



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



Strasbourg, 12 July 2011

CommDH(2011)25  
Original version

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## REPORT

**by Thomas Hammarberg**  
**Commissioner for Human Rights of the Council of Europe**

**Following his visit to Turkey**  
**from 27 to 29 April 2011**

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Freedom of expression and media freedom in Turkey

## Summary

The Council of Europe Commissioner for Human Rights ('the Commissioner') has been closely following human rights developments in Turkey, including those relating to freedom of expression and media freedom which are essential foundations of a democratic society. In this context, he visited Turkey from 27 to 29 April 2011. During this visit the Commissioner obtained information on the latest developments concerning freedom of expression and freedom of the media.

The Commissioner welcomes the progress made by Turkey in recent years concerning a free and open debate on a variety of human rights-related issues. However, in view of the very large number of judgments of the European Court of Human Rights ('the Court'), for more than a decade, finding violations by Turkey of the right to freedom of expression, he remains concerned by the fact that Turkey has not yet taken all necessary measures to effectively prevent similar violations. He considers that the reported increase in criminal proceedings and arrests involving journalists in Turkey are the result of a failure to effectively address to date the underlying causes identified notably in the judgments of the Court.

The present Report focuses on the following issues, which the Commissioner considers of particular relevance to freedom of expression and media freedom in Turkey:

### **I. Impact of the Turkish Constitution and statutory legislation on freedom of expression**

The Commissioner welcomes recent changes to the Turkish Constitution, which are likely to have a positive effect on freedom of expression and media freedom. He considers, however, that the letter and spirit of the 1982 Constitution continue to lie at the very heart of the origins of the serious, long-standing dysfunctions identified in this report. He encourages the Turkish authorities to reflect on and address these issues in the framework of the planned constitutional reform, in close consultation with all political parties and civil society.

The Commissioner considers that the various amendments to the Turkish Criminal Code and the Anti-Terrorism Act have not been sufficient to effectively ensure freedom of expression. He calls on the Turkish authorities to overhaul and amend the provisions detailed in this Report, in order to prevent their disproportionate use to limit freedom of expression. As regards criminal and civil defamation provisions, the Commissioner invites the Turkish authorities to curb their use, in particular by senior officials and politicians.

The Commissioner also encourages the Turkish authorities to review the Act on the Establishment of Radio and Television Enterprises and their Broadcasts and its application by the Radio and Television Supreme Council, in order to ensure their compliance with Council of Europe standards.

### **II. Serious dysfunctions of the domestic judicial system affecting freedom of expression**

The Commissioner observes that most violations of freedom of expression in Turkey stem from a lack of proportionality in the interpretation and application of the existing statutory provisions by courts and prosecutors. He is concerned that the interpretation of the concept of "incitement to violence" is not compliant with the case-law of the European Court of Human Rights. The Commissioner urges the authorities to introduce into the Turkish legal system the defences of truth and public interest, through legislation and case-law.

The Commissioner is deeply concerned that the excessive length of criminal proceedings and remands in custody, problems concerning defendants' access to evidence against them pending trial, and the lack of restraint on the part of prosecutors in filing criminal cases, has a distinct chilling effect on freedom of expression in Turkey and has led to self-censorship in Turkish media. He urges the Turkish authorities to address these problems through legislative and practical measures, as well as through systematic training and awareness raising activities within the justice system.

**III. Other issues (actions of non-state actors, Internet censorship, media landscape)**

The Commissioner recalls several judgments of the European Court of Human Rights, where the Court found violations of the right to freedom of expression as a result of civil defamation proceedings in Turkey. He is deeply concerned about a recent domestic judgment against the writer Orhan Pamuk in a civil defamation case, and urges the Turkish authorities to prevent this judgment from becoming established case-law.

The Commissioner is also concerned about the number of attempts at intimidation, attacks and murders perpetrated against journalists and human rights defenders. Recalling in particular the judgment of the European Court of Human Rights regarding the murder of Hrant Dink, the Commissioner urges the Turkish authorities to increase their efforts to protect journalists from and conduct effective investigations into such acts.

The Commissioner considers that the practice of censorship of the Internet and the blocking of websites in Turkey is beyond what is necessary in a democratic society. He encourages the Turkish authorities to review the Turkish Internet Act and carefully delimit its application by administrative bodies in accordance with the Council of Europe standards.

The Commissioner observes that the media landscape in Turkey, which is dominated by large conglomerations, raises certain concerns about editorial independence of newspapers and broadcasting media. He is also concerned that the labour rights of media professionals are often violated and many journalists, in particular investigative journalists, work under precarious conditions. He considers that this media landscape requires particular vigilance on the part of the authorities, who should be urged to refrain from any actions which have chilling effects on freedom of expression and on the work of media professionals.

The Commissioner's conclusions and recommendations are at the end of the Report.

The Turkish authorities' comments on the Report are appended.

## Introduction

1. Ensuring freedom of expression and a free, independent and pluralistic media is a core element for any healthy democracy. These freedoms should be fully and effectively respected and protected by states whatever the circumstances, including in the fight against terror and during periods of unrest and conflict.
2. The Commissioner has been closely following human rights developments in Turkey, including those relating to freedom of expression and media freedom. In this context, he visited Turkey from 27 to 29 April 2011. During this visit the Commissioner obtained information on the latest developments concerning freedom of expression and freedom of the media.<sup>1</sup> He held several meetings in Istanbul with a number of journalists and media experts, civil society organisations active in the field of human rights, as well as professional associations of journalists, publishers and lawyers. He also met the legal representatives of Nedim Şener and Ahmet Şık, two prominent journalists who had been arrested on 3 March 2011 and who were remanded in custody pending trial.
3. In his 2009 Report issued following his visit to Turkey the Commissioner expressed his concern regarding the large number of freedom of expression cases that have been brought against Turkey before the Court, and the large number of relevant judgments delivered by the Court against Turkey.<sup>2</sup> The Commissioner notes that violations of Article 10 of the European Convention on Human Rights ('ECHR') on freedom of expression have consistently taken a prominent place in the case-law of the Court concerning Turkey for more than a decade and continue to do so.
4. The execution by Turkey of a very large group of judgments by the Court concerning violations of freedom of expression is pending before the Council of Europe Committee of Ministers (more than 100 cases, the first dating from 1998).<sup>3</sup> Most of these cases concern criminal convictions, based mainly on certain provisions of the Turkish Criminal Code and the Anti-Terrorism Act (see below), coupled with a non-Convention compliant interpretation of this legislation by domestic courts, which have thus imposed undue restrictions on criticism concerning issues of public interest in the absence of any incitement to violence. It is noted that the majority of these judgments pending for supervision of execution before the Committee of Ministers concern situations where freedom of expression has been exercised and linked directly or indirectly to the "Kurdish issue" or Kurdish organisations.
5. Apart from criminal convictions, there are also judgments where the Court found violations in connection with unnecessary and disproportionate closures of newspapers or periodicals, suspensions of broadcasting licences for alleged separatism, defamation or incitement to violence, and unjustified interference with freedom of expression as a result of civil defamation proceedings.
6. There has been a growing concern, both in Turkey and internationally, regarding the large number of criminal proceedings and arrests involving journalists in Turkey.<sup>4</sup> According to the figures provided by the Turkish Trade Union of Journalists to the Commissioner, 67 press workers (including three newspaper distributors and 64 reporters, editors, correspondents or commentators) were in prison as of 19 April 2011 (8 convictions and 59 remands in custody).
7. According to the 2010 media watch report of the Turkish Independent Communication Network (BIA), 220 persons, including 104 journalists, faced trials in 2010 in connection with what could be

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<sup>1</sup> During the visit the Commissioner was accompanied by the Deputy to the Director of his Office, Mr Nikolaos Sitaropoulos, and his Adviser, Mr Hasan Bermek.

<sup>2</sup> Report by the Commissioner for Human Rights following his visit to Turkey on 28 June-3 July 2009, Issue reviewed: Human rights of minorities, [CommDH\(2009\)30](#).

<sup>3</sup> For details of the cases, see the website of the Department for the execution of judgments of the European Court of Human Rights, <http://www.coe.int/t/dghl/monitoring/execution>.

<sup>4</sup> See, for example, the statement of the OSCE Representative on freedom of the media on imprisoned journalists in Turkey and its annex, 4 April 2011, <http://www.osce.org/fom/76373>.

considered freedom of expression cases.<sup>5</sup> In addition to cases currently on trial, there were several reports that a vast number of criminal investigations having a bearing on freedom of expression were ongoing, most of which concern the protection of the secrecy of investigations or alleged attempts to influence the functioning of the judiciary.

8. While recent developments, such as the arrests of the two prominent journalists Nedim Şener and Ahmet Şık, as well as the raids conducted to seize copies of an unpublished manuscript by Ahmet Şık, drew increased attention to the issue of freedom of expression in Turkey, the arrest and deprivation of liberty of a large number of journalists appear to be symptoms of a long-standing systemic dysfunction in Turkey, which is reflected in the case-law of the Court.
9. The Commissioner wishes to continue his constructive dialogue with the Turkish authorities on these issues. He trusts that this dialogue will be facilitated by the present Report which consists of the following sections: I. Impact of the Turkish Constitution and statutory legislation on freedom of expression; II. Serious dysfunctions of the domestic judicial system affecting freedom of expression; III. Other issues affecting freedom of expression (actions of non-state actors, Internet censorship, media landscape).

## **I. Impact of the Turkish Constitution and statutory legislation on freedom of expression**

### **I a. The Turkish Constitution and freedom of expression**

10. In the last decade, Turkey has adopted a number of constitutional amendments aimed at bringing its law and practice in line with the case-law of the Court. The Commissioner welcomes, in particular, the fact that Articles 13 and 26 of the Constitution, as amended, limit restrictions to freedom of expression to grounds listed in the Constitution, and specify that procedures for such restrictions should be prescribed by law. Another significant change was the amendment of Article 90 of the Constitution, designed to give direct effect to international treaties, such as the ECHR, in the Turkish domestic legal system.
11. However, it has been widely recognised that the letter and spirit of the present Turkish Constitution represent a major obstacle to the effective protection of pluralism and freedom of expression. The present Constitution, approved in the aftermath of the *coup d'état* of 12 September 1980, enshrines a state-centrist approach, based on the principle of the 'indivisible integrity of the state', and an apparent intolerance towards pluralism.
12. The constitutional amendments approved in the referendum of 12 September 2010 imply reforms which, while not affecting freedom of expression directly, could nonetheless have a positive impact. The Commissioner notes in particular the setting up of an Ombudsman, the right to individual application to the Constitutional Court, independent supervision of judges and prosecutors, and limitation of the competence of military courts to military offences. With respect to the future Ombudsman, the Commissioner recalls the importance of the relevant international standards, and in particular the Paris Principles.<sup>6</sup> He also welcomes the changes aiming at reinforcing the independence of the judiciary, and the progress made with regard to the status of the High Council of Judges and Prosecutors (HSYK).
13. The Commissioner welcomes the momentum and growing consensus, both within the domestic political parties and civil society, for a more thorough constitutional change in the near future.

<sup>5</sup> See BIA [2010 Media Monitoring Report](#), available on [www.bianet.org](http://www.bianet.org).

<sup>6</sup> Principles relating to the Status of National Institutions ([The Paris Principles](#)), Adopted by UN General Assembly resolution 48/134 of 20 December 1993. See also the Commissioner's viewpoint "[Ombudsmen are key defenders of human rights – their independence must be respected](#)", 18 September 2006.

14. In this context the Commissioner encourages the Turkish authorities to pay special attention to the role of the Turkish Constitutional Court. The Commissioner welcomes the recent constitutional changes concerning this institution, in particular the right to individual petition. However, he notes that the Constitutional Court currently lacks the competence to assess the compatibility of Turkish laws with relevant international treaties, including the ECHR, in spite of Article 90 of the Constitution. This has reportedly led to some confusion, and caused delays in the introduction of ECHR standards into the case-law of Turkish courts.

**I b. Turkish statutory legislation and freedom of expression**

15. As noted by the Commissioner following his 2009 visit to Turkey, the Turkish Criminal Code and the Anti-Terrorism Law, at the origin of the vast majority of freedom of expression cases against Turkey brought to the European Court of Human Rights, were amended in 2004 and 2006 respectively.<sup>7</sup> There have also been some amendments subsequently. However, the provisions in the amended texts have kept the contents of the former texts largely intact. This assessment has been validated by the Court in 2010, in particular in its judgments in the cases of *Dink v. Turkey*<sup>8</sup> (concerning Article 301 of the Turkish Criminal Code as amended) and *Gözel and Özer v. Turkey*<sup>9</sup> (concerning Article 6, paragraph 2 of the Anti-Terrorism Act as amended).

***The impact of the Turkish Criminal Code***

16. The Commissioner notes that criminal proceedings continue to be brought against journalists, writers and human rights defenders, on the basis of a number of provisions of the Turkish Criminal Code. Of particular concern are those provisions of the new Criminal Code containing the same offences as the provisions of the former Criminal Code which gave rise to violations of Article 10 ECHR according to the Court. The main offences in this respect are:

- Praising a crime or criminal, Article 215 (former Article 312, paragraph 1);
- Inciting the population to enmity or hatred and denigration, Article 216 (former Article 312, paragraphs 2 and 3);
- Insulting the Turkish nation, the State of the Turkish Republic, the Turkish Grand National Assembly, the Government of the Republic of Turkey or the judicial organs of the state, Article 301 (former Article 159);
- Discouraging persons from doing their military service, Article 318 (former Article 155).

It is noted that committing some of these acts through the press or other publications is considered an aggravating circumstance, increasing the punishment by half (Articles 218 and 318).

17. Following his visit to Turkey in 2009, the Commissioner expressed his concern regarding Article 301, notwithstanding an amendment adopted in 2008 which led to a decrease in the number of proceedings brought under this article. On 14 September 2010 the Court delivered its judgment in the case of *Dink v. Turkey* in which it found a violation of Article 10 ECHR on account of Hrant Dink's conviction based on Article 301. The Court held that Hrant Dink's conviction for denigrating Turkish identity prior to his murder did not correspond to any "pressing social need" which is one of the major conditions on which interference with one's freedom of expression may be warranted in a democratic society. The Commissioner considers that the amendment adopted in 2008, which subjects prosecution to a prior authorisation by the Ministry of Justice in each individual case, is not a lasting solution which can replace the integration of the relevant ECHR standards into the Turkish legal system and practice, in order to prevent similar violations of the Convention.

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<sup>7</sup> Report by the Commissioner for Human Rights following his visit to Turkey on 28 June-3 July 2009, Issue reviewed: Human rights of minorities, [CommDH\(2009\)30](#).

<sup>8</sup> *Dink v. Turkey*, judgment of 14 September 2010.

<sup>9</sup> *Gözel and Özer v. Turkey*, judgment of 6 July 2010.

18. Following his 2009 visit the Commissioner expressed his deep concern about the application of Article 220 of the Criminal Code, and in particular its paragraphs 6 and 8,<sup>10</sup> and considers that this concern remains valid in the context of freedom of expression and freedom of the media in Turkey.
19. As regards cases concerning convictions for having published statements which were considered to incite abstention from compulsory military service, six judgments of the Court against Turkey await execution.<sup>11</sup> Pursuant to Article 318 of the Criminal Code, the non-violent expression of opinions on conscientious objection is still a criminal offence, similar to the former Article 155 which gave rise to these judgments. The Court held that the fact that an article on conscientious objection was published in a newspaper was an indication that it could not be considered as incitement to immediate desertion. This is in contradiction with Article 318, paragraph 2 of the Criminal Code, according to which the publication itself is an aggravating circumstance. The Commissioner is concerned by the fact that the above provision continues to be applied. He has been informed that in June 2010 four persons were sentenced by an Ankara court to imprisonment ranging from 6 to 18 months for having issued a press release in favour of a conscientious objector, Enver Aydemir.<sup>12</sup>
20. In addition to these provisions, the Criminal Code contains several others which have a bearing on freedom of expression, in particular Articles 285 (breaching the confidentiality of criminal investigations) and 288 (attempting to influence judicial bodies unlawfully). These Articles have come to particular prominence since 2007, due to a steep increase in cases brought against journalists in connection with their writings on the *Ergenekon* case. According to the European Commission, there were more than 4 000 ongoing investigations on the basis of these articles as of 2010.<sup>13</sup>
21. Chapter 8 of the Criminal Code concerning “crimes against dignity” and in particular Article 125 on defamation, has also often been used against journalists. According to the Turkish Independent Communication Network (BIA), 14 persons, including 11 journalists, were sentenced to a combined prison term of 11 years and 4 months and fines of 23 780 000 TL (approx 10 million €) in 2010 as a result of criminal defamation cases.<sup>14</sup> There are a total of 47 persons still facing trial. The Commissioner notes with concern that many of these cases have been initiated by high officials, including the Prime Minister, following statements they see as defamatory, including statements made in the press or broadcasting media.
22. As regards Article 226 of the Criminal Code regarding obscenity, the Commissioner notes that the application of the previous version of this Article (former Article 426) had led in 2010 to a finding of a violation of Article 10 ECHR in the case of *Akdaş v. Turkey*.<sup>15</sup> However, the Commissioner welcomes the fact that the new Article 226 has introduced an exception for works of scientific or artistic interest. Nevertheless, the Commissioner remains concerned by reported criminal proceedings initiated under this Article concerning depictions or descriptions of homosexuality. He notes in this context that the definition of the concept of obscenity is also relevant for the application of the Turkish Acts concerning broadcasting media and the Internet (see below).

<sup>10</sup> Article 220, paragraph 6 provides that any person who commits an offence on behalf of an illegal organisation, even though they are not a member of the organization, shall be sentenced for the offence as well as for membership of the organisation. Paragraph 8 defines the offence of making propaganda for a terrorist organization or its aims.

<sup>11</sup> The leading case is *Ergin v. Turkey*, judgment of 4 May 2006.

<sup>12</sup> See BIA [2010 Media Monitoring Report](#).

<sup>13</sup> European Commission, Turkey 2010 Progress Report, [COM \(2010\) 660](#).

<sup>14</sup> See BIA [2010 Media Monitoring Report](#).

<sup>15</sup> *Akdaş v. Turkey*, judgment of 16 February 2010. This case concerned the imposition of a fine on the publisher of the Turkish translation of the novel « *Les onze mille verges* » by Guillaume Appollinaire, first published in 1907, and the seizure of copies of the book. The Court found that the acknowledgment of the cultural, historical and religious particularities of the Council of Europe’s member states could not go so far as to prevent public access to a work belonging to the European literary heritage. The Court found that the application of the Turkish legislation did not satisfy a pressing social need and that the measures had been disproportionate to the aim of the protection of morals, thus not necessary in a democratic society.

23. The Commissioner notes that many other provisions of the Criminal Code are used in freedom of expression-related cases, notably those concerning offences against privacy (Articles 132-134). Finally, Article 314 of the Criminal Code concerning criminal organisations aiming at overthrowing the constitutional order, is often used in conjunction with the Anti-Terrorism Act (see below).

### **The Turkish Anti-Terrorism Act**

24. Following his 2009 visit to Turkey the Commissioner expressed his concern about the continued application of the Anti-Terrorism Act (Act No. 3713) with a view to prosecuting and convicting persons who have expressed non-violent opinions, in particular in cases where the opinions expressed relate to the situation of the Kurdish minority in Turkey or the ongoing conflict mainly in south-east Turkey.<sup>16</sup>
25. The Commissioner regrets that the situation has not changed since 2009 and that the provisions of this Act continue to be used in the same way. The main provisions of this Act of relevance to freedom of expression are:
- Article 6, paragraph 2, which provides that printing or publishing of declarations or leaflets emanating from terrorist organisations is punishable by a term of imprisonment from one to three years. The Commissioner notes that before the amendment in 2006, the punishment was only a pecuniary fine;
  - Article 6, paragraph 4, which provides for imprisonment of owners (ranging from a thousand to ten thousand days) and editors (up to five thousand days) of press or other media, even if they have not personally participated in the commission of crimes coming under Article 6 (a kind of objective criminal liability);
  - Article 6, paragraph 5, which allows for the suspension by a judge of the publication of periodicals containing propaganda of a terrorist organisation, incitement to commit a crime, or praising of a committed crime, for a period ranging from 15 days to a month;
  - Article 7, paragraph 2, which provides for a term of imprisonment from one year to five years for propaganda in favour of a terrorist organisation (increased by half if committed through the press, including punishment for the owner and editor of the periodical).
26. The Commissioner is deeply concerned by the figures provided in the media watch report of the Independent Communication Network (BIA), according to which 33 persons were sentenced to a total of 365 years of imprisonment in 2010 on the basis of the Anti-Terrorism Act in connection with cases which could be considered of relevance to freedom of expression. This is a substantial increase compared to 2009 (the corresponding figures for 2009 were 23 persons for a combined term of 58 years).<sup>17</sup> Most prominently the editor-in-chief of the Kurdish-language daily *Azadiya Welat* was sentenced to 166 years of imprisonment by an assize court in Diyarbakir in March 2010.
27. A particular problem is the combination of the Anti-Terrorism Act and certain provisions of the Turkish Criminal Code, in particular Article 220, paragraph 8 of the latter, which provides for imprisonment ranging from one to three years for a person who makes propaganda in favour of a criminal organisation *or its aims*. This allows for a very wide interpretation, in that even non-violent statements can be subject to proceedings, when they are seen to overlap with any one of the aims of a terrorist organisation.
28. The Commissioner notes that Article 6, paragraph 2 of the Anti-Terrorism Act has recently been scrutinised by the Court. In its judgment in the case of *Gözel and Özer v. Turkey*<sup>18</sup> of 6 July 2010, the Court found a violation of Article 10 ECHR, noting that the grounds for the applicants' criminal convictions, which were based on the publication of statements of illegal organisations and members of illegal organisations, had not been sufficient. The Court considered that the absence

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<sup>16</sup> Report by the Commissioner for Human Rights following his visit to Turkey on 28 June-3 July 2009, Issue reviewed: Human rights of minorities, [CommDH\(2009\)30](#), paragraph 56.

<sup>17</sup> See BIA [2010 Media Monitoring Report](#).

<sup>18</sup> *Gözel and Özer v. Turkey*, judgment of 6 July 2010.



of reasoning stemmed from the very wording of Article 6, paragraph 2 of the Anti-Terrorism Act, which contained no obligation for judges to carry out a textual or contextual examination of the writings, in the light of the criteria established and implemented by the Court under Article 10 ECHR. This appears to explain many cases where journalists were prosecuted under the Anti-Terrorism Act for journalistic activity, e.g. for publishing interviews with members of illegal organisations. The Court observed (in a non-operative part of its judgment) that to bring the relevant domestic law into compliance with Article 10 would constitute an appropriate form of redress by which to put an end to the violation in question.<sup>19</sup>

29. The continued use of Article 6, paragraph 5 of the Anti-Terrorism Act to suspend publications, in particular Kurdish newspapers, but also some publications associated with the revolutionary left movement, has particularly affected freedom of expression in Turkey. The Commissioner recalls that the Court found in its 2009 judgment in the case of *Ürper and others v. Turkey*,<sup>20</sup> that the practice of suspending the publication of periodicals on the basis of this provision was in breach of Article 10 of the Convention. The Court noted that the measures in question were not imposed only on selected issues but on the future publication of entire newspapers whose content was unknown at the time of the domestic courts' decisions, which were taken without hearing the applicants.
30. The Court therefore concluded that the suspension orders had the preventive effect of dissuading the applicants from publishing similar articles or news reports in the future, hindered their professional activities and constituted censorship (the so-called "chilling effect"). In its judgment, the Court noted (in a non-operative part of the judgment) that the Turkish government should revise the provision in question in order to put an end to the practice of suspending the future publication and distribution of entire periodicals. As of April 2011, no information had been provided by the Turkish government to the Committee of Ministers regarding the execution of this judgment. In this context, the Commissioner notes that, in 2010 alone, the Kurdish-language newspaper *Azadiya Welat* was suspended three times, each time for a period of one month.

### **Media legislation and regulatory authorities**

31. The Turkish Press Act, which was largely amended in 2004, is generally seen by press professionals as an important improvement regarding the regulation of the press. The Commissioner welcomes the fact that these amendments included provisions concerning the protection of journalists' sources. However, he is concerned that the Act does not include a strong public interest clause for the protection of journalists. He also notes some concerns regarding a decision by the Turkish Constitutional Court of 2 May 2011 invalidating Article 26 of the Press Act, which imposes time limits for the filing of criminal cases by prosecutors following publication in a periodical (two months for a daily and four months for a weekly).<sup>21</sup>
32. The Commissioner is concerned by the fact that the Act on the Establishment of Radio and Television Enterprises and their Broadcasts (Act No. 6112 of 15 February 2011, which replaced Act No. 3984) contains many restrictions, which are vigorously applied by the regulatory authority, the Radio and Television Supreme Council (RTÜK). Most notably, Article 6 of the aforementioned Act contains more than 20 principles with which media service providers have to conform. Failure to respect these principles may result in administrative sanctions going from warnings, substantial fines, and temporary suspensions, up to complete withdrawal of broadcasting licences. The above Act provides the RTÜK with a great degree of latitude in interpreting relevant principles and monitoring their respect by broadcasters. The Commissioner notes in particular that these principles contain references to notions subject to subjective interpretation, such as "public morality", "family values", "trivialisation of violence", etc.

<sup>19</sup> This kind of « soft instructions » form part of the quasi-pilot judgments rendered by the Court, after the first pilot judgment rendered in 2004 in the case of *Broniowski v Poland*. Unlike the quasi-pilot judgments, in the pilot judgments the Court indicates *in the operative provisions of its judgments* general measures that the respondent state is obliged to take, under the CM supervision, in order to execute the judgment in question (and avoid recurrence of the violation).

<sup>20</sup> *Ürper and others v. Turkey*, judgment of 20 October 2009.

<sup>21</sup> See the [press release](#) of the OSCE Representative on Freedom of the Media, 17 May 2011.

33. Decisions by the RTÜK and their subsequent validation by administrative courts have already been brought to the attention of the Court. The execution of four relevant judgments is pending before the Committee of Ministers, the leading case being *Özgür Radyo v. Turkey*.<sup>22</sup> In this judgment, the Court considered, contrary to the RTÜK and domestic administrative courts, that the statements having led to warnings and suspensions of broadcasting licences not only did not incite to violence or hatred, but covered questions of general interest. In a more recent judgment, the Court held that an administrative sanction imposed by the RTÜK had been arbitrary and violated procedural guarantees necessary for the respect of Article 10 ECHR.<sup>23</sup>
34. As an illustration of this problem, the RTÜK issued a warning and asked for explanations from a broadcaster for having broadcast, with encryption, a film, on the ground that the depiction of a same-sex marriage in the film was a violation of the principle contained in Article 4(z) of Act No. 3984, which concerns “programmes which could impair the physical, mental and moral development of young people and children”.

## II. Serious dysfunctions of the domestic judicial system affecting freedom of expression

35. There are a number of long-standing, systemic shortcomings in the administration of justice in Turkey, which have been highlighted in numerous judgments of the Court. The Commissioner is concerned about the significant impact of this situation on freedom of expression in Turkey, including freedom of the media.

### I a. Definition of acceptable restrictions to freedom of expression and “incitement to violence”

36. The Commissioner recalls that freedom of expression is one of the essential foundations of a democratic society. It is to be noted that under the ECHR, this freedom is subject to exceptions which must, however, be construed strictly, and any restrictions must be established convincingly. Most violations by Turkey of Article 10 ECHR result from a lack of proportionality in the interpretation and application of the legal provisions relating to freedom of expression by both judges and prosecutors. This concerns notably restrictions on criticism relating to issues of public interest, in the absence of any incitement to violence.
37. As described above, Turkey made a number of legislative changes aimed at bringing its law and practice in line with the case-law of the Court, including by amending the Constitution. However, the Commissioner observes that the Turkish judiciary still seems to adopt a considerably wider interpretation of “incitement to violence” (that would justify restrictions in a democratic society) than the Court’s case-law allows, and more efforts are necessary for the practice and case-law of domestic courts, and in particular that of the supreme courts, to internalise the ECHR standards. Furthermore, despite several judgments of the Court<sup>24</sup>, there is no indication that domestic courts, when deciding on freedom of expression cases, systematically assess whether the content of journalistic reporting is true, and if so, whether the public has a legitimate interest in and a right to obtain the information in question (the so-called defences of truth and public interest).
38. The Commissioner recalls the Court’s case-law according to which ‘while the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues,

<sup>22</sup> *Özgür Radyo v. Turkey*, judgment of 30 March 2006.

<sup>23</sup> *Nur Radyo ve Televizyon Yayıncılığı A.Ş. v. Turkey*, judgment of 12 October 2010.

<sup>24</sup> See the Court’s judgment in the case of *Sürek v. Turkey (No. 2)*, judgment of 8 July 1999, paragraphs 35-39; see also *Özgür Gündem v. Turkey*, judgment of 16 March 2000, paragraph 68. These cases concerned news articles concerning alleged serious misconduct of public officials, which, if true, were of public interest. However, the truth of the articles and the public’s right to be informed were not factors taken into account by domestic courts when applying the Turkish legislation.

including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders'.<sup>25</sup>

39. Therefore, the legislative changes to the Criminal Code and the Anti-Terrorism Act adopted so far do not appear in themselves to be sufficient to prevent similar violations of Article 10 ECHR by Turkish judges and prosecutors, in the absence of a drastic shift in the adjudicative approach of the judiciary.
40. Already in the Report following his visit to Turkey in 2009, the Commissioner stressed the importance of systematic training of judges and prosecutors in the Court's case-law. Recalling the Committee of Ministers Recommendation Rec(2004)4 on the European Convention on Human Rights in university education and professional training,<sup>26</sup> the Commissioner underlined the importance of initial and continuous professional training, especially of judges and prosecutors, for a Convention-compliant interpretation and application of domestic legislation.
41. To this end, the Commissioner fully encouraged the continuation and reinforcement by the Ministry of Justice of the relevant legal and human rights capacity building programmes which are carried out in co-operation with the Council of Europe. The Commissioner notes that the 2010 *Interlaken Declaration* also called upon member states to commit themselves to "continuing to increase, where appropriate in co-operation with national human rights institutions or other relevant bodies, the awareness of national authorities of the Convention standards and to ensure their application".<sup>27</sup>

## **II b. Systemic problems in domestic criminal proceedings – side effects on freedom of expression**

42. The Commissioner is concerned that the length of detentions on remand remains a major problem in the Turkish judicial system. As of April 2011, there were 121 judgments of the Court under supervision of execution, which primarily concern the length of detention on remand and excessive length of criminal proceedings in Turkey. The Court found notably that the absence of sufficient reasons given by domestic courts in their decisions to extend detention, using instead stereotyped wording such as "having regard to the nature of the offence, the state of the evidence and the content of the file",<sup>28</sup> constituted a violation of Article 5, paragraph 3 of the ECHR.
43. The Court also considered in some cases that domestic courts had failed to take into account alternative restrictions on personal freedom, such as bans on leaving the country or release on bail, despite the fact that such measures are provided for in the Turkish Code of Criminal Procedure. In many cases, the applicants had no domestic remedy whereby they could challenge the lawfulness of their detention, which was genuinely adversarial or offered reasonable prospects of success (in violation of Article 5, paragraph 4 ECHR).
44. In the relevant leading case *Cahit Demirel v. Turkey*, the Court considered, in the light of more than 140 similar cases pending before it, that these cases originated "in widespread and systemic problems arising out of the malfunctioning of the Turkish criminal justice system and the state of the Turkish legislation, respectively" and that "general measures at national level must be taken" in order to remedy the situation.<sup>29</sup>
45. The Court also found on several occasions violations of Article 6, paragraph 1 ECHR concerning the right to a fair trial, owing to failures to communicate the prosecutor's opinion to the applicants.

<sup>25</sup> *Sürek v. Turkey (Nº)*, judgment of 8 July 1999, paragraph 59.

<sup>26</sup> Committee of Ministers Recommendation, [Rec\(2004\)4](#), on the European Convention on Human Rights in university education and professional training.

<sup>27</sup> High Level Conference on the Future of the European Court of Human Rights, [Interlaken Declaration](#), 19 February 2010, paragraph 4.b of the Action Plan.

<sup>28</sup> *Cahit Demirel v. Turkey*, judgment of 7 July 2009, paragraph 45.

<sup>29</sup> *Cahit Demirel v. Turkey*, judgment of 7 July 2009, see paragraphs 46 and 48.

As regards equality of arms, access to evidence against defendants is another major concern for the Commissioner: in accordance with Article 10(d) of the Anti-Terrorism Act, and by derogation from normal criminal procedure, a prosecutor may request that the access of the defendant's counsel to the contents of the prosecution file be restricted. A judge may authorise this restriction, if he or she considers that such access can compromise the investigation. The Commissioner notes with concern that this possibility is routinely applied and that it was used, for example, in 2011 in the above-mentioned case of Nedim Şener and Ahmet Şık.

46. Excessive length of criminal proceedings is another major concern, as can be seen in the extensive case-law of the Court concerning this question. A prominent case in this respect was the criminal prosecution of Pınar Selek, a sociologist who was arrested in connection with an alleged bombing which took place in July 1998, and has been subject to criminal proceedings ever since. At the time of the event, she was conducting sociological research into the PKK. On 9 February 2011, she was acquitted for the third time in this 13-year old case by the competent Istanbul assize court. The previous two acquittals had been quashed by the Supreme Court (Yargıtay). The competent prosecutor announced that he would once more appeal the acquittal decision.
47. The difficulties concerning the excessive length of criminal proceedings are compounded by the fact that in many cases, especially where proceedings are brought under the Anti-Terrorism Act, suspects are kept in custody for excessively long periods without an indictment.
48. In connection with the 2011 arrest of Ahmet Şık, the Commissioner was informed about raids conducted at Şık's home, at the offices of his lawyers, the publishing house *İthaki* and the daily *Radikal* newspaper, in order to seize or destroy copies of his unpublished manuscript entitled "İmamın Ordusu". The Commissioner is concerned about this event, and the court order notified to the persons concerned, which allegedly specified that any refusal to hand over copies of the draft would constitute a crime under Article 124 of the Code of Criminal Procedure (procedures concerning individuals who refuse to surrender requested items), as well as the crime of aiding a criminal organisation. An appeal against the decision to seize the manuscript, on the grounds that it constituted a breach of Articles 124 and 126 of the Code of Criminal Procedure and of Article 36 of the Advocacy Act which provide immunity from seizures to persons who can refuse testimony against the principal accused, was reportedly dismissed by the competent assize court.
49. The Commissioner is deeply concerned about the decision of the prosecutors and courts to seize copies of an unpublished manuscript, which has serious chilling effects on freedom of expression, of the press and of publication. He is also very concerned about the information provided by the lawyers of Nedim Şener and Ahmet Şık, according to which the interrogation by the police and the competent prosecutor concerned exclusively their journalistic activity and sources.
50. In conclusion, the combination of these factors results in a situation where the mere possibility of the opening of an investigation by a prosecutor can be a dissuasive factor against the exercise of freedom of expression, regardless of the final outcome of the actual trial. However, prosecutors appear to exercise little restraint in filing criminal cases, including clearly unmeritorious cases, in particular in the light of the case-law of the European Court of Human Rights. This state of affairs has reportedly led to a great degree of self-censorship in mainstream Turkish media.

### **III. Other issues**

#### **III a. Actions of non-state actors affecting freedom of expression and of the media in Turkey**

51. There are numerous reports in the media according to which journalists and human rights activists have been attacked or threatened by third persons, in connection with their journalistic activity concerning individuals or for their opinions.
52. The most prominent example in this respect is the murder of Hrant Dink, editor-in-chief of the newspaper *Agos*, on 19 January 2007. It is important to note that in its judgment concerning this

murder the Court found that the Turkish authorities had not complied with their positive obligation under Article 10 ECHR to protect Dink's right to freedom of expression from attack.<sup>30</sup>

53. Following his 2009 visit, the Commissioner called for effective investigations into this murder, with a view to identifying and punishing those responsible. In this respect, the Commissioner notes that the Court also found in the aforementioned judgment that Turkey had failed to protect Dink's life and to conduct effective investigations into his murder in breach of Article 2 ECHR. The Commissioner notes, in particular, that the Court pointed to numerous shortcomings in the investigations and observed that all proceedings in which the authorities were implicated had been discontinued.
54. The Commissioner notes that on 2 June 2011, a criminal court in Trabzon sentenced two officers and four non-commissioned officers of the Trabzon Gendarmerie to imprisonment from 4 to 6 months for negligence and failure to act on intelligence on Dink's potential assassination. The trial of the principal suspects of Dink's murder is ongoing. The Commissioner stresses once again the importance of carrying out transparent investigations and holding those behind the murder to account.
55. Another example concerning attacks perpetrated against journalists was the murder on 18 December 2009 of the general editor of the local newspaper *Güney Marmara'da Yaşam*, Cihan Hayırsevener. Hayırsevener had reported on corruption charges involving the owners of *İlkhaber*, another major daily in his town (Bandırma) and the deputy mayor of the town, and was shot by a hitman after receiving numerous death threats. The criminal proceedings concerning this murder have been extended to 12 persons.
56. The effect of civil defamation cases on freedom of expression is another issue of concern. The Commissioner observes that there are a number of judgments of the Court finding violations by Turkey of Article 10 of the ECHR, based on civil defamation proceedings brought by individuals. The main reasons for the Court's findings of unjustified interference with the applicants' right to freedom of expression have been:
- Disproportionate amounts of damages imposed by courts;<sup>31</sup>
  - The lack of distinction in the interpretation of defamation provisions by civil courts between value judgments and factual statements, in particular in cases involving public figures or politicians or in cases relating to academic freedom;<sup>32</sup>
  - The fact that applicants did not have the possibility either of proving their good faith or invoking public interest for their statements.<sup>33</sup>
57. The execution of these judgements would require a substantial shift in the interpretation of defamation provisions by domestic courts, with a view to limiting their application, as well as the introduction into the Turkish legal system of the exceptions of truth and public interest, through legislation and/or case-law.
58. A very recent worrying development brought to the Commissioner's attention was the conviction in 2011 of the writer Orhan Pamuk to pay 6 000 TL (approximately 2 500 €) in damages by a domestic civil court. The case was brought by six individuals under Article 49 of the Turkish Code of Obligations, which provides for non-pecuniary damages as a result of a violation of one's personality. The plaintiffs considered that Pamuk's interview published in a Swiss newspaper in 2006, where he stated "one million Armenians and 30 000 Kurds were killed in these lands and no one but me dares talk about it", violated their personalities (criminal proceedings under Article 301 of the Turkish Criminal Code for the same statement had been finally dismissed). While the first instance civil court had twice dismissed the case, on the ground that the plaintiffs did not have the

<sup>30</sup> *Dink v. Turkey*, judgment of 14 September 2010.

<sup>31</sup> *Pakdemirli v. Turkey*, judgment of 22 February 2005.

<sup>32</sup> For example, see *Turhan v. Turkey*, judgment of 19 May 2005.

<sup>33</sup> *Saygılı and others v. Turkey*, judgment of 8 January 2008.

capacity to sue Pamuk, the Supreme Court (*Yargıtay*) insisted that one's personality included such concepts as "professional identity, honour, dignity, race, religion and nationality as well as feelings of belonging to a nation. As a result, the plaintiffs have the capacity to sue Pamuk who said 'we have killed 30 000 Kurds and one million Armenians'".

59. Although the contentious statement of Pamuk is now considered statute-barred for further civil cases under Turkish law, the Commissioner is deeply concerned that this judgment, which allows any Turkish citizen to bring civil claims against statements "insulting Turkishness", may have adverse effects for freedom of expression, at a time where the number of criminal proceedings under Article 301 of the Criminal Code has decreased.

### **III b. Internet censorship**

60. Access to websites by Turkish Internet users may be blocked in accordance with Act No. 5651, entitled "Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publications", commonly known as the "Internet Act of Turkey". Under Article 8, paragraph 1 of this Act, access to websites can be blocked if there are sufficient reasons for a 'suspicion' that certain crimes defined in the Turkish Criminal Code are committed through the Internet. The eight crimes covered in the Act include incitement to suicide, sexual exploitation and abuse of children, facilitation of the use of drugs, obscenity, prostitution, as well as crimes against Atatürk proscribed by Act No. 5816. According to Act No. 5651, a judge can order the blocking during preliminary investigations and the court may do so during proceedings.
61. Paragraph 4 of Article 8 provides that administrative blocking orders are issued *ex officio* by the Telecommunications Communication Presidency (TIB), in cases where the content is hosted outside Turkey or where the content concerns sexual exploitation of children or obscenity. It is noted that 80% of the blocking orders have been issued by the TIB while the rest have been ordered by courts or a judge.
62. The Commissioner notes that in practice websites have been blocked on other grounds as well. Some of the blocking orders appear to have been issued because the content on the website was considered to be in breach of the aforementioned Article 301 of the Criminal Code, or anti-terrorism legislation or because the content in question was infringing intellectual property rights. For example, access to the independent news site, [www.istanbul.indymedia.org](http://www.istanbul.indymedia.org), was blocked in 2008 since some of its contents were considered to have insulted the Turkish identity (Article 301) whereas access to websites cannot be banned on this ground pursuant to the Internet Act.
63. Different figures exist for the number of sites which are subject to a blocking order. According to the OSCE Representative on Freedom of the Media, in June 2010 there were 5 000 Internet sites blocked, including YouTube, GeoCities and Google sites.<sup>34</sup> In addition, news sites dealing with south-eastern Turkey, such as Özgür Gündem, Keditör, and Günlük Gazetesi, and websites which form the online gay community in Turkey with approximately 225 000 users were also blocked intermittently. According to the website [engelliweb.com](http://engelliweb.com), which keeps an updated list of blocked websites, as of 27 May 2011 there were 13 074 such websites.
64. On 30 October 2010 the ban on access to Youtube was lifted following the removal of the videos allegedly insulting Atatürk, which had caused the restriction. The ban was reinstated on 2 November 2010 by a court decision this time over a secretly taped video allegedly showing the former chairman of the opposition party in a bedroom with a colleague. On 4 March 2011, a first instance court in Diyarbakır imposed a blanket access ban on Google's blog hosting site blogspot, which is reportedly used by 600 000 Turkish bloggers, due to intellectual property concerns affecting a small number of blogs. While the block was subsequently removed, access had not been restored as of 13 April (apparently due to an error in the decision of the court, which referred to "blogspot" instead of "blogspot").

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<sup>34</sup> See [Report](#) of the OSCE Representative on Freedom of the Media on Turkey and Internet Censorship of 18 January 2010.

65. The Commissioner notes that a by-law relating to Act No. 5651 was issued by the Turkish government on 30 November 2007 concerning Publications on the Internet, which provides a number of principles to which publications on the Internet must adhere. In addition to the crimes listed in the Internet Act, this regulation provides, *inter alia*, that contents may not be harmful to the “physical, mental and moral development of children and young persons”, or to the “peace and welfare of the family”. While it is not clear whether these principles are also used in practice by the authorities to block websites, the Commissioner notes that the TIB made a reference to them in an e-mail it addressed in April 2011 to Internet hosting companies, where it provided 138 words which the TIB considers as an indicator of illegal content and requested those companies to remove any such content.
66. Another development which caused considerable concern is the reported intention by the Information Technologies and Communication Authority (BTK, under the authority of which TIB operates) to introduce an obligation to service providers to propose the option to their users to choose between a standard service and three levels of filtering. The filtering will be operated on the basis of black or white lists, depending on the level of filtering chosen by the user. The Commissioner is concerned that the criteria for establishing these lists, which will not be available to the public, are not defined in this regulation and are left to the discretion of the BTK and TIB. The Commissioner was informed that this regulation had been referred to the Administrative High Court (Danıştay) for a stay of execution.
67. In addition to blocking access to websites, an issue of concern regarding the use of the Internet is the criminal proceedings against website owners for comments left by readers. A prominent case in this respect was the prosecution of Barış Yarkadaş, the editor of the online newspaper *Gerçek Gündem*, on the basis of Article 299, paragraph 2 of the Criminal Code concerning insults against the President of the Republic. The prosecution was initiated on the basis of an anonymous user’s comment concerning an article published on 24 April 2009, following a complaint by the General Secretariat of the Presidency. Yarkadaş was acquitted of the charges in 2010, however new criminal proceedings have been brought against him for the same article in March 2011. The Commissioner was informed that there were other ongoing criminal proceedings against online journalists, notably for insults to public officials (for example, the President of the Council of Forensic Medicine and a member of the Constitutional Court, etc.).

### III c. Concerns about the media landscape in Turkey

68. The Commissioner notes that large media conglomerations dominate the majority of both print and broadcasting media. Practically all the major commercial channels and newspapers belong to these holdings, some of which also have very large interests in other sectors (industry, finance, telecommunications, tourism). In addition, distribution of print media seems to be a quasi-duopoly in the hands of Doğan Group’s Yay-Sat and Turkuvaz Group’s Turkuvaz Dağıtım Pazarlama.<sup>35</sup>
69. The editorial independence of newspapers and broadcasting media concerning the affairs of the conglomerations they belong to is often called into question in Turkish media, and the Commissioner has noted that a great degree of suspicion exists in this respect among journalists and media experts. The Commissioner considers that this media landscape can potentially intensify the chilling effect of certain actions of politicians and the administration, and requires a particular degree of vigilance and restraint on their part.
70. In this connection, the Commissioner noted in particular that a tax fine ordered in 2009 against the Doğan Media Group, was perceived by some as a reprisal for criticism against the government by the Group.
71. As regards labour rights, Turkish legislation includes a specific law on regulating the social rights of journalists (Act Regulating Relations between Employees and Employers in the Press, Act No. 5953, often referred to as Act No. 212 under its previous number). This legislation is seen to be generally protective of the social rights of journalists. However, it is reported that media owners

<sup>35</sup> See the [report](#) of the European Journalism Centre on the media landscape in Turkey.

often establish irregular working conditions depriving journalists from the protection of this Act. There are also reports indicating that labour rights are regularly violated, including reprisals to journalists for joining trade unions. As a result, trade union affiliation is low, despite the large number of (mostly local) professional associations and trade unions in Turkey.

72. It is noted that Ahmet Şık, referred to above in connection with his arrest in March 2011, had been laid off from the *Radikal* newspaper (belonging to the Doğan Group) for “low performance” in May 2005, in what was largely seen as a reprisal for his trade union activities, following two lawsuits he had filed against the newspaper for non-payment of overtime pay and the absence of a nursery on the premises. He won a subsequent lawsuit for unlawful termination of employment and the right to be reinstated.
73. Another consideration regarding Turkish print media is the fact that all newspapers are very comment-dominated: many media analysts criticise the imbalance between the space allocated to commentators, their influence and high salaries, as opposed to the very marginal room allocated to and low remuneration for investigative journalism and first-hand reporting. This state of affairs is significant in the light of the fact that Nedim Şener and Ahmet Şık, like many other journalists subject to arrests and criminal proceedings, represent this particularly fragile segment of the Turkish press.

### **Conclusions and recommendations**

74. The Commissioner underlines that freedom of expression and media freedom have a crucial role to play in the development and progress of European democratic societies. They are the pillars upon which are founded pluralism and openness to dialogue, major characteristics of democracy. Particular attention is due to developments concerning media, the “public watchdog” which informs the public about developments in society, including those which may embarrass those with power and influence. The Commissioner recalls the European Court of Human Rights’ case-law according to which freedom of expression, in the context of Article 10 ECHR, is applicable not only to information or ideas that are favourably received or regarded as inoffensive but also to those that ‘offend, shock or disturb the State or any sector of the population’.
75. The Commissioner welcomes the progress Turkey has made in recent years regarding the possibility of having a free and open debate concerning human rights-related issues which were previously considered to be sensitive or taboo subjects.
76. The Commissioner remains concerned, however, that the conditions underlying the very high number of judgments, delivered for more than a decade, by the European Court of Human Rights against Turkey in this field have not been effectively addressed to date by the Turkish authorities and continue to represent a constant, serious threat to freedom of expression in Turkey. The recent waves of arrests of journalists have particularly highlighted the reality of this risk.
77. The Commissioner considers that the effective implementation of these judgments requires amendments of the letter and spirit of the Turkish Constitution, statutory legislation and the judicial system in order to ensure effective respect and protection of pluralism and freedom of expression and that any restrictions to freedom of expression correspond to the strict proportionality provided for by the ECHR.

### **Constitutional and institutional changes**

78. It has been widely recognised that one of the main obstacles to the effective protection of pluralism and freedom of expression has been the letter and spirit of the present Turkish Constitution, approved in the aftermath of the *coup d’état* of 12 September 1980, which enshrines a state-centrist approach, based on the principle of the ‘indivisible integrity of the state’ and an apparent intolerance towards pluralism.
79. The Commissioner welcomes the momentum and growing consensus, both within political parties and civil society, for a more thorough constitutional change. However, it is crucial that the Turkish



authorities ensure broad support for such wide-reaching reforms. For this, the Commissioner urges the Turkish authorities to ensure that constitutional reform is carried out with the participation of all political parties and broad consultation of civil society, in order to affirm the representative and democratic nature of the future constitution.

80. The constitutional amendments approved in the referendum of 12 September 2010 imply reforms which, while not affecting freedom of expression directly, could nonetheless have a positive impact, such as the setting up of an Ombudsman, the right to individual application to the Constitutional Court, independent supervision of judges and prosecutors, and limitation of the competence of military courts to military offences.
81. In this context the Commissioner encourages the Turkish authorities to pay special attention to the role of the Turkish Constitutional Court. The Commissioner welcomes the recent constitutional changes concerning this institution, in particular the right to individual petition. However, he considers that this right could be usefully complemented with the competence for the Constitutional Court to assess the application and compatibility of Turkish laws also with relevant international treaties, including the European Convention on Human Rights.
82. Lastly, the Commissioner notes that, in order to eliminate undue restrictions on freedom of expression and media freedom, independence of the judiciary from political or other pressure is key. In this respect, the Commissioner welcomes the recent constitutional changes regarding the High Council of Judges and Prosecutors (HSYK) and the corresponding Act as an improvement. However, the independence of the HSYK, as well as of judges and prosecutors in general, should be further developed in order to affirm the independence of the judiciary. The Commissioner encourages the Turkish authorities to draw upon the relevant expertise of the Venice Commission.<sup>36</sup>

#### *The need for statutory changes*

83. The Commissioner has already called on the Turkish authorities to review the relevant provisions of the Turkish Criminal Code and the Anti-Terrorism Act in his 2009 Report.<sup>37</sup> As set out in more detail above, the letter and/or the application of many provisions of the Criminal Code and the Anti-Terrorism Act continue to be serious impediments to freedom of expression in Turkey. The Commissioner urges the Turkish authorities to address the concerns raised in this Report and fully align domestic law and practice with the case-law of the European Court of Human Rights.
84. As regards the Criminal Code, this recommendation relates in particular to:
  - Articles 214, 215, 216, 217, 220 (crimes against public order);
  - Articles 285 (confidentiality of investigations) and 288 (attempts to influence the judiciary);
  - Article 301 (insulting the Turkish nation, the Republic, organs and institutions of the State);
  - Article 318 (discouraging persons from doing their military service).
85. As regards the Anti-Terrorism Act, the Turkish authorities should overhaul Articles 6 and 7, with a view to preventing, in particular, its patently disproportionate use against journalists, publishers and broadcasters.
86. As regards criminal defamation cases, the Commissioner considers that the mere existence of criminal defamation laws could intimidate journalists and cause self-censorship. Recalling notably Resolution 1577 (2007) "Towards Decriminalisation of Defamation" adopted by the Parliamentary

<sup>36</sup> See Venice Commission, Interim Opinion on the on the Draft Law on the High Council for Judges and Prosecutors ([CDL-AD \(2010\) 42](#)), and Opinion on the Draft Law on Judges and Prosecutors of Turkey, [CDL-AD\(2011\)004](#).

<sup>37</sup> Report by the Commissioner for Human Rights following his visit to Turkey on 28 June-3 July 2009, Issue reviewed: Human rights of minorities, [CommDH\(2009\)30](#).

Assembly of the Council of Europe,<sup>38</sup> the Commissioner urges the Turkish authorities to abolish prison sentences for defamation by amending Article 125 of the Turkish Criminal Code.

87. The Commissioner is particularly concerned about high-profile criminal defamation cases brought by senior officials and politicians. It is noted that according to the case-law of the European Court of Human Rights, politicians have to accept that their words and actions are open to a higher degree of scrutiny by both journalists and the public at large.<sup>39</sup> The Commissioner therefore calls on public figures to exercise the utmost caution when considering the initiation of such proceedings, in order to avoid the serious, chilling effect they have on freedom of expression and on the media, as well as to promote pluralism and a climate of tolerance towards criticism and dissent. The Commissioner considers that this is all the more important given the concerns about editorial independence deriving from the Turkish media landscape. Recalling Resolution 1577 (2007) of the Parliamentary Assembly of the Council of Europe, the Commissioner furthers calls on the Turkish authorities to remove the increased protection of public figures provided for by Article 125, paragraph 3 of the Turkish Criminal Code.<sup>40</sup>
88. The Commissioner strongly urges the Turkish authorities to take all necessary measures in order to prevent the recent civil defamation judgment against the writer Orhan Pamuk from becoming established case-law.
89. The Commissioner considers that the crucial role of the media in the defence of public interest should be introduced into the Turkish legal order, as a general principle to be respected when assessing the criminal responsibility of members of the press.
90. Steps should be taken to protect journalists and human rights defenders from intimidation, and to conduct effective investigations into murders and attacks directed against them. The Commissioner also urges the Turkish authorities to ensure that labour rights of all journalists are respected, and not only those covered under Act No. 5953.
91. The Commissioner considers that a review by the Turkish authorities of the Internet Act and the Radio and Television Act is essential and urgently needed, in order to circumscribe the grounds for restriction to those accepted in the case-law of the European Court of Human Rights. The Commissioner considers in particular that the censorship of the Internet and the blocking of websites in Turkey is beyond what is necessary in a democratic society. He further calls upon the Turkish authorities to limit the arbitrary powers of the relevant administrative authorities in interpreting and applying these acts, and to ensure that this application be strictly controlled by the courts.
92. However, it is doubtful that mere statutory changes can in themselves produce the desired effect of ensuring effective compliance with the ECHR standards and the case-law of the Court regarding freedom of expression.

*The need to ensure Turkish prosecutors and courts' effective compliance with ECHR standards*

93. The Commissioner observes that prosecutors and courts in Turkey often perceive dissidence and criticism, as well as the expression of minority identities, primarily as a threat to the integrity of the state. There are also studies showing that members of the judiciary in Turkey see their primary role as protecting the interests of the state, as opposed to upholding the human rights of individuals, rule of law and democracy.<sup>41</sup>

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<sup>38</sup> Parliamentary Assembly of the Council of Europe (PACE), [Resolution 1577 \(2007\)](#), "Towards Decriminalisation of Defamation", paragraph 13.

<sup>39</sup> See, *inter alia*, *Lingens v. Austria*, judgment of 8 July 1986.

<sup>40</sup> See also Parliamentary Assembly of the Council of Europe (PACE), [Resolution 1577 \(2007\)](#), "Towards Decriminalisation of Defamation", paragraph 17.6.1.

<sup>41</sup> See, *inter alia*, the study by Mithat Sancar and Eylem Ümit Atılğan commissioned by the Turkish Economic and Social Studies Foundation (TESEV), "[Justice can be Bypassed Sometimes: Judges and Prosecutors in the Democratization Process](#)", 2009.

94. This is indeed a serious impediment to the efforts made in order to lift the over-restrictive atmosphere surrounding freedom of expression, including media. The Commissioner urges the Turkish authorities to seriously address this problem and give a clear signal to all actors, and in particular to the prosecutors and courts. Special attention should be paid to the concept of “incitement to violence”, which should be interpreted in full and effective compliance with the ECHR standards, as well as to the defences of truth and public interest.
95. In his 2009 Report, the Commissioner already pointed to the need for the systematic training of judges and prosecutors, which remains crucial. He calls upon the Turkish authorities to review the curricula of law faculties, as well as the Turkish Academy of Justice (which provides in-house training to judges and prosecutors), to address these concerns.
96. The Commissioner considers that the role of prosecutors is particularly important. It appears that prosecutors exercise little restraint in initiating criminal proceedings affecting freedom of expression. Even where these cases are dismissed by competent courts, because of the systemic problems in the Turkish judicial system detailed in the present Report, such proceedings have a distinct chilling effect on freedom of expression, including the media.
97. Prosecutors should be further and systematically trained in order to fully heed the Court’s case-law concerning freedom of expression and the strict conditions pertaining to possible restrictions of this freedom under Article 10 ECHR. They should be supported in this respect by their professional bodies, their hierarchy and the courts.
98. In addition, Turkey must adopt all necessary legislative and other necessary measures in order to eliminate excessively lengthy judicial proceedings, as well as excessively lengthy custodies in remand without a comprehensive justification by a court, and the non-application of alternatives to custody. The Commissioner considers that the application of Article 10(d) of the Anti-Terrorism Act is also a serious impediment to the right to a fair trial and should be discontinued.
99. The Commissioner encourages all actors, including the Turkish authorities, and the relevant bodies of the Council of Europe and the European Union, to continue and reinforce co-operation and capacity-building programmes, and consider a higher degree of substantive involvement of the Court in them.
100. In the Commissioner’s opinion the problems relating to freedom of expression and freedom of the media in Turkey can only be resolved if the judges and courts at all levels, and in particular the supreme courts, take full account of ECHR standards and embed them in their decisions concerning possible restrictions of freedom of expression.



## APPENDIX

### Comments of the government of Turkey on the report of Commissioner Hammarberg



**Republic of Turkey**  
**Ministry of Foreign Affairs**

Ankara, 11 July 2011

Dear Commissioner

With reference to your report dated 20 June 2011 on freedom of expression and media freedom in Turkey, we very much welcome your willingness to cooperate with us.

As you have mentioned in your report, Turkey has made a remarkable progress in recent years in respect of achieving a free and open debate concerning human rights-related issues which were previously considered to be sensitive or taboo subjects.

In this respect, you may rest assured that due consideration has already been given to the issues raised in your report. There is a general understanding in the Turkish Grand National Assembly that the letter and spirit of the present constitution, despite recently adopted amendments, are inadequate in providing effective protection of pluralism and freedom of expression. Adoption of a new constitution is high on the Assembly's agenda.

The new Government has reiterated its resolve to continue with the ongoing transformation process as regards relevant legislation and its implementation. The ongoing training programs for judges and prosecutors are a strong sign of our cooperation with the CoE in this respect. We are considering remedying deficiencies taking into account constructive proposals, in line with the expectations and needs of the society. The high turnout and the overwhelming election results manifest the strong support given to the ongoing reform process within the society at large.

Mr Thomas HAMMARBERG  
Commissioner for Human Rights  
Council of Europe

We have no intention to go into details of what has been achieved in aligning the legal framework with the standards and principles set by the European Convention on Human Rights. Also we would not like to respond to each and every finding and recommendation in your report. Rest assured that the Government remains determined to expand the scope of the freedom of expression and thus will address the current situation in relation to freedom of expression and the media.

The new Government has expressed commitment that guaranteeing fundamental freedoms is a must to further strengthen the democracy.

We look forward to enhancing our cooperation in the future.

Yours sincerely,



Erdoğan IŞCAN  
Ambassador  
Director General for  
Multilateral Political Affairs