



Bu proje Avrupa Birliđi tarafından finanse edilmektedir.
This project is funded by the European Union.

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

TURKEY FREE EXPRESSION TRIAL MONITORING REPORT

March 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 (March, 2020), 93 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.

Four more reports² published in July, September, November and January covering hearings from February 20 until December 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.

This Trial Monitoring Report covers the period between January 1 and February 29, 2020.

¹ For regular updates please check the #FreeTurkeyJournalists platform

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

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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.

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.

The dataset in this report covers a total of 64 hearings involving 291 defendants, including 164 journalists and 26 media workers, held between January 1 and February 29, 2020.

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 64 hearings of 291 defendants, held between January 1 and February 29, 2020. The data were collected by nine observers at various court instances in nine cities: Ankara (6 hearings), Diyarbakır (9), Istanbul (41), Van (5), and one hearing each in Balıkesir, Muş and Tunceli.

Findings

Defendants and charges

MLSA observers attended 64 hearings (corresponding to 60 case files) from January 1 to February 29 2020. There were 291 defendants, of whom 164 were journalists and 26 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 50 cases (54 hearings), followed by media employees (seven cases), activists (five cases, 88 activists), academics (two cases), author (one case), artist (Ferhat Tunc, five cases,) and students (one case), politicians (two cases) and one film director (one case).

The most common charges were for terrorist-related offences, present in 40 out of (60 cases), or 63 percent. Of these, the most widespread were “conducting propaganda for a terrorist organization”, (30 cases), and “membership of a terrorist organization” (14 cases). Other terrorism-related charges include “Disrupting the unity and national integrity of the state” (four cases) “knowingly and willfully helping the organization without being a member”, three cases, “revealing the identify of people involved in the fight against terrorism” (two cases) “establishing an armed organization”, one case and “attempting to eliminate the government or prevent it from performing its duties by use of force” (one case).



Of the 50 cases that concerned journalists, in 32 the charges were terrorism-related. Of these 32 terrorism cases 20 of them (63 percent) used primarily the defendants’ journalism as evidence, and an additional eight cases relied primarily on social media posts (25 percent). In 19 cases journalists were charged with insult whether of the president, a public official or the Turkish nation.

Other charges included attempting the violent overthrow of the government (one case) incitement to hatred (two cases) participating in illegal demonstrations (two cases) breaking the law on capital markets (one case) civil litigation (one case) and attempted murder (one case).

Most of the hearings attended were at the level of the High Criminal Court (41 hearings) and the Criminal Court of First Instance (18 hearings). Three cases were heard in the civil court of first instance and one case was heard by Istanbul's Regional Court of Appeal. 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

Ten of the 291 defendants were being tried while behind bars. One, philanthropist Osman Kavala, is in pre-trial detention since October 2017, while the other nine are all HDP activists held since October 14, 2019 after organizing a demonstration in Istanbul.

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 2019/531: the nine HDP activists were held on pre-trial detention until their hearing on February 21 when the court released them setting the next hearing for July. The defendants had organized a demonstration to mark the seventh anniversary of the launch of the People's Democratic Party (HDP) in defiance of a government ban. They face charges of "conducting terrorist propaganda" and "defying the law on assemblies and demonstrations".

Travel restrictions

Travel bans abroad have been imposed on defendants in 11 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 (two cases involving journalists) and in one case ordered the attachment of an electronic tag on the journalist Emre Orman.

Evidence presented

The evidence presented in most of the cases (observed in 37 out of the 60 cases) was reported 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 6). In 20 of the cases this included social media posts. Other evidence was provided by witness statements (observed in four) participating in press conferences (three cases) and in one case, the carrying of a banner.

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.

64% of cases concerning journalists were for **TERRORISM RELATED OFFENCES** (32 out of 50)

In 20 of these cases (63%) the defendant's **JOURNALISM** was used as evidence to support terrorism charges **63%**



Hearing outcomes

Of the 64 hearings observed, 17 were final with eight convictions and seven acquittals. Two cases were dropped for passing the press law's four months statute of limitations. One ruling, by the Constitutional Court, found in favour of the defendant, Wikipedia.

Case 2019/977: On January 16, Ankara's 24th Criminal Court of First Instance convicted journalist **Melda Onur** of insult (through social media) and applied a fine of 1.000 TL

Case 2019/14: On January 23, Istanbul's 29th High Criminal Court, sentenced journalist **Kazım Güleçyüz** to one year and eight months and journalist **İbrahim Özdamak** to one year and six months and 22 days imprisonment for terrorism propaganda.

Case 2019/449: On January 24, Istanbul's 24th High Criminal Court, sentenced journalist **Osman Akın** to one year, six months and 22 days for terrorist propaganda.

Case 2019/146: On February 13, Istanbul's 34th High Criminal Court, sentenced journalist **Emre Orman** to one year, six months and 22 days for terrorist propaganda.

Case 2019/183 On February 13, Istanbul's 34th High Criminal Court sentenced journalist **Ali İhsan Terzi** to one year 6 months and 22 days for terrorist propaganda.

Case 2018/42: On February 20, Istanbul's 35th High Criminal Court sentenced journalist **Şirin Kabakçı** to six years and three months imprisonment for terrorist propaganda.

Case 2018/1648: On February 26, Istanbul's regional justice court no. 3 sentenced journalist **Faruk Arhan** to one year, two months and 17 days for insulting the president.

Case 2016/106: On February 28, Istanbul's 22nd High Criminal Court sentenced film director **Veyssi Altay** to one year and three months suspended sentence for terrorist propaganda, and a 6.000 TL fine for publishing statements of a terrorist organization

Acquittals: Four defendants were acquitted of charges of conducting terrorist propaganda including Mehmet Erol, Aydın Keser, Arjin Dilek Öncel and academic Ahmet Tuna Altinel.

Three journalists, Berfin Aslan, Mehmet Şahin, Perihan Erkılınç, and eight other activists, were acquitted of participating in an illegal demonstration.

Mehmet Kızmaz was cleared of insult and slander.

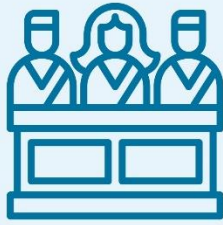
Lastly in the **Özgür Gündem** main trial journalists Necmiye Alpay and Bilge Aykut of all charges and Aslı Erdoğan was acquitted of “disrupting the unity and integrity of the state” and “membership of terrorist group” and dropped the “propaganda” charge citing the f the four-month statute of limitations for pressing charges as per Article 26/1 of Turkey’s Press Law. The cases against Zana Kaya, İnan Kızılkaya, Kemal Sancılı and Eren Keskin, were separated and adjourned to give more time for their final defense statements.

Right to a lawful judge

In 27 percent of cases, 16 out of 60, at least one member of the three-person judicial panel changed during the proceedings and in 14 of these cases (23 percent) it was the presiding judge.

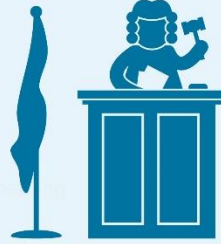
These changes occurred despite the Turkish Constitution guaranteeing the right to a lawful judge in Articles 36 and 37. This right stipulates that judges who rule on a specific case should be selected based on objective criteria predetermined by law. Frequent changes to the panel of judges contravene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



27%

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23%

In 23% of cases (14 out of 60) it was **THE PRESIDING JUDGE.**

Frequent changes to the panel of judges contravene the principle of the lawful judge and put the impartiality and independence of courts in jeopardy.

Courtroom conditions

In 19 percent of the hearings (12 out of 64) 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 (five hearings)
- Hard to hear what the judicial panel said (six hearings)
- The hall was too crowded (one hearings)
- the SEGBİS connection was weak and hard to follow (two 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 independent³.

³ 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.

In three hearings the monitors reported inappropriate treatment of defendants by persistent interruptions. In a fourth the monitor reported the judge using the informal you “sen” instead of the formal you “siz” to address the defendant, and in a last case the monitor reported the defendant being strapped to an electronic tag the day before the hearing lending the appearance of assumed guilt.

Defendants’ presence in court

During the 64 hearings monitored no defendant was required to testify through the SEGBİS video conference system. 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.

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.

This document is produced with financial support of the European Union (EU). Media and Law Studies Association (MLSA) and the International Press Institute (IPI) are responsible for the content of this document and can in no way be interpreted as the opinion of the EU and/or Republic of Turkey.

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