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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

January 2020

*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 (January, 2020), 89 journalists are behind bars¹.

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. A pilot programme was conducted from June to December 2018 and a first report published in January 2019 covering 90 court hearings involving 71 separate trials. Since April 2019 the programme has been supported by the EU's Civil Society Support Programme II.

Three more reports² published in July, September and December covering hearings from February 20 until October 31, 2019.

They confirm initial findings that Turkey's courts systematically ignore domestic and international standards for the right to a fair trial and continue to persecute journalists with terrorism-related charges for which journalistic work is presented as primary evidence. Dozens of journalist have been subjected to lengthy pre-trial detention in the process and numerous breaches of fair trial rules particularly 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.

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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.

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 on the extent to which trials concerning the right to free expression fail to meet fair trial standards, with a specific focus on the trials of journalists. Previously, most existing evidence on this topic was anecdotal only. 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 observers and produce a consistent set of objective data, IPI and MLSA's legal unit created an electronic trial monitoring form based on materials published by the Organization for Security and Co-operation in Europe (OSCE).

The dataset in this report covers 60 hearings of 271 defendants, held between November 1 and December 31, 2019. The data were collected by 10 observers at various court instances in nine cities: Ankara (10 hearings), Diyarbakır (8), Istanbul (34), Van (2), Izmir (2) and one hearing each in Balıkesir, Hatay, Mersin and Batman.

The dataset in this report covers a total of 60 hearings involving 271 defendants, including 159 journalists and 29 media workers, held between November 1 and December 31, 2019.

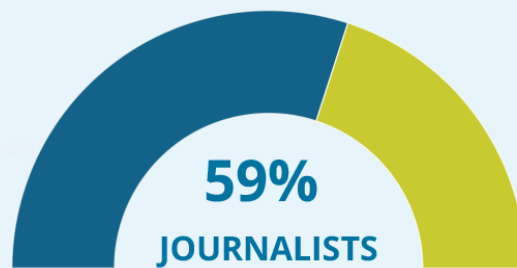
Findings

Defendants and charges

MLSA observers attended 60 hearings (corresponding to 57 case files) from November 1 to December 31, 2019. There were 271 defendants, of whom 159 were journalists and 29 were media workers, while the others were members of various professions facing trial for their exercise of free expression. Many cases had multiple defendants facing often more than one set of charges. Journalists were defendants in 51 of the hearings, followed by media employees (seven hearings), activists (five hearings), academics (three hearings), lawyers (two hearings), artists (two hearings) and students (one hearing).

The most common charges were for terrorist-related offences, present in 30 out of 57 cases, or 53 percent. Of these, the most widespread were “conducting propaganda for a terrorist organization”, 20 cases, and “membership of a terrorist organization”, 11 cases. Other terrorism-related charges include “knowingly and willfully helping the organization without being a member”, six cases, and “establishing an armed organization”, three cases.

159 JOURNALISTS
and **29 media workers**
out of **271** defendants



Of the 48 cases that concerned journalists, in 28 the charges were terrorism-related. Of these 28 terrorism cases 23 of them (82 percent) used primarily the defendants’ journalism as evidence. In 17 cases journalists were charged with insult whether of the president, a public official or the Turkish nation.

Other charges included publishing state secrets (two cases) attempting the violent overthrow of the government (one case) participating in illegal demonstrations (two cases) making illegal recordings during a trial (one case) and refusal to publish a correction (one case).

Most of the hearings attended were at the level of the High Criminal Court (37 hearings) and the Criminal Court of First Instance (21 hearings). One case was heard in the civil court and the last case was the Wikipedia appeal finally heard by the Supreme Court on December 26. 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

Nine of the 271 defendants were being tried while behind bars. One, philanthropist Osman Kavala, was in pre-trial detention, while the other eight were tried while serving out sentences from other cases. Of these nine, seven were journalists. All nine defendants had been behind bars for longer than one year.

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 2013. 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”. On February 18, 2020, Kavala and his co-defendants were all acquitted on the grounds of insufficient evidence. However, within hours Kavala was rearrested under new charges related to the failed coup of 2016.

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 and Taraf newspapers 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.

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, 2019 when she was released from detention pending appeal following the application of the judicial reform package. She is banned from travelling abroad and has to register with the local police station once a month.

Case 2016/218: **Mehmet Baransu**, a columnist for the shuttered Taraf newspaper, 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 2016/34: **Yetkin Yıldız**, the former editor-in-chief of news site Aktif Haber, was detained in December 2015 and found guilty of membership of a terror organization in 2018 receiving a sentence of seven years. He is now facing charges of insult and slander.

Travel restrictions

Travel bans abroad have been imposed on defendants in 14 cases, seven of which concerned journalists.

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

Evidence presented

The evidence presented in most of the cases (observed in 27 out of the 57 files) was reported as being directly related to the professional occupation of the defendants, such as written and published news stories and articles (observed in 22 cases), or phone calls with sources (observed in 2). In twelve of the cases this included social media posts. Other evidence was provided by witness statements (observed in six) and the presence of the ByLock³ secure communications app on a defendant's phone (two cases).

The overriding dependence of the evidence on journalistic content and activities demonstrates the extent to which the courts are, in practice, criminalizing the act of journalism.

58% of cases concerning journalists were for **TERRORISM RELATED OFFENCES** (28 out of 48)

In 21 of these cases (75%) the defendant's **JOURNALISM** **75%** was used as evidence to support terrorism charges



Hearing outcomes

Of the 60 hearings observed, 17 were final with eight acquittals and nine convictions. One ruling, by the Constitutional Court, found in favour of the defendant, Wikipedia.

Case 2019/252: On November 4, Istanbul's 26th High Criminal Court convicted **Ahmet Altan** and **Nazlı Ilıcak** of "aiding a terrorist organization without being a member". Ahmet Altan was sentenced to 10 years and six months while Nazlı Ilıcak was sentenced to eight years before they were both released from detention having already served three years in prison. Ahmet Altan was re-arrested on November 13 after the prosecution claimed he was a flight risk. **Mehmet Altan's** earlier acquittal by the Supreme Court of Cassation

³ The Turkish authorities believe ByLock was exclusively used by followers of Fethullah Gülen, the exiled Islamic cleric Turkey blames for the July 2016 coup attempt

was confirmed. Co-defendants **Fevzi Yazıcı** and **Yakup Şimşek** were sentenced to 10 years 15 months and **Şükrü Tuğrul Özşengül** to 12 years for “membership of a terrorist organisation”. All three remain in prison.

Case: 2018/128: On November 6, Istanbul’s Criminal Court convicted **Berzan Güneş** of “terrorism propaganda” and sentenced him to three years, one month and 15 days in prison. He was acquitted of membership of a terrorist group.

Case 2018/147: On November 7, Istanbul’s 13th High Criminal Court convicted **Atakan Sönmez**, former news director of Cumhuriyet’s online edition, of “printing or publishing declarations or announcements legitimizing or praising the methods of a terrorist organization” and handed him a 10 month suspended prison sentence. This was reduced from the more serious original charge of “systematically disseminating propaganda for a terrorist organization”.

Case 2019/301: On November 8, Van’s 4th Criminal Court of First Instance rejected the appeal of **Adnan Bilen**, a reporter with the Mezopotamya news agency, and confirmed his conviction for “insulting the president” when using the word “disgraceful” on social media. The original sentence of 11 months and 20 days in prison was, however, commuted to a fine of 7.000 TL (approximately 1.000 €).

Case 2019/151: On November 21, Istanbul’s 27th High Criminal Court confirmed the original convictions on terrorism related charges in April 2018 of 12 of the 13 **Cumhuriyet journalists**. In doing so the court rejected the September decision of the Supreme Court of Cassation to acquit the defendants and maintained the sentences of 12 defendants. **Kadri Gürsel**, a member of IPI’s Executive Board, was the only defendant to be fully acquitted while his colleagues are forced to appeal again.

Case 2019/340: On November 28, Batman’s Criminal Court convicted **Deniz Kılıç**, former bureau chief for the shuttered Kurdish newspaper Azadiya Welat, of terrorist propaganda and sentenced him to three years, one month and 15 days imprisonment.

Case 2017/35: On November 28, Istanbul’s 2nd Criminal Court of First Instance convicted **İshak Yasul**, **Kenan Kırkaya**, **Özgür Paksoy** and **Selman Keleş**, journalists of the shuttered Özgürlükçü Demokrasi, of denigrating the Turkish nation under the notorious Article 301, and handed each five months suspended jail sentences. The files of defendants Aziz Oruç and Ersin Çaksu were separated.

Case 2019/543: On December 5, Anadolu’s 2nd Criminal Court of First Instance convicted **Bülent Onur Şahin** and **Neşe Düzel** of violating the Press law by failing to publish a correction. They were fined 41.666 TLR (approximately 6.000 €)

Case 2017/22355: On December 26, the Constitutional Court declared the ban imposed on **Wikipedia** first imposed in April 2017, as unconstitutional and a violation of freedom of expression. The government finally lifted the ban on January 15, 2020.

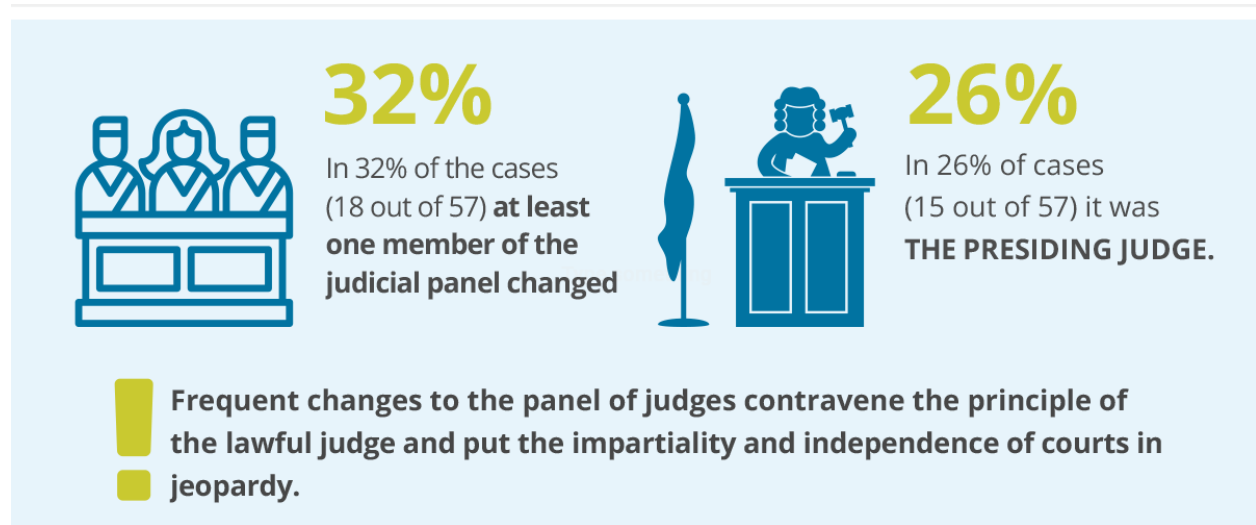
Case 2017/84: On December 27, Istanbul’s 37th High Criminal Court found seven of the nine defendants guilty of “knowingly and willingly aiding a terrorist organization (FETÖ) without being a member” in the trial of the Sözcü newspaper journalists. Columnists **Emin Çölaşan** and **Necati Doğru** were sentenced to three years six months. Editor in Chief **Metin Yılmaz** and Online Editor **Mustafa Çetin** were sentenced to three years and four months. Online editorial coordinator **Yücel Arı**, reporter **Gökmen Ulu** and accounts employee **Yonca Yücekaleli** were sentenced to two years one month. **Mediha Olgun** was acquitted while the case of Sözcü owner **Burak Akbay** was separated.

Right to a lawful judge

In 32 percent of cases, 18 out of 57, at least one member of the three-person judicial panel changed during the proceedings and in 15 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 35 percent of the hearings (21 out of 60) 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 (six hearings)
- Hard to hear what the judicial panel said (13 hearings)
- Courtroom too hot/too cold (seven hearings)
- Observers could not enter the courtroom (one hearing)

Impartiality and (appearance of) independence

Independence and impartiality of the tribunal are institutional requirements enshrined within the concept of the right to a fair trial of Article 6.1 of the Convention, and therefore also under Turkish law. The appearance of independence is one of the four criteria listed by the ECtHR for determining whether the court is independent⁴.

In six hearings the monitors reported inappropriate treatment of defendants in particular persistent interrupting of the defendants.

Defendants' presence in court

During the 60 hearings monitored over this period the SEGBİS video conference system was used twice, for Yetkin Yıldız and during the Altan brothers' case, meaning that defendants in these cases were not present physically in court and instead participated via video link. This is a marked contrast to our report published in January 2019, in which defendants in 34 percent of the hearings were not physically present in the courtroom and instead submitted their defense from prison via SEGBİS.

⁴ 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.

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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