



Media and Law Studies Association
Medya ve Hukuk alıřmaları Derneđi

Stakeholder

Report

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*Media and Law Studies Association (MLSA)
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I. Introduction

1. This submission is a stakeholder contribution to the third cycle of the Universal Periodic Review (UPR) mechanism for Turkey. The Media and Law Studies Association (MLSA) appreciates the opportunity of participating in this cycle and recognises the important human rights issues being raised by other stakeholder reports. This submission is limited to addressing the growing concerns regarding violations of freedom of expression, freedom of the press, and the right to a fair trial in Turkey, and their interconnection with other human rights violations. It draws extensively on the Justice Monitoring Report¹ prepared by MLSA and Friedrich Naumann Foundation for Freedom with data gathered between June - December 2018, and a second one prepared by MLSA in collaboration with the International Press Institute (IPI) with data collected between February - May 2019. MLSA is a Turkish non-profit organisation (registered as Medya ve Hukuk Çalışmaları Derneği) founded in December 2017 to respond to an urgent and growing need for a return to democracy and normalization in Turkey². Its main goals are to offer legal protection to journalists penalised for expressing their thoughts, promoting the public's right to information in particular by supporting good financial and scientific journalism, and promoting the rights of minority groups, with a concentration on refugees and the LGBTI community.
2. Although the State of Emergency was lifted on 18 July 2018, the judiciary and police system in Turkey has continued since that date to apply repressive measures in many cases violating individuals' fundamental rights and freedoms. Moreover, the independence of the judiciary remains an issue. Prior to the attempted coup of July 15, 2016, there were 33 journalists in prison. At the time of writing, there are 137. Hundreds of politicians, over 570 lawyers and 3000 judges and prosecutors were arrested after the coup attempt because of their occupational activities. There is significant anecdotal evidence that trials linked to the exercise of the right of freedom of expression by defendants do not meet the standards of the right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights (ECHR), however little systematic data collection has been undertaken.
3. Among this data is the systematic trial monitoring data collected by MLSA between June and December 2018, then between February and May 2019. During the first period 82 court hearings were observed, during the second 86. The trial monitoring form was based on the trial monitoring reference material published by the Organisation for Security and Co-operation in Europe (OSCE)³ and participants in the project were trained by two experts from the UK Bar's Human Rights Committee (BHRC).
4. Turkey has received multiple recommendations by various States during the 2015 UPR

¹ <https://www.mlsaturkey.com/wp-content/uploads/2019/01/justice-monitoring-report.pdf>

² <https://www.mlsaturkey.com/en/home/>

³ <https://www.osce.org/odihr/94216>

review session concerning its justice system and the effectiveness of the right to freedom of expression. Although most of these recommendations appear as supported on the UPR database, the 2016 coup attempt was a turning point in the Turkish State's approach to human rights, as evidenced by the numbers given above, and there has been no UPR since then to record the dramatic developments that aimed to oppress freedom of press and expression through the media crackdown that took place following the coup attempt.

5. The right to freedom of expression, contained in Article 10 of the ECHR, is granted a particularly high protection by the ECtHR and interferences by the State must not only be proportionate but also necessary in a democratic society. This is because freedom of expression is the very basis of democracy and is a conduct for the exercise of other fundamental rights. Indeed, information of the public by free media is not only a necessary requirement of democracy, but free expression also allows for individuals to claim basic rights such as freedom from discrimination, freedom of association, and so on. This right is also recognized as fundamental by the Turkish Constitution (Article 26).
6. The data presented in both reports show that Turkey continues to criminally prosecute journalists, human rights activists, artists and many others for their work and for making use of their right to freedom of expression. Most of the defendants are charged with terrorism related offences, but indictments often cite insufficient evidence that is directly related to the occupation of the defendants such as published articles, interviews, statements, photos or their social media posts. Even though the evidence often does not justify the criminal charges, journalists are often held in lengthy pre-trial detention. In addition to unlawful detention, the data suggest that the right to a fair trial is continuously and frequently breached during court proceedings, in relation to the right to a lawful judge, conditions of the courtroom, the secrecy of the judicial deliberations, and the publicity of the verdict. The data collected reinforces the argument that Turkish courts fail to provide an effective domestic remedy for such rights violations.

II. Turkey's commitments

7. Turkey is a state party to the European Convention on Human Rights. Moreover Article 90 of the Turkish Constitution gives legally binding force to international treaties that are duly in force. As such, the government of Turkey has obligations and duties under European law to respect, protect and ensure the effectiveness of human rights including the prohibition of arbitrary and unjustified deprivations of liberty (Article 5), the right to a fair trial (Article 6), and the right to freedom of expression (article 10). The Turkish Constitution also contains the right to personal freedom and security (Article 19).
8. The UN Human Rights Council (HRC) has made numerous recommendations to states

regarding arbitrary detention⁴. Moreover the Committee has noted that arbitrary detention is often associated with torture and ill-treatment.

9. In 2014, the UN Human Rights Committee adopted General Comment 34 on States parties' obligations under Article 19 of the [International Covenant on Civil and Political Rights \(ICCPR\)](#). The General Comment⁵ provides guidance to States on what the freedoms of opinion and expression mean in practice, and therefore strengthens the protection provided by international law. The General Comment states (para 35) that:

“When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat”.

It also highlights that States parties have to be proactive in putting in place “effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression” (para 23).

III. Areas of concern

Repression of the exercise of freedom of expression

10. In the compilation of UN information from the 2015 UPR review cycle, it is noted that: “The HR Committee recommended that Turkey ensure that human rights defenders and journalists could pursue their profession without fear of being subjected to prosecution and libel suits, and bring relevant provisions of the Criminal Code into line with article 19 of the Covenant. UNESCO recommended that Turkey ensure respect for freedom of expression and of the press, and urged a free and safe operating environment for journalists and media. UNESCO also recommended that Turkey investigate attacks on journalists and media workers, and ensure full implementation of the rule of law” (Para 60)⁶. However, it has to be acknowledged that these recommendations have not been implemented. In fact, the situation has actually degraded since 2015 in this regard.
11. Indeed, according to MLSA’s report, 72% of defendants in the hearings observed between June 2018 and May 2019 were journalists. The next biggest category were writers and lawyers. Moreover, the evidence presented in most of the cases (79%) was directly related to the professional occupation of the defendants, such as written and published news stories and articles, social media posts, or phone calls with journalists’

⁴ See A/HRC/39/45, Report of the Working Group on Arbitrary detention, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/196/69/PDF/G1819669.pdf?OpenElement>

⁵ [General Comment No. 34 on Article 19 of the ICCPR in English](#)

⁶ <https://docs.google.com/document/d/1Gr7I5vBGx899guSYTw65IqDTIhxNGb4H/edit>

sources. Statements of the accused, witnesses, defendants, and most importantly unreliable statements of secret witnesses constituted another common category of evidence. The nature of the evidence based on which defendants face years of imprisonment, including pre-trial detention, offers further indication that the ongoing crackdown on Turkish media and civil society is driven by a desire to silence critical voices. This is contrary to ECtHR jurisprudence, in which it has been repeatedly stated that governments must tolerate close scrutiny by the press and public, and that journalists or activists should not face prosecution for articles critical of the government and its officials.⁷

12. The charges for which this evidence provided the basis were in vast majority related to terrorist offences (71% of hearings), most frequently propaganda for a terrorist organisation and membership in a terrorist organisation. Other charges included insulting the President; violation of personal rights; incitement of hatred and violence; violation of the law on public demonstrations; humiliation of the Turkish nation, Republic and the state's institutions and organs; publishing and/or dissemination of information that should remain confidential to protect the security of the state; and attempting to abolish the constitutional order.

13. In the observed hearings, journalists were very often tried before the High Criminal Court, which shows the seriousness of the criminal charges invoked in the prosecution of journalists.

Unlawful detention

14. In the 2015 UPR review, the Human Rights Committee had already indicated its concern about the widespread use of lengthy pretrial detention, which “contributed to the problem of overcrowding in prisons” (para 54 of the compilation of UN information)⁸.

15. However in a large number of cases, defendants were tried while in pre-trial detention in high-security prisons. Out of these, about 58% were in pre-trial detention for longer than 12 months, in some cases placed in solitary confinement.

16. The ECtHR has repeatedly stated that pre-trial detention in relation to the right to freedom of expression is a “real and effective constraint” on Article 10 of the Convention⁹. In the specific case of pre-trial detention of journalists, the Court has stated that such detention may create a climate of self-censorship for the detained journalist as well as for other journalists carrying out their work¹⁰. Justifying pre-trial detention in relation to the exercise the freedom of expression would be permissible only “where other fundamental rights have been seriously impaired, for example, in the

⁷ *Lingens v. Austria*, [9815/82](#), 08/07/86, § 42; *Castells v. Spain*, [11798/85](#), 23/04/92, § 46.

⁸ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/210/44/PDF/G1421044.pdf?OpenElement>

⁹ *Şık v. Turkey*, [53413/11](#), 08/07/14, §85; *Nedim Şener v. Turkey*, [38270/11](#), 08/07/14, § 96.

¹⁰ *Şık v. Turkey*, § 111; *Nedim Şener v. Turkey*, §122.

case of hate speech or incitement to violence.”¹¹

17. Furthermore, the Court in its *Şahin Alpay v. Turkey* ruling noted that criticism of governments and the publication of information about leaders of the country “should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda”. This report shows that, despite this ruling, most journalists and activists are charged with such serious offences¹²
18. The Court also stated that even if such serious charges are brought, pre-trial detention shall be used as a last resort¹³. Pre-trial detention of defendants, and especially its length and weak justification, is one of the many alarming issues highlighted in this report.
19. Thus, pre-trial detention continues to be applied beyond its legitimate scope in Turkey, in contravention of ECtHR rulings. The abuse of pre-trial detention and long custody periods have increased in number, especially since the coup attempt of July 25th, 2016.
20. Finally international travel bans are often imposed on defendants, which considerably restricts their private and professional life.

Violations of the right to a fair trial

21. In 34% of the trials observed by this study in which the defendant was in detention, the defendant is not brought to the courtroom. This is mainly caused by the fact that the defendant is kept in a prison located in a province different than the court, which is another grave violation of the right to a fair trial. The report shows that defendants in a significant amount of cases were not brought to the courtroom, and instead allowed at the court’s discretion only to express themselves through a video conference system (SEGBIS). The issues with this video system are that defendants cannot directly pose questions to witnesses, examine the evidence newly added to the file or receive direct legal advice from their lawyers during hearings. This limits the defendant’s right to self-defense as well as the principle of face-to-face confrontation.
22. In the 2015 UPR review, the special rapporteur on judges had expressed concerns about the impartiality of the judicial system. Indeed, the information states: “she recommended that measures be taken to ensure a clear separation of the duties, functions and careers of both judges and prosecutors. All necessary steps should be taken to remove any ambiguity about the respective status and roles of judges and prosecutors, in order to fully ensure their respective independence, impartiality and

¹¹ *Cumpănă and Mazăre v. Romania*, [33348/96](#), 17/12/04, § 115

¹² *Şahin Alpay v. Turkey*, [16538/17](#), 20/03/18, § 181.

¹³ *Şahin Alpay v. Turkey*, § 181.

autonomy” (para 51)¹⁴.

23. However these recommendations do not seem to have been implemented, as our report indicates that in many cases (46% of hearings) the panel of judges did not conduct a private deliberation. Pursuant to Article 227 of the Turkish Criminal Procedure Code, deliberations should take place only among participating judges. In order to guarantee the court’s independence and impartiality, no other person can participate in the deliberations even if they have the purpose of consultation. The presence of the prosecutor during deliberations seriously undermines judges’ impartiality.
24. In addition, in 30% of hearings observed the panel of judges was changed at least once. This contravenes the principle of the lawful judge and puts the impartiality and independence of courts in jeopardy. Along with this, disrespectful and sometimes aggressive conduct by judges towards defendants was also noted as an issue by our observers.
25. Finally, obstruction of the defense was noted as common in the report, with lawyers being denied the floor or interrupted by judges. In addition to this, Turkish authorities frequently issue a confidentiality order, making it impossible for defense lawyers and defendants to gain access to the case files. This practice violates the right to a fair trial and contravenes the equality of arms principle, which requires a fair balance between the opportunities afforded to the parties involved in a case.

IV. Recommendations:

26. Turkey should:
 1. Put an end to the abuse of its extremely inefficient anti-terror legislation and the penal code to prosecute journalists, activists and other civil society actors, release the detainees and drop pending charges against individuals without concrete evidence of engagement in armed groups.
 2. Cease the practice of lengthy and unjustified pre-trial detention without any concrete evidence and push prosecutors to accelerate the process of preparing indictments because many defendants wait for their indictment for a long time while in detention.
 3. Ensure the effectiveness of the right to a fair trial for all defendants by for controlling that the panel of judges leave the courtroom and move to a private room to deliberate the decision without anyone accompanying them; ensuring defendants’ access to the courtroom; encouraging judges to adopt a neutral; appointing a fixed panel of judges to any given case
 4. Respect the legal criteria and the conditions of legitimate purpose and necessity in a democratic society in penalties, investigations and prosecutions against journalists, and press and media workers.

¹⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/210/44/PDF/G1421044.pdf?OpenElement>

5. Render clear and predictable Art. 7§2, 8§2 of the Anti-Terrorism Law number 3713; and Arts. 299, 301, 302, 312, 314 of the Turkish Penal Code number 5237, which currently increase the risk of acceptable forms of expression being suppressed and allow unlawful interventions by means of criminal law.
6. Render clear and predictable Art. 299 of the Turkish Penal Code which regulates the “insulting the President” offence. Countless citizens are indicted for this charge mainly due to their social media posts criticizing the government’s policies. The fact that Turkish President is both the president and the ruling party’s Chairperson makes it difficult to practice this article effectively and is abused by subjective commentary. This article is currently one of the main obstacles against freedom of expression in Turkey.
7. Abolish restrictions on passports and reinstate academics under criminal investigation and prosecution because of having signed the petition titled “We will not be a party to this crime!”

