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Meeting: 1369<sup>th</sup> meeting (March 2020) (DH)

Communication from NGOs (Article 19 and Turkey Human Rights Litigation Support Project (TLSP)) (27/01/2020) in the ONER AND TURK group of cases v. Turkey (Application No. 51962/12) and reply from the Turkish authorities (04/02/2020).

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1369<sup>e</sup> réunion (mars 2020) (DH)

Communication d'ONG (Article 19 et Turkey Human Rights Litigation Support Project (TLSP)) (27/01/2020) concernant le groupe d'affaires ONER ET TURK c. Turquie (requête n° 51962/12) et réponse des autorités turques (04/02/2020) **[anglais uniquement]**

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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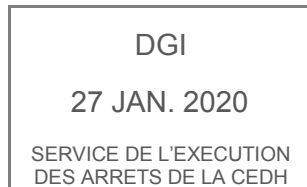
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**27 January 2020**



**COMMUNICATION**

**In accordance with Rule 9.2. of the Rules of the Committee of  
Ministers regarding the supervision of the execution of judgments  
and of terms of friendly settlements**

**by ARTICLE 19 and the Turkey Human Rights Litigation Support  
Project (TLSP)**

***Öner and Türk v. TURKEY (51962/12<sup>1</sup>)***

**Description of case**

The *Öner and Türk* group covers 32 cases, concerned with violations of Articles 9 or 10 of the European Convention on Human Rights (Convention) due to criminal proceedings against the applicants based on Article 7(2) and Article 6 (2) and (4) of the Prevention of Terrorism Act (Law no. 3713) and Article 215 of the Turkish Criminal Code (TCC). The applicants were all convicted on the basis of their expression which the European Court of Human Rights (ECtHR) found did not incite violence or hatred.

This submission will therefore look at the legislative changes introduced by the Turkish Authorities regarding Article 7(2) and Article 6 (2) and (4) of Law no. 3713 and Article 215 of the TCC.

The submission will provide examples of cases demonstrating that the Turkish Authorities' violations of the right to free expression using these articles have not only continued, but that the large numbers of prosecutions demonstrate their widespread use to harass journalists and others on the basis of their expression. Our analysis in a number of cases since the *Öner and Türk* ruling shows that the Turkish courts are still failing to examine "the proportionality of the interference and the balancing of rights taking into

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<sup>1</sup> <http://hudoc.exec.coe.int/eng?i=004-36806>.

account freedom of expression”, as noted by the Court in *Öner and Türk*. Finally the submission will address other points made in the most recent action plan submitted by Turkey on this group, specifically regarding the Judicial Reform Strategy and the training of judges.

## **ARTICLE 19**

ARTICLE 19 is an international non-governmental organisation working around the world to protect and promote the rights to freedom of expression and freedom of information. We advocate for the development of progressive standards on freedom of expression and freedom of information at the international and regional level, and the implementation of such standards in domestic legal systems, including in Turkey. ARTICLE 19 frequently intervenes as a third party before the ECtHR including in relation to cases concerning Turkey. For instance, we have intervened in the Altan’s and Demirtas cases. In those cases, we have outlined the implications of the now lifted State of Emergency in Turkey on the right to freedom of expression. At national level, we recently submitted expert opinions on cases against signatories of the Academic for Peace petition, among others.

## **The Turkey Human Rights Litigation Support Project**

The Turkey Human Rights Litigation Support Project provides expertise and support to bring effective legal action to address the emerging human rights issues in Turkey. Consisting of a group of leading academics, human rights lawyers and researchers, within Turkey and internationally, the project carries out a range of activities, including litigation, research, advocacy and capacity building in human rights. It provides legal assistance and guidance to domestic lawyers and other stake-holders in their litigation related activities in Turkey, working in close co-operation with lawyers, Bar Associations, national and international experts, and civil society actors to pursue strategic litigation. A recent report on the state of emergency in Turkey complements the advice and legal support provided in a number of cases before the domestic courts, including the Turkish Constitutional Court, as well as the ECtHR and the United Nations (UN) bodies and procedures.

## **Key recommendations**

- Abolish Article 7(2) and Article 6 (2) and (4) of Law no. 3713. Instead, Turkish law should only prohibit *incitement* to commit acts of terrorism in line with international standards on freedom of expression;
- Amend the definition of terrorism under Article 1 of Law no. 3713 to bring it in line with international standards on human rights and counter-terrorism;

- Amend Article 2 of Law no. 3713 to ensure that those who are not members of an illegal terrorist organisation and have not committed a serious crime cannot be convicted as such;
- Re-establish the independence of the judiciary, through implementing the recommendations of the Venice Commission regarding the 2017 amendments to the Turkish Constitution.

## General Measures

### Legislative amendments

In its action plan of 9 January 2020, the Turkish Authorities claim that they have introduced legal changes to Article 7(2) and Article 6(2) and (4) of Law no. 3713 and Article 215 of the TCC which will ensure that the violations found in this group of cases will not be repeated. However, our analysis indicates that the reforms are insufficient in preventing the prosecution of individuals for their expression which is not intended to incite violence or hatred.

### Articles 7(2) and 6 (2) and (4) of Law no.3713

Article 7(2) of Law no. 3713 previously read: *“Any person who disseminates propaganda in favour of a terrorist organisation shall be liable to a term of imprisonment of one to five years”*

An amendment in 2013 added the sentence *“by justifying, praising or encouraging the use of methods constituting coercion, violence or threats”*.

Article 6 (2) and (4) of Law no. 3713 previously read: *“Anyone who prints or publishes leaflets or declarations of terrorist organisations shall be sentenced to imprisonment for a term of one to three years.”*

An amendment in 2013 added the sentence: *“which justify, praise or incite the terrorist organisations’ methods containing violence, force or threat”*.

ARTICLE 19 and TLSP note that the 2013 amendments are an improvement on the original wording of Articles 7 (2), 6 (2) and (4) of Law no. 3713, which were in clear breach of international standards on freedom of expression. Nonetheless, we further note that the 2013 amendments still fall far below those standards. In particular, the amendments fail to define what amounts to “propaganda” or “justifying” “praising or “encouraging” the

use of terrorist methods. This leaves those provisions open to being broadly applied to a range of actions not properly within the scope of the offence. Moreover, these articles fail to include the essential element of *intent* to incite violence, i.e. that the act of expression had some direct and imminent link to the violent act, which was intentional. In our view, this omission renders these provisions incompatible with the requirements of necessity and proportionality under Article 10 of the Convention and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).<sup>2</sup>

A further amendment to Article 7(2) in 2019, added the sentence: “*Expressions of thought that do not exceed the limits of reporting or for the purpose of criticism shall not constitute a crime.*” While this amendment appears to be intended to prevent the use of this law for the prosecution of journalists or others criticising the government, the wording is still far too broad and fails to define what the ‘limits of reporting’ are. Moreover, it also fails to address the issue of intent.

More generally, Law no. 3713 allows an overly broad interpretation of the term ‘terrorism’, leading to the prosecution of journalists and others on the basis of their expression alone, which did not incite violence or hatred. In particular, Article 1 does not require that the acts committed amount to deadly or otherwise grave violence. This analysis is consistent with the comments made by UN Special Rapporteur Martin Scheinin in 2006 on this issue.<sup>3</sup> He stated that “The Anti-Terror Act is drafted in a way that allows for an overly broad application of the term terrorism” since “the provision is applicable to any kind of act that entails “pressure, force and violence, terror, intimidation, oppression or threat” with “the aim to change the “political, legal, social, secular and economic system” of Turkey and the aim of “weakening ... the authority of the State.” He went on to note that in Article 2 of Law no. 3713, which defines who is a terrorist offender, “there is no requirement that the person must have committed a serious violent crime.”

## **Article 215 of the Turkish Criminal Code**

Article 215 of the TCC previously read: “*Anyone who publicly praises an offence that was committed, or a person on account of an offence he/she committed, shall be sentenced to imprisonment for a term of up to two years.*”

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<sup>2</sup>Third-Party Intervention Submissions by Article 19 in Support of Defendants and Acquittal, in the case of Republic of Turkey v. Erol Önderoğlu, Rasime Şebnem Korur and Ahmet Nesin, 13 March 2017, [https://www.article19.org/data/files/medialibrary/38680/Amicus-Turkey-case-March-2017---FINAL\\_English.pdf](https://www.article19.org/data/files/medialibrary/38680/Amicus-Turkey-case-March-2017---FINAL_English.pdf).

<sup>3</sup> the texts of Articles 1 and 2 (paragraph 1) are unchanged. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Turkey, 16 November 2006, A/HRC/4/26/Add.2, paras. 14 and 15, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/149/42/PDF/G0614942.pdf?OpenElement>.

An amendment in 2013 added the sentence: “*provided that there emerges an imminent and clear danger to the public order*”.

In our view, Article 215 plainly fails to meet the legality requirement under Article 10 of the Convention. In particular, a series of terms are excessively vague or undefined, such as “praising” “offence” “emerges” and “public order”. As such, this provision is clearly open to abuse and prevents individuals from foreseeing when their acts of expression may be criminalised under Turkish law.

Furthermore, the provisions fail to satisfy the third requirement of the permissible limitations test, namely that laws must be strictly necessary and proportionate to the aim pursued. In this respect, we note that Principle 6 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles) - which have been endorsed by the UN special mandate on freedom of expression - clearly stipulates the following elements that such laws must contain, in order to satisfy the principles of necessity and proportionality:

- The act is intended to incite imminent violence;
- The act is likely to incite such violence; and
- There is a direct and immediate connection between the speech and the likelihood or occurrence of such violence.

Although Article 215 of the TCC requires a connection between the giving of public praise and an “explicit and imminent danger to the public order”, it still lacks a requirement that the praise was *intended* to incite violence. International law is clear that laws prohibiting incitement to terrorism or any form of violence will not be compliant with human rights standards unless the law stipulates that the relevant conduct must have been clearly intended to directly incite such conduct. Given the potentially broad interpretation of the term “praising”, and the lack of a requirement to demonstrate intent, Article 215 can be easily misconstrued to criminalise expression which only transmits information from or about an offence or offender, contrary to Principle 8 of the Johannesburg Principles.

### **Case law of the Turkish judiciary**

While we believe that more legal reforms are required to ensure that the violations the ECtHR found in the *Öner and Türk v. Turkey* group are not repeated, a further issue is the lack of reasoning by reference to the Convention in domestic courts’ judgments in similar cases. Indeed, in *Öner and Türk v. Turkey*, the Court noted “that it was not indicated in the reasoning of the domestic courts’ judgments whether they had examined the proportionality of the interference and the balancing of rights taking into account freedom of expression.” We believe that the examples set out below illustrate that this problem is on-going, despite the 2013 legal amendments. Furthermore, we do not believe

that the 2019 amendment to Article 7(2) of Law no. 3713 will be sufficient to resolve this problem.

- **Solidarity with Özgür Gündem cases:** In 2016, investigations were initiated against 50 guest editors, including prominent academics, writers and human rights defenders, who had taken part in a solidarity campaign with Özgür Gündem (a Pro-Kurdish Newspaper which was shut down under the state of emergency) by becoming guest editors for one day. Thirty-nine of the guest editors were tried under Articles 6(2) and 7(2) of Law no. 3713, in relation to the articles published in the newspaper on the day they were guest editor, leading in many cases to fines or imprisonment. For instance, a human rights activist, Murat Çelikkan, was sentenced to 1 year and 6 months in jail and imprisoned between 14 August 2017 and 21 October 2017 when he was released on probation. While it has not been possible to monitor all the trials which relate to this solidarity campaign, ARTICLE 19 analysed the charges and evidence in the cases against Erol Önderoğlu, Reporters Without Borders' (RSF) Turkey Correspondent; Rasime Şebnem Korur Fincancı, Director of Turkey Human Rights Foundation (Türkiye İnsan Hakları Vakfı, TİHV); and Ahmet Nesin, and independent journalist. We found that the evidence submitted in these cases was in fact legitimate reporting on the conflict in the Kurdish southeast Turkey. While the defendants in these particular cases were eventually acquitted, we believe that their prosecution was politically-motivated and amounted to harassment, much like the other cases brought against those who had taken part in the solidarity campaign.<sup>4</sup>
- **Main Özgür Gündem case:** the İstanbul Public Prosecutor submitted its final request to the İstanbul 23rd Assize Court in this case on 13 January 2020 (after the October 2019 amendment of Article 7(2) of Law no. 3713). The prosecutor requested conviction of Aslı Erdoğan, an acclaimed author, for terrorist propaganda under Article 7(2) for her four articles published in the newspaper. Similarly, the prosecutor requested sentencing of another defendant, Billur Kaya, for terrorist propaganda under Article 7(2) of Law no. 3713 and the owners of the newspaper, Kemal Sancılı and İnan Kızılkaya, for membership of a terrorist organization. The prosecutor also requested conviction of Eren Keskin for alleged membership to a terrorist organization pursuant to Article 314 of the TCC on the ground that, when she was the editor in chief of the newspaper, she had published

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<sup>4</sup>Third-Party Intervention Submissions by Article 19 in Support of Defendants and Acquittal, in the case of Republic of Turkey v. Erol Önderoğlu, Rasime Şebnem Korur and Ahmet Nesin (n. 2), see also <https://www.article19.org/resources/turkey-article-19-submits-expert-opinion-in-ozgur-gundem-solidarity-campaign-case/>.

articles which were in line with the objectives of the Kurdistan Workers' Party (PKK). The next hearing in this case is on 14 February 2020<sup>5</sup>.

- **Eren Keskin:** In addition to being a defendant in the main case, Eren Keskin, who became co-editor of Özgür Gündem between 2013 and 2016 as an act of solidarity, is facing more than 140 criminal cases<sup>6</sup> against her because of her role at the newspaper in relation to news and articles by other authors despite the fact that according to the Turkish Press Law, editors-in-chief can be indicted for publications only in cases when the responsible authors cannot be held to account. Six of these cases are final while in sixty-nine of them Eren Keskin was sentenced but the cases are under review by the Court of Appeals or the Supreme Court. As a result, she faces long-term imprisonment and heavy fines. In these cases, she has been charged with 'disseminating propaganda for a terrorist organization' (Article 7(2) of Law no. 3713), 'denigrating the Turkish nation, the Republic of Turkey, the institutions and organs of the State' (Article 301 of the TCC), 'insulting the President' (Article 299 of the TCC), and 'insult' (Article 125 of the TCC).
- **Bakur case:** Journalist Ertuğrul Mavioğlu and documentary filmmaker Çayan Demirel, the co-directors of the documentary Bakur (North), were convicted of 'disseminating propaganda for a terrorist organization' and sentenced to 4 years 6 months of imprisonment by the Batman 2nd Assize Court on 18 July 2019. ARTICLE 19 reviewed the 2015 documentary, which is about PKK militants' withdrawal during the short-lived Kurdish-Turkish peace process, and believes that it amounts to legitimate reporting and expression of opinions on political events, in particular the ongoing conflict between the PKK and the Turkish security forces in the Kurdish southeast Turkey. The court initially sentenced each to three years in prison. The sentences were increased on the grounds that "the crime had been committed through the press."<sup>7</sup>
- **Cases against the People's Democratic Party (HDP) politicians:** According to the HDP's own report published in 2019, more than 15,000 of its members have been arrested and 6,000 people (including 750 party members and executives) have been detained since 2015.<sup>8</sup> Among those arrested or prosecuted were 16 HDP MPs, including its then Co-Chairs Selahattin Demirtaş and Figen Yüksekdağ, seven Central Executive Committee members, 21 Party Assembly members and

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<sup>5</sup> <https://www.sozcu.com.tr/2020/gundem/ozgur-gundem-davasinda-yazar-asli-erdoganin-hapsi-istendi-5564844/>.

<sup>6</sup> As of 18 December 2018, she was faced with a potential imprisonment of up to 12 and-a-half years and fines of approximately 93,000 euros. See <https://ahvalnews.com/eren-keskin/turkish-lawyer-facing-143-lawsuits-vows-never-leave-country>.

<sup>7</sup> <https://www.article19.org/resources/turkey-charges-against-filmmakers-violate-right-to-free-expression/>.

<sup>8</sup> <https://morningstaronline.co.uk/article/w/turkeys-hdp-reports-increased-violations-human-rights-week>, see also <http://bianet.org/english/print/216945-6-000-people-from-hdp-arrested-since-2015>.



over 750 provincial and district party executives. Seven HDP MPs are currently in prison. Moreover, 11 HDP MPs' MP status have been revoked due to their convictions, mostly under anti-terror legislation.

- **Selahattin Demirtaş:** Ex-Co-Chair of HDP, Demirtaş, was sentenced to four years and eight months of imprisonment also for 'disseminating propaganda for PKK' pursuant to Article 7(2) of Law no. 3713 at a speech he gave in 2013. Despite the ECtHR's ruling that this case violated Article 18 of the Convention as it was politically motivated<sup>9</sup>, Demirtaş remains detained, having been sentenced to 56 months imprisonment in another case. He is also facing many other pending charges against him which might result in long-term imprisonment.
- **Figen Yüksekdağ:** In 2017, the other ex-Co-Chair of HDP, Figen Yüksekdağ was convicted for 'disseminating propaganda for PKK' pursuant to Article 7(2) of Law no. 3713, sentenced to one year and six months in jail. She lost her seat in Parliament as a result of an earlier similar conviction, her leadership in the party was revoked and she has been banned from standing in Parliamentary or local elections. She is also facing other pending charges against her which might result in long-term imprisonment.
- **İdris Baluken:** One of the heaviest sentences was given to HDP MP for Diyarbakir, İdris Baluken, who received a total of 16 years and 8 months in prison for 'membership of a terrorist organization' (Article 314 of the TCC), 'disseminating propaganda for a terrorist organization' (Article 7 of Law no. 3713), and 'opposing the law on meetings and demonstrations' (the Law no. 2911).
- **Cases against human rights defenders associated with the Human Rights Association (İHD):** On 1 June 2018, İHD published a list of investigations and cases against its members targeting their human rights activities. The list provides details of 225 procedures, including at least 130 investigations initiated for Article 7 of Law no. 3713, Article 314 of the TCC and other related charges<sup>10</sup>.
- **Banning of books of the Avesta publishing house:** On 29 September 2017, the İdil Criminal Judgeship of Peace banned the sale and distribution of 9 books printed by Avesta publishing house (mostly publications on Kurdish issues) on the grounds that they constituted terrorist propaganda under Article 7(2) of Law no. 3713. The banned publications included doctoral dissertations from the world's leading universities between 2003 and 2015, books regarding Yazidis' holy writings and Battle of Chaldiran, and a book on the genocide in Iraq largely

<sup>9</sup> See <https://www.article19.org/resources/turkey-respect-ecthr-ruling-and-end-politically-motivated-trials-against-demirtas/>.

<sup>10</sup> See <http://www.ihd.org.tr/insan-haklari-savunucularina-ihd-ve-ihd-yoneticilerine-yonelik-baskilar-raporu/>.

consisting of Human Rights Watch official reports.<sup>11</sup> Similarly, on 12 September 2018, the Çukurca Criminal Judgeship of Peace banned the sale and distribution of 3 other books published by Avesta between 2011-2014 on suspicion that the contents constituted terrorist propaganda pursuant to Article 7(2) and (5) of Law no. 3713 and other relevant laws.<sup>12</sup> The objections made by Avesta to the relevant judicial authorities were either rejected or left unresolved. The bans are still in place with Avesta's individual application to the Turkish Constitutional Court still pending. This case constitutes strong evidence illustrating that not only is the arbitrary use of Article 7 of Law no. 3713 ongoing, but that it is used for other disproportionate restrictions on the right to freedom of expression in addition to criminal prosecutions.

In Turkey's 2020 action plan, section D includes statistics purporting to demonstrate an improvement in the implementation of ECtHR judgments and application of its case-law. However, the fact that the statistics are provided in the form of percentages (such as percentages of cases in which the prosecution office filed the bill of indictment, or percentage of cases in which there were acquittals) masks the actual numbers at stake. Turkey claims that the numbers have decreased steadily over the period. However, the actual numbers tell a different story and demonstrate that the cases mentioned above are far from isolated, but rather form part of a pattern of violations. Over a period of four years, between 2013-2016, criminal cases were initiated against 56,478 people under Articles 6 and 7(2) of Law no. 3713.<sup>13</sup> While not all of the prosecutions have ended in convictions,

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<sup>11</sup> The original names of the banned books are as follows; Kan İnançlar ve Oy Pusulaları, Türkiye'de Kürt Milliyetçiliğinin Yönetimi 2007-2009, Robert Olson (**published in 2010**); Cesur Adamların Ülkesine Yolculuk, Dana Adams Schmidt (**published in 2011**); Tasavvur mu Gerçek mi? Mahabad Kürt Cumhuriyeti, Büyük Güçlerin Politikasında Kürtler 1941-1947, Borhaneddin A. Yassin (**published in 2014**); Mağdur Diasporadan Sınırötesi Vatandaşlığa mı? Fransa ve İsveç'teki Kürtlerde Diasporanın Oluşumu ve Ulus-Ötesi İlişkiler (**published in 2010**); Ülkemde Bir Yabancı, İsveç'teki Kürt Gençlerinin Aidiyet Politikaları, Barzoo Eliassi (**published in 2012**); Çaldıran Savaşı'nda Osmanlılar Safeviler ve Kürtler, İlk Kürt-Osmanlı İttifakı 1514, Murad Ciwan (**published in 2015**); Tanrı ve Şeyh Adi Kusursuzdur, Yezidi Tarihinden Kutsal Şiirler ve Anlatılar, Philip G. Kreyenbroek/Xelîl Cindî Reşow (**published in 2011**); Kürdistan Bayrağının Altında, Mustafa Barzani Yaşamı ve Eylemi, Xoşevi Babekr/Pauel Shethman (**published in 2010**); Irak'ta Soykırım, Kürtlere Karşı Yürütülen Enfal Askeri Harekatı, Middle East Watch (**published in 2003**). See <https://turkeypurge.com/turkish-court-bans-9-books-on-terror-charges>

<sup>12</sup> The original names of the banned books are as follows; Kürtler ve Kürdistan, Abdurrahman QASIMLO (**published in 2009**), 1880 Kürt Ayaklanması, Şeyh Ubeydullah Nehri, Celile CELİL (**published in 2014**), Kürt Ulusal Hareketi, Chris KUTSCHERA (**published in 2001**).

<sup>13</sup> A group of Turkey based NGOs (İnsan Hakları Derneği (İHD), Hafıza Merkezi, Eşit Haklar için İzleme Derneği (ESHİD), Yurttaşlık Derneği (eski HYD), Türk Tabipleri Birliği (TTB) and Hak İnisiyatifleri Derneği) and Diyarbakır Bar Association submitted a joint report to the Department of Human Rights of the Ministry of Justice in March 2019. They addressed the human rights issues in the country and analysed statistics of the Ministry of Justice on the use of Law no. 3713. See Adalet Bakanlığı İnsan Hakları Daire Başkanlığı'nın "Yeni İnsan Hakları Eylem Planı" Çerçevesinde Gerçekleştirdiği 14 Şubat 2019 Tarihli Toplantıda İnsan Hakları ve Meslek Örgütlerinin Sunduğu Görüş ve Öneriler ile Konu Hakkındaki Yazılı Görüş Raporu, 6 March 2019, [https://hakikatadaletahafiza.org/wp-content/uploads/2019/03/AdaletBakanligi\\_InsanHaklariEylemPlaniOneriler\\_Son-06.03.2019.pdf](https://hakikatadaletahafiza.org/wp-content/uploads/2019/03/AdaletBakanligi_InsanHaklariEylemPlaniOneriler_Son-06.03.2019.pdf).

the large number of prosecutions suggests that these articles are used to systematically harass journalists and others on the basis of their expression.

- In 2013, 10,547 people were prosecuted under Article 7(2) and 178 people under Article 6,
- In 2014, 15,815 people under Article 7(2) and 125 people under Article 6,
- In 2015, 13,608 people under Article 7(2) and 100 people under Article 6,
- In 2016, 15,913 people under Article 7(2) and 192 people under Article 6.

The statistics for 2017 and 2018 do not provide a breakdown based on the relevant article, however a total of 24,585 people<sup>14</sup> were prosecuted under Law no. 3713 as a whole in 2017 and in 2018 the total was 17,077. Judicial harassment of journalists or others for their criticism of the authorities is also much broader than prosecutions and convictions. The opening of investigations against individuals, even without leading to prosecution, contributes to a threatening environment for journalists and has a chilling effect on freedom of expression. According to the official 2018 statistics from the Ministry of Justice<sup>15</sup>, in 2018 alone the judicial authorities concluded criminal proceedings in relation to 46,220 offences that were opened under Law no. 3713.

Despite our efforts we could not obtain the statistics for 2019 in relation to the use of Law no. 3713 by the judicial authorities in Turkey. However, based on the above, it is clear that the Government's claim in its action plan that the number of cases opened under Law no. 3713 has decreased steadily through the years 2013-2018 is misleading.

## **The Judicial Reform Strategy and training of judges**

In its action plan of January 2020, the Turkish authorities claim that the Judicial Review Strategy will prevent further Article 10 violations, in addition to addressing concerns regarding the rule of law and the independence of the judiciary in Turkey. However, the text of the Judicial Review Strategy does not introduce any concrete changes to that effect.<sup>16</sup> Turkey also states that it has begun a programme of training of judges. While the training of judges on Convention standards is welcome, it does not address the core issue of the independence of the judiciary, which was severely weakened by the constitutional changes brought in through referendum in April 2017. Those constitutional changes

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<sup>14</sup> Adalet Bakanlığı İnsan Hakları Daire Başkanlığı'nın "Yeni İnsan Hakları Eylem Planı" Çerçevesinde Gerçekleştirdiği 14 Şubat 2019 Tarihli Toplantıda İnsan Hakları ve Meslek Örgütlerinin Sunduğu Görüş ve Öneriler ile Konu Hakkındaki Yazılı Görüş Raporu (n. 14).

<sup>15</sup> See 2018 judicial statistics of the Ministry of Justice, p. 24, <http://www.adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/2082019153842istatistik2018.pdf>.

<sup>16</sup> For a detailed analysis of the Judicial Review Strategy see International Commission of Jurists, 'Turkey's Judicial Reform Strategy and Judicial Independence', November 2019, <https://www.icj.org/wp-content/uploads/2019/11/Turkey-Justice-Reform-Strat-Advocacy-Analysis-brief-2019-ENG.pdf>

modified the procedure of appointment of members to the Council of Judges and Prosecutors, which is the body responsible for the admission, appointment, transfer, promotion, disciplinary proceedings and supervision of judges, creating a dangerously imbalanced system which favours the executive. Indeed, before the changes were introduced, the Venice Commission noted that they were ‘extremely problematic’ and put the independence of the judiciary in ‘serious jeopardy’ since the President would have the power to appoint more than half the members of the body in charge of appointing and dismissing judges.<sup>17</sup> The issue of the independence of the judiciary relates directly to free expression cases in Turkey, since many of the cases appear to be politically motivated and aimed at harassing individuals on the basis of their expression of views which are critical of the government. Re-establishing the independence of the judiciary is therefore crucial to ensure that these cases are dealt with in line with Convention standards.

## Conclusion

ARTICLE 19 and TLSP believe that the Turkish Government’s Action Plan of 2020 fails to take adequate general measures to implement the ECtHR judgments in the *Öner and Türk* group cases. Overall, our assessment is that the amendments made by Turkey in 2013 failed to prevent the widespread misuse of these laws, and in particular Article 7(2) of Law no. 3713. Given the large numbers of journalists and others prosecuted on the basis of these articles, we believe they should be repealed entirely. Indeed, in reference to this article and others which are frequently used in Turkey to restrict the right to free expression, the Council of Europe Commissioner for Human Rights stated in 2017 that:

*“Considering the failure of past amendments of these provisions to prevent new human rights violations, the Commissioner considers that many of these provisions need to be simply abrogated.... It is also clear that legislative changes in this field cannot be piecemeal and must address some structural deficiencies. In the Commissioner’s view, this must primarily include the introduction of a systematic reference to the defences of truth and of public interest, to the concept of contribution to public debate, protection of journalistic sources and of the obligation for the judiciary to properly balance any other imperative against freedom of expression and media freedom in all*

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<sup>17</sup> Venice Commission, Opinion on the Amendments to the Constitution, 13 March 2017, CDL-AD(2017)005, para 119, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e).

*relevant cases, in particular by taking full account of the role of journalism in a democratic society.”<sup>18</sup>*

Furthermore, the Judicial Review Strategy does not introduce any substantial reform and fails to address the core issues at stake regarding the independence of the judiciary. We therefore urge the Committee of Ministers not to close these cases due to the widespread harassment of journalists and others using the laws addressed in these cases.

## Recommendations

- Abolish Articles 7(2) and 6 (2) and (4) of Law no. 3713. Rather, Turkish law should only prohibit *incitement* to commit acts of terrorism in line with international standards on freedom of expression;<sup>19</sup>
- Amend the definition of terrorism under Article 1 of Law no. 3713 to bring it in line with international standards on human rights and counter-terrorism;<sup>20</sup>
- Amend Article 2 of Law no. 3713 to ensure that those who are not members of an illegal terrorist organisation and have not committed a serious crime cannot be convicted as such;
- Re-establish the independence of the judiciary, through revoking the 2017 constitutional amendments which changed the method of appointment to the High Committee of Judges and Prosecutors, in line with the recommendations of the Venice Commission.

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<sup>18</sup> Council of Europe Commissioner for Human Rights, Memorandum on freedom of expression and media freedom in Turkey, 15 February 2017, CommDH(2017)5, para. 125, [https://rm.coe.int/ref/CommDH\(2017\)5](https://rm.coe.int/ref/CommDH(2017)5).

<sup>19</sup> See UN Special Rapporteur on freedom of expression, 2011, A/66/290, at paras.32-26: <https://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf> ; see also UN Special Rapporteur on Counter-terrorism, A/HRC/16/51, 2010, para. 29-32: <https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/a-hrc-16-51.pdf>;

<sup>20</sup> *Ibid.* at paras. 26-28:

Ankara, 3 February 2020

**THE TURKISH GOVERNMENT'S SUBMISSION**  
**IN RESPONSE TO THE RULE 9.2 COMMUNICATION OF ARTICLE 19**  
**AND THE TURKEY HUMAN RIGHTS LITIGATION SUPPORT PROJECT (TLSP)**  
**Öner and Türk v. Turkey Group (no. 51962/12)**

**I. INTRODUCTION**

1. The Turkish authorities would like to make the following explanations in response to the submission of *Article 19* and *the Turkey Human Rights Litigation Support Project (TLSP)* with respect to the *Öner and Türk* (no. 51962/12) group of cases.

2. At the outset, the Action Plan submitted to the Committee of Ministers in January 2020 in respect of the *Öner and Türk* group of cases, comprises Turkey's actions regarding the issues raised in the communication of *Article 19* and *the TLSP*. The Turkish authorities reiterate their submissions in this regard.

3. In this submission, the authorities would like to clarify the following issues raised in the communication of *Article 19* and *the TLSP*.

4. As general measures, the Turkish authorities have taken a number of measures aiming at preventing similar violations. These measures include, in particular, legislative amendments, introduction of an effective individual application before the Constitutional Court and measures on the publication, the projects and awareness raising activities, and dissemination of the judgments of the European Court of Human Rights ("the Court").

**II. LEGISLATIVE AMENDMENTS**

5. The authorities would like to reiterate that the Court found that the implementation of the legal provisions by national courts in practice was problematic rather than the wording of the said provisions in the judgments of the *Öner and Türk* group of cases. The Court also highlighted that the national courts did not provide adequate or relevant reasoning in their decisions.

6. Turkey has taken significant steps in recent years so as to eliminate the deficiencies and to provide additional safeguards in the field of freedom of expression.

**1. The offence of disseminating propaganda in favour of an illegal organisation (Article 7 § 2 of the Prevention of Terrorism Act (Law no. 3713))**

7. At the outset, the authorities would like to state that the first sentence of Article 7 § 2 of the Law no. 3713 was amended on 30 April 2013 by the Law no. 6459. As per the amendment, the act of making propaganda of terrorist organizations by justifying or praising or inciting their methods has been recognized as an offence only if they contain violence, force or threat (see §§ 20-21 of the Action Plan of the *Öner and Türk* group of cases).

**2. Printing and publishing the declarations and statements of terrorist organizations (Article 6 § 2 of the Law no. 3713)**

8. Turkey also amended Article 6 § 2 of the Law no. 3713 with the Law no. 6459. As per this amendment, the act of printing and publishing leaflets and statements may be penalized as long as those of which justify or praise or incite the terrorist organizations' methods. Moreover, those methods must be containing violence, force or threat. In this way, the applicability of the said provision has been narrowed down (see §§ 22-23 of the Action Plan of the *Öner and Türk* group of cases).

**3. Praising an offence or an offender (Article 215 of the Turkish Criminal Code (Former Article 312 § 1))**

9. Article 215 of the Turkish Criminal Code ("TCC") was also amended with the Law no. 6459. Article 215 of the TCC was revised and a new criterion, namely providing that an expression is to cause an imminent and clear danger to the public order, was added in line with the case-law of the Court (see §§ 24-25 of the Action Plan of the *Öner and Türk* group of cases).

**4. The latest amendments introduced on 17 October 2019 with the Law no. 7188**

10. The authorities would also like to reiterate a very recent legislative amendment made with the Law no. 7188 on 17 October 2019.

11. With this amendment, a new sentence was added into Article 7 § 2 of the Law no. 3713. According to this amendment, expressions of thought that do not exceed the limits of reporting or for the purpose of criticism shall not constitute a crime (see §§ 26-27 of the Action Plan of the *Öner and Türk* group of cases).

12. The Turkish authorities would also like to recall the amendment introduced with the Law no. 7188. With the said amendment, convictions under certain crimes including Article 215 of the TCC and Article 6 §§ 2 and 4 and Article 7 § 2 of the Law no. 3713, could be appealed before the Court of Cassation following the completion of the proceedings by the

District Court of Appeals. This new provision will further ensure the conformity of the case-law in similar cases.

### **III. CASE-LAW OF THE TURKISH JUDICIARY**

13. First of all, the authorities would like to provide explanations as to certain expressions in the communication of *Article 19* and *the TLSP*.

14. In some part of the relevant communication, the expressions such as “... the conflict in the Kurdish southeast Turkey” have been used. As set out in Article 3 of the Constitution of the Republic of Turkey (“the Constitution”), the State of Turkey, with its territory and nation, is an indivisible entity. Therefore, the said expressions used in the said communication are unacceptable.

15. As a member of the United Nations, a founding member of the Council of Europe, and a founding participating State of the Organization for Security and Cooperation in Europe, Turkey is a democratic state of law which has adopted respect for human rights, the rule of law and democracy, and the universal principles, values and norms required by a state of law are guaranteed in its national legislation.

16. The armed terrorist organisation PKK is recognised as a terrorist organisation by the national and international authorities. The terrorist acts of violence carried out by the terrorist organisation in question, in pursuit of its intended separatist purposes, pose a severe threat to the constitutional order, national security, public order and the safety of the lives and properties of individuals.

17. In this scope, the national authorities conduct an effective and resolute fight, within the framework of the democratic rules of law, against the terrorist organisations threatening national security and public order and targeting the security forces and the safety of the lives and properties of citizens.

18. Being aware of its international obligations, the Republic of Turkey fulfils all its responsibilities in protecting the fundamental rights and freedoms by taking measures required by law and democracy. In this regard, the measures being taken by Turkey within the scope of its fight against terrorism are compatible with the Constitution and the relevant national legislation as well as the principles of the state of law and international obligations.

19. In the communication, *Article 19* and *the TLSP* asserted some criminal proceedings. The authorities would like to note that the Action Plan are only related to the judgments of the Court included in the *Öner and Türk* group of cases. For this reason, the



authorities would not like to make a remark on the proceedings which are not included in the said group of cases.

20. The statistics stated in the communication of *Article 19* and *the TLSP* could lead to make false assessment as well as misinterpretation of Articles 6 § 2 and 7 § 2 of the Law no. 3713 since these provisions are not particularly related to the right to freedom of expression and freedom of assembly. Moreover, some of the statistics stated in the said communication which give the numbers in respect of all Articles of the Law no. 3713 could not be taken into account because the *Öner and Türk* group of cases concerns some Articles of the Law no. 3713. The authorities would like to note that the convicts who materially aid a terrorist organisation might be sentenced according to the related Articles of the TCC.

21. Related statistics and percentage are given in the Action Plan of the *Öner and Türk* group of cases.

22. Furthermore, detailed information and sample decisions of the public prosecutor's offices, the first instance courts, the District Courts of Appeals, the Court of Cassation and the Constitutional Court are indicated in §§ 30-68 of the Action Plan of the *Öner and Türk* group of cases.

23. The authorities would also like to reiterate the remedy of individual application before the Turkish Constitutional Court. The Court has examined the effectiveness of the remedy of individual application with the Constitutional Court in its decision in the case of *Hasan Uzun v. Turkey* and the Court indicated that the individual application to the Constitutional Court should be considered as an effective remedy in respect of all decisions that had become final after 23 September 2012.

24. The authorities recall that the Constitutional Court analyses the individual applications before it in accordance with the circumstances of the case and in the light of the Constitution and the Convention and the case-law of the Court and the Constitutional Court, and establishes its decisions.

#### **IV. PROJECTS AND AWARENESS RAISING ACTIVITIES**

25. The Turkish authorities would like to reiterate the explanations stated in the Action Plan in respect of the Judicial Reform Strategy and the preparation of a new Human Rights Action Plan.

26. As indicated in the Action Plan, the main objectives set out in the document can be listed as follows strengthening the rule of law, protecting and promoting rights and freedoms more effectively, strengthening the independence of the judiciary and improving

impartiality, increasing the transparency of the system, simplifying judicial processes, facilitating access to justice, strengthening the right of defence and efficiently protecting the right to trial in a reasonable time. Furthermore, the right to freedom of expression is one of the most important headings under the Judicial Reform Strategy. The Judicial Reform Strategy aims to raise the standards applied by the courts in freedom of expression cases to the European Convention standards.

27. The authorities also indicate that the preparation of a new Human Rights Action Plan is underway within the scope of the Judicial Reform Strategy.

28. It is also noteworthy to state that the pre-service and in-service trainings of the judges and public prosecutors are enlarging with the Justice Academy. The Turkish authorities would like to highlight that human rights law and more specifically the case-law of the Court are included in the training of the judges and public prosecutors.

## **CONCLUSION**

29. The Turkish authorities kindly invite the Committee of Ministers to take into consideration the above-mentioned explanations within the scope of the execution of the *Öner and Türk* group of cases.

30. Furthermore, the Turkish authorities would not like to speculate on the claims raised in the communication that are not subject to any current application or judgment of a violation.