

OBSERVATIONS BY TURKEY ON THE MEMORANDUM OF COMMISSIONER MUIZNIEKS ON FREEDOM OF EXPRESSION AND MEDIA

The Commissioner for Human Rights of the Council of Europe, Nils Muiznieks, conducted two separate visits to Turkey in April and September 2016. In the course of these visits, Turkish authorities maintained full cooperation with the Commissioner and his delegation with a view to facilitating independent and effective performance of his functions in line with his mandate. Besides high-level meetings, full access was accorded to the Commissioner for all the places he requested to see and he was able to meet all the persons he requested to in Ankara, İstanbul and Diyarbakır. Both during his visits and afterwards, the Turkish authorities provided in good time information requested by the Commissioner.

Without prejudice to further observations that the Turkish Government could provide in due course, it is deemed necessary to draw attention to the following points:

1. As a founding member of the Council of Europe, Turkey is committed to maintaining close cooperation with the organization and its mechanisms. Among the various mechanisms of the Council, the Commissioner for Human Rights has a particular role to play in promoting respect for human rights in Europe. We take note of the contributions of the Commissioner's work in fulfilling this mission within the limits of his mandate.

With this understanding, despite our strong disagreement with certain observations, due consideration is given by Turkish authorities to the issues raised in the said text.

2. We would have preferred that the manner in which the Commissioner has put forward his findings and assessments in this memorandum had been constructive. The Commissioner can provide his views and advice on national legislation of the member states and their implementation. Nevertheless, defining the judicial authorities and the national legislation of a member state as "an instrument of judicial harassment" exceeds the scope of his mandate. The use of such a definition is unacceptable.

Having regard to the fact that the independence and impartiality of the judiciary is guaranteed by the Turkish Constitution, the statements of the Commissioner questioning the independence of Turkish courts as well as the professional integrity of judges and prosecutors are inadmissible. Such statements would only serve the efforts to undermine confidence in the judiciary. The European Court of Human Rights (ECtHR) has frequently held that the courts should be protected against unfounded, destructive and untrue attacks in order to maintain confidence in the judiciary.

3. Freedom of expression and the media constitutes one of the foundations of Turkish democracy. The Constitution guarantees the right to express and disseminate thoughts and opinions without interference by official authorities as well as the freedom of the media. It provides that no one shall be blamed or accused because of his/her thoughts and opinions.

Turkey remains resolved to further align its legislation and implementation with the European Convention on Human Rights (ECHR) and the jurisprudence of the Court with a view to strengthening fundamental rights and freedoms, including freedom of expression and the media.

4. The foiled terrorist coup attempt of 15th of July revealed the fact that FETO (Fetullah Gülen Terrorist Organization) constitutes a direct and imminent threat to the survival of the state and the life of the nation. Over the years, FETO elements infiltrated to the State organs; recruited their members by cheating on exams; misused their authority and public resources to serve the terrorist organization. These crimes led to blatant violations of fundamental rights of many people. They also established their own network in private sector, including the media to finance their illegal goals.

FETO is not the only threat that Turkey has to counter. Besides FETO, Turkey has been countering various terrorist organizations simultaneously, including DEASH, PKK/YPG and DHKP/C.

Due to increasing threats against the survival of the state and the nation, it has become inevitable to take measures under State of Emergency since 21 July 2016. Turkey has also resorted to the right of derogation in time of emergency as prescribed in Article 15 of the Constitution, and permitted under the Article 15 of the European Convention on Human Rights.

Following the principles of proportionality and necessity, measures are taken within the limits of the rule of law and international obligations. With respect to these measures, legal remedies are available under Turkish legal system, including individual application to the Turkish Constitutional Court. The supervision of the ECtHR naturally continues as usual.

State of Emergency measures are constantly reviewed. In this process, we maintain a close dialogue with the Council of Europe organs and mechanisms. With the existing domestic remedies, to date, over 300 institutions (among them 17 newspapers, 1 TV channel and 2 radio stations) have been reopened and more than 31 thousand public employees have been reinstated. With the decree laws issued on 23 January 2017, further improvements of considerable scope have been introduced. Inquiry Commission on State of Emergency Measures has been established as a domestic legal remedy, to address applications in particular against dismissals and closure of associations, institutions including those of media which were carried out as listed in relevant decree laws. Decisions taken by this commission are subject to judicial review. Furthermore, the maximum duration of police custody has been reduced from thirty days to seven days. Lastly, the provision enabling public prosecutors to impose restrictions up to five days for the persons in police custody on consulting their lawyers has been abolished.

5. As indicated in the Memorandum, certain media outlets have been closed in Turkey. In fact the activities of many of these outlets were ceased due to their links with terrorism and terrorist organizations. They are subject to criminal investigations. In the context of these investigations, a number of Criminal Magistrates' Offices indicated that those press and media organizations made publications as per instructions of the founder and the executives of terrorist organizations in order to achieve their illegal goals.

Certain individuals who have been working as journalists or media workers are currently charged with serious crimes - such as being a member of, or supporting an illegal or armed terrorist organization. The criminal investigations and prosecutions are conducted against the concerned persons for their activities which are defined as an offense pursuant to the Turkish criminal legislation. The related investigations are not due to their journalistic work but due to their support and link to the terrorist organization and other non-journalistic activities.

6. Concerning the statement of the Commissioner on Article 299 of the Turkish Criminal Code, it must be stated that this Article was adopted in 2004 in light of the international conventions to which Turkey is a party. Similar provisions also exist in the criminal codes of several other member states of the Council of Europe. The Turkish Constitutional Court in its judgment of 14 December 2016 declared that Article 299 does not touch the essence of the right to freedom of expression and thus is constitutional. As indicated by the Constitutional Court, the requirement that prosecution under Article 299 shall be subject to the permission by the Minister of Justice provides an additional safeguard.

In a democratic country that is based on the rule of law, public institutions are subject to close public scrutiny and should endure criticism. However, this does not include insult and statements that spread, incite, promote or justify hatred or expressions constituting hate speech. Recent acts constituting defamation against the President of the Republic of Turkey are mostly in the form of vulgar and disgraceful swearing at family and sacred values he believes in. Most of these cases also involve hate speech and exceed the limits of criticism. These statements have nothing to do with the freedom to receive and disseminate information, either.

The President of Turkey, as a sign of his good intentions, decided to withdraw cases of insult against him and his family except some very serious ones.

7. With regard to internet governance, in line with the principle of proportionality, the Turkish national legislation, in the first place, makes use of a “notice and take down” procedure. Under this procedure, the content and hosting providers can be first contacted to demand the removal of a particular content. It is also possible to apply to the court which may order the removal of the content on the grounds of *inter alia* national security and public order, prevention of crime or protection of public health. In cases in which the content removal is not technically possible, the court may order, as a last resort, blocking access to the internet site which publishes the content in question.

Only as an exception, in cases where delay may cause irreversible damage, the national legislation authorizes the Prime Ministry to take any necessary measure on the afore-mentioned grounds and to notify the Information and Communication Technologies Authority for implementation. The decision is conveyed to access and hosting providers which are to implement it within two hours. Then decision is submitted for the approval of the judge within 24 hours. The judge shall announce his/her decision within 48 hours. If not, the restriction shall be automatically lifted.

The main reasons behind resorting to the measure of access blocking derives from the technical difficulties in removing a particular content from most of the internet sites. It is technically not possible to block access to a particular content in internet sites in “https” format. In these cases, if the content is not removed by the content or hosting provider in line with the relevant order, then the only option for the authorities turns out to be access blocking. In other words, at the heart of the problem, there lies the non-compliance of content and hosting providers with the relevant court decisions and the universal principles of the rule of law. Internet governance lays responsibility not only on governments but also on all stake-holder including content and hosting providers. They should act in accordance with professional ethics and comply with the court decisions.

8. Lifting of immunities of certain parliamentarians is also mentioned in the Memorandum. This has become possible with an amendment to the Constitution following a long public debate

on the issue and extensive deliberations at the Grand National Assembly of Turkey. The amendment entered into force on 8 June 2016. The Constitutional amendment has opened the way for prosecution of those MPs, for whom criminal charges have been filed involving various crimes. Indeed, there were 810 pending case files before the judicial authorities about 154 MPs from all political parties in the parliament. Of those 55 are from the Peoples' Democratic Party (HDP). Some have been detained on remand, others have been released with judicial control measures. Some detained parliamentarians are being charged with offences falling under terror crimes such as committing crimes in favour of an organization without being a member of it, membership of terrorist organization, establishing and leading an armed terrorist organization, providing weapon to the armed terrorist organization. No parliamentarian is under detention due to a charge under Article 299. The process continues in accordance with Turkish national legislation and in full observance of our international obligations.

9. Turkey has compromised neither its efforts to strike the right balance between freedom and security nor its ultimate determination to maintain reform agenda. Over a period of fifteen years Turkey has achieved important reform steps towards protecting and promoting freedom of expression and media, which is notably apparent in the case law of the ECtHR.

In response to the recommendation of the Commissioner on some articles of the Turkish Criminal Code and Anti-Terror Law, Turkey would like to underline that in view of the case law of the ECtHR, violations of freedom of expression do not arise from the mere existence of said provisions. With a view to further developing the national case-law in line with the jurisprudence of the Court, Turkey continues its efforts to eliminate possible deficiencies in regard to implementation.

10. As a democratic state based on the rule of law and a founding member of the Council of Europe, Turkey's commitment and political will to uphold the core values of this organization, namely, human rights, democracy and the rule of law is indisputable.

In the face of the challenges threatening European democratic ideal, Turkey reiterates its belief in the necessity of a stronger Council of Europe. With this understanding, even while simultaneously countering multiple fiercest terrorist organizations, Turkey will maintain its support for strengthening the role of the organization and for achieving a greater European unity.

It is hoped that the observations included in this note will contribute to the accurate and more comprehensive understanding of the situation in Turkey.