



Third Party Intervention

**In the Case of Mümtazer TÜRKÖNE v. TURKEY
(App. No. 70430/17)**

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

An independent non-governmental organization specialized in defending and promoting freedom of expression

I. Introduction

1. İFÖD will address in its intervention in the case of *Mümtazer Türköne v. Turkey* (App. no. 70430/17) the issue of deterioration of freedom of expression and press freedom in Turkey.
2. It is understood from the Court’s communication that the applicant is a University Professor (political scientist), a journalist and was a columnist for Zaman, a daily newspaper considered to be the main publication organ of the “Fetullahist” network and closed following the adoption of Legislative Decree No. 668, promulgated on 27.07.2016, during the state of emergency. He was suspected of belonging to the FETÖ/PDY (Fetullahist Terrorist Organization/Parallel State Structure). He was detained, indicted and prosecuted for attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the government by force and violence, and of committing offenses in the name of a terrorist organization. He was sentenced to ten years and six months’ imprisonment for membership of a terrorist organization. By a judgment of 25.06.2019, the Istanbul Court of Appeal upheld this judgment. After the applicant lodged his cassation application his sentence was quashed in September 2020 by the Court of Cassation on the basis of his actions do not constitute membership to a terrorist organisation, rather aiding it. He was released from prison. His related application to the Constitutional Court was rejected.
3. The application mainly concerns the placing and continued detention on remand of the applicant, who alleges a violation of Article 5 §§ 1, 3 and 4 and of Article 10 of the Convention. Although the Court asked several questions in relation to the applicant’s detention in relation to his pre-trial detention with regards to Article 5 of the Convention, **İFÖD’s submission will involve the Court’s question on whether the applicant’s freedom of expression was violated.** It is understood from the case file that basic accusations against the applicant were based on his news articles published in the daily Zaman. İFÖD will assess whether the criminal proceedings against the applicant, for offences carrying a serious penalty were directly linked to his work as a journalist and therefore constituted “interference” with the exercise by the applicant of his right to freedom of expression guaranteed by Article 10 of the Convention.
4. In this intervention İFÖD will provide an overview of legal and political developments in Turkey in the last years, during which freedom of expression has been in decline (**Part II**). Starting from the end of 2013, the government has utilised different means to silence journalists and others including through subjecting them to criminal procedures and prosecutions. Within this context, anti-terror legislation has been systematically abused to criminalise journalists and others. Therefore, such cases including the applicant’s case cannot be duly understood without the rule of law problems such as expansive and unforeseeable interpretation and application of anti-terror laws (**Part III**) and lack of independence of judiciary (**Part IV**) are taken into the account. In recent years the European Court has delivered several judgements with regards to freedom of expression of journalists and found violation of the Convention. This intervention will also summarize relevant case-law briefly (**Part V**). İFÖD is of the opinion that the case **is not an isolated case** and the applicant and others are subjected to criminal sanctions to prevent them from disseminating critical views that might put

the government into trouble. Therefore, the application needs to be assessed against this background.

II. Deterioration of Freedom of Expression and Freedom of Press in Turkey

5. As has been noted above, Turkey has been in a sharp democratic backslide within the last ten years. This democratic deterioration has been confirmed by different impartial observers. Freedom House published recently its “**Freedom in the World in 2021**” report under the title of “Democracy Under Siege”, which annually explains the results of research on the state of political rights and civil liberties in the world. According to this report, Turkey **is the second** in the rankings of 10 years largest decline in freedoms.¹
6. With this dramatic backslide on freedom, Turkey scored 32 points, which makes it as the 146th country out of 196 countries and places it to the category of countries as being “not free”, according to the global freedom score index. A closer look into the index shows that Turkey receives 16 points out of 40 in political rights, and 16 points out of 60 in civil liberties. Under the headings of political rights and civil rights, the report states that Turkey has major deficiencies in areas of electoral process, political pluralism and participation, functioning of government, **freedom of expression** and belief, organizational rights, rule of law, personal autonomy, and individual rights. In evaluation of developments in 2020, the report emphasizes that **prosecutions and campaigns of harassment against** opposition politicians, prominent members of civil society, **independent journalists**, and critics of Turkey’s increasingly aggressive foreign policy **continued throughout the year**. In terms of media freedom, the report points out that the mainstream media, especially television broadcasters, reflect government positions and have often carried identical headlines. Although some independent newspapers and websites continue to operate, **they face tremendous political pressure and are routinely targeted for prosecution**. More than 150 media outlets were closed in the months after the attempted coup in 2016. Moreover, the report indicated that new outlet closures and **arrests of journalists occur regularly**. **Journalists were arrested or prosecuted during 2020 for their reporting on** Turkey’s military and intelligence operations in Libya and on the government’s response to COVID-19, among other topics.²
7. Similarly, V-Dem published its **Democracy Report 2021** under the title of “Autocratization Turns Viral” recently and it ranks Turkey 149th out of 179 countries with the score of 0.11 in the Liberal Democracy Index. According to the report, Turkey turned from “electoral democracy” to “electoral autocracy” and ranked 3rd in the most autocratizing countries in the last ten years.³ The report emphasizes that the **decay in freedom of the press**, academia, civil society, and increasing spread of false information in Turkey predates 2010 but **has continued since**, with legal restrictions to further limit civil society activity and freedom of expression.⁴

¹ Freedom House (2021), Freedom in the World in 2021, p. 6. Available at https://freedomhouse.org/sites/default/files/2021-02/FIW2021_World_02252021_FINAL-web-upload.pdf

² Available at <https://freedomhouse.org/country/turkey/freedom-world/2021>

³ V-Dem, Democracy Report 2021, p. 19. Available at <https://www.v-dem.net/files/25/DR%202021.pdf>

⁴ *Ibid*, p.22.

8. Moreover, Turkey is ranked 154th out of 180 countries in the Reporters Without Borders's ("RSF") **2020 World Press Freedom Index**.⁵ RSF has produced a figures-based overview of press freedom in Turkey.⁶ RSF indicated that these figures show the scale of the crackdown since the failed coup in July 2016. Some of these figures will be presented here:

"200 journalists and media workers have been imprisoned in Turkey in the past five years and it continues to be one of the world's leading jailers of journalists. A 71-year-old journalist and novelist Ahmet Altan is still in detention. A total of 48 journalists spent at least one day in police custody in 2020. The reasons for their arrests including referring to the fate of Syrian refugees, investigating the government's handling of the Covid-19 pandemic, or covering the Kurdish issue. 63 journalists have been convicted of "insulting the president" under article 299 of the criminal code since 2014. Journalists are also often convicted under the terrorism law, usually on a charge of supporting or being a member of an illegal organization. Can Dündar, the former editor of the daily newspaper Cumhuriyet, was sentenced to 27 years 6 months in prison on 23 December 2020 on charges of spying and assisting a terrorist organization based on a news article about stopping of lorries (allegedly belong to the Turkish secret service) carrying guns by a public prosecutor. Turkish journalists have been the targets of at least 139 physical attacks in the past five years. At least 18 journalists were attacked in 2020 alone. At least 160 media outlets have been forced to close. A total of 3,436 journalists have been fired from Turkish media outlets in the past five years. The number fired in 2020 was 215."

9. In October 2020, eleven international organisations⁷ issued a statement entitled "**Turkey: Press Freedom under Attack**" voicing concerns about pressures on press freedom in Turkey.⁸ They emphasized that scores of journalists remain behind bars in Turkey or face baseless prosecutions in retaliation for their work. They also point out that **state authorities continue to instrumentalize a justice system that does not guarantee basic due process rights** in court. The lack of political will to end this pattern, largely unchanged since 2016, is hugely disturbing. The statement also draw attention to the safety of journalists indicating that journalists and political prisoners were effectively excluded from an early release programme announced in 2020 to ease overcrowding in prisons in the context of the Covid-19 pandemic. Journalists who are already deprived of their liberty face a grave risk to their health.
10. Several Council of Europe organs also observed similar problems in Turkey. The former Council of Europe Commissioner for Human Rights, Nils Muiznieks in his intervention to 10 applications against Turkey⁹ stated that, the "**overall picture unfortunately showed very serious interferences with the freedom of expression and the**

⁵ RSF, 2020 World Press Freedom Index, Available at https://rsf.org/en/ranking_table

⁶ RSF, Turkey- Press Freedom in Figures (2021), Available at <https://rsf.org/en/news/turkey-press-freedom-figures>

⁷ International Press Institute (IPI), ARTICLE 19, the Association of European Journalists (AEJ), the Committee to Protect Journalists (CPJ), the European Centre for Press and Media Freedom (ECPMF), the European Federation of Journalists (EFJ), Human Rights Watch (HRW), Osservatorio Balcani e Caucaso Transeuropa (OBCT), PEN International, Reporters without Borders (RSF) and the South East Europe Media Organisation (SEEMO).

⁸ https://www.hrw.org/sites/default/files/media_2020/10/Download%20the%20statement%20here_0.pdf

⁹ <https://rm.coe.int/third-party-intervention-10-cases-v-turkey-on-freedom-of-expression-an/168075f48f>

right to liberty and security not only of journalists, but also of human rights defenders, academics, members of parliament and social media users. In particular, **journalists had been widely targeted by spurious prosecutions and lawsuits, disparaging statements by high ranking officials and even physical attacks and violence, all of which have had a chilling effect on the climate for their legitimate and vital work**” (para. 5). He emphasized that “...More particularly following the declaration of the state of emergency, a large number of journalists have been detained and prosecuted as alleged members of various terrorist groups, **almost exclusively on the basis of their statements**, which were deemed by the authorities to coincide with the aims of a terrorist organisation (para. 11). Within this context, the Commissioner noted that “... in the majority of cases, journalists have been charged with terrorism-related offences **without any evidence corroborating their involvement with a terrorist organisation**” and “...The Commissioner was struck by the **lack of material evidence given the seriousness of the charges brought against the journalists** and observed that the **sole ground for their pre-detention order had been their purely journalistic activities and/or public statements, which fell within the ambit of speech protected by Article 10 of the Convention** (para. 24). The Commissioner reached the conclusion that “... there is currently a clear pattern of **suppressing legitimate dissenting views in Turkey** and that **judicial action targeting individuals and groups expressing those views is an integral part of this pattern**” (para. 37).

11. The Commissioner also published a “**Memorandum on freedom of expression and media freedom in Turkey**” following his visit to Turkey from 6 to 14 April 2016 and raised similar concerns in detail.¹⁰ The Commissioner states that ‘*journalists have been among the most affected by the various forms of judicial harassment*’ and also that ‘*detention is the most visible and chilling form that this harassment has taken.*’ The Memorandum also noted that ‘*the exceptional nature of remands in custody, and the need to provide clear legal reasoning in cases where they are necessary are not embedded in the practice of the Turkish judiciary.*’ It goes on to say that many Turkish judges still continue to use the list of catalogue crimes in the Code of Criminal Procedure as grounds for detention without a careful examination of the remaining conditions of detention.¹¹
12. The **Venice Commission** also noted that without individualized decisions, and without the possibility of timely judicial review, “membership” of terrorist organizations charges and arrests without relevant and sufficient reasons, instead of restoring democracy may further undermine it.¹²
13. The European Commission in its “**Turkey Report 2020**” stated about situation of fundamental rights that “*The Council of Europe continued its monitoring of Turkey’s respect for fundamental freedoms. Serious backsliding in most areas continued. Legislation introduced immediately after the lifting of the state of emergency (SoE) removed crucial safeguards protecting detainees from abuse, thereby increasing the*

¹⁰ Nils Muiznieks, (2017) “Memorandum on Freedom of Expression and Media Freedom in Turkey”, CommDH(2017)5, available at [https://rm.coe.int/ref/CommDH\(2017\)5](https://rm.coe.int/ref/CommDH(2017)5)

¹¹ Comm DH (2017)5, para. 79.

¹² The Venice Commission, Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media, CDL-AD(2017)007, 10-11 March 2017.

risk of impunity. Restrictions imposed on and surveillance of the activities of journalists, writers, lawyers, academics, human rights defenders and critical voices on a broad scale have a negative effect on the exercise of these freedoms, and lead to self-censorship. The enforcement of rights is hindered by the fragmentation and limited independence of public institutions responsible for protecting human rights and freedoms, and is aggravated by the lack of an independent judiciary”¹³

14. İFÖD in agreement with these observations would like to emphasize that under these conditions **an isolated approach to the case at hand** may cause losing sight about surrounding conditions of the applicant’s accusation and detention by public authorities. Therefore, İFÖD is of the opinion that the **broader political context in which the applicant was arrested and detained should be taken into account** when evaluating whether interference with his freedom of expression pursued a legitimate aim, and whether it was necessary and proportional.

III. Unforeseeable and Expansive Interpretation and Application of Anti-Terror Legislation

15. It is already established by many international observers that anti-terror legislation is interpreted and applied by the Turkish judicial authorities in an unforeseeable and expansive way. The Venice Commission examined in 2016 several articles of the Turkish Criminal Code.¹⁴ In its opinion, the Venice Commission came to the conclusion that, despite some positive changes in the wording of these articles and attempts by the Court of Cassation to limit their application, progress had been clearly insufficient and that all these articles continued to allow for excessive sanctions and had been applied too widely, penalising conduct protected under the European Convention and the International Covenant on Civil and Political Rights. The Venice Commission underlined, in particular, that *“prosecution of individuals and convictions in particular by lower-courts, which have a chilling effect on the freedom of expression, must cease. This is not sufficient if individuals are in some cases finally acquitted by the Court of Cassation after having been subject of criminal prosecution for several years.”*¹⁵
16. Nevertheless, after the Venice Commission adopted its aforementioned opinion on the Criminal Code, the situation in Turkey deteriorated following the coup attempt in July 2016. Too many journalists or dissidents like the applicant were prosecuted and detained on terrorism related charges. The Venice Commission re-examined the issue in the context of Emergency Decrees. The Commission adopted its Opinion **“On the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media”** at its 110th Meeting in March 2017.¹⁶ The Commission reiterated its findings about the Criminal Code pointing out that provisions of the Code

¹³ The European Commission, Turkey Report 2020, p.28, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/turkey_report_2020.pdf

¹⁴ Articles 216, 220, 299, 301 and 314 most of which are considered as terror crimes in the meaning of Law No. 3713 and Law No. 6415

¹⁵ Venice Commission, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002, 11-12 March 2016, paras. 123 and 124.

¹⁶ Venice Commission, Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media, CDL-AD(2017)007, 10-11 March 2017.

which deal with “verbal act offences” are dangerously vague “which may raise an issue under Article 7 of the European Convention”. The Commission also suggested that

“in the current context the first step to improve the situation with the journalistic freedom would be to construct the notion of “membership” very narrowly. 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.”¹⁷

17. The **Human Rights Commissioner of the Council of Europe** also emphasized that an overbroad interpretation by the Turkish judiciary of what constitutes terrorism or membership of an armed criminal organisation despite all the changes over the years is still a matter of concern.¹⁸ She made a worrying general observation on the state of criminal justice in Turkey. She concluded that

“while many of the long-standing concerns regarding the application of criminal law provisions continue to apply, the situation significantly deteriorated in recent years. ... Disregard within the judiciary of the most basic principles of law necessary to have a system of rule of law, such as presumption of innocence, non-retroactivity of offences, not being judged for the same facts twice, as well as legal certainty and foreseeability of criminal acts, has reached such a level that it has become virtually impossible to assess objectively and in good faith whether a legitimate act of dissent or criticism of political authority will be re-interpreted as criminal activity by Turkish prosecutors and courts.”¹⁹

18. It should be noted that one of the reasons of lack of foreseeability in relation to prosecution of journalists stem from the extending the scope offences such as membership to a terrorist organisation or aiding and/or abetting to a terrorist or terrorist organisation to acts which were not criminal offences when they were conducted. However, such an application contradicts with **Article 7 of the Convention**. According to the established case law of the European Court, Article 7 § 1 of the Convention goes beyond prohibition of the retrospective application of criminal law to the detriment of the accused. It also sets out, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). **While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences**, it also lays down the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where an individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him or her criminally liable.²⁰

¹⁷ *Ibid.*, para. 72.

¹⁸ Dunja Mijatovic, Commissioner for Human Rights of the Council of Europe, Report Following her Visit to Turkey from 1 to 5 July 2019, para.36, at <https://rm.coe.int/report-on-the-visit-to-turkey-by-dunja-mijatovic-council-of-europe-com/168099823e>

¹⁹ *Ibid.*, para. 50.

²⁰ *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 242, 28.06.2018.

19. The Court indicated that the legitimacy of the fight against terrorism “*does not mean that the fundamental safeguards enshrined in Article 7 of the Convention, which include reasonable limits on novel or expansive judicial interpretations in the area of criminal law, stop applying when it comes to prosecution and punishment of terrorist offences.*”²¹
20. The European Court has also found overwide interpretation and application of the Turkish Anti-Terrorism legislation by the judiciary unforeseeable. The Court found application of articles of 220 § 6, 220 § 7 and 314 of the Criminal Code in a number of cases unforeseeable and decided violation of several articles of the Convention. In the *Işıkırık* case,²² the Court found that the domestic courts have interpreted the notion of “membership” of an illegal organisation under article 220 § 6 of the Criminal Code in extensive terms. The applicant was convicted of membership of an armed organisation merely on account of his attendance at two public meetings, which, according to the first-instance court, were held in line with the instructions by the PKK, and his acts therein, that is to say, walking close to coffins and making a “V” sign during the funeral and applauding during the demonstration. Hence, the Court ruled that when applied in connection with article 220 § 6, the criteria for a conviction under article 314 § 2 of the Criminal Code were extensively applied to the detriment of the applicant. The Court concluded that article 220 § 6 of the Criminal Code was not “foreseeable” in its application since it did not afford the applicant the legal protection against arbitrary interference with his right under Article 11 of the Convention.²³
21. The Court reached similar conclusions in a number of cases in terms of articles 220 § 6 and 220 § 7 of the Criminal Code.²⁴
22. The Grand Chamber in its *Demirtaş (2)* decision²⁵ found that the national judicial authorities, including the public prosecutors who conducted the criminal investigation and charged the applicant, the magistrates who ordered his initial and/or continued pre-trial detention, the assize court judges who decided to extend his pre-trial detention, and lastly the Constitutional Court judges, adopted a broad interpretation of the offences provided for in article 314 §§ 1 and 2 of the Criminal Code. The Court stated that the political statements in which the applicant expressed his opposition to certain government policies or merely mentioned that he had taken part in the Democratic Society Congress – a lawful organisation – were held to be sufficient to constitute acts capable of establishing an active link between the applicant and an armed organisation.²⁶ The Court concluded that the range of acts that may have justified the applicant’s pre-trial detention in connection with serious offences punishable under article 314 of the Criminal Code is so broad that the content of that article, coupled with its interpretation by the domestic courts, does not afford adequate protection against arbitrary interference by the national authorities. In the Court’s view, such a broad interpretation of a provision of criminal law cannot be justified where it entails

²¹ *Parmak and Bakır v. Turkey*, no. 22429/07 25195/07, 03.12.2019, para.77.

²² *Işıkırık v. Turkey*, no. 41226/09, 14.11.2017.

²³ *Ibid.*, para. 63-68.

²⁴ *Bakır and Others v. Turkey*, no. 46713/10, 10.7.2018; *İmret v. Turkey* (no 2), no. 57316/10, 10.7.2018; *Zülküf Murat Kahraman v. Turkey*, no. 65808/10, 16.7.2019; *Daş v. Turkey*, no. 36909/07, 2.7.2019.

²⁵ *Selahattin Demirtaş v. Turkey* (no.2) [GC], no. 14305/17, 22.12.2020.

²⁶ *Ibid.* para. 278.

equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link.²⁷ The Court found violation of Article 10 of the Convention on the basis that interferences with the applicant's freedom of expression did not comply with the requirement of the quality of law on account of the interpretation and application in the applicant's case of the provisions governing terrorism-related offences.

23. Finally, the European Commission recommended in its Turkey Report 2020 that Turkey should align criminal and anti-terror legislation and their interpretation with European standards, the Convention and the Court's case-law and Venice Commission recommendations.²⁸
24. Considering all above findings, İFÖD is in the opinion that the applicant's case should be evaluated against this broad background.

IV. Lack of Independence of Judiciary

25. Moreover, it should also be emphasized that the lack of independence of judiciary is one of the most significant factors in the democratic backslide, deterioration of the rule of law and crackdown on basic freedoms including freedom of expression and press in recent years in Turkey. It should also be noted that expansive and unforeseeable interpretation of anti-terror legislation by the judiciary also related to the fact that judiciary is prone to executive influences. Although there has always been problems in terms of judicial independence in Turkey, the situation has drastically worsened within the last ten years. As, the judiciary's situation has gradually been deteriorated, judicial authorities in most cases did not provide protection against the abuse of anti-terror measures. On the contrary, the judiciary, has become part of the systemic problems.
26. Within the last ten years, two major constitutional amendments and numerous legislative amendments have been adopted in order to redesign the structure and functioning of the Judicial Council, the Constitutional Court and other top appeal courts including the Court of Cassation and the Council of State. The constitutional amendments in 2010 and 2017 restructured the judicial council (Council of Judges and Prosecutors -HSK) and changed its functioning which effectively put the Council under control of the executive (the President) and because of the Council's key role of overseeing the appointment, promotion and dismissal of judges and public prosecutors, the President's control over it effectively extends to the whole judiciary branch. The amendments of 2017 have been severely criticized by international observers because they imperilled judicial independence.²⁹

²⁷ *Ibid.*, para.280.

²⁸ The European Commission, Turkey Report 2020, p. 28, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/turkey_report_2020.pdf

²⁹ Venice Commission, Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, adopted at its plenary session, 10- 11 March 2017, Doc. CDL-AD(2017)005-e, para. 119; Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East - January - December 2017, March 2018, para. 34; Country Report of the Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, Following Her Visit to Turkey from 1 to 5 July 2019, 19 February 2020, CommDH(2020)1, para. 14.

27. Between 2011 and 2017, the structure and functioning as well as the number of members of the Court of Cassation and the Council of State completely changed four times by various laws adopted by the parliament.³⁰ Dismissal of high number of judges and prosecutors (more than 4.400) and recruitment of more than 10.000 new ones after the failed coup attempt completely changed the structure of the whole judiciary and as noted by the Council of Europe’s Commissioner for Human Rights this situation created “*an atmosphere of fear among the remaining judges and prosecutors.*”³¹ The European Commission also stressed that “*The negative effects of the large-scale dismissals of judges and prosecutors since the state of emergency and new recruitments in a fast-track procedure and in a non-transparent selection process continued to weigh on the efficiency and professionalism of the judiciary. Political pressure on judges and prosecutors continued to have a significant negative effect on the independence and the overall quality of the judiciary.*”³² The Commission also emphasized that “*the negative impact of the dismissal and forced removal of 30% of Turkish judges and prosecutor remained, both regarding independence and efficiency. There were concerns that dismissals in the absence of respect for due procedures caused self-censorship and intimidation within the judiciary.*”³³ Nevertheless, Turkish authorities extended the emergency powers underpinning these dismissals for a further three years by adopting Law No. 7145 in July 2018 and HSK dismissed at least 28 judges and prosecutors pursuant to this new law in 2020.³⁴ This means that one of the most basic guarantees of judicial independence is effectively suspended until at least July 2021.

28. Another factor which intensifies the political influence and imperil judicial independence is the recruitment system of judges and prosecutors. Judge and prosecutor candidates are elected by a board majority of members composed of Ministry of Justice bureaucrats. More than 10.000 new judges and prosecutors had been recruited after the declaration of the state of emergency. This means that more than two thirds of the existing judges and prosecutors are inexperienced and affiliated with the ruling party. The Council of Europe’s Commissioner for Human Rights raised her concern by stating that “*consistent reports that loyalty to the ruling coalition appears to have become a key criterion for selection in this context. It is also noteworthy that induction ceremonies for new judges and prosecutors and the opening of the judicial year are now held in the Presidential Palace, which reinforces the*

³⁰ In 2011 by the Law no 6110, in 2014 by the Law no 6572, in 2016 by the Law no 6723, and in 2017 by the Decree Law no 696. For details of these amendments and their purpose see Third Party Intervention by İFÖD in the Kavala case, https://ifade.org.tr/reports/IFOD_ECtHR_Osman_Kavala_Third_Party_Intervention.pdf.

³¹ Abdullah Zeydan others v. Turkey, ECtHR, Application no. 25453/17 and others, Third party intervention by the Council of Europe Commissioner for Human Rights, Doc. CommDH(2017)33, 2 November 2017, para. 35

³² The European Commission, Turkey Report 2020, p.21, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/turkey_report_2020.pdf

³³ *Ibid.*, p. 21.

³⁴ The numbers and dates of dismissal of judges and prosecutors by the HSK decisions are as follows: 3 judges and prosecutors were dismissed by the decision no. 2020/46 dated 11.3.2020; one judge was dismissed by the decision no 2020/127 dated 10.07.2020; 11 judges and prosecutors were dismissed by the decision no. 2020/136 dated 14.10.2020, and 13 judges and prosecutors were dismissed by the decision no. 2020/604 dated 27.11.2020.

public's perception of politicisation of the judiciary and of the control exerted on it by the executive."³⁵

V. The Courts' Recent Case-Law on Media Freedom in Turkey

29. The Court has delivered **several judgments** in regards with detention of journalists following coup attempt in 2016 on account of terrorism related charges.³⁶ In some of those cases the applicants were accused of and detained just because of their criticism about the government and the president. They were also accused for their employment in media outlets legally established and freely continued their activities before the coup attempt and there were no criminal investigation against them when the applicants worked for those media outlets. After the coup attempt, those media outlets were declared to be affiliated with a terrorist organisation and were shut down by Emergency Decrees by the government without any trial and without providing any reason.
30. In all these cases, the Court so far found violations of Articles 5 § 1 and 10 of the Convention. The Court ruled 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 an armed terrorist organisation, 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 according to the Court when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings.³⁷ In the Sabuncu and others case the Court noted that, in order to justify the applicants' pre-trial detention, the judicial authorities concerned created confusion between, on the one hand, criticism of the government in the context of public debate and, on the other hand, the pretexts used by the terrorist organisations to justify their violent acts. They characterised criticism levelled legitimately at the authorities in the context of public debate, in accordance with freedom of expression and press freedom, as assisting terrorist organisations and/or disseminating propaganda in favour of those organisations.³⁸ The Court ruled that such an interpretation of the criminal law is not only difficult to reconcile with the domestic legislation recognising public freedoms, but also posed a considerable risk to the Convention system, resulting in any person expressing a view at odds with the views advocated by the government and the official authorities being characterised as a terrorist or a person assisting terrorists. Such a situation is incapable in a pluralist democracy of satisfying an objective observer of the

³⁵ Country Report of the Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, Following Her Visit to Turkey from 1 to 5 July 2019, 19 February 2020, CommDH(2020)1, para. 23; See also The European Commission, Turkey Report 2020, p.21, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/turkey_report_2020.pdf

³⁶ See for example, *Şahin Alpay v. Turkey*, no. 16538/17, 20.03.2018; *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20.03.2018; *Sabuncu and others v. Turkey*, no. 23199/17, 10.11.2020; *Şik v. Turkey (2)*, no. 36493/17, 24.11.2020; *Atilla Taş v. Turkey*, no. 72/17, 19.01.2021

³⁷ *Mehmet Hasan Altan*, § 211; *Şahin Alpay*, § 181

³⁸ *Sabuncu and others*, § 178.

existence of a reasonable suspicion against journalists who are aligned with the political opposition but do not promote the use of violence.³⁹

31. However, the Court **did not examine whether interference with freedom of expression of the applicants was foreseeable**. Although the Court, in Mehmet Altan case, considered that serious doubts may arise as to whether the applicant could have foreseen his initial and continued pre-trial detention on the basis of articles 309, 311 and 312 in conjunction with article 220 § 6 of the Criminal Code, it did not examine this question considering its findings concerning the necessity of the interference.⁴⁰ In Sabuncu and others; Şık (2) and Atilla Taş cases the Court found interference with freedom of expression unlawful considering its finding that applicants' detention was not based on a reasonable suspicion.

Conclusion

32. Considering the foregoing, **İFÖD** kindly invites the Court to examine whether **interference with freedom of expression of the applicant was foreseeable**. As indicated in this intervention there is a systemic problem in Turkey in terms of usage of anti-terror legislation by Turkish authorities including judiciary to suppress critical voices. Such an application of criminal justice system **poses a lethal risk to the fundamental values of the Convention**, namely, democracy, rule of law and human rights. Retrospective incrimination of journalistic activities eliminates foreseeability and violates principle of no punishment without law guaranteed by Article 7 of the Convention. Therefore, the Court should examine whether the applicant could have foreseen his initial and continued pre-trial detention and prosecution on the basis of articles 220 § 7, 309, 312 and 314 of the Criminal Code.
33. İFÖD also would like to emphasize that even though the Court has not put questions to the parties in relation with the applicant's complaint of violation of Article 18 of the Convention in conjunction with Article 5, **this is requested by the applicant** and considering the above mentioned background of the case it seems unavoidable to examine whether detention and prosecution of the applicant pursued a political aim.

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İfade Özgürlüğü Derneği – İFÖD (Turkey)

Web: <https://ifade.org.tr> Twitter: @ifadeorgtr

İfade Özgürlüğü Derneği (İFÖD) has been set up formally in August 2017 protect and foster the right to freedom of opinion and expression. The new Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.

³⁹ *Ibid.* § 179.

⁴⁰ *Mehmet Altan*, § 205; for a similar approach see *Şahin Alpay*, § 175.