

# TURKEY: FREEDOM OF EXPRESSION IN JEOPARDY

VIOLATIONS OF THE RIGHTS OF AUTHORS, PUBLISHERS AND  
ACADEMICS UNDER THE STATE OF EMERGENCY

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# ABOUT THE AUTHORS

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Akdeniz and Altıparmak have co-authored the book *Internet: Restricted Access, A Critical Assessment of Internet Content Regulation and Censorship in Turkey*, published by İmaj Yayınları in 2008. Their book *Academics for Peace: Defending Academic Freedoms in Times of Emergency* was published by İletişim Yayınları in 2017.

Akdeniz and Altıparmak's applications to the Constitutional Court of Turkey against the blocking orders for Twitter and YouTube in 2014 were concluded in favour of the applicants with the Court finding a violation of their freedom of expression. Their application to the European Court of Human Rights on the blocking order against YouTube issued by the Presidency of Telecommunications and Communications resulted in the Court finding a violation of their freedom of expression safeguarded under Article 10 of the Convention in December 2015.

Akdeniz and Altıparmak are the recipients of the 2014 Publishers Association Award, the 2015 Halit Çelenk Law Award and the 2016 Global Freedom of Expression Prize and the Freedom of Press Award of the Journalists Association of Turkey.

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# INTRODUCTION

Turkey has a long history of censorship and criminalisation of speech, which extends well beyond traditional media outlets and has been encroaching on the Internet and social media platforms since 2007 after the Internet Law No 5651 was enacted.

This report, written for English PEN, presents an overview of the current situation of freedom of expression in Turkey and engages in a critical evaluation of the violations of the rights of writers, publishers, academics and within academic institutions.

The suppression of writers, publishers, scholars and academic institutions along with investigations and prosecutions amounting to violations of freedom of expression have intensified through the use of new instruments and means to execute the 'silencing policies' we now frequently encounter under the rule of the Justice and Development Party (AKP). These instruments and means include decisions of closure and dismissals from public service in accordance with Statutory Decrees issued under the State of Emergency which was declared after the coup attempt of 15 July 2016. Even prior to the failed coup, criminal investigations and prosecutions were a course of action used to silence dissent, alongside prior restraints on publications; legal action aimed at inflicting harm; abuse of the legal right of reply in print media; forced removal of internet content, news reports and social media posts, especially by the opposition; frequent blocking of websites and social media platforms; administrative sanctions and tax investigations against media outlets and their owners; and forced dismissal of journalists critical of the government and its policies. All of these are ongoing interventions carried out within the 'boundaries of the law'.

These wide-ranging and systematic practices and their silencing and chilling effects were never confined to print and broadcast media and journalists. However, in the post-coup period following 15 July 2016, they have been extended to regularly target NGOs, human rights activists, business people, writers, publishers, scholars and academic institutions.

In addition to fuelling self-censorship in both private and professional spheres, these practices have led to freedom of expression being replaced with a climate of fear in which political discourse and opposing views have declined. This report presents an evaluation of the current state of freedom of expression in Turkey, in view of prevalent practices in the post-coup period, and with a special focus on writers, publishers and academics.

# THE CURRENT STATE OF FREEDOM OF EXPRESSION IN TURKEY

Generally speaking, Turkey has always been one of the most restrictive countries among Council of Europe member states in terms of media freedom and freedom of expression. Of the total of 20,657 judgments issued by the European Court of Human Rights (ECtHR) between 1959 and 2017, 3,386 judgments (16.36%) involve Turkey as a respondent State, ranked first in the list of all member States. Turkey also ranks first in terms of the number of judgments in which a violation was found –with a total of 2,988 judgments. Of a total of 700 judgments in which the ECtHR has found a violation of freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), Turkey easily ranks first with 281 judgments and is followed by Russia with 39, France with 37 and Austria with 35.

As a result of its obligation to recognise the case law of the ECtHR, Turkey has introduced certain amendments to its legislation on freedom of expression in light of the Court's judgments. Although significant improvements have been brought about in this regard<sup>1</sup>, there are serious concerns about the approach of Turkish courts in implementing the standards of the ECHR. One may observe references to the jurisprudence of the ECtHR in the decisions of the Constitutional Court after it started to receive individual applications in 2012. However, this does not necessarily mean that the Constitutional Court is always aligned with the ECtHR in its judgments or that the jurisprudence of the two courts is reflected in the decisions of first instance courts.

The main themes in cases of freedom of expression brought before the ECtHR against Turkey are terrorism and violence. Indeed, the majority of the ECtHR's judgments concerning Turkey involve individuals convicted for disseminating propaganda on behalf of a terrorist organisation (under Articles 6 and 7 of the Anti-Terrorism Law); publishing content or books or disseminating public messages that incite hatred or hostility, or glorify crime or criminals (Article 312 of the former Criminal Code and Articles 215 and 216 of the current Criminal Code); and for denigrating and publicly defaming the Turkish nation, the Republic of Turkey, the Grand National Assembly of Turkey or the moral personality of the state, its institutions and the Turkish Armed Forces (Article 159 of the former Criminal Code and Article 301 of the current Criminal Code). A second set of judgments involve individuals automatically convicted for publishing the statements of a terrorist organisation (under Article 6(2) of the Anti-Terrorism Law) with total disregard to the context or content of such statements. Generally speaking, the ECtHR is of the opinion that such statements (in writings, books, publications, etc.) do not justify interference in freedom of expression since they do not incite hatred or violence.

The ECtHR also shows concern regarding violence against journalists and intellectuals. The case of the newspaper *Özgür Gündem* is a symbolic manifestation of such practices. The ECtHR was convinced that between 1992 and 1994, numerous acts of violence, including murders, attacks and acts of arson, had taken place against the newspaper, its journalists, distributors and others who had affiliations with the newspaper.<sup>2</sup> The Court found that the State had failed to meet its positive obligation to protect *Özgür Gündem* in exercising its freedom of expression.<sup>3</sup> The case of Hrant Dink also sets a precedent in this regard. Dink was convicted of denigrating Turkishness and was subsequently killed in Istanbul in 2007. In this case,

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<sup>1</sup> Among such changes, the most symbolic is Law No. 6459 on Amendments to Some Laws In Relation to Human Rights and Freedom of Expression. The report of the sub-committee drafting the law explicitly states that the relevant provisions of the law were introduced for harmonisation with the jurisprudence of the ECtHR. For a text of the law, deliberations and reports see <https://www.tbmm.gov.tr/sirasayi/donem24/yil01/ss445.pdf>

<sup>2</sup> *Özgür Gündem v. Turkey*, Application No. 23144/93, 16 March 2000.

<sup>3</sup> *Ibid.*, paragraph 38-46.

the court reiterated that the State had failed to meet its obligation to create an environment allowing public debate.<sup>4</sup>

For the past twenty years, the main issue restricting public debate in terms of Turkish laws has been the prosecution and imprisonment of journalists, writers and intellectuals on the grounds that they contribute to violence and terrorism. Together with the re-emergence of conflicts after the end of the Peace Process regarding the Kurdish issue in July 2015, fighting terrorism became the main grounds for interfering in freedom of expression. Following the failed coup of 15 July 2016, fighting terrorism has once again emerged as the main justification for restricting freedom of expression. Turkey is going through a period in which anyone thought to be in the opposition, including but not limited to academics, members of parliament, artists, journalists and writers, can be investigated, arrested and prosecuted for disseminating terrorist propaganda or for being a member of a terrorist organisation.

## The nature of repression of freedom of expression under AKP rule

In the 1980s and 1990s, most freedom of expression related prosecutions concerned the denigration of Atatürk, Turkishness and the territorial integrity of the state. Under the rule of the AKP, these have been replaced by prosecutions involving denigration of religion, the government and defamation of the President. Recourse to anti-terrorism legislation, frequently invoked in the 1990s, was toned down in the first period of AKP rule. However, after the end of the Peace Process and the attempted coup of 15 July 2016, recourse to anti-terrorism legislation has become even more pervasive.

Moreover, recent years have shown a change not only in the subject matter of restrictions of freedom of expression but also the methods used. Although physical attacks against journalists are rare and incidents of torture and ill-treatment of students and intellectuals are exceptional, thousands of criminal cases are filed under flimsy pretexts by political figures against almost anyone who criticises the government including students, public officials, media organisations and social media users. The accused in these cases are almost always found guilty.

In terms of attacking freedoms, the AKP government has developed a much more subtle and sophisticated mechanism involving different methods, in contrast with the 'rough' methods employed in the 80s and 90s. As noted by a commentator, this new style of contending opposition is 'less brutal but much more effective'.<sup>5</sup> It not only employs prosecutions and criminal sanctions but also prior restraints, decisions of the newly established Criminal Judgeships for Peace blocking access to websites and social media platforms, harsh governmental control exercised by the Supreme Board of Radio and Television, and onslaughts by pro-government media outlets against journalists and newspapers.

Within the scope of this new strategy, everything is done in accordance with the letter of the law. Indeed, some decisions issued by national courts and prosecutors refer to judgments of the ECtHR wherein the Court found legitimate interference in freedoms to be necessary in a democratic society. Criminal prosecutions are, for the most part, initiated by lawyers representing politicians or by supporters of the AKP against private individuals. Another prevalent scenario is one in which pro-government newspapers publicly invite prosecutors to launch criminal investigations against the opposition. Dissidents in these cases are almost always found guilty. One striking example is the former mayor of Ankara who once stated that he had filed 3000 criminal reports leading to prosecutions. Similarly, the current President of the Republic has launched hundreds of prosecutions and/or private legal cases. Although the ECtHR and the Turkish Constitutional Court have noted that criticism of politicians should enjoy a higher degree of protection, this principled approach and ensuing case law are disregarded almost entirely by national courts.

<sup>4</sup> Dink v. Turkey, Application No. 2668/07 and others, 14 September 2010, paragraph 137.

<sup>5</sup> Jacob Weisberg, 'President Erdogan's new style of media censorship is less brutal-and much more effective', [www.slate.com/articles/news\\_and\\_politics/foreigners/2014/10/president\\_erdogan\\_s\\_media\\_control\\_turkey\\_s\\_censorship\\_is\\_less\\_brutal\\_but.html](http://www.slate.com/articles/news_and_politics/foreigners/2014/10/president_erdogan_s_media_control_turkey_s_censorship_is_less_brutal_but.html).

Almost all demands made by members of the government are followed up by investigations and these are rapidly turned into indictments and prosecutions. Every year, the Criminal Judgeships for Peace issue thousands of blocking orders against internet content on the grounds that the personal rights of government members, their relatives and pro-government business people have been violated. Meanwhile, demands for the publication of disclaimers on such content are invariably accepted.

Criminal investigations have become the most crucial element of the new 'less brutal but much more effective' strategy. Parallel to the recent shift in Turkey's approach regarding anti-terrorism, cases concerning freedom of expression and association have attracted heavier sentences. Numerous people have thus been prosecuted and convicted for committing crimes in the name of a terrorist organisation despite not being a member of it (Criminal Code 220 § 6) or deliberately aiding a terrorist organisation despite not holding a place within its hierarchical structure (Criminal Code 220 § 7). Moreover, such crimes are given heavier sentences on grounds that they been committed in the name of an armed organisation (Criminal Code 314 § 1 and 314 § 2). As such provisions have only recently been introduced to the new Criminal Code, they have only just begun to be reflected in the case law of Strasbourg<sup>6</sup> but already stand as explicit examples of the fact that problems related to freedom of expression are becoming ever more serious in Turkey.

According to statistical data regarding cases filed prior to the failed coup of 15 July 2016, between 2010 and 2017 a total of 94,396 cases were filed under Article 7 § 2 of the Anti-Terror Law (TMK) on terrorist propaganda. In the same period, 103,227 decisions were finalised, 26,921 of which resulted in conviction and 15,599 in acquittal. In 4,622 cases, the national courts issued a decision of deferment of the announcement of the verdict (DAV).<sup>7</sup>

TMK 7/2	2010	2011	2012	2013	2014	2015	2016	Total
<b>Filed</b>	11416	11425	15672	10547	15815	13608	15913	94396
<b>Concluded</b>	14429	13037	21177	15789	14671	10305	13819	103227
<b>Conviction</b>	7644	7210	4224	2251	669	1728	3195	26921
<b>Acquittal</b>	1686	2071	2191	1438	878	2843	4492	15599
<b>DAV</b>	0	0	0	0	1010	1645	1966	4621
<b>Other</b>	5099	3756	14762	12100	12114	4089	4166	56086

In the same period, 13,581 cases were filed under Article 220 § 7 of the Criminal Code (TCK) regarding membership to illegal organisations. Of the 11,751 decisions issued, 2,226 resulted in convictions, 3,418 in acquittals and the announcement of 62 decisions were deferred.<sup>8</sup>

TCK 220/7	2010	2011	2012	2013	2014	2015	2016	Total
<b>Filed</b>	1565	1844	2605	1698	3190	1262	1417	13581
<b>Concluded</b>	1277	1073	2292	1998	2562	1345	1204	11751
<b>Conviction</b>	259	233	872	424	110	209	119	2226
<b>Acquittal</b>	355	303	509	600	437	638	576	3418
<b>DAV</b>	0	0	0	0	11	37	14	62
<b>Other</b>	663	537	911	974	2004	461	495	6045

Again, a total of 3,213 cases were filed under Article 314 § 1 of the Criminal Code (TCK) on membership to armed organisations. Of the 1,870 decisions finalised, 224 resulted in convictions, 155 in acquittals and one with a deferment of the announcement of the verdict.<sup>9</sup>

<sup>6</sup> *Gülcü v. Turkey*, no. 17526/10, 19.1.2016; *Işıkırık v. Turkey*, no. 41226/09, 14.11.2017.

<sup>7</sup> According to official statistics, 56,086 decisions were classified as 'other' decisions. This category comprises decisions of non-prosecution, abatement, rejection of the case, deferment based on special laws, decisions issued under Article 32 of the Criminal Code (mental health etc.), decisions of non-jurisdiction, decisions to join cases, and some decisions for the deferment of the announcement of the verdict for certain years.

<sup>8</sup> According to official statistics, 6,045 decisions were classified as 'other' decisions. See 7 for further explanation.

<sup>9</sup> According to official statistics, 1,380 decisions were classified as 'other' decisions. See 7 for further explanation.

TCK 314/1	2010	2011	2012	2013	2014	2015	2016	Total
<b>Filed</b>	242	205	312	214	679	285	1276	3213
<b>Concluded</b>	177	148	236	247	657	132	273	1870
<b>Conviction</b>	120	17	101	52	5	16	23	334
<b>Acquittal</b>	13	7	29	25	24	29	28	155
<b>DAV</b>	0	0	0	0	1	0	0	1
<b>Other</b>	44	124	106	170	627	87	222	1380

Between 2010 and 2017, the highest number of cases were brought under Article 314 § 2 of the Criminal Code on membership to an armed organisation s. In this period, 98,904 cases were filed, making this article even more popular than terrorist propaganda. Of the 88,062 decisions issued in this period, 34,796 resulted in convictions, 13,635 resulted in acquittals and 621 with a deferment of the announcement of the verdict.<sup>10</sup>

TCK 314/2	2010	2011	2012	2013	2014	2015	2016	Total
<b>Filed</b>	7689	8301	10722	8110	19796	14854	29434	98906
<b>Concluded</b>	8427	8312	13134	14028	18696	10689	14776	88062
<b>Conviction</b>	4157	4647	8069	8058	1625	3319	4921	34796
<b>Acquittal</b>	1359	1518	1924	2331	1092	2406	3005	13635
<b>DAV</b>	0	0	0	0	121	162	338	621
<b>Other</b>	2911	2147	3141	3639	15858	4802	6512	39010

A significant increase in criminal investigations and prosecutions is observed in cases under Article 314 § 2 of the Criminal Code, especially after the attempted coup of 15 July 2016. Against the 14,854 cases filed under this article in 2015, the figure rose to 29,434 in 2016 showing a 100 per cent increase. Although official statistics have not yet been published, the increase in the number of prosecutions concerning membership to terrorist organisations has continued in 2017. In the period 2010-2016, a total of 210,096 people were prosecuted for all the crimes noted above.

Similarly, there has been an exponential increase in cases filed under Article 299 of the Criminal Code on Defamation of the President after the election of Recep Tayyip Erdoğan as President. Of the total of 6,860 cases filed between 2010 and 2016, 6,272 were filed in the period 2014-2016 after the election of Recep Tayyip Erdoğan as President. In the period 2010-2016, a total of 1,315 cases resulted in convictions. 1,162 of these were issued during the presidency of Recep Tayyip Erdoğan.<sup>11</sup>

TCK 299	2010	2011	2012	2013	2014	2015	2016	Total
<b>Filed</b>	133	175	141	139	132	1953	4187	6860
<b>Concluded</b>	108	183	192	203	141	678	2579	4084
<b>Conviction</b>	28	41	40	44	40	238	884	1315
<b>Acquittal</b>	26	37	33	39	25	120	544	824
<b>DAV</b>	0	0	0	0	19	151	720	890
<b>Other</b>	54	105	119	120	57	169	431	1055

Although the article involves defamation of the President as an individual, the prosecutors and courts have interpreted the article to criminalise all criticism against the President as an attack on the State. Tens of thousands of people have been prosecuted and arrested under this article. An examination of cases filed against opposition MPs, some of whom are still in remand, shows that defamation of the President is intertwined with allegations of terrorism-related crimes.

<sup>10</sup> According to official statistics, 39,010 decisions were classified as 'other' decisions. This category comprises decisions of non-prosecution, abatement, rejection of the case, deferment based on special laws, decisions issued under Article 32 of the Criminal Code (mental health etc.), decisions of non-jurisdiction, decisions to join cases, and some decisions for the deferment of the announcement of the verdict for certain years.

<sup>11</sup> In the period 2010-2017, a total of 4,084 decisions were issued under Article 299 of the Criminal Code. Of these, 1,315 resulted in convictions, 824 in acquittals and 890 in deferment of the announcement of the verdict. According to official statistics, 1,055 decisions were classified as 'other' decisions. This category comprises decisions of non-prosecution, abatement, rejection of the case, deferment based on special laws, decisions issued under Article 32 of the Criminal Code (mental health etc.), decisions of non-jurisdiction, decisions to join cases, and some decisions for the deferment of the announcement of the verdict for certain years.



## Turkey and freedom of expression in international reports

Owing to these methods and practices, Turkey has become one of the worst performers in the world in terms of freedom of expression and media freedom, as reflected in recent international reports. In 2016, Reporters Without Borders (RSF) ranked Turkey 151st of 180 countries in their World Press Freedom Index. In 2017, Turkey ranked 155th.<sup>12</sup> Similarly, Freedom House classified Turkey as a 'partly free' country ranking it 156th in its 2016 media freedom index with a 20 point decrease in score compared to 2010.<sup>13</sup> In April 2017, it was announced that Turkey had fallen to 163rd in the global index. In the most recent report published in January 2018, Turkey was ranked 154th and classified as 'not free' for the first time.

The crisis of freedom of expression in Turkey is evident not only in reports published by NGOs but also in reports issued by interstate oversight mechanisms. The UN Special Rapporteur on Media Freedom noted his concerns in his preliminary observations after his visit to Turkey in November 2016.<sup>14</sup> The Council of Europe's platform to promote the protection of journalism has also noted that Turkey has the highest number of alerts and that a large part of these involve imprisonment of journalists.<sup>15</sup> The Council of Europe Commissioner for Human Rights' *Memorandum on Freedom of Expression and Media Freedom in Turkey* published in February 2017, 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.'<sup>16</sup> The Memorandum also notes 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. Although it takes time for such practices to be examined by the ECtHR, these developments have reached a level that cannot be ignored by the ECtHR. As a measure against detention being used as a systematic and pervasive instrument to silence dissent in Turkey and other countries, the ECtHR has adopted changes to its priority policies effective as of 22 May 2017 to speed up the processing of such applications.<sup>17</sup> The ECtHR has thus widened the category of 'urgent' applications, which formerly comprised applications that showed risk to life or health of applicants, to include these new cases. The category of urgent applications now includes those instances where the applicant is deprived of liberty as a direct consequence of the alleged violation of his or her Convention rights. Following this change, the ECtHR immediately started to process applications involving some journalists,<sup>18</sup> human rights defenders,<sup>19</sup> and MPs<sup>20</sup> and asked for the opinion of the State.

## Independence of the judiciary in Turkey

The root of all human rights-related issues in Turkey, including those affecting freedom of expression, is the problem of the rule of law, which arises as a deep structural crisis. Continual government intervention in the judiciary throughout the last decade has led to a situation in which the judiciary can no longer take any steps against the will of the government. Without grasping this problem, it is not possible to provide a clear explanation of any issue concerning fundamental rights. The Turkish judiciary has been criticised for many

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<sup>12</sup> Reporters Without Borders, World Press Freedom Index 2016 <https://rsf.org/en/turkey>.

<sup>13</sup> Freedom House, Freedom of the Press 2016, <https://freedomhouse.org/report/freedompress/2016/turkey>.

<sup>14</sup> Preliminary conclusions and observations by the UN Special Rapporteur on the right to freedom of opinion and expression to his visit to Turkey, 14-18 November 2016: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20891>

<sup>15</sup> Of the 239 alerts, 82 involve Turkey and 50 are classified as Level 1 alerts. Platform to promote the protection of journalism and safety of journalists: <http://www.coe.int/en/web/media-freedom/all-charts>

<sup>16</sup> CommDH (2017)5, para. 79.

<sup>17</sup> See [http://www.echr.coe.int/Documents/Priority\\_policy\\_ENG.pdf](http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf)

<sup>18</sup> Taş and Aksoy v. Turkey, no. 72/17; Ilicak v. Turkey, no. 1210/17, Altan and Altan v. Turkey, no. 13237/17; Alpay v. Turkey, no. 16538/17; Bulaç v. Turkey, no. 25939/17; Sabuncu and Others v. Turkey, no. 23199/17.

<sup>19</sup> Özakça v. Turkey, no. 45940/17; Gülmen v. Turkey, no. 46171/17.

<sup>20</sup> Demirtaş and Others v. Turkey, no. 14305/17.



years for its lack of independence and impartiality. However, the current crisis is not limited to the scope of these general criticisms.

The unresolved assassinations and attacks of the 1990s associated with the 'deep state' in Turkey against journalists and oppositional circles are not as prevalent as they once were. Instead they have been replaced by the government's attempts to rule over the judiciary and to use it to silence dissent. This strategy, which is fairly new, does not immediately appear as brutal and threatening as past measures of imprisoning journalists and executing intellectuals. This is why it has not received sufficient attention from international observers prior to the failed coup of 15 July 2016.<sup>21</sup> Nevertheless, the developments described below are clear signs of the abuse of law by the government.

After the 2010 Constitutional referendum, the government took control over the High Council of Judges and Prosecutors. The Gezi Park resistance in the summer of 2013 was the first show of wide opposition in reaction to the repressive policies and breach of the rule of law and arose as the first reaction to government authority in the last decade. In December 2013, an investigation was launched against senior politicians and their families based on graft allegations. This resulted in a severing of ties between the Fethullah Gülen community and the government which, until then, had been strong. The Prime Minister at the time, aware of the influence of the Gülen community in the judiciary, made numerous interventions to weaken this influence.

Although the referendum of 2010 gave the government the opportunity to control the High Council of Judges and Prosecutors, the opportunity resulted in the appointment of numerous members of the Gülen community to the Court of Cassation and the Council of State, since the Gülen movement was allied with the government at the time. As a result of the crisis between the Gülen community and the government, in February 2014, the government introduced legal amendments increasing the authority of the Minister for Justice within the High Council of Judges and Prosecutors. Based on these new amendments, the Minister for Justice made crucial changes in the administrative staff of the High Council and appointed the members of the Council to various other posts. Some of the changes introduced in February 2014 were found unconstitutional and repealed by the Constitutional Court on 10 April 2014.<sup>22</sup> However, the decisions of the Minister for Justice made prior to the Constitutional Court ruling remained in effect.

More recently, the European Commission for Democracy Through Law (Venice Commission) published the *Declaration on Interference with Judicial Independence in Turkey* in which it pointed to a pattern of interference with the independence of the judiciary in clear violation of European and universal standards. As noted in the Declaration, 'Judicial decisions and requests from prosecutors were not executed in violation of the law; prosecutors were suddenly removed from cases prepared by them over a long period; judges and prosecutors allegedly were arbitrarily transferred to other courts; judges were dismissed for decisions taken by them; alarmingly judges and prosecutors were even arrested for decisions taken by them'.<sup>23</sup>

Furthermore, amendments were introduced to the Criminal Procedure Law (under Law No. 6546 dated 18 June 2014)<sup>24</sup> abolishing the Criminal Courts of Peace, whose decisions could be challenged before Criminal Courts of First Instance, and establishing the Criminal Judgeships for Peace. A decision issued by a Criminal Judgeship for Peace can only be challenged before another Criminal Judgeship for Peace. As mentioned before, the newly established Judgeships quickly became the government's weapon for repressing oppositional views in the media, among journalists, on the Internet and social media platforms. This new

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<sup>21</sup> Undoubtedly, there are exceptions to this negligence. In 2012, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, issued a detailed evaluation on freedom of expression. CommDH(2011)25, 12 July 2011.

<sup>22</sup> Constitutional Court decision, E. 2014/57, K. 2014/81, 10.04.2014.

<sup>23</sup> Declaration on Interference with Judicial Independence in Turkey, 20 June 2015, <http://venice.coe.int/files/turkish%20declaration%20June%202015.pdf>.

<sup>24</sup> Law No. 6545 on Amendments to the Turkish Criminal Code and Other Laws was put into effect after its publication in the Official Gazette (29044) on 28 June 2014.

structure, which the Constitutional Court found to be in accordance with the Constitution,<sup>25</sup> was subject to serious criticism by the Venice Commission.<sup>26</sup>

There are numerous independent observation reports noting that the judiciary in Turkey is under heavy political influence. As reflected in these reports, the legal changes brought about in the Court of Cassation and Council of State are evidence of such influence. With these changes, existing members of these high courts were removed from office, and new members were appointed by the High Council of Judges and Prosecutors. In addition, the presidents of both high courts have close relations with the President of the Republic, a fact which reinforces the impression that the judiciary is under political influence.

The politicisation of the judiciary became even more apparent after the failed coup of 15 July. A total of 4,140 judges and prosecutors were dismissed from office including 333 judges and two prosecutors of the Court of Cassation, 276 members of the Council of State, two chief public prosecutors, 1,280 public prosecutors, 2,346 criminal and civil court judges and two members of the Constitutional Court.<sup>27</sup> Of these, 2,200 were placed in detention. In its recent report on the Immunity of Members of Parliament, the Venice Commission made reference to the observations of PACE, GRECO and the High Commissioner for Human Rights, noting that even MPs in Turkey had no chance of being tried by an independence and impartial judiciary.

The problem of judicial independence, which was already grave, became even more serious following the Constitutional amendment adopted after the referendum of 16 April 2017. According to Article 18 of the Amendment, all new articles, with the exception of two, will enter into force in 2019. However, the first two amendments that were made immediately effective concerned the independence and impartiality of the judiciary. The first rule allows for the President of the Republic to abandon his impartiality and assume leadership of a political party. Indeed, following the introduction of this new rule, President Recep Tayyip Erdoğan resumed leadership of the AKP. The second rule involves the High Council of Judges and Prosecutors. The High Council plays a crucial role in the judicial harassment measures noted above and it is widely believed that it brings no safeguards to the judiciary. Nevertheless, one may claim that there is a slight chance that the Council may shrug off the control of the government depending on political conjunctures. Following the amendment, the new High Council of Judges and Prosecutors will comprise of 13 members with a mandate to appoint members to the high courts, discharge from the profession, take disciplinary measures and assign members to courts. According to the new provision, the Minister for Justice and the Undersecretary for Justice are both members of the High Council, while the President of the Republic holds the authority to appoint four members. In other words, a little less than half of the 13 members of the High Council are to be appointed by the President of the Republic, who is officially the leader of a political party. The remaining seven members are to be chosen by the parliament. In its current state, the Grand National Assembly of Turkey is composed mostly of AKP MPs and, as such, the remaining seven members were also chosen in line with the wishes of the government.

An observation of the number of times changes were introduced to the chambers of high courts and the numbers of their members shows how frequently and arbitrarily the government has interfered in the judiciary. Interestingly, government initiatives to 'design' the judiciary have resulted in continual changes in the number of judges in high courts. After the High Council of Judges and Prosecutors came under the control of the government and the Gülen community following the constitutional referendum of 2010, the number of chambers in the Court of Cassation rose from 32 to 38 while the number of its members rose from 250 to 387. In 2014, a new need arose to decrease the influence of the Court of Cassation members affiliated with the Gülen community. The number of chambers was once again increased to 46 and the

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<sup>25</sup> Constitutional Court decision, E. 2014/164, K. 2015/12, 14.01.2015.

<sup>26</sup> Venice Commission (2017), Opinion on the Duties, Competences and Functioning of the Criminal Peace Judgeships, CDL-AD(2017)004.

<sup>27</sup> Human Rights Joint Platform (2017), Measures and Regulations under the State of Emergency, Updated Status Report – 31/12/2017, p. 25.

number of its members was increased to 516. Then, in 2016, a total purge of members of the Gülen community was planned and the number of chambers was reduced from 46 to 24 and the number of members from 516 to 200. At this point in time, the new intermediate courts of appeal had been established giving the impression that there would be no more interference with the high courts. However, new amendments were introduced through Emergency Decree No. 696 in the laws governing the Court of Cassation and the Council of State allowing for the appointment of 100 new members to the Court of Cassation and 16 new members to the Council of State. The High Council of Judges and Prosecutors, entirely composed of members appointed by the ruling party, in turn appointed nearly half of the new members of the Court of Cassation. As one can observe, not even high judges and courts have any safeguards against the government. Within a period of seven years, hundreds of judges in the highest courts of the country were replaced and thousands of judges and prosecutors were arrested and detained.

Under these conditions, it is evident that no judge can pass an independent judgment in any case that is likely to have political implications.

The influence of the executive over the judiciary in all political cases is an undeniable occurrence noted by all objective observers. This influence becomes more pronounced in cases involving the Erdoğan family and politicians belonging to the ruling party. In such cases, the courts totally disregard media freedom, the right of the media to impart information and the right of the public to receive information, automatically accepting all claims that the personal rights of these politicians have been attacked.

More importantly, writers, academics, journalists and individuals with oppositional views are announced as having links with multiple illegal organisations despite a lack of any concrete evidence. Again, the various illegal organisations, which have nothing in common with one another, are given joint reference in investigations with no evidence whatsoever and a vast number of people are placed in detention on grounds such as membership to such organisations. In reaching these conclusions, articles written by journalists, their remarks on television shows and social media posts are presented as the sole evidence of their crime.

Charges of membership to terrorist organisations such as FETÖ/PDY, the PKK and the DHKP-C are used as a means of deterring oppositional journalists. Conducted in the absence of concrete evidence, such investigations and arrests are usually founded on reasons such as writers and intellectuals having shared social media content or volunteered to act as the editor-in-chief of a newspaper for 24 hours. Moreover, almost all appeals made against orders of pre-trial detention issued by Criminal Judgeships of Peace are rejected by another Criminal Judgeship of Peace. Another precedent in Turkey was set in the case of Atilla Taş, Murat Aksoy and 11 journalists who were being tried by the Istanbul 25th Assize Court. On March 31 2017, the Istanbul Assize Court ordered the release of the defendants. The 13 journalists were arrested again just before their release and were once again detained based on even heavier charges. Consequently, İbrahim Lorasdağı, the presiding judge of the Istanbul 25th Assize Court which ordered their release, its members, Barış Cömert and Necla Yeşilyurt Gülbiçim, and the prosecutor of the case, Göksel Turan, were subjected to a disciplinary inquiry by the High Council of Judges and Prosecutors on 3 April 2017. The judges and the prosecutor were temporarily suspended from office. After the inquiry, their posts were changed thereby preventing them from returning to the Istanbul 25th Assize Court.

The influence of the government on the judiciary is so noticeable that even the judgments of the Constitutional Court, which is the last domestic remedy in human rights violations, can be disregarded by first instance courts if they are disliked by the government. This problem arose in January 2018 after the Plenary of the Constitutional Court found violations of fundamental rights in the cases of journalist Şahin Alpay<sup>28</sup> and journalist, academic and writer Mehmet Altan.<sup>29</sup> In the two judgments, adopted with an 11 to 6

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<sup>28</sup> Application of Şahin Alpay, [GK] B.No: 2016/16092, 11/01/2018. Note further the second decision issued by the Constitutional Court in relation to Şahin Alpay's release: Application of Şahin Alpay (2), [GK] B.No: 2018/3007, 15/3/2018.

<sup>29</sup> Application of Mehmet Hasan Altan, [GK] B.No: 2016/23672, 11/01/2018.

majority vote of the Plenary, the Constitutional Court found that the detention of the applicants had violated their right to personal liberty and security safeguarded under Article 19 of the Constitution as well as their right to freedom of expression under Article 26 and freedom of the press under Article 28. On the same day, the Constitutional Court forwarded its judgment in the case of Şahin Alpay to the Istanbul 13th Assize Court and its judgment in the case of Mehmet Altan to the Istanbul 26th Assize Court where the applicants had been respectively tried, calling for remedial action to reverse the violations. Both judgments were met with strong reactions from political figures and the Constitutional Court was claimed to have overstepped its powers. Although the correct course of action would have been to release the detainees following these criticisms, the judgments of the Constitutional Court, which are binding, were not executed by the Assize Courts trying the applicants. In its decision adopted with a two to one majority of the vote, the Istanbul 13th Assize Court alleged that the Constitutional Court had 'seized jurisdiction' and that it would not execute the judgment regarding Şahin Alpay. For the first time in the legal history of Turkey, a local court thus challenged the jurisdiction of the Constitutional Court.

The appeals against the detention order in the case of Şahin Alpay were rejected by the Istanbul 13th and 14th Assize Courts while the appeals in the case of Mehmet Altan were rejected by the Istanbul 26th and 27th Assize Courts. All four courts have thus ruled that the judgments of the Constitutional Court which are binding are, in effect, not binding. While being the very first example in Turkish legal history of a local court failing to execute the judgments of the Constitutional Court, this event will go down in history as the most striking piece of evidence showing that the judiciary is not independent from politics. Subsequently, the Constitutional Court was forced to issue a second decision for Alpay's release from prison on 15 March, 2018.<sup>30</sup> Alpay was released, but put under house arrest which created further tension between the local court and the Constitutional Court. The crisis of freedom of expression in Turkey has become intertwined with the crisis of the rule of law and the Constitutional crisis, starting with the failure of local courts to execute the judgments of the Constitutional Court. An environment that would genuinely allow for public debate on these matters is only possible within a legal system that respects the rule of law. Such an environment is non-existent in Turkey where the State of Emergency is repeatedly and automatically extended.

## The State of Emergency

On 15 July 2016, a group of military officials, alleged to be affiliated with the Gülen movement, attempted a coup to overthrow the government. Numerous public buildings, including the parliament and the Presidential building were bombed, roads and bridges were blocked. During the attempted coup, lasting less than 24 hours, 248 civilians were killed and many were injured. After the attempted coup was suppressed, a large number of people were arrested and detained. On 20 July 2016, the Council of Ministers, headed by the President, declared a State of Emergency.<sup>31</sup> On 21 and 22 July 2016, Turkey a communicated a notice to the United Nations<sup>32</sup> and the Council of Europe<sup>33</sup> declaring its derogation from obligations under the European Convention on Human Rights and the UN International Covenant on Civil and Political Rights. The articles of the UN International Covenant on Civil and Political Rights subject to derogation are as follows:

- Article 2(3)- General Provisions / The right to an effective remedy for persons whose rights under the Covenant are violated
- Article 9- The right to liberty and security

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<sup>30</sup> Şahin Alpay (2) Başvurusu, [GK] B.No: 2018/3007, 15/3/2018.

<sup>31</sup> See the Official Gazette, <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2016/07/20160721.htm&main=http://www.resmigazete.gov.tr/eskiler/2016/07/20160721.htm>

<sup>32</sup> See the Communication sent by Turkey at <https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf>

<sup>33</sup> See the Communication sent by Turkey at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2929966&SecMode=1&DoId=2380676&Usage=2>

- Article 10- Rights of persons deprived of their liberty
- Article 12- Right to liberty of movement
- Article 13- Procedural safeguards against the deportation of aliens
- Article 14- Right to a fair trial
- Article 17- Right to privacy
- Article 19- Freedom of expression
- Article 21- Freedom of peaceful assembly
- Article 22- Freedom of association
- Article 25- Political rights
- Article 26- Equality before the law
- Article 27- Protection of minorities

Turkey's recent history is not unfamiliar with States of Emergency. After the Martial Law between 1980 and 1983, a State of Emergency was effective in 13 provinces until 2002. This period is remembered for the grave human rights violations committed and was the subject of numerous ECtHR judgments in subsequent years.<sup>34</sup>

However, the current State of Emergency is different from the earlier one in that it is effective throughout the country and employs 'atypical' and unprecedented measures. The State of Emergency declared in 2016 is not limited to measures affecting criminal and criminal procedure law. Nevertheless, the new State of Emergency measures can be examined under two general categories:

- a. **Emergency Decrees resulting in lasting effects for individuals:** dismissal of public officials; closure of unions, federations, confederations, private health institutions, private educational institutions, universities; closure of private radio and television outlets, newspapers and magazines, news agencies, publishing houses and distributors; closure of associations and foundations.
- b. **Legal amendments to various laws affecting rights safeguarded under the ECHR and the ICCPR,** including but not limited to the Law on Criminal Procedure, Law on Municipalities,<sup>35</sup> the Law on Elections,<sup>36</sup> the Law on Higher Education,<sup>37</sup> the Law on Civil Servants, the Law on Citizenship,<sup>38</sup> and the Law on the Protection of Personal Information.

A general term to describe the new State of Emergency is 'lustration'. The government has undertaken a far-reaching lustration operation under the State of Emergency against the Gülen movement, which is alleged to have planned and executed the failed coup, as well as against other terrorist organisations it views as a

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<sup>34</sup> Some significant cases deliberating on human rights violations arising out of the State of Emergency in Southeastern Turkey are the following: *Aksoy v. Turkey*, no 21987/93, 18/12/1996; *Bati and Others v. Turkey*, no 33097/96 and 57834/00, 3/6/2004; *Akkum and Others v. Turkey*, no. 21894/93, 24/3/2005; *Erdoğan and Others v. Turkey*, no. 19807/92, 25/4/2006.

<sup>35</sup> The following paragraph was added by Emergency Decree No. 674 Article 38 to Article 45 of the Municipality Law No. 5393: 'However, where a mayor or a deputy mayor or a council member is suspended from duty or detained or banned from public service or his/her position as a mayor or member of council terminates due to the offences of aiding and abetting terrorism and terrorist organizations, a mayor or a deputy mayor or a council member shall be assigned by the authorities listed in Article 46. It is obligatory for that person to be assigned should be eligible. If a member of the municipal council, who has been suspended from duty, detained resigns, the provisions of this paragraph shall apply. Under this paragraph, in municipalities to which a mayor or deputy mayor is assigned, it may be ensured that budget and accounting works and proceedings are carried out by the revenue office or revenue department upon approval of the governorship. The municipal council shall not convene without the mayor's call in these municipalities. Duties and powers of municipal councils, committees and commissions shall be exercised by members of committees laid down in Article 31'. Based on this article, all co-mayors of the Democratic Regions Part have been dismissed from office.

<sup>36</sup> Article 149/A of Law No. 298 on Elections, allowing the Supreme Board of Elections to sanction private media organizations that failed to make impartial broadcasts during elections was repealed by an Emergency Decree. This rule was repealed just before the constitutional referendum and according to the Election Observation Mission of the OSCE, contributed to a period of unfair electioneering: <http://www.osce.org/odihr/elections/turkey/311721?download=true>

<sup>37</sup> The rule allowing university rectors to be appointed by the President was introduced under Article 85 of Emergency Decree No. 676.

<sup>38</sup> Article 75 of Emergency Decree No. 680 sets forth that the citizenship of individuals who fail to return to Turkey within three months as of the initiation of an inquiry shall be revoked.

threat to national security. Interestingly, the purge was not limited to public agencies but was also reflected in the private sector.

Despite many peculiarities, the lustration measures against public officials are reminiscent of the Eastern European experience after the Cold War. However, in contrast with these countries, the regime has not changed in Turkey. Another difference is that the lustration process in Turkey is not undertaken based on preconceived rules or as a result of inquiries but rather through haphazard Emergency Decrees. A total of 116,250 people were dismissed from public service in this process. Although a small number of public officials have been reinstated to office, as of 31 December 2017, 114,279 people are still banned from public services. Many of those dismissed from public office have also been subjected to other measures. Their passports have been revoked, preventing them from leaving the country, and it has become impossible for them to find a job in the country through a series of de jure and de facto measures. Furthermore, as employment of dismissed officials by the private sector puts companies at risk of being labelled as supporters of terrorism, numerous dismissed officials have become civilly dead.

The grave picture observed prior to the attempted coup of 15 July 2016 has turned into one in which media freedom in particular has been completely undermined since the declaration of the State of Emergency. In this period, 140 media organisations including television, radio and periodicals, and 30 publishing houses were shut down.<sup>39</sup> Although the numbers differ according to sources, the number of imprisoned journalists has risen to more than 120, placing Turkey first in the global ranking.<sup>40</sup> In addition, 17 journalists are still in police custody and 520 are being prosecuted.<sup>41</sup>

The Venice Commission's *Opinion on the Measures Provided in the Recent Emergency Decree Laws With Respect to Freedom of the Media* in Turkey, published in March 2017 notes that 'such measures as mass liquidations of media outlets on the basis of the emergency decree laws, without individualised decisions, and without the possibility of timely judicial review, are unacceptable in light of the demands of international human rights law, and extremely dangerous. The same concerns the intensification of criminal prosecutions of journalists based on their writings, under the heading of 'membership' of terrorist organisations, and their arrests without relevant and sufficient reasons.'<sup>42</sup> At the end of report the Venice Commission called on the authorities to 'ensure that the journalists are not prosecuted under the heading of 'membership' of terrorist organisations (and alike), where the charges against them are essentially based on their writings', and to 'ensure that where journalists are prosecuted essentially because of their publications, pre-trial detention is not imposed on the sole ground of the gravity of the charges which are derived from the content of their publications; the authorities should be able to demonstrate 'relevant and sufficient' reasons for the detention of journalists, in line with the case-law of the ECtHR on the matter, and such detentions should remain an exception'.

In addition, Emergency Decrees were issued to close public and private legal entities such as associations, foundations and companies without the possibility of judicial review. This uncertainty has resulted in tens of thousands of similar applications to administrative courts, the Constitutional Court and the European Court of Human Rights. Individuals working in such organisations are considered to be employees of closed private institutions and therefore share a fate similar to those dismissed from public service. For example, it is estimated that at least 2,500 media workers have become unemployed as a result of these measures. The number of people subject to long-term unemployment due to such measures is unknown.

The State of Emergency measures have had both direct and indirect significant effects on matters that are central to this report.

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<sup>39</sup> Human Rights Watch, *Silencing Turkey's Media: The Government's Deepening Assault on Critical Media*, December 2016.

<sup>40</sup> BIA Media Observation: BIA Medya Gözlem Ekim-Kasım-Aralık 2017, <http://bianet.org/bianet/medya/193287-bia-medya-gozlem-ekim-kasim-aralik-2017-tam-metin>

<sup>41</sup> BIA Media Observation: BIA Medya Gözlem Ekim-Kasım-Aralık 2017, <http://bianet.org/bianet/medya/193287-bia-medya-gozlem-ekim-kasim-aralik-2017-tam-metin>

<sup>42</sup> Opinion No. 872 / 2016, CDL-AD(2017)007, Strasbourg, 13 March 2017.



5,822 of those dismissed from public office are academic staff employed in higher education, including 386 Academics for Peace, signatories to the declaration 'We Will Not Be a Party to This Crime'. Similarly, as will be discussed below, 30 publishing houses were closed by Emergency Decrees.

Numerous negative developments have been experienced in criminal prosecutions under the State of Emergency. Permanent amendments have been introduced through Emergency Decrees to criminal procedure laws and to criminal laws. Writers and academics were deeply affected by the newly introduced rules. Prolonged detention periods, restrictions to the right to have access to a lawyer, and the right of suspects to see their families have been extremely problematic.

Numerous journalists and intellectuals are being accused of attempting to overthrow the government, being leaders of illegal organisations and of acting in the name of illegal organisations despite not being a member. A number of the applications filed at the ECtHR in relation to these prosecutions have already been communicated to the government for their opinion.<sup>43</sup>

The effects of the State of Emergency will be examined in the light of concrete cases in the following pages. This section will provide information on the atypical regime under Emergency Decrees and its restrictive effects on writers, academics and publishers followed by a discussion of the effectiveness of legal remedies available against such restrictions.

## The approach of the Constitutional Court and the non-reviewability of State of Emergency Measures

The Constitution of Turkey defines the limits of measures that can be taken under a State of Emergency. According to Article 121, paragraph two of the Constitution, 'The financial, material and labour obligations which are to be imposed on citizens in the event of the declaration of state of emergency under Article 119 and the manner how fundamental rights and freedoms shall be restricted or suspended in line with the principles of Article 15, how and by what means the measures necessitated by the situation shall be taken, what sorts of powers shall be conferred on public servants, what kinds of changes shall be made in the status of officials as long as they are applicable to each kinds of states of emergency separately, and the extraordinary administration procedures, shall be regulated by the Act on State of Emergency'. In other words, the Constitution states that the restriction of fundamental rights and freedoms under a State of Emergency is to be governed by a law to be adopted by the Grand National Assembly of Turkey.

Law No 2035 on The State of Emergency includes provisions that allow for the adoption of numerous measures which are not applicable under normal circumstances. The law thus allows for measures such as the suspension of associations for a three-month period; declaration of curfews; prohibition of publications; or obligation to obtain prior permission for the publication (including reprints and editions) and distribution of newspapers, magazines, brochures, books, etc.; the control and, if deemed necessary, restriction or prohibition of all kinds of broadcasting and dissemination of words, writings, pictures, films, records, sound and image tapes (Article 11).

In addition, according to Article 121 paragraph three of the Constitution, 'During the state of emergency, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decrees having the force of law on matters necessitated by the state of emergency. These decrees shall be published in the Official Gazette, and shall be submitted to the Grand National Assembly of Turkey on the same day for approval; the time limit and procedure for their approval by the Assembly shall be indicated in the Rules of Procedure'. In view of the previous provision, it is evident that these emergency decrees must be limited in two respects. Firstly, it must be acknowledged that emergency decrees issued under a State of

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<sup>43</sup> The applications for which the ECtHR has requested the opinion of the State are *Sabuncu and Others v. Turkey*, no. 23199/17; *Altan and Altan v. Turkey*, no. 13237/17 and 13252/17, *Ilıcak v. Turkey*, no. 1210/17; *Taş and Aksoy v. Turkey*, no. 72/17 and 80/17; *Alpay v. Turkey*, no. 16538/17; *Bulaç v. Turkey*, no. 25939/17.



Emergency cannot be about the restriction of fundamental rights and freedoms since the regulation of such rights and freedoms are the subject matter of the Law on State of Emergency. At the very least, emergency decrees cannot be issued about matters that are not governed by the Law on State of Emergency. Secondly, it is clear that Emergency decrees must be 'limited to those matters necessitated by the state of emergency'. Indeed, in its earlier judgments on decrees issued under the State of Emergency, the Constitutional Court ruled that emergency decrees unrelated to the State of Emergency in terms of subject matter and time cannot be regarded as a State of Emergency Decree and repealed such decrees.<sup>44</sup>

However, in its judgments after the declaration of the State of Emergency on 20 July 2016, the Constitutional Court made a unanimous shift from its own case-law without giving any reasonable explanation. According to the Constitutional Court, examining whether a State of Emergency decree can indeed be regarded as a State of Emergency decree would be a breach of Article 148 of the Constitution which states 'decrees having the force of law issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance'. Therefore it is not possible for the Constitutional Court to engage in a discussion of the constitutionality of emergency decrees.<sup>45</sup>

This approach, which is regarded as the Constitutional Court's issuing of its own death warrant,<sup>46</sup> has created an area completely closed to review. Owing to this judgment, the government has started to regulate under emergency decrees both individual matters such as dismissals from public office and dozens of matters which it does not wish to lose time with in parliament. The absence of all legislative and judicial reviews has led to the regulation of all matters by the government.

Moreover, although Article 121 of the Constitution sets forth that decrees having the force of law under a State of Emergency shall be submitted to the parliament for review and discussed as per its Rules of Procedure, all Emergency decrees have been approved by the Parliament over a year after the date envisaged in Rules of Procedure. Another issue that adds to the gravity of the situation is that the government continues to extend the State of Emergency for three months at a time without allowing for any public or parliamentary debate. Two days before the end of each term of State of Emergency, the National Security Council issues its opinion on the extension; the following day, the draft is expeditiously accepted by parliament thereby extending the State of Emergency for another three months. The State of Emergency, initially declared for three months, has now been effect for 21 months.

The vicious circle created by this practice can only be summarised as follows: the government extends the State of Emergency, continues to issue emergency decrees that have nothing to do with the State of Emergency and then presents these emergency decrees to parliament for approval. Neither the extension, nor the emergency decrees, nor the submission of these to parliament is subject to judicial review. This can be regarded as an indefinite rule of unlawfulness.

## The ECHR's and Council of Europe's principles on freedom of expression

According to an amendment introduced to Article 90 of the Constitution, international conventions on fundamental rights and freedoms, which have been duly put into effect, prevail over national legislation in cases where there is a conflict in their provisions. The 2010 referendum introduced the right to make individual applications to the Constitutional Court based on allegations of the violation of fundamental rights and freedoms safeguarded in the Constitution and within the scope of the European Convention on

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<sup>44</sup> E.2003/28, K.2003/42, 22.05.2003

<sup>45</sup> E.2016/166, K. 2016/159, 12.10. 2016; E. 2016/167, K.2016/160, 12.10 2016; E. 2016/171 K. 2016/164, 2.11.2016; E. 2016/172 K. 2016/165, 2.11. 2016.

<sup>46</sup> Kerem Altıparmak, 'AYM, artık bir anayasamız olmadığını ilan etti!' [The Constitutional Court declared that we do not have a Constitution anymore], T24, 5 November 2016; Selin Esen 'Analysis: Judicial Control of Decree-Laws in Emergency Regimes — A Self-Destruction Attempt by the Turkish Constitutional Court?', blog of IACL, AIDC, 19 December 2016; and Ali Acar, 'The Hamartia of the Constitutional Court of Turkey: Part I and II', blog of I-CONnect, 30 March and 4 April 2017.

Human Rights by public authorities. Due to its strong position in national law and rich case law on freedom of expression, the ECHR, which is the most effective protection mechanism in international law, provides the standards and principles that are fundamental to this report. References will be made to other international and national standards in relevant sections of the report.

Article 10 § 1 of the ECHR states that:

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.

The article thus safeguards the three elements of freedom of expression: the right to hold opinions, the right to receive information and ideas, and the right to impart information and ideas. Although Article 10 does not explicitly mention media freedom, in its judgment in the case of *Lingens v. Austria*<sup>47</sup> and many others that follow, the ECtHR developed a comprehensive case law on the exercise of freedom of expression, laying out a series of principles and rules granting the press a special status. According to the Court, 'Freedom of the press [...] affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.'

In addition to the freedom of the press, artistic, scientific and academic freedoms are also safeguarded under Article 10. As frequently noted by the ECtHR, those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. The State has an obligation not to encroach unduly on their freedom of expression.<sup>48</sup> Although the ECHR does not set forth scientific freedom under a separate heading, academic freedoms were defined and protected by the Court as a separate field.<sup>49</sup> The ECtHR underlines the importance of academic works and recognises that any restrictions to studies and publications of academics need to pass a more rigorous examination.<sup>50</sup>

With regard to artistic and scientific freedom of expression, the Constitution is different from the European Convention on Human Rights in that it sets forth scientific freedom as an independent right under Article 27 of the Constitution, as will be discussed below.

Recent years have shown a diminishing tolerance towards alternative ideas. The ECtHR uses the words 'enabling environment'<sup>51</sup> to describe the potential for everyone to take part in public debate and express their thoughts and ideas without fear. However, a more detailed explanation is warranted to understand what an enabling environment entails. According to the Court, 'In establishing a system for the effective protection of writers and journalists, States have the obligation to create an enabling environment by allowing for everyone to take part in public debate and express their thoughts and opinions free from fear even if such thoughts and opinions are contrary to those held by official authorities or a significant segment of the public and even if such opinions shock or disturb the public.'<sup>52</sup>

<sup>47</sup> *Lingens v. Austria*, no. 9815/82, 08/07/1986.

<sup>48</sup> *Müller and Others v. Switzerland* no. 10737/84, 24.05.1988, para 33.

<sup>49</sup> *Sorguç v. Turkey*, No.17089/03, 23.6. 2009, para. 35; *Sapan v. Turkey*, No. 44102/04, 8.6.2010, para. 34.

<sup>50</sup> *Aksu v. Turkey* [BD], No. 4149/04 and 41029/04, 15.03.2012, para. 71

<sup>51</sup> For a detailed discussion of this concept, see, Peter Krug and Monroe E. Price, 'The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Governance', The USAID Office of Democracy and Governance Occasional Paper Series, January 2002, Doc. No. PN-ACM-006; Monroe Price and Peter Krug, 'The Enabling Environment For Free and Independent Media', Mark Harvey, (der.), *Media Matters: Perspectives on Advancing Governance & Development from the Global Forum for Media Development* (Pekin, Internews Europe, 2007). 94-101.

<sup>52</sup> *Dink v. Turkey*, no. 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09, 14/09/2010, para. 137.

The Court has also noted that 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention'<sup>53</sup> Any restrictions to freedom of expression in Council of Europe member States must meet the rigorous criteria required by Article 10 of the Convention.

According to ECtHR case law, any restrictions on freedom of expression must be both necessary<sup>54</sup> and must pass a three-pronged test setting the criteria. The most critical condition set forth by Article 10 § 2 of the Convention is that any interference in freedom of expression by public authorities must be prescribed by law:

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.<sup>55</sup>

The second paragraph of Article 10 expressly sets forth that any restrictions on freedom of speech have to be 'prescribed by law'. Having a legal basis for a restriction in national law is not sufficient to meet this important condition. Any law allowing for such restrictions must also have certain 'qualities'. In other words, a norm cannot be regarded as a 'law' within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable citizens to regulate their conduct.<sup>56</sup> The scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.<sup>57</sup> The concept of foreseeability is applicable not only in terms of how individuals must regulate their conduct, but also in terms of 'formalities, conditions, restrictions or penalties' that can be brought to such conduct if it is found to be against national law.<sup>58</sup> If the interference in the right is prescribed by law, it still has to be based on one of the legal grounds set forth in the second paragraph of Article 10 (national security, public safety, territorial integrity, prevention of disorder or crime, protection of health or morals, or protection of the reputation or rights of others). Lastly, any restriction must be 'necessary in a democratic society'<sup>59</sup> and State interference must respond to a 'pressing social need'.<sup>60</sup> The measures employed by the State and the restrictions prescribed by law must also be 'proportionate to the legitimate aim pursued'.<sup>61</sup> The ECtHR requires that the reasons adduced by national authorities for the interference are 'relevant and sufficient'.<sup>62</sup> Moreover, the ECtHR also notes that paragraph two of Article 10 has a very narrow scope of application in terms of the restriction of political speech and debate where freedom of expression is particularly important.

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<sup>53</sup> *Lingens v. Austria*, Series A No. 103, 8 July 1986, para. 42.

<sup>54</sup> *Morice v. France* [BD] (no. 29369/10, 23/04/2015, § 124).

<sup>55</sup> In this context, one must also point to articles 19 of the Universal Declaration of Human Rights and the UN International Covenant on Civil and Political Rights. See, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, 16 May 2011, [www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf). Also see, General Comment No 34 regarding Article 19 of the ICCPR of the UN Human Rights Committee in its 102nd session in Geneva, on 11-29 July 2011.

<sup>56</sup> See for example, *Lindon, Otchakovsky-Laurens and July v. France* [BD], Application no. 21279/02 and 36448/02, para. 41, European Court of Human Rights, 2007-XI.

<sup>57</sup> See, *Groppera Radio AG and Others v. Switzerland*, 28.03.1990, para. 68, Seri A no. 173.

<sup>58</sup> See, *Kafkaris v. Cyprus* [BD], Application No. 21906/04, para. 140, European Court of Human Rights 2008.

<sup>59</sup> See, *Sunday Times v. United Kingdom* (No. 2), Series A No. 217, 26.11.1991, para. 50; *Okçuoğlu v. Turkey*, Application No. 24246/94, 8.07.1999, para. 43.

<sup>60</sup> See, *Sürek v. Turkey* (No. 1) (Application No. 26682/95), 8.07.1999, European Court of Human Rights 1999; *Sürek v. Turkey* (No. 3), 8.07.1999.

<sup>61</sup> See, *Bladet Tromsø and Stensaas v. Norway* [BD], no. 21980/93, European Court of Human Rights 1999-III.

<sup>62</sup> In addition to the requirement of being 'relevant and sufficient' the ECtHR notes that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference with the freedom of expression: See, *Cumpăna and Mazăre v. Romania* [BD], Application No. 33348/96, para. 111, and *Zana v. Turkey*, 25 November 1997, para. 51, European Court of Human Rights 1997-VII. The Court also reiterates that states must exercise caution when resorting to criminal sanctions, especially when other means are available. See, the judgment in the case of *Başkaya and Okçuoğlu v. Turkey*, 8 July 1999, European Court of Human Rights, 1999.

Member States of the Council of Europe have a certain margin of appreciation in assessing whether there exists a 'pressing social need' that would justify restriction of freedom of expression based on Article 10. However, the measures taken by state parties are nevertheless subject to supervision by the ECtHR in line with European standards; the state party has the obligation to convincingly establish that restrictions on content were indeed necessary.<sup>63</sup> Therefore, the final decision on whether a restriction is in accordance with Article 10 of the Convention rests with the ECtHR.<sup>64</sup> Such supervision by the Court must be strict because of the importance of the rights in question, as stressed by the Court many times. According to the Council of Europe Committee of Experts for the Development of Human Rights, all examinations of interferences in the exercise of freedom of expression rest on striking a balance between interests which the Court views in terms of the importance of freedom of expression for democracy.<sup>65</sup>

However, the examination of 'the balance between interests' in a concrete case is not sufficient to understand the larger scope of freedom of expression that must be protected by member states. For example, the blocking of a single website may have a seemingly small effect on freedom of expression. Similarly, imposing a small fine on a journalist may be justifiable in certain circumstances. However, if these measures essentially lead to a chilling effect, they will not be accepted under the standards of the Council of Europe.<sup>66</sup>

While States have the obligation to refrain from arbitrarily interfering in the rights of individuals to create an environment allowing for alternative views and consequently a well-functioning democracy, they also have the positive obligation to ensure that individuals in society respect one another's ideas. It is now commonly acknowledged that such positive obligations protect individuals not only against interferences by the State but also against interferences from other individuals.<sup>67</sup>

These obligations safeguard the principle of pluralism under which everyone, regardless of national boundaries, has the right to receive and impart all kinds of information and ideas through any medium. The facts disseminated may be wrong and the ideas may offend, shock or disturb.<sup>68</sup> While the level of positive obligations may differ depending on the type of freedom of expression,<sup>69</sup> the ECHR's and Council of Europe's main aim can be summarised as creating an open environment for public debate. In other words, the main purpose of the Convention is not to protect governments against oppositional views; on the contrary, it is to create an environment in which people can express themselves without fear.

The Court's case law has developed specific principles guiding expectations from member States. Firstly, the Court has developed the doctrine that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.<sup>70</sup> Second, the concepts 'enabling environment' and 'chilling effect'<sup>71</sup> are critical. As mentioned above, most of the measures taken against journalists, members of parliament, writers, human rights defenders, business people and social media users have caused fear in other people in terms of taking part in discussions or imparting information. For example, the forced disclosure and identification of sources<sup>72</sup> creates a chilling effect on other journalists.

<sup>63</sup> *Observer and Guardian v. United Kingdom*, 26 November 1991, Series A no. 216, pp. 29-30, para. 59.

<sup>64</sup> *Lingens v. Austria*, 8.07.1986, Series A No. 103, p. 26, para. 41; *Perna v. Italy* [BD], Application No. 48898/99, para. 39, ECHR 2003-V; and *Association Ekin v. France*, Application No. 39288/98, para. 56, European Court of Human Rights 2001-VIII.

<sup>65</sup> Council of Europe Steering Committee for Human Rights, Committee of Experts for the Development of Human Rights, Working Group A, Report on Hate Speech, GT-DH-DEV A(2006)008, Strasbourg, 9 February 2007, para. 22. Also see, *Handyside v. United Kingdom*, no. 5493/72, 07.12.1976, Series A No. 24, para. 49.

<sup>66</sup> This is why the ECtHR found the 30-Euro fine imposed on the applicant for defaming the President to be sufficient to amount to a violation of Article 10 in the case of *Eon v. France*, no. 26118/10, 14/03/2013, paras. 34-35.

<sup>67</sup> See, in addition to other judgments, *Palomo Sánchez and Others v. Spain* [BD], no. 28955/06 and, 12/09/2011, para. 60; *Fuentes Bobo v. Spain*, no. 39293/98, 29/02/2000, para. 38.

<sup>68</sup> *Handyside v. United Kingdom*, no. 5493/72, 07/12/1976, para. 49.

<sup>69</sup> *Özgür Gündem v. Turkey*, no. 23144/93, 16.03.2000, para. 43.

<sup>70</sup> *Airey v. Ireland*, 09/10/1979, para. 24, Series A no. 32.

<sup>71</sup> *Lombardo and Others v. Malta*, no. 7333/06, §61, *Association Ekin v. France*, no. 39288/98 and *Aktan v. Turkey*, no. 20863/02, §§ 27-28.

<sup>72</sup> *Goodwin v. United Kingdom*, no. 17488/90, 27.03.1996, para. 39; *Financial Times Ltd and Others v. United Kingdom*, no. 821/03, 15.12.2009, para. 70.

Moreover, such measures lead people to think that they will be subject to legal sanction in the form of interim injunctions, prior restraints or bans in cases where they impart news on certain issues.<sup>73</sup> The Court also considers that the above-mentioned principles also apply to measures taken by domestic authorities to maintain national security and public safety as part of the fight against terrorism.<sup>74</sup>

In summary, although the ECtHR deliberates and passes judgment on individual cases, its jurisprudence provides clear guidelines for States regarding how the principle of a pluralistic democracy can be protected against the legal and de facto attacks by public authorities and private persons and entities. The following chapters of this report will illustrate how this principle is blatantly undermined through the sophisticated control and censorship mechanisms employed in Turkey.

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<sup>73</sup> See, for example, *Cumhuriyet Vakfı and Others v. Turkey*, no. 28255/07, 8.10.2013, para. 62.

<sup>74</sup> *Gül and Others v. Turkey*, no. 4870/02, 08/06/2010§ 38; *Faruk Temel v. Turkey*, no. 16853/05, 01.02.2011, §58; *Yavuz and Yaylalı v. Turkey*, no. 12606/11, 17.12.2013, § 45.

# VIOLATIONS AGAINST PUBLISHERS AND WRITERS

This section of the report will focus on the closures ordered under the State of Emergency following the failed coup of 15 July 2016, providing an account of publishing and distribution agencies that were shut down and an evaluation of the circumstances faced by 80 writers being investigated. Ongoing investigations and proceedings will be evaluated.

Under the State of Emergency, 200 media outlets and publishing organisations have been shut down, including news agencies, newspapers, periodicals, radio and television outlets and distribution companies. Only 25 of the decisions for closure were later revoked. As of 31 December 2017, there are 175 organisations that are still closed.<sup>75</sup>

## Closed periodicals

In addition to television and radio channels, newspapers and news agencies, 18 periodicals were closed under Emergency Decrees No. 668, 675 and 677 during the State of Emergency. Under Emergency Decree No. 668 (published on 27/7/2016) the following periodicals were closed: Akademik Arařtırmalar Dergisi, Ekolife, Gül Yapradı, Yeni Ümit Aksiyon, Asya Pasifik (PASIAD), Ekoloji Dergisi, Nokta, Zirve, Bisiklet Çocuk, Fountain, Sızıntı, Yağmur, Gonca, Diyalog and Avrasya. With Emergency Decree No. 675 (published on 29/10/2016), the following periodicals were closed: Özgürlük Dünyası, Tiroj and Evrensel Kültür. With Emergency Decree 677 (published on 22/11/2016) the periodical Haberexen was closed. None of the decisions ordering the closure of these periodicals were later revoked.

## Closed Publishing and Distribution Channels

Under Emergency Decree 668 (dated 27/07/2016), 29 publishing houses were initially closed and none of the decisions were revoked. The names of these publishing houses are as follows: Altın Burç Yayınları, Burak Basın Yayın Dağıtım, Define Yayınları, Dolunay Eğitim Yayın Dağıtım, Giresun Basın Yayın Dağıtım, Gonca Yayınları, Gül Yurdu Yayınları, GYV Yayınları, Işık Özel Eğitim Yayınları, Işık Akademi, Işık Yayınları, İklim Basın Yayın Pazarlama, Kaydırak Yayınları, Kaynak Yayınları, Kervan Basın Yayıncılık, Kuşak Yayınları, Muştı Yayınları, Nil Yayınları, Rehber Yayınları, Sürat Basım Yayın Reklamcılık Eğitim Araçları, Sütun Yayınları, Şahdamar Yayınları, Ufuk Basın Yayın Haber Ajans Pazarlama, Ufuk Yayınları, Waşanxaneya Nil, Yay Basın Dağıtım Pazarlama, Reklamcılık, Yeni Akademi Yayınları, Yitik Hazine Yayınları and Zambak Basın Yayın Eğitim Turizm. Under Emergency Decree 675, the number of closed publishers rose to 30 with the addition of Evrensel Basım Yayım (Doğa Basın Yayın) to the list.

In addition, according to Article 4 & 2 of Emergency Decree 668:

Private radio and television organisations, newspapers and periodicals, publication and distribution channels that have been found to be a member of structure/entities, organisations or groups, or terrorist organisations, which are found established to pose a threat to the national security, or whose connection or contact with them have been found to exist and which are not listed in Annexes (2) and (3), shall be closed down upon the proposal of the commission to be established by the minister in the relevant ministries and with the approval of the Minister. The provisions of paragraph three shall also apply to institutions and organisations closed down under this paragraph.

<sup>75</sup> See, IHOP, Status Report on the State of Emergency (31 December 2017). [http://www.ihop.org.tr/wp-content/uploads/2018/01/OHALdurumraporu\\_31122017.pdf](http://www.ihop.org.tr/wp-content/uploads/2018/01/OHALdurumraporu_31122017.pdf).



The third paragraph of the same article notes that:

Movable property as well as all kinds of assets, receivables, rights and all documents and papers that belong to the newspapers, periodicals, publishing houses and private radio and television organisations closed down shall be deemed to have been transferred to the Treasury without cost, and all real estate that belong to them shall be registered ex officio, free and clear of any restrictions and encumbrances on the immovable properties, in the name of the Treasury in the land registry. Under no circumstances shall any claim or demand related to all kinds of debts of these be made against the Treasury. The Ministry of Finance shall carry out all procedures relating to transfer by receiving necessary assistance from all institutions concerned.

The above-mentioned commission ordered the shut-down of 20 television and radio channels on 27 September 2016. Among these were popular television channels, including İMC TV. However, unlike closures ordered by Decrees, the decisions of the Commission are not shared with the public. As such there is no information available on the number of newspapers, periodicals, publishers and distribution channels that have been closed on their orders.

## An evaluation of the decisions of closure

Both the Constitution of the Republic of Turkey and international human rights treaties allow member states wider authority in limiting fundamental rights and freedoms during a state of emergency. Nevertheless, it is evident that these authorities cannot be used in an unlimited and arbitrary manner. Both the European Court of Human Rights<sup>76</sup> and the Human Rights Committee<sup>77</sup> have explicitly stated that measures that are not relevant to the state of emergency cannot be applied as such for expediency.

The on-going State of Emergency in Turkey has two atypical characteristics. Firstly, numerous issues that have nothing to do with the state of emergency have become the topic of emergency decrees after the declaration of the State of Emergency. Secondly, State of Emergency measures have been applied to individuals and organisations in the absence of individual explanations or concrete evidence. Both of these are clear violations of the principle of the separation of powers. Issues that have nothing to do with the state of emergency are being regulated through emergency decrees and have been incorporated into law. Furthermore, these changes have not been subject to any parliamentary debate or scrutiny.<sup>78</sup> These regulations can clearly be described as the transfer of legislative power. In addition, decisions regarding the dismissal of public officials and the closure of legal entities have been implemented in a manner that results in the transfer of judicial power. The question of whether an individual or organisation is associated with a terrorist organisation is one that can be answered through a process of judicial review. However, the emergency decrees have made this determination without giving the accused an opportunity to defend themselves against these charges.

As will be elaborated in the next chapter, the lack of individualised investigations in the process of mass dismissals of academics is also observed in the mass closures affecting publishers and other media organisations. However, the latter are significant in another respect. As underlined by the Venice Commission, in almost all judgments of the ECtHR regarding the restriction of freedom of expression, there is a discussion of whether the restriction was justified.<sup>79</sup> The jurisprudence of the Court involves cases where criminal, administrative or legal sanctions have been imposed due to an expression used in writing, expressions uttered during a broadcast or slogans chanted in a demonstration. However, decisions regarding the closure of publishing organisations and other media outlets do not use the same method. The

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<sup>76</sup> Among other decisions, see *Aksoy v. Turkey*, no. 21987/93, 18.12.1996.

<sup>77</sup> General Comment No: 29 on derogations, CCPR/C/21/Rev.1/Add.11, 31.08.2001.

<sup>78</sup> Laws no. 7070 to 7079 were adopted in a single day on 01/02/2018; laws no. 7080 to 7086 were adopted in a single day on 06/02/2018; laws no. 7087 to 7097 were adopted within two days in parliament on 7 and 8/2/2018.

<sup>79</sup> CDL-AD(2017)007-e Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), para. 30 vd.



Emergency Decrees do not specify concretely which publication or expression should be subject to restrictions. The fact that dozens of decisions of closure were issued shortly after the declaration of the State of Emergency, suggests that there was no possibility to conduct an individual analysis in the given time. These Emergency Decrees cannot be seen to focus on specific publications but instead have been used to impose a blanket ban on the existence of certain publishers or media outlets.

This situation makes it impossible for the relevant decisions to successfully pass the three-part test developed by the ECtHR. The first step of the three-part test<sup>80</sup> is to determine whether the interference in the right is prescribed by law. The Emergency Decrees have created new grounds for restricting rights, which did not exist before. This has led to the closure of publishing organisations by applying the new rules retroactively.

According to Article 121 § 2 of the Constitution of the Republic of Turkey, the restriction of or derogation from fundamental rights and freedoms, and the manner of adopting measures required by the state of emergency shall be regulated under the Law on State of Emergency. Article 11 of the State of Emergency Law sets forth the measures that may be adopted in cases of violence. According to paragraph (e) of this article, these include the 'Prohibition of, or imposition of obligation to require permission for, the publication (including issuance of reprints and editions) and distribution of newspapers, magazines, brochures, books, etc.; prohibition of importation and distribution of publications published or reprinted outside regions declared to be under a state of emergency; and confiscation of books, magazines, newspapers, brochures, posters and other publications of which publication or dissemination has been banned'. However, the article does not allow for the permanent closure of publishers. Although it is possible to understand the direct link between the State of Emergency and the suspension of certain publications through administrative decisions, it is not possible to explain the permanent closure of publishers in the absence of concrete evidence. Moreover, despite contrary claims by the government,<sup>81</sup> it is clearly against the principle of legality for an Emergency Decree to be applied retroactively and permanently, despite the explicit provisions of Article 121 of the Constitution.<sup>82</sup> Therefore it is not possible to argue that these regulations have the quality of a law.

There is also uncertainty as to which pressing need is met under Article 10 of the European Convention in terms of the state of emergency by closing publishing agencies or periodicals. Since there is no concrete evidence or information available regarding the decisions of closure, it has not been possible to determine how a publisher was deemed an instrument for a terrorist organisation.

A decision adopted by the Commission established under Emergency Decree No. 668 Article 2 § 4 indicates the arbitrary nature of these decisions. In its session of 2016/05 dated 27/09/2016, the Commission decided on the closure of eleven television and radio channels. According to this decision, Azadi TV, which broadcasted in Kurdish and Turkish, was closed because it had previously been subjected to administrative fines on two occasions. Similarly, TV10 was closed down because it had been subjected to an administrative fine on one occasion. Setting aside the fact that these administrative fines had already been executed, it is hard to understand how an administrative fine can be grounds for legitimising the closure of a television channel. It is easy to imagine that the same rationale would be applied to publishers. The parliamentary inquiry submitted by HDP (People's Democracy Party) deputy Feleknaş Uca on 29/9/2016 regarding other media outlets closed in this fashion was left unanswered by Prime Minister Binali Yıldırım.<sup>83</sup>

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<sup>80</sup> See Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression Under the European Convention on Human Rights: A Handbook for Legal Practitioners*, Council of Europe Publishing, 2017, p 35, at <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>

<sup>81</sup> In the memorandum submitted by the government to the Venice Commission, it is noted that issues not covered by the State of Emergency Law may be regulated through Emergency Decrees: Government's Memorandum, see CDL-REF(2016)067, p. 45.

<sup>82</sup> For the opinion of the Venice Commission see, CDL-AD(2016)037-e Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, para. 70 ff.

<sup>83</sup> See, <http://www2.tbmm.gov.tr/d26/7/7-8255s.pdf>

The Venice Commission has noted that the State of Emergency Inquiry Commission established under Emergency Decree No. 685 should give priority to examining appeals made by media organisations that were closed.<sup>84</sup> However, neither the Emergency Decree establishing the Commission, nor the related Regulation have any provisions on this issue. Since the decisions of the Commission are not made public, no information is available as to whether they have so far issued any decisions regarding publishers or periodicals.

## Writers subject to investigations and prosecutions

The research conducted in preparation for this report yielded a list of 80 writers who have been subject to investigations and prosecutions. The list was prepared taking into consideration whether each writer had a published work and any political investigations or on-going/concluded prosecutions. The criteria used in making this classification was not whether these writers had been investigated/prosecuted because of their books but instead whether the subject matter of their investigations constitutes 'ordinary crimes'. Writers were accused of being members of a terrorist organisation or disseminating propaganda on behalf of a terrorist organisation not because of any act they had committed but because of what they had said or written. For this reason, and in consideration of all accusations against the writers on the list, their associated indictments, the evidence in their case files, and the subsequent court rulings, they can all be classified as being accused of thought crimes.

The 80 authors listed in the annex to this report, including Ahmet Altan, Ahmet Şık, Aslı Erdoğan, Kadri Gürsel, Murat Belge, Necmiye Alpay, Özgür Mumcu and Hamide Yiğit have published works in Turkey and/or other countries; 77 are also journalists and 19 are academics.

Of the 80 authors, 19 are still in pre-trial detention, and 22 have been released pending trial. Of the 80 individuals, the proceedings against 34 have been concluded and 26 have been convicted; only eight have been acquitted. Of the 19 authors in pre-trial detention, 16 were detained after the attempted coup of 15 July 2016. These authors are being tried in cases including the case of the FETÖ/PDY organisation, the case of the FETÖ/PDY media organisation, the case of *Cumhuriyet* newspaper, the case of *Zaman* newspaper, the case of FETÖ/Foundation of Journalists and Writers, and the case of FETÖ/ *Taraf* Newspaper. Of the 22 writers tried without detention, 18 were subjected to investigations launched following the coup attempt. Eight were initially detained and subsequently released.

The indictments include such crimes as defaming the President of the Republic (Criminal Code, art. 299), attempting to undermine the constitutional order (Criminal Code art. 309), deliberately aiding a terrorist organisation while not being a member (Criminal Code art. 314 § 2), crimes against the judiciary (Criminal Code art. 311), crimes against the government (Criminal Code art. 312), establishing an organisation with the intention of committing a crime, founding or managing an armed terrorist organisation, being a member of an armed terrorist organisation (Criminal Code art. 314), inciting the public to hostility and hatred (Criminal Code art. 216), disseminating propaganda on behalf of a terrorist organisation (Criminal Code art. 7 § 2), and membership of a criminal organisation (Criminal Code art. 220 § 2, art. 314 § 2).

## Criminal procedures as a silencing tool

Following the Gezi Protests of 2013, the government developed a multi-faceted silencing strategy.<sup>85</sup> The initial strategy, which was implemented through various means such as blocking orders and lawsuits, made limited use of criminal proceedings. However, following the attempted coup of 15 July 2016, the number of criminal investigations launched on the above-mentioned grounds has increased dramatically. Criminal law

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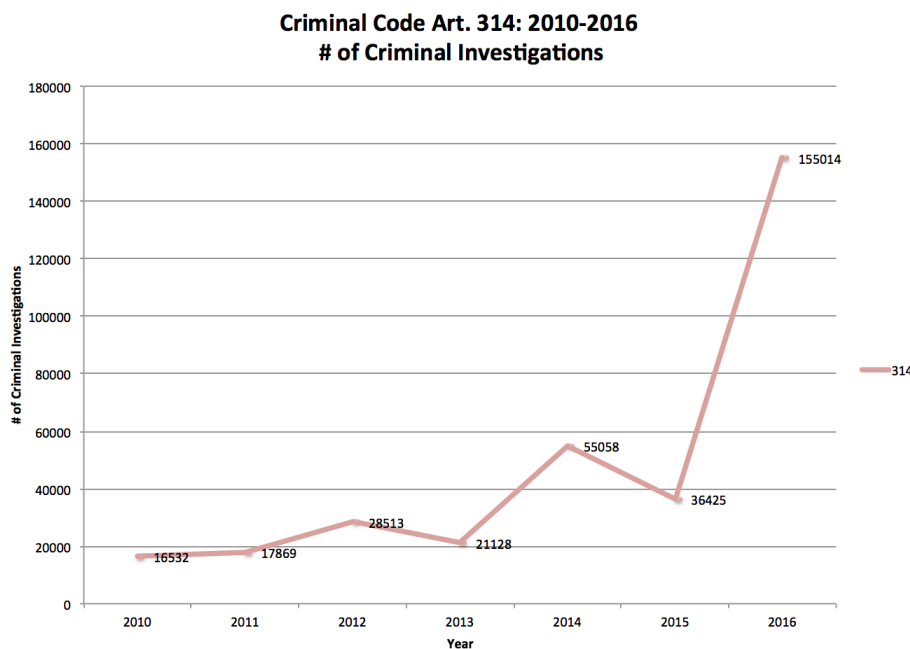
<sup>84</sup> CDL-AD(2017)007-e, para. 89.

<sup>85</sup> Yaman Akdeniz and Kerem Altıparmak, *Silencing Effect on Dissent and Freedom of Expression in Turkey*, in *Journalism at Risk: Threats, Challenges and Perspectives*, Council of Europe Publishing 2015, pp 145-173.

has now become the primary instrument for silencing speech. For example, the crime 'attempting to undermine the constitutional order' (Article 309 of the Criminal Code) was invoked in a total of 4,512 investigations between 2010 and 2015 and 236 investigations in 2015. In 2016 the same article was invoked in 36,071 criminal cases, an increase of more than 152% in comparison with the previous year. Only 566 cases (1.5%) were closed with a decision of non-prosecution.<sup>86</sup>

Similarly, Article 311 of the Criminal Code setting forth 'crimes against the judiciary' was invoked in a total of 1,577 investigations between 2010 and 2015, including 53 investigations in 2015. In 2016, this article has been used as grounds in 10,956 investigations, an increase of more than 200% when compared with 2015. A decision of non-prosecution was issued in only 117 investigations involving this type of crime.<sup>87</sup> Meanwhile, Article 312, concerning 'crimes against the government', was invoked in a total of 4,914 investigations in the period 2010-2015 and only in 638 investigations in 2015. In 2016, the same article was invoked in 13,701 criminal investigations with an increase of 21-fold compared to 2015. Only 220 investigations (1.6%) were concluded with a decision of non-prosecution.<sup>88</sup>

As shown in the graph below, the highest increase in percentages was observed in the number of cases involving Article 309 of the Criminal Code, 'attempting to undermine the constitutional order'. The highest numerical increase was observed in investigations involving Article 314 involving establishing, managing or being a member to 'armed organisations'. A total of 175,525 criminal investigations were launched in the period 2010-2015 with 36,425 investigations in 2015. In 2016, a total of 155,014 criminal investigations were launched under the same article. Hence, a 4.25-fold increase is observed compared to 2015. A decision of non-prosecution was issued in 15,531 (10%) investigations.<sup>89</sup>

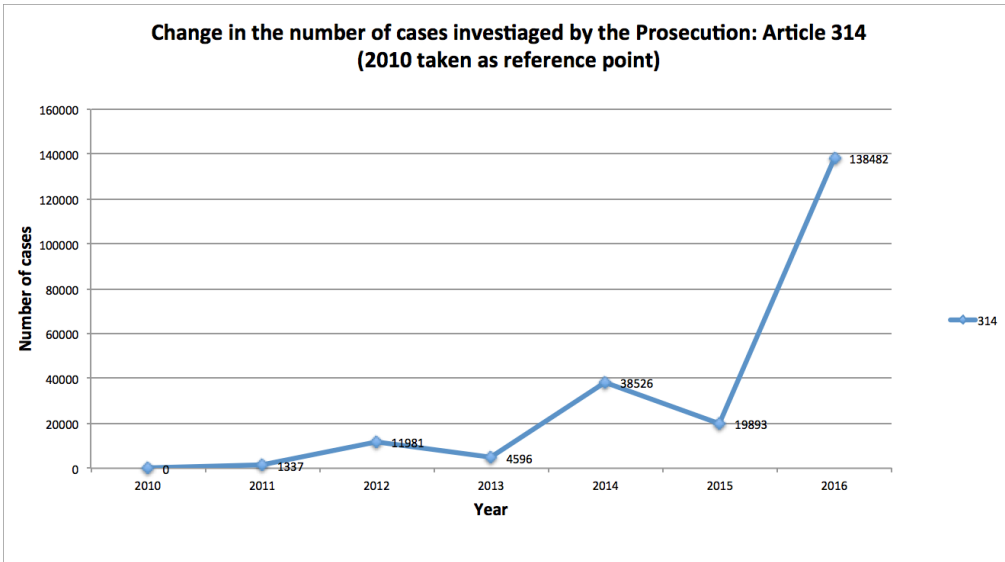


<sup>86</sup> See, Adalet İstatistikleri 2016, [http://www.adlisicil.adalet.gov.tr/AdaletIstatistikleriPdf/Adalet\\_ist\\_2016.pdf](http://www.adlisicil.adalet.gov.tr/AdaletIstatistikleriPdf/Adalet_ist_2016.pdf), 2010-2015 Adalet İstatistikleri, <http://www.adlisicil.adalet.gov.tr/adaletistatistya.html>.

<sup>87</sup> *Ibid.*

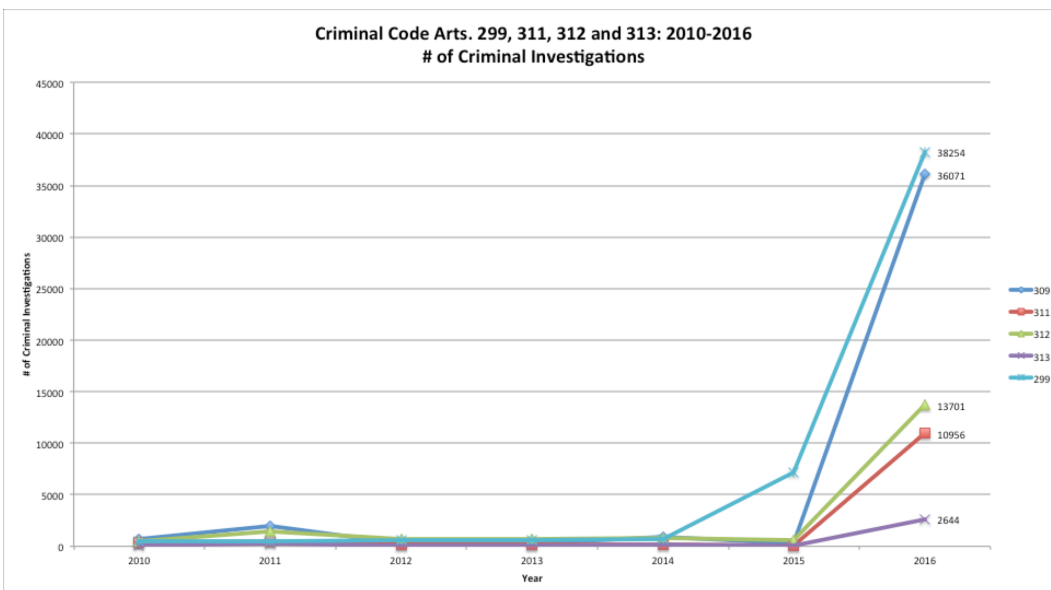
<sup>88</sup> *Ibid.*

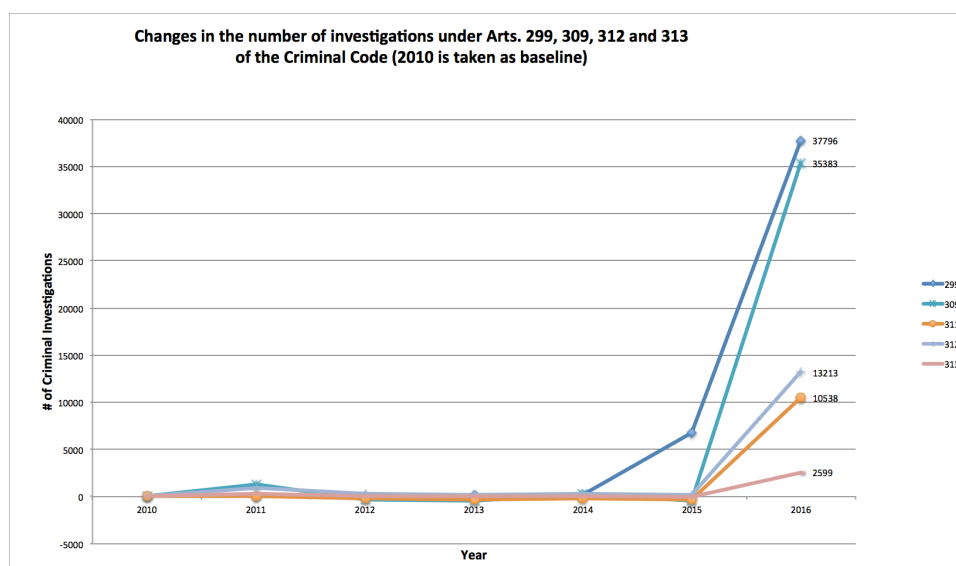
<sup>89</sup> *Ibid.*



Following the coup attempt, an increase in the number of criminal investigations brought has not only been observed for articles 309 to 316 of the Criminal Code involving ‘crimes against the constitutional order and its functioning’ but also for article 299 regarding the defamation of the President. Prior to the Presidency of Recep Tayyip Erdoğan in August 2014, a total of 2,136 criminal investigations were launched in the period 2010-2014. In 2014, the year that Erdoğan took office, 682 investigations into defaming the President were launched. In 2015, this figure rose to 7,216. A dramatic increase was observed in the number of criminal investigations under this article with a total of 38,254 investigations brought in 2016. Each and every one of these criminal investigations launched in 2016 pertains to one individual – the President.

As observed in the graphs below, the state of emergency is not limited to certain additional burdens imposed on citizens through Emergency Decrees: one also observes that the criminal rules implemented in ordinary times are now regularly used as a silencing measure. This new situation is mostly overlooked when speaking about the State of Emergency. However, this is a de facto situation that will prevail even if the State of Emergency is lifted.





While the statistical data paints a vivid picture of the current state of affairs in Turkey, the situation of individual authors affected also constitutes an important part of this picture. As observed in the statistics, the burgeoning in the number of investigations is closely related to the coup attempt and the end of the Kurdish peace process in 2015. Nevertheless, these dramatic numbers are not a reflection of the actual number of people who were directly involved in the coup and/or who had taken up arms. This group of individuals is mostly investigated or prosecuted under articles 309 to 316 of the Criminal Code.<sup>90</sup> Many individuals who express their views in newspapers, the media and social media are being accused of being associated with terrorist organisations only because of opinions they have expressed. Naturally, writers and academics, whose job it is to express their opinions and make evaluations, have been heavily affected by these practices. Of the 80 authors listed in this report, only three are being tried for the books they have written. A large majority of the remaining 77 authors are being prosecuted for being member of a terrorist organisation or for having affiliations or links with such organisations due to their newspaper articles or social media posts.

## Case studies: writers

Although statistical data gives some indication of the arbitrary nature of these criminal investigations, a closer look at some high profile cases will be useful in understanding the ambiguous nature of terrorism-related accusations in Turkey. This section of the report will present five detailed case studies of criminal investigations or prosecutions launched against five separate authors. The featured writers include:

- Aslı Erdoğan, currently on trial in relation the case against *Özgür Gündem* newspaper
- Necmiye Alpay, on trial in the case of Solidarity for *Özgür Gündem*,
- Ahmet Altan who was sentenced to life imprisonment in the case of the FETÖ/PDY media organisation
- Ahmet Şık who is being tried in the case of *Cumhuriyet* newspaper
- Atilla Taş who is being tried in yet another FETÖ/PDY media organisation case.

Before examining each of these cases, it will be useful to remind readers of the ways in which public authority is being/has been abused across all criminal investigations during the State of Emergency. In every one of these investigations, writers under investigation for what they have written and for expressing their opinion are subjected to home searches that go on for hours. Following their arrests by the police, their investigation files have been restricted with a secrecy order. The suspects are then put in pre-trial

<sup>90</sup> However, as shown in the table in the Annex to this report investigations and prosecutions are not limited to these crimes. The spectrum of crimes is much broader.

detention by the criminal judges for peace. Once the indictments are prepared, the unfounded nature of the measures become evident. For example, one fails to understand why their homes were searched or why the investigation was classified as secret.

The police arrests also reveal the extent of arbitrariness and disproportionality in these measures. In all of the investigations examined below, prolonged police custody emerges as a routine practice. The police custody period, which was increased to 30 days following the declaration of the State of Emergency, was reduced to seven days on January 23 2017 under Article 11 of Emergency Decree No. 684. However, public prosecutors were given the authority to 'issue a written order to extend the police custody period for seven days due to difficulties in collecting evidence or the high number of suspects'. Although 18 months have elapsed since the initial declaration of the state of emergency, this authority is still being exercised and suspects in police custody are being subjected to prolonged periods of police custody although no apparent steps are taken regarding their investigation. Towards the end of the custody period, suspects are brought before a judge who either issues a decision for pre-trial detention or a decision of release on judicial control.

## 1. Aslı Erdoğan

Aslı Erdoğan is an award-winning writer whose first book was published in 1994. In 1997, she received first prize from the Deutsche Welle competition for her short story 'Wooden Birds'. She was a columnist for *Radikal* newspaper between 1999 and 2000. She was invited to France after winning the MEET scholarship. In 2005, she was among the '50 Writers of Future' named by French literary Magazine LIRE. In 2010, she was awarded the Sait Faik Short Story Prize in Turkey. She received 'The Book of the Year' Prize from Dünya Publishing for her book 'In the Silence of Life'. In April 2011, she started writing a column for the newspaper *Özgür Gündem* and became a member of their Advisory Board. Aslı Erdoğan was chosen a 'Zurich City Writer' in 2012 by Literaturhaus and PEN International. In 2013, she received the Words Without Borders International Prize in Norway.

### The case of *Özgür Gündem* and related allegations

The case of Aslı Erdoğan is significant in showing certain routine practices observed across all recent political investigations.

On 16 August 2016, *Özgür Gündem* was temporarily closed by a decision of the Istanbul 8<sup>th</sup> Criminal Judgeship for Peace based on accusations of 'disseminating terrorist propaganda'. The newspaper was later permanently shut down under Emergency Decree No. 675 issued on 29 October 2016. On 16 August 2016, the newspaper building was searched by police squads and its representatives were arrested by the police. On 17 August, Aslı Erdoğan, who was a columnist for the newspaper and a member of its Advisory Board, was subjected to a house search by the Special Operations Police for nearly seven hours. On 19 August, Aslı Erdoğan was placed in pre-trial detention by the Istanbul 4<sup>th</sup> Criminal Judgeship for Peace for being a member of the Advisory Board of the newspaper and for the articles she had written in her column. The investigation file was classified as secret. On 22 August Aslı Erdoğan's friends and supporters started a Vigil for Freedom in front of Bakırköy Prison where she was imprisoned. On 23 August, writers and artists started a support campaign called 'Friends of Aslı' to support Aslı Erdoğan and defend freedom of expression.<sup>91</sup> On 25 August 2016, Aslı Erdoğan communicated through her lawyers that she had not been given her medication for five days. Erdoğan, who suffers from diabetes, stated that she was not provided the diet required by her illness and that her condition was worsening. She also noted that the bed in which she slept was soiled with urine, that she was not allowed any fresh air and that she had been treated in a way that caused permanent damage to her body. Following these statements, PEN called upon the authorities to urgently cater to the basic needs of Aslı Erdoğan, including providing access to the necessary medication,

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<sup>91</sup> For news coverage on the writing vigil see: Evrensel, 'Yazar Aslı Erdoğan' destek olmak için 'Aslı'nın Arkadaşları' oluşumu tarafından Yazı Nöbeti başlatılıyor', 24/08/2016, <https://www.evrensel.net/haber/288357/aslinin-arkadaslarindan-yazi-nobeti>

and to release her as soon as possible.<sup>92</sup> The following day, the Ministry of Justice issued a statement in which it said that Aslı Erdoğan was allowed to go out for fresh air, that she was given her medication, water and clean sheets.<sup>93</sup>

### The indictment

On 10 November 2016, the indictment for the case of *Özgür Gündem* was submitted to the court with nine people accused. On 23 November, the indictment was accepted. Although Aslı Erdoğan's release was ordered for charges under Article 302 of the Criminal Code, she continued to remain in pre-trial detention for charges under Article 314 of the same law.

The indictment stated that Aslı Erdoğan was accused of 'criticising the operations conducted by the security forces against the PKK, conveying to the public the idea that the security forces massacred civilians and knowingly being a member of the Advisory Board of the newspaper which acts as a spokesperson for a terrorist organisation, which amounts to evidence that she supports the ultimate goals of the PKK/KCK terrorist organisation and acts on their behalf'. The indictment against Aslı Erdoğan included charges under the Criminal Code Article 302§1 (undermining the unity of the state and the integrity of the nation), Article 314§2 (armed organisation), Article 220§1, 2, 8 (establishing an illegal organisation for the purpose of committing a crime), and Anti-Terrorism Law Article 7§2 (disseminating propaganda on behalf of a terrorist organisation).

The indictment also accused her of the following:

- Criticising the operations conducted by the security forces against the PKK/KCK terrorist organisation in the Lice district of Şırnak Province in her column article entitled 'Faşizm Güncesi: Bugün' (Fascism Journal: Today) on 20 May 2016, for fabricating the events and showing them as a massacre conducted by the Security Forces in which children and people were burned alive;
- Conveying the idea that 'the cases, detentions and deaths of representatives of *Özgür Gündem* Newspaper are a struggle and that she wishes to narrate the story of the life and death of a person imprisoned for being a member of the KCK', in her article 'Yetmiş Beş, Yetmiş Altı' (Seventy-five, Seventy-six) dated 28 June 2016,;
- Criticising the closure of *Özgür Gündem* newspaper, 'owning' the mission of the newspaper, and for having said in her statement to the prosecutor that she was not just a symbolic member of the Advisory Board in her article 'Öteki Gündem' (The Other Agenda) dated 1 July 2016;
- Portraying a member of a terrorist organisation, namely Mehmet Şirin Kocakaya, code name 'Şirin', as a civilian citizen [...]; criticising the security operations against the PKK terrorist organisation and giving the impression that the security forces massacred civilians' in her article 'Ayların En Zalimi' (The Cruellest of Months) published on 8 July 2016,

As observed in these excerpts, the indictment is based entirely on Aslı Erdoğan's writing and shows no justification for the judicial measures taken against her.

### The release

On 29 December 2016, Aslı Erdoğan was released from pre-trial detention but the Istanbul 23rd Assize Court where she was being tried imposed a travel ban on her. Almost six months later, on 22 June 2017, Aslı Erdoğan's travel ban was lifted by the court.

### Ongoing proceedings

In the hearing held by the Istanbul 23rd Assize Court on 31 October 2017 at which time Aslı Erdoğan had already been released from pre-trial detention, two of her co-defendants, İnan Kızılkaya and Kemal Sancılı,

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<sup>92</sup> For the news coverage, see Milliyet 'Uluslararası PEN: Aslı Erdoğan'ın sağlık durumundan endişeliyiz, 27.08.2016, <http://www.milliyet.com.tr/uluslararasi-pen-asli-erdogan-in-gundem-2301764/>

<sup>93</sup> For Aslı Erdoğan's statement and the statement made by the Ministry of Justice see: Diken, 'Bakanlığa göre yazar Aslı Erdoğan'ın cezaevi koşulları normal', 26.08.2016, <http://www.diken.com.tr/bakanliga-gore-yazar-asli-erdoganin-cezaevi-kosullari-normal/>



were also released with a travel ban. The next hearing was scheduled for 6 March 2018. From the outset of the case against *Özgür Gündem*, solidarity events were organised and statements released in support of Aslı Erdoğan and her colleagues both in Turkey and in other countries. Aslı Erdoğan was awarded the Kurt Tucholsky Prize by PEN Sweden – a prize given to writers who fight for peace and press freedom under difficult circumstances. Aslı Erdoğan was also made an Honorary Member of PEN. After her release, she received numerous prizes including the 2017 Princess Margriet award from the European Cultural Foundation and the 2018 Simone de Beauvoir Prize for women's freedom by the German feminist magazine *Emma*.

## 2. Necmiye Alpay

Necmiye Alpay graduated from Ankara University Faculty of Political Sciences in 1969 and earned her doctoral degree in international economics from Paris Nanterre University. In the period leading to the coup of 12 September 1980, she was detained while serving as a faculty member at Ankara University and imprisoned in Mamak prison for three years. After her release, she worked as a translator and wrote books on literature and linguistics. Necmiye Alpay is known for her three books *Türkçe Sorunları Kılavuzu* (2000) (A Manual of Common Mistakes in Turkish), *Dilimiz, Dillerimiz: Uygulama Üzerine Yazılar* (2004) (Our Language, Our Languages: Essays on Practise) and *Yaklaşma Çabası* (2005) and many translated works. She was a member of the advisory board of the daily newspaper *Özgür Gündem* until it was shut down.

On 3 May 2016, World Press Freedom Day, *Özgür Gündem* newspaper launched the 'Editors-in-Chief on Watch' campaign, a show of solidarity with colleagues facing charges and against the repression the newspaper was facing. Necmiye Alpay took part in the 'Editors-in-Chief on Watch' for 24 hours on 5 June 2016, writing an article entitled 'The newspaper that created its own freedom'. Necmiye Alpay's membership of *Özgür Gündem's* Advisory Board and her participation in the campaign are examples of formal solidarity and her commitment to the words 'I disapprove of what you say, but I will defend to the death your right to say it'.<sup>94</sup>

### Pre-trial detention

Based on the news stories published in *Özgür Gündem* on the day of Necmiye Alpay's one-day watch as editor in chief on 5 June 2016, the Istanbul Chief Prosecutor's Office launched a criminal investigation on 7 June 2016 and prepared an indictment. The news stories leading to the investigation included 'Ulusal birlik özgürleştirir' (National unity liberates), '10 bin JÖH-PÖH'e karşı 140 YPS'li' (140 from the YPS Against 10 Thousand from Special Operations) and 'HPG: Ameddeki eylemde 8 asker öldü' (HPG: eight soldiers killed in the protests in Amed). Necmiye Alpay faces charges of disseminating terrorist propaganda under Article 7§2 of the Anti-Terrorism Law and making and publishing statements under Article 6§2 of the same law.

On 16 August 2016, *Özgür Gündem* was temporarily shut down on orders of the Istanbul 8th Criminal Judgeship for Peace for disseminating propaganda in the name of the terrorist organisation PKK. Many members of staff were taken into police custody during the police raid on the newspaper building. The homes of some journalists were also raided by the police. On 31 August 2016, Necmiye Alpay appeared before the Prosecutor to give a statement since her name was included in the main case against *Özgür Gündem*. After the questioning by the Prosecutor, Necmiye Alpay was brought before the court with a motion for pre-trial detention on grounds of 'being a member of a terrorist organisation'. Alpay was questioned by the court and placed in pre-trial detention for 'being a member of a terrorist organisation' under Article 314 § 2 of the Criminal Code and for 'undermining the unity of the state and the integrity of the nation' under Article 302 § 1 of the same law, with the reasoning that she would 'be a fugitive if she were released given the length of the proposed sentence, her publications and writings in the newspaper and her position in the newspaper.'

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<sup>94</sup> For her statements, see: 'Necmiye Alpay'ın savunmasının tam metni' [Full Text of Necmiye Alpay's Defence] 30/12/2016, <http://kulturservisi.com/p/necmiye-alpayin-savunmasinin-tam-metni>

### The indictment

The indictment demanded imprisonment for all individuals accused in the case, including Necmiye Alpay, under Article 302 § 1 of the Criminal Code for 'undermining the unity of the state and the integrity of the nation', under Article 314 § 2 regarding 'terrorist organisations', under Article 220 § 1, 2, 8 for 'establishing an illegal organisation for the purpose of committing a crime', and under the Anti-Terrorism Law Article 7 § 2 for 'disseminating propaganda on behalf of a terrorist organisation'. The section of the indictment involving Necmiye Alpay stated that she 'was knowingly a member of the Advisory Board of the newspaper... supporting the ultimate goals of the terrorist organisation and acting on their behalf'. In the same section of the indictment, it was noted that Necmiye Alpay participated in the editor-in-chief campaign on 5 June 2016 and 'defended *Özgür Gündem* daily and owned its mission' in her article 'The newspaper that creates its own freedom' published on the same day.

As observed from these statements, the case of Necmiye Alpay is a typical example of the extent to which charges involving being a member of a terrorist organisation can be expanded. Alpay's membership of the newspaper's advisory board does not constitute evidence of her membership of a terrorist organisation. Nevertheless, Alpay remained in pre-trial detention for months on the grounds that she 'supported the ultimate goals of the [terrorist] organisation' for being a member of the advisory board of a newspaper that had been in circulation for years before the declaration of the State of Emergency despite not having had a say in its editorial policies.

### The release

During Necmiye Alpay's period in detention, numerous foreign organisations including PEN America, PEN International, English PEN and Conseil Européen des Associations de Traducteurs Littéraires issued joint statements of solidarity.<sup>95</sup> On 27 October 2016, Beyoğlu Mephisto Bookstore organised a solidarity event with 40 authors, 'Grab your book and join us: signing for Necmiye Alpay and Aslı Erdoğan'. On 29 December 2016, the Istanbul 23rd Assize Court ordered her release upon the motion filed by her attorneys and in consideration of the period spent in pre-trial detention.

### Ongoing proceedings

During the hearing at the Istanbul 22nd Assize Court on 9 March 2017 regarding the news stories published in *Özgür Gündem* on the day Necmiye Alpay was editor-in-chief for a day, the court accepted the demands of the defence and ordered that the case file be sent to the Istanbul 23rd Assize Court, the court responsible for the main case against *Özgür Gündem*. Following a hearing at the Istanbul 23rd Assize Court on 31 October 2017, the next hearing was scheduled for 6 March 2018 but nothing noteworthy happened during the hearing. The case will continue on 4 June 2018.

## 3. Ahmet Altan

Ahmet Altan is one of the most important journalists and writers in Turkey. Among his notable works are *Dangerous Tales*, *Trace on the Water*, *Cheating* and *The Longest Night*. In addition to his novels, Altan has worked as a columnist for numerous publications including *Nokta Magazine* and newspapers such as *Hürriyet*, *Milliyet*, *Güneş* and *Yeni Yüzyıl*. Ahmet Altan is one of the founding members of *Taraf* newspaper which launched in 2007 and is known for his column 'Hourglass'. He was the editor-in-chief of the newspaper until 2012. On 7 October 2015, Ahmet Altan returned to journalism with his column in *Haberdar*.

Ahmet Altan has fallen foul of the authorities on a number of occasions. He was sentenced to one year and eight months in prison by the State Security Court for his newspaper article 'Atakürt' on 17 April 1995 and was laid off by *Milliyet*, on account of this incident. Ahmet again faced prison when he was sentenced to one year and two months for insulting President Recep Tayyip Erdoğan through the press with his article 'State

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<sup>95</sup> For the text of the solidarity statement and petition see: Pen America, 'Free Turkish Translator Necmiye Alpay', <https://pen.org/free-turkish-translator-necmiye-alpay/>

Complicity and Morality' about the Roboski massacre on 4 January 2012. The sentence was converted to a fine of seven thousand liras by the court.

Ahmet Altan has received numerous awards for his writing, including the Leipzig Prize for the Freedom and Future of the Media 2017, the International Hrant Dink Award, and the Turkish Publishers' Association Freedom of Thought and Expression Prize.

### **Ahmet Altan's arrest and pre-trial detention**

Ahmet Altan and his brother Professor Mehmet Altan were arrested on the morning of 10 September 2016 within the scope of the FETÖ investigation, launched in the wake of the attempted coup of 15 July. It was noted that the Altan brothers were arrested for sending 'subliminal messages' on a TV show they took part in on 14 July, alongside Nazlı Ilıcak. The television channel, Can Erzinçan, was later shut down on allegations that it belonged to FETÖ. It was alleged that the Altan brothers had made several political analyses during the programme, commented on President Erdoğan, allegedly sent 'subliminal messages' to the coup plotters during the programme and 'explicitly stated that there would be a coup'. In this context, Ahmet Altan was accused of having prior knowledge of the coup.<sup>96</sup>

Following 12 days of questioning, the Criminal Judgeship for Peace on duty ordered Ahmet Altan's release under judicial control measures. On the same day, based on the objections of the Chief Public Prosecutor, the Istanbul 1st Criminal Court of Peace issued a warrant for his apprehension after which he was arrested for the second time. On 22 September 2016, Ahmet Altan was placed in pre-trial detention for 'attempting a coup and being a member of FETÖ'. Mehmet Altan was also placed in pre-trial detention after questioning for 'Attempting to overthrow the government of the Republic of Turkey or prevent it from performing its duties and for being a member of a terrorist organization'.<sup>97</sup>

### **Ahmet Altan's Indictment**

The 247-page indictment issued by the Terrorism and Organised Crime Bureau of the Istanbul Chief Public Prosecutor's Office on 11 April 2017 lists 17 accused including Ahmet Altan, Mehmet Altan and Nazlı Ilıcak. President Recep Tayyip Erdoğan, the Office of the Speaker for the Grand National Assembly of Turkey, and the 65th government of the Republic of Turkey are listed as 'injured parties'.

The indictment makes a demand for aggravated life imprisonment for Ahmet Altan, Mehmet Altan and Nazlı Ilıcak on three counts: 'attempting to abolish the parliament or prevent it from performing its duties' under Article 311 § 1 of the Criminal Code (as indicated in articles 3 and 5 of the Anti-Terrorism Law); 'attempting to overthrow the government of the Republic of Turkey or prevent it from performing its duties' under Article 312 § 1 of the Criminal Code; and 'attempting to undermine the constitutional order' under Article 309 § 1 of the Criminal Code. Moreover, the prosecutor demanded a 7.5 to fifteen-year prison sentence for each on grounds of Article 314 § 2 of the Criminal Code on 'armed organisations' –an article invoked by reference to Article 220 § 6 of the Criminal Code regarding 'the commission of crimes in the name of an armed terrorist organisation despite not being a member'.

The indictment also stated that 'an overall evaluation of the permanent nature of the relations between media elements and the terrorist organisation, the nature of their activities and their impact on society has lead to the determination that the actions of the suspects cannot be regarded as ordinary expressions of ideas and discourse but rather as acts that showed participation in the coup attempt.' It was also noted that the suspects had prior information about the coup in line with the goals of the organisation. The suspects were accused of 'engaging in discourse and propaganda, which cannot be regarded as isolated elements

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<sup>96</sup> Sözcü Newspaper: 'Ahmet Altan ve Mehmet Altan gözaltına alındı!', 10/09/2016 <http://www.sozcu.com.tr/2016/gundem/ahmet-altan-kimdir-ahmet-altan-ve-mehmet-altan-gozaltina-alindi-1387048/>

<sup>97</sup> For detailed information about the decision of the court on duty see: Diken, 'Yazar Ahmet Altan 'darbecilik' ve 'FETÖ üyeliği' suçlamalarıyla tutuklandı', 23/09/2016 <http://www.diken.com.tr/yazar-ahmet-altan-darbecilik-ve-feto-uyeligi-suclamalariyla-tutuklandi/>

but rather as predicates of coercion which itself is a sub-element of the criminal act of attempting the coup to achieve the goals of the organization based on claims that there was a so-called political and social chaotic environment leading to the coup attempt.' They were regarded as principal perpetrators for using the power of the media to suggest to the public that they should not resist the coup or by conveying orders to some cells within the Armed Forces suggesting that the coup should take place.

In view of their social positions, their past relations and actions –pointing towards the existence of 'organic ties'– Ahmet Altan, Mehmet Altan and Nazlı Ilıcak were noted to have taken part in the attempted coup in the name of the armed terrorist organisation with which they were in permanent cooperation.

The indictment, which was issued approximately seven months after Ahmet Altan and his co-defendants were placed in detention, was accepted by the Istanbul 26th Assize Court in May 2017.<sup>98</sup>

### The proceedings and the sentence

The trial started on 22 June 2017. At the hearing held on 19 September 2017, Ahmet Altan described the indictment as 'a hodgepodge of lies'. He went on to say that 'When you read it, you comprehend how courts have been turned into a slaughter house for the law. I have no trust in the current justice system. Therefore I have no demands.'<sup>99</sup> At the hearing on 13 October 2017, Ahmet Altan noted that the prosecutor for the case had changed and stated 'As I was listening to the lines of the prosecutor a moment ago, I understood that he is an actor in this theatre. How can a prosecutor who lacks thorough knowledge of the case speak based on rote repetition? This is not law, this is not a court.'<sup>100</sup> At the hearing held on 11 December 2017, the prosecutor submitted his observations on the case and demanded that the accused be sentenced to aggravated life imprisonment under Article 309§1 of the Criminal Code for 'attempting to overthrow the order established by the Constitution of the Republic of Turkey, or to replace the existing order with another one or to prevent the functioning of the order through the use of coercion and violence'.<sup>101</sup>

At the hearing held on 12 February 2018, Ahmet Altan and the other accused made their last defence. Altan stated that the government had created 'a rule of fear' and that 'we are approaching the end of a bad play'. He concluded his defence with the following words: 'Whenever a tyrant has punished his opponent through unjust practices, he has ended up facing the same punishments himself. Those who sent people to the guillotine had to face the guillotine themselves; those who imprisoned were imprisoned and those who exiled were exiled in return. The punishments imposed by tyrants were marked as a target to be achieved in their own fate. You will now have me die in prison. After having told you these truths I say to you that I am ready to die in prison. And I ask: What about you? Are you also ready to die in prison? Because the punishment you will impose will be mapped into your own fates.'<sup>102</sup>

On 16 February 2018, the Istanbul 26th Assize Court sentenced six defendants including Ahmet Altan to aggravated life imprisonment under Article 309 of the Criminal Code for 'violating the constitution'.<sup>103</sup>

As in other cases, the evidence used against Ahmet Altan relate to *verbal offences*. Although this category of offences is deemed to be punishable under certain conditions where there is a call to violence or in cases

<sup>98</sup> Oda Tv, 'Nazlı Ilıcak ve Altan Kardeşler'e müebbet istemi', 14.04.2017 <https://odatv.com/nazli-ilicak-ve-altan-kardeslere-istenen-ceza-belli-oldu-1404171200.html>; Evrensel, 'Altan kardeşler ve Nazlı Ilıcak'ın iddianamesikabul edildi,' 05.05.2017, <https://www.evrensel.net/haber/318524/altan-kardesler-ve-nazli-ilicakin-iddianamesi-kabul-edildi>

<sup>99</sup> Diken, 'Yazar Ahmet Altan'ın 'son söz'ü: Adalet sistemine güvenim yok, bir talebim de yok', 22.06.2017 <http://www.diken.com.tr/yazar-ahmet-altanin-son-sozu-adalet-sistemine-guvenim-yok-bir-talebim-de-yok/>

<sup>100</sup> Diken, 'Altanlar ve Ilıcak'ın tutukluk halinin devamına karar verildi', 13.11.2017 <http://www.diken.com.tr/altanlar-ve-ilicakin-yargilandigi-davada-tutukluk-halinin-devamina-karar-verildi/>

<sup>101</sup> Diken, 'Ağırlaştırılmış müebbet istenen Ilıcak ve Altanların duruşması ertelendi', 11/12/2017 <http://www.diken.com.tr/agirlastirilmis-muebbet-istenen-ilicak-ve-altanlarin-durusmasi-ertelendi/>

<sup>102</sup> Detaylı bilgi ve savunmanın tam metni için bkz: Cumhuriyet, 'Ahmet Altan savunmada: Yargılanmıyorum ben yargılıyorum', 13.02.2018 [http://www.cumhuriyet.com.tr/haber/turkiye/926010/Ahmet\\_Altan\\_savunmada\\_\\_Yargılanmıyorum\\_ben\\_yargılıyorum.html](http://www.cumhuriyet.com.tr/haber/turkiye/926010/Ahmet_Altan_savunmada__Yargılanmıyorum_ben_yargılıyorum.html)

<sup>103</sup> Diken, 'Altan kardeşler ve Ilıcak'a ağırlaştırılmış müebbet', 16/02/2018 <http://www.diken.com.tr/altan-kardesler-ve-ilicaka-agirlastirilmis-muebbet/>

of hate speech, it is highly likely that there is a violation of freedom of expression where an individual is deemed to be a member of a terrorist organisation only on account of their words or writings.<sup>104</sup> The likelihood of a violation is even higher in the case of the Altans because the accused were convicted of having violated the Constitution with their opinions. The court decision refers to no evidence other than the fact that the accused expressed their thoughts.

With respect to the individual application made to the Constitutional Court by Mehmet Altan, the Court had determined that the applicant's newspaper article 'The Meaning of Sledgehammer' published in the national newspaper *Star* on 17 December 2010 'does not present factual grounds that would give rise to the conclusion [by investigative authorities] that the article was written to serve the goals of FETÖ/PDY'.<sup>105</sup> Moreover, as noted by the Constitutional Court, 'neither the detention orders nor the indictment explain which specific writings or statements of the applicant in which specific media outlet is the subject of the charges'.<sup>106</sup>

#### 4. Ahmet Şık

Ahmet Şık, a journalist since 1991, has frequently been the focus of public discourse with his news coverage, interviews and research. Cases filed against him have run parallel to his life as a journalist. He reported on the cadre deployment policy of Gülen movement in civil service, the security forces and the judiciary during the period in which the movement and the AKP government were allied in a strategic partnership. His research culminated in the notable book *The Imam's Army*. On 3 March 2011, when the book was about to be published, Ahmet Şık was arrested under the scope of the ODATV case. His words 'Whoever touches will burn!' came to epitomise the Ergenekon Investigations<sup>107</sup>. Recep Tayyip Erdoğan, who was then Prime Minister, remarked 'There are some books that have a bigger impact than a bomb!' On 12 March 2012, after 375 days in detention, Ahmet Şık was released. In its judgment in the case of Ahmet Şık, ECtHR found that his rights to security and liberty and freedom of expression had been violated.<sup>108</sup>

Following his release, Ahmet Şık continued to draw attention with his news stories and books about the relations between the AKP and the Gülen movement. More recently, he published the book 'Paralel Yürüdük Biz Bu Yollarda' (We Walked This Path in Parallel).

#### Ahmet Şık's arrest and detention

On 31 October 2016, 14 people were arrested and subsequently placed in pre-trial detention, including executives of the Cumhuriyet Newspaper Foundation, its writers and employees for 'committing crimes in the name of the FETÖ/PDY and PKK/KCK terrorist organisations despite not being a member of them by sponsoring the PKK/KCK and FETÖ/PDY, violating due procedures when choosing members to the foundation during the executive board meeting on 2 April 2013 (No. 2013/4) and publishing content aimed at legitimising the coup prior to its execution.'

On 29 December, 61 days after the above-mentioned operation, Ahmet Şık was arrested in relation to his tweets and news stories. He was placed in pre-trial detention on 30 December 2016.<sup>109</sup> The prosecutor leading the case stated that 'Having established that the suspect Ahmet Şık, who is a journalist for Cumhuriyet Newspaper, has committed his acts in alignment with the ideas and acts of the other suspects,

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<sup>104</sup> CDL-AD(2017)007-e, Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), para. 70.

<sup>105</sup> Application of *Mehmet Hasan Altan*, [GK] B.No: 2016/23672, 11/01/2018, para 135.

<sup>106</sup> Application of *Mehmet Hasan Altan*, [GK] B.No: 2016/23672, 11/01/2018, para 143. A similar evaluation was made by the Constitutional Court in the Application of Şahin Alpay: "No information is provided in the decision for pretrial detention as to which writing or social media post has been considered an offence. While the indictment points to the writings that are the subject matter of the case, it does not include the relevant social media posts." Application of *Şahin Alpay* [GK B.No: 2016/16092, 11.01.2018, para 95.

<sup>107</sup> A short description of the Ergenekon investigations and proceedings may be found in *Şık v. Turkey*, no.53413/11, 8.07.2014, § 10.

<sup>108</sup> *Şık v. Turkey*, no. 53413/11, 8.7.2014.

<sup>109</sup> For news coverage of the relevant tweet see: BBC Turkish, "Gazeteci Ahmet Şık tutuklandı," 30/12/2016, <http://www.bbc.com/turkce/haberler-turkiye-38467668>

his case (Case No. 2016/158637) was joined with the current case of Cumhuriyet Newspaper (Case No. 2016/97293).

### The indictment of Ahmet Şık and Cumhuriyet<sup>110</sup>

The case of Ahmet Şık and Cumhuriyet illustrates another typical characteristic of the political trials in Turkey. In the same case, individuals are accused of simultaneously supporting terrorist organisations that are unrelated to one another. Indeed, the writers and executives of Cumhuriyet –one of the most prominent defenders of the secular world view– are simultaneously accused of being a member of FETÖ, an organisation which represents a community built on a religious belief, and for acting in the name of the PKK/KCK and the DHKP-C organisations. These accusations, which have no legal grounds whatsoever, are described by the government as a 'cocktail'.

Ahmet Şık's case file was joined with the main case in the indictment issued by the Istanbul Chief Public Prosecutor's Office 156 days after the arrest of the newspaper's writers and executives. The indictment primarily rests on allegations concerning the editorial policy of the newspaper over the last three years, the choices made by the executives' regarding the newspapers editors-in-chief and allegations made by witnesses. Ahmet Şık himself was accused of 'committing crimes in the name of an armed terrorist organisation despite not being a member' under Article 220 § 7 of the Criminal Code. The allegations and evidence against Ahmet Şık are based on interviews he conducted with the perpetrators in the assassination of Prosecutor Mehmet Selim Kiraz<sup>111</sup> and Cemil Bayık<sup>112</sup>, his coverage of the Turkish National Intelligence Organization's (MIT) involvement in supplying weapons to Syria (MIT trucks)<sup>113</sup> and his social media posts.

Based on the above, the Prosecutor demanded Ahmet Şık's conviction for 'writing articles and posting social media content aiming to legitimize the actions of the PKK&KCK and the DHKP-C terrorist organisations and attempting to publicly portray the terrorist perpetrators as good people.'

### The proceedings

In the hearing held by the Istanbul 27th Assize Court on 24 July 2017, Ahmet Şık presented a defence in which he effectively tried the political power that had placed him in prison. Ahmet Şık continued to display this form of resistance in every single hearing and was ordered out of the courtroom by the presiding judge for making a 'political defence' at the hearing on 24 December 2017. The sixth hearing in this case was held on 9 March 2018 in Silivri. Ahmet Şık was released after 435 days in detention. There is no information regarding how the court will decide on the merits of the case. The ECtHR has stated that the application made by Ahmet Şık on 9 June 2017 would be given priority.<sup>114</sup> The ECtHR is soon expected to announce its judgment in the case of Ahmet Şık.

## 5. Atilla Taş

Atilla Taş is a renowned singer, journalist and writer, with more than 1.55 million followers on Twitter (@AtillaTasNet). Atilla Taş has published tweets on many occasions affirming that he is a social democrat and a follower of Atatürk. He is known to never mince his words when criticising any development that conflicts with his world view including criticism of the government and the organisation known as the Gülen movement. Atilla Taş worked as a columnist in Meydan Daily Newspaper and showed the same political

<sup>110</sup> See, <http://www.detailhaber.com/d/file/cumhuriyet-gazetesi-iddianame-tam-metin-hali.pdf>

<sup>111</sup> Ahmet Şık, 'Öldürülmeden yarım saat önce eylemcilerden Ahmet Şık'a çarpıcı açıklamalar', Cumhuriyet, 31/03/2015, [http://www.cumhuriyet.com.tr/haber/turkiye/240343/Oldurulmeden\\_yarim\\_saat\\_once\\_eylemcilerden\\_Ahmet\\_Sik\\_a\\_carpici\\_aciklamalar.html](http://www.cumhuriyet.com.tr/haber/turkiye/240343/Oldurulmeden_yarim_saat_once_eylemcilerden_Ahmet_Sik_a_carpici_aciklamalar.html)

<sup>112</sup> Ahmet Şık, 'Ya Apo Kandil'e ya biz İmralı'ya,' Cumhuriyet, 14/03/2015, [http://www.cumhuriyet.com.tr/haber/turkiye/231247/Ya\\_Apo\\_Kandil\\_e\\_ya\\_biz\\_imrali\\_ya.html](http://www.cumhuriyet.com.tr/haber/turkiye/231247/Ya_Apo_Kandil_e_ya_biz_imrali_ya.html)

<sup>113</sup> Ahmet Şık, 'TIR'daki sır aydınlandı,' Cumhuriyet, [http://www.cumhuriyet.com.tr/haber/turkiye/213863/\\_TIR\\_daki\\_sir\\_aydinlandi.html](http://www.cumhuriyet.com.tr/haber/turkiye/213863/_TIR_daki_sir_aydinlandi.html)

<sup>114</sup> Diken, 'AİHM, tutuklu gazeteci Ahmet Şık'ın başvurusuna öncelik verecek,' 11/06/2017, <http://www.diken.com.tr/aihm-tutuklu-gazeteci-ahmet-sikin-basvurusuna-oncelik-verecek/>



leanings in his column. Atilla Taş has also published two books *Bir Delinin Kapak Defteri* and *Sakıncalı Çökelek*, a narrative of the 13 months and 21 days he spent in detention in Silivri prison.

### Arrest and detention

Atilla Taş was arrested in September 2016 on account of his journalistic activities within the scope of the criminal investigation launched against the media organisation of FETÖ/PDY. He was placed in pre-trial detention on grounds of knowingly aiding a terrorist organisation' under Article 220§2 of the Criminal Code.

### The first indictment

The first indictment against Atilla Taş was based on charges of 'being a member of the FETÖ/PDY terrorist organisation' under Article 314§2 of the Criminal Code. The indictment produced no evidence other than numerous tweets posted by Atilla Taş and some column articles published in Meydan Newspaper. His tweets, dating back to 2011, were regarded as being 'salient' considering that 'FETÖ/PDY utilised social media effectively... both in Turkey and abroad to influence public opinion and set the agenda, by systematically resharing (retweeting) the posts published by members of the organisation (Atilla Taş) and thus influencing the agenda (trending topics)'. Some of his tweets were alleged to be related to calls for a military coup and to 'have laid the foundation for the coup'. Atilla Taş was accused of being a member of a terrorist organisation 'although he was initially arrested for knowingly aiding a terrorist organisation', 'in consideration of the fact that he has shared posts praising members of FETÖ and discredited investigations conducted to fight the organisation, has accused the President on numerous occasions in alignment with the general stance of the FETÖ organisation, and has been known to support TV channels shut down due to their affiliation with the organization.'

### Orders for Atilla Taş's release, its rejection and renewed detention

The trial of Atilla Taş started on 27 March 2017 at the Istanbul 25th Assize Court based on the case file no. 2017/67 E. After being kept in pre-trial detention for seven months, his release was ordered at the hearing on 31 March 2017, together with the release of 20 other suspects.

Although the court ordered the release of Atilla Taş from pre-trial detention, even before the writ of release was sent to the Silivri prison where he was being held, some pro-government journalists and advisors to the President started to make comments on social media strongly criticising the decision and calling on the High Council of Judges and Prosecutors to take action. On 3 April 2017, the High Council responded by suspending the prosecutor and judges of the Istanbul 25th Assize Court and launched an investigation against them.<sup>115</sup>

A few hours after the decision to release Taş was announced on 31 March 2017, the Istanbul Chief Public Prosecutor's Office started a new investigation on Atilla Taş and 12 other journalists<sup>116</sup>. Based on this entirely new case file access to which was restricted by a Judge order, an apprehension and arrest warrant was issued for Atilla Taş. After being kept in police custody for 14 days at the Istanbul Directorate for Security, Taş and the 12 journalists were questioned on 13 April 2017. Atilla Taş was again placed in pre-trial detention, this time for 'attempting to forcibly change and overthrow the constitutional order and government' under Article 309 and 312 of the Criminal Code. It soon became evident that this second case file contained no new evidence against him.

### The second indictment

The second indictment provided some general information about Atilla Taş, including noting that he had worked as a columnist for Meydan newspaper which was shut down under Emergency Decree No. 668 for 'having relations, affiliations or connections with the Fetullah Gülen Terrorist Organisation / Parallel State Structure identified as being a threat to national security'. He was also alleged to have written articles for Haberdar, despite having never had any of his work published on the website. He was also noted to have

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<sup>115</sup> Decision of the High Council of Judges and Prosecutors: HSYK 2. Daire, Karar No:2017/120, 03.04.2017.

<sup>116</sup> 2017/49173 Sor. No.



travelled abroad numerous times, although no comment was made as to why this was a problem. Finally, he was claimed to have contacted, through his mobile phone, members of FETÖ/PDY who used the application Bylock.<sup>117</sup> All of these were considered as violations of the Constitution and crimes against the government under Articles 309 and 312 of the Criminal Code. Atilla Taş was charged for 'attempting to forcibly change and overthrow the constitutional order and the government' with a demand for life imprisonment on two counts.

In the indictment, the press and broadcast media organisation of the FETÖ/PDY was described as a structure 'serving as one of the most important tools used by FETÖ to create a public base and conduct perception management operations while also acting as the source of financial support for the [FETÖ/PDY] organisation, which had a cell-type hierarchical organisation and which secretly organised within state agencies aiming to undermine the independence or unity of the state, to fully or partially prevent state agencies from performing their duties, to unlawfully overthrow a democratically elected government by leaking confidential information and documents, to undermine state agencies by provoking the public'.

### The Release

The first and second indictments were merged in a hearing held in August 2017. On 24 October 2017, Atilla Taş, who had been in pre-trial detention for almost 14 months was released based on the prosecutor's observations and in consideration of the possibility that 'the nature of the crime may have changed'.

### The proceedings and conviction

In the hearing of 6 February 2018, the prosecutor submitted his opinion on the case, demanding Atilla Taş's conviction for being a member of the FETÖ/PDY armed terrorist organisation under Article 314 § 2 of the Criminal Code and Article 5 of the Anti-Terrorism Law and for his acquittal under Articles 309 and 312 of the Criminal Code regarding the crime of attempting to overthrow the government or preventing it from performing its functions.

As observed, the charges that were introduced in the second indictment were dropped, suggesting that the main aim of the second indictment was to arbitrarily restrict Atilla Taş's liberty. Yet, the suspension of the members of a judicial body solely for their decision in a case has given a clear message to all prosecutors and judges working on political cases.

During his 14-month pre-trial detention, Atilla Taş made three applications to the Constitutional Court and three applications to the European Court of Human Rights. While the ECtHR had given priority to this application and was expected to announce its judgment in March 2018, the proceedings were concluded at the trial held on 8 March 2018. Atilla Taş and the other journalists were acquitted of charges brought against them under Articles 309 § 1 and 312 § 1 of the Criminal Code. However, the Istanbul 25<sup>th</sup> Assize Court found Atilla Taş guilty of knowingly aiding the armed terrorist organisation FETÖ/PDY despite not being a member, under Article 314 § 2 of the Criminal Code by reference to Article 220 § 7. In view of the court's consideration of the manner in which the crime was committed and its intensity, Atilla Taş was sentenced to five years imprisonment. However, his prison sentence was reduced to three years, one month and 15 days prison, taking into account his conduct in Court as well as other sentencing related considerations. Although the prosecutor demanded Atilla Taş's placement in pre-trial detention once again, the court rejected their demands in view of the period of time Atilla Taş had already spent in pre-trial detention.

As observed from the five separate case studies presented in this section, evidence provided to support charges including membership of terrorist organisations or attempting to undermine the constitutional

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<sup>117</sup> Bylock, unknown before the coup attempt, is a standard messaging application allegedly used by Gulenists between March 2014 and early 2016. Turkish courts have seen it as adequate evidence for membership in FETÖ. See further Owen Bowcott, 'Turks detained for using encrypted app 'had human rights breached'' The Guardian, 11.09.2017, at <https://www.theguardian.com/world/2017/sep/11/turks-detained-encrypted-bylock-messaging-app-human-rights-breached>

order has been limited to the authors' writings, their social media posts or their positions as editor in chief in newspapers such as *Özgür Gündem*.

Needless to say, the proceedings in these cases and other prosecutions have had a serious chilling effect on freedom of expression. Under normal conditions, if views expressed in line with the case law of the ECtHR do not incite violence or serve as an apology for terrorist activities or if they cannot be categorised as incitement to violence against certain people based on a deep and irrational hatred '[...] Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media'.<sup>118</sup> However, as observed in these case studies, conditions in Turkey are far from normal, an inevitable effect of the State of Emergency. As such, all oppositional writers, journalists, academics, business people and civil society representatives who refuse to adhere to a single uniform view espoused by the government will continue to be at risk and under threat for as long as they speak and write.

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<sup>118</sup> *Sürek v. Turkey (No. 4)* [BD], no. 24762/94, 08.07.1999, para. 60; *Ahmet Şık v. Turkey*, no. 53413/11, 08.07.2014, para. 105.

# VIOLATIONS AGAINST ACADEMICS

The consequences of the deteriorating state of freedom of expression observed to affect writers, publishers, and journalists has also had a significant impact on academic freedoms in Turkey. Administrative and criminal sanctions against academics had started to increase gradually even prior to the declaration of the State of Emergency in Turkey. This increase was coupled with the smear campaigns carried out by pro-government media outlets. Together with the declaration of the State of Emergency, this environment of repression gave way to dismissals and other measures adopted under Emergency Decrees.

To elaborate on the system of repression used against academia in Turkey, this chapter will focus on the problem of academic dismissals, which has been the most heavy-handed measure against academics. We will also examine the case of the Academics for Peace to provide give a concrete account of how dismissals and disciplinary measures are implemented and the subsequent large-scale criminal proceedings launched against academics. We will also discuss the changes in disciplinary regulations under which academics who have not yet been dismissed are subjected to a narrowing of their academic freedoms.

## Dismissals under the State of Emergency

As a result of the Emergency Decrees issued under the State of Emergency, a total of 116,250 public officials were dismissed from public service without the possibility of being readmitted. Only 1.69% of those dismissed were reinstated to their duties. As of 31 December 2017, there are 114,279 people against whom a decision of dismissal has been issued.

With regard to academia, as of the end of 2017, a total of 5,822 academics (4,723 men and 1,099 women) had been dismissed from 118 public universities under Emergency Decrees issued under the State of Emergency. Of these, only 141 academics have been reinstated to their positions after the decisions were revoked.<sup>119</sup> The ten most affected universities and the number of dismissals from each are as follows:

- Süleyman Demirel University with 253 dismissals;
- Gazi University with 227 dismissals;
- Çanakkale Onsekiz Mart University with 204 dismissals;
- Istanbul University with 192 dismissals;
- Pamukkale University with 174 dismissals;
- Dicle University with 172 dismissals;
- Atatürk University with 148 dismissals;
- Dumlupınar University with 144 dismissals;
- Erciyes University with 144 dismissals;
- Ankara University with 133 dismissals.

Of the total number of academic dismissals, 840 were full professors (14.59%); 1,026 were associate professors (17.86%); 1,510 were assistant professors (26.13%); 1,523 were research assistants (25.57%); 476 were lecturers (8.15%) and 447 were teaching fellows/experts. In addition, a total of 15 private universities, with a total of 3041 academic staff members, were closed under Emergency Decree No. 667 in the academic year 2015-2016.

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<sup>119</sup> As of 8 January 2018, the State of Emergency will have been in effect for 18 months. See IHOP, Status Report on the State of Emergency (31 December 2017) [http://www.ihop.org.tr/wp-content/uploads/2018/01/OHALdurumraporu\\_31122017.pdf](http://www.ihop.org.tr/wp-content/uploads/2018/01/OHALdurumraporu_31122017.pdf).

## Legal remedies against dismissals

Both the institutions that were closed and the individuals who were dismissed from public service have been left without a remedy to challenge the procedures launched against them due to the legal loophole explained in the introduction. The injured parties have resorted to four separate remedies to challenge the decisions—three of which are judicial and one is administrative. Public officials dismissed from office and organisations dissolved by emergency decrees launched either individual or concurrent appeals with administrative bodies, administrative courts, the Constitutional Court and the European Court of Human Rights (ECtHR).

As mentioned above, only a few administrative appeals have resulted in people being restored to their former positions. The administrative appeal option<sup>120</sup> is not guided by any rules or principles and thus cannot be regarded as an effective remedy.

Appeals made to administrative courts have been rejected with the same reasoning across Turkey. Even before the establishment of the State of Emergency Inquiry Commission, administrative courts across Turkey stated that 'although Emergency Decrees are issued by the Executive branch, they cannot be the subject of judicial review by administrative courts since they function as laws'. After the establishment of the State of Emergency Commission under Emergency Decree No. 685, all cases pending before administrative courts were referred to the Commission under Provisional Article 15 3 of the Decree.

The situation is different at the level of the Constitutional Court. In November 2016, Prof. Dr. Engin Yıldırım, Vice-President of the Constitutional Court, noted that, after 15 July 2016, 45,000 applications were filed and that their number was expected to reach 100,000 by the end of the year. Yıldırım noted that 'It is indeed extremely difficult to review 100,000 applications. This is worrying for us'.<sup>121</sup> As of end of 2017, a total of 173,479 individual applications have been made to the Constitutional Court. 80,756 of these were made during 2016 and 40,530 during 2017. The majority of dismissal related applications were rejected by the Court during 2017. Notably, of the 3,409 individual applications made to the Court involving freedom of expression, the Court had only decided on 53 as of the end of 2017.

Lastly, in its pilot judgment in the case of *Zihni v. Turkey*, the European Court of Human Rights found the application inadmissible on grounds that domestic remedies had not been exhausted.<sup>122</sup> In its judgment, the ECtHR noted the following:

- a. Appeals lodged with the Administrative Courts concerning the sanction of dismissal from public service under Emergency Decrees are still pending and their outcome is not known; hence as of the date of the current application, one cannot find administrative courts as an ineffective domestic remedy. (para. 24)
- b. Furthermore, the amendment introduced to Article 148 of the Constitution on 23/09/2012 allows for individual application to the Constitutional Court once ordinary domestic remedies have been exhausted. The arguments of the applicant are not sufficient to conclude that the Constitutional Court is not an effective remedy in the current case.

The decision shows that the ECtHR is of the opinion that the two domestic remedies explained above could not be deemed to be ineffective—at least as of the end of November 2016. However, it is also observed that the Venice Commission, another organ of the Council of Europe, is not so hopeful about either the administrative courts or the Constitutional Court.<sup>123</sup> Moreover, the Venice Commission has noted that both

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<sup>120</sup> The only exception to the rule is Emergency Decree No. 697. With this Decree, 1823 public officials were reinstated to their duties because the Bylock app had been installed on their mobile phones without their consent. With this one exception, the remaining Decrees provide no rationale for the reinstatement of public officials they apply to.

<sup>121</sup> <http://gazeteyolculuk.net/aktuel/aym-baskanvekili-yildirim-15-temmuzdan-sonra-onumuze-45-bin-basvuru-geldi.html>.

<sup>122</sup> *Zihni v. Turkey*, no: 59061/16, 29.11.2016

<sup>123</sup> Venice Commission, Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016, CDL-AD(2016)037, para. 200-202.

administrative courts and individual applications to the Constitutional Court are not available to public officials who were dismissed under Emergency Decrees.<sup>124</sup>

Having made this determination, the Venice Commission recommended that the government establish an *ad hoc* commission to review the State of Emergency measures.<sup>125</sup> The Secretary General of the Council of Europe made a similar recommendation which was supported by an *ad hoc* sub-committee established by the Parliamentary Assembly of the Council of Europe.<sup>126</sup>

Following the above-mentioned developments, the government seems to have realised that it could not keep stalling in response to recommendations by various bodies of the Council of Europe and thus issued Emergency Decree No. 685 establishing the Inquiry Commission for State of Emergency Measures. The timing of the publication of the Emergency Decree betrays its purpose. On the day the Emergency Decree was published, the Parliamentary Assembly of the Council of Europe rejected the request to hold an urgent debate on Turkey. Although there were 94 votes in favour, 68 against and 19 abstaining, the proposal was rejected on grounds that the necessary two thirds majority had not been reached. It is understood from the statement issued by the PACE Committee on Political Affairs that the Emergency Decree adopted on the same night played a significant role in this decision.<sup>127</sup>

Despite serious criticism of the State of Emergency Inquiry Commission<sup>128</sup>, the ECtHR found the application of Köksal v. Turkey inadmissible stating that the applicant had not exhausted domestic remedies by not applying to the Inquiry Commission. After this initial application, the ECtHR issued decisions of inadmissibility against all applications concerning dismissal from public office.<sup>129</sup> Immediately after this decision, the Constitutional Court of Turkey issued a decision of inadmissibility in an application challenging dismissal from public office.<sup>130</sup> This led to a wholesale decision of inadmissibility for a total of 70,711 applications on grounds that they fell under the jurisdiction of the Inquiry Commission.<sup>131</sup>

The State of Emergency Inquiry Commission was not established for a long time: the appointments to the Commission were made four months after the Emergency Decree No. 685 under which it was established. The Commission started working from 22 May 2017. However, the Commission accepted the first applications on 17 July 2017, almost an entire year after the dismissals. In the last week of December 2017, the Commission announced that it had reached a decision in the first batch of applications. However, according to this announcement, the decisions would be 'notified to the relevant authorities, which would, in turn, notify them to the applicants as per Article 15 of the Communiqué on the Working Principles and Procedures of the State of Emergency Inquiry Commission published in the Official Gazette No. 30122 dated 12/7/2017'.

The setbacks of this method are evident. Firstly, despite more than a year and a half having passed since the first dismissals, it is not yet known how the Commission has defined and interpreted the excessively ambiguous concepts used in the Emergency Decrees. Secondly, public officials who were dismissed do not know the reasons for their dismissal, just as those who were reinstated do not why they were reinstated. This is problematic in that an individual who wishes to challenge the Commission's decision before the courts will not know what to challenge or on what grounds. Moreover, as the Commission does not publish its decisions, it will become impossible to assess why certain applications to the Commission were

<sup>124</sup> Memorandum prepared by Turkish authorities for the visit of the rapporteurs to Ankara, together with the additional documents appended to it, CDL-REF(2016)067), s. 31.

<sup>125</sup> Report of the Venice Commission, para. 220 ff.

<sup>126</sup> Committee on Political Affairs and Democracy *Ad hoc* Sub-Committee on recent developments in Turkey, Report on the fact-finding visit to Ankara (21-23 November 2016), AS/Pol (2016) 18rev, para. 62,63.

<sup>127</sup> Situation in Turkey: statement by PACE Committee on Political Affairs, <http://assembly.coe.int/nw/xml/News/News-View-en.asp?newsid=6492&lang=2>

<sup>128</sup> Kerem Altıparmak (2017), 'Ölü Doğan Çocuk: 685 Sayılı KHK ile Kurulan OHAL Komisyonu', Ankara Barosu Dergisi, 2017/1, p. 69.

<sup>129</sup> <http://www.hurriyetdailynews.com/european-court-rejects-25-000-turkish-coup-attempt-cases-122408>

<sup>130</sup> Application of *Remziye Duman*, No. 2016/25923, 20.7.2017

<sup>131</sup> For the press release, see, <http://www.anayasa.gov.tr/icsayfalar/duyurular/detay/65.html>

accepted and others rejected in the absence of transparency. Lastly, a total of 103,276 applications were made to the Commission. As of the end of February 2018, 100 of these applications have been decided in favour of the applicants whereas 4,316 applications have been rejected.<sup>132</sup> Under the circumstances, it is clear that a significant number of applicants will be kept waiting for years.

## The case of the Academics for Peace

Of the 5,822 academics who were dismissed from public service, 386 were among those who had signed the 'Declaration of Academics for Peace' in January 2016. The Academics for Peace Initiative (<https://barisicinakademisyenler.net>) was launched in November 2012 by a group of academics who 'came together to issue a declaration during the hunger strikes by Kurdish prisoners'. In their inaugural declaration the Academics for Peace noted their objective as being 'to produce academic knowledge by examining world examples regarding non-conflict processes as well as those for peace building and socialisation and to expeditiously present this knowledge to the public and those concerned'.

The administrative and criminal proceedings launched against members of the Academics for Peace Initiative and their subsequent dismissal are particularly important in showing the repressive practices against academics who oppose the official views of the state in Turkey.

On 11 January 2016, Academics for Peace shared the declaration 'We Will Not Be a Party to This Crime'<sup>133</sup> with the public. The declaration was initially signed by 1,128 academics. By 20 January 2016, the number of signatures had almost doubled and totalled 2,212.

The text reads as follows:

### **As academics and researchers of this country, we will not be a party to this crime!**

The Turkish state has effectively condemned its citizens in Sur, Silvan, Nusaybin, Cizre, Silopi, and many other towns and neighbourhoods in the Kurdish provinces to hunger through its use of curfews that have been ongoing for weeks. It has attacked these settlements with heavy weapons and equipment that would only be mobilised in wartime. As a result, the right to life, liberty, and security, and in particular the prohibition of torture and ill-treatment protected by the constitution and international conventions have been violated.

This deliberate and planned massacre is in serious violation of Turkey's own laws and international treaties to which Turkey is a party. These actions are in serious violation of international law.

We demand the state to abandon its deliberate massacre and deportation of Kurdish and other peoples in the region. We also demand the state to lift the curfew, punish those who are responsible for human rights violations, and compensate those citizens who have experienced material and psychological damage. For this purpose we demand that independent national and international observers to be given access to the region and that they be allowed to monitor and report on the incidents.

We demand the government to prepare the conditions for negotiations and create a road map that would lead to a lasting peace which includes the demands of the Kurdish political movement. We demand inclusion of independent observers from broad sections of society in these negotiations. We also declare our willingness to volunteer as observers. We oppose suppression of any kind against the opposition.

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<sup>132</sup> Diken, 'OHAL Komisyonu, bugüne dek 100 işe iade, 4 bin 316 ret kararı verdi,' 02.03.2018, <http://www.diken.com.tr/ohal-komisyonu-bugune-dek-100-ise-iade-4-bin-316-ret-karari-verdi/>

<sup>133</sup> <https://barisicinakademisyenler.net/node/62>

We, as academics and researchers working on and/or in Turkey, declare that we will not be a party to this massacre by remaining silent and demand an immediate end to the violence perpetrated by the state. We will continue advocacy with political parties, the parliament, and international public opinion until our demands are met.

This text marks the turning point towards a more pronounced authoritarianism in Turkey. Following the Declaration, the multidimensional silencing strategy previously used against a smaller segment of society was rapidly widened to target all oppositional groups and turned into a routine practice.<sup>134</sup> The strategy has many actors supported by both official and unofficial pillars. The process often starts with either harsh criticism from the President or with systematic smear campaigns carried out by the pro-government media using copy-paste news reports or articles. Such campaigns are soon followed by action by prosecutors or administrative investigating authorities. The victims of intimidation are not just those who are being investigated, but all people who are likely to voice similar views. Therefore, the case of the Academics for Peace is not a singular case of a group of academics being investigated. It is a general message from the government to all academics and intellectuals who would dare to voice views disapproved by the government.

Immediately after the declaration was published, numerous government officials and President Recep Tayyip Erdoğan in particular, targeted the signatories as 'supporters of terrorism.' On 12 January 2016, President Erdoğan addressed the matter for the first time in a speech he gave at the Annual Convention of Ambassadors: 'This mob that call themselves academics are blaming the government' and 'these poor replicas of an intellectual unfortunately speak of the state engaging in a massacre. All you so-called intellectuals (enlightened ones), you are nothing but dark, dark forces. There's nothing about you that's enlightened. You are so dark and ignorant that you have no idea where the Southeast or the East of this country is.' He further stated that the state was facing 'the treason of so-called intellectuals'<sup>135</sup>.

In another speech he delivered on 14 January 2016, President Erdoğan said, 'This mass that call themselves 'academics' are imposing the language and style of the terrorist organisation on the public; they are lies, distortions and propaganda. There is no difference between firing a gun in the name of the terrorist organisation and disseminating propaganda on its behalf. This has nothing to do with freedom of thought and expression.'<sup>136</sup> On 15 January 2016, Erdoğan went on to say 'I once again strongly condemn those academics who have published this dark declaration and condoned those massacres.' With these words, the President not only defined the academics as 'dark forces/people' but also said 'They are infamous persecutors, because those who stand with persecutors are persecutors themselves.... I have invited all judicial bodies and the university senates to assume their responsibilities against these actions which are against the Constitution and laws...to take urgent action... they have committed the same crime.'<sup>137</sup> The President thus called upon all authorities to take the necessary action against the signatories of the Declaration. On 20 January 2016, Erdoğan continued to speak against the signatories 'I'll be clear, I'm disgusted with this mentality – they issue so-called academic and political fatwas about attacks against public officials by the terrorist organisation, and then when civilians are killed, they say 'they shouldn't have done that.'<sup>138</sup>

## Administrative investigations and the scale of unlawfulness

After these statements, which had the characteristics of an order, universities rapidly began launching disciplinary proceedings against the signatory academics. While some faculty members were suspended

<sup>134</sup> Among other well-known methods used in this new strategy are: the lifting of the impunity of parliamentarians and their detention, the apprehension and detention of human rights defenders during their meeting in Buyukada, the investigation and detention of businessman Osman Kavala.

<sup>135</sup> <http://bianet.org/bianet/toplum/171012-erdogan-dan-akademisyenlere-ey-aydin-musveddeleri>

<sup>136</sup> <http://www.imctv.com.tr/cumhurbaskani-erdogandan-akademisyenlere-yeniden-elestiri/>

<sup>137</sup> <http://www.hurriyet.com.tr/erdogandan-akademisyenler-bildirisine-sert-sozler-40040876>

<sup>138</sup> <http://www.hurriyet.com.tr/akademisyenlere-tiksiniyorum-40043131>



from their positions after proceedings were launched, others were dismissed by the public and private universities which employed them. Academic teaching staff on assignment in other countries were called back on grounds that inquiries had been started against them.

However, as these investigations were being conducted, there was a legal loophole regarding the disciplinary rules to be implemented at universities in Turkey. The Constitutional Court had noted that such investigations could only be conducted based on the rules prescribed by law and stated that the Regulation in force at the time was insufficient to impose disciplinary penalties.<sup>139</sup>

This chain of events is important for two reasons. Firstly, one observes that there is total disregard of legal principles and rules even in universities. Although academics being investigated have argued, in all inquiries against them, –for the principle of ‘no punishment without crime’ and noted that there is no legal rule to be used against them, this point was never considered by the authorities and their arguments were met with silence. Secondly, the Declaration was first published and investigations against academics had concluded in many universities before Turkey experienced the coup attempt or the State of Emergency. In other words, the Declaration of Academics for Peace cannot be linked to the attempted coup or the State of Emergency. Therefore, the Emergency Decrees ordering the dismissal of these academics are not only unlawful in their retro-activity, they are also applied to persons who are not linked to the events leading to the State of Emergency. Thirdly, as we have explained in detail elsewhere,<sup>140</sup> although all universities in Turkey are subject to the same disciplinary rules, the reactions of different universities have been different. While some public and private universities refrained from launching investigations, those who chose to do so referred to different rules with some trying to impose penalties under a provision of the Regulation which was not in force. This strange and discriminatory attitude continued in the process of dismissals. University administrations which were pro-government passed the names of the signatory academics to the Council of Ministers asking for their dismissal whereas others refrained from doing so. Some academics who had signed the petition were subject to neither administrative investigations nor dismissal. As a result, while some academics who signed the petition were labelled as ‘terrorists’, others continued their duties. Ironically, one of the signatories of the petition was even nominated as a candidate judge to the European Court of Human Rights by the government.

## Process of dismissals through Emergency Decrees

Numerous universities launched administrative inquiries against the signatories of the Declaration of Academics for Peace upon the orders of the President. However, in the absence of legal grounds, no one was dismissed from their position prior to the attempted coup of 15 July 2016. The first Emergency Decrees issued after the State of Emergency was declared noted that the dismissals targeted individuals who had been ‘determined to be a member of, have affiliation or connections with the Fethullah Gülen Terrorist Organisation (FETÖ/PDY)’.<sup>141</sup> However, after the Emergency Decree No. 672, the formula was changed to include individuals who ‘were members of, had an affiliation, link or connection with terrorist organisations or structures, formations or groups which have been determined by the National Security Council to perform activities against the national security of the State’. This new formulation allowed for the dismissal of individuals who had nothing to do with the coup or the FETÖ/PDY organisation which was accused of organising the coup.

Individuals dismissed under these Decrees are not given any information regarding which organisation they were determined to be associated with or how they were found to have such associations. In the case of Academics for Peace, being a signatory of the Declaration has been found to be sufficient reason for dismissal. In this way, where legal grounds for administrative investigations were lacking, the Emergency

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<sup>139</sup> E: 2014/100, K: 2015/6, T: 14.01.2015.

<sup>140</sup> Kerem Altıparmak & Yaman Akdeniz (2017), *Barış İçin Akademisyenler: Olağanüstü Zamanlarda Akademiyi Savunmak*, İstanbul: İletişim, s. 30 vd.

<sup>141</sup> Emergency Decrees No. 667 to 670.

Decrees allowed for the dismissal of numerous academics under ambiguous concepts such as 'structures, formations or groups' and 'membership, affiliation, link or connection'.

During the State of Emergency, 386 signatory academics were dismissed from their duties. The penalties imposed on signatories of the Declaration as of 17 January 2018 are given in the table below:<sup>142</sup>

Violations of the rights of Academics for Peace			
	Public	Private	Total
Dismissal from public service under Emergency Decrees	378	8	386
Dismissal	38	48	86
Forced Resignations	18	24	42
Forced retirement	25	1	26
Disciplinary inquiries	442	63	505
Files referred to the Council of Higher Education with a request for 'dismissal from university duties or public service'	107	5	112
Suspension	90	11	101
Removal from administrative duties	3	4	7
Police arrest	67	3	70
Pre-trial detention	2	2	4

## Criminal cases

In addition to the administrative proceedings initiated at universities, Chief Public Prosecutors in many provinces launched criminal investigations. Some academics were taken into police custody and questioned within the scope of these investigations. Faculty members Esra Mungan, Muzaffer Kaya, Kıvanç Ersoy and Meral Camcı were arrested and prosecuted on grounds of 'disseminating terrorist propaganda' under Article 7 § 2 of the Anti-Terrorism Law. At the first hearing held on 22 April 2016, the Public Prosecutor of the case asked for permission from the Ministry of Justice for the prosecution of the academics under Article 301 of the Turkish Criminal Code for 'denigrating the Turkish nation, the Republic of Turkey, the institutions and bodies of the State'. The case is still pending before the court.

Other prolonged investigations against signatories were concluded by the Office of the Public Prosecutor in October 2017 and separate indictments were prepared against some of the signatories. As a result of the lack of judicial independence in Turkey, no official statement was made as to why academics are being the subject of separate indictments given that different prosecutors initially joined the case in Istanbul and claimed that the signing of the Declaration was an organised act. As noted above, the grounds for the charges against the first academics who had been detained were changed from Article 7§2 of the Anti-

<sup>142</sup> <https://barisicinakademisyenler.net/node/314> Retrieved on 17/01/2018.

Terrorism Law to Article 301 of the Turkish Criminal Code. However, in the new indictments, the prosecutor demanded that they be tried under Article 752 of the Anti-Terrorism Law for 'disseminating terrorist propaganda'. As far as we know, of the 1,128 initial signatories, the trials of 148 from 15 universities<sup>143</sup> started on 5 December 2017<sup>144</sup> and are still ongoing.<sup>145</sup>

In the first hearing, some lawyers representing the accused made two fundamental demands. First, they asked that the proceedings be based on Article 301 of the Turkish Criminal Code and not on Article 752 of the Anti-Terrorism Law as decided earlier. Second, they asked for the separate cases to be joined since all of the accused had signed the same petition and hence engaged in the same act. All of the courts hearing the case rejected these demands.

Although individual indictments for the majority of these academics have not been prepared, proceedings have started for academics in Istanbul. In three of the cases, the proceedings have been concluded in the second hearings held in February 2018. Former research assistants Ayda Rona Aylin Altınay Cingöz and Ezgi Pınar from Istanbul University tried by the Istanbul 32nd Assize Court have been sentenced to one year and three months of imprisonment. By resorting to the deferment of the announcement of the verdict, the court has deferred these sentences. Prof. Dr. İzzettin Önder, a retired professor from the same university, was also sentenced to one year three months imprisonment, which was later deferred by the same court.<sup>146</sup>

The indictment prepared by the Istanbul Chief Public Prosecutor's Office and accepted by different Assize courts across Istanbul spoke of the Declaration of Academics for Peace as the 'so-called declaration for peace'. The indictment read: 'as it has been clearly understood, the so-called declaration for peace is public propaganda in support of the PKK/KCK terrorist organisation'. It also alleged that terrorist propaganda had been disseminated 'by means of national and international smear campaigns against the Republic of Turkey, the government, the judiciary, the military and the security forces in a fashion that aimed to legitimise or encourage the coercive, violent or threatening methods of the PKK/KCK terrorist organisation'. It continued: '[the declaration] therefore led state officials to feel concerned about consequent terrorist actions in the country.' The Office of the Chief Public Prosecutor presented its opinion of the academics who signed the declaration as follows: 'Due to the special role they have as the scientific community, although they have the right to voice their reactions within the limits of acceptable criticism as defined by law by showing respect to the honour, reputation and rights of the Republic of Turkey, they have committed a crime by disseminating propaganda supporting a terrorist organisation and by choosing to write a declaration that uses derogatory language and distorts the truth.'

Overall, the indictment makes two claims: a) those who issued the declaration have knowingly distorted the truth; b) as a result they have encouraged a certain public perception of the Republic of Turkey in the national and international community. It is obvious that neither one of these claims establishes a link between the expressions used in the declaration and acts of violence.

According to the prosecutorial authorities, 'the ECtHR has ruled that value judgments can be made on condition that the facts are proven and finds it wrongful to make unfounded and unproven statements that negatively present states and institutions.' Aside from the fact that the ECtHR does not follow a methodology of establishing what is right or wrong, the indictment fails to refer to the laws and court rulings on which the practices in Spain, the United Kingdom and the USA were deliberated as the reference point to these arguments. Moreover, it also fails to give reference to the judgments in which the ECtHR made the claimed determinations.

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<sup>143</sup> Galatasaray University, Istanbul University, Yıldız Technical University, Istanbul Technical University, Marmara University, Boğaziçi University, Mimar Sinan Fine Arts University, Yeni Yüzyıl University, Nişantaşı University, Kadir Has University, Özyeğin University, Bahçeşehir University, Kemerburgaz University, Arel University and Işık University.

<sup>144</sup> Bianet, '148 Barış Akademisyeninin Dava Takvimi,' 03.12.2017, <https://m.bianet.org/bianet/insan-haklari/192084-148-baris-akademisyeninin-dava-takvimi>

<sup>145</sup> Bkz. <http://bianet.org/konu/akademisyen-yargilamaları>

<sup>146</sup> Bianet, "Üç Barış Akademisyenine Hapis Cezası, Cezalar Ertelendi," 23.02.2018, <http://bianet.org/bianet/insan-haklari/194579-uc-baris-akademisyenine-hapis-cezasi-cezalar-ertelendi>

Although the indictment refers to some ECtHR judgments without giving their names, there is no legal argument in terms of the crime 'terrorist propaganda' as set forth under Article 752 of the Anti-Terrorism Law. Neither is there reference to the established case law of the Court of Cassation, the Constitutional Court and the ECtHR about this topic. Yet the indictment claims: '[the declaration] cannot be regarded as falling within the right to freedom of expression or the right to criticise; the text of the declaration is essentially no different from the statements issued by the PKK; it advocates and is a propaganda of the PKK which violates human rights rather than defending it; the title and body of the declaration deliberately uses and emphasises words such as massacre, torture and exile; the academics were aware of the connotations in the meanings of these words; it attempts to legitimise the methods of coercion, violence or threat used by the PKK/KCK terrorist organisation which is responsible for the events in the region.'

The writing style of the indictment is symbolic in terms of the criminal proceeding practices witnessed in recent years. Instead of working from concrete evidence, the prosecution argues from an abstract premise, claiming that the accused have attempted to 'create a perception', 'stated an intention', 'hold the same aims as the terrorist organisation' and have therefore engaged in terrorist propaganda and are members of a terrorist organisation. As the prosecution produces these claims, just as in the indictments against Academics for Peace, it provides no concrete information but argues that this is the case even in countries that are proponents of freedom. The prosecution goes as far as to give names of countries but does not discuss concretely whether this is really the case. However, as we discuss in the last chapter, neither the case law of the ECtHR, nor the practices in international human rights law support the abstract claims made in these indictments.

## Amendments to Disciplinary Law

Understanding the repression of freedom of expression in Turkey requires one to bear in mind that the repression does not have a single dimension but instead employs various methods and instruments. The various silencing methods function in a web and are sometimes used simultaneously and sometimes by different actors. As noted above, numerous academics have been discharged from public duties after the declaration of the State of Emergency and some are being tried for having signed a declaration for peace. Yet, the repression of academic freedoms is not limited to the State of Emergency nor to this particular group. It is not just the Academics for Peace who are a source of disturbance for the government due to their writings, their public statements or articles making a call for peace. A wide community of academics, who have not been dismissed from public service, are subjected to various methods of repression if they express opposing views. The instruments of repression are both direct and indirect.

Indirect instruments of repression and methods used for silencing include but are not limited to obstacles to the assignment of oppositional academics to posts in foreign countries, obstacles pertaining to applications for scholarships, number of hours of instruction assigned to academics and the administrative positions they are allowed

Meanwhile, disciplinary proceedings –a more direct method of silencing– function to inhibit freedom of expression. This threat has turned into a more serious problem since the autonomy of universities was completely undermined. The Rector is the chief disciplinary authority in universities. Although unconnected to the State of Emergency, an amendment was introduced to Article 13 of Law No. 2547 (via Article 85 of Emergency Decree No. 676). The new system set forth that university Rectors were to be appointed directly by the President of the Republic. Throughout the State of Emergency, some Rectors have been dismissed from their duties by the Council of Higher Education. Therefore, it is very clear that an individual who is likely to trouble the government cannot become a Rector. It is just as clear that a Rector who is still in office cannot remain in office if they carry out activities that would trouble the government. Needless to say, the same situation holds true for deans of faculties who have even fewer safeguards.

Administrative and criminal proceedings against academics who challenge the official ideology of the state are by no means an exceptional practice in Turkey. Nevertheless, the recent categorisation of all

oppositional discourse as 'terrorism' and the changes to disciplinary procedures in universities have resulted in a constant threat of investigation against for academics.

Until 2015, the administrative proceedings against university staff were the subject of the Higher Education Disciplinary Regulations. However, after the Constitutional Court ruled that administrative crimes and penalties concerning university staff may only be prescribed by law and not a regulation, amendments were introduced to Law No. 2745 on Higher Education.

The new legal arrangements set forth that Law No. 657 on Civil Servants would also be applicable to faculty members.<sup>147</sup> In addition, it introduced new types of crimes applicable only in the case of faculty members. In other words, according to the new legal arrangements, university staff may be investigated for administrative crimes that previously involved civil servants as well as specific crimes that can only be committed by university staff.

Before elaborating on the provisions of these new legal arrangements that concern freedom of expression, we must stop to criticise this awkward approach. Faculty members and academic teaching staff are different from other civil servants. This is why Article 130 of the Constitution sets forth that personnel matters concerning academic staff must be set forth by a separate law. A civil servant may be expected to be loyal to the state and its official ideology. However an academic may only be expected to be loyal to the truth. Any subject, including the official ideology of the state, can become the subject of study for an academic. Hence, the application of disciplinary rules intended for civil servants to academic staff is against both the Constitution and the spirit of scientific inquiry.

Indeed, it is extremely problematic for some provisions of the Civil Servants law to academic staff. For example, Article 125 of Law 657 sets forth that 'Giving information or making statements, in the absence of authorisation, to the press, news agencies or radio and television organisations' is punishable by a notice of censure. It is obvious how meaningless it is for an academic to obtain permission from an authority before giving information or making statements to the press about their subject of study. Similarly, according to the same law, 'printing, reproducing, disseminating all kinds of banned publications or declarations, posters, banners and other similar items that are ideological' is punishable by dismissal from public service. Yet an academic should be able to discuss why a publication was banned and whether the ban is against freedom of expression and, in order to engage in that discussion, an academic should be able to reproduce that document or information as class or research material. Indeed, one academic has been subject to criminal charges for wishing to discuss works of Abdullah Öcalan that were published 30 years earlier in his class about the Kurdish issue and the intellectual changes of the movement.<sup>148</sup>

While these provisions in the Civil Servants Law are sufficiently repressive, new provisions (introduced to Law No. 6764 and 2547), have increased the risk of academics being investigated arbitrarily. According to this, the penalty of censure under the new Article 53 § b(2) in Law No. 2547, is now applicable to the act of 'printing, reproducing, disseminating declarations, posters, banners and tapes and other similar items whose content serve violence, terrorism and hostility, or hanging or exhibiting the same at any location in the institution'. Similarly, the penalty of dismissal from public office under Article 53 § b (6) is now applied to those 'engaging in acts characterised as terrorism or to support such acts'.

These provisions, which at first sight seem to be prohibiting terrorism, violence and hatred, result in changing the meaning of the concept of terrorism in Turkey based on political conjuncture and widening it to encompass all oppositional views. There are myriad examples of this arbitrary and wide interpretation. The most recent example is what happened to the members of the Central Committee of the Turkish Medical Association, who, after the military operation Turkey launched against Afrin in Syria, stated that war

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<sup>147</sup> Law No. 2547 uses the term 'in addition to the crimes set forth under Law No. 657' for the offences it lists, which means that all disciplinary offences regulated by Law No. 657 on Civil Servants are also applicable in the case of academic staff.

<sup>148</sup> For a legal evaluation of the case, see Kerem Altıparmak and Yaman Akdeniz (2016), 'Mütalaa', 71 (1) Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi 321.

was a public health issue.<sup>149</sup> As observed in many other examples, the President of Turkey first blamed the members for being traitors.<sup>150</sup> Subsequently, the members of the Central Committee, some of whom are academics, were taken into police custody for disseminating terrorist propaganda. Moreover, human rights defenders who criticised the custody of these individuals and defended their rights were also taken into police custody on grounds of engaging in terrorist propaganda. Professor Raşit Tükel, President of the Central Committee of the Medical Association, and Professor Taner Gören, who is a cardiologist and a member of the Central Committee, were suspended from their academic duties for three months by Istanbul University which launched disciplinary proceedings against them.<sup>151</sup>

These examples and others clearly show the way in which the word 'terrorism' has turned into a disciplinary 'stick' in Turkey. The highly problematic criminal investigations are thus supported by the threat of administrative investigations.

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<sup>149</sup> For the statement made by the Central Committee, see, [http://www.ttb.org.tr/haber\\_goster.php?Guid=28de85da-00e5-11e8-a05f-429c499923e4](http://www.ttb.org.tr/haber_goster.php?Guid=28de85da-00e5-11e8-a05f-429c499923e4)

<sup>150</sup> The President made the following statement about the case: 'Those who are uncomfortable with this the so-called Turkish Medical Association, wish to carry out a campaign they call "No to War". We have never seen these terrorist lovers say "yes to peace". <https://www.ntv.com.tr/turkiye/cumhurbaskani-erdogandan-turk-tabipleri-birligine-tepki,pYdd4f-mm0iYPxxP2y80Pw>

<sup>151</sup> Turkish Medical Association Central Committee member Şeyhmuz Diken was also dismissed from his duties in the Central Bank. Evrensel, 'Atanmış rektörden seçilmiş Tükel'e uzaklaştırma,' 01.02.2018, <https://www.evrensel.net/haber/344630/atanmis-rektorden-secilmis-tukele-uzaklastirma>

# AN EVALUATION OF VIOLATIONS AGAINST PUBLISHERS, WRITERS AND ACADEMICS IN THE LIGHT OF CONSTITUTIONAL SAFEGUARDS

This chapter will present an evaluation of interventions to freedom of expression affecting publishers, writers and academics in view of Constitutional safeguards and the case law of the ECtHR.

## Scientific and artistic freedom as a special facet of freedom of expression

Freedom of expression affects a significant part of other rights and freedoms safeguarded in the Constitution and the ECHR and is therefore a crucial element of a pluralistic democratic order for imparting all kinds of views –including those that are against the majority– for finding support for views, acting on views and for convincing others about such views.<sup>152</sup>

Freedom of expression, as safeguarded under Article 26 of the Constitution and Article 10 of the European Convention on Human Rights covers not only the freedom to ‘hold thoughts and opinions’ but also ‘the freedom to impart and disseminate ideas and opinions’ as well as the ‘freedom to receive and impart news’. Such freedoms are the foundations for a democratic society, and are necessary for its development as well as for the self-development and self-actualisation of the individual.<sup>153</sup> Article 26 of the Constitution refers to ‘speech, writing, pictures and other media’ as the means to disseminate thoughts and opinions. The phrase ‘other media’ indicates that all kinds of means used to express opinions are under Constitutional protection.<sup>154</sup>

In addition, Article 28 of the Constitution sets forth negative obligations, noting that the press shall not be censored, and introduces positive obligations to the effect that the State shall take the necessary measures to ensure press freedom. Hence, the Constitution regards the press as one of the means for mass communication. However, it is distinct from other mass communication media in that it has special constitutional protection.<sup>155</sup> Freedom of the press comprises the right to express views and opinions via newspapers, periodicals and books and the right to publish and disseminate information, news and critiques.<sup>156</sup> In addition to Article 28, Article 29 sets forth the right to publish periodicals and non-periodicals, and Article 30 sets forth the protection of printing facilities.

Freedom of science and the arts holds a special place within freedom of expression and is safeguarded under Article 27 of the Constitution. Article 27 establishes freedom of science and the arts as follows:

Everyone has the right to study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely.

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<sup>152</sup> Application of *Abdullah Öcalan*, B. No: 2013/409, 25/06/2014, para. 74.

<sup>153</sup> Application of *Emin Aydın*, B. No: 2013/2602, 23/01/2014, §40-41.

<sup>154</sup> Application of *Emin Aydın*, B. No: 2013/2602, 23/1/2014, §43, *Yaman Akdeniz and Others*, Application. No: 2014/3986, 02/04/2014)

<sup>155</sup> *Kadir Sağdıç* [GK], B. No: 2013/6617, 8/4/2015, § 46; *Abdullah Öcalan* [GK], B. No: 2013/409, 25/6/2014, § 73.

<sup>156</sup> *AYM*, E.1996/70, K.1997/53, K.T. 5/6/1997, Application of *Fatih Taş*, B. No: 2013/1461, 12/11/2014, § 65.



The grounds for restrictions listed under other articles of the Constitution are therefore not listed under Article 27. In contrast with freedom of expression, the freedom of science and the arts is not limited to only expressing opinions, but also includes the freedom to study, teach, express disseminate and carry out research.

The safeguards for freedom of artistic expression set forth under Article 26 and more particularly under Article 27 of the Constitution provide for the opportunity to impart, disseminate and exchange all kinds of cultural, political and social information and views.<sup>157</sup> As frequently noted by the ECtHR, those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. As such, the State is obliged not to encroach unduly on their freedom of expression.<sup>158</sup>

Article 10, which brings special obligations to state parties with respect to the visual arts also provides strong protection regarding literary works.<sup>159</sup>

Similar to the current situation in Turkey, the 1990s and 2000s also saw the conviction of many people under anti-terrorism legislation with total disregard for the context in which a specific expression took place. When examining the applications regarding these convictions, the ECtHR stated the following on why artistic expression requires stronger protection:

Taken literally, the poems might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers.

In that connection, the Court observes that Article 10 includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds (see, *mutatis mutandis*, the *Müller and Others v. Switzerland* judgment of 24 May 1988, Series A no. 133, p. 19, § 27). Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression (*ibid.*, p. 22, § 33). As to the tone of the poems in the present case – which the Court should not be taken to approve – it must be remembered that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed.<sup>160</sup>

The ECtHR draws attention to the difference between the same content being expressed through poetry and other forms as follows:

The Court observes, however, that the applicant is a private individual who expressed his views through poetry – which by definition is addressed to a very small audience – rather than through the mass media, a fact which limited their potential impact on ‘national security’, ‘[public] order’ and ‘territorial integrity’ to a substantial degree. Thus, even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.<sup>161</sup>

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<sup>157</sup> See, *mutatis mutandis*, *Müller and Others v. Switzerland*, no: 10737/84, 24.5.1988 § 27.

<sup>158</sup> *Müller and Others v. Switzerland*, no: 10737/84, 24.05.1988 § 33

<sup>159</sup> *Jelševar and Others v. Slovenia*, no. 47318/07, 113.2014, para. 33.

<sup>160</sup> *Karataş v. Turkey*, no. 23168/94, 8.7.1999, para. 49.

<sup>161</sup> *Karataş v. Turkey*, no. 23168/94, 8.7.1999, para. 52.

As observed from these words, even a call to violence which could be penalised under normal circumstances is regarded as a legitimate exercise of freedom of expression when conveyed in a literary form.

The ECtHR is of the opinion that a similar exception applies in instances where themes of hatred and violence are conveyed within a novel:

The Court notes that the book contains passages in which graphic details are given of fictional ill-treatment and atrocities committed against villagers, which no doubt creates in the mind of the reader a powerful hostility towards the injustice to which the villagers were subjected in the tale. Taken literally, certain passages might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was a novel, a form of artistic expression that appeals to a relatively narrow public compared to, for example, the mass media.<sup>162</sup>

The Constitutional Court takes in similar considerations with regard to literary forms of expression. For example, in deliberating the application of Fatih Taş, prosecuted Article 7 § 2 of the Anti-Terrorism Law for publishing two poetry books, *Bu Yürek Dağlar Aşar- Gerilla Şiirleri-1* (This Heart Crosses the Mountains: Guerrilla Poetries) and *Dağın Kalbinde Gizliyiz: Gerilla Şiirleri 2* (Hidden in the Mountain: Guerrilla Poetries 2), the Constitutional Court noted that one could not interpret the contents of the poem as 'glorifying violence, encouraging individuals to adopt terrorist methods, or as incitement to violence, hatred, vengeance or armed insurgency'. On the contrary, the Court noted that in the poems shown as grounds for the applicant's conviction, he 'has narrated, in poetic and abstract language, the discomfort felt regarding the imprisonment of the founder and leader of the PKK terrorist organisation, and the grief felt for those who had died in armed conflict; the applicant has said that the people who died in the region described as Kurdistan died in the name of freedom.'<sup>163</sup>

It is also observed that the ECtHR uses a stricter test when the restriction involves satirical works. The Court has noted that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate.<sup>164</sup> Accordingly, any interference with a right to such expression must be examined with particular care<sup>165</sup> and requires very strong reasoning for justifying restrictions.<sup>166</sup>

With respect to scientific works and freedom of expression, different from the ECHR, the Constitution sets forth scientific freedom as a distinct right. However, although the ECHR does not address scientific freedom under a separate article, the ECtHR has defined academic freedom as a separate field and noted that it should be afforded special protection.<sup>167</sup> The Court notes that interferences in academic work and publications should be subject to more careful examination and emphasises the importance of scholarly works.<sup>168</sup>

In this regard, academic freedom in research should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction. It is therefore consistent with the Court's case-law to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings. This freedom, however, is not restricted to academic or scientific research, but also extends to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research,

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<sup>162</sup> *Alınak v. Turkey*, no. 40287/98, 29.3.2005, para. 41.

<sup>163</sup> Application of *Fatih Taş* [GK], B. No: 2013/1461, 12.11.2014, para.106.

<sup>164</sup> *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, 25.1.2007, para. 33. Also see, *Alves Da Silva v. Portugal*, no. 41665/07, 20.10.2009; *Ernst August Von Hannover v. Germany*, no. 53649/09, 19.2.2015.

<sup>165</sup> *Sürek v. Turkey* (1), no. 26682/95, para 61.

<sup>166</sup> *Taranenko v. Russia*, no. 19554/05, 13.10.2014, para. 77.

<sup>167</sup> *Sorguç v. Turkey*, no.17089/03, 23.6.2009, para. 35; *Sapan v. Turkey*, no. 44102/04, 8.6.2010, para. 34.

<sup>168</sup> *Aksu v. Turkey* [BD], nos. 4149/04 and 41029/04, para. 71

professional expertise and competence. This may include an examination of the functioning of public institutions in a given political system, and a criticism thereof.<sup>169</sup> In the light of these views, academic freedom can be regarded as a type of freedom requiring a higher level of scrutiny when an interference is in question.

## A special domain: freedom of political expression

For the purposes of determining the strength of protection it will enjoy, the subject matter of a statement is just as important as the means and method through which it is disseminated. The special protection enjoyed by scientific and artistic expression in terms of method of expression is also observed in political expression due to the subject matter of the domain. In consideration of the element of public interest with regard to free political debate, both the Constitution and the ECHR give special importance to its protection. Indeed, the ECtHR has noted that the freedom to debate on political matters relevant to the public is 'one of the essential foundations of a democratic society'<sup>170</sup> and that discussions and statements on political issues are a matter of public interest.<sup>171</sup> As a natural result of this understanding, the scope and conditions of a legitimate interference in freedom of political expression has been narrowly defined.

Since almost all proceedings against academics and writers examined within the scope of this report arise from their exercising their freedom of political expression, it is important to recall the special emphasis on freedom of political expression.

It has been noted by the Constitutional Court that in cases of interference with freedom of expression and freedom of the press, the grounds and legitimate aims under Articles 13, 26 and 28 of the Constitution must be present, the interference must be in line with the principles of a democratic society and there must be a balance between the aim of the restriction and the method used. Special care must be taken to ensure that the essence of the right is not undermined.<sup>172</sup> According to the Constitutional Court, if the interference damages the essence of the right and freedom or inhibits its enjoyment or makes it exceptionally difficult, or if there is an imbalance between the legitimate aim pursued and the means of restriction violating the principle of proportionality, this would be against the principles of a democratic society.<sup>173</sup>

The principle of a 'democratic society' as set forth under Article 13 of the Constitution and the standard of 'necessity in a democratic society' as set forth under Articles 9, 10 and 11 of the ECHR show how this principle runs parallel in both legal instruments. In this regard, the standard of a democratic society must be interpreted to incorporate pluralism, tolerance and broadmindedness.<sup>174</sup> Accordingly freedom of expression, which is one of the essential foundations of a democratic society 'is applicable not only to 'information' or 'ideas' that are favourably 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'".<sup>175</sup>

One may argue that the government of Turkey is of the same view. In its opinion in the case of *Perinçek v. Switzerland* finalised by the ECtHR's Grand Chamber on 15 October 2015, the government noted that 'Freedom of expression encompassed a degree of provocation. It applied to ideas that shocked and offended and to the form in which they were conveyed, even when it included a virulent style'.<sup>176</sup>

<sup>169</sup> *Mustafa Erdoğan v. Turkey*, no. 346/04, 27.5.2012, para. 40

<sup>170</sup> *Lingens v. Austria*, no. 9815/82, 08.07.1986; AYM, Application of *Ali Rıza Üçer* (2), B.No: 2013/8598, 02.07.2015, para 54.

<sup>171</sup> AYM B.No: 2013/5574, 30.06.2014 §67, *Egeland and Hanseid v. Norway*, no: 34438/04, 16.04.2009, para. 58.

<sup>172</sup> Application of *Emin Aydın*, B.No: 2013/2602, 23.01.2014 §56, Application of *Youtube LLC Corporation Service Company and Others*, B No: 2014/4705, 29/05/2014 §53.

<sup>173</sup> Bkz. AYM, E.2009/59, K.2011/69, K.T. 28/4/2011; AYM, E.2006/142, K.2008/148, K.T. 17/4/2008

<sup>174</sup> Application of *Abdullah Öcalan*, B. No: 2013/409, 25.06.2014, para. 93.

<sup>175</sup> *Handyside v. United Kingdom*, no: 5493/72, 7.12.1976, para. 49

<sup>176</sup> *Perinçek v. Switzerland*, Grand Chamber, no. 27510/08, 15.10.2015, para. 175.

Furthermore, the Constitutional Court has adopted the standards of the ECtHR in its judgment in the case of Abdullah Öcalan, in which it deliberates, with reference to Articles 26 and 28 of the Constitution that 'those exercising public authority have a very narrow margin of appreciation in cases of interference in political speech relevant to public interest or debates on matters of public concern'. On the other hand, although no restriction has been placed on the freedom to express and disseminate ideas or the freedom of the press with respect to content, the Constitutional Court has noted that the State authorities have a wider discretion in their interventions on issues such as racism, hate speech, war propaganda, inciting and encouraging violence, calls to insurgency or the justification of terrorist acts.<sup>177</sup> The Constitutional Court found a violation of the freedom to impart and disseminate ideas and the freedom of press under Articles 26 and 28 of the Constitution in the case of Abdullah Öcalan involving a publication alleging that 'The Turkish State aims to dispose of Kurdishness with its political, military, cultural and ideological policies', describing 'the conflict between the terrorist organisation PKK and the security forces as a 'war of freedom'', and stating that 'the Kurdish question is a complex one and the PKK has also undergone transformations in the process'.

In its judgment, the Constitutional Court also noted that the book in question 'harshly criticises Turkey's Kurdish policy and its actions in the south-east', and 'portrays the Republic of Turkey and the security forces in particular in a bad light'. Nevertheless, the Court noted that the applicant 'demands the recognition of the 'Kurdish reality' and asks for the use of peaceful means instead of resorting to armed conflict.' Hence, according to the Constitutional Court, 'the book should be assessed as a whole to determine whether certain parts include 'a call to violence, 'call to armed resistance' and 'insurgency', whether the statements are of a nature that triggers a deep and unreasonable hostility and causes violence'.<sup>178</sup>

In assessing the book as a whole, the Constitutional Court did not find it to 'glorify violence; or to provoke or encourage people to adopt terrorist methods, i.e. to violence, hatred, revenge or armed resistance, in the 'future process that lays before us' as conceptualised by the applicant.<sup>179</sup>

In the application of Mehmet Ali Aydın,<sup>180</sup> the Constitutional Court examined the arrest of the applicant, the provincial chair of the Diyarbakır branch of the BDP (Peace and Democracy Party) for statements he made during a press conference and the allegations that his freedom of expression, and right to personal freedom and security had been violated due to his trial under Article 7 § 2 of the Anti-Terrorism Law. The proceedings against the applicant were based on a press announcement read by the applicant in which he was accused of glorifying the illegal terrorist organisation PKK and its founder and leader Abdullah Öcalan, glorifying terrorist activities by describing them as a struggle for freedom and assisting the organisation by disseminating terrorist propaganda. According to the Constitutional Court, consideration should be given to the fact that the applicant is the provincial chair of the Diyarbakır branch of the BDP and the subject raised in the press statement are social issues relevant to a segment of the society. On the question of whether there was any propaganda for the PKK terrorist organisation, the Court noted the following: 'Regard must be had to the words used when describing the PKK terrorist organisation and Abdullah Öcalan as well as the context in which they were published, the identity of the speaker, the time and purpose of the words used, the identities of the persons to whom it was addressed, its possible effect and the other statements in the press conference as a whole'.<sup>181</sup>

According to the Constitutional Court, the first instance court had not demonstrated the specific words that were claimed to glorify violence, or how the statements provoked and encouraged people to adopt terrorist methods, i.e. violence, hatred, revenge, or armed resistance. The first instance court had merely decided that the applicant had supported the PKK terrorist organisation and Abdullah Öcalan with his words. Furthermore, the Constitutional Court noted that when the statements of the applicant were examined as a

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<sup>177</sup> Application of *Abdullah Öcalan* [GK], B. No: 2013/409, 25.06.2014, para. 99.

<sup>178</sup> Application of *Abdullah Öcalan*, para. 105.

<sup>179</sup> Application of *Abdullah Öcalan*, para. 108.

<sup>180</sup> Application of *Mehmet Ali Aydın* [GK], B. No: 2013/9343, 4.06.2015.

<sup>181</sup> *Özgür Gündem v. Turkey*, no: 23144/93, 16.3.2000, para. 63; *Sürek v. Turkey*, no: 24762/94, 8.7.1999, para. 12, 58.

whole, they could not be construed to 'glorify violence or terrorist acts, or to provoke or encourage people or groups to adopt terrorist methods, or violence, or to invite them to racism, hatred, revenge or armed resistance'.<sup>182</sup> On the contrary, the Court held that the applicant, in the press statements, criticised the government's policies in addressing the Kurdish question, 'oppose[d] the use of violent methods instead of democratic means, and demand[ed] the lifting of political bans, the cessation of armed conflict and the release of Abdullah Öcalan'.<sup>183</sup>

Thus, according to the unanimous decision of the Plenary Session of the Constitutional Court, 'ideas that are unpalatable for the public authorities or a segment of the society cannot be restricted so long as they do not incite to violence, justify terrorist acts or trigger hostile emotions'.<sup>184</sup>

## Statements associated with terrorism and political expression

Two principal reasons are given for restrictions on political expression. The first is allegations regarding the defamation of political actors. As illustrated in the first chapter, the number of criminal investigations and prosecutions launched for insulting the head of state in Turkey is unprecedented in any modern democracy. The second reason is an argument more prevalent in proceedings against writers and academics. According to this argument, the expression that is subject to interference is not political, artistic or scientific in nature; rather, such statements are penalised because they support terrorism or because those who make these statements are themselves members of terrorist organisations.

As a result, it is especially important to establish a correct framework regarding the link between political expression and violence as used by the government of Turkey. One of the most fundamental questions in Constitutional and international human rights case-law regarding freedom of expression is how to assess the link between freedom of expression and violence. This debate has a history of nearly a hundred years in US Constitutional law and decades in ECHR law. The purpose of these two mechanisms and other constitutional and international review systems is, in essence, quite simple. However, fulfilling this purpose is challenging due to the diversity of expressions and their medium. The challenge has become even more pronounced due to the fact that the problem mostly arises in relation to the concept of 'terrorism', which lacks an international definition. In addition, new means for expression brought about by technological advancements have had a significant effect on violence-related issues, while sensitivities have increased following the attacks of 11 September 2001 in New York and 7 July 2005 in London.

The simple equation we have presented above can be explained as follows:

The purpose of anti-terrorism regulations is to maintain public order by means of preventing possible acts of violence; however the restrictions introduced for this purpose have an extremely high potential of violating freedom of political speech, which should be afforded the widest protection.

This is because offences categorised as terrorism are often directly linked to political demands. Hence, the problem should be viewed not as one of making a political demand, but as resorting to violence and threats to have those demands met. It is also the case that in each instance where violence is used to pursue a political aim, there are other groups who advocate the same political aim through peaceful means. Moreover, in most cases, there will inevitably be some communication between those groups who accept violence as a legitimate means and those groups who don't in pursuing the same political demands.

The employment of violence by some groups to achieve an aim does not justify the restriction of legitimate demands. One of the most frequently voiced legitimate demands in these instances is the cessation of State violence. Those who believe that State violence can only be resisted through further violence can still

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<sup>182</sup> Application of Mehmet Ali Aydın, para 82.

<sup>183</sup> Application of Mehmet Ali Aydın, para. 83.

<sup>184</sup> Application of Mehmet Ali Aydın [GK], B. No: 2013/9343, 4.06.2015, para. 84.

criticise the former in an effort to legitimise their own views. However, this certainly does not mean that everyone who criticises State violence or methods of combating terrorism is disseminating terrorist propaganda. Since political criticism in general and criticism of the State in particular should be afforded the widest protection under freedom of expression, a distinction must be made between political expression and statements that encourage violence.<sup>185</sup>

A legal system based on the standards of international human rights instruments must refrain from violating the obligation to give the widest freedom to political expression while preventing calls to violence that would disturb public order. Various legal systems have developed interpretation methodologies to serve this purpose. Disregarding all such criteria and restricting freedom of expression solely because the demands voiced are the same as those expressed by a terrorist organisation would not be in line with the ECHR's principles, other human rights instruments or the Constitution.

The following discussion is not an assessment from the perspective of criminal law, but from that of human rights law and is therefore not based on any current provision in the Turkish legal system. Nevertheless, it should be read as a general assessment to be applied to all relevant provisions. As explained in the following pages, whether an interference in freedom of expression is based on Articles 215, 216, 220, 314 or 301 of the Turkish Penal Code or Article 7 of the Anti-Terrorism Law is of no consequence. Similarly, disciplinary proceedings that ignore the criteria for freedom of expression, as discussed here, must be deemed to be null and void since they violate a fundamental rule of human rights guaranteed at the Constitutional level.

## The scope of speech associated with terrorism

The categorisation of statements associated with terrorism as an offence is based on the argument that it is not the statement itself but the effect that it causes which must be prohibited. Since the restriction of speech is problematic, it is necessary to determine the conditions under which a statement associated with terrorism can be restricted.

Firstly, one should determine what the word 'associated' implies, because a statement condemning terrorism is surely also associated with terrorism. In this instance, the word 'associated' suggests that the statement should be one that endorses acts of terrorism or their purpose, since these are the kinds of expressions that are set forth as crimes. However, since this interpretation is extremely wide, restrictions of statements that fall under this category are also an exception. Acts described as terrorism are often the means to achieve a political aim. It is not the political aim sought or the act of defending that particular political aim that is prohibited but rather the use of violence and threats to achieve said aim. Different from hate speech, speech associated with terrorism is criminalised not because of its content but because of the causal link it has with damage. For example, demanding Federalism, for instance, would not amount to a criminal act, whereas using violence to achieve that end would. In this case, in order for speech 'associated' with terrorism to be criminalised, it does not suffice to demand Federalism. One must establish a causal link between an act of violence and the speech in order to impose a punishment.

Such an assessment requires considering two separate elements:

- a. **The Causality Link:** The question of whether the link with the act is direct or indirect.
- b. **The Temporal Connection:** The question of whether the statement came before (ex ante) or after (ex post) the act.

The criteria concern the degree to which the speech caused the act, as well as the timing of the speech. In order to understand the link between any statement and an act of violence, an assessment must be made of these two elements.

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<sup>185</sup> C. Walker (2002), *Blackstone's Guide to Anti-Terrorism Legislation* (Blackstone, London), pp. 18-19.



Uttering statements in a way that would give rise to the commission of a crime would generally be regarded as complicity in criminal law systems and its penalisation would not pose a serious legal problem even in the absence of a separate legal regulation. Direct incitement to commit a crime is described as desiring and motivating a person to commit a certain criminal act and is against the law in many countries. On the other hand, indirect incitement to crime is not criminalised in many legal systems.<sup>186</sup>

Two fundamental problems arise in the case of terrorism-related offences: general statements which are not associated with a concrete criminal act; and statements that indirectly incite terrorism. In both cases, in order for criminal sanctions imposed on such statements not to violate freedom of expression, a link must be established with a violent act. Since terrorist propaganda and incitement to terrorism are regarded as criminal endangerment crimes, they need not give rise to damage for there to be a link with violence; it would suffice for such acts to be of a nature that could incite or encourage any likely violent conduct in the future. This would mean that a test to be conducted in terms of freedom of expression would be one to determine the proximity between the statement and the act. States do not have unlimited discretion in regulating and setting forth this matter within the scope of criminal law: the limits are drawn by human rights conventions and the case-law of the bodies interpreting them.

### The problem of restricting artistic, scientific and political expression

In Turkey, restrictions brought by the criminal law in terms of the link between expression and violence tend to differ depending on time and context. Depending on the place and time a statement was expressed, it may either be protected under freedom of expression or be subject to criminal proceedings on grounds of terrorist propaganda under the Anti-Terrorism Law, membership to a terrorist organisation or committing crimes in the name of a terrorist organisation despite not being a member or even armed insurgency against the government under the Criminal Code. Such differences can be clearly observed when one compares the period marked by the Kurdish Peace Process and the State of Emergency after the failed coup of 15 July 2016. These varying approaches to freedom of expression are also reflected in criminal statistics.<sup>187</sup>

Moreover, such arbitrary restrictions are based not on the date on which the statements were actually made but on the date when the criminal investigation was launched. In other words, there is no guarantee that a statement made at a time marked by a relatively free environment will not be subject to criminal investigation at a later time marked by repression. Indeed, the tweets published by Atilla Taş in February 2011 were used as grounds for his detention five and a half years later in August 2016 and later produced as evidence in his prosecution for membership to an illegal organisation and even for attempting to carry out a coup against the state. When legal provisions are left to the arbitrary interpretation of judges and prosecutors, lack of legal foreseeability becomes inevitable.

The problem in Turkey not only concerns where the line between freedom of expression and the crime of terrorist propaganda is drawn, but the line between freedom of expression and criminal acts in general. When freedom of expression is restricted in many other countries, one expects to see statements that glorify terrorism or engage in terrorist propaganda. In Turkey, however, statements that are not protected by freedom of expression can be categorised as more serious crimes requiring tens of years of imprisonment. For this reason, an examination of freedom of expression should focus not on the equation of freedom of expression and propaganda but rather on the equation of freedom of expression and criminal acts in general.

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<sup>186</sup> Explanatory Report on the Council of Europe's Convention on the Prevention of Terrorism, para. 97.

<sup>187</sup> See statistics in Chapters 1 and 2 of this report.

It is clear that restrictions brought to freedom of expression under criminal law must not violate international human rights law. The Council of Europe Convention on the Prevention of Terrorism<sup>188</sup>, to which Turkey is a party, gives member states a wider margin of appreciation but also stipulates the limits based on human rights law:

1. Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.
2. The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.<sup>189</sup>

Thus, even if proscription of propaganda activities can be viewed as legitimate for purposes of combating terrorism, it is clear that arbitrary, discriminatory, racist and disproportionate restrictions are a violation of international law.

## The Causality Link

In determining causality, speech that directly prompts an individual to engage in violence is not the main element to be examined. This would amount to direct incitement, which is prohibited in the Turkish legal system as in many others. The question is, rather, whether speech described as indirect incitement can be penalised. This calls for an examination of the strict test developed by the US Supreme Court and the more flexible test developed by the ECtHR, which grants higher discretion to State Parties. The case-law of the Court of Cassation and the Constitutional Court observes the ECtHR's test more closely. Nevertheless, since some provisions in national legislation refer to the criteria adopted by the US Supreme Court and because the two tests yield the same result in many cases, the US Supreme Court test also deserves a close examination. It can be said with certainty that in cases where both tests find a restriction to be illegitimate, there would be violation of international standards and the Constitution.

## The Clear and Present Danger test

The 'clear and present danger' test was first adopted by the US Supreme Court and is the more rigorous of the two tests used to delineate the connection between violence and speech. Needless to say, the tribunals of a foreign country cannot be directly taken as a reference point in criminal law. However, one may argue that the law-maker in Turkey has opted for this test since the standard it brings has been inscribed in a number of provisions in Turkish law. An examination of this test is important not only because it is an alternative to the ECtHR test, but also because of its influence in Turkish and ECHR law.

The 'clear and present danger' test appears in three separate provisions in Turkish law. The standard was first incorporated into Turkish law under Article 6 of Law No. 4748 which introduced an amendment to Article 17 of Law No. 2911.<sup>190</sup> Articles 215<sup>191</sup> and 216<sup>192</sup> of the Turkish Penal Code count 'clear and present

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<sup>188</sup> OG: 13/1/2012, S. 28172.

<sup>189</sup> The introduction section states that the Convention is not intended to affect established principles relating to freedom of expression and freedom of association.

<sup>190</sup> 'The regional governor, governor or district governor may postpone a specific meeting for a period of not more than one month for reasons of national security, public order, prevention of crime, general health and general morals or for the protection of the rights and freedoms of others, or may ban the meeting if there is a **clear and present danger** that a crime will be committed.'

<sup>191</sup> Article 215 of the Turkish Penal Code (as amended by Article 10 of Law No.6459): 'Any person who publicly praises an offence or a person on account of an offence he has committed shall be sentenced to a penalty of imprisonment for a term of up to two years if such praise creates a clear and present danger to public order.'

danger' as a constituent element in determining whether speech can be criminalised. The amendments in national legislation were introduced for compliance with the case-law of the ECtHR.<sup>193</sup>

The 'clear and present danger' standard is not only inscribed in provisions of law but also mentioned in judgments in which there is a discussion of the connection between speech and violence. The Court of Cassation requires the application of the 'clear and present danger' test in crimes of terrorist propaganda:

Regardless of whether the expressions take place in rallies and demonstration marches, an assessment should be made to determine whether the message delivered in print or oral speech (chants, banners or uniforms) is a call, incitement or encouragement to violence, armed resistance or insurgency, or if it is hate speech provoking an atmosphere conducive to violence by creating meaningless hostility and aggressive emotions; in cases where there is a direct or indirect call to violence the speech should be subject to a **test of clear and present danger** in view of the identity and position of the accused and the place and time of speech."<sup>194</sup>

The doctrine of clear and present danger has a history of almost a century. Over the years, it has deviated from the original standard.<sup>195</sup> Whereas in its original version, the test took as its basis the consequences that speech would lead to, in its final form, ever since the *Brandenburg v. Ohio*<sup>196</sup> decision of the Supreme Court, a three-pronged test is applied to determine both the nature of the content and its probable consequences.<sup>197</sup> The *Brandenburg* case employed a cumulative test requiring an examination to determine the existence of both elements. The famous principle adopted in the *Brandenburg* judgment is as follows:

The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>198</sup>

As understood from this statement, after 1974 the 'clear and present danger' test was fashioned in such a way as to ensure that advocating the use of force was not seen as an act to be penalised. The only exception to this is knowingly offering material support, help or resources to foreign terrorist organisations such as the PKK and others. In these cases, penalisation is regarded as a 'precautionary measure' against terrorist attacks and one which prohibits the act of giving foreign terrorist groups material support.<sup>199</sup>

The three-pronged *Brandenburg* test requires that:

- a) the speech must intend to incite imminent lawless action
- b) in context, the words used should be likely to produce imminent lawless action
- c) the words used by the speaker must objectively encourage incitement.

<sup>192</sup> Article 216 § 1 of the Turkish Penal Code: 'A person who publicly provokes hatred or hostility in one section of the public against another based on social class, race, religion, sect or regional differences, thereby posing a clear and present danger to public security, shall be sentenced to imprisonment for a term of one to three years.'

<sup>193</sup> See, 'İnsan Hakları ve İfade Özgürlüğü Bağlamında Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Tasarısı Gerekçesi', <http://www.tbmm.gov.tr/d24/1/1-0748.pdf>.

<sup>194</sup> Court of Cassation: 16 CD., E: 2015/2742, K: 2015/2316, T: 17.7.2015; Yargıtay 16 CD., E: 2015/1843, K: 2015/3918, T: 10.11.2015; Yargıtay 16 CD., E: 2015/3635, K: 2015/4310, T: 23.11.2015; Yargıtay 16 CD., E: 2015/2032, K: 2015/4019, T: 5.11.2015; Yargıtay Ceza GK, E: 2007/244, K: 2008/92, T: 29.4.2008; Yargıtay 8. CD, E: 2014/35434, K: 2015/22535, T: 12.10.2015, Yargıtay 16. CD., 2017/1383 E., 017/4393 K. 31.05.2017, Yargıtay 16. CD., 2017/1334 E., 2017/4470 K., 15.06.2017.

<sup>195</sup> There is a wealth of academic literature on the subject. For some examples see: G. Edward White (1996) 'The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America', 95 Michigan Law Review 299; Martin H. Redish (1982), 'Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger' 70 California Law Review 1159.

<sup>196</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>197</sup> For examples from practice, see, *Hess v. Indiana*, 414 U.S. 105 (1973), *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

<sup>198</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969), s. 447.

<sup>199</sup> *Holder, Attorney General, Et Al. v. Humanitarian Law Project Et Al.*, 561 U.S. 1 (2010), 130 S.Ct. 2705.

The test considers two elements, namely 'incitement' and 'producing imminent lawless action'. Although indirect speech can be prohibited with respect to the second element, it would be extremely difficult to prove this using the Brandenburg test.

### The ECtHR's multi-pronged incitement test

The ECtHR opts for a more complex test compared to the clear and present danger standard used by the US Supreme Court. The test takes into account the varying needs of different legal systems and grants a margin of appreciation to both the ECtHR and the State Parties. Although there are arguments that this approach leads to uncertainty, it would be safe to say that in most cases the ECtHR's balancing test yields similar results.

The ECtHR's 1999 judgments in cases against Turkey and its subsequent case-law, where a balancing test is applied to determine the connection between speech and violence, take into consideration the person making the speech and the medium used. This balancing approach requires a three-pronged cumulative test based on the idea that the individual 'cannot be said to incite violence or construed as inciting violence'.<sup>200</sup>

- i. Does the assessment take into consideration who the expression is uttered by, on what subject and through which means?
- ii. Is there incitement to violence?
- iii. Is it likely that the speech will cause violence?

In other words, in order for speech to be lawfully restricted under the Convention, it must be an incitement to violence and there must be a likelihood of violence occurring as a result of such incitement. The ECtHR examines a set of factors to determine whether these two conditions are met.

## Incitement to violence

### Direct Incitement

#### Speech alone is not sufficient for incitement

Although cases brought against Turkey at the ECtHR concerning the violation of Article 10 are based on different criminal provisions, they are similar in that they all involve statements that disturb the State and the society at large, mostly criticising the government's anti-terrorism practices and its policies regarding the Kurdish issue.

In such cases, the ECtHR finds that it is not acceptable to impose criminal sanctions based solely on the statement itself. In numerous judgments issued after 2005, the ECtHR has repeatedly found violations and made reference to its earlier judgments without the need for any additional in-depth examination in cases where national courts have issued decisions of imprisonment in the absence of any examination, solely because the statements in question were unfavourable and amounted to propaganda and incitement to hostility and hatred.<sup>201</sup>

Needless to say, one must first examine the statement itself to determine whether it is of a nature that incites violence. However, the mere fact that an expression is harsh and critical of the government and even one-sided does not necessarily mean that it amounts to incitement. In this regard, the ECtHR has found various statements to fall within the acceptable limits of freedom of expression including on issues including Kurdistan having been annexed as a colony by the Turkish State; the portrayal of the Turkish State

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<sup>200</sup> David G. Barnum, 'Indirect incitement and freedom of speech in Anglo-American law', 3 E.H.R.L.R. 258, 269.

<sup>201</sup> Judgments in this category are still subject to supervision by the Committee of Ministers in the group of cases titled *Gözel and Özer v. Turkey* and *Incal v. Turkey*. A list of over 100 judgments can be accessed here: <https://tinyurl.com/y89epcd6>

as an oppressor of 'Kurdistan' in 'political, military, cultural [and] ideological' terms; the 'racist policy of denial' *vis-à-vis* the Kurds being instrumental in the development of the 'fascist movement';<sup>202</sup> the romanticising of the aims of the Kurdish movement by saying that 'it is time to settle accounts'; referring to the Republic of Turkey as a 'terrorist state';<sup>203</sup> the condemning of the 'military action' of the State which includes the State's 'dirty war against the guerrillas' and the 'open war against the Kurdish people';<sup>204</sup> 'describing events as genocide';<sup>205</sup> claiming that the State is engaging in 'massacre' or defining the conflict as 'a war'.<sup>206</sup>

In Turkey, those who are critical of the Turkish State are often condemned because they do not equally criticise terrorist organisations and hence fail to fulfil their moral responsibilities. Although there is no rule requiring individuals to condemn terrorist organisations in Turkish law, if a person criticising state violence does not equally condemn terrorist organisations this is often interpreted as a support to terrorist organisations by the Turkish legal authorities. However, according to the ECtHR, although criticism directed at both sides would indicate that the statements do not constitute incitement, the one-sided nature of the expression is not sufficient reason to justify its incrimination. On the contrary, national authorities have an obligation to give sufficient weight to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them.<sup>207</sup> In its recent judgment in the case of *Yavuz and Yaylali*, the ECtHR pointed out that the fact that information is one-sided is not sufficient reason on its own for limiting freedom of expression.<sup>208</sup> Similarly, the Constitutional Court has adopted the opinions in the ECtHR judgments in its decision in the case concerning Abdullah Öcalan's book *Kurdistan Revolution Manifesto, The Kurdish Question and the Solution of a Democratic Nation* (Defending the Kurds in the Tongs of Cultural Genocide). The Constitutional Court noted that, under Articles 26 and 28 of the Constitution, 'bodies exercising public authority have a very narrow margin of appreciation in restricting political speech of public interest or debates on social issues'.

### The tone and veracity of the statement

The fact that a statement is biased, resorts to hyperbole and distorts the truth, is provocative, or is voiced as an insult against the State are not sufficient grounds on their own to criminalise speech.<sup>209</sup> In cases where views are expressed in an unbiased manner, criticise both sides and reflect the truth, one cannot speak of any incitement whatsoever. The same applies to statements that call for peace and equality.

In the case of Abdullah Aydın, the applicant was sentenced to imprisonment on grounds that he had not condemned and criticised the actions of the PKK despite having made a call for 'peace, equality and freedom'. The ECtHR was of the opinion that this was not sufficient grounds to restrict freedom of expression.<sup>210</sup> In the case of the DTP (Democratic Society Party), the ECtHR found it unfortunate that no weight had been given to the peaceful aims expressed by the co-presidents of the party with their words: 'We defend the view that violence is not a solution. Weapons must be silenced and the PKK must abandon arms (...) In the first quarter of the 21st century, we have reached the end of armed struggle!' (A. Tuğluk) and 'We absolutely do not advocate the use of arms' (E. Ayna)".<sup>211</sup>

Since uncovering the truth is of utmost importance with respect to crimes allegedly committed by the State, statements that explain the truth and contribute to uncovering it should be more carefully considered.

<sup>202</sup> *Başkaya and Okçuoğlu*, nos. 23536/94 24408/94, 08.07.1999, para. 64.

<sup>203</sup> *Sürek (no. 4)*, no. 24762/94, 08.07.1999, para. 56.

<sup>204</sup> *Erdoğdu v. Turkey*, no. 25723/94, 15.06.2000, para. 62.

<sup>205</sup> *Şener v. Turkey*, no. 26680/95, 18.07.2000, para. 44.

<sup>206</sup> *Karkın v. Turkey*, no. 43928/98, 23.09.2003.

<sup>207</sup> *Şener v. Turkey*, no. 26680/95, 18.07.2000, para. 45.

<sup>208</sup> *Yavuz and Yaylali v. Turkey*, no. 12606/11, 17.12.2013, para. 51; *Güler and Uğur v. Turkey*, no. 31706/10, 2.12.2014, para. 52. Similarly see: *Yağmurdereli v. Turkey*, no. 29590/96, 04.06.2002, para. 52.

<sup>209</sup> *Özgür Gündem v. Turkey*, no. 23144/93, 16.03.2000, para. 60.

<sup>210</sup> *Abdullah Aydın v. Turkey*, No. 42435/98, 9/3/2004, para. 33.

<sup>211</sup> *Demokratik Toplum Partisi and Others Diğerleri v. Turkey*, no. 3840/10, 12.01.2016, para. 77.

## Indirect incitement

The common argument in terrorism-related investigations in Turkey is that the main purpose of those who criticise the State is to support the terrorist organisation, and that even if the name of the organisation is not explicitly stated or openly supported, the intention is to offer indirect support, which is the reason why statements to this end must be punished. However, the Report of the UN Security Council shows a special effort to keep indirect incitement outside the scope of legitimate restrictions.<sup>212</sup> The introductory part of the UN Security Council Resolution only renounces speech that would incite the recurrence of the violent act in the future. However, the situation is different from the perspective of the Council of Europe and the European Union<sup>213</sup> A study conducted by the Council of Europe at the preparation stage of the Convention on the Prevention of Terrorism showed that indirect incitement was not regulated as an offence in Council of Europe member states with the exception of three countries and recommended the criminalisation of indirect incitement with a view that this created a loophole.<sup>214</sup> The Convention was thus drafted to include the concepts of both direct and indirect incitement.<sup>215</sup>

According to Article 5 of the Convention entitled 'Public provocation to commit a terrorist offence':

For the purposes of this Convention, 'public provocation to commit a terrorist offence' means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

The Committee of Experts on Terrorism, when drafting this provision, took into consideration the views of the Parliamentary Assembly of the Council of Europe<sup>216</sup> and the Council of Europe Commissioner for Human Rights.<sup>217</sup> The Commissioner has stated in his report that the provision covers 'conduct, such as the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour, that could constitute indirect provocation to terrorist violence.'

The provision is important in that while it aims to prohibit indirect encouragement of terrorist activity, it tries to set forth an obligation compliant with the case-law of the ECtHR. As observed, the provision brings together the three conditions which must cumulatively be met:<sup>218</sup>

- i. The message must directly or indirectly advocate terrorist offences,
- ii. The message must cause a danger that one or more such offences may be committed,
- iii. The person must disseminate the message with the intent to incite the commission of a terrorist offence.

The ECtHR does not make a clear distinction between direct and indirect incitement.<sup>219</sup> However, it is extremely difficult to fulfil the conditions of the test applied by the Court in cases where the statement does not openly provoke violence. Furthermore, in cases where the accused is alleged to have intentions

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<sup>212</sup> For the report of the UN Secretary General See: Report on the protection of human rights and fundamental freedoms while countering terrorism, 28.08.2008, UN Doc. A/63/337, [http://www.securitycouncilreport.org/atf/cf/{65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9}/Terrorism\\_A\\_63\\_337.pdf](http://www.securitycouncilreport.org/atf/cf/{65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9}/Terrorism_A_63_337.pdf).

<sup>213</sup> Framework Decision on Combating Terrorism, EU Council Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA combating terrorism, Official Journal of the European Communities (OJ) L 330/21, 9 December 2008.

<sup>214</sup> Olivier Ribbelink (2004), 'Apologie du terrorisme' and 'incitement to terrorism' (Council of Europe Publishing, Strasbourg), 44-45.

<sup>215</sup> For discussions in all three organisations, see: Yael Ronen (2010), 'Incitement to Terrorist Acts and International Law', 23 Leiden Journal of International Law 645, 664 vd.

<sup>216</sup> Opinion no. 255 (2005), paragraph 3 vii and ff.

<sup>217</sup> Opinion of the Commissioner for Human Rights, Alvaro Gil-Robles on the Draft Convention on the Prevention of Terrorism, BcommDH (2005) 1, 02/02/2005, p 30, <https://rm.coe.int/16806da622>.

<sup>218</sup> David G. Barnum, 'Indirect incitement and freedom of speech in Anglo-American law', 3 E.H.R.L.R. 258, 261.

<sup>219</sup> Howard Davis, 'Lessons from Turkey: Anti-Terrorism Legislation and the Protection of Free Speech' [2005] E.H.R.L.R. 75.



different from those they publicly display, the authorities have an obligation to present concrete evidence that this is the case<sup>220</sup>: merely arguing that the terrorist organisation also voices similar views does not count as concrete evidence. Hence, as noted by the Constitutional Court, and to be further elaborated below 'restrictions cannot be imposed on ideas that are unfavourable to public authorities or a segment of the society if such ideas do not encourage violence, justify terrorist acts and trigger hatred.'<sup>221</sup>

### Likelihood of the statement to cause violence

In the case-law of the ECtHR, a measurement of the likely danger created by the statement does not play as significant a role as in the jurisprudence of the US Supreme Court. Instead, the analysis is largely based on whether incitement is involved. In its semi-pilot judgment in the case of *Gözel and Özer v. Turkey*, the ECtHR summarises a basic formula which clearly shows that the probability of the statement to cause violence must be considered when determining incitement: 'A statement cannot be proscribed only because it is a statement made by or about a terrorist organisation if it does not incite violence, justify terrorist acts to facilitate the aims of its supporters and cannot be construed to encourage violence based on a deep and unreasonable hatred towards certain people.'<sup>222</sup>

Although the ECtHR has only recently started to explicitly use the phrase 'clear and present danger' as adopted by the US Supreme Court, one can easily infer from both a range of judgments that the Court requires danger to be present in order to justify interference. For example, in its judgment in the case of *Erdoğdu v. Turkey*, the Court was not convinced by the argument that the publication could, in the long term, result in consequences that would prove harmful in terms of the prevention of disorder and crime in south-east Turkey, nor that young people would be incited by the publication 'to join the ranks of the PKK against their better judgment', as the government maintains.<sup>223</sup> In the case of *Gül and Others v. Turkey*, 'the Court observes that, taken literally, some of the slogans shouted (such as 'Political power grows out of the barrel of the gun', 'It is the barrel of the gun that will call into account') had a violent tone. Nevertheless, bearing in mind the fact that these are well-known leftist slogans and that they were shouted during lawful demonstrations – thus limiting their potential impact on 'national security' and 'public order' – they cannot be interpreted as a call for violence or an uprising.'<sup>224</sup> In the case of *Yağmurdereli*,<sup>225</sup> the fact that the harsh statements made by the applicant were uttered in Istanbul, hundreds of kilometres away from the area of conflict, played an important role in the Court's finding that there had been a violation of the applicant's right to freedom of expression.

The flexible test applied by the ECtHR requires consideration of various different factors. Yet, in its essence, it yields the same results as the 'clear and present danger' standard by taking into account 'incitement to violence' and the 'potential of such incitement to cause violence'.

### The lack of foreseeability in the judicial system and freedom of expression

Although every case requires a new interpretation, international human rights law has always developed considerably foreseeable and clear standards regarding terrorism, politics and freedom of expression. Turkey is a long-standing party to the ECHR and has been open to the supervision of its protection mechanism for 27 years. The reason behind the continual penalisation of writers, academics, artists and

<sup>220</sup> *Yağmurdereli v. Turkey*, no. 29590/96, 04.06.2002, para. 53.

<sup>221</sup> Application of *Mehmet Ali Aydın*, [GK], B. No: 2013/9343, 4.06.2015, para. 84.

<sup>222</sup> Altıparmak, Kerem and Hüsnü Öndül (2013), Monitoring Report on the Execution of the Judgment in the case of *Gözel and Özer v. Turkey*, İHOP, 2013, 6. See also: *Süreç v. Turkey (no. 1)*; *Gözel and Özer v. Turkey*, no. 43453/04 ve 31098/05, 06.07.2010; *Faruk Temel v. Turkey*, no. 16853/05, 01.02.2011; *Öner and Türk v. Turkey*, no. 51962/12, 31.03.2015; *Gül and Others v. Turkey*, no. 4870/02, 08.06.2010, para. 41-45.

<sup>223</sup> *Erdoğdu v. Turkey*, no. 25723/94, 15.06.2000, para. 69.

<sup>224</sup> *Gül and Others v. Turkey*, no. 4870/02, 08.06.2010, para. 41. Similarly, see *Kılıç and Eren v. Turkey*, no. 43807/07, 29.11.2011, para. 28.

<sup>225</sup> *Yağmurdereli v. Turkey*, no. 29590/96, 04.06.2002, para. 54.

intellectuals by the judicial system despite these clear standards is not the lack of knowledge on the part of judicial authorities regarding these criteria.

Indeed, depending on political conjuncture, there have been times when the Turkish judiciary has produced case law that is very much in alignment with these standards. It was the Constitutional Court of Turkey which found Abdullah Öcalan's book to fall within the protection afforded by freedom of expression. However, the problem of freedom of expression and rule of law in Turkey emerges as a structural and systemic problem. As such, when conditions change, words that were uttered only a few years earlier can result in the application of the current oppressive standards rather than the standards of the time.

The cases and criminal investigations against writers and academics examined within the scope of this report are overwhelmingly marked by a lack of foreseeability. There are thousands of instances where expressions that have nothing to do with calls to violence or hate lead to grave criminal investigations. In almost all instances, the international and national criteria for freedom of expression explained in this chapter are entirely disregarded.

It has not been possible to find solutions to such structural problems through individual applications to the ECtHR. Of the tens of thousands of cases involving freedom of expression, as shown by the statistical data, a couple of dozen judgments on freedom of expression issued each year by the ECtHR have no effect on government practices..

For this reason, unless mechanisms are developed and used to address the lack of political will which is the main obstacle in effectively applying the standards of freedom of expression, it will not be possible to solve the structural problems and create a free legal system for writers in Turkey.

# AFTERWORD

This report presented an overview of the state of freedom of expression in Turkey in addition to an evaluation of rights violations affecting authors, publishers, academics and the academia, especially after the failed coup of 15 July 2016. The bleak picture that emerges from the findings, the statistical data, the case studies and evaluation reveals that violations of freedom of expression with respect to writers, publishers and academics closely resemble the pattern of restrictions brought to print and broadcast media as well as the internet. The widespread and systematic 'silencing policy' of the government, and its subsequent chilling effect, is also applied systematically in the case of writers, publishers and academics. Moreover, writers and academics who publicly express their views on various issues as required by their profession and their social role have become more noticeable targets under the State of Emergency.

It is evident that almost all of the 80 writers evaluated within the scope of this report have been associated with crimes of terrorism due to their political and oppositional views. Similarly, it is clear that an attempt is being made to portray as terrorist criminals the 2,212 academics who signed the Declaration of Academics for Peace which called for an immediate end to the violence inflicted by the State on its citizens. Even if such a text disturbs the government and includes harsh criticism, it should be regarded as an inevitable, even indispensable aspect of a pluralistic democracy.

As the ECtHR has noted in its judgment in the case of *Castells v. Spain*, national courts should refrain from punishing criticism against state authorities because the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician.<sup>226</sup> According to the ECtHR, where the views expressed do not comprise an incitement to violence protection of territorial integrity or public order cannot be used as justification to restrict the right of the general public to be informed of them.<sup>227</sup> Hence, both the text of the declaration of Academics for Peace and the content published by the authors evaluated in this report should be accepted as harsh criticism levelled at the state.

The crisis of freedom of expression, which emerges as a part of the silencing policy in Turkey, is closely intertwined with the crisis faced by the judiciary. Although this crisis manifests in a multitude of ways, it primarily arises from the complete erosion of the rule of law. The judges and prosecutors removed from office by the High Council of Judges and Prosecutors because of their decision to release some journalists, the courts that refused to release applicants by not executing the judgments of the Constitutional Court (for example in the case of Şahin Alpay<sup>228</sup> and Mehmet Altan<sup>229</sup>), and the prosecutors who launch criminal investigations based on every single claim of 'defaming the President' are all manifestations of this problem. The Turkish judiciary, alleged by the government to be 'independent', is also one of the principal actors in violations of freedom of expression against writers, publishers and academics. Hence, the crisis of freedom of expression in Turkey has become directly linked to the crisis of the rule of law and the Constitutional crisis which began with the refusal of courts to execute the judgments of the Constitutional Courts. The solution to the problem cannot be achieved through these individual cases alone: the structural crisis needs to be overcome. However, such a solution is highly unlikely in an environment where the State of Emergency is repeatedly and automatically extended.

<sup>226</sup> *Castells v. Spain*, no. 11798/85, 23.04.1992, para. 46; *Dmitriyevskiy v. Russia*, no. 42168/06, 03.10.2017, para 96.

<sup>227</sup> *Dmitriyevskiy v. Russia*, no. 42168/06, 03.10.2017, para 100; *Fatullayev v. Azerbaijan* no. 40984/07, 22.04.2010, para 116.

<sup>228</sup> Application of Şahin Alpay, [GK B.No: 2016/16092, 11.01.2018.

<sup>229</sup> Application of Mehmet Hasan Altan, [GK] B.No: 2016/23672, 11.01.2018.