Freedom Of Expression And Turkey: Implementation Of ECtHR Judgments 2020

EXPRESSION INTER-RUPT-ED!

BAĞIMSIZ GAZETECİLİK PLATFORMU

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Introduction

Turkey's legislation and practices in the area of freedom of expression and media freedom have long been at the heart of its relations with the Council of Europe, of which it has been a member since 1950, and the European Court of Human Rights (ECtHR). Lately the issue of Turkey's compliance with the European Convention on Human Rights (ECHR or Convention) has become all the more important, in view of developments in the aftermath of the attempted coup of 2016 and a high number of applications claiming rights violations lodged with the ECtHR in this context.

Latest ECtHR data places Turkey on top of the 47-member list of the Council of Europe states with respect to judgments finding a violation of freedom of expression under Article 10 of the Convention: Of the 845 judgments ECtHR delivered between 1959 and 2019, 356 were against Turkey. Turkey is followed by Russia, a distant runner-up in this case, with 72 judgments. In 2019, like in 2018 and 2017, Turkey was again the country with most judgments finding violation of freedom of expression delivered against it.

This report is an outcome of the *Expression Interrupted* project, supported by the European Union and implemented by Punto 24 Platform for Independent Journalism (P24) in partnership with the London-based freedom of expression organisation ARTICLE 19 to monitor Turkey's compliance with international free expression standards. It was prepared by human rights lawyer Benan Molu, who is known for her work in the field of the ECtHR case-law.

The report looks at ECtHR's case-law in freedom of expression and press freedom cases in the light of a series of recent judgments finding rights violations in applications filed against Turkey. Relying on the latest data, the report aims to present Turkey's recent track record concerning violations of the relevant provisions of the European Convention and its implementation of ECtHR judgments. The report, which was first prepared on the basis of 2019 data, was later revised in the light of key developments in the subsequent period. Statistics cited in the report were last updated on 12 December 2020. Due to a high number of judgments finding rights violations and the diversity of the violations found, the report focuses only on Articles 299, 301, 220/6, 220/7 and 314 of the Turkish Penal Code (TCK) and Articles 6/2 and 7/2 of the Law on the Fight Against Terrorism (TMK), which are most frequently used in convictions and sentencing and most commonly cited in

monitoring reports by the Committee of Ministers of the Council of Europe, the Venice Commission and the Council of Europe Commissioner for Human Rights focusing on restrictions on freedom of expression in Turkey.

The findings in this report demonstrate that Turkey will be unable to show progress in the field of freedom of expression and media freedom unless judicial independence is fully established, which is in turn conditional upon emergence of political will to that effect. We hope this report will contribute to the body of valuable work exploring the state of play between the ECtHR case-law and Turkey's freedom of expression record, as well as towards a much-needed progress in the latter.

Freedom of Expression and Media Freedom in Turkey: An Overview

Article 10 of the European Convention on Human Rights protects the right to freedom of expression. The article reads as follows:

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

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

While the first paragraph of Article 10 provides the right to freedom of expression, the second paragraph describes legitimate aims that may justify restrictions on it. According to the European Court of Human Rights, "the freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it 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 pluralism, tolerance and broadmindedness without which there is no 'democratic society'."[1]

Freedom of expression and of the media has been one of the most problematic issues for Turkey for decades. Particularly during and following the State of Emergency declared after the coup attempt on 15 July 2016, international bodies and human rights organisations including the Council of Europe, the United Nations, the European Union, Human Rights Watch and Amnesty

1 Handyside v. United Kingdom, Application No: 5493/72, 07.12.1976, para. 49.

International have issued numerous statements and reports underlining the worsening freedom of expression and media freedom in Turkey.[2]

According to the Ministry of Justice data cited in the Human Rights Watch World Report 2019, almost one fifth of 246,426 persons imprisoned in Turkey (48,924), are either charged with or convicted of terror crimes.[3] In the same report, Human Rights Watch notes that "the practice of holding individuals charged with terrorism offences in prolonged pre-trial detention raised concerns its use has become a form of summary punishment" as many terrorism trials in Turkey "lack compelling evidence of criminal activity or acts that would reasonably be deemed terrorism."

Many among these people are journalists. Turkey has been one of the world's biggest prison for journalists for many years. It is ranked 154th among 180 countries in the Reporters Without Borders' World Press Freedom Index 2020.[4] Compiling the information provided by Journalists' Union of Turkey, Journalists' Association of Turkey, and DİSK (the Confederation of Progressive Trade Unions of Turkey), the Commissioner for Human Rights of the Council of Europe noted that 210 journalists were detained during the State of Emergency in Turkey, not including huge numbers of journalists taken into custody, questioned and released under judicial control.[5]

2 From among many reports: Memorandum on the Human Rights Implications of the Measures Taken Under the State of Emergency in Turkey, Nils Muiznieks, Council of Europe Commissioner for Human Rights, 07.10.2016, https://rm.coe.int/ref/CommDH(2016)35; 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. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=20891; Nils Muiznieks, Council of Europe Commissioner for Human Rights, Memorandum on Freedom of Expression and Media Freedom in Turkey, 15.02.2017, https://rm.coe.int/turkiye-de-ifade-ozgurlugu-ve-medya-ozgurlugune-iliskin-memorandum/16808b7281; Council of Europe, Parliamentary Assembly resolution on the Functioning of Democratic Institutions in Turkey, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23665&lang=en; Council of Europe Commissioner for Human Rights, Third Party Intervention Concerning the Applications of Turkish Journalists Pending Before ECtHR, https://rm.coe.int/third-party-intervention-10-cases-v-turkey-on-freedom-of-expression-an/168075f48f.

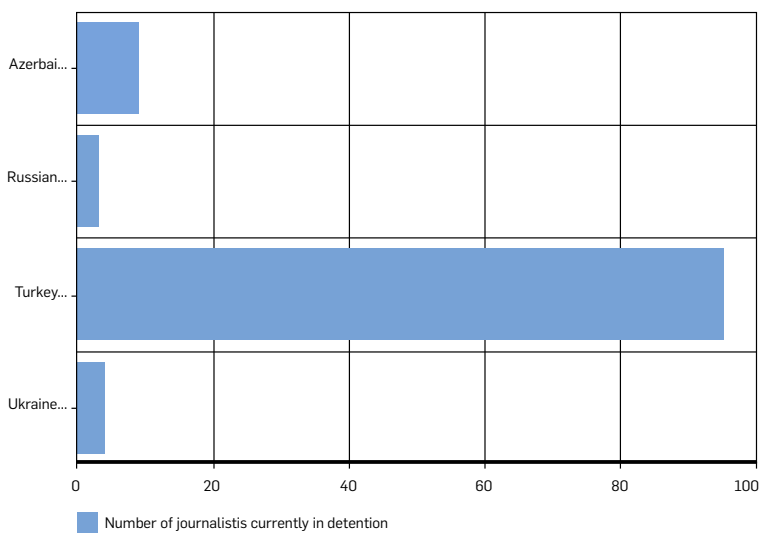
3 Human Rights Watch, World Report 2019, 19.12.2019, https://www.hrw.org/tr/world-report/2019/country-chapters/325436

4 Reporters Without Borders, 2020 World Press Freedom Index, 10.12.2020, https://rsf.org/fr/classement

5 Third Party Intervention by Council of Europe Human Rights Commissioner concerning the cases of journalists, https://rm.coe.int/third-party-intervention-10-cases-v-turkey-on-freedom-of-expression-an/168075f48f, para. 18.

According to the Council of Europe's Platform to Promote the Protection of Journalism and Safety of Journalists, 148 of the 849 alerts concerning "the severest violations to media freedom including physical assault, assassination, intimidation, impunity in the crimes against the journalists, and implementation of overly harsh penal laws in order to protect the state authorities from a level of criticism that is needed to be expected in democracies," which have been recorded regarding all 47 member states of the Council of Europe since the Platform's establishment in April 2015 concern Turkey.[6] According to the data of this platform, which, at the time of the writing of this report, shows 95 journalists in prison, Turkey is the biggest jailer of journalists among 47 member states of the Council of Europe. The vast majority of these journalists are held in pre-trial detention or serving conviction for their journalistic activities on unsubstantiated charges of links with terrorist organisations or the coup attempt in politically motivated trials, with their articles or statements that do not glorify or incite violence and hatred used as evidence against them.

Number of journalists currently in detention per country
(All charts are based on figures registered since April 2015)



(**Source:** https://www.coe.int/en/web/media-freedom/all-charts Last Accessed: 10.12.2020)

6 https://www.coe.int/en/web/media-freedom. Last accessed on 12.12.2020

In response to a parliamentary motion in 2018, the government disclosed that a total of 116 media outlets, including six news agencies, 18 television stations, 22 radio stations, 50 newspapers and 20 magazines, were shut down by the emergency decrees (KHKs) issued during the State of Emergency.[7] Only in 2019, 61,019 domains and websites were blocked in Turkey, including 5,599 URLs containing news items, bringing the total number of websites and domains blocked in Turkey since 2014 to 408,494.[8] According to the Interior Ministry figures, 14,186 social media accounts were investigated and legal action was taken against 6,743 individuals identified in connection with these accounts from 1 January 2020 to 14 August 2020 for "spreading propaganda for a terrorist organisation, incitement to hatred and enmity, insulting a section of the population, spreading fear and panic among the population and sharing provocative and misleading posts based on false documents."[9]

Opposition lawmakers have been arrested and sentenced for their speeches and statements made on behalf of their voters. In its Human Rights Defenders at Risk report, Front Line Defenders has underlined that Turkey remained the top jailer of journalists in the world and that while human rights defenders of all types have been targeted, lawyers stood out as the main target of repression in 2017.[10] Human Rights Watch cited data indicating that as of April 2019, 1,546 lawyers have been prosecuted, with 274 among them convicted in first-instance courts of membership of a terrorist organisation, and 598 having been held in pre-trial detention for varying periods.[11]

7 Diken, "KHK Bilançosu: Bugüne Dek 116 Basın Yayın Kuruluşu Kapatıldı", 09.05.2018, http://www.diken.com.tr/khk-bilancosu-bugune-dek-116-basin-yayin-kurulusu-kapatildi.

8 Engelli Web 2019, Freedom of Expression Association and Engelli Web, 10.12.2020, https://ifade.org.tr/reports/EngelliWeb_2019.pdf

9 Interior Ministry, "Siber Suçlarla Mücadele Daire Başkanlığı tarafından 1 Ocak'tan Bugüne 14.186 Hesap Hakkında Çalışma Yapıldı", 14.08.2020, https://www.icisleri.gov.tr/siber-suclarla-mucadele-daire-baskanligi-tarafindan-1-ocaktan-bugune-14186-hesap-hakkinda-calisma-yapildi

10 Front Line Defenders, Annual Report on Human Rights Defenders at Risk in 2017, https://www.frontlinedefenders.org/en/resource-publication/annual-report-human-rights-defenders-risk-2017.

11 Human Rights Watch, Lawyers on Trial: Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey, 10.04.2019, https://www.hrw.org/report/2019/04/10/lawyers-trial/abusive-prosecutions-and-erosion-fair-trial-rights-turkey

11 human rights defenders were charged with "aiding an armed terrorist organisation" and "membership in an armed terrorist organisation" for attending a training on protection of human rights defenders and digital security in Büyükada island off Istanbul and prosecuted on the basis of their work in the field of human rights. Four of them were eventually convicted and sentenced to prison terms. Businessperson and leading civil society figure Osman Kavala was arrested in November 2017, while 13 other human rights defenders were also subsequently arrested and prosecuted along with him for allegedly organising the anti-government Gezi Park protests of 2013. Kavala and his co-defendants in the Gezi Park trial were eventually acquitted but Kavala was re-arrested as part of a different investigation and kept behind bars despite the acquittal verdict from the trial court and an ECtHR judgment in December 2019 against his detention. Non-governmental organisations working in the field of human rights have been targeted while public events and planned Pride parades have been banned. 822 academics stood trial on the charge of "spreading propaganda for a terrorist organisation" for signing a peace declaration entitled "We Will Not Be a Party to This Crime" and hundreds of them have been sentenced to prison terms ranging from 15 to 36 months.[12]

12 For current information on Academics for Peace trials: https://barisicinakademisyenler.net/node/314

Case-Law of the European Court of Human Rights

That being the case, Nils Muiznieks, the previous Commissioner for Human Rights of the Council of Europe, has concluded that judicial harassment no longer targets only media and journalism but "all sectors of Turkish society, including politicians, academics, NGOs, human rights defenders and ordinary citizens expressing themselves in public settings."[13] These serious and systematic violations of the right to freedom of expression are being brought to the Constitutional Court and then to the ECtHR, following the exhaustion of domestic remedies.

On 30 May 2017, ECtHR announced that with effect from 22 May 2017, it amended its "priority policy," which had been in effect since 2009. Accordingly, the Court established that it would prioritize applications by those who are deprived of liberty as a direct consequence of the alleged violation of their Convention rights, as well as the applications raising questions capable of having an impact on the effectiveness of the Convention system or applications raising an important question of general interest, including questions capable of having major implications for domestic legal systems or for the European system.[14]

Following this amendment, the Court accorded priority to many applications and began to notify the relevant governments about such applications, which include many from Turkey. A week after the Court announced amendments to its priority policy, it decided to review as a priority the cases of imprisoned deputies and journalists and requested the Turkish government's observations in applications of the columnists and executives of the *Cumhuriyet* newspaper (8 June 2017); applications of journalists Ahmet Altan, Mehmet Altan, Nazlı Ilıcak, Şahin Alpay, Ali Bulaç, Atilla Taş and Murat Aksoy (13 June 2017); and applications of the Peoples' Democratic Party (HDP) deputies Selahattin Demirtaş and Figen Yüksekdağ (29 June 2017). The number of applications communicated to the government by the Court has been

13 Memorandum on freedom of expression and media freedom in Turkey, para. 65.

14 Priority Policy of ECtHR, 30.05.2017, http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf

increasing since then.[15] A common feature of these applications made by journalists, politicians and human rights defenders was that, except for the applications of Nazlı Ilıcak and Ali Bulaç, their cases involved the alleged violation of Article 18 of the ECHR. The applicants also claimed that they had been deprived of their liberty for exercising their freedom of expression and of the media, with their legitimate work presented as evidence of crime in trials that were used as a political tool aimed at silencing and punishing them.

In March 2018, the ECtHR ruled that the right to freedom of expression and the right to liberty and security of journalists Mehmet Altan and Şahin Alpay had been violated as a result of their detention.[16] In those applications, ECtHR found that there was no need to review the claim that Article 18 of the ECHR had been violated but in November the same year, when it ruled on the application of Selahattin Demirtaş, the co-leader of the HDP at the time, the Court concluded, for the first time in an application against Turkey, that Article 18 of the Convention had been violated.[17] Following the Demirtaş judgment, the Court again ruled that Turkey had violated Article 18 in the application filed against Osman Kavala's detention.[18] In the applications of *Cumhuriyet* journalists and executives and of journalist Ahmet Şık, which were concluded in November 2020, the Court found that the applicants' rights to liberty and security and to freedom of expression and of

15 Sabuncu and Others, Application no. 23199/17; Atilla Taş and Murat Aksoy, Application no. 72/17 and 80/17; Nazlı Ilıcak, Application no. 1210/17; Ahmet Altan and Mehmet Altan, Application no. 13237/17 and13252/17; Şahin Alpay, Application no. 16538/17; Ali Bulaç, Application no. 25939/17; Demirtaş and Others, Application no. 14305/17; Ahmet Şık, Application no. 36493/17; Deniz Yücel, Application no. 27684/17; Tunca Öğreten and Mahir Kanaat, Application no. 42201/17 42212/17; Abdullah Kılıç, Application no. 43979/17, Osman Kavala, Application no. 28749/18, Taner Kılıç, Application no. 208/18 and İdris Sayılgan, Application no. 53887/18.

16 Mehmet Hasan Altan v. Turkey, Application no. 13237/17, 20.03.2018 and Şahin Alpay v. Turkey, Application no. 16538/17, 20.03.2018.

17 Demirtaş v. Turkey (no. 2), Application no. 14305/17, 20.11.2018.

18 Osman Kavala v. Turkey, Application no. 28749/18, 10.12.2019

the press had been violated.[19] The ECtHR is expected to decide soon on the rest of the pending cases, which were taken up by the Constitutional Court after a long wait and then rejected in contravention of the top court's own established case-law.

19 Sabuncu and Others v. Turkey, Application no. 23199/17, 10.11.2020, and Ahmet Şık v. Turkey (no. 2), Application no. 36493/17, 24.11.2020.

Turkey's Record of Violations and Implementation of ECtHR Judgments

Future ECtHR judgments finding rights violations in the currently pending cases would no doubt worsen the record of Turkey, which already tops the list among the Council of Europe member states when it comes to violations of freedom of expression. Between 1959 and 2019, 3,645 of the 22,535 judgments delivered by the Court were against Turkey, making it the country against which the ECtHR has delivered the most judgments.[20] On freedom of expression, Turkey again topped the list of the Council of Europe countries violating Article 10 of the Convention: Of the 845 judgments between 1959 and 2019 where ECtHR found violations of freedom of expression, 356 were against Turkey. Turkey is followed by Russia with 72 judgments, France with 38, and Austria with 35 judgments. After topping the list in 2018, Turkey was ranked first again among the Council of Europe countries in 2019, with 35 judgments finding a violation of freedom of expression delivered against it.[21]

One of the most important reasons for these huge numbers is non-implementation of the previous judgments of the ECtHR, which sets the stage for repetition of similar violations in the future. Hundreds of cases are currently pending before the Committee of Ministers of the Council of Europe, which supervises the execution of the ECtHR judgments, regarding a variety of violations ranging from seizing letters and confiscating magazines and books at prison facilities to criminalisation of insulting the memory of Mustafa Kemal Atatürk and to blocking access to websites, all waiting to be resolved through individual or general measures required by the related ECtHR judgments.

When the ECtHR rules that one or more of the rights and freedoms

20 ECtHR, Overview 1959-2019, https://www.echr.coe.int/Documents/Overview_19592019_ENG.pdf

21 ECtHR, Analysis of Statistics 2019, January 2020, https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf. In 2016, 7 out of 37 violation of freedom of expression decisions were delivered against Turkey; in 2015, 10 out of 28 violation of freedom of expression decisions were delivered against Turkey.

safeguarded in the Convention and its additional protocols have been violated, the next step is to ensure that this binding judgment is implemented domestically. The supervisory task of the Committee of Ministers begins with the finalisation of the Court's judgment. Judgment by a chamber of the Court is not final; as the applicants or the respondent government can still request the referral of the case to the Grand Chamber. If the applicants or the respondent government declare that they do not intend to take the case to the Grand Chamber, or if the case is not referred to the Grand Chamber within three months of the judgment, then the decision becomes final. If the parties apply to the Grand Chamber within three months of the judgment of the Chamber, and if the panel formed within the Grand Chamber rejects this request, the decision again becomes final. If the parties' request for the referral of the case to the Grand Chamber is accepted, the decision to be taken by the Grand Chamber is also final. In such cases, following the finalisation of a judgment or a decision, it is sent to the Committee of Ministers to supervise its execution. The Committee of Ministers shall decide whether the supervision process should be carried out under standard or enhanced procedure. Based on its assessments, the Committee of Ministers may issue interim resolutions regarding individual and general measures that are required to be taken by the respondent state. Individual measures may be deemed to have been fulfilled upon the payment of the compensation awarded by the judgment, the release of the applicant if detained, the removal of the verdict of conviction from the judicial records, or the retrial of the applicant. General measures are the measures to prevent a similar violation in the future, such as a constitutional amendment, amendment of relevant legislation or the case-law, translation of the decision issued in English and/or French into the official language of the state concerned, and organisation of trainings on violations identified by the Court.

According to latest figures from the Committee of Ministers,[22] there are 5,231 cases pending before the Committee as of 2019, awaiting execution by state parties. 1,663 of these cases belong to Russia. With 689 cases before the Committee of Ministers, Turkey holds the second place in terms of non-

22 Council of Europe Committee of Ministers, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2019, https://rm.coe.int/annual-report-2019/16809ec315

implementation of the ECtHR decisions. Ukraine follows Turkey with 591 cases.

Due to the large number of the ECtHR judgments against Turkey and diversity of violations identified in those judgments, it is not possible to analyse all of them in this report. Accordingly, the content of the report is limited to the key pieces of legislation which are most frequently highlighted in the reports of international institutions such as the Committee of Ministers, the Venice Commission and the Office of the Commissioner for Human Rights of the Council of Europe as the main obstacles towards the exercise of freedom of expression[23] and which, according to the statistics of the Turkish Justice Ministry, are most frequently used in convictions and sentencing. Thus, Articles 299 and 301 of the Turkish Criminal Code (TCK); second paragraphs of Articles 6 and 7 of the Anti-Terror Law (TMK); and the paragraphs 6 and 7 of Article 220 of the TCK and Article 314 of the TCK are reviewed below along with the relevant assessments of the Committee of Ministers, the Venice Commission, and the Commissioner for Human Rights of the Council of Europe.

23 In addition to the documents cited in Footnote 2, see also: Council of Europe Commissioner for Human Rights Thomas Hammarberg's report after his visit to Turkey on 10-14 October 2011, https://rm.coe.int/16806db733; Council of Europe Commissioner for Human Rights, Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 27 to 29 April 2011, 12 July 2011, https://rm.coe.int/16806db7522011; Council of Europe Venice Commission, Draft Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, adopted on 11-12.03.2016, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e.

Insulting the President: Article 158 of the Previous TCK, Article 299 of the Current TCK

Article 158, which criminalised insulting the President under the Turkish Criminal Code No. 765, was repealed on 1 June 2005 when the current version of the criminal code, the Turkish Criminal Code No. 5237, went into force.

Article 299 of the Turkish Criminal Code, which criminalises insulting the President of the Republic, reads as follows:

1. Anyone insulting the President of the Republic shall be sentenced to imprisonment for a term from one year to four years.

2. (Amended: 29/6/2005 by Article 35 of the Law No. 5377) when this offence is committed in public, the sentence to be imposed shall be increased by one sixth.

3. Initiation of prosecution for this offence is subject to the permission of the Minister of Justice.

ECtHR is yet to deliver any judgment on Article 299 of the TCK. But there are judgments issued in the past finding that convictions based on Article 158 of the Turkish Criminal Code No. 765 had violated the freedom of expression. The first of these judgments is *Pakdemirli v. Turkey*,[24] in which the Court ruled that a domestic court ruling ordering the applicant to pay a large amount of compensation to then President Süleyman Demirel in damages amounted to a violation of the right to freedom of expression of the applicant, who called Demirel a "liar," "slanderer," "fatso of Çankaya," "narrow minded," and said "May his tires go flat," "God will not forgive him in afterlife." The *Pakdemirli v. Turkey* judgment is the leading case in the Pakdemirli group of cases, which consists of 14 cases concerning violation of the right to freedom of expression as a result of civil defamation proceedings and is currently under standard supervision of the Committee of Ministers. In its judgments in the applications gathered under this group,

24 Pakdemirli v. Turkey, Application no. 35839/97, 22.02.2005.

the ECtHR found that violations stemmed from disproportionate amount of compensation imposed on the applicants; lack of distinction in interpretation of defamation provisions between value judgments and statement of facts; and impossibility for the applicants to prove their good faith or invoke public interest in the context of civil defamation proceedings.

Pakdemirli judgment was followed by that of *Artun and Güvener v. Turkey*, in which the Court found that the sentencing of the applicants, journalist and editor-in-chief of the *Milliyet* newspaper, to terms of imprisonment under Article 158 of the Turkish Criminal Code No. 765 for publishing articles criticising then President Süleyman Demirel and public authorities in general for failing to take necessary measures prior to and in the aftermath of a deadly earthquake in western Turkey in 1999, amounted to violation of their freedom of expression safeguarded in Article 10 of the Convention.

Under the ECtHR case-law, provisions that afford greater protection to heads of the states compared to other people and provide them a with privileged status are deemed to be grounds for violation when they are used to interfere with the exercise of the right to freedom of expression.

In Artun and Güvener group of cases,[25] which is under enhanced supervision by the Committee of Ministers, the latest action plan submitted to the Committee of Ministers by the Turkish Government on 21 June 2018 stated that the lower and upper limits of the penalty had been reduced by Article 299 of TCK, and that there were similar defamation laws that are in effect in other Council of Europe countries such as Poland, Italy, Germany, Belgium, Spain, the Netherlands and Norway and presented examples of progressive decisions by criminal courts of first instance and the Court of Cassation.[26] At the end of its meeting on 3-5 March 2020, the Committee of Ministers decided to transfer the Artun and Güvener group of cases from standard supervision to the enhanced procedure and invited the authorities to provide information on the individual and general measures envisaged for the execution of the judgments in this group of cases.[27]

25 Ali Çetin v. Turkey, Application no. 30905/09, 20.09.2017 and Cem Uzan v. Turkey, Application no. 30569/09, 10.09.2018.

26 The action plan submitted by Turkey on 21.06.2018, http://hudoc.exec.coe.int/eng?i=DH-DD(2018)663E.

27 Council of Europe Committee of Ministers, 1369th Meeting, 3-5 March 2020, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809cc944

Nils Muiznieks, the previous Council of Europe Commissioner for Human Rights, devoted special attention to Article 299 in his Memorandum on freedom of expression and media freedom in Turkey, noting that the application of similar provisions was unprecedented "in any of the other 46 member states of the Council of Europe, including those where insulting the president is still considered a separate criminal offence."[28] According to Muiznieks, the use of Article 299 "seems to have become a tool for stifling any criticism of the President, and by extension of any policy that he supports, and used indiscriminately and at an unparalleled level against all categories of persons, notably journalists, caricaturists, academics, celebrities, students and pupils, including many minors."[29]

As it will be explained below under the heading of Article 301 of the TCK, the ECtHR has ruled in its judgments in Hrant Dink and Taner Akçam applications that the requirement to seek permission from the Ministry of Justice to initiate prosecution under Article 301 is not a sufficient measure against violation of the right to freedom of expression. As stated by the Venice Commission, there is no reason to reach a different conclusion in respect of the requirement for permission of the Ministry of Justice as referred to in paragraph 3 of Article 299.[30]

Between 1993 and 2015, a total of 3,134 persons were prosecuted for insulting the President, while 1,953 of these cases (62 percent) were initiated in 2015 under President Recep Tayyip Erdoğan's term. When compared to the previous presidential terms, it can be seen that during Süleyman Demirel's 7-year Presidency between 16 May 1993 and 16 May 2000, there were only 162 criminal proceedings. There were 159 criminal proceedings during Ahmet Necdet Sezer's term (16 May 2000 – 28 August 2007) and a total of 860 criminal proceedings during Abdullah Gül's presidency (28 August 2007 - 28 August 2014).[31] Article 299 has been used at an alarming frequency

28 Memorandum on freedom of expression and media freedom in Turkey, para. 54.

29 Memorandum on freedom of expression and media freedom in Turkey, para. 54.

30 Opinion of Venice Commission, para. 51.

31 AİHMİZ, "Avrupa İnsan Hakları Mahkemesi Artun Ve Güvener/ Türkiye Kararı (75510/01, 26.06.2007) Monitoring Report, http://www.aihmiz.org.tr/files/Artun_ve_Guvener.pdf, p. 17.

since Erdoğan took office as president on 28 August 2014. Indeed, the judicial statistics published by the Ministry of Justice reveal the gravity of the situation. Since 2015, the number of lawsuits filed under Article 299 of the Turkish Criminal Code, verdicts of conviction and deferred convictions has been increasing each year.[32]

TCK 299/1	Number of Offences in the Lawsuits Filed	Number of Offences in the Lawsuits Concluded	Conviction	Acquittal	Deferred Verdicts	Other Verdicts	Total Verdicts
2010	133	97	28	26	No data	54	108
2011	175	168	41	37	No data	105	183
2012	141	174	40	33	No data	119	192
2013	140	179	44	39	No data	120	203
2014	132	120	40	25	19	57	141
2015	1953	570	238	120	151	169	678
2016	4187	2156	884	544	720	431	2579
2017	6033	4069	2099	873	1660	518	5150

Unfortunately, the Constitutional Court has so far failed to provide an effective remedy against such arbitrary and excessive use of Article 299. The Karşıyaka 7th Criminal Court of First Instance and the Istanbul 43rd Criminal Court of First Instance filed an application with the Constitutional Court in 2016, arguing that Article 299 of the TCK is against the "principle of the rule of law" and "the principle of equality before the law" enshrined in Articles 2 and 10 of the Constitution respectively. Having merged these applications, the Constitutional Court rejected the lower courts' appeal for annulment of Article 299, holding the view that the provision was not contrary to the Constitution.[33]

Although the Karşıyaka 7th Criminal Court of First Instance and the Istanbul 43rd the Criminal Court of First Instance cited the above-mentioned judgments of the ECtHR in their applications, the Constitutional Court did not refer to any ECtHR judgment in its decision. In addition, unlike the ECtHR and

32 For the judicial statistics published by the Ministry of Justice see: http://www.adlisicil.adalet.gov.tr/ac-cik.html

33 Constitutional Court, Docket no: 2016/25, Judgment no: 2016/186, 14.12.2016. http://www.resmigazete.gov.tr/eskiler/2017/01/20170103-11.pdf.

international institutions, the Constitutional Court deemed the requirement to obtain permission from the Ministry of Justice to be a sufficient safeguard against abuse and found the sanction foreseen in Article 299 for insulting the President – imprisonment of up to four years – proportionate.[34] Again contrary to the ECtHR case-law, the Constitutional Court maintained that Article 299 protects reputation of not only the President but also of the state; therefore, such a criminal act against the President as a person should also be deemed as directed at the State. As such, it should be distinguished from the offence of insulting state officials and defined as a separate offence, even if the offence is committed against the personality of President.[35]

The issue was brought before the Constitutional Court once again, this time through an individual application. In its decision on the application filed on behalf of lawyer Umut Kılıç, who was given a deferred sentence of one year and six months of imprisonment for calling Erdoğan "a thief, and a murderer" during his magistrate interview, the Constitutional Court again made no reference to any ECtHR judgments about criminalisation of insulting the heads of states and ruled that the applicant's claim that his right to freedom of expression had been violated as a result of his conviction was unfounded.[36] With this decision, the Constitutional Court contradicted not only the case-law of the ECtHR but also its own case-law, which establishes that the imposition of deferred sentence constitutes an interference with the freedom of expression.

As underscored in a 2016 report by the Council of Europe's constitutional advisory body, the Venice Commission, Article 299 of the TCK should be repealed:[37]

"With respect to Article 299 (Insulting the President of Republic), no progress has been made and its use has recently increased substantially. The Article fails to take into account the European consensus which indicates that States should either decriminalize defamation of the Head of State or limit this offense to the most serious forms of verbal attacks against them, at

34 Ibid, paras. 14, 21.

35 Ibid, paras. 13, 16.

36 Constitutional Court, Umut Kılıç application, Application no. 2015/16643, 04.04.2018.

37 Opinion of Venice Commission, paras. 49-75 and 126.

the same time restricting the range of sanctions to those not involving imprisonment. Having regard to the excessive and growing use of this Article, the Commission considers that, in the Turkish context, the only solution to avoid further violations of the freedom of expression is to completely repeal this Article."

The previous Council of Europe Commissioner for Human Rights shares the Venice Commission view as well, saying that annulment of Article 299 is the only solution to obvious violations of Article 10 of the ECHR. The commissioner maintains that the use of this provision is "profoundly incompatible with the ECHR and amounts to judicial harassment, especially considering that the ECtHR holds that conferring a privilege or special protection to Heads of State, shielding them from criticism solely on account of their function or status cannot be reconciled with modern practice and political conceptions"; and regrets that the Constitutional Court found that Article 299 was constitutional, by arguing that it does not touch the essence of the right to freedom of expression.[38]

38 Memorandum on freedom of expression and media freedom in Turkey, para. 55.

Article 301 of TCK: Denigrating the Turkish Nation, the State of the Turkish Republic, the Institutions and Organs of the State

Previous to an amendment adopted on 29 April 2008 (Law No. 5759), Article 301 read as follows:

1. Public denigration of Turkishness, the Republic or the Grand National Assembly of Turkey shall be punishable by imprisonment of between six months and three years.

2. Public denigration of the Government of the Republic of Turkey, the judicial institutions of the State, the military or security structures shall be punishable by imprisonment of between six months and two years.

3. In cases where denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third.

4. Expressions of thought intended to criticise shall not constitute a crime.

The current version of Article 301 of TCK is as follows:

1. A person who publicly degrades Turkish Nation, State of the Turkish Republic, Grand National Assembly of Turkey, the Government of the Republic of Turkey and the judicial bodies of the State shall be sentenced to a penalty of imprisonment for a term of six months to two years.

2. A person who publicly degrades the military or security organisations shall be sentenced according to the provision set out in paragraph one.

3. The expression of an opinion for the purpose of criticism does not constitute an offence.

4. The conduct of an investigation into such an offence shall be subject to the permission of the Minister of Justice.

As can be seen, the amendment in 2018 introduced three major changes in the text of Article 301 of the Turkish Criminal Code. First, the concepts of "Turkishness" and "Republic" have been replaced by "Turkish Nation" and "the Republic of Turkey." Secondly, the maximum limit of imprisonment that could be imposed in the case of conviction was reduced, and the aggravating circumstances were removed from the article. Thirdly and finally, an additional safeguard measure was introduced, requiring the permission of the Ministry of Justice to initiate prosecution for acts deemed to be criminal under Article 301.

The ECtHR made important observations on Article 301 in the context of the case of Armenian journalist Hrant Dink, who was publicly targeted because of a series of articles published in the Turkish-Armenian weekly newspaper *Agos*, put on trial on the basis of the Article 301, and eventually murdered by a nationalist group, who alleged to have felt an assault on their "Turkish identity" as a result of Dink's writings and statements.

In response to the applicants' claim that Article 301 of the TCK was not foreseeable and therefore there was no legal basis for the prosecution and conviction of Dink, the Court confined itself to stating that the wide scope of the term "Turkishness" as interpreted by the judiciary raised serious doubts as to the foreseeability of Article 301 and that failure to protect the life of Hrant Dink, who was threatened for expressing his opinions which did not promote violence, could not be justified on account of any legitimate goal such as "protecting the public order," moving on to examine whether the interference was necessary in a democratic society.[39]

To determine whether the interference was necessary in a democratic society, the Court first examined how the Court of Cassation interpreted Dink's impugned expression to reach the conclusion that convicting him for denigrating Turkishness was justified. According to the Court of Cassation, "Turkishness" constitutes "all national and moral values, composed of human, religious and historical values as well as the national language, national feelings and traditions." The Court found that the Court of Cassation's interpretation of the term of Turkishness in the Dink case had a dual meaning for the interests protected by Article 159 under the previous version of the penal code and Article 301 of the current penal code:[40] On

39 Dink v. Turkey, Application no. 2668/07, 14.09.2010.

40 Dink v. Turkey, para. 131.

the one hand, referring to "Turkish nation," thus to one of the constitutive elements of the State, Turkishness was identified with the state itself as it is expressed in governmental policies and in the acts of its institutions. On the other hand, by confining Turkishness to the traditional Turkish religious, historical and linguistic identity, the Court of Cassation excluded all religious, linguistic or ethnic minorities, whether they are recognized as minority under international agreements or not, from the scope of Turkishness.

Such an interpretation means that any criticism directed against the official narrative on the 1915 events could be regarded as "distorting, devaluating or despising" Turkishness or the Turkish nation. In the light of these observations, the Court found that by convicting Dink of denigrating Turkish identity because of his articles, the Turkish authorities had indirectly punished him "for criticising the State institutions' denial of the view that the events of 1915 amounted to genocide."[41]

According to the ECtHR, conviction of Hrant Dink under Article 301 for a series of articles that did not encourage violence, armed resistance or uprising and for expressing opinions that are protected under the right to freedom of expression, taken together with the failure of the state authorities to take the appropriate measures to protect his life against the fatal attack by ultranationalist militants, amounted to a violation of his freedom of expression under Article 10 of the ECHR.[42]

In his report dated 12 July 2011, Thomas Hammarberg, the former Commissioner for Human Rights of the Council of Europe, expressed concern over Article 301 of TCK, recalling conclusions of the Hrant Dink judgment:[43]

41 Dink v. Turkey, 132.

42 Dink v. Turkey, paras. 134 and 139. Dink v. Turkey case is subject to another monitoring under the Dink group of cases, separate from the Akçam group. In its meeting on 18-20 September 2018, the Committee of Ministers noted that the trial into Hrant Dink's assassination has been ongoing for 11 years, urged the authorities to accelerate their efforts to bring the case to a conclusion in line with the Convention standards, and requested precise and detailed information on the general measures taken or being planned with a view to protecting the right to life of journalists faced with real and imminent threats to their lives. See: http://hudoc.exec.coe.int/eng?i=004-37184.

43 Hammarberg's report, para. 17.

"Following his visit to Turkey in 2009, the Commissioner expressed his concern regarding Article 301, notwithstanding an amendment adopted in 2008 which led to a decrease in the number of proceedings brought under this article. On 14 September 2010 the Court delivered its judgment in the case of Dink v. Turkey in which it found a violation of Article 10 of the ECHR on account of Hrant Dink's conviction based on Article 301. The Court held that Hrant Dink's conviction for denigrating Turkish identity prior to his murder did not correspond to any "pressing social need" which is one of the major conditions on which interference with one's freedom of expression may be warranted in a democratic society. The Commissioner considers that the amendment adopted in 2008, which subjects prosecution to a prior authorization by the Ministry of Justice in each individual case, is not a lasting solution which can replace the integration of the relevant ECHR standards into the Turkish legal system and practice, in order to prevent similar violations of the Convention."

Following the Hrant Dink judgment, the Court examined the application of history professor Taner Akçam, who, similar to Dink, was publicly targeted for his articles published in *Agos* on the events of 1915. Following this intimidation campaign, during which he was called a "traitor" and "spy" and received death threats, and a criminal complaint filed by a nationalist group, a criminal investigation was launched against Akçam under Article 301 of the TCK for allegedly insulting Turkishness. Examining the case, the ECtHR ruled that the fact that the prosecutor had issued a non-prosecution decision did not mean that the applicant was not in danger of facing a similar investigation in the future.[44] Although the Government stated that the amendment to Article 301 required the permission of the Ministry of Justice to initiate prosecution, the Court's view was that the measures adopted by the Government do not appear to provide an effective safeguard to prevent the general arbitrariness or unfair proceedings within the scope of Article 301.

The Court, in this respect, firstly examined whether the requirement for authorisation provided a safeguard. Having reviewed the statistical information submitted by the Government and the applicant and in view of

44 Altuğ Taner Akçam v. Turkey, Application no. 27520/07, 25.10.2011, para. 56.

the high percentage of authorisations issued by the Ministry of Justice, the Court held, along the same lines as Commissioner Hammarberg, that the requirement to obtain permission of the Ministry of Justice for the initiation of prosecution was not a lasting solution, which can replace the integration of the relevant ECHR standards into the Turkish legal system and practice.[45] Furthermore, the Court also did not dismiss the possibility that, although the Article 301 of TCK has not been applied in such cases for a considerable period of time, the provision may be applied again at any time in the future, in case of a change of political will by the current government or change of policy by a new government.[46]

The Court then examined the established case-law of the Court of Cassation, repeating its criticism in the above-mentioned Dink judgment, in particular with regard to the way the terms "Turkishness" and "Turkish nation" were interpreted. Unlike the Dink judgment, however, in which the Court had refrained from examining the foreseeability of Article 301, it decided this time to address this question.

Although the term "Turkishness" has been replaced by "the Turkish nation" in the text of the article, there seems to be no change or difference in the interpretation of these concepts. According to the Court, the scope of the terms under Article 301 was so wide and vague that the way they were interpreted by the judiciary including, most notably, the Court of Cassation, posed a constant threat on the exercise of the right to freedom of expression. Therefore, the Court has ruled that Article 301 of TCK does not meet the "quality of law" required by the Court since its unacceptably broad terms do not allow for foreseeability of its effects and violates the freedom expression.[47]

Given this judgment, Article 90 of the Constitution, and Article 46 of the ECHR, it would be unlawful even to initiate a criminal investigation against an individual under Article 301. However, both the number of cases and the number of conviction verdicts are on the rise.

45 Altuğ Taner Akçam v. Turkey, paras. 76-77.

46 Altuğ Taner Akçam v. Turkey, para. 78.

47 Altuğ Taner Akçam v. Turkey, paras. 95-96.

TCK 301/ 1-2-3	Number of Offences in the Lawsuits Filed	Number of Offences in the Lawsuits Concluded	Conviction	Acquittal	Deferred Verdicts	Other Verdicts	Total Verdicts
2010	172	258	20	37	No data	203	260
2011	140	217	11	38	No data	174	223
2012	177	211	15	25	No data	182	222
2013	112	130	9	19	No data	108	136
2014	163	134	15	45	22	55	137
2015	184	120	28	26	32	44	130
2016	482	241	89	59	73	69	290
2017	753	479	166	79	139	178	562

Article 301 of the TCK has been widely criticised by the international human rights organisations over the years. During the Universal Periodic Review in 2010, Armenia, Cyprus, Spain, France and the United States openly called for annulment or revision of Article 301; the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media said the wording of Article 301 is vague and open to various interpretations and can be used to chill public debate; Amnesty International stated that even after the 2008 amendment, Article 301 constituted a direct restriction on the use of freedom of expression; Freedom House, in its Freedom of the Press 2015 report, observed that judicial authorities continued to launch legal proceedings and issue verdicts of convictions under Article 301, creating a chilling effect on freedom of expression.[48]

And finally, the Venice Commission in its report published on 15 March 2016 emphasized that the amendment to Article 301 of the TCK was not sufficient since it did not provide necessary safeguards; that it would continue to constitute an obstacle to freedom of expression unless all the concepts used in it were made sufficiently clear and specific to satisfy the principle of foreseeability and legality; and that use of the tools of

48 Opinion of Venice Commission, p. 21.

criminal law should be limited to expressions that incite violence.[49]

There are 14 cases pending before the Committee of Ministers of the Council of Europe, in which the ECtHR has found that there has been a violation of Article 159 of the former TCK or Article 301 of the current TCK.[50] Execution of the ECtHR judgments in these cases, collectively called the Akçam group of cases, is being supervised by the Committee of Ministers under enhanced procedure. At its meeting held on 19-21 September 2017, the Committee requested that Article 301 of the TCK be brought into line with the EHRC standards without further delay.[51] The Committee also called on the authorities to ensure that no investigation or prosecution is initiated against those expressing their opinions and ideas. Government noted that as of as of the end of January 2018, the prosecutors issued non-prosecution decisions concerning 6,271 cases. It said the violations of freedom of expression resulted from a broad interpretation of Article 301 by the judiciary; therefore, there was no need for a new legislative amendment. At its meeting on 18-20 September 2018, the Committee decided to continue monitoring execution of the Akçam group of cases and again invited the authorities to revise Article 301 of the TCK without delay.[52]

More recently, in its action plan submitted to the Committee of Ministers in January 2020, the government again insisted that the violations found in this group of cases stemmed from the overly wide interpretation of Article

49 Opinion of Venice Commission, p. 24.

50 Altuğ Taner Akçam v. Turkey, Application no: 27520/07, 25.10.2011; Dilipak v. Turkey, Application no: 29680/05, 15.09.2015; Kürkçü v. Turkey, 43996/98, 27.07.2004; Birol v. Turkey, Application no: 44104/98, 01.03.2005; Güzel v. Turkey (no. 3), Application no: 6586/05, 24.07.2007; Özer v. Turkey (no. 2), Application no: 871/08, 26.01.2010; Çamyar v. Turkey, 42900/06, 05.09.2017; Özer v. Turkey, Application no: 47257/11, 05.09.2007; Yurtsever v. Turkey, Application no: 42320/10, 05.09.2017; Balbal v. Turkey, Application no: 66327/09, 10.10.2017; Çamyar v. Turkey, Application no. 16899/07, 10.10.2017; Surat v. Turkey, Application no. 50930/06, 10.10.2017; Demirtaş Nurettin v. Turkey, Application no. 37048/97, 09.10.2003; Erkanlı v. Turkey, Application no. 37721/97, 13.02.2003.

51 Council of Europe Committee of Ministers, 1294th Meeting, 19-21 September 2017, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168074a28a.

52 Council of Europe Committee of Ministers, 1324th Meeting, 18-20 September 2018, http://hudoc.exec.coe.int/eng?i=004-37188.

301 and noted that the percentage of investigations under this provision in which prosecutors filed an indictment was only 12 percent in 2019. In 2017, 2018 and 2019, prosecutors issued non-prosecution decisions in 3,740, 38,598 and 119,636 investigations respectively.[53] At its meeting held on 3-5 March 2020, the Committee recalled that Article 301 of the Criminal Code was found by the Court not to meet the "quality of law" requirement in view of its "unacceptably broad terms" and urged the Turkish authorities to revise the provision without further delay in view of the Committee's previous decisions and the clear case-law of the Court.[54]

53 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168099813c

54 Council of Europe Committee of Ministers, 1369th Meeting, 3-5 March 2020, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809cc944.

Propaganda for a Terrorist Organisation: Articles 6/2 and 7/2 of the Anti-Terror Law No. 3713 (TMK)

ECtHR has delivered a large number of judgments against Turkey in applications filed against prosecutions, imposition of prison sentences or, even when judicial proceedings resulted in acquittal verdicts, the presence of the threat of punishment for extended periods of time on account of actions ranging from making statements or sharing statements made by others to shouting slogans.[55]

In the *Gözel and* Özer *v. Turkey* judgment, which is based on Article 46 of the Convention, the ECtHR established that there was a systematic problem in Turkey in this regard, considering the fact that it had previously found similar violations in numerous cases against Turkey. The judgment concerns conviction of the applicants, the owner and editor and publisher and editor of two publications, *Maya* monthly magazine and *Yeni Dünya* İçin Çağrı magazine, under Article 6/2 of the TMK for publishing three articles that the domestic courts characterised as statements by a terrorist organisation.

While assessing whether the "necessity" of interference with the freedom of expression was convincingly demonstrated in this case, the ECtHR examined, pursuant to its case-law, the reasoning given by the Turkish courts for the conviction of the applicants. It found that the judges considered only the fact that the applicants' journals published the writings of an organisation recognised as terrorist under the Turkish law and convicted the applicants under Article 6/2 of the TMK solely on this ground.[56] The judges did not consider whether any of these writings encouraged the use of violence, armed resistance or uprising, nor did they analyse the context in which these pieces were written with reference to the criteria set forth by ECtHR in the cases related to the freedom of expression. In the opinion of the ECtHR, speeches or statements of a member of a prohibited organisation or harsh criticism of government policies on their

55 These judgments were subject to enhanced monitoring by the Committee of Ministers under the Incal v. Turkey and Gözel and Özer v. Turkey groups of cases. The Incal v. Turkey and Gözel and Özer v. Turkey groups were closed upon execution of the individual measures required in the 117 cases included under these groups. Supervision of general measures is ongoing with the Öner and Türk v. Turkey group of cases.

56 Gözel and Özer v. Turkey, Application no. 43453/04 and 31098/05, 06.07.2010, paras. 58, 61.

own cannot justify interference with the right to freedom of expression.[57]

The Court underlines in this judgment that the lack of such consideration in conviction verdicts stemmed from the wording of Article 6/2 of the Anti-Terror Law No. 3713 itself, which provides conviction of "anyone who prints or publishes statements or leaflets by terrorist organisations" and contained no obligation for the judges to carry out a textual or contextual examination of the writings, applying the criteria established and implemented by the Court under Article 10. These conclusions demonstrate that the violation of the applicants' rights guaranteed by Article 10 stems from a problem related to the way this provision is worded and applied. In this respect, the ECtHR concluded that bringing the relevant law into conformity with the Convention would constitute an appropriate remedy, which would make it possible to put an end to the violation found and to prevent similar violations in the future.[58]

Following this judgment, significant amendments were introduced in the TMK through a series of judicial reforms focusing particularly on freedom of expression, which are publicly known as the Third Judicial Package and the Fourth Judicial Package. Second paragraphs of Articles 6 and 7 of the TMK were amended as part of the Fourth Judicial Package. Second paragraph of Article 7 was further amended when the first reform package introduced under the government's Judicial Reform Strategy went into force on 24 October 2019. The following sentence was added to paragraph 2 under the latest reform: "Expressions of thought that do not exceed the boundaries of reporting or are made for the purpose of criticism do not constitute an offence."

In its action plan submitted to the Committee of Ministers, the government stated that Article 6/2 of the TMK had been replaced by the provision that "a person who makes propaganda for terrorist organisations in a manner which would legitimize or praise their methods including force, violence or threats or publishing leaflets and statements which would incite the use of these methods shall be sentenced to a penalty of imprisonment for a term of one to three year," and added that no imprisonment had been ordered during the past seven years based on this provision.

57 Gözel and Özer v. Turkey, para. 63.

58 Gözel and Özer v. Turkey, para. 76.

However, it seems that the second paragraph of Article 6 of the TMK has been replaced by the second paragraph of Article 7 of the same law. Despite the amendments on 30 April 2013 as part of the Fourth Judicial Package and on 24 October 2019 under the Judicial Reform Strategy, Article 7/2 is still one of the most widely used articles.

Following the latest amendments, Article 7/2 of the TMK reads as follows:

"Any person making propaganda for a terrorist organisation shall be punished with imprisonment from one to five years. If this crime is committed through means of mass media, the penalty shall be aggravated by one half. In addition, those responsible for the publication who have not participated in the perpetration of the crime shall be punished with a judicial fine from one thousand to fifteen thousand days' rates. (Additional Sentence: 17/10/2019 - by Article 13 of the Law No. 7188) "Expressions of thought that do not exceed the limits of reporting or are made for the purpose of criticism do not constitute an offence." The following actions and behaviours shall also be punished according to the provisions of this paragraph:

a) (Repealed on 27/3/2015 by Article 10 of the Law No. 6638)

b) As to imply being a member or follower of a terrorist organisation, even if it does not take place during a demonstration;

1. carrying insignia and signs belonging to the organisation,

2. shouting slogans,

3. making announcements using audio equipment,

4. wearing a uniform of the terrorist organisation imprinted with its insignia.

Although the government reported to the Committee of Ministers that there was an increased awareness on the protection of freedom of expression among the prosecutors and domestic courts and that there were

numerous decisions ordering non-prosecution or acquittal based on the ECtHR judgments, judicial statistics show that the number of trials and of convictions issued each year has been increasing.

TMK 7/2	Number of Lawsuits	Number of Offences in the Lawsuits Concluded	Conviction	Acquittal	Deferred Verdicts	Other Verdicts	Total Verdicts
2010	11416	10786	7644	1686	No data	5099	14429
2011	11425	9141	7210	2071	No data	3756	13037
2012	15672	18139	4224	2191	No data	14762	21177
2013	10547	13434	2251	1438	No data	12100	15789
2014	15815	14339	669	878	1010	12114	14671
2015	13608	9560	1728	2843	1645	4089	10305
2016	15913	12199	3195	4492	1966	4166	13819
2017 **All TMK statistics**	24585	16561	6162	5202	3395	5404	20163

In April 2019, the ECtHR reiterated its established case-law in the judgments of *Gürbüz v. Turkey*[59] and *Mart and Others v. Turkey*,[60] issued a week apart. Ali Gürbüz, the owner of the newspaper *Ülkede Özgür Gündem* at the time, systematically faced criminal proceedings in seven different investigations launched against him under Article 6/2 of the TMK for publishing statements of the executives of the PKK in the newspaper. He was prosecuted without being imprisoned and was finally acquitted in each group of trials, lasting from five to seven years. In the case of Mart and Others, the applicants were accused of being readers of *Atılım* and *Özgür Gençlik* journals which were deemed to be publications of the proscribed Marxist Leninist Communist Party (MLKP) group and copies of which were found in their homes; participating in the MLKP activities and demonstrations and shouting slogans in favour of the group and carrying its flags and banners there. They were put on trial in July 2004 on the charge of membership of the MLKP and were eventually sentenced to two years

59 Ali Gürbüz v. Turkey, Application no. 52497/08, 12.03.2019.

60 Mart and Others v. Turkey, Application no. 57031/10, 19.03.2019.

and six months of imprisonment for spreading propaganda for a terrorist organisation under Article 7/2 of the TMK.

ECtHR found that the use of the Anti-Terror Law in these cases automatically without any examination of the content and context is irreconcilable with freedom of expression, maintaining that the applicants' facing criminal lawsuits and threat of punishment for years for publishing the statements made by the executives and members of an organisation that is classified as terrorist under the Turkish law, unless these statements explicitly contain call for violence or hate speech, would lead to self-censorship and constitute a form of harassment even if they were acquitted in the end, and therefore would have a chilling effect on the conduct of public debate.[61]

According to the Court, local courts and the Court of Cassation in Turkey take legal action and impose penalties without considering the content and context of the writings, news, slogans or banners that are subject to prosecution and without analysing and presenting sufficient justification on whether they encourage violence or armed resistance or contain hate speech. Concerning the case of Ali Gürbüz, the Court noted that criminal proceedings were systematically commenced against the applicant for each publication containing statements made by representatives of an organisation classified as terrorist in Turkish law, even where those statements were harmless messages such as Christmas greetings or congratulations on a sporting success.[62] In the Court's view, the automatic application of the relevant provisions of the Law No. 3713 to any statement issued by a terrorist organisation could have had a chilling effect on freedom of expression and public debate. According to the Court, even if they were acquitted in the end, the prolongation of the proceedings and the fear of being inevitably punished during that time led to pressure and self-censorship on the individuals concerned. Moreover, given the number of investigations and the length of the proceedings, it could be regarded as a form of harassment.[63]

In its meeting on 19-21 September 2017, the Committee of Ministers expressed regret that, despite the legislative measures taken and the emerging case

61 Ali Gürbüz v. Turkey, paras. 75-76.

62 Ali Gürbüz v. Turkey, para. 74.

63 Ali Gürbüz v. Turkey, paras. 77-78.

law of the Turkish Constitutional Court which aligns its practice with that of the ECtHR, no progress has been reported in the implementation of the legislation to comply with Convention standards.[64] The Committee thus urged the authorities to take:

complementary legislative or other measures to ensure that criminal investigations are not initiated solely on the basis of expressions of opinion unless compelling reasons exist, such as incitement to violence or hatred;

measures to ensure that individuals are not taken into police custody or detained on remand when the evidence in the investigation or case-file concerns solely expressions of opinion unless compelling reasons exist, such as incitement to violence or hatred;

measures to align the practice of prosecutors and first instance courts to ensure that they apply the case law of the Constitutional Court and the ECtHR under Article 10 of the Convention.

At the end of its meeting on 3-5 March 2020, the Committee welcomed the continuing good practice of the higher courts, in particular the Constitutional Court, in applying the criminal law in accordance with the Convention principles but stressed that prosecutors and the lower courts seemed to continue to apply the criminal law without ensuring respect for freedom of expression and that it did not appear that the measures taken so far were sufficient to remedy the problems revealed by the relevant ECtHR judgments over the years.[65]

64 Council of Europe Committee of Ministers meeting on 19-21 September 2017, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168074a2dc

65 Committee of Ministers meeting on 3-5 March 2020, http://hudoc.exec.coe.int/eng?i=004-37188

Membership of an Armed Terrorist Organisation: Paragraphs 6 and 7 of Article 220 of TCK and Article 314 of TCK

Article 314 of the Turkish Criminal Code, entitled "Armed Organisation," reads as follows:

Article 314

(1) Any person who establishes or commands an armed organisation with the purpose of committing the offences listed in parts four and five of this chapter shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years.

(2) Any person who becomes a member of the organisation defined in paragraph one shall be sentenced to a penalty of imprisonment for a term of five to ten years.

(3) Other provisions relating to the forming of an organisation in order to commit offences shall also be applicable to this offence.

Special attention needs to be given to Article 220 of the TCK in the context of "other provisions relating to the forming of an organisation to commit crimes." Paragraph 6 of Article 220, which is entitled "Establishing Organisations for the Purpose of Committing Crimes," states that "any person who commits an offence on behalf of an organisation" without being its member shall be sentenced for the offence of being a member of that organisation. Article 7 says "any person who aids and abets an organisation knowingly and willingly" without being its member shall again be sentenced for being a member.

There are a series of ECtHR judgments which found that arrests and pre-trial detention of investigative/critical journalists for prolonged periods of time under Articles 220, 312 and 314 of the TCK without credible evidence of criminal activity amounted to violation of the right to liberty and security guaranteed under Article 5 of the Convention and the right to freedom of expression protected under Article 10. These judgments are gathered together under the Nedim Şener group of cases and include, in addition to

the *Nedim* Şener *v. Turkey* judgment, the judgments in Mehmet Altan and Şahin Alpay cases.

Applicants Nedim Şener and Ahmet Şık, both of whom are well known journalists, were taken into custody on 3 March 2011, placed in pre-trial detention on 6 March 2011 and released on 12 March 2012. Following the imprisonment of the applicants, authorities, including the prosecutor in charge of the investigation and senior government officials, made statements that the applicants were remanded for alleged membership in the organisation, not because of their journalistic activities.

The applicants complained that their pre-trial detention in connection with the criminal proceedings brought against them had infringed their right to liberty and security and freedom of expression and claimed that their detention had been aimed to prevent them from exercising their profession as investigative journalists.[66]

In its judgment made in response to the application, the ECtHR questioned whether the purpose of the applicants' placement in pre-trial detention was to prevent criticisms or comments concerning the conduct of a trial which had already been widely debated by the public by then, and therefore, whether the interference had been aimed at pursuing the legitimate aims proposed by the government, but decided that it would address the question in the section discussing whether the interference was necessary in a democratic society.[67]

Maintaining that pre-trial detention of the applicants for such a long period without "relevant" or "sufficient" reasons violated Article 5 of the Convention, and considering the nature and severity of the measures taken against the applicants, the Court decided that irrespective of the circumstances, the measures constituted an interference disproportionate to the legitimate aims pursued by Article 10 of the Convention and, thus, they could not be deemed necessary in a democratic society.[68] Following the delivery of the

66 Nedim Şener v. Turkey, Application no. 38270/11, 08.07.2014, para. 87.

67 Nedim Şener v. Turkey, para. 105.

68 Nedim Şener v. Turkey, paras. 120,121,123.

judgment, both applicants were acquitted on 12 April 2017.

At its meeting held on 8-10 March 2016, the Committee of Ministers recalled the ECtHR's well-established case-law that the taking of custodial measures against journalists created a chilling effect and a climate of self-censorship and urged the authorities to take measures and put in place safeguards to ensure that Turkish law and practice do not allow the imposition of disproportionate measures, such as custodial measures, within the context of the exercise of freedom of expression.

The Committee also invited the authorities to provide statistics covering the period from 1 March 2012 to 1 June 2016, as to how many journalists were detained and/or convicted, on what grounds and for how long.[69]

In September 2016, the Government submitted a list of 106 persons, claiming that "no convict or detainee... was being held for solely journalistic activities."[70]

But Commissioner for Human Rights of the Council of Europe disagrees. Over the past years, lawsuits against individuals for expressions that should be considered to be clearly under the protection of Article 10 of the ECHR, have not only persisted but become more numerous as well.

TCK 314/ 1-2-3	Number of Lawsuits	Number of Offences in the Lawsuits Concluded	Conviction	Acquittal	Deferred Verdicts	Other Verdicts	Total Verdicts
2010	7946	6238	4280	1373	No data	2969	8622
2011	8507	5472	4664	1525	No data	2271	8460
2012	11035	8898	8170	1953	No data	3254	13377
2013	8325	9496	8113	2356	No data	3809	14278
2014	20476	18606	1630	1116	122	16487	19355
2015	15139	9281	3335	2435	162	4889	10821
2016	30710	12327	4944	3033	338	6734	15049
2017	146718	46371	36927	6095	692	24428	68142

69 Council of Europe Committee of Ministers, 1250th Meeting, March 2016, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1f7e

70 Information note presented by the government to the 1273rd Meeting, 6-8 December 2016, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806a7f49.

TCK 220/ 6-7	Number of Offences in the Lawsuits Filed	Number of Offences in the Lawsuits Concluded	Conviction	Acquittal	Deferred Verdicts	Other Verdicts	Total Verdicts
2010	1595	1207	276	356	No data	702	1334
2011	939	939	233	306	No data	539	1078
2012	2610	1740	872	511	No data	915	2298
2013	1770	1779	425	600	No data	986	2011
2014	3214	2540	111	437	11	2028	2587
2015	1268	1245	209	638	37	463	1347
2016	1417	1113	119	576	14	495	1204
2017	2286	1520	514	652	29	641	1836

This should be considered within the context of an overall increase in the number of cases and requests for detention based on the relevant provisions of the Criminal Code. In a third party intervention submitted to the ECtHR concerning the applications by imprisoned journalists Ahmet Altan, Şahin Alpay, Atilla Taş, Ali Bulaç, Nazlı Ilıcak, Mehmet Altan, Murat Aksoy, Deniz Yücel, Ahmet Şık and Murat Sabuncu and other journalists and executives of *Cumhuriyet* newspaper, the Council of Europe Human Rights Commissioner observed that in the majority of cases, journalists have been charged with terrorism-related offences without any evidence corroborating their involvement with a terrorist organisation. According to the Commissioner, the majority of the criminal proceedings against journalists were initiated on the basis of unsubstantiated charges and with no factual evidence other than their purely journalistic activities.[71]

From among these cases, the Court ruled in March 2018 in the applications of journalists Şahin Alpay and Mehmet Altan, finding that their pre-trial detention on account of their political and critical statements and writings violated the right to liberty and security safeguarded in Article

71 Third Party Intervention by the Council of Europe Human Rights Commissioner Concerning the Cases of Journalists, para. 14.

5 of the Convention and freedom of expression protected in Article 10.[72] In *Sabuncu and others v. Turkey* and *Ahmet* Şık *v. Turkey* judgments, which were delivered in November 2020, the Court found again that the journalists' right to liberty and security and freedom of expression had been violated.[73]

An important feature of these judgments is that they are the first – and the last for the time being - ECtHR judgments regarding detention of journalists in the aftermath of the coup attempt. In these cases, the Court also assessed whether the detention orders made during the state of emergency violated the Convention. The Court considered that the attempted military coup disclosed the existence of a "public emergency threatening the life of the nation" and regarded the declaration of a state of emergency to be in line with the Convention. However, this does not mean, contrary to the government's assertion, that any measure taken during the state of emergency could be justified under Article 15 of the Convention and these measures will automatically be in conformity with the Convention, the Court maintained, recalling the Constitutional Court's conclusion that the right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed a criminal offence.[74] The Court has acknowledged the difficulties facing Turkey in the aftermath of the attempted military coup of 15 July 2016, but it has emphasized that this does not mean that the authorities have *carte blanche* under Article 15 to order the detention of an individual during the state of emergency without any verifiable evidence or information, or without a sufficient factual basis satisfying the minimum requirements of Article 5/1 (c) regarding the reasonableness of a suspicion.[75]

One of the principal characteristics of democracy is the possibility it offers of resolving problems through public debate, the Court said, emphasising that democracy thrives on freedom of expression:

72 Mehmet Hasan Altan v. Turkey, Application no. 13237/17, 20.03.2018 and Şahin Alpay v. Turkey, Application no. 16538/17, 20.03.2018.

73 Sabuncu and others v. Turkey, Application no. 23199/17, 10.11.2020 and Ahmet Şık v. Turkey (no. 2), Application no. 36493/17, 24.11.2020.

74 Şahin Alpay v. Turkey, para. 100.

75 Alparslan Altan v. Turkey, Application no. 12778/17, 16.04.2019, para. 147.

210. ... In this context, the existence of a "public emergency threatening the life of the nation" must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society. In the Court's view, even in a state of emergency – which is, as the Constitutional Court noted, a legal regime whose aim is to restore the normal regime by guaranteeing fundamental rights – the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.

211. In this context, the Court considers that criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offenses such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings. Should this not be the case, the national courts' interpretation cannot be regarded as acceptable.[76]

There is no definition of an armed organisation or membership of an armed organisation provided in the TCK. However, some criteria have been determined by the established case-law of the Court of Cassation: In order to talk about an armed terrorist organisation, there must be an organisation with a hierarchical structure, a strict discipline, an active cooperation and at least three members. In terms of its structure, membership, equipment and materials, this organisation must be armed and fit for committing the "intended crimes" set forth by the TCK.[77]

In their assessments over the past years, the Council of Europe Commissioner for Human Rights, Freedom House, Amnesty International and the Venice Commission noted that the offence of being a member of an armed

76 Mehmet Altan v. Turkey, para. 210-211.

77 Court of Cassation, General Criminal Assembly, Docket no: 2006/10-253, Judgment no: 2007/80, 03.04.2007.

organisation set out in Articles 220 and 314 of the TCK has a very broad definition and field of application. In its *Işıkırık v. Turkey*[78] judgment in 2017, and *İmret v. Turkey* and *Bakır v. Turkey*[79] judgments in 2018, the ECtHR found that the paragraphs 6 and 7 of Article 220 were not foreseeable as to their application. In the Işıkırık judgment, which concerned the sentencing of the applicant on 20 November 2007 to six years and three months of imprisonment for "being a member of a terrorist organisation" under Article 314/2 of the TCK with reference to Article 220/6 and Article 314/3 of the same legislation and to one year and eight months of imprisonment for "spreading propaganda for a terrorist organisation" under Article 7/2 of the TMK for attending a funeral in Diyarbakır and shouting slogans and making a victory sign there, the ECtHR, citing a 2016 opinion by the Venice Commission and reports of 2011 and 2012 and a memorandum of 2017 by the Council of Europe Commissioner for Human Rights, concluded that Article 220/6 of the Criminal Code was not "foreseeable" in its application since it did not afford the applicant the legal protection against arbitrary interference with his right to freedom of assembly under Article 11 of the Convention.

According to the Court, courts in Turkey interpret the notion of "membership" of an illegal organisation under Article 220/6 of the TCK in extensive terms, and as is the case in the application in question, regard the mere act of attending a public meeting and shouting slogans and making victory signs there to be sufficient to conclude that the person in question acted on behalf of a terrorist organisation and to punish them as an actual member of that organisation. The Court further noted that when Article 314 is applied alone, the domestic courts must have regard to the "continuity, diversity and intensity" of the acts of the accused, whereas when the same article was applied in connection with Article 220/6, the courts disregard those and apply the criteria for conviction under Article 314/2 extensively to the detriment of the accused. The Court concluded, therefore, that the wording of the provision, including its extensive interpretation by the domestic courts, did not afford a sufficient measure of protection against arbitrary interferences by the public authorities.

78 Işıkırık v. Turkey, Application no. 41226/09, 14.11.2017.

79 İmret v. Turkey (no. 2), Application no. 57316/10, 10.07.2018; Bakır and Others v. Turkey, Application no. 46713/10, 10.07.2018.

Noting that the applicant was given a prison sentence of six years and three months for allegedly participating in a demonstration and making victory sign and shouting slogans there, the Court found that the sanction arising from Articles 314/2 and 220/6 was "strikingly severe and grossly disproportionate." It concluded, therefore, that Article 220/6 would inevitably have a particularly chilling effect on the exercise of the rights to freedom of expression and assembly and that the application of this provision was not only likely to deter those who were convicted but also other members of the public who wish to attend demonstrations and participate in open political debate from exercising their freedom of assembly. Accordingly, the Court held that the interference was not prescribed by law and decided, without needing to determine whether it pursued a legitimate aim and was necessary in a democratic society, that the interference constituted a violation of Article 11.

The ECtHR continued this approach a year later. In two judgments, the Court found that the wording of the paragraph 7 of Article 220 of TCK and its interpretation and implementation by the local courts and the 9th Criminal Chamber of the Court of Cassation were too broad; thus, it was not foreseeable and violated the principle of legality. The first of these judgments, *İmret v. Turkey*, concerned an applicant who was originally sentenced to six years and three months of imprisonment, which was later commuted to five years, two months and 15 days following a legislative amendment, for participating in 10 gatherings as a politician, giving speeches in Kurdish in these activities, and referring to the Kurdistan Workers' Party (PKK) leader Abdullah Öcalan as "Mr. Öcalan." The second judgment, *Bakır and Others v. Turkey*, concerned applicants who were sentenced to prison terms of six years and three months, seven years and six months, and one year and eight months for participating in two demonstrations on different dates and for wearing clothes with ESP and SGD written on them.

In those subsequent judgments, the ECtHR observed that Article 220/7 was interpreted and applied in an extensive way, same conclusions it had reached with regard to Article 220/6 in the *Işıkırık v. Turkey* judgment. It further pointed out that in respect of their convictions for acts that fell within the scope of Articles 10 and 11 of the Convention, no distinction was made between the applicants and individuals who had committed offences

within the structure of the PKK (*İmret v. Turkey*) or the Marxist-Leninist Communist Party (MLKP) (*Bakır and Others v. Turkey*). The Court stated that, although it does not underestimate the difficulties to which the fight against terrorism gave rise, such extensive interpretation of a legal norm cannot be justified when it has the effect of equating mere exercise of fundamental freedoms with membership of an illegal organisation in the absence of any concrete evidence of such membership.

Although the ECtHR's conclusions regarding the lack of foreseeability concern paragraphs 6 and 7 of Article 220 in respect of violations of freedom of assembly under Article 11 of the Convention, the same conclusions also apply to Article 314 of the TCK and applications claiming violation of the right to freedom of expression under Article 10 of the Convention.

Since 2009, Commissioners for Human Rights of the Council of Europe, in their reports prepared after their visits to Turkey, have referred to Articles 220 and 314 of the TCK as obstacles for the exercise of freedom of expression and freedom of the media and called for amendment without delay of these provisions and for their application in accordance with the case-law of the Court.

Venice Commission is also of the opinion that Article 314 should be applied with strict adherence to the criteria of "continuity, diversity and intensity" and "the organic relationship" as set forth by the case-law of the Court of Cassation. As for Article 220, it maintains that the sentence "although he is not a member of that organisation, shall also be sentenced for the offence of being a member of that organisation" in paragraphs 6 and 7 should be repealed, and that in case this sentence is kept, the application of Article 220 in conjunction with Article 314 should be limited to cases which do not involve the exercise of the rights to freedom of expression and assembly.[80]

Arrests and pre-trial detention of individuals without any credible evidence of crime and for exercising their right to freedom of expression are a matter of close scrutiny for the Committee of Ministers as well. After discussing the execution of judgments in the Nedim Şener group of cases at a meeting in 2018, the Committee urged the Turkish authorities to rapidly take more concrete and result-oriented measures in order to ensure that the provisions of the Criminal Code and the Anti-Terror Law are "not interpreted broadly,

80 Opinion of Venice Commission, para. 128.

in breach of Convention rights, so that criminal proceedings are not initiated against individuals for expression of views which do not incite violence or hatred."[81]

Most recently, the Committee noted at its meeting on 3-5 March 2020 that the problem of the disproportionate use of the criminal law to punish journalists and other persons who express critical or unpopular opinions has been pending before the Committee in relation to various judgments for over 20 years and, given the particular importance accorded to freedom of the press by the Court in its case-law, requested the authorities to provide statistical information on the number of journalists prosecuted, convicted and held in pre-trial and post-conviction detention, with details of the allegations involved.[82]

81 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168064d59f7

82 The Committee of Ministers meeting, 3-5 March 2020, http://hudoc.exec.coe.int/eng?i=004-37188.

In Lieu of Conclusion

As explained above, judicial reform packages and action plans have been introduced and a number of amendments have been made in the relevant legislation over the recent years, following ECtHR judgments finding violations of freedom of expression. With a Constitutional reform that went into effect in 2010, the mechanism of individual application to the Constitutional Court was introduced as of 23 September 2012. Through projects jointly implemented by the Ministry of Justice, the Council of Europe and the European Union, thousands of judges and prosecutors have been given training on the ECtHR standards on freedom of expression.

More recently, the Law No. 7188 on Amendments to the Criminal Procedure Code and Other Laws, publicly known as the First Judicial Reform Package issued under the Judicial Reform Strategy that was announced by President Erdoğan on 30 May 2019, came into effect on 24 October 2019 after being published in the Official Gazette.[83] The law introduced numerous amendments to the relevant legislation, including those that are the focus of this report. One such amendment is the addition, as mentioned earlier, of the sentence "Expressions of thought that do not exceed the boundaries of reporting or are made for the purpose of criticism do not constitute an offence" into the text of Article 7/2 of the TMK, which deals with the offence of "spreading propaganda for a terrorist organisation." Another amendment introduced under the First Judicial Reform Package made it possible to take those convictions ordering imprisonment of the defendants for a term of less than five years under Articles 299, 301 and 314 of the TCK and Articles 6/2 and 7/2 of the TMK to the Court of Cassation, even after they were confirmed by a regional appellate court.

The Committee of Ministers has welcomed such amendments and measures but stressed that they were not sufficient. As stated by the Commissioner for Human Rights of the Council of Europe, many of the problematic provisions have either not been amended at all despite their incompatibility with ECHR standards, or have been superficially amended without addressing the underlying issues.[84] The Commissioner for Human Rights

83 https://www.resmigazete.gov.tr/eskiler/2019/10/20191024-22.pdf.

84 Memorandum on freedom of expression and media freedom in Turkey, para. 16.

devoted a separate section to the first reform package in a report following her visit to Turkey from 1-5 July 2019. According to the Commissioner, provisions in the Constitution and the Convention and judgments by the Constitutional Court and the ECtHR already stipulate that news reporting and criticism cannot constitute crime, therefore it is unclear whether the amendment introduced to Article 7 of the TMK was necessary. While welcoming the opening of the possibility of appeal to the Court of Cassation for a number of offences as a positive step, which rectifies a problem that was created at the time of the establishment of regional appellate courts, the Commissioner was still of the opinion that unless the Turkish authorities change course by adopting far more decisive, far-reaching and comprehensive measures, the Judicial Reform Strategy is unlikely to lead to the desired results.[85]

The Committee of Ministers shares a similar view. In its meeting held on 18-20 September 2018, the Committee examined the developments in the Incal, Gözel and Özer, Nedim Şener and Akçam groups of cases and underlined the "serious and continuing nature" of the problems in the area of freedom of expression in Turkey as revealed by the Court's judgments since 1998 and maintained that that the measures taken so far have not proven sufficient to ensure full compliance with Convention standards. This, according to the Committee, results from the fact that the relevant provisions are interpreted and applied broadly by the judges and prosecutors.[86]

While recalling that judgments that found rights violations in applications by persons who faced criminal proceedings, detained or convicted without sufficient grounds under various articles of the TCK and the TMK for having expressed opinions that did not incite hatred or violence have been pending before the Committee for over 20 years, the Committee of Ministers welcomed the amendment of Article 7 of the TMK and the relevant Constitutional Court judgments, but stressed that the measures taken were not sufficient in remedying the problems. The Committee

85 The Council of Europe Commissioner for Human Rights, Report following her visit to Turkey from 1 to 5 July 2019, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168099823e 19.02.2020.

86 Council of Europe Committee of Ministers, 1324th Meeting, 18-20 September 2018, http://hudoc.exec.coe.int/eng?i=004-37188.

therefore requested the Turkish authorities to provide detailed statistical information showing the total number of prosecutions and convictions for the offences at issue in the groups of cases mentioned; to amend Article 301 of the TCK, which does not meet "quality of law" requirements, without further delay; to consider further legislative amendments in view of the ECtHR's case-law; and invited them to send a high-level political message to underline that freedom of expression is valued in Turkish society and that the criminal law should not be used in such a way as to restrict it.[87]

Indeed, the legislative amendments adopted so far in the Criminal Code and the Anti-Terror Law appear to be insufficient to prevent similar violations of Article 10 by Turkish judges and prosecutors, unless there is a "drastic shift" in the adjudicative approach of the judiciary.[88] As it was repeatedly pointed out by the Commissioner for Human Rights and by various judgments of the ECtHR, structural problems in the interpretation and application of legal provisions by judges and prosecutors constantly undermine freedom of expression and media freedom in Turkey. Independence of the judiciary from political and other interference plays a central role in eliminating unjust restrictions on freedom of expression and of the media.[89]

Two issues that have been highlighted in almost all international monitoring reports stand out in this context: The structure of the Council of Judges and Prosecutors (HSK) and the Criminal Peace Judgeships.

Following the corruption investigations launched on 17 December 2013, the Council of Judges and Prosecutors intervened more actively in the judiciary through forced reassignments of a large number of members of the judiciary, investigations, suspensions and dismissals. Although these measures were apparently aimed at the Gülenist network within the judiciary, the Commissioner reported that he had heard from many interlocutors that they produced a general atmosphere of apprehension and fear within the judiciary, exacerbating or reviving state-centrist attitudes and a reluctance to draw attention, for example by taking controversial decisions upholding freedom of expression.[90]

87 Committee of Ministers meeting, 3-5 March 2020, http://hudoc.exec.coe.int/eng?i=004-37188.

88 Hammarberg's report, para. 39.

89 Memorandum on freedom of expression and media freedom in Turkey, para. 127.

90 Memorandum on freedom of expression and media freedom in Turkey, paras. 49-50.

Criminal Peace Judgeships are also considered to be a tool for "judicial harassment" intended to suppress freedom of expression and media. Such concerns about these one-judge courts are raised by the Venice Commission as well. The following assessment of the Commission is particularly noteworthy:

> *"In the Venice Commission's view, the Turkish system of 'opposition' to a single peace judge of the same level does not offer sufficient guarantees that the appeal will be impartially examined. Criminal peace judges are colleagues of equivalent experience and qualifications, sharing premises and examining each other's appeals; they form a closed circuit. It is not unreasonable to imagine that they trust each other and to expect that they tend to respect each other's decisions. They are indeed likely to naturally defend the reputation of competence of their own colleagues, their own and of their institution as a whole. This system does not offer sufficient prospects of an impartial, meaningful examination of the appeal against applications for review of the legality of detention."* [91]

According to the Venice Commission, the manner in which Criminal Peace Judges are appointed is problematic in terms of judicial impartiality and independence; they are burdened not only with "protective measures" including arrest, pre-trial detention, search and seizure, but also with other duties (such as traffic fines, Internet shutdown requests, and the like); they have a closed system of work amongst themselves isolated from other judges and courts, raising concerns over their impartiality and exposure to influence; reasoning is absent or insufficient in decisions of the peace judgeships; the system of horizontal appeals to protective measures is problematic in terms of the human rights law. In the light of this review, the Commission recommended that powers of the Criminal Peace Judgeships to take protective measures be removed. If not, then it should be ensured that the decision of these judgeships can be appealed before the criminal courts of first instance or the courts of appeal.

The role of the Constitutional Court, which reviews numerous applications against decisions of Criminal Peace Judgeships, also needs to be discussed.

91 Opinion of Venice Commission, p. 14.

In its action plans submitted to the Committee of Ministers, the government mentions availability as of 23 September 2012 of the mechanism of individual application to the Constitutional Court and decisions of the Constitutional Court finding rights violations. In his third-party intervention submitted to the Court in the case of human rights defender Osman Kavala, Commissioner for Human Rights criticised that no further judgment came from the Constitutional Court in a reasonable time after its judgments in Mehmet Altan and Şahin Alpay cases that were delivered in January 2018.[92] Similarly, the ECtHR held in Osman Kavala's application for the first time that there has been a violation of Article 5/4 of the Convention on account of the lack of a speedy judicial review by the Constitutional Court.[93] The Council of Europe Commissioner for Human Rights also stressed that the Constitutional Court cannot be deemed "speedy" in politically sensitive cases of detained persons:

> *96. As regards the issue of speediness, the Commissioner notes that after the state of emergency, the Constitutional Court received tens of thousands of applications and it has been slow in rendering judgments, particularly in politically sensitive cases. In the context of detentions, this has prompted the Commissioner to raise serious concerns about the "speediness" of the remedy before the Constitutional Court in a third-party intervention before the ECtHR. She notably drew attention to the long delays by the Constitutional Court in examining the applications of a number of journalists and MPs despite the urgency of the situation and the numerous human rights at stake, arguing that in the applicant's case a delay of almost one year could also not be seen as "speedy" given the specific circumstances of the case, in particular "the manifest disconnect between the seriousness of the alleged crimes and the non-violent nature of the acts in question, and the profound chilling effect this case continues to exert on Turkish civil society.*

92 Third Party Intervention by the Council of Europe Commissioner for Human Rights submitted on the application Osman Kavala v. Turkey, https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-cas/1680906e27, paras. 39-40.

93 Osman Kavala v. Turkey, Application no. 28749/18, 10.12.2019.

Although the Constitutional Court ruled in the Şahin Alpay and Mehmet Altan cases that the applicants had been detained for their journalistic activities and that their right to liberty and security and freedom of expression had been violated as a result of their detention, first the 13th and 26th High Criminal Courts of Istanbul where the journalists had been tried and convicted, and then the 14th and 27th High Criminal Courts, which acted as appeal courts, refused to release the journalists in defiance of the Constitutional Court judgments. Open resistance by the four local courts to the Constitutional Court's judgment was widely regarded as a constitutional crisis that has raised questions even about the very effectiveness of the Constitutional Court.

It should be underlined that, in a country where the Constitutional Court was attacked by high-level officials, including the president and the justice minister, for its judgment against detention of journalists Can Dündar and Erdem Gül and lower courts were openly urged not to implement the judgment; where the president has publicly targeted human rights defenders; and where judges and prosecutors were relocated, investigated or suspended on account of their decisions ordering release of the defendants (i.e., in the cases of politician İdris Baluken and journalists Murat Aksoy and Atilla Taş), judges are being encouraged to deliver decisions that unlawfully order detention of individuals for reporting or commentary critical of actions of the government.

Hence, in the case of Selahattin Demirtaş, the ECtHR observed that the tense political climate in Turkey in recent years had created an environment capable of influencing certain decisions by the national courts and that the judicial authorities were reacting harshly to the dissidents.[94] The Court established that, in the light of the overall political situation prevailing in Turkey, Demirtaş's extended detention and other restrictions imposed on him pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate. It maintained, therefore, that what was under threat was the democratic system itself, not just Demirtaş's rights and freedoms as an individual, and ruled that Article 18 of the Convention had been violated.[95]

94 Demirtaş v. Turkey (no. 2), Application no. 14305/17, 20.11.2018, para. 271.

95 Demirtaş v. Turkey (no. 2), para. 274.

Later, on 10 December 2019, the ECtHR held that businessperson Osman Kavala was detained without reasonable suspicion and that his extended detention had the ulterior purpose of reducing him to silence and punishing him and the civil society, finding a violation of Article 18 of the Convention for the second time in an application against Turkey.[96] The ECtHR additionally held in both Demirtaş and Kavala applications that, pursuant to Article 46 of the Convention, the continuation of the applicants' pre-trial detention without new incriminating evidence against them would entail the prolongation of the violations, and concluded that Turkey should take all measures to secure Demirtaş and Kavala's immediate release. Despite these judgments, both Demirtaş and Kavala were later detained on different charges based on the same evidence in their initial detention and have still not been released as of this writing. Considering the fact that domestic courts that have been blocking the implementation of the ECtHR judgments, it would not be far-fetched to conclude that there has been a certain resistance in Turkey against implementation of the judgments by higher courts.

These judgments are also a milestone and a warning with regard to cases of the journalists and human rights defenders, who are targeted for their journalistic activities or their work in the field of human rights, and deprived of their liberty in order to be silenced and punished.

Prosecutors and courts, in the words of the Council of Europe Commissioner for Human Rights, must stop using criminal procedures, and in particular pre-trial detention, to punish and discourage the exercise of freedom of expression, including on the Internet, where there is an absence of direct, incontrovertible evidence establishing criminal wrongdoing or membership of a criminal organisation, in particular when the only basis is the content of journalistic writings or perceived affiliation based on spurious evidence.[97] But for this to happen, independence of the judiciary must be fully achieved. And for this, the authorities must demonstrate such political will. Without it, all legislative amendments and all measures taken to improve freedom of expression would be futile.

96 Osman Kavala v. Turkey, Application no. 28749/18, 10.12.2019.

97 Memorandum on freedom of expression and media freedom in Turkey, para. 130.