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BY COUNTRY](#)[WHERE WE  
WORK](#)[HUMAN RIGHTS  
BODIES](#)[NEWS AND  
EVENTS](#)[PUBLICATIONS AND  
RESOURCES](#)[English > News and Events > DisplayNews](#)[Google +](#)

## Preliminary conclusions and observations by the UN Special Rapporteur on the right to freedom of opinion and expression to his visit to Turkey, 14-18 November 2016

ANKARA (18 November 2016) – At the invitation of the Government, I spent this week in Turkey to examine the protection and promotion of the freedom of opinion and expression under international human rights law. Thanks to the support of the Ministry of Foreign Affairs (MFA), which organized my government meetings in Ankara, I met with senior officials at the MFA, the Ministry of Justice, the Prosecutor's Office, the Ministry of Interior, the Parliamentary Human Rights Inquiry Committee, the Directorate General of Press and Information, the Information and Communication Technologies Authority, the Constitutional Court and the Court of Cassation. I was unable to arrange a meeting with the office of the President or Prime Minister but welcome the opportunity to do so in the future. That said, I want to begin by thanking the Government for its hospitality, its work to make this a successful mission, and its commitment to United Nations mechanisms.

With the support of the UN Country Team based in Ankara, I also met dozens of individuals in Ankara and Istanbul, such as journalists and writers -- including several detained at Silivri and Bakirköy prisons in Istanbul -- representatives of non-governmental organizations, lawyers, artists, academics, and politicians.

As special rapporteur, in all cases I examine freedom of expression issues according to the well-accepted sources of international human rights law. Turkey is a party to the International Covenant on Civil and Political Rights (ICCPR), Article 19 of which is my main source for analysis, and the European Convention on Human Rights. Both protect everyone's right to hold opinions without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. The right to freedom of opinion permits no exception or restriction. Article 19(3), however, acknowledges that States may restrict freedom of expression so long as the restriction meets the conditions of legality, necessity and proportionality, and legitimacy of the objective. Article 4 of the ICCPR permits derogations from freedom of expression (but not opinion) during declared states of emergencies, but only where strictly necessary according to the exigencies of the situation.

This is a preliminary set of observations in very brief form, drafted at the conclusion of a full week of fact-finding. It covers a fraction of all of the issues I identified this week and in my research leading up to this mission, and I encourage individuals to continue to reach out to me with their concerns as I draft the full. I will be presenting a full official report to the Human Rights Council in March 2017, and I am mainly prioritizing immediate concerns now while others may yet be addressed in the official report.

### An Overview of the Situation

It is noteworthy and important that Government officials throughout the week expressed Turkey's commitment to the freedom of opinion and expression. They identified a variety of domestic protections...

commitment to the freedom of opinion and expression. They identified a variety of domestic protections, such as those found in the Constitution (Articles 26 and 28) and the judiciary's review of alleged violations, and the supervisory role played by the European Court of Human Rights. This commitment, if realized, leaves room for optimism about the possibilities for the observance of fundamental freedoms in Turkey's future.

Every government official I met emphasized the perception that Turkey faces grave threats. The 15 July 2016 coup attempt is appropriately regarded as an assault on Turkish democracy, during which the entire political spectrum rallied around Turkey's democratic institutions. Hundreds were killed, and the shock of F-16 bombs crashing into Parliament's grounds, or of tanks on the streets, continues to resonate. One evening, a guide at Parliament showed me the twisted and bombed-out metal that, had the attack taken place at daylight, could have led to countless other deaths.

Turkey also faces threats of terrorism from various actors. ISIS and PKK attacks stand out as horrific examples. Turkey also faces a massive refugee crisis that undoubtedly weighs in the thinking of government officials charged with protecting public order. I have genuine sympathy for the dilemmas the people of Turkey face in confronting terrorism and threats to democratic institutions while at the same time protecting and promoting freedom of expression.

Without a doubt, Turkey faces threats that may justify restrictions under Article 19(3) to protect national security and public order. My concerns center, therefore, not on the fact of restrictions but on the overwhelming number, depth and seeming disproportionality of restrictions that not only touch every aspect of public and private life in the country but are, to my mind, leading Turkey away from the fundamental guarantees available in every genuinely democratic society. In this I am not alone. To name two, the Human Rights Commissioner of the Council of Europe and the European Commission report on Turkey have raised alarms in recent weeks, and for very good reason.

To put the situation in terms of my evaluation under Article 19, I ask the following questions: Are the restrictions on expression necessary to protect national security or public order? Are they proportionate? Do the restrictions amount to interference with opinion, which are impermissible under Article 19? Do the processes of challenge and appeal, if they exist at all, comply with the requirements of legality and rule of law?

Allow me to define the terms of this evaluation by way of illustration, underlining the grave concerns I have about the legal situation for compliance with freedom of expression norms:

- When Article 19(3) requires me to examine whether a restriction is "provided by law", the first condition of legality, I ask questions such as: Is the law on which a restriction is based specific enough to allow individuals the knowledge of what will be considered terrorism or support for terrorism? Is the restriction so vague as to leave excessive discretion in prosecutors, judges or others? Can a journalist or Facebook poster or tweeter, for instance, know in advance when criticism of government may lead to a defamation lawsuit by a senior official or an accusation of terrorist propaganda? Do they have meaningful avenues to challenge the restriction imposed?
- When Article 19(3) requires me to examine necessity, I ask questions such as: Is the firing of *this* academic or *these* academics necessary to protect against terrorism? Are there other approaches less restrictive than removing thousands of academics from their jobs? Is the shutting down of a media house actually and effectively protect against terrorism, or may targeted approaches both deal with the threat and yet enable access to information?
- When Article 19(3) requires me to examine proportionality, I ask questions such as: Is it excessive to jail a 71 year-old woman for terrorism because she served on the advisory board and as an occasional editor for a Kurdish publication? Or to jail columnists and editors and publishers for a news publication? Or to criminally prosecute a person for criticizing the President?

### **Legal Framework in Turkey**

Perhaps the most important feature of the current situation is the lack of legal clarity. Throughout my visit, individuals expressed bewilderment and pain at the application of these broad legal provisions. The Government's point of view is that people are expressing themselves in ways that promote terrorism. It is understandable and often necessary that a Government should restrict *incitement* to violence. Yet it appears nearly impossible to pin down what it means exactly to "promote" terrorism, and in situation

after situation brought to my attention, restrictions seemed unrelated to incitement but rather closely tied to reporting and the public's right of access to information.

There are several main laws whose revision -- or short of that, a commitment not to apply them in such broad terms -- would advance the cause of freedom of expression. Again, there are others, but at this point I would highlight the following:

- Article 28 of the Constitution, which protects freedom of press, now permits Turkish authorities, through amendments made under Act No. 4709, to prosecute journalists who "threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation" and allows the judiciary to ban, seize, and suspend the publication of periodicals. This provision falls short of identifying the kind of activities that may give rise to a threat to the integrity or security of the State.
- Several provisions of the Anti-Terror Act (Law No. 3713), which deals with criminal offences perpetrated in the context of terrorism, similarly provide very little clarity. Article 1, for instance, does not clarify what kinds of acts amount to terrorism. It provides an uncertain scope for membership in a terrorist organization. Especially harmful for freedom of expression is Article 7 (2), which provides for the punishment of those who make "propaganda" for a terrorist organization. It further provides that, should the offence of propaganda be committed via press and publication, the sentence in punishment should be increased by half.
- Article 220 of the Turkish Penal Code sanctions membership in criminal organisations, with a number of unclear definitions. Of particular concern in the context of freedom of expression is paragraph 8, 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.
- Criminal defamation laws increasingly limit criticism of public officials, particularly Penal Code Article 125 concerning defamation against public officers and Article 299 criminalizing the defamation of the President of the Republic. In 2015/2016 alone, figures suggest that the President brought over 1900 defamation cases before the courts for criticisms made against him. Such expression may rankle the powerful, particularly when it is uncivil or obnoxious, but it is protected by Article 19 and enables public debate, accountability and engagement by individuals in public life.
- Since the imposition of the state of emergency in July, the Council of Ministers has issued ten decrees with the force of law granting the Turkish authorities wide-ranging powers. According to the State of Emergency Law adopted in the early 1980s, the scope of such decrees should be limited to the emergency situation, but the decrees have increasingly broadened to terrorism beyond FETÖ, the Gülenist organization deemed terrorist under the law. Article 2(4) of Decree 668, issued on 25 July 2016, provides for the closing of numerous TV and radio stations, newspapers, periodicals and distribution companies under the accusation that they belong to, are connected to or are in contact with terrorist organizations posing a threat to national security. These decrees - that is decree no. 667 of 22 July 2016, decree no. 668 of 27 July 2016, decree no. 669 of 31 July 2016, decree no. 670 and no. 671 of 17 August 2016, decree no. 672, no. 673, and no. 674 of 1 September 2016, and decree no. 675 and no. 676 of 29 October 2016 - have also facilitated a number of restrictions to the right to freedom of media and expression, particularly the use of Decree 672 to crack down on the expression of those deemed terrorists, and the use of decree no.676 to suspend 370 associations on 11 November 2016. They have also reduced or eliminated altogether the ability to challenge detentions, enjoy the right of access to counsel, and travel abroad (by virtue of passport confiscations). The state of emergency decree nos. 667 and 668 established impunity for those responsible for removals of employees, among other things, preventing accountability for abuses.
- Law 5651 allows the government to restrict access to Internet content and networks, including phone service networks. In addition, amendments made through an omnibus law of March 2015 give the government the power to shut down websites in only four hours. Four articles in Law 5651 provide for blocking of certain websites and posts: Article 8 (protection of children from harmful content); Article 8A (protection of national security, public order, protection of life and property, and protection of public health and prevention of crime); Article 9 (violation of individual rights); and Article 9A (violation of privacy). It is common for restrictions to go beyond restrictions under the protection of children. Instead, Article 8A in particular is used broadly to limit online access. The internet "killswitch" amendment passed into law on 11 June 2016 gives the Information and Communications Technologies Authority the power to partially or entirely suspend internet access due to war or national security, without any oversight.

These provisions -- separately and sometimes in conjunction with one another, along with other provisions I have not named here -- have been used in ways that undermine rights to opinion and expression, as discussed elsewhere in this statement. They are principally problematic in the vagueness and breadth of their language, leaving excessive discretion in government officials.

### ***Journalists and writers in prison***

The terrorism and defamation laws have been used for some time to crack down on writers and journalists, a situation exacerbated since July by the emergency decrees. Depending on how you count, up to 155 journalists or media workers are held in prison today, highlighting the fact that reporting and writing opinion have been redefined as support for terrorism under application of Turkish law. This number is astonishing even in the context of the threats highlighted by the Government and raise major questions not only of necessity and proportionality but even, particular in the broader context of media house shutdowns, whether restrictions are based upon illegitimate grounds such as government criticism. Such numbers do not reflect the many journalists and writers who were previously detained and released but continue to face charges and potential imprisonment, resulting in a revolving door of detention.

Because of my mandate's historic concern for the safety of journalists and writers, I sought access to a number of detainees. The Ministry of Justice denied me access to the writers and journalists **Asli Erdogan, Ahmet Altan, Mehmet Altan, Kadri Gursel, Murat Sabuncu, Turhan Gunay, and Musa Kart**.

The Ministry of Justice permitted me to visit five individuals affiliated with *Cumhuriyet* newspaper held at Silivri Prison in Istanbul: **Hakan Karasınır, Bülent Utku, Güray Tekin Öz, Mustafa Kemal Güngör, and Onder Celik**. We were permitted to visit the writer and activist **Necmiye Alpay** at Borokoy Women's Prison in Istanbul. I spoke with lawyers for or associates of other detainees.

I am glad to report that all six detainees whom I visited seem to be in good health. However, the men held in Silivri, which houses thirteen thousand prisoners, reported an initial detention process that involved days without access to information about the charges against them, or access to legal support, and at least two days of sleep-deprivation that culminated in a 2 a.m. court presentation. They have limited access to a lawyer, books, pen and paper, or other ways to access information or communicate with the outside world. They expressed total bewilderment at the basis for their detentions.

**Necmiye Alpay** enjoys a somewhat better situation at Borokoy, such as fuller access to books and pen and paper. However, she is a seventy-one year old woman, a writer and editor whose only crime appears to be association with a Kurdish newspaper since closed. The prize-winning author, **Asli Erdogan**, held with her, suffers from health concerns, and I regret that we could not see her.

### ***The broader attack on media***

Media freedom in the country was already in crisis prior to the attempted coup, including closure of critical media, media associated with Gülenists, and broad use of anti-terror legislation against journalists. In response to the failed coup, the breadth and scope of the crackdown on media freedom has intensified dramatically, with measures of an unprecedented scale being justified on grounds of ensuring stability.

I heard repeated personal stories of media workers and government critics being arrested and harassed, independent newspapers and broadcasters being forced to close. For instance, at least twelve television and eleven radio stations have been shut down by way of emergency decree. As a result of the media shutdowns, over 3,000 journalists are currently unemployed and hundreds of the yellow press cards have been cancelled. Following the coup attempt, media outlets subject to the emergency decrees have not been limited to allegedly FETÖ-affiliated media; the closure of *Özgür Gündem* (a leftist pro-Kurdish newspaper), the attempted closure of *Evrensel* (a socialist/workers' newspaper), and police raids on *Cumhuriyet* (a critical, secularist paper), are examples of how the state of emergency in Turkey has been deployed against dissident or critical journalism.

Of particular concern is the apparent decimation of all forms of media in the southeast, particularly Kurdish media, leading to massive lack of access to information.

I am also concerned about repeated broadcasting bans in the wake of terrorist attacks, thereby limiting the public's access to information. Particularly in the southeast, restrictions have amounted to complete media blackout on coverage of the conflict with the PKK.

### ***Mass firings of academics***

Over the course of the current year, the Government has launched at least two sets of actions against academics. The first began on 11 January 2016, when more than 1400 academics in Turkey and abroad published a statement expressing concern about the failing peace process with the Kurds in southeastern Turkey. In response, at the instructions of the Higher Educational Council, many university administrations have taken disciplinary actions, including removals, against signatories. The Government has stated that the petition signed by the academics echoed a statement previously made by one of the leaders of the PKK. More than one thousand academics in Turkey have been subject to anti-terrorism police operations and widespread harassment. At least twenty academics have been detained and investigated by the Istanbul prosecutor's office.

Since that first wave, thousands more academics have been removed from their positions in the wake of the 15 July coup attempt. I spoke with academics who could not identify a particular cause for their removal, as they had no connection to the coup or its plotters, or to PKK, and yet they were forced out of their positions and then denied a passport that would allow them to work abroad.

### ***Attack on digital rights: content takedowns, network shutdowns***

I have learned of a vast wave of Internet shutdowns and content takedowns that have taken place in recent years, accelerating since the 15 July coup attempt. Social media take down requests, for instance, are expansive, as one sees in Twitter's regular transparency reports. Following decisions by the Constitutional Court and the European Court of Human Rights, holding that the government could not block access or shut down a network without a court order, Turkey amended its law accordingly. Many access denials are based on Law 5651 noted above. Decree 671 (17 August 2016) expands the ability of the Government to shut down networks or take down content. There appears to be extremely limited room for appeal of Government decisions in this respect.

The Government asserts that shutting down communications networks, particularly in crisis situations, may serve to limit attacks, but it also forces individuals to be in the dark. Citizens cannot communicate with one another, access information that might contribute to their safety or provide one another with support. Lengthy network shutdowns have been shown in particular to have a strongly negative economic impact.

Internet news sites and individual social media accounts have been routinely subject to blocking orders. During the state of emergency, this has increased, with Twitter reportedly complying with requests to withhold Kurdish media twitter accounts in Turkey, including that of the Kurdish daily news paper Özgür Gündem. Blocking orders are issued by courts and owners are usually not informed of the order. The orders frequently order the blanket blocking of an entire website without specifying the offending content.

### ***Attack on opposition and civil society***

Just before I arrived on this mission, I learned that the Government suspended up to 370 non-governmental organizations operating in Turkey under emergency decree in one day. I met with some representatives subject to this order, who expressed disbelief that their work could be considered associated with terrorism or terrorist groups. This most recent action highlights a broad problem for civil society and dissenting voices operating in the country. I want to identify a few of these problems, which I will expand upon in my later report.

- Among civil society organizations, I have become familiar with organizations associated with artistic and cultural centers, children, women and LGBTI rights that are facing significant pressure. Pressure on such organizations limits the ability of individuals to enjoy the freedom of expression, and even more so, restrictions interfere with their ability to provide essential services.
- Opposition voices are especially hit hard. Of immediate concern is the situation for the HDP and other opposition parties facing, or potentially facing, terrorism-related accusations. On 20 May 2016, the parliamentary immunity of members of parliament was lifted, causing serious concern that criticism

parliamentary immunity of members of parliament was lifted, causing serious concern that criticism of Government may be characterized as promotion of terrorism. Several HDP leaders have been imprisoned on the basis of Emergency decrees, while they also face Ministry of Interior charges of making false propaganda. 117 investigations have been initiated recently in addition to 683 existing cases. 500 cases belong to HDP and members of parliament of HDP. The co-chairs of the HDP alone face 103 cases. Since the attempted coup, approximately two thousand members of the HDP have been detained.

### **Rule of law, separation of powers, and independence of the judiciary**

In my report next year, I will address more fully how the situation for the judiciary is undermining freedom of opinion and expression. It is clear that members of the Turkish judiciary (the Court of Cassation and the Constitutional Court) take enormous pride in adhering to the European Convention and incorporating the jurisprudence of the European Court of Human Rights into its decisions. I am especially concerned that, pursuant to Law No. 6545, the system of Criminal Judicature of Peace (or Criminal Peace Judges) is streamlining cases in such a way as to limit the ability to appeal and challenge emergency decrees. The Venice Commission has also identified a range of problems that interfere with the independence of the judiciary.

Since the coup attempt in July, the situation has escalated. The judiciary was charged with carrying out administrative investigations into its officers and an alarming number of prosecutors and judges were dismissed. 3,626 judges and prosecutors were removed under emergency decree, with only 198 so far reinstated. Several dozen judges, including one judge serving in the Mechanism for International Criminal Tribunals (MICT), Judge **Aydin Sedaf Akay**, have been detained. We sought but were denied access to visit Judge Akay.

### **Preliminary recommendations**

- I urge the Government to immediately release journalists, writers, and academics who are currently detained pursuant to counter-terrorism legislation and emergency decrees. Nobody should be held in detention for expressing opinions that do not constitute an actual incitement to hatred or violence.
- I urge the Government to adopt all necessary measures to ensure that any restriction to freedom of expression during the state of emergency is strictly proportionate to the exigency of the situation. In particular, it should ensure, in line with article 9 of the ICCPR, that anyone who is deprived of his/her liberty by arrest or detention is entitled to take proceedings before a court to challenge the lawfulness of her detention, and that anyone who has been the victim of unlawful arrest or detention has an enforceable right to compensation.
- In a similar vein, I urge the Government to review its emergency legislation so as to ensure that persons deprived of employment by virtue of emergency decree have access to appropriate judicial and administrative mechanisms to challenge the lawfulness of the decision and to obtain adequate compensation in cases of illegal dismissal.
- I urge the Government to adopt all appropriate measures to ensure that press and other media, not to mention all individuals, are able to comment on public issues and to inform public opinion without censorship or restraint. Such measures include, inter alia, the review and revision of national legislation, such as the defamation laws, to bring them in line with international standards.
- I urge the Government to review, as a matter of urgency, the Anti-Terrorism Law so as to ensure that counter-terrorism measures are compatible with Article 19(3) of the Covenant. Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not continue to lead to unnecessary or disproportionate interference with freedom of expression.
- I call on the Government to repeal articles 125 and 299 of the Penal Code, which criminalise the defamation of public officials and the President of the Republic, respectively. In this regard, I wish to reiterate that the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties. Furthermore, the penalization of individuals solely for being critical of the government can never be considered to be a necessary restriction of freedom of expression.
- I urge the Government to reverse its shutdowns of media outlets, including Internet media, networks and mobile telephony, and ensure that suspension of media outlets occur only in exceptional circumstances provided for by the law, and only in accordance with appropriate judicial procedures. Such measures should always be subject to judicial review.

**SUCH MEASURES SHOULD ALWAYS BE SUBJECT TO JUDICIAL REVIEW.**

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