

**SUBMISSION TO THE FOLLOW-UP STUDY ON COUNTRY VISITS OF THE
SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE
RIGHT TO FREEDOM OF OPINION AND EXPRESSION**

With reference to the follow-up study on country visits of the Special Rapporteur on the Promotion and the Protection of the Right to Freedom of Opinion and Expression, Turkey would like to submit its contributions to the questionnaire on the implementation of recommendations made by the Special Rapporteur following his visit herein below.

Question 1: What efforts have been made to ensure that no persons are held in detention, investigated or prosecuted for sharing opinions that do not constitute an incitement to hatred or violence consistent with article 19(3) and 20 of the International Covenant on Civil and Political Rights? Have any journalists, writers, judges or academics detained on such basis been released?

Article 145 of the Emergency Decree no. 694 dated 15 August 2017, which became law on 8 March 2018 after it was adopted by the Parliament, made amendments to the Code of Criminal Procedure (CCP). One of these amendments was the additional paragraph to Article 158 of the CCP.

Pursuant to this paragraph, if it is clear without a need for investigation that a certain act subject to denunciation or complaint does not amount to a crime or if the denunciation or complaint is of general or abstract character, the prosecutor will decide not to investigate on the matter. In this case, the person subject to complaint will not be defined as “accused”. Decisions not to investigate pursuant to this article are filed in a separate system from court files.

Above mentioned paragraph added to Article 158 of the CCP, aims to eliminate the drawbacks with regard to presumption of innocence and to prevent incrimination caused by investigations or prosecutions regarding acts that do not constitute crime or cannot be taken into consideration because of the vagueness of the complaints.

This important amendment, which entails a comprehensive pre-assessment of complaints or denunciations before an investigation can be commenced, also bears significance with regard to safeguarding freedom of expression.

Furthermore, according to Article 218 of the Turkish Criminal Code (TCC), which is prescribed as a common article encompassing all crimes stipulated between Articles 213-217 thereof,

disclosure of opinion containing criticism that do not exceed the limitations of reporting cannot constitute a crime. This article aims to eliminate the possibility of referring to Articles 213-217 to limit freedom of opinion and expression.

Above mentioned legislation aims to ensure that persons are not held in detention, investigated or prosecuted for sharing opinions that do not constitute an incitement to hatred or violence consistent with article 19(3) and 20 of the International Covenant on Civil and Political Rights (ICCPR).

Question 2: What measures have been adopted to ensure that the press, other media, and all individuals are able to comment on public issues and to inform public opinion without facing censorship or constraint?

The Law on Press (Law no. 5187), which guarantees the freedom of press, prohibition of its censorship, and the state's obligations to safeguard its freedom while referring to Articles 26 and 27 of the Constitution serves as a benchmark for any limitation thereof and contains sufficient guarantees to safeguard the freedom of media.

Question 3: What steps have been taken to reverse closures of media outlets, including Internet media? Which outlets have been granted permission to re-open? Have measures been put in place to ensure that media outlets are only suspended in exceptional circumstances prescribed by law and subject to judicial review?

State of emergency measures were constantly reviewed in order to prevent any possible grievances. More than 43 thousand (39.755 through administrative Review Boards and more than 3700 by way of Decrees) public employees have been reinstated to date while more than 360 private entities have been allowed to function again.

Furthermore, the Inquiry Commission on State of Emergency Measures was established with Emergency Decree no. 685 on 23 January 2017 to receive applications regarding measures taken in the scope of decree laws including dismissals from public service and closures of associations, foundations, and media outlets including radio and television stations, journals, newspapers, and news agencies.

The Commission started to receive applications in July 2017. It has been recognized as a domestic remedy by the European Court of Human Rights. Legal remedies are available against the decisions of the Commission.

The Internet Law (Law no. 5651) clearly defines the grounds for limitations that may be imposed on the right to freedom of expression in accordance with Article 22 of the Constitution, Article 10 of the European Convention on Human Rights (ECHR), and Article 19 of the ICCPR.

Question 4: Has Law no. 5652 – the Internet Law – been reviewed? If so, what changes have been made to it?

“Law on the Regulation of Online Broadcasts and against the Crimes Committed through such Broadcasts” (“Internet Law” or the Law no. 5651) combats a limited number of crimes in order to prevent online child abuse and to protect national security, public order and public health, as well as the right to privacy and other personal rights.

Turkey, having recognized the principles of democracy, human rights and the rule of law, employs a transparent and an open method to combat illegal contents on the Internet by clearly defining the responsibilities of the internet actors and giving priority to the notice and take-down mechanism in order to give the online service providers the possibility to take down the illegal online content voluntarily in line with the relevant provisions of the Turkish Constitution, the ECHR, and the ICCPR.

Question 5: Have any measures been taken to ensure requests for take downs of online content are consistent with the requirements of articles 19(3) and 20 of the International Covenant on Civil and Political Rights? To what extent does blocking and filtering of content occur?

According to Article 8 of the Internet Law (Law no. 5651), online content can be blocked in accordance with the decision of a judge (during the investigation stage) or a court (during the prosecution stage) if there is reasonable doubt that crimes such as sexual exploitation of children, prostitution, or facilitating access to drugs is committed through such broadcasts.

The public prosecutor can render a decision to block the online content only in exceptional circumstances. This decision is immediately removed if it is not approved by a judge within 24 hours after it was given.

The decision to block online content is an interim injunction and can be objected before the Court in accordance with the CCP.

If the public prosecutor decides not to further investigate the case or if the person/s accused of committing the abovementioned crimes is/are acquitted during the prosecution phase, the decision to block the online content becomes null and void. Furthermore, if part of the online

content that amounts to abovementioned crimes is removed voluntarily, the decision to block is revoked by the public prosecutor or the judge.

According to Article 8/A of the Law no. 5651, only in non-delayable cases regarding national security, public order, public health and the right to life, the Information and Communication Technologies Authority of Turkey (ICTA) may take administrative decisions to block or remove online content upon the formal request of the Presidency or the relevant ministries. The decision must be brought before a competent judge within 24 hours and the judge renders a decision within 48 hours; otherwise the administrative decision of the ICTA is revoked automatically. The name of the Court and the decision to block is displayed on the page of the online content that was blocked or removed. Any person or entity affected by the decision can appeal before the Court.

As stated above, administrative decisions to remove or block online content can only be rendered in exceptional circumstances prescribed by law. Such decisions are subject to judicial review in all cases.

Furthermore, according to Article 9 Law no. 5651, persons who claim their personal rights are infringed by an online content can request from the judge to block access to the content. The judge may only block access to the URL address of the specific content if he/she decides that there is a violation of personal rights. The entire content cannot be blocked unless it is not possible to avert the infringement of personal rights by blocking access to specific content. If part of the online content that infringes personal rights is removed voluntarily, judge's decision to block becomes null and void.

Question 6: Have emergency decrees remaining in place subsequent to the state of emergency been reviewed and revised to ensure their consistency with international human rights standards? In particular, has a process been put in place enabling persons deprived of their liberty pursuant to emergency decrees to initiate challenges to the lawfulness of their detention before a court?

State of emergency was lifted on 19 July 2018. The emergency decrees issued during the state of emergency do not infringe upon the rights of persons under custody or detention as they do not impair the guarantees stipulated in the CCP.

Throughout the state of emergency, persons could object the decision to arrest. They were also able to lodge a request for their release before a competent judge at any moment while they were under custody. Furthermore, they benefited from legal assistance by their lawyers.

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Commented [CS2]: Justice of the Peace, reviewing the decision of other justice's of the peace – criticised by the Venice Commission amongst others

Commented [CS3]: But length of time before the authorities were obliged to give them access to them was extended

Decisions of detention were also open to objection throughout the state of emergency in accordance with Article 101/5 of the CCP. In addition, during the investigation phase, decision of detention is reviewed every 30 days by the competent judge in order to assess if it can be revoked.

Therefore, the emergency decrees do not infringe upon the rights of persons deprived of their liberty and guarantee their rights to challenge the lawfulness of their detention before judicial authorities.

Furthermore, all emergency decrees have gone under parliamentary supervision and became law. Several measures that were applied in this period were revoked after the end of state of emergency. The Law no. 7145 which revoked or brought amendments to several state of emergency measures came into force on 31 July 2018.

Question 7: What steps have been taken to ensure the right to review and remedy for victims of unlawful arrest, detention or dismissal?

During the state of emergency, the principle of the rule of law was strictly abided by. Persons deprived of their liberty can challenge the decision of arrest or detention before the competent judge and their right to object the said decisions was upheld throughout the state of emergency.

Article 141 of the CCP grants the right to claim pecuniary and non-pecuniary damages to a wide category of persons under investigation or prosecution, including those who were not brought before a judge within the period prescribed for custody; who were arrested or detained unlawfully; who were detained in accordance with relevant provisions but not brought before a judge in a reasonable period; who were not notified of the reasons of their arrest or detention or the charges against them; who were detained without being informed of their rights or without being given the chance to exercise those rights; who were acquitted after being arrested or detained in accordance with law; search warrant against whom was excessively made use of; whose relatives were not provided with information regarding their arrest or detention; whose property was confiscated outside the circumstances prescribed by law.

The Inquiry Commission on the State of Emergency Measures was established in 2017 with Emergency Decree no. 685 (which subsequently became Law no. 7075) in order to assess

applications regarding all dismissals, demotions, and closures of foundations, associations and media outlets pursuant to emergency decrees. It started receiving applications in July 2017 and has issued over 3900 decisions of reinstatement. There are available domestic legal remedies against its decisions. It has been recognized as a domestic remedy by the European Court of Human Rights.

Right to lodge an individual application before the Constitutional Court was introduced in 2012. Turkish citizens who claim that their rights guaranteed under the Constitution or the European Convention on Human Rights have been violated can apply to the Constitutional Court. Within this context, decisions of the Inquiry Commission on the State of Emergency Measures can be contested before the Constitutional Court.

Consequently, Turkish legal system has effective mechanisms to ensure that persons dismissed or deprived of their liberty can challenge the administrative and judicial decisions against them.

Question 8: What has been done to grant persons dismissed from their employment pursuant to emergency decrees access to appropriate and independent judicial and administrative mechanisms to challenge the lawfulness of such decisions?

Please refer to questions 3 and 7 for measures taken by Turkey in this regard.

Question 9: Has a process been initiated to review Law no: 3713 – the Antiterrorism Law – and ensure that counter-terrorism measures are compatible with article 19(3) of the International Covenant on Civil and Political Rights? If the law has been reviewed, what changes have been brought about?

Law no. 6459 dated 30 April 2013 brought significant amendments to various laws in the field of fundamental rights including the freedom of opinion and expression. Some of the amendments introduced by the Law no. 6459, which is known by the public as the 4th Judicial Reform Package, are explained below:

a) The elements of the crime of “printing or publishing statements and declarations of terrorist organizations” (Article 6 of the Law no: 3713) were altered in order to only include publications of statements of declarations that legitimize, praise or incite violent methods of the terrorist organizations, thus giving a concrete framework to the definition of the crime and its elements, making it more in line with the standards of the ECHR.

b) Similarly, the elements of the crime of “making propaganda of a terrorist organization” (Article 7 of the Law no: 3713) were altered in order to only include propaganda that legitimize,

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praise or incite violent methods of the terrorist organizations, thus giving a concrete framework to the definition of the crime and its elements, making it more in line with the standards of the ECHR.

c) Article 220 of the TCC previously prescribed that persons who commit a crime on behalf of a terrorist organizations without being a member of that organizations would also be prosecuted for the crime of being a member of a terrorist organization. The amendment brought to the said Article of the TCC with the Law no. 6459 limits its application to “armed terrorist organizations” and thus prevents the same person from being prosecuted for both crimes.

d) “Publicly praising a crime or a criminal” was previously prescribed in Article 220 of the TCC as a separate crime. With the amendments brought by the Lawno. 6459 to the said article, “publicly praising a crime or a criminal” can constitute a crime only if a clear and imminent threat towards public security arises because of such activity.

Question 10: Have steps been taken towards the repeal of the articles 125(3) and 299 of the Penal Code? If so, at what stage is this process and what are its effects?

Freedom of expression or freedom of press are not absolute rights and can be limited in accordance with law. All countries impose certain restrictions on these freedoms. To grant the right to insult or humiliate the President or government officials not only infringes upon their personal rights but also undermines the will of the public who have elected them.

Various members of the Council of Europe have similar provisions. Prison sentences ranging from 3 months to 5 years stipulated in the Criminal Codes of Germany, Italy and Spain can be given as examples. Insulting the king or the head of state is regulated as a crime in Netherlands, Belgium, Denmark, Portugal, Slovenia and Iceland.

Considering the representative position of the President and the relevant legislative provisions in various Council of Europe countries, changes to Articles 125(3) and 299 are **not deemed necessary.**

Question 11: Have any further laws, regulations, policies, administrative decisions or other measures affecting the right to freedom of opinion and expression been implemented following the Special Rapporteur’s visit?

Turkish Constitution contains comprehensive articles that safeguard the freedom of opinion and expression and the freedom of press, namely, Article 22 on the confidentiality of communications between persons; Article 25 on the freedom of thought and opinion and the

prohibition of incriminating persons for holding certain opinions; Article 26 on the right to express and disseminate opinion through writing, drawing or any other means; Article 28 on the freedom of press and the prohibition of its censorship; Article 29 on the rule that no license is required prior to making publications.

Law on Press (Law no. 5187) guarantees the freedom of press, including the right to gather and disseminate opinion, right to comment on or criticize the policies and the right to create material.

Following the Special Rapporteur's visit, in 15 August 2017, with the Emergency Decree no. 694 (which became law on 8 March 2018 after it was adopted by the Parliament) a paragraph was added to Article 158 of the CCP in order to strike a better balance between the right to privacy, the presumption of innocence and the right not to be incriminated due to baseless accusations. Pursuant to the added paragraph, if it is clear without a need for investigation that a certain act subject to denunciation or complaint does not amount to a crime or if the denunciation or complaint is of general or abstract character, the prosecutor will decide not to investigate on the matter. In this case, the person subject to complaint will not be defined as "accused". Decisions not to investigate in pursuant to this article are filed in a separate system from court files.

Above mentioned paragraph added to Article 159 of the CCP, aims to eliminate the drawbacks with regard to presumption of innocence and to prevent incrimination caused by investigations or prosecutions regarding acts that do not constitute crime or cannot be taken into consideration because of the vagueness of the complaints.

This important amendment that entails a comprehensive pre-assessment of complaints or denunciations before an investigation can be commenced, also serves the purpose of safeguarding freedom of expression as it eliminates the possibility of being subject to investigation or prosecution for expressing opinion due to vague or baseless complaints.

Educational, technical and administrative trainings have been given to members of the judiciary and the law enforcement personnel in order to ensure the effective implementation of this amendment. Between the date the amendment entered into force (25 August 2017) and 31 January 2019, "the decision to not further investigate" was given with regard to 49.586 files out of the 109.055 that were registered to the complaints and denunciations database.

Question 12: Is there any relevant additional information you would wish to add?

It is important to stress the significance of an independent and impartial judiciary, and in particular the high courts including the Constitutional Court, in safeguarding the freedom of opinion and expression and setting precedent for other courts to give utmost importance to uphold the above-mentioned rights.

In this respect, the Court of Cassation and its “Rules of Conduct”, which were adopted unanimously in 8 December 2017 by the Grand Plenary Assembly of the Court, has an important function to strengthen the independence and impartiality of the judiciary which in return has a positive effect on the freedom of opinion and expression.

Furthermore, “Istanbul Declaration on Transparency in the Judicial Process and the Draft Implementation Measures” were adopted in the 4th High Courts Summit which was organized in cooperation with the Court of Cassation of Turkey and the United Nations Development Programme.

Principle 11 of the Istanbul Declaration further addresses the need to afford appropriate assistance to the media by the judiciary for it to perform its legitimate function of shaping the public opinion. The Principle underlines that *“freedom of the media to decide which cases are to be brought to the attention of the public and how they are to be treated, and the right to criticize the organization and functioning of the justice system, should only be departed from to the extent set out in the International Covenant on Civil and Political Rights.”* Turkey’s organization of the High Courts Summit and its adoption of the Istanbul Declaration, which contains a specific principle regarding the importance of the freedom of media clearly shows the significance given by Turkey to the freedom of opinion, expression and media.

The judgment of the Constitutional Court regarding Article 8 of the Law no. 5651 is a significant precedent with regard to the freedom of opinion and communication.

In its judgment (case file numbered E.2015/76), the Constitutional Court found Article 8.1.a.5 of the Law no. 5651, which enabled ICTA to block access to online content involving obscene material without an approval of a judge if the provider of such content is based outside Turkey, unconstitutional. The Court noted that the internet has become widespread for mass communication and it has been increasingly preferred over the conventional means, and therefore falls within the scope of freedom of opinion, communication and expression which is safeguarded by Articles 22 and 26 of the Constitution. The Court further stated that the freedom

of communication extends to the online content which are in the nature of or intended for communication or contact and therefore there must be an approval of a judge in order to block access to websites or applications primarily used for communication for containing obscene material even if the service providers of such websites or applications are based outside Turkey (such as Twitter, Facebook, etc.).

The Court then turned to scrutinize the contested provision under Article 13 of the Constitution, which lays out the criteria for restriction of fundamental rights. The first criterion is that fundamental rights and freedoms may be restricted only by law. Within this scope, a provision must meet legality requirement not only with respect to the form but also with respect to the substance. As noted in judgments of the Court, the principle of legal certainty entails that laws must be clear, precise, understandable and impartial to the extent they would not cause uncertainty for individuals and the administration; and that they must not yield to arbitrary acts and actions by the public authorities.

The Court noted that it was not clear whether the contested provision empowered ICT A to block access to only relevant online criminal content or the whole website or whether access would be blocked gradually depending on the website's technical features. Within this scope, the administration was empowered with a vague discretion in terms of limitation of the freedoms of communication and expression. The Court therefore held that the contested provision, within the scope of "obscenity", did not meet the constitutional principle of "legal certainty" and therefore contradicted Articles 13, 22 and 26 of the Constitution.

The above mentioned judgment of the Constitutional Court not only demonstrates the level of judicial supervision over the provisions regarding the freedom of opinion, expression, and communication; but also sets a precedent for future cases where the Constitutional Court itself or other courts have to decide on the extent to which the above mentioned rights can be subjected to limitations.