



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



Strasbourg, 10 October 2017

CommDH(2017)29  
English only

---

## **Third party intervention by the Council of Europe Commissioner for Human Rights**

under Article 36, paragraph 3, of the European Convention on Human Rights

---

Applications:

**Ahmet Hüsrev Altan v. Turkey** (no. 13252/17)  
**Alpay v. Turkey** (no. 16538/17)  
**Atilla Taş v. Turkey** (no. 72/17)  
**Bulaç v. Turkey** (no. 25939/17)  
**Ilıcak v. Turkey** (no. 1210/17)  
**Mehmet Hasan Altan v. Turkey** (no. 13237/17)  
**Murat Aksoy v. Turkey** (no. 80/17)  
**Sabuncu and Others v. Turkey** (no. 23199/17)  
**Şık v. Turkey** (no. 36493/17)  
**Yücel v. Turkey** (no. 27684/17)

## Introduction

1. On 29 August 2017, the Council of Europe Commissioner for Human Rights (hereinafter: 'the Commissioner') informed the European Court of Human Rights (hereinafter: 'the Court') of his decision to intervene as a third party in the Court's proceedings, in accordance with Article 36, paragraph 3 of the European Convention on Human Rights (hereinafter: 'the Convention'), and to submit written observations concerning a group of ten applications concerning Turkey and relating to the freedom of expression and right to liberty of journalists.
2. The Commissioner has a mandate to foster the effective observance of human rights; to assist member states in the implementation of Council of Europe human rights instruments; to identify possible shortcomings in the law and practice concerning human rights; and to provide advice and information regarding the protection of human rights and the prevention of human rights violations.
3. Freedom of expression and media freedom have been priority themes for the Commissioner, who has addressed some of the most pressing concerns both in his country-specific work and thematically. With respect to Turkey, the Commissioner and his predecessor have carried out extensive work to help address the persistent pattern of violations of freedom of expression stemming from the statutory legislation in force and its judicial interpretation, both of which fall short of the standards set by Article 10 of the Convention.
4. The Commissioner has observed that restrictions on freedom of expression have further intensified under the state of emergency which followed the attempted coup d'etat of 15 July 2016. Prosecutions and detentions of journalists and other media workers, notably for terrorism-related offences, have been a cause for serious concern not only for the Commissioner but also for a number of other international institutions, including the Parliamentary Assembly of the Council of Europe<sup>1</sup>, the European Commission for Democracy through Law (hereinafter: 'the Venice Commission')<sup>2</sup> and the European Parliament<sup>3</sup>.
5. The present submission is based on two visits the Commissioner carried out to Turkey from 6 to 14 April 2016 (Istanbul, Ankara and Diyarbakır) and from 27 to 29 September 2016 (Ankara), his ensuing Memorandum on Freedom of Expression and Media Freedom (hereinafter: 'Memorandum')<sup>4</sup> as well as on continuous country monitoring. During these visits, the Commissioner held discussions with a number of state authorities and met with the representatives of national and international non-governmental organisations, as well as journalists, media representatives, academics and lawyers. The overall picture unfortunately showed very serious interferences with the freedom of expression and the right to liberty and security not only of journalists, but also of human rights defenders, academics, members of parliament and social media users. In particular, journalists had been widely targeted by spurious prosecutions and lawsuits, disparaging statements by high ranking officials and even physical attacks and violence, all of which have had a chilling effect on the climate for their legitimate and vital work.
6. Having regard to the central role of journalists in a functioning democracy, Section I of the present written submission provides the Commissioner's observations concerning the impact of the legal framework in force and current judicial practice in Turkey on the freedom of expression of journalists. Section II deals with problems related to the use of pre-trial detention against journalists and the deficiencies in the relevant procedural safeguards.

---

<sup>1</sup> [Resolution 2156 \(2017\)](#) and [Resolution 2121 \(2016\)](#) on the functioning of democratic institutions in Turkey adopted on 25 April 2017 and 22 June 2016 respectively.

<sup>2</sup> Venice Commission Opinion No. 872 / 2016 on Measures provided in the recent emergency Decree-Laws with respect to Freedom of the Media, [CDL-AD\(2017\)007](#), 13 March 2017; Venice Commission Opinion No. 831/2015 on articles 216, 299, 301 and 314 of the Penal Code of Turkey, [CDL-AD\(2016\)002](#), 15 March 2016.

<sup>3</sup> European Parliament resolution on the situation of journalists in Turkey, [2016/2935\(RSP\)](#), 27 October 2016

<sup>4</sup> Memorandum on freedom of expression and media freedom in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, [CommDH\(2017\)5](#), 15 February 2017.

Finally, Section III addresses the systematic targeting of dissenting voices through judicial actions and raises concerns regarding judicial independence and impartiality, against the background of which the former two sections must be read. These sections are followed by the Commissioner's conclusions.

#### I. Observations on freedom of expression

7. Both the Commissioner and his predecessor have highlighted numerous times the widespread violations of freedom of expression and media freedom in Turkey, which is also illustrated by the fact that the country is the subject of the highest number of judgments of the Court regarding Article 10 of the Convention.
8. In his 2011 report on freedom of expression, the Commissioner's predecessor noted that the application of certain provisions of the Turkish Criminal Code and the Anti-Terrorism Act, including those under which the majority of the applicants in the cases at stake have been charged, had a seriously negative impact on freedom of expression.
9. The Commissioner's findings during his April and September 2016 visits not only confirmed the concerns of his predecessor but also revealed that the problems identified had become more pronounced and prevalent. In this respect, the Commissioner observed in his Memorandum that, despite the limited attempts of the government to bring Turkish legislation into line with the Convention, most of the problematic provisions in the Turkish Criminal Code and the Anti-Terrorism Act either remained intact or underwent superficial amendments which failed to address the underlying issues. The Commissioner's concerns were echoed by the Venice Commission, which regarded some of these provisions as dangerously vague.<sup>5</sup>
10. An equally serious cause of concern for the Commissioner has been the overly wide application of these provisions by Turkish prosecutors and courts to journalists, penalising conduct protected under Article 10 of the Convention, contrary to the Court's established principle that "the dominant position of the state institutions requires the authorities to show restraint in resorting to criminal proceedings in matters of freedom of expression."<sup>6</sup>
11. The Commissioner has observed that a large portion of the prosecutions and criminal proceedings launched against journalists concerned charges of committing an offence on behalf of a criminal organisation or aiding such an organisation, disseminating terrorist propaganda, degrading the Turkish nation or the organs and institutions of the state and insulting the President or other officials. More particularly following the declaration of the state of emergency, a large number of journalists have been detained and prosecuted as alleged members of various terrorist groups, almost exclusively on the basis of their statements, which were deemed by the authorities to coincide with the aims of a terrorist organisation.
12. While the Commissioner does not underestimate the difficulties to which the fight against terrorism gives rise, he considers that this fight alone does not absolve the national authorities from their obligations under Article 10 of the Convention. In this respect, the Commissioner reiterates the findings of the Court that "although freedom of expression may be legitimately curtailed in the interests of national security, territorial integrity and public safety, those restrictions must still be justified by relevant and sufficient reasons and respond to a pressing social need in a proportionate manner."<sup>7</sup> Likewise, he shares the Venice Commission's view that the "membership" concept must be interpreted very narrowly and should not be applied to journalists, where the only act imputed to them is the content of their publications.<sup>8</sup>
13. The Commissioner, however, notes that the practice of the Turkish judiciary also falls

<sup>5</sup> [CDL-AD\(2017\)007-e](#), *op.cit.*, para. 72.

<sup>6</sup> See for example *Morice v. France*, judgment of 23 April 2015, para. 176.

<sup>7</sup> See *Döner and others v. Turkey*, judgment of 7 March 2017, para. 102.

<sup>8</sup> *Ibid.*, [CDL-AD\(2017\)007-e](#).

seriously short of the requirements of Article 10, exacerbating the problems embedded in the statutory legislation, the prosecutors exercise little restraint in filing criminal cases and the domestic courts fail to take into consideration in their decisions the instrumental role of journalists as watchdogs in a democratic society and to thoroughly assess whether the disputed statements are true, and if so, whether the public has a legitimate interest in the information in question.<sup>9</sup>

14. The Commissioner observes that the majority of the criminal proceedings against journalists were initiated on the basis of unsubstantiated charges and with no factual evidence other than their purely journalistic activities. As an illustration of this, in his Memorandum the Commissioner expressed concern about the decisions of criminal judges of the peace regarding the detention of journalists and administrators of *Cumhuriyet*, among whom are some of the applicants. These journalists were accused of “acting on behalf of a terrorist organisation without being a member” under Article 220 § 6 of the Criminal Code, with the only evidence against them being a number of news items published in *Cumhuriyet* which were regarded by the domestic court as propaganda for the FETÖ (“Fethullahist Terrorist Organisation”) and PKK (Kurdistan Workers' Party) armed terrorist organisations. The Commissioner was struck by the lack of consideration for freedom of expression in the court's assessment, the patently implausible nature of the charges of making propaganda for both FETÖ and PKK, organisations which have consistently opposed one another, at the same time and by the lack of material evidence establishing any link whatsoever between the suspects and these organisations, aside from the abovementioned critical newspaper articles on matters of public interest.
15. Similarly, the detention order concerning Ahmet Şık, another journalist of the same newspaper and an applicant in the group of cases at stake, indicated that he was accused of spreading propaganda for the PKK, the Revolutionary People's Liberation Party/Front (DHKP-C) and FETÖ. The Commissioner observes that these charges against Mr Şık seriously lack credibility, especially considering that at the time of the Commissioner's predecessor's visit in 2011, Mr Şık was in detention on remand on what turned out to be false charges filed by Gülenist prosecutors, in retaliation to his exposure of the infiltration of the Turkish state by the Fethullah Gülen movement.
16. Another detention decision examined by the Commissioner in his Memorandum concerned the applicant Ahmet Altan, who was detained for membership in a terrorist organisation and attempting to overthrow the government of the Turkish Republic under Article 312 of the Criminal Code. Once again, the evidence considered by the judge was limited to the editorial line of the *Taraf* newspaper of which Ahmet Altan had previously been the editor-in-chief, as well as his statements during a TV programme the night before the coup attempt, which were deemed as “preparing the terrain for a military coup”.
17. More generally, the Commissioner notes that measures involving deprivation of liberty against journalists have not only been unjustified and disproportionate but have contributed to generating a climate of self-censorship for any investigative journalist planning to carry out research and comment on the conduct and actions of state bodies.

## II. Observations on deprivation of liberty

18. As the Commissioner and his predecessor have pointed out numerous times, the excessive use of detention on remand and the lack of relevant and sufficient reasoning by courts in resorting to such measures have been a long-standing problem in Turkey, with seriously negative repercussions in the area of freedom of expression. In his Memorandum, the Commissioner observed that the number of detained journalists in Turkey had reached alarming proportions. According to TGS (Journalists' Union of Turkey), TGC (Journalists Association of Turkey) and DİSK (Confederation of Progressive Trade Unions of Turkey),

---

<sup>9</sup>[CommDH\(2017\)5](#), *op.cit.*, para. 90.

during the state of emergency, 210 journalists were detained<sup>10</sup>. It must be noted that this number does not include the huge numbers of journalists taken into custody, questioned and released under judicial control during this period.

19. Furthermore, at the time of the Commissioner's Memorandum, the Platform for the Protection of Journalism and Safety of Journalists administered by the Council of Europe indicated that, of the 250 alerts posted by partner organisations and registered until 20 January 2017, 86 concerned Turkey – the figures at the time of this writing being 77 alerts concerning Turkey out of 324 active alerts<sup>11</sup>.
20. One of the underlying reasons behind the high rates of detention in criminal proceedings is the practice of the judiciary which often tends to disregard the exceptional nature of detention as a measure of last resort that should only be applied when all other options are deemed insufficient and always in line with the principle of presumption of innocence. The Commissioner notes that even though the legal basis for pre-trial detention has not been changed, the application of restrictive measures against journalists and human rights defenders has increased dramatically during the state of emergency. The Commissioner notes once more with regret that in most of these cases, the journalists have been detained on the basis of spurious charges and with very little or no *prima facie* evidence suggesting any guilt.
21. The Commissioner also notes that the measures introduced during the state of emergency further restricted a number of procedural safeguards against arbitrary detention. These included the extension of the maximum custody period without a court decision to 30 days, limitations on the right of access to a lawyer (including the possibility to prevent it altogether for 5 days), as well as limitations on or full abolition of the confidentiality of the client-lawyer relationship, all of which have a strong potential to affect the suspects' capacity to effectively challenge their detention. These measures remained in force for six months following the declaration of state of emergency, the period during which the majority of criminal investigations against journalists were initiated. Some of these restrictions were attenuated by an emergency decree of January 2017, which reduced the maximum length of the custody period without a court decision to 14 days and brought the limitation on access to a lawyer back to 24 hours for terror-related crimes. However, other restrictions, including as regards the confidentiality of client-lawyer communications, remain.
22. Moreover, inefficiencies in the criminal justice system led to excessively lengthy pre-trial detention, where journalists were held for several months without formal charges while the preliminary investigation and collection of evidence was being conducted by public prosecutors.
23. Regarding more specifically the justification of detention, the Commissioner recalls that even though the existence of a reasonable suspicion that the suspect has committed a criminal offence is a prerequisite for pre-trial detention, it is not sufficient in itself to justify continued detention. According to the established case-law of the Court "the domestic courts are under an obligation to demonstrate other "relevant" and "sufficient" grounds to justify deprivation of liberty even if there is a reasonable suspicion that the person arrested has committed an offence"<sup>12</sup>. Accordingly, the national judicial authorities must examine all the facts arguing for or against the existence of a genuine requirement justifying detention and take into consideration specific facts and the individual's personal circumstances.<sup>13</sup>
24. However, as regards reasonable suspicion, the Commissioner notes with regret that in the majority of cases, journalists have been charged with terrorism-related offences without any evidence corroborating their involvement with a terrorist organisation. As detailed above, the

---

<sup>10</sup> [CDL-AD\(2017\)007](#), *op.cit.*, para. 73.

<sup>11</sup> See the [website](#) of the Platform.

<sup>12</sup> See *Labita v. Italy* [GC], judgment of 6 April 2000, para. 153.

<sup>13</sup> See *Aleksanyan v. Russia*, judgment of 22 December 2008, para. 179.

detention orders examined in the Commissioner's Memorandum provide a clear demonstration of this practice. The Commissioner was struck by the lack of material evidence given the seriousness of the charges brought against the journalists and observed that the sole ground for their pre-detention order had been their purely journalistic activities and/or public statements, which fell within the ambit of speech protected by Article 10 of the Convention and could not be considered as evidence establishing their links with terrorist organisations.

25. As concerns other relevant and sufficient grounds, the Commissioner notes that the detention orders delivered by the criminal judges of the peace are often based on stereotypical and abstract formulas that lack reasoning, referring simply to the wording of the law and lacking a thorough examination of any such grounds. The detention orders concerning the journalists of *Cumhuriyet* and Ahmet Altan are especially noteworthy in this regard as the applicants spent almost a year in pre-trial detention before the start of their trial, based on the vague ground of "the nature of the offence, the state of the evidence and the content of the file". The Commissioner notes that his concerns are confirmed by several judgments of the Court against Turkey finding a violation of Article 5 of the Convention. Notably in the judgments of *Şık v. Turkey*<sup>14</sup> and *Nedim Şener v. Turkey*,<sup>15</sup> the Court concluded that the lack of detailed reasons meant that there had been no specific evidence demonstrating the need to keep the applicants, who were both investigative journalists, in pre-trial detention. According to the Court, a stereotyped list of general reasons was not sufficient to compensate for this deficiency. The Commissioner finds it especially unfortunate that despite the earlier judgment of the Court in the case of this particular applicant, Ahmet Şık finds himself again in detention as a result of a judicial practice that apparently remains unaddressed.
26. Lastly, both the Commissioner and his predecessor have stressed the problematic nature of the so-called "catalogue crimes", i.e. a list of crimes in the Code of Criminal Procedure including crimes against the security of the state and the constitutional order, in respect to which detention can be ordered solely on the basis of the existence of a strong suspicion against the person, without the requirement to assess other conditions for detention, for example, the risk of absconding or of perverting the course of justice. The Commissioner underlines that this legal presumption results in practice in the almost automatic issuance of detention orders in the prosecution of the enlisted crimes and contributes to the overuse of pre-trial detention by the Turkish judiciary on the basis of stereotypical grounds.

#### **Issues concerning the review procedure of continued detention**

27. The Commissioner has already drawn attention to the problems inherent in the system of criminal judges of the peace in his Memorandum, including the review mechanism which provides that the decisions of one judge of the peace can only be appealed to another such judge.
28. According to the figures provided by the Ministry of Justice to the Commissioner in June 2016, in 2015 21.5% of appeals regarding detention decisions were successful, although this figure appears to include the appeals made by prosecutors against decisions refusing detention. This system of horizontal appeals, which was also criticised by the Venice Commission in their opinion on these judicial formations,<sup>16</sup> results in the judges of the peace ignoring or resisting the positive developments in the case-law of Turkish courts, including the Constitutional Court, which take better account of Article 10 standards.
29. Furthermore, by virtue of emergency decree no. 667, during the state of emergency the review of continued detention has been carried out on the basis of the case file alone, depriving suspects of a chance to present their request for release in person before a judge. As a result, persons in detention, including the applicants, were not heard by a judge for a

---

<sup>14</sup> *Şık v. Turkey*, judgment of 8 July 2014.

<sup>15</sup> *Nedim Şener v. Turkey*, judgment of 8 July 2014.

<sup>16</sup> Venice Commission Opinion No. 852 / 2016 on the duties, competences and functioning of the criminal peace judgeships, [CDL-AD\(2017\)004](#), 13 March 2017.

long stretch of time during the pre-trial stage. The Commissioner notes that this practice has been considered by the Court as a violation of the right to an effective remedy to challenge the lawfulness of continued detention as required by Article 5 § 4 of the Convention.<sup>17</sup>

30. The detention review procedure has also been negatively affected by restrictions on access to the investigation file. Accordingly, the detained suspects were denied information about the factual grounds for their detention and the evidence against them, which curtailed their capacity to effectively challenge their continued detention. Recalling the Court's findings in similar cases to those of the applicants, the Commissioner underlines that the principle of equality of arms is gravely undermined when the applicants or their counsel are denied access to such essential information in the investigation file.<sup>18</sup>
31. Lastly, the Commissioner is aware of the fact that decisions of judgeships of peace can be appealed before the Constitutional Court. However, the Commissioner observes that a large number of appeals have been pending before the Constitutional Court for a considerably long period and to this date, no decision has been delivered in respect of applications lodged by detained journalists despite the importance of the rights at stake and the fact that the case-law of the Constitutional Court in similar cases, which follows the standards set by the Court, is well established.

### III. Observations on the targeting of dissenting voices and the role of the judiciary

32. At the outset, the Commissioner wishes to point to the increase in prosecutions and requests for detention on remand with a bearing on the right to freedom of expression, including through the application of offences related to counter-terrorism and the security of the state. The figures provided by the Ministry of Justice indicate that the number of requests for detention on remand by prosecutors for Articles 216 (provoking the public to hatred and hostility), 220 §§ 6 and 7 (committing an offence on behalf of an organised criminal group and aiding it), 301 (degrading the Turkish nation, the organs and institutions of state) and 314 (membership of an armed organisation) increased more than three-fold from 2013 to 2015. The number of court decisions granting detention requests increased almost four-fold (from 1 099 to 3 732) over the same period. A change in the attitude of the government *vis-à-vis* judicial proceedings involving freedom of expression also emerges from official figures and can be seen as providing support to this hardening of attitude by the judiciary. Thus, for instance, with reference to Article 299 (insulting the President), which requires an authorisation from the Ministry of Justice for prosecution, 85 files were authorised for prosecution in 2013, and 1 540 in 2015 (out of 2 476 prosecution requests), a more than 18-fold increase. Between 1 January and 30 April 2016 alone, 915 further authorisations had been issued with respect to 2445 prosecution requests.<sup>19</sup>
33. Freedom of expression and media freedom have further deteriorated at considerable speed since the state of emergency that followed the attempted coup d'état. Outright closures of media organs which are perceived as opposition by the government; judicial actions targeting various groups including journalists, human rights defenders, academics and social media users; a high number of detained journalists; and the increase in defamation cases have resulted in the space for the exercise of freedom of expression shrinking dramatically, especially for those who are critical of the government's policies. A number of foreign correspondents have been detained, expelled or otherwise prevented from working in Turkey over the past year as well.
34. Members of Parliament have also suffered the consequences of this deterioration of freedom of expression. For example, the immunities of a group of MPs consisting mostly of members of the opposition parties were lifted by an *ad hoc*, "one shot" and "*ad homines*" measure. The

<sup>17</sup> See, for example, *Hazni Bayam v. Turkey*, judgment of 18 July 2017 and *Erişen and Others v. Turkey*, judgment of 3 April 2012, para. 53.

<sup>18</sup> *Hazni Bayam, op.cit.*, and *Lazoroski v. the former Yugoslav Republic of Macedonia*, judgment of 8 October 2009, para. 52.

<sup>19</sup> [CommDH\(2017\)5](#), *op.cit.*, para. 52.

majority of those MPs were subjected to criminal prosecution as a result of statements they made in the course of their parliamentary work, with some even losing their parliamentary seats.

35. Moreover, academic freedom, another important pillar of freedom of expression, has been deeply affected by this deteriorating situation. An emblematic example in this respect is the disciplinary sanctions, lay-offs and even criminal proceedings that targeted the petitioners of "Academics for Peace" following the remarks of the President of the Republic and certain Ministers referring to the group as "mock academics". This was followed by the dismissal of thousands of academics via emergency decrees during the state of emergency.
36. In a series of public statements, including some as recent as July 2017, the Commissioner has furthermore expressed dismay at the worrying trend of judicial actions targeting human rights defenders who were arrested and prosecuted on unsubstantiated charges of links to terrorist organisations.
37. The Commissioner must share his view that, as these examples contribute to show, there is currently a clear pattern of suppressing legitimate dissenting views in Turkey and that judicial action targeting individuals and groups expressing those views is an integral part of this pattern. The numerous cases of detention of journalists must therefore be seen against this more general background. In this respect, the Commissioner notes that the defence often advanced by the Turkish authorities in this connection, i.e. that journalists are not prosecuted or detained in connection with their journalistic activity but for other crimes, loses credibility as their journalistic activity is often the only "evidence" available to establish such crimes.
38. The Commissioner underscores that the deterioration of the situation regarding freedom of expression in Turkey as described above has gone hand-in-hand with the erosion of the independence and impartiality of the Turkish judiciary. As the Commissioner mentioned in his Memorandum, an important development in this respect seems to have been the crackdown on what was then called the "parallel state" in the aftermath of the corruption investigations launched on 17 December 2013. While the Constitutional Court blocked many of the changes affecting the High Council of Judges and Prosecutors (HSYK) which were hastily adopted following these investigations, the HSYK, within which the government already wielded considerable power, intervened in the judiciary much more actively from then on, through a high number of forced relocations of members of the judiciary, followed by investigations, suspensions and dismissals. While these measures were ostensibly aimed at the Gülenist network within the judiciary, the Commissioner heard from many interlocutors that they produced a general atmosphere of apprehension and fear within the judiciary, exacerbating or reviving state-centrist attitudes and a reluctance to draw attention to oneself, for example by taking controversial decisions upholding freedom of expression. This situation also seems to have reinforced the widely-held belief that the Turkish judiciary is strongly influenced by the political climate and was responsive to the increasing pressures put on its independence and impartiality in this period. The Commissioner underscores that these pressures were seriously aggravated after the state of emergency. He notes in particular that under the emergency decrees, almost one fourth of the members of the judiciary were dismissed by the HSYK without any individualised reasoning,<sup>20</sup> and that the Constitutional Court decided to dismiss two of its judges for having connections with the FETÖ, understandably creating an atmosphere of fear among the remaining judges and prosecutors.
39. The Commissioner takes note of the fact that a number of international bodies including the Venice Commission, the Group of States against Corruption (GRECO), the European Union

---

<sup>20</sup> Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, [CommDH\(2016\)35](#), 7 October 2016, para. 29.

and the International Commission of Jurists have raised similar concerns regarding judicial independence in Turkey.<sup>21</sup>

40. The Commissioner received numerous reports of the executive's direct or indirect interference with the assessment of judicial authorities. He is particularly shocked by the 3 April 2017 decision of the HSYK to suspend the judges of the 25<sup>th</sup> Istanbul Assize Court who had ordered the release of 21 journalists, including some of the applicants in the cases at stake, pending their trial along with the prosecutor who initially requested their release. Eventually, none of these journalists were released as the Istanbul Chief Prosecutor's Office ordered their re-arrest the same day, in some cases on different charges within the scope of a new investigation.
41. More recently, the Commissioner expressed his concerns about the effects of the constitutional amendments, which were approved by Turkish voters in the referendum of 16 April 2017, on the independence of the judiciary, stressing that the new formation of HSYK did not offer adequate safeguards for the independence of the judiciary and considerably increased the risk of it being subjected to political influence.<sup>22</sup>
42. In this connection, the Commissioner also notes with concern a number of occasions when high-ranking officials publicly referred to journalists as "terrorists", "traitors" or "spies" for having published information of public interest. These acts of vilification exposed journalists to violent attacks and various other forms of harassment. In the current context described above, the Commissioner points to the impact that such remarks by high-ranking officials are bound to have on judges and prosecutors. The validity of the Commissioner's concerns are demonstrated in the case of Can Dündar and Erdem Gül, where the Constitutional Court's decision of 25 February 2016 finding the detentions of the said journalists in violation of freedom of expression was publicly and harshly criticised by the Minister of Justice and the President, the latter of whom stated that he did not "accept or respect" the high court's decision. The Commissioner notes that in its judgment of 6 May 2016 convicting Mr Dündar and Mr Gül, the first instance court criticised the Constitutional Court for overstepping its jurisdictional limits, in words alarmingly resembling the remarks of the President and the Minister of Justice.
43. As mentioned earlier, the Constitutional Court, which had previously delivered a number of judgments in line with the case-law of the Court on articles 5 and 10 of the Convention, including the aforementioned decision in the case of Can Dündar and Erdem Gül, has not yet issued decisions on the detention of a number of journalists, including the applicants, despite the urgency of the rights at stake and the gravity of the allegations pending before it. While the reasons for this are likely to include a range of factors, including an increased workload as a result of the high number of applications the Constitutional Court has received since the attempted coup d'état, the Commissioner must share his concern that the serious shortcomings currently affecting the impartial and independent functioning of the judiciary briefly described in this section may play a central role.

---

<sup>21</sup> See respectively: Venice Commission [Declaration](#) on Interference with Judicial Independence in Turkey, 20 June 2015; GRECO, Evaluation Report on Turkey "Corruption prevention in respect of members of parliament, judges and prosecutors", [Greco Eval IV Rep \(2015\) 3E](#), 16 October 2015; Commission staff working document, [Turkey 2016 Report](#), sections 2.3 and 2.43, 9 November 2016; and International Commission of Jurists, [report](#) entitled "Turkey: the Judicial System in Peril—A briefing paper", 2 June 2016.

<sup>22</sup> See the Commissioner's [statement](#) of 7 June 2017.

## Conclusions

44. The Commissioner sees the recent detention and prosecution of numerous journalists as part of a broader pattern of repression against those expressing dissent or criticism of the authorities, which is currently prevailing in Turkey. He considers that such detentions and prosecutions have resulted in human rights violations and undermined the rule of law for the following reasons:

- Certain criminal provisions on the security of the state and terrorism are prone to arbitrary application due to their vague formulation and the overly broad interpretation of the concepts of terrorist propaganda and support for a terrorist organisation, including to statements and persons that clearly do not incite violence. In the aftermath of the attempted coup d'état, many journalists have faced unsubstantiated terrorism-related charges under such provisions in connection with their legitimate exercise of the right to freedom of expression.
- The detention and prosecution of journalists under such grave charges results in a strong chilling effect on fully legitimate journalistic activities and contributes to promoting self-censorship among those who wish to participate in the public debate.
- Decisions of domestic courts often fall short of justifying the need to resort to pre-trial detention or its extension as they lack sufficient reasoning and references to credible evidence and they fail to address the factual grounds of the case or the individual circumstances of the suspect. The legal presumption created by the so-called 'catalogue crimes' exacerbates this practice.
- The measures introduced during the state of emergency, which limited the right to be heard in person by a judge and access to the case file during the investigation stage, have significantly curtailed the right to obtain an effective review of detention.
- Numerous instances of judicial actions targeting not only journalists but also human rights defenders, academics and members of parliament exercising their right to freedom of expression indicate that criminal laws and procedures are currently used by the judiciary to silence dissenting voices.
- Upholding the right to freedom of expression is at present all the more difficult as a result of a marked erosion of the independence and impartiality of the judiciary in Turkey.

Against this background, it is difficult for the Commissioner to connect the recent use of pre-trial detention against journalists in Turkey with any of the legitimate aims prescribed by the Convention for that purpose.