pre-trial detention has a “chilling effect” on critical voices was several times repeated by the ECtHR, for instance in the **Altan** Case. The Kavala judgment by the ECtHR comes a case of higher importance in this regard. The Court clearly found that the Turkish state abused the pre-trial and the judicial prosecution to muffle its critics by limiting their freedoms and rights for ulterior purposes (Article 18 ECHR). In particular, the Court considered it *“to have been established beyond reasonable doubt that the measures complained of in the present case pursued an ulterior purpose, contrary to Article 18 of the Convention, namely that of reducing the applicant to silence”*. This rings a clear warning bell for the deteriorating rule of law problem in Turkey. As of September 2020, however, Kavala unfortunately still remains in jail despite the ECtHR’s clear call on the Turkish authorities to end his detention.

Taking into account all these elements, the ultimate yet unfortunate conclusion of the present report, is that that the violations of freedom of the press, committed by the Turkish government can no longer be considered a reaction linked to the "*coup d'état*" or aiming at fighting political violence and terrorism. The clear purpose is to silence all critical voices in Turkey as much as possible, whereby prosecution and long-term imprisonment are used as a frequent method to reach that goal.

ANNEX 1

OPENING SPEECH DELIVERED BY DR. METIN FEYZIOĞLU, PRESIDENT OF ANKARA BAR ASSOCIATION, ON THE OCCASION OF THE “INTERNATIONAL LAW CONGRESS, 2012” ORGANIZED BY ANKARA BAR ASSOCIATION

Ankara, 10 January, 2011

1. Coups had enormously damaged the Turkish society. Each time, non-governmental organizations were seriously injured. In the aftermath of the coup of 1980, political parties were shut down and political culture, which was onerously created by the society, was erased. The entire society was driven apart from politics because of dissolution of political parties, abolishment of youth and woman branches of political parties, prohibition of civil servants and university students to become a member of a political party. Moreover, politics and political parties were introduced to the new generations as “pestilent of the society”. On the other hand, establishment and membership of associations were complicated, union rights were restricted, union organizations were trimmed, universities were subordinated to the government by the Higher Education Institution (YÖK), jurisdiction was exposed to the influence of the government by the Supreme Board of Judges and Prosecutors (HSYK). Therefore, Aren't we totally daydreaming to believe that we are living in a democratic system just because an election is called in every 4 years in this country where non-governmental organizations are so weakened, universities are appeased and lost their scientific autonomy, democratic protests are severely punished firstly by police and then by jurisdiction?

2. People are quite paranoid in Turkey. Almost everybody, even bagel and tea sellers, question whether they are monitored or not. Perceptions are as important as the facts. If there is such a perception in the society, the government is responsible for changing it. Trust cannot be spread in the society by brushing the issue aside through expressions such as “Let's trust to the justice” or “Some people are deliberately spreading such fears”. According to official numbers, telephone lines of over 70 thousand people are tapped. Assuming that every person talks to approximately 100 different person in three months, accordingly telephone lines of 7 million people are tapped. This is equal to 1/7 of the population of this country. However, there is no way to calculate unofficial tapping. The saddest thing is that it is now assumed to be normal when personal meetings and images that are alleged to belong to the people who are somehow seen as a threat disseminated on the internet or press. Even highly reputable people who are expected to lead and guide the society make hypocritical expressions that start with “we respect personal life, but...” instead of asking who made the recording by using what kind of right. This is being

an accessory to a criminal act. How can one politically lynch people by assuming the content of a video tape, to be authentic and to constitute a crime, although recorded by an unknown source.

3. I assert that 99% of the arrests in Turkey are contrary to universal standards of law. In spite of statutory provisions of the European Convention on Human Rights, the Constitution of the Republic of Turkey and the Code of Criminal Procedure, no justification is stated in any arrest warrant; it is avoided by just inscribing abstract provisions of the legislation in the court decision. So, could you tell me how the people taken under custody can know why they were arrested or plead not to be guilty if justification is not included in the decision? Unfortunately, arrest is enforced like a prejudged arbitrary punishment imposed most of the time. Sadly, presumption of innocence remains to be a pleasant tune in the Constitution. For instance, in our society, people are expected to prove not to be guilty in one hand when they are claimed to be "guilty", on the other hand, it is the claimant who is obliged to prove when someone owes him 100TL. Individual freedom and life of individuals are invaluable. I hope that the process called to be "Ergenekon" will result with a social awareness in this regard. Unfortunately, sufferings of the people of Anatolia at courthouses for years has become the most important item in the agenda of the press, and as a result of this process the society has learned, the importance of right of defence, presumption of innocence and that arrests are only precautions, through negative examples. I wish this learning process could have been based on positive, contemporary, fine examples.

4. Today, State Security Courts continue to function in the name of Specially Authorized Aggravated Felony Courts. The truth is tried to be found at courts and justice is sought. A court cannot be established to protect the state against an individual. The courts which are established to protect the state or government are as if they are the continuation of the tribunals of the Inquisition of the middle ages. At this point, specially authorized prosecutors and courts started to question and arrest the people stipulated in Article 148 by omitting explicit statutory provision of the Constitution of the Republic of Turkey assigning the Constitutional Court and Chief Public Prosecutor of the Supreme Court of Appeals. Despite all efforts to disguise, it is clear that such unlawfulness is extremely grave and dangerous. Now, people stipulated in Article 148 of the Constitution such as the President of the Republic of Turkey, the President of the Turkish Grand National Assembly, all Members of the Council of Ministers, the President and the Members of the Council of State and the Supreme Court of Appeals, the President and the Members of the Supreme Board of Judges and Prosecutors and all others stipulated thereon can be questioned and taken under custody by specially authorized aggravated felony prosecutors and courts. This is the establishment of a "combination of specially authorized prosecutors and courts" as the 4th force over legislation, law enforcement and justice. If the 4th force is a force other than press and media in a country, it is no longer possible to call it a democracy, but fascism.

5. From my point of view, there is no advanced or regressed democracy. It is absurd talking about more or less democracy. Either there is democracy or there isn't. Nowadays, we live in the illusion of democracy. In the referendum, the provisions which regulate the justice system were presented and accepted with a *fait accompli*. Clearly, people who said "yes" or who said "no" were not aware what they were voting for. However, it was the duty of the government to impartially explain to the people the meaning of those amendments, which may impact the forthcoming 100-150 years of this society and the future of their unborn children. The government has not been successful in the examination. I am not talking about the result of the referendum. I am trying to explain that the government has not fulfilled the fundamental principles of democracy.

6. We no longer have freedom of press in Turkey. Tens of journalists who express their thoughts were taken under custody in open-ended inquiries. The newspapers, televisions, radios are forced to implement self-censor. Implementations of tax audits, penal inquiries and civilian authorities put pressure on the press and media. Local press and media whose screams are not heard in Ankara and Istanbul is left to the following predicament: "Obey or perish". In fact, there is no freedom of expression in a country where there is no freedom of press. How can we all think if the press and media do not provide us data by which we think and discuss? It is said that there is "stability". Could there be stability in a country where there is no freedom of thought! In a country where freedom of press is abolished and the people are afraid to criticize the government, individuals understand that there is no stability when they are fired, left hungry and homeless, or unduly arrested. But it is too late then! If you are not convinced that there is no freedom of press in Turkey, I urge you to listen to remarks of the directors of 8 international press organizations, who came to Turkey upon an invitation of the Platform for Freedom of Journalists. The said journalists are stating that; "the press and media are under pressure of the government in Turkey". It is not fair to accept the positive statements of Europe and America and reject or ignore their criticism. This is not right. The people of Anatolia deserve to enjoy democracy in universal standards. No one is entitled to take this right away from us.

7. There is nothing more meaningless and contradictory to rely on the army to protect democracy. Democracy cannot be entrusted to an institution which does not have democracy inside. No wise person can accept a conflicting thought to wish for coup in the name of democracy. The protector of democracy is non-governmental organizations and political parties. On the other hand, it is not possible to attack to army just for depressing, breaking down and eliminating. It cannot be considered as an accomplishment to say "we have touched the untouchables". The important thing is to touch to the necessary ones. Today, civil society keeps quiet in Turkey; universities keep quiet and are silenced. The press is silenced. The justice, including appeal courts, is exposed to the influence of the government. Therefore, politics should reach to a common mind by finding a democratic solution for democracy, rule

of law and freedom. At this point, the mission firstly falls to the Esteemed President of the Republic and the Esteemed President of the Turkish Grand National Assembly.

8. We have never lost our hopes. When you lose hope, you should quit fighting. Every morning we wake up with a new hope and are excited for the day ahead of us. At this point, I can point out that as the Ankara Bar association, we are peaceful because we fight for the people of our country and the future of our children mainly together with our board of directors, each of whom are my true friends, and masses composed of millions of people, circle by circle, longing for freedom. We have never lost our hopes. We have been to every corner of Anatolia. They were not protocol visits; we are always among the people. Some might call it “descend to the people”. If you know the people, you try to ascend to the level of people instead of descending. Please do not bother to serve to the society, if you do not care for others and if you are not open to learn from people. A person who loves and wishes to serve to people should stay focused on the target as a whole together with colleagues and coworkers. The person who focuses on the target succeeds. Teamwork and supporting each other is necessary. We reach nowhere if we try to pull each other down.

9. We closely follow up the efforts for the new Constitution. Months ago, we have established our commissions, but we are concerned since political parties who are eager for change did not put down what do they wish to change and how. Any modification in the Constitution cannot be conducted like a bargaining; there shouldn't be (a) plans, (b) plans. We have the right to expect full sincerity from everyone.

10. Presidential system is a disaster for Turkey. There is no country other than the United States of America to benefit from democratic consequences of presidential system. This system has led to dictatorships in all countries other than the USA.

11. Lastly, some might ask why the topic regarding modification on the Attorneys' Code was not included in the Law Congress while it is taken into the agenda and our works and efforts, as Ankara Bar Association, are clear for having substantial and effective contributions. The topic of our Congress is “The State Governed by the Rule of Law and Democracy”. Is it possible to consider the rule of law and democracy in a process where the main aim is to create the silent attorney model without including the attorneys therein, where attorneys are economically dependent, legally weak, and de facto ineffective, the procedure where mediation without attorneys is deemed to be the new face of qadi (Muslim judge) system, similarly where efforts are made to permit free activity of foreign law firm partnerships, where law apprenticeship is regulated under surveillance of the Ministry of Justice?

The rule of law and democracy cannot be present in a law/state/society order without attorneys and where attorneys are excluded from the system; in such a system, judges and prosecutors shall be converted into bureaucrats in gowns.

In this regard, each day, each session and each speech of the Law Congress titled “The State Governed by the Rule of Law and Democracy” is actually about advocacy. As long as people at certain positions become aware of and accept the function of an advocate and the bar association and cooperate with attorneys; and as long as they serve no purpose other than advocacy, the rule of law and democracy and they decide to take the effective path to fight for the rule of law and democracy by addressing advocacy as the main target and hand in hand with fellow lawyers.

I hope that International Law Congress of Ankara Bar Association will serve to the best interest of all legal practitioners both in Turkey and all around the world, and I would like to thank sincerely to all participants and audiences as well as sponsor organizations who supported us to organize our Congress and to institutional entity of the Union of Turkish Bar Associations, the institution which is improved and promoted by the the efforts of legendary presidents Att. Faruk Erem, Att. Eralp Özgen, and Att. Özdemir Özok, respectively.

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