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Civil Society Support Programme - II
Monitoring Judicial Practices in Turkey and
Strengthening EU Human Rights Mechanisms

TURKEY FREE EXPRESSION TRIAL MONITORING REPORT

NOVEMBER 2019

*Report by the International Press Institute (IPI)
based on data collected by the Media and Law Studies Association (MLSA)*

MLSA

Media and Law Studies Association
Medya ve Hukuk alıřmaları Derneđi



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Introduction

There continues to be grave concern over the manner in which the Turkish judicial system handles freedom of expression cases, especially those involving journalists. As part of the country's ongoing crackdown on the media, scores of journalists have faced prosecution based primarily on terrorism-related charges. At the time of the publishing of this report (December 18, 2019), 116 journalists are behind bars, either serving a sentence or in pre-trial detention¹.

To analyse the level of protection of the fundamental rights of journalists and others exercising their right to freedom of expression by Turkish courts, the International Press Institute (IPI) and the Media and Law Studies Association (MLSA) are carrying out a comprehensive trial monitoring programme across Turkey. The trial monitoring programme began with a pilot programme from June to December 2018 and a first report published in January 2019 covering 90 court hearings involving 71 separate trials found that Turkish courts systematically ignore domestic and international standards set for securing the right to a fair trial. Since April 2019 the programme has been supported by the EU's Civil Society Support Programme II

The second and third reports² published in July and September covering court hearings from February 20 until July 22, 2019 confirmed the initial findings that Turkey has continued to criminally persecute journalists on the basis of terrorism-related charges for which journalistic work is presented as evidence and often subjecting journalists to lengthy pre-trial detention. In addition, the data suggested continuing breaches of right to a fair trial during court proceedings related to right to a lawful judge and courtroom conditions.



Its findings confirm the pattern of violating fundamental rights to liberty, freedom of expression and fair trial guaranteed in the Turkish Constitution, the European Convention on Human Rights and the jurisprudence of the ECtHR.

This Trial Monitoring Report covers the period between July 23 and October 31, 2019.

Its findings confirm the pattern of violating fundamental rights to liberty, freedom of expression and fair trial guaranteed in the Turkish Constitution, the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights (ECtHR). The data collected reinforce the argument that Turkish courts are failing to provide an effective domestic remedy for rights violations, the exhaustion of which is a precondition for application to the ECtHR. Journalists and others targeted for exercising freedom of expression are therefore being denied effective protection of their rights.

Additional trial monitoring reports will be published regularly over the course of the monitoring programme.

¹ For regular updates please check the #FreeTurkeyJournalists platform

² <https://freeturkeyjournalists.ipi.media/trial-monitoring/>

Methodology

IPI and MLSA's Legal Unit designed a methodology to systematically collect data that would support already available anecdotal evidence that trials concerning the right to free expression fail to meet the standards of the right to a fair trial, with specific focus on the trials of journalists. The methodology consists of trial monitoring, observation and reporting.

MLSA has recruited and trained more than 20 trial observers from various professional backgrounds including journalists, civil society professionals and students. The trial observers took part in a full-day trial monitoring training provided by experts from the Bar Human Rights Committee of England & Wales (BHRC).

In order to facilitate the work of the trial observers and produce a consistent set of objective data on observed trials, IPI and MLSA's legal unit created an electronic trial monitoring form. The form is based on trial monitoring reference materials published by the Organization for Security and Co-operation in Europe (OSCE). It is in the form of a standard electronic template where observers can highlight and comment on the presence or absence of specific criteria in relation to the conduct of a fair trial.

The collection of the data commenced on June 1, 2018 and is ongoing. The dataset in this report covers 69 hearings of 342 defendants, held between July 23, and October 31, 2019. The data were collected by 13 observers at various court instances in five cities: Ankara (13 hearings), Diyarbakır (5), Istanbul (44), Van (5) Balıkesir (1) and Bitlis (1). The trials observed were chosen from among freedom of expression-related cases, with a focus on journalist trials. The observers filled in the electronic form, which instantly created an electronic database of their observations, and their answers were reviewed by MLSA editors.

The dataset in this report covers a total of 69 hearings involving 342 defendants, including 134 journalists and 20 media workers, held between July 27 and October 31, 2019.

Domestic legal protection

The Turkish legal system guarantees all basic rights and freedoms as enshrined in international treaties, including the right to personal freedom and security in Article 19 and the right to freedom of expression in Article 26 of the Constitution of the Republic of Turkey (the Constitution). In addition, Article 90 of the Constitution gives legally binding force to international treaties. The constitutionality of transposed international treaties cannot be challenged before the Constitutional Court, which means that international treaties take precedence over domestic statutes in the event of conflict, and thus the violation of transposed international instruments means the violation of the Turkish legal order.

Article 13 of the Constitution permits derogation from human rights guarantees only by law. However, the law in question should not violate the “spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality”. In addition, Article 15 allows for partial or full suspension of the exercise of fundamental rights and freedoms in the event of war, general mobilization, a state of siege or a state of emergency, if obligations under international law are not violated. And even under these extraordinary circumstances, there should be no violation of the following basic rights: the individual’s right to life (except where death occurs as a result of acts compatible with the law of war); the right to physical and spiritual integrity; freedom of religion, conscience and thought; the rule that no one may be compelled to reveal his or her beliefs or blamed or accused on account of them; the prohibition of retrospective punishment; and the presumption of innocence.

Moreover, the European Convention on Human Rights (the Convention) in Article 5 prohibits arbitrary and unjustified deprivations of liberty³. There is a vast amount of case law of the European Court of Human Rights (ECtHR) in relation (not only) to Turkey and violations of the right to liberty (Article 5) and freedom of expression (Article 10). Especially relevant for this report is that the ECtHR has repeatedly stated that pre-trial detention in relation to the right to freedom of expression is a “real and effective constraint” on Article 10 of the Convention⁴. In the specific case of pre-trial detention of journalists, the Court has stated that such detention may create a climate of self-censorship for the detained journalist as well as for other journalists carrying out their work⁵. Justifying pre-trial detention in relation to the exercise the freedom of expression would be permissible only “where other fundamental rights have been seriously impaired, for example, in the case of hate speech or incitement to violence.”⁶

Furthermore, the Court in its *Şahin Alpay v. Turkey* ruling noted that criticism of governments and the publication of information about leaders of the country “should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organization, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda”. This report shows that, despite this ruling, most journalists and activists are charged with such serious offences⁷. The Court also

³ *S., V. and A. v. Denmark*, par. 73; *McKay v. the United Kingdom*, par. 30.

⁴ *Şık v. Turkey*, par. 85; *Nedim Şener v. Turkey*, par. 96.

⁵ *Şık v. Turkey*, par. 111; *Nedim Şener v. Turkey*, par. 122.

⁶ *Cumpănă and Mazăre v. Romania*, par. 115.

⁷ *Şahin Alpay v. Turkey*, par. 181.

stated that even if such serious charges are brought, pre-trial detention shall be used as a last resort⁸. Pre-trial detention of defendants, and especially its length and weak justification, is one of the many alarming issues highlighted in this report.

⁸ *Şahin Alpay v. Turkey*, par. 181.

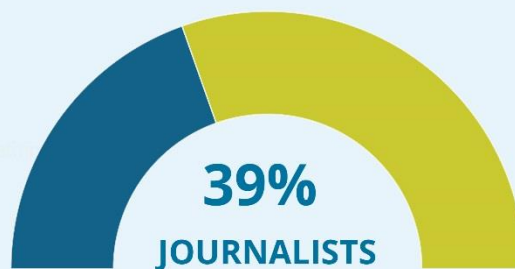
Findings

Defendants and charges

MLSA observers attended 69 hearings (corresponding to 61 case files) from July 27 to October 31, 2019. Altogether, there were 342 defendants, of whom 134 were journalists and 20 media workers, while the others were members of various professions facing trial for their exercise of free expression. In terms of hearings by profession, journalists were defendants in 54 of the hearings, followed by media employees (seven hearings), writers (two hearings) and academics (four hearings), lawyers (two hearings), artists (two hearings), activists (nine hearings) and students (one hearing).

The most common charges in the case files were for terrorist-related offences (present in 35 out of 61 cases, or 57 percent). Of these, the most widespread were propaganda for a terrorist organization (present in 25 out of 61 cases) and membership of a terrorist organization (present in 21 out of 61 cases). Other terrorism-related charges were knowingly and willfully helping the organization without being part of the hierarchical structure within the armed terrorist organization.

134 JOURNALISTS
and **20 media workers**
out of **342 defendants**



Of the 48 cases that concerned journalists, in 26 the charges were terrorism-related. And of these 26 terrorism cases 19 of them (73 percent) used primarily the defendants' journalism as evidence. The most common charges in these hearings were conducting propaganda for a terrorist organization (present in 18 cases) and membership in a terrorist organization (present in 19 cases) (note: cases can include multiple charges). Journalists were also charged with insult in 15 cases whether of the president, a public official or the Turkish nation.

Other charges included incitement of hatred and violence (one case); humiliation of the Turkish nation, Republic and the state's institutions and organs (three cases); attempting to abolish the constitutional order (two cases.); publishing state secrets (four cases); refusing to publish a correction (one case); and inducing financial market scam (one case).

Trial monitors observed proceedings at different court levels. Most of the hearings attended were at the level of the High Criminal Court (43 in general, 35 concerned journalists) and the Criminal Court of the First

Instance (20 hearings, 16 concerning journalists). The fact that so many journalists are tried before the High Criminal Court, which handles first-instance cases for certain grave crimes, shows that the authorities are using the most serious criminal charges to prosecute journalists.

Pre-trial detention

Seventeen of the 342 defendants were being tried while behind bars. Seven were in pre-trial detention while the other ten were tried while serving out sentences from other cases. Of these 17, 14 were journalists. In addition,

- All 17 defendants had been behind bars for longer than one year.
- Among the evidence used to justify the pre-trial detention of journalists were articles and photos written or published by the defendants (observed in four cases); phone calls with sources (observed in one cases) and defendants' social media posts (observed in three cases);

Below are some examples of cases in which defendants were being held in pre-trial detention:

- **Case 2019/74:** of the 16 defendants in this case only one, Osman Kavala, is being held in pre-trial detention. Kavala, a prominent Istanbul businessman and philanthropist, has been held since October 18, 2017 on charges of “attempting to overthrow the government through violence” for helping organize the Gezi Park protests of 2015. On December 10, 2019, the European Court of Human Rights called for his immediate release stating that the trial’s motivation was to “reduce Kavala and all human rights defenders, to silence”.
- **Case 2019/252:** Five of the six defendants in this case – journalists Ahmet Altan, Nazlı Ilıcak, Fevzi Yazıcı, Yakup Şimşek, Şükrü Tuğrul Özşengül, who had all worked for the now-closed Zaman newspaper and Samanyolu TV – served extensive pre-trial detention. During the hearing observed in this period, they were technically serving out earlier convictions against which they had appealed. Ahmet Altan and Nazlı Ilıcak were released following the hearing in November when they were convicted of “aiding and abetting a terrorist organization without being a member”. Ahmet Altan received ten years and six months and Nazlı Ilıcak eight years and nine months before being released on probation for time already served. Within ten days, however, Ahmet Altan was rearrested following an appeal from the prosecutor arguing that he was a flight risk. Meanwhile Mehmet Altan’s earlier acquittal by the Supreme Court of Cassation was confirmed.
- **Case 2018/827:** Kibriye Evren, a journalist for the pro-Kurdish and feminist Jin News Agency, accused of “membership of a terrorist organization” and “conducting propaganda for a terrorist organization”, was detained on October 9, 2018. She was held in pre-trial detention through eight different hearings until November 12, when she was released from detention pending appeal following the application of the judicial reform package.

- **Case 2016/218:** Mehmet Baransu has been in Silivri prison since March 2015 on charges of “revealing state secrets” in the 2013 article “The Decision to end Gülen was reached at the National Security Council (MGK) in 2004”. He is also serving sentences of ten months for insulting the president and 11 months for criticizing the head of the National Intelligence Organisation.
- **Case 2018/468:** Uğur Yılmaz, a journalist from Bitlis working at the Municipality’s Press Bureau, has been in pre-trial detention since July 2017. On November 5, the court finally ruled to acquit him of “terrorist propaganda” but convicted him of “membership of a terrorist organization”. He was sentenced to six years and ten months imprisonment. Yılmaz will remain behind bars while his sentence is reviewed by the appeal court. Yılmaz protested at being forced to testify through video-conference link SEGBİS.
- **Case 2019/309:** Journalist İdris Yılmaz, from Van, who has been in pre-trial detention since January 2018, was acquitted on October 13, 2019 for “making terrorist propaganda” but convicted of “membership of a terrorist organization” and sentenced to six years and three months. His lawyers will request his release, arguing that he served enough time during his 22-month detention. Yılmaz protested at being forced to testify through SEGBİS.
- **Case 2019/232:** Tuna Altinel, an academic, was held in pre-trial detention for 81 days between May 11, and July 31, 2019, facing terror propaganda charges. Altinel had previously been one of the signatories to the Academics for Peace petition and was on this occasion prosecuted after attending a conference in Lyon organized by the Lyon Rhône-Alpes Kurdish Friendship Association. The case continues.

These findings confirm that pre-trial detention continues to be applied beyond its legitimate scope and in contravention of ECtHR rulings.

**All 17 defendants have been detained
FOR MORE THAN A YEAR.
7 of them in pre-trial detention;
10 serving out previous sentences.**



Travel restrictions

Even if journalists on trial are not tried whilst in detention, the ongoing court proceedings are frequently accompanied by restrictions on their freedoms, such as a ban on travel outside the place of residence or outside the country. Such measures constitute a considerable restriction on journalists’ private and professional lives. Travel bans abroad have been imposed on defendants in 15 cases, 13 of which

concerned journalists⁹. In addition to travel bans, courts imposed on several defendants the duty to report regularly to a police station (five cases, all involving journalists).

Evidence presented

The evidence presented in most of the cases (observed in 40 out of the 61 files) was reported by the MLSA monitors as being directly related to the professional occupation of the defendants, such as written and published news stories and articles (observed in 36 cases), or phone calls with sources (observed in four). Social media posts were provided as evidence in 13 cases. Other evidence was provided by witness statements (observed in six) photos of public demonstrations (one case) and the presence of the ByLock secure communications app on a defendant's phone (one case).

The nature of the evidence based on which defendants are facing years of imprisonment including pre-trial detention offers further indication that the ongoing crackdown on Turkish media and civil society is driven by a desire to silence critical voices.

54% of cases concerning journalists were for **TERRORISM RELATED OFFENCES** (26 out of 48)

In 19 of these cases (73%) the defendant's **JOURNALISM** **73%** was used as evidence to support terrorism charges



Hearing outcomes

Of the 69 hearings observed, 15 were final. In nine cases all the defendants were acquitted, in three cases all were convicted, and in three cases some of the defendants were acquitted and some were convicted. Cases that ended in convictions include the following:

Case : 2019/171: On September 6, Canan Kaftancıoğlu, Istanbul chair of the Republican People's Party (CHP), was convicted of "insulting the President, insulting a public officer in relation to his office, openly

⁹ Case Nr.: 2019/232, 2018/468, 2017/194, 2019/53, 2018/709, 2017/120, 2017/35, 2017/35, 2017/102, 2019/252, 2017/322, 2019/74, 2018/269, 2018/68, 2018/57

insulting the Republic of Turkey, openly inciting hate and hostility, and spreading terror propaganda". She was sentenced to nine years and eight months.

Case: 2017/168: On September 5, photojournalist Çağdaş Erdoğan was convicted of repeated "terrorism propaganda" and handed a 20-month suspended sentence. He was cleared of charges of "membership of a terrorist organization". Erdoğan was prosecuted after sharing photos on social media including protests about the Kurdish question, images displayed at the art gallery SALT, Istanbul and retweeting a news report by The New York Times.

Case 2018/254: On September 26, Bülent Şık, former assistant professor at Akdeniz University, was convicted of "disclosing confidential information" and given a suspended sentence of 15 months. Şık had published a series of articles on a Ministry of Health's investigation into food standards under the headline "The state has concealed the carcinogen products, we are making them public! Here is the poison list". The unpublished investigation had been conducted between 2011 and 2016 in Antalya, Ergene and Dilovasi, regions with above average cancer-related deaths and revealed very high levels of pesticides in locally produced food.

Şık had previously been dismissed from his position at the university for signing the Academics for Peace petition as part of a government decree issued in November 2016 during the State of Emergency.

Case: 2018/650: On September 12, Cem Şimşek, the managing editor of Evrensel daily, was convicted of failure to publish reply and correction. Evrensel was sued for defamation and insult by Berat Albayrak, President Erdoğan's son-in-law and Turkey's minister for the treasury and finances, for a July 13, 2018, article entitled "Albayrak gave the signal for the plan on attacking workers". Şimşek had previously been instructed to publish a correction to the story. While Evrensel did publish a correction, Albayrak's lawyers argued that it had failed to provide a specific introduction to explain the correction. The court fined Şimşek 41,660 Turkish Lira.

Case: 2019/12: On October 8, Aret Demirci, project director at the Friedrich Naumann Foundation's Turkey office, was handed a suspended sentence of 11 months and 20 days for "insulting the president" based on a tweet posted during the presidential election campaign in June 2018. The tweet referred to President Erdoğan as "Başçalan," which means Chief Thief, a commonly used word play, because it sounds similar to "Başbakan", which means Prime Minister. Demirci claimed in his defense that his tweet targeted the media, not the president, which he said was guilty of double standards in broadcasting hours of AKP rallies while ignoring opposition party rallies.

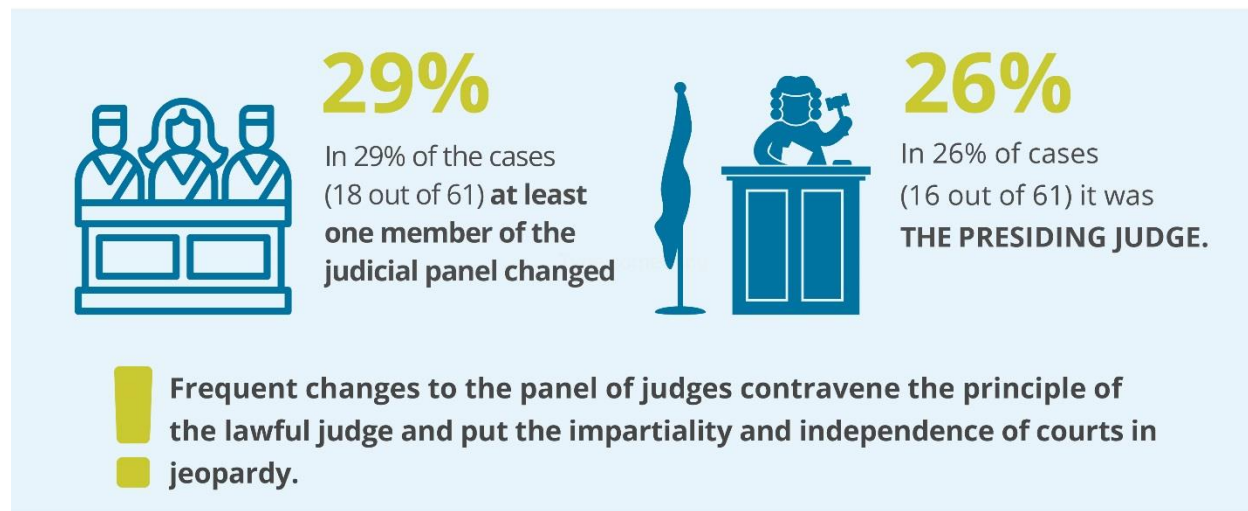
Case 2018/545: On October 31, Mümtazer Türköne, a former columnist for the Zaman daily, was found guilty of insulting the president and fined 1740 Turkish Lira for an article published in March 2014 "Would he be this vicious if he didn't have to be?"

Right to a lawful judge

In 29 percent of cases (18 out of 61) at least one member of the three-person judicial panel changed during the proceedings and 16 of these cases (26 percent) it was the presiding judge.

These changes occurred despite the Turkish Constitution guaranteeing the right to a lawful judge in Articles 36 and 37. This right stipulates that judges who rule on a specific case should be selected based on objective criteria predetermined by law. Frequent changes to the panel of judges contravene the principle of the lawful judge and put the impartiality and independence of courts in jeopardy.

The replacement of judges has become of even more concern since the appointment procedure to the body responsible, the Council of Judges and Prosecutors (HSK), changed with the highly controversial 2017 constitutional amendment, which introduced direct appointment of the council by the President (6 of 13 members) and by the parliament (7 of 13 members).



Courtroom conditions

In 26 percent of the hearings (18 out of 69) MLSA observers noted that the session was adversely affected by at least one of the following conditions of the courtroom:

- Courtroom was too small, not enough space for the audience (13 hearings)
- Hard to hear what the judicial panel said (nine)
- Courtroom too hot/too cold (two)
- Observers could not enter the courtroom (one)

Impartiality and (appearance of) independence

Independence and impartiality of the tribunal are institutional requirements enshrined within the concept of right to a fair trial of Article 6.1 of the Convention, and therefore also under Turkish law. Some of the monitored hearings cast doubt on both of these principles.

The appearance of independence is one of the four criteria listed by the ECtHR for determining whether the court is independent¹⁰. Our monitors noted in several hearings behaviour that would lead to questioning the court's independence.

In 14 hearings the monitors reported inappropriate treatment of defendants including using the informal “you” (sen) in six hearings and persistent interrupting of the defense in eight hearings. In three hearings the defendants were brought to the room in handcuffs in violation of Turkish law.

The data show that for the 25 out of 40 hearings in which a judicial panel deliberation took place, this deliberation did not take place in private. This means that at no point during the hearing was the court cleared for the judges to deliberate. From among the cases in which a final verdict was rendered in only one did the deliberations take place in public, however; the defendant was acquitted in that case.

Defendants' presence in court

During the 69 hearings the SEGBİS video conference system was used six times including in all three hearings for Mümtazer Türköne (file 2018/545). This is a marked contrast to our report published in January 2019, in which defendants in 34 percent of the observed hearings were not physically present in the courtroom and were forced instead to submit their defense from prison via SEGBİS. While the data suggest an improvement in the right of defendants to physically attend their own trials it is too early to draw definite conclusions.

Use of secret witnesses

The use of a secret witness was recorded in the case of Meşale Tolu (file number 2017/322). Tolu is charged with “membership of a terrorist organization” and “terrorist propaganda”. The secret witness, while admitting she didn't know Tolu personally, testified that Tolu was an active member of the Marxist-Leninist Communist Party. Tolu is currently in Germany after spending seven months in pre-trial detention in 2017 and granted permission to travel in August 2018.

This issue continues to be monitored because the excessive use of secret witnesses risks jeopardizing the right to a fair trial. While there may be circumstances when it can be necessary, and Turkish law allows for it in terrorism-related cases, the ECtHR has stated that authorities must present relevant and sufficient reasons to keep secret the identify of witnesses¹¹.

¹⁰ The ECtHR has listed four criteria used for determination of tribunal's independence:

1. the manner of appointment and 2. the duration of term of office of judges, 3. the guarantees protecting the judges against outside pressures and 4. appearance of independence.

¹¹ Doorson v. the Netherlands, par. 70; Van Mechelen and Others v. the Netherlands, par. 53.

Interpreters

In only one hearing did a defendant testify in Kurdish. In that case, an interpreter was provided.

This issue is monitored particularly out of concern for defendants seeking to testify in Kurdish. Any refusal to do so violates the right to a fair trial according to the ECHR's Article 6.3(e), which stipulates the right to have the free assistance of an interpreter, if the defendant cannot understand or speak the language used in the court.

About the International Press Institute (IPI): Founded in 1950, IPI is a global network of editors, journalists and media executives dedicated to furthering and safeguarding press freedom, promoting the free flow of news and information, and improving the practices of journalism.

About the Media and Law Studies Association (MLSA): MLSA is a Turkish non-profit (registered as Medya ve Hukuk Çalışmaları Derneği) founded in late 2017 to respond to an urgent yet growing need for going back to democracy and normalization in Turkey.

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