Report on the findings and recommendations of the Peer Review Mission on Freedom of Expression (Istanbul and Ankara, 12-16 May 2014)

Disclaimer

This peer review was conducted from 12 to 16 May 2014 by two independent experts in agreement between the European Commission and the Turkish authorities with the support of TAIEX, and followed by a series of exchange of comments and additional information, including during a meeting held in Brussels on 27 November 2014.

The views expressed in this report are entirely those of the independent experts and do not represent the views neither of the European Commission nor of the Turkish government.

Peer Review Mission on Freedom of Expression, Istanbul and Ankara, 12-16 May 2014

Chapter 23: Judiciary and Fundamental Rights

Findings and Recommendations

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Section I written by Prof. Dr Wolfgang Benedek[1]

I.1. Executive Summary

There have been significant positive developments in the legislative framework since the last peer review in 2011 as well as visible efforts to address the necessary legal reforms by measures taken by the government, in particular the Ministry of Justice and the Ministry of EU Affairs. This took the form of several reform packages and the creation of new human rights institutions as well as the elaboration of an Action Plan on Prevention of European Convention of Human Rights Violations. There have also been changes in the practice of the judiciary towards giving freedom of expression more attention in balancing with reasons for limitations.

However, also some trends in the opposite direction were observed with regard to the amendments to the Internet Law (IL) in particular and there are some worrying developments in the practice regarding the silence of some media in the Gezi Park protests and concerning the removal and transferal of large numbers of prosecutors and judges after December 2013. Criticism was expressed by governmental officials of the judiciary, in particular of the Constitutional Court, which could be seen as an interference with the autonomy of the judiciary, in cases related to freedom of expression. Accordingly, the mission found that since the last peer review in 2011 there have been significant developments in the legislative framework towards larger freedom of expression, while important concerns remain to be addressed and new concerns have evolved.

A. Improvements:

- The number of journalists in prison has decreased significantly, sentences were reduced and trials suspended
- The problems for journalists in certain laws have partly been addressed by three judicial reform packages, i.e. by introducing the benchmark of violence in the legislation
- The practice has evolved towards avoiding prison sentences in defamation cases
- The number of indictments under the Article 301, which need the authorization of the MoJ has dropped significantly
- Special Anti-Terrorism Courts have been abolished
- The Kurdish language can be more freely used and the Armenian issue discussed without legal consequences

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- A new constitutional complaint procedure has been introduced creating an important new remedy
- New human rights institutions like the Ombudsman and the Human Rights Institution have been set up and started to work
- An Action Plan on Prevention of ECHR Violations has been elaborated under the leadership of the MoJ
- A Working Group on Freedom of Expression of the Reform Action Group has been established
- Opportunities for training and capacity-building activities on FoE have increased

B. Concerns remaining to be addressed:

- Journalists are suffering from insecure working conditions
- Only about 1 % of journalists make use of their right to association by joining Unions
- The number of defamation cases brought by politicians is still high, although courts seems to be aware of pertinent jurisprudence of the European Court of Human Rights and to take it into account
- Oligopolistic media ownership structures are generally not conducive to the public interest/service function of the media, which focus more on entertainment
- Governmental control of the media has been increasing
- Many journalists consequently feel intimidated leading to self-censorship
- The polarization in society is also reflected in the media
- The law on demonstrations has been used to restrict freedom of expression.

C. New Concerns:

- Continuing pressure on traditional media, which partly fail to fulfil their public service function
- Amendments to the Internet Law aim to increase control of the social media, which have partly taken the role not played by traditional media in public discourse
- Trials against use of social media in context of freedom of assembly and FoE
- Data retention provisions in the information law are not in conformity with the European acquis, in particular after the EU Court decision of April 2014 declared the EU Data Retention Directive invalid
- Enlargement of powers of secret services and of their immunity in the amended Intelligence Law and high fines for journalists reporting on unclearly defined state secrets has a chilling effect in particular on investigative journalism
- Elaboration of Data Protection Law and planned reforms of the Press Law regarding online news portals lack transparency and therefore raise fears among part of the media
- Prosecution and detention of journalists and representatives of critical media

Main Recommendations:

1. In spite of significant improvements in law and practice towards freedom of expression, some concerns of the past still need to be addressed for which purpose the Action Plan on Prevention of ECHR Violations can be usefully employed. However, the momentum needs to be accelerated again, for which purpose the Reform Action Group could play an important role.
2. New challenges need to be addressed like FoE through social media in order not to negate advances by reforms in traditional problem areas.
3. Structural problems need to be addressed like media ownership structures or poor working conditions of journalists contributing to a general climate of intimidation and lack of public interest reporting.
4. New opportunities of cooperation with the Ombudsman Office and the new Human Rights Institution as well as with traditional partners like the Ministry of Justice, the Justice Academy, the Bar Association, media NGOs and academia should be used for capacity-building and development of expertise in European standards of FoE. Projects in this field need to be continued and enlarged.

I.2. Purpose of the Mission

The main objectives were to review recent legislative reforms related to freedom of expression (FoE), relevant judicial practice as well as practice by other authorities, the ownership structure of the media and the working conditions of journalists in their impact on the media environment and on FoE.

The peer review mission did take place from 12-16 May 2014, with two days in Istanbul and three days in Ankara. The independent experts had meetings with a wide variety of media actors, like journalists and media owners, academics and NGOs, judges and lawyers, human rights institutions, High Courts and regulatory authorities as well as competent ministries.

The Turkish Ministries of EU Affairs and of Justice deserve special thanks for co-organizing the programme and facilitating a constructive dialogue.

After the receipt of the report, these Ministries, however, criticized parts of it and requested a meeting in Brussels to discuss their criticisms and request for updates, which took place on 27 November 2014. Only one of the experts (Benedek) was able to participate. The present, final version of the report takes this criticisms as well as new developments and information provided into account, whereever it contributes to the quality and purposes of the report. The final assessment, however, is the responsibility of the expert.

The last EU Peer Review Visit on freedom of expression has been undertaken in January 2011 by Lord Macdonald of River Gloven QC, who identified a number of legislative and

practical shortcomings. He reported the existence of serious obstacles to the full enjoyment of freedom of expression stemming in particular from certain provisions of the Turkish Penal Code, the Anti-Terror Law and other laws related to the media and the Internet, but also the practice of prosecutors and judges in opening and pursuing cases related to freedom of expression. Subsequently, in April 2011, also the Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, visited Turkey with a focus on freedom of expression and media freedom and came to similar conclusions emphasizing in particular that not enough had been done to reduce the numerous judgments of the European Court of Human Rights finding Turkey in violation of freedom of expression. He was also concerned with an increasing number of criminal proceedings against and arrests of journalists.[2]

I.3. General Developments since 2011

Since 2011, there were three judicial reform packages. The 3rd package by "Law No. 6352 amending some Laws for Effectiveness of Judicial Service and Suspension of Cases and Sentences Regarding the Offences Committed via Press", amended in particular the Turkish Penal Code, the Anti-Terror Law and the Press Law. It also introduced a suspension of cases and convictions for offences committed before 31 December 2011 via the press, publication or other communication ways, so-called crimes committed by opinion and thought published in the media, for which there was a maximum fine of 5 years. Accordingly, all judicial activities on these cases were postponed. If the persons do not commit any offences within three years, the cases will be dropped, otherwise they will be continued. This procedure allowed the Cassation Court to suspend a significant number of cases, but the persons concerned could also have benefitted from reformed laws instead of being under the threat of continued persecution for three years. The aim of prevention of re-commission of crimes, which include crimes committed via press can have a chilling effect on the freedom of expression of those affected.

The focus of the Fourth Judicial Reform Package, which was adopted in April 2013 was freedom of expression.[3] The main purpose of the package was to reduce the number of violations found by the European Court of Human Rights in this field. It contained amendments to eight different laws.

Furthermore, the 5th Judicial Reform Package, which came into force in March 2014[4] brought further changes to the Anti-Terror Law, in particular the abolishment of the Regional Heavy Criminal Courts established under Article 10 of the Anti-Terror Law and the reduction of the pre-trial detention for crimes falling under their former competence from 10 to 5 years. Therefore, the provision in Law No. 6352, which allowed the special courts under Article 250

2 See report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey from 27 to 29 April 2011, CommDH (2011) 25 of 12 July 2011.

3 See Law Amending Certain Laws within the scope of Fundamental Rights and Freedom of Expression of 11 April 2013.

4 See Law No. 6526 Amending the Anti-Terror Law, the Criminal Procedure Code and Various Laws, which came into force on 6 March 2014.

of the Criminal Procedure Code to continue with already ongoing cases was changed by Law No. 6526 and all cases transferred to ordinary criminal courts.

In addition, the Democratization package[5] of 2014 needs to be highlighted as it lifts restrictions on the use of different languages and dialects in political campaigns and in education in private schools and also repeals criminal sanctions in the Turkish Penal code regarding the use of letters such as q, x and w. In this context, the Chief Public Prosecutor of Istanbul in a meeting confirmed that the Kurdish language was allowed and that it had become also possible to mention the words "Armenian genocide".

In March 2014, an "Action Plan on Prevention of European Convention on Human Rights Violations", adopted by the Council of Ministers was published, which also contains a section No. 11 on "Enabling Freedom of Expression and Media in the Widest Sense" with several reform proposals.[6] On 8 November 2014, the high-level Reform Action Group decided to set up a working group on freedom of expression to undertake a revision of the legislation in the light of international documents, consultative visit reports, progress reports, ECHR criteria and decisions of the ECtHR with respect to freedom of expression.

Furthermore, in 2012 two new institutions for the protection of human rights were established, i.e. the Office of the Ombudsman and the Turkish Human Rights Institution, which is supposed to develop into the national human rights institution of Turkey. While the former seems to have had a better start than the latter, it is important that both do receive complaints and thus new remedies have been created, which the Turkish public in general and the media in particular still have to make proper use of.[7]

Finally, maybe the most positive development has been the decrease of the number of journalists in prison. While the peer review of 2011 reported an increasing number of around 40 and this number indeed increased to about 95 according to OSCE sources, at the time of the visit in May 2014 it had dropped to less than 30 or according to the Committee for the Protection of Journalists to 16. The Turkish authorities, based on a study undertaken, claim that none of them is in prison because of his or her journalistic work. Actually, most of them seem to have been imprisoned on charges under the anti-terror law. Immediately before the peer review mission several of them have been released. Unfortunately, on 14 December 2014, a number of journalists and media respresentatives were arrested in a police raid on media critical of the government, which the European Union declared incompatible with the freedom of the media.[8] The OSCE Representative for the Freedom of the Media called for the immediate release of the journalists.[9]

5 See Law No. 6529 on amending certain laws for the enhancement of Fundamental rights and freedoms.

6 See Directorate General for International Law and Foreign Relations, Human Rights Department, Action Plan on Prevention of European Convention on Human Rights Violations, published in official Gazette on 1 March 2014.

7 See also under 5.

8 See Joint Statement on the police raids and arrests of media representatives in Turkey by Frederica Mogherini, High Representative of Foreign Affairs on Security Policy/Vice-President of the Commission

I.4. Developments with Regard to Criminal and Security Legislation

This legislation is only of indirect importance for freedom of expression. However, because it has been used rather extensively against journalists in the past, it has been a major area of criticism, which in the meantime has been partly addressed by the judicial reform packages, while major issues remain.

A. Turkish Penal Code

A major point of criticism has been Article 125 TPC, which criminalizes defamation, is broadly drafted and has been used widely against journalists and broadcasters. In spite of international criticism, the article has not been revised, while the practice appears to have changed as prosecutors seem to open fewer cases against the media. This might also be due to the fact that the Court of Cassation has developed a stricter line on defamation cases by putting more emphasis on freedom of expression, which also covers heavy criticism, but does not call for violent action. However, the number of defamation cases is still very high: according to statistics provided by the Court of Cassation, the number of appealed cases in the Penal Departments of the Cassation Court in 2013 was 8961, while the number of appealed cases regarding "compensation for defamation" in the 4th Civil Chamber of the Court was about 1500.

Accordingly, defamation has still not been decriminalized as suggested by the previous pear review mission, but the recommendation to take freedom of expression better into account in the balancing process seems to have been accepted. The judiciary is thus mitigating the ongoing practice of politicians and others to use the defamation rules against criticism. However, according to the jurisprudence of the European Court of Human Rights public figures must endure a higher amount of criticism, than ordinary citizens and this seems to be increasingly taken into account by the Turkish judiciary. A solution to the problem of the exaggerated use of defamation rules can best be provided by a reform of Art. 125 to take the case law of the European Court of Human Rights into account. With regard to the long-standing recommendation to decriminalize the offences related to freedom of expression, the reported fact that hardly any prison sentences are handed down anymore, which in itself is an important progress, should make it easier to delete this article from the penal law.

Amendments were made to **Articles 132-134 TPC** protecting the right to privacy, with the result that journalistic activities are better protected against prosecution under these articles.

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and Johannes Hahn, Commissioner for European Neighbourhood Policy and Enlargement Negotiations of 14 December 2014, EEAS 141213_02_en.

9 See OSCE, Media freedom representative calls on authorities in Turkey to release detained journalists, 15 December 2014, OSCE Vienna.

With regard to **Articles 214-216** and **220 TPC** on the protection of public order, there have been also some amendments. For example, **Article 215 TPC** now requires a "clear and imminent danger to the public order" in line with the criteria of the European Court of Human Rights (ECtHR) in order to make "praising the offences and offenders" a criminal offence. However, **Article 216 TPC** on provoking public hatred and hostility has been used to prosecute public figures for critical remarks on religion like the pianist and composer Fazil Say for insulting religion by a tweet. This Article would also need to be adjusted or the judicial practice to be changed.

Also **Article 220 para. 8 TP**C was amended making the praise of the methods of an organization an offence only if those methods contain violence, force or threat. A new provision in **paragraph 6** clarifies that the scope is only applicable to armed organizations. It can be expected that this will reduce the number of cases considerably.

No change is reported in **Article 226 TPC**, which in the past allegedly was used to prevent the description or depiction of homosexuality as falling under the publication or broadcasting of obscene material. Whether this practice has changed, could not be established.

Amendments have been made to **Article 285 TPC** as well as to **Article 288 TPC**, which prohibits attempts to influence prosecutors, judges, courts or witnesses. In both cases, the lack of at least a public interest provision had been criticized already in the previous peer review report. Now, reporting about investigations and the trial without exceeding the limits of news reporting shall not constitute a crime, but there seems to be a lack of clarity what that means in practice.

No changes are also recorded for **Article 301 TPC** on insulting the Turkish nation, which according to the previous peer reviewer should have been repealed or at least amended to include a clear public interest defense. However, according to the Ministry of Justice, which based on a circular of 2008 needs to give its consent to any prosecutions, the number of authorizations is few, which reduces the problem in practice, but does not resolve it, because the practice can be changed any time. Furthermore, the number of authorizations for 2013 increased, while preliminary figures for 2014 show a similar result.[10] There are at least two judgments of the ECtHR regarding Article 301, the implementation of which is pending.

Several Kurdish journalists were detained for membership of an armed organization on the basis of **Article 314 TPC**, which also remained unchanged. Some of these journalists were released, while others remained in detention. The Turkish Government claims that this is unrelated to their journalistic activity.

10 According to the Information Note of the Ministry on EU Affairs on Freedom of Expression of May 2014, out of 277 files submitted in 2012, permission was granted only in 18 cases. According to information received from the Ministry of Justice as well as found in the EU Progress Report published in 2014 out of 373 cases in 2013 40 were allowed to go on, which actually means a doubling of cases in that year. For 2014, by end of October, the number of cases had already reached 304, while the number of authorization was not provided.

Regarding **Article 318 TP**C, which makes discouraging people from military service an offence, the practice under the article seems to have softened, while the article has not been repealed or amended as suggest, but rather been made more clear and concrete, without solving the real problem that the provision as such interferes with the freedom of expression and possibly also the freedom of religion.

B. Anti-Terror Law

With regard to the anti-terror law, the reform packages did also bring several positive changes: **Article 6** has been amended in a way that the printing or publishing of materials of terrorist organizations or praising their methods are now punished only if it relates to methods containing coercion, violence or threat or encourage appealing to these methods, which is still a very wide definition. Former paragraph 5 of Article 6 foreseeing a pro-active ban on publications for terrorist organisations has been repealed, which led to a fast reduction of banned publications.

Also **Article 7** on the prohibition of the funding, managing and membership of terrorist organizations and propaganda on their behalf, which has been used against journalists and broadcasters as observed by the peer report of 2011 has been amended in paragraph 2 so that making propaganda for a terrorist organization is only punishable if related to coercion, violence or threats thereof. Some other obvious problems of the law were also addressed like someone who is not a member of a terrorist organization, but committed crimes in their name under other laws shall no longer be prosecuted for being member of a terrorist organization.

C. Law on Crimes against Atatürk

Also the **Atatürk law**, which has been misused in the past to restrict political speech, has remained unchanged although the requirement of consent by the Minister of Justice has resulted in only few cases. The restrictive practice can, however, be changed anytime according to the political will. Therefore, the mere existence of such laws do have a chilling effect on political speech.

D. Law on Demonstrations

According to Bianet media reporting for January to March 2014, 17 persons were sentenced to a cumulative total of 31 years for insulting former Prime Minister Erdogan, on the basis of the law on demonstrations (No. 2911) combined with other laws.[11] Therefore, this application of the law also interferes with the freedom of expression. Freedom of expression and the right to assembly are closely related. Accordingly, the frequent limitations of these freedoms by the Turkish Police can constitute a violation of the freedom of expression.

11 See Bianet of 2 May 2014.

Preliminary Conclusion

In conclusion, there have been several amendments as part of the third, fourth and fifth judicial package, which, however, did not cover all the problematic provisions and, in some cases, did not go far enough. Accordingly, there is a need for a continuation of the reform efforts. This is recognized also by the Action Plan on Prevention of European Convention on Human Rights Violations, prepared by the Directorate General for International Law and Foreign Relations, Human Rights Department, and adopted by the Turkish Government in March 2014, when it identifies the revision of Articles 125, 299 and 301 of the Turkish Penal Code for bringing it into conformity with the standards of ECHR-case law. Unfortunately, this is planned only as a long-term goal, while other reforms are to be reached in the medium term. The action plan also foresees impact assessments of the reformed Articles 215, 220, 277, 285, 288 and 318 to be undertaken in the short and medium term, which provides an opportunity to see whether the amendments are working in practice and to reform those provisions further.

E. The New Law Regulating the Intelligence Sector

While in the other fields of penal and security laws there have been some – limited – developments towards larger conformity with the European standards as contained in the case law of the European Court of Human Rights, the new Intelligence Agency (MIT) Law[12] points in a different direction: The law provides wide powers to MIT to obtain all kind of information from public institutions and private organizations and to wiretap communications, which creates major interferences with the right to data protection and privacy. With regard to the freedom of expression its Article 8 foresees imprisonment of 4 to 10 years for any person, who takes possession, without authorization, of information and documentation concerning the activities of MIT. In case of publication via radio, television, internet, social media, newspapers … and all other media tools …, the media owner, content provider, correspondent, editor, publisher and printer face prison sentences of 3 to 12 years.

No doubt that this law will have a strong chilling effect on the publication of news on activities of MIT, which would be in the public interest. However, no public interest exceptions exist to the high fines foreseen.

I.5. Developments in the Area of Media Law

This area is regulated mainly by the press law of 2004, the new broadcasting law of 2011 and the internet law of 2007. The main focus will be on the amendments of the internet law of 2014 and the subsequent practice as those raise basic issues of conformity with European standards.

12 See amending the law on the state intelligent services and national intelligence organizations (Law No. 2937), adopted on 17 April 2014.

A. Press Law

The peer review of 2011 of the Press Law No. 5187 recommended amendments to the press law including a strong public interest clause protecting journalists and publishers to report on and publish matters of legitimate public interest.

The third judicial reform package did indeed bring amendments to Article 19 of the Press Law with regard to compromising the judicial process and the time limit for a law suit by legal amendment of July 2012. **Article 19**, which had foreseen high fines for publishing material about proceedings of an inquiry or comments about the judge before the case is concluded has been abolished.[13]

However, the fourth and fifth judicial packages on freedom of expression did not touch on the press law at all. According to statistics provided by the Bureau for Investigation of Press Crimes in the offices of the Chief Public Prosecutor of Istanbul, there were 604 investigations until 9 May for 2014 of which 96 were concluded with an indictment. 23 cases concerned publications revealing the identities of victims of sexual offense or victims below the age of 18, while the other 73 concerned offences such as insult, slander, attempts to influence a fair trial or violation of confidentiality regulated in the Turkish Penal Code. Although this shows that the majority of cases does not lead to indictments, the number of cases brought in four months for Istanbul alone shows that there is still a high number of investigations, which by themselves can already have a chilling effect on freedom of expression.

The Committee to Protect Journalists (CPJ), in April 2014, has addressed an open letter to the Prime Minister to ease the heavy pressure on traditional and online media. While recognizing the release of journalists, it deplored that violations against the Turkish Press have increased in recent months and that the media environment in Turkey became increasingly repressive.[14] In October 2014, a joint delegation of the CPJ and the International Press Institute met with top representatives of Turkey and reported that while Turkey's leaders defended the press freedom record they also agreed to address the delegations' concerns.[15] Accordingly, although there have been some positive developments, in particular in the practice, there appears still to be a need to reform the press law.

B. Law on the Establishment of Radio and Television Enterprises and their Media Services (new Broadcast Law)

The previous Law No. 3984 on broadcasting foresaw the possibility of sanctions on broadcasters for a wide range of violations. There have been complaints on its implementation by RTÜK as limiting freedom of expression. The peer review of 2011 also in this case has

13 See Law No. 6352 of 2 July 2012, Art. 105.

14 See Committee to Protect Journalists – Open Letter to Prime Minister Erdogan, Turkey should revise all anti-press measures and laws, 9 April 2014.

15 See Committee for the Protection of Journalists, Press Release of 3 October 2014, http:cpj.org/x/5d34.

proposed the inclusion of a strong public interest clause allowing to favor the broadcasting of matters of legitimate public interest also in cases of otherwise questionable material.

In March 2011 the new law came into force as a successor to the former broadcasting law.[16] In Article 8 it contains a long list of media service principles, which mainly consist of prohibitions, which include human dignity and the principle of privacy, but do not refer to the requirements of freedom of expression. There is also no public interest clause. With regard to the obligation not to act "contrary to the national and moral values of the society, general morality and the principle of family protection (Article 8f)", statistics were provided according to which in 2013 18 warnings and 14 pecuniary fines were given by the competent board of RTÜK. However, altogether the number of sanctions for the period 1 January 2013 until 31 March 2014 was much higher, which would indicate a close monitoring of other principles and obligations.

According to Article 7 of the Law 6112, the Prime Minister or respectively appointed Minister can impose a temporary ban if "evidently required by public security or in situations where it is highly likely that the public order will be seriously disrupted". Such sweeping powers, although they apparently have not been used so far and can be brought to the Council of State for review, raise also issues of the freedom of expression as the existence of such provision may already have a self-censorship effect. It has been criticized that the mainstream media were slow in reporting about the Gezi Park Events, which resulted in a loss of confidence with the public.

Accordingly, the Law 6112 should be reviewed with regard to the practice of sanctions and its emergency provision.

C. Internet Law

The application of the law on the regulation of publishing in the internet environment and the combatting of offences, committed through such publication (the internet law) No. 5651 of 2007 has been characterized by the peer review in 2011 as internet censorship, which goes beyond what is necessary or proportionate in a democratic society leading to the conclusion that the law should be abolished or revised. Furthermore, it has been recommended to make higher courts responsible and include a strong public interest clause to better protect journalists, bloggers and other publishers.

However, the amendments made to the internet law in February 2014, although modified on the request of the Turkish President go in the opposite direction by enlarging and strengthening the instruments of control. New paragraphs added to Articles 4 and 5 require content and hosting service providers to furnish the Telecoms Communication Presidency (TIB) with any information it may demand and take such measures as directed by TIB.

16 Law No. 6112 on the Establishment of Radio and Television Enterprises and their Media Services.

The amendments by a new **Article 6A** foresee the establishment of a "union of access providers" with obligatory membership of all internet access and service providers. The hosting providers are further committed to retaining all traffic information concerning their services for at least one year (Article 5, para. 3). Due to an amendment requested by the President as a condition for his signature, requests for this information by the presidency now require to be demanded by courts with regard to criminal proceedings. Compared to the EU data retention obligation, which recently has been found in violation of the Charter of Fundamental Rights of the EU because of a lack of principles for limitations and of proportionality, the internet law does not contain any such elements either and therefore does not meet European standards as defined by the Court of the European Union.

In partial response to the case *Yildirim v. Turkey*.[17] Article 8, which foresees the possibility of blocking measures for violations of the eight public crimes identified, has been amended to provide that the decision on denial of access may also be issued for a specific time period but only if this serves the intended purpose. Also the sanction of prison sentences has been changed into monetary fines.

Article 9 provides a procedure for persons and entities, who assert a violation of their personal rights by a publication on the internet. They can request from the provider to remove the content. The provider has to respond within 24 hours or apply to a criminal court judge, who should give a decision within 24 hours. This decision can be appealed. Again, the amendments take Yildirim hardly into account when the removal of content or denial of access based on complaints for violations of personal rights according to Article 9 shall now be limited to the – part of – the content, which has occasioned the violation and that total denial of access shall not be decided by the judge except if s/he convinced that a lesser interference would not be sufficient in which case the reasons need to be specified.

A new Article 9A has been added on "confidentiality of private life" allowing persons, who claim that their right to privacy has been violated by any publication on the internet to apply directly to TIB with a request for denial of access to the content. Access providers are informed by TIB through the "Union" and have to carry out the request within a maximum of four hours. In urgency cases, the President of TIB can give direct instructions through the presidency, which need to be sent for approval to a criminal court judge within 24 hours who has 48 hours to decide. The person demanding the blogging has to seek confirmation within 24 hours from a criminal court judge, who has 48 hours to take its decision and sent it to TIB, which has the right to make objections based on the criminal procedure code.

This procedure does not spell out any rights of the persons or providers affected by the decision of denial of access, like the internet or content providers, the Union, or the owners of affected websites. It is left unclear, whether and by which procedure they have the right to challenge the decision of the judge. Article 6A, para. 8 provides only for a possibility of objection of the Union against decisions sent to it without spelling out any procedure.

17 See *Ahmed Yildirim v. Turkey*, Appl. No. 3111/10, Judgment of 18 December 2012.

Therefore, not only does the internet law show a preference in the balancing of the right to privacy versus the freedom of expression in favor of the former, it also entrenches this preference in a procedure, which does not provide equal rights for both sides. This, however, raises an issue of the right to fair trial, first, because all decisions are taken within very short deadlines without rights of the defense like a fair hearing according to Article 6 ECHR. No special urgent procedure is foreseen to challenge these decisions and the appeal can be launched only in accordance with the general rules. Therefore, there is a need to bring the procedure in cases of Article 9 and Article 9A into conformity with European standards based on the ECHR.

Furthermore, another important finding of the European Court of Human Rights in Yildirim, regarding the legality and foreseeability is not sufficiently met as many details of the internet law are left to further executive regulation. The Court also requests a strict legal framework, which would include a balancing obligation to determine the proportionality of restrictive measures and it saw the powers of TIB already as "extensive". However, these powers have substantially been further increased although some judicial requirements have been added in the last round of amendments. According to the EU Progress Report for Turkey out of 50.000 websites estimated not accessible, only 6.000 have been banned by a court order.[18] Accordingly, there is a need to review the powers of TIB as well as the question of the requirement of a strict legal framework, whether they are in conformity with the case law of the European Court of Human Rights.

D. Twitter and YouTube Cases

The blocking of Twitter by the Telecoms Communication Agency (TIB) on 21 March, right after the Prime Minister has threatened "to wipe out twitter, regardless of what the international community says" at an electoral rally in Bursa on 20 March, has been the most controversial decision regarding access to the internet in Turkey so far, because the total ban affected millions of people. The explanation given by TIB was that it was acting on several court decisions and it had been technically impossible due to the lack of cooperation from Twitter to block certain incriminated accounts.

The measure was heavily criticized in Turkey, starting from the state president and abroad, for example by the OSCE Representative for the Freedom of the Media. A large number of tweets, however, circumvented the ban, which thus was hardly effective.

On 2 April, the Constitutional Court, based on three individual applications and by an urgency procedure, unanimously decided the closure of Twitter by TIB to be a violation of the constitutional rights of the applicants and order TIB to eliminate the violation. It also argued that blocking access to social media site restricts freedom of expression. Also the effect on democracy in view of the local elections on 30 March were noted. It further referred to the jurisprudence of the European Court of Human Rights and made reference to the principle of

18 European Commission, Turkey, Progress Report, October 2014, p. 52.

proportionality.[19] TIB complied with the decision, which, however, was criticized by the Minister of Justice for not following all procedures. Although the ban on Twitter was not based on the amendments to the information law, it shows the strong role of TIB and raises doubts as to its autonomy.

Also the ban on access to YouTube of 27 March 2014 was based on a court decision, with regard to the law on crimes against Atatürk and Article 8 of the internet law, but implemented by an administrative decision of TIB, allegedly after YouTube refused to take down the incriminated URLs. A later court decision on a partial lifting of the ban seems not to have been followed by TIB, allegedly to keep YouTube under pressure to comply more fully. Again, it was the Constitutional Court, which on 28 May 2014, based on three individual applications, decided that there had been a violation of individual rights and of freedom of expression.[20]

Accordingly, the conformity with the right to freedom of expression was re-established in both cases by the Constitutional Court, who has thus demonstrated that it is taking his new mandate of deciding individual applications in line with the ECHR seriously. This should allow the authorities like the TIB, but also TCTA to bring their practice in conformity with the right to freedom of expression as interpreted by the European Court of Human Rights. They should be aware that much confidence has been lost by the blocking decisions and that the reputation of freedom of expression in Turkey has been damaged on the national and international level. Therefore, it would be necessary to rebuild the trust by reforming the internet law accordingly, bringing it in full conformity with the right to freedom of expression.

However, on 11 September 2014, a new amendment to the Internet law was passed by Parliament, which foresaw additional powers for the President of TIB to block access to the Internet without court order in cases of national security, prevention of crime and preservation of the public order (Article 127 of Law No. 6552). According to Article 126 of this law, the Presidency should also be allowed to collect traffic information of internet users from service providers. However, the Constitutional Court, by decision No. 2014/149 of 2 October 2014 annuled the amendments and ordered a stay of execution for the second part, while the amendment in Article 127 continues to be effective till the publication of the decision of the Constitutional Court. Already by a law of June 2014, the penal courts of peace were replaced by specialised courts to deal with protection measures, in particular also related to the Internet Law.[21]

The use of social media, like Twitter, by demonstrators, has led to a number of cases, known as "Twitter cases" before a court in Izmir, which gave reason to concern. It seemed that the law on demonstrations was being used to restrict the freedom of expression. However, the freedom of assembly and the freedom of expression are closely related and therefore the freedom of expression needs to be taken into account together with the right to assembly. This

19 Constitutional Court, Section Two, Decision of 02.04.2014, Application No. 2014/3986.
20 Constitutional Court, General Assembly, Decision of 28.05.2014, Application No. 2014/4705.
21 Law No. 6545 of 18.06.2014 on Amending the Turkish Penal Code and Some Other Laws.

seems also to have been the position of the Izmir Court, which found a violation only in one case.[22]

I.6. New Remedies of Relevance for Freedom of Expression

A. Individual Application to the Constitutional Court

The individual application to the Constitutional Court was adopted in 2010 and came into force on 23 September 2013. It has been introduced to serve the role of an effective domestic remedy and thus to reduce the number of violations found by the ECtHR. Anyone, who considers his or her rights under the ECHR and the Turkish constitution violated, can apply. In this context, it is of importance that according to Article 90 of the Turkish constitution as amended in 2004, the provisions of international agreements concerning fundamental rights and freedoms like the ECHR shall prevail.

In the Twitter and YouTube cases, the Constitutional Court has indeed found a violation of freedom of expression, which has been accepted, although with criticism, by the concerned governmental agency, the TIB, and the government. This shows that the decisions of the Constitutional Court in these cases have indeed served as an effective domestic remedy.

However, somehow similar to the European Court of Human Rights, the Constitutional Court could become a victim of its success. Since September 2012 it has already received more than 16,500 cases and although it has reorganized its structure and working methods and given already more than 4.000 rulings it is only able to decide on substance a limited number of cases per year. This could lead to a situation, in which the ECtHR might consider the individual application as ineffective, because justice delayed is also justice denied. The issue of the increasing workload was also the topic of a conference on the Individual Application to the Constitutional Court in Antalya in November 2014. The report to the Conference noted that the workload might be one of the main problems the Court might face in the future as the "danger of a huge backlog exists".[23]

B. The Ombudsman Office

The Ombudsman Office has been established in 2012 and started its activities in March 2013. It can receive complaints and reports to a joint committee consisting of members of the Committee of Petitions and the Committee of Human Rights of the Parliament.

Until May 2014, it has already received some 10,000 complaints, which are distributed according to 20 topics identified between the five Ombudsman, which support the Chief Ombudsman. So far, there were only few complaints regarding issues of freedom of

22 Judgment of the 22nd Izmir Criminal Court of first instance of 22 September 2014.

23 See Council of Europe, Needs Assessment Report on the Individual Application to the Consitutional Court of Turkey, 2014, p. 34 ex seq.

expression, which could be partly due to a lack of awareness, given the high number of complaints in other fields. In particular, no complaints had been received by journalists or the media. Partly, this could also be due to the limited means of the Office in addressing the complaints.

One field of relevance was the rules on Access to Information, which are to improve access to personal information by the administration. Furthermore, the Ombudsman Office is publishing reports on major issues of concern like a comprehensive report on the Gezi Park events with recommendations which was due in the beginning of June 2014 and a May days report on the events in beginning of May 2013.

C. The Human Rights Institution

The Human Rights Institution has also been established in 2012 and started operating in 2013. It seems to have had a slow start and to be less operative than the Office on the Ombudsman. It aims at being recognized as the Turkish national human rights institution in the future, according to the Paris principles of the UN. As it is still building up, an application has not yet been made.

The Human Rights Institution can also receive applications or complaints and is in a process of awareness raising in this regard. So far the topic of freedom of expression did not play a role as applications are received mainly from prisoners. It also plans to issue a report on Gezi Park events.

The Human Rights Institution was involved in the Action Plan on Prevention of ECHR violations and thinks of proposing on "Action Plan on Human Rights". It is also involved in human rights education and awareness raising. Prosecutors and judges have been identified together with public officials for training activities.

The development of this institution remaining to be seen, there is an obvious need of coordination with the Ombudsman Office and to make the public more aware of the potential of the new institution, which could also be relevant for freedom of expression.

I.7. Capacity-Building Efforts on Freedom of Expression

The strengthening of freedom of expression is not only a matter of bringing laws in conformity with the obligations under the ECHR as interpreted by the European Court of Human Rights. Of similar importance is to create awareness and to adjust the practice by application of the Convention in the daily procedures and routines.

For this purpose, the EU and the Council of Europe as well as others have engaged in a number of training activities as well as study visits to Strasbourg and other places. On the Turkish side these activities have been mainly undertaken by the Ministry of Justice and the

Justice Academy as well as the High Council of Judges and Prosecutors, but also the Bar Association, involving significant number of participants.

For example, a project on freedom of expression and media in Turkey was implemented by the Council of Europe between 2012 and 2014, with a number of Round Tables and study visits, which involved 370 and 75 judges and prosecutors as well as academics respectively. It is to prepare also a commentary book to explain the case law of the European Court of Human Rights, but also the domestic law and case law of High Courts. Three other projects focusing on raising awareness about freedom of expression in the judiciary were implemented or are planned by the Justice Academy.

Such activities are highly relevant for the development of awareness and proper application of the law in conformity with the right to freedom of expression. In several meetings, judges and prosecutors showed that they had benefited from this experience, which had increased their knowledge and was being taking into account in their practice. An evaluation of the impact of these projects is under way. Some concern is raised by the recent numerous transferals of judges and prosecutors to other positions. This also affected the Justice Academy, which also was restructured. It might well be that this had negative effects on the capacities built by the various projects before.

In addition to training programmes there is still a need for well-designed teaching materials. However, there should also be more effective coordination of all activities in order not to duplicate work like the translation of the judgments of the European Court of Human Rights and to better share the work undertaken. Translation of Court decisions on Turkey as well as their publication and distribution is the responsibility of the Ministry of Justice. As there is a number of actors in the field of freedom of expression, activities should be undertaken for all of them including lawyers, journalists and civil society. It would also be useful to organize training events bringing the different actors together to help overcome the growing polarization. The Bar Association might be able to serve as a platform for such events. Also, with the establishment of new institutions like the Ombudsman Office and the Human Rights institution, they should be involved in such training activities as well.

I.8. Conclusions

Since 2011, there have been important positive developments in the legislative framework related to freedom of expression as well as visible efforts by most governmental actors, in particular the Ministry of Justice and the Ministry of European Affairs to address the open issues like by the elaboration of an Action Plan on Prevention of ECHR Violations. More attentions to the case law of the European Court of Human Rights regarding freedom of expression can also be observed with the judiciary. New institutions have been established for the protection of human rights and new remedies created like the individual application to the Constitutional Court.

Most importantly, the number of journalists in detention has dropped significantly and in defamation cases hardly prison sentence are given anymore. Cases based on Article 301 TPC or the Atatürk Law against journalists have been reduced. Trials were suspended and restrictions on publications lifted. The Kurdish language can be more freely used. Special Anti-Terrorism Courts were abolished. Opportunities for education and training activities on freedom of expression for judges and prosecutors were created and used.

However, it appears that since the May 2013 demonstrations and the Gezi Park events as well as the corruption allegations against members of government the dynamics of reform in some areas has slowed down if not partly been reversed. But the positive changes observed will only be a lasting if the reform process is gaining new momentum again. A number of issues identified already in 2011 still wait to be addressed. The speedy implementation of the Action Plan on Prevention of ECHR Violations has to be a first priority, but more reforms are needed than indicated there and on a faster pace, if freedom of expression is to be brought up to European standards.

The judicial reform packages have brought important improvements, but they stopped short of attacking the main problems, which need more fundamental reforms. On the same lines the Representative for Freedom of the Media of OSCE in a speech at the Rule of Law Symposium in Istanbul on 9 May 2014 has called for a "long overdue, thorough reform of the laws that govern freedom of expression and media freedom". She also emphasized the need to clear the law from ambiguous or vague definitions. Indeed, such vagueness reduces the trust into the law as it can always be used in restrictive ways against freedom of expression. For example, the European Court of Human Rights has found that Articles 301 TPC is excessively broad and vague, but no changes have been made so far.[24]

The evolving practice of the Turkish judiciary as described during the peer review mission gives the impression that the practice in some respects is ahead of the laws, which proves that certain provisions and threats contained in the law are not needed anymore.

The downgrading of the press freedom in Turkey by Freedom House from "partly free" to "not free"[25] has been very critically commented by the Turkish interlocutors, who on the other side admitted that the media were slow in reporting on the Gezi Park protests in May 2013. Freedom House also explains that pressures to fire journalists or make them resign after reporting on sensitive issues like corruption allegations and the fact that the Turkish Prime Minister himself has intervened with the media where the reasons for such deterioration.[26] These facts were not disputed in talks the peer review mission had at the Directorate General

24 See *Altug Taner Akcam v. Turkey*, Appl. No. 27520/077, judgment of 25 October 2011, para. 93, where the Court speaks of Article 301 as "a continuing threat to the exercise of freedom of expression", because of its vagueness.

25 See Freedom House, Press Freedom Report 2013, according to which the score of Turkey deteriorated from 56 to 62 points on a scale of 100.

26 See Karin Deutsch Karlekar, Project Director of „Freedom of the Press", Why is Turkey's Media Environment Ranked „Not Free"?, at http://www.freedomhouse.org/blog/why-turkey-media-environment-ranked-not-free.

of the Prime Minister for the Press and Information, but it was explained that some journalists had resigned on their own will. This might be the case, but seems to have been motivated by the desire to maintain their professional integrity.

There is no doubt that Turkey is a democracy. But as free speech is the oxygen of democracy, the quality of the democracy also depends on how freedom of expression is experienced by the citizens in general and the media in particular. In this respect, the Turkish legal environment together with the insecure working conditions of journalists, who are hardly organized in unions, and oligopolistic media ownership structures still gives the impression of a repressive system resulting in intimidation and self-censorship of the media, which is a challenge for the development of the democracy. Media increasingly appear to focus on entertainment and apolitical content instead of putting more emphasis on public interest programmes and news reporting. Investigative journalism is under threat. The general impression is that governmental control of the media is increasing. The situation is aggravated by a large polarization in society which affects also the media.

In this situation, the so-called "new media" as in particular the social media have gained in importance and it is a matter of concern that the government is trying to increase its control also of this media. The amendments to the information law and the indiscriminate bans on Twitter and YouTube strengthen this impression as do criminal cases against Twitter users. Also the new data retention obligation goes in this direction. There are fears that the planned amendments to the Press Law to include online news platforms and internet journalism might also be used to strengthen control. There seems also to be a lack of transparency in the elaboration of the data protection law, which could interfere with freedom of expression. The rules on access to information should also be clarified and made better known.

The enlargement of the powers of secret services and the strengthening of their immunity together with the high fines for journalists reporting about vaguely defined state secrets must have a chilling effect on any investigative journalism. A chilling effect on freedom of expression, can also be expected from the recent detentions of journalists and representatives of media critical of the government.

In conclusion, the progress made by the judicial reform and democratization packages and other efforts appear to be at risk in view of recent tendencies to invigorate the control over the media and to extend it also to the new media on the internet.

I.9. Recommendations

- In spite of significant improvements in law and practice towards freedom of expression, some concerns of the past still need to be addressed for which purpose the Action Plan on Prevention of ECHR Violations can be usefully employed. However, the momentum needs to be accelerated again.

- Structural problems need to be addressed like media ownership structures or poor working conditions of journalists contributing to a general climate of intimidation and lack of public interest reporting
- New legislation should be elaborated in a transparent way and by consulting all relevant actors; the increasing practice of package bills does not allow for a proper legislative process and should therefore be avoided.
- Autonomous institutions need to be seen as independent and therefore need to act independently from the government.
- The freedom of the social media and other new media like online information platforms as major instruments of freedom of expression needs to be better protected.
- The number of possible interferences with freedom of expression and the work of journalists in the existing legislation needs to be reduced.
- In balancing freedom of expression with other rights the public interest function of the media and the principle of proportionality should always be taken into account.
- In determining the legitimacy of interferences with the freedom of expression, the principle of necessity in a democratic society corresponding to an urgent social need has to be taken into account.
- While the suspension of trials is a move in the right direction, care has to be taken that reformed legal provisions benefit those indicted under previous legislation.
- In order to meet the requirement of clarity and pre-visibility, laws should not contain vague or ambiguous provisions, which therefore need to be made more precise by legal reform.
- Measures should be undertaken to strengthen the independence of the judiciary; governmental criticism of the judiciary should be avoided and separation of powers respected.
- The welcome new remedy of an individual application to the Constitutional Court must not lead to undue delays in dealing with complaints regarding the ECHR.
- Particular support should be given to independent institutions, like the Bar Associations
- Efforts should be made to increase public awareness of the newly created Human Rights Institution and the Ombudsman Institution. There is an obvious need to enhance cooperation between the two institutions, which tasks can overlap.
- Efforts need to be made to overcome the polarization in the media and in society. Critical media must not be intimidated by judicial means.
- Freedom of expression and freedom of assembly are closely related. The law on demonstrations must not be used to restrict freedom of expression.
- Efforts should continue to offer training and expertise with the work of the ECtHR and relevant institutions in other European countries on freedom of expression.

Section II written by Prof. Dr Katrin Nyman-Metcalf[27]

II.1. Executive Summary

The importance of **internet and social media** is growing and there have been recent changes to legislation like Law 5651 on internet. Pending amendments to the Press Law would allow a possibility for websites to be seen as mass media in the legal sense with benefits (press cards for contributors, eligibility for official advertisements) but also responsibilities. Regarding internet content the Telecommunications Presidency (TIB) has the power to ask for content to be taken down or to block it, based normally on court decisions. Recent changes include the creation of an Association of Internet Providers, to act as a counterpart for discussions with the regulators concerning notice and takedown of unsuitable internet content.

The most famous instances of cases on internet content concern **bans on access to Twitter and YouTube.** After the Constitutional Court ruled against the Twitter ban, there has been some progress with the regulatory authorities entering into a dialogue with the providers and looking at more limited measures. It is not in line with freedom of expression to block such important channels for debate and information and these measures were disproportionate.

27 Prof dr Katrin Nyman-Metcalf, Professor of Law and Technology, Tallinn University of Technology, Head of Research e-governance Academy, an independent expert

The role of **regulatory agencies** like TIB, the Radio and Television Supreme Council RTÜK and the Information and Communication Technologies Authority BTK is important as such agencies have an increasingly important role due to convergence, liberalisation, new media, etc. Regulators must operate with maximum transparency, applying principles such as proportionality and necessity. Turkey has modern regulatory agencies but there is room for improvement as far as the independence from the Government and transparency is concerned.

The **media ownership** situation is highly problematic and there are no ongoing reforms. Owners - large conglomerates, subject to political pressure through dependence on public contracts in other areas of the economy – interfere in editorial freedom. Editors and journalists fear this and exercise self-censorship. There is an absence of specific legislation on media ownership and thus no effective tools to deal with this. The problems are exacerbated by a lack of transparency on media ownership and lack of mechanisms to identify real (including indirect) ownership. The **digitalisation process**, handled by RTÜK, is under way but has been delayed by legal challenges to tenders, instigated by existing powerful media owners. The entire process may need to be redone, either a new tender process or a new method of licensing.

A different area of concern is **working conditions for journalists**, with lack of job security, difficulty to get the press card which is issued by a government body and no proper application of labour legislation. In such a situation there is a high level of self-censorship. There is no system of press (media) **self-regulation** and codes of ethics are not applied in any consistent fashion. The **polarisation** of the media (as of society) means that there is no realistic outlook for a self-regulatory system.

II.2. Introduction

The main issues of interest for the study identified and reflected in the Terms of Reference included:

- The Penal Code (and other relevant legislation) concerning defamation, obscenity, offences against public order or state security, support for criminal organisations, influencing trials, breaches of confidentiality, matters related to disclosure of information
- Article 301 of the Penal Code on insult of the Turkish nation - subject of many complaints in the European Court of Human Rights - and the Law on crimes against Atatürk
- The Anti-terror Law and cases under this law against journalists
- The Internet Law and possible restrictions to internet through this law
- The activities of the judiciary, its independence and quality including its willingness and ability to apply principles of the European Convention on Human Rights (proportionality, necessity in a democratic society of any restrictions to freedom of expression)

- The functioning of regulatory agencies, including their independence and efficiency and whether they support or hinder media freedoms (including on the internet)
- Imprisonment of journalists for defamation, terror offences or for other reasons as well as suspended sentences and the potential chilling effect this has on freedom of expression
- Poor working conditions and absence of job security of journalists having a negative effect on freedom of the media
- Ownership issues, especially the concentration of media ownership in large corporations with widespread business interest and the influence owners have on media content
- Self-regulation and media ethics

The mission confirmed that these points are indeed of interest. It is essential to look at implementation of law, as the recent legislative changes – which are positive – must also be reflected in practice. Principles expressed by the European Court on Human Rights (ECtHR) such as proportionality, necessity in a democratic society and legal basis for any limitations of freedom of expression must be applied not just by courts but also by regulatory authorities and any other organs that apply laws and regulations. In addition to this, the mission confirmed that many of the problems of the Turkish situation for freedom of expression and more particularly freedom of the media are due to the polarisation and politicisation of society as well as of media; mistrust between government and opposition and the media of the different fractions; lack of independence or at least of the perception of independence of regulatory agencies; and other such factors that are difficult to pinpoint exactly or to quantify.

As additional issues of interest that were not explicitly set out in the Terms of Reference, legislation on state secrets as well as legislation on data protection turned out to be of interest, as it appeared such legislation in some instances is used to limit freedom of expression – or could potentially be used in that manner. Freedom of expression includes the right to impart as well as to obtain information. At the same time, privacy is protected under the European Convention of Human Rights (ECHR) as well as under the European Union (EU) Charter on Fundamental Rights, which also contains an explicit clause on data protection. Thus, the need for a careful and proportionate balancing of rights is essential.

On the positive side it can be mentioned that a number of taboos in Turkish media have (almost) been lifted recently. This includes the use of Kurdish language in media and the discussion on Kurdish issues as well as matters related to the Armenian question. All interlocutors agreed that it is now possible to discuss these issues in a more open fashion than only recently, although we also experienced that certain things like the use of the word "genocide" in relation to the Armenian issue is still sensitive.

It was pointed out by many commentators that there is a high number of newspapers as well as of influential columnists in Turkey that are in opposition to the Government. Although this may be over-interpreted as a sign of plurality and diversity, it is true that it shows a media landscape that allows some freedoms.

II.3. Developments to the Penal Code and Anti-terror Legislation

A. The Penal Code

There have been a number of recent amendments to the Penal Code (and other relevant legislation), which should support freedom of expression. However, the implementation of the provisions remains to be seen. Some interlocutors said that the judiciary in general is not supportive of freedom of expression and would tend to interpret provisions in a restrictive manner. This was contradicted by representatives of the judicial sector who instead pointed to efforts to incorporate principles of the ECHR. This has been further elaborated in the section written by Professor Benedek above.

Turkey has been the subject of many complaints in the ECtHR and has been found in violation of the Convention on numerous occasions. Cases have been in relation to convictions under the Penal Code for offences insulting Turkishness but also regarding convictions under the Anti-Terror Law. Recent legislative amendments go in the direction of lessening the situations where people can be convicted in violation of the ECHR but whether these changes will be sufficient will primarily be shown through practice. There are various attempts to ensure that the judiciary and others concerned are familiar with ECtHR case law and take the principles expressed in it into account.

Regarding defamation, there are constantly many cases brought by politicians, including the Prime Minister. This indicates that public figures have not accepted the principles of the ECtHR about politicians and others in the public eye having to accept more scrutiny and criticism by media.[28] The prosecutors as well as judges that we met pointed out that many such complaints are not pursued, including complaints by the Prime Minister. They insisted that they operate independently and are able to dismiss complaints from the highest political level, based on an independent evaluation of facts. If there is defamation of the person rather than of political decisions it can be a case worth pursuing – not if it is part of a political debate. There is no reason to distrust these statements *per se* and it does appear that there are fewer cases on defamation by politicians, but the number is still higher than what should be the case in a democratic society with freedom of expression. Politicians, public officials and other public figures should refrain from making complaints and the courts should signal this by being very restrictive regarding what complaints to pursue. The special press prosecutors underlined that they have never brought charges based on their own monitoring of publications (which covers publications printed in the respective jurisdictions of the prosecutors) but instead have acted only based on complaints. Nevertheless, having special prosecutors with a mandate to monitor printed publications can send a signal that publications must be cautious, which may lead to self-censorship.

Our interlocutors informed us that one reason for the perception of many cases of defamation is that due to a short statute of limitation for defamation, investigations are started more or less immediately if there is a complaint without time for a preliminary investigation. (We were told the statute of limitation was four months although it is six months.) In any event, the Press Judges suggested this fact could be behind allegations of many cases against

28 As famously elaborated in the *Lingens* case for example.

journalists; they confuse the opening of an investigation with an indictment. The judges were eager to stress the high proportion of investigations that have as their conclusion that no indictment is made.

As a relatively new risk it was mentioned that there has been an increase in blasphemy cases. We did not manage to get much information about such cases and it appears that there may not be so many, but those that have been brought have been against well-known persons and thus have attracted attention.

B. Article 301 of the Penal Code: Insulting "Turkishness"

Article 301 of the Penal Code is proposed to be amended but this has not been done yet. It is an open question if it will be amended or abolished. The legislation is still used quite frequently and means a restriction on freedom of expression that may be difficult to properly predict, thus lessening legal certainty and having a chilling effect.

C. Anti-Terror Legislation

The amendments to the Anti-Terror Law should make it more difficult to use this against journalists by stipulating that propaganda will not be punishable if it does not include encouragement to violence. It is too early to say if this improvement will be seen in practice as the terms used are open to interpretation. Some commentators pointed to risks that such legislation would instead be used more, as it still permits wide interpretations of the crimes it includes. The link to the National Intelligence Services Law and the opportunities to use this Law to hinder publication of certain information was brought up in this context. Generally, commentators from media and civil society were sceptical about the changes and pointed to the possibility of indictment for terrorism offences still hanging over journalists as a threat and as something that induces to self-censor sensitive topics.

II.4. Imprisonment of journalists

One of the positive developments noted during the mission in May was that there were fewer journalists imprisoned, none on defamation and fewer on terror offences or for other reasons. The assessment of this varies widely between different interlocutors, which is due both to issues of definition of who is a journalist and of what crimes are seen as linked to journalistic activities. There remain possibilities to imprison journalists on spurious grounds, if the judiciary does not fully respect freedom of expression. As noted above, on 14 December 2014, a number of journalists and media respresentatives were arrested in a police raid on government critical media.

Turkey has a special prosecutor for Press Crimes. Such crimes include various matters related to publications in the media like revealing the identity of victims of sexual offences or of underage persons as victims or perpetrators of crimes. Relatively few cases concern matters under the Penal Code such as insult, slander, attempting to Influence a fair trial or violation of confidentiality. Only a small proportion (about 15%) of matters investigated is pursued. This was presented as evidence of the freedom of the media. Although it is positive that there are

no excessive investigations of offences committed by the media, it is difficult to draw too many conclusions from these figures as it is a complicated web of factors that affect how free media is: how much editorial freedom there is, do journalists exercise self-censorship, is the structure of media really diverse and so on.

II.5. State Secrets and Data Protection

Data protection legislation is one way to express principles of protection of privacy – a reason to restrict freedom of expression. There are some variations between European countries on the exact systems for data protection. Provided the restrictions are set out in law and are applied in a proportional manner to the extent that is necessary in a democratic society the ensuing limitation to freedom of expression is in line with best European practice. The independent monitoring of data protection by independent organs is a feature of the European data protection landscape. Turkey lacks data protection legislation, although a constitutional principle was introduced in 2010, but a draft law is in the process. The independence of the proposed agency was questioned by commentators as supposedly it is to be created by Government. This was giving rise among civil society representatives to fears that data protection may be used to unduly restrict freedom of expression. It is to be hoped that the system created will show such fears are not needed.

Fears were expressed that legislation on state secrets would be abused to silence journalists. The vague definitions in the legislation would allow for this. Some commentators even mentioned that this may be used to cancel out positive changes to the Penal Code and Anti-Terror legislation, by finding leaking of classified information a terror crime. It was mentioned by journalists that in cases of leaked classified information, legal action is often taken against journalists and media outlets, including bans on broadcasting, rather than against the officials that leak the information. The intelligence service MIT is a powerful actor that can act without a court order and without any transparency to requisition information from journalists or others, to monitor data and so on. Access to information legislation exists, with strict deadlines for when information must be made available. It appears as if the legislation mainly works, although if some material would be deemed extra sensitive, including on political grounds, it may be isolated from the effect of the law through the state secrets law, without due regard to necessity and proportionality.

II.6. Application of principles of the European Convention on Human Rights

Turkey has been subject to a number of convictions in the ECtHR for various offences, including defamation cases where the Court has found disproportional reaction including in the form of suspension of licences by the regulatory authority RTÜK. Courts as well as other concerned authorities are aware of the European case law and take measures to include it in their decision-making just as also recent legislative changes go in the direction of incorporating the findings of the Court. However, the effect of this will be shown by implementation and there remains work to be done. It is difficult to get the impression of how genuine the desire is to implement the ECtHR way of thinking. Some authorities and persons

appear genuinely willing to change practice so that the principles are incorporated whereas others may be claiming to respect the verdicts without a genuine understanding or willingness to adhere to the principles expressed through them. Given the number of cases against Turkey and the number of convictions, it is clear that quite a lot of work must be done to turn around this unfortunate situation. There has been a reduction of cases recently and it is to be hoped this trend will continue.

The independence of the judiciary and its willingness and ability to apply principles of the ECHR is a key issue. Many of the legislative changes that are positive may not have any effect if the judiciary applies them in a restrictive manner. There have been some positive changes in recent years, most notably the introduction of the possibility for individual complaints to the Constitutional Court (since September 2012). The high number of complaints and convictions in the ECtHR was an important incentive to introducing this complaint procedure and it has proven to be very much used – for relevant complaints as well as (inevitably) various less appropriate complaints, especially before the procedure has become very well known.

During our mission we were told of several cases in Turkish courts where ECtHR case law was explicitly referred to and used to support freedom of expression, for example in the context of what criticism and scrutiny of public officials that should be allowed without bringing convictions for defamation.

II.7. Internet legislation and cases regarding Internet

Internet is primarily regulated by Law 5651 from 2007. This Law was amended in February 2014 and Septembre 2014, although the later amendments were partly declared unconstitutional by the Constitutional Court. An Association of Internet Providers was created at the same time (operational in May 2014), which will be the counterpart for discussions with the Telecommunications Agency (TIB) and the Information and Communication Technologies Authority BTK.

TIB has the power to block internet content and ask for it to be taken down, in the manner which is common in the EU and many other parts of the world. It is in addition possible for the victim of e.g. defamation on the internet to sue the content provider, if the requisites for the crime are at hand – irrespective of the notice and take-down procedure of TIB. TIB does not monitor internet content but acts based primarily on court decisions that have found content in contravention of laws or in some cases by itself based on complaints. There are eight different offenses in Law 5651 regarding which TIB can react. Internet users are not obliged to first contact the content or service provider to ask for a take-down, as it may be hard for individuals to identify the proper party. However, for the agency asking for take-down is always the first step if it decides to act on a complaint. If that does not work, individual web-site URL-s will be blocked if possible. TIB publishes why sites have been blocked or content taken down, rather than just the regular “Error 404” message, so with this they are more transparent than many similar agencies in other European countries.

Pending amendments to the Press Law would allow a possibility for certain websites to be seen as mass media in the legal sense with benefits (availability of press cards for contributors/journalists, eligibility for official advertisements) but also responsibilities under press legislation. Such or similar actions are seen also in EU, as part of an attempt to clarify definitions of various types of media, where existing definitions do not fit in the internet age.

The cases to ban access to Twitter and YouTube are worthy of criticism, as these bans were disproportionate and are more worrying then the legal provisions. After the Constitutional Court finding against the Twitter ban, there has been some progress with the responsible regulatory agencies entering into a dialogue with the providers and looking at more limited measures. Whether their approach in the future will be more proportional remains to be seen. This is a question of implementation rather than legislative change. At the same time, after the mission in May 2014 legal amendments were made (September 2014) that would permit the President of TIB to block access to the Internet without court order in cases of national security, prevention of crime and preservation of the public order. In addition, there were provisions on collection of traffic information of internet users from service providers. The Constitutional Court (decision No. 2014/149 of 2 October 2014) annuled certain amendments and ordered a stay of execution for some parts, as mentioned in the part written by Professor Benedek above.

The agencies stressed the creation of the Association of Internet Service Providers as a positive step, as this gives a counterpart with which to discuss. TIB and BTK claimed that in the Twitter case they had made several attempts to contact Twitter to make them take down unsuitable content but Twitter had not responded. It is not possible technically to bloc selected content on a site such as Twitter, which does not use URL but SSL, so the agencies claimed there was no other possibility than blocking the entire site. Only after this was done, did it become possible to communicate with Twitter and since then it has been possible to take targeted measures. TIB and BTK did not criticise the Constitutional Court decision that overturned their ban, but indicated that they had not been happy to take such restrictive measures but they had no alternative. It is not possible to ascertain with any certainty to what extent it is correct that there were serious but failed communication attempts. Also, it is not the aim of this report to go into details of specific cases. It is quite clear that to ban the entire Twitter or You Tube networks is disproportional. If there are difficulties to get serious response from the relevant companies, more attempt must be made. It is not in line with freedom of expression to stop such an important channel for debate and information as Twitter (or You Tube). In weighing pros and cons of having some unsuitable content available because of difficulties to get it taken down or closing an essential communications channel, the decision must fall on the side of permitting the content – even if it legitimately should be taken down if possible.

The question of how to react to unsuitable internet content is one that is discussed all over the world, given that this medium does not fit well into traditional and established media regulatory systems and it developed so fast that regulation did not keep pace. There is now an

ongoing discussion about how to avoid that internet becomes a lawless space while at the same time maintaining its freedom.[29] However, even if the question on how to deal with internet content may to some extent be open, it is clear that any restrictions to freedom of expression need to be proportionate, necessary in a democratic society and based on law, just like any limitations of human rights. In Turkey, the issue of proportionality of the bans on internet content has not been well handled.[30] Social media is very important in Turkey with many users of Twitter for example. In the important Gezi Park events in 2013 social media played a key role in helping to organise events and keep people informed about developments. Several commentators hinted that this important role of social media such as Twitter was a key reason for the harsh reaction to it – much more than the supposed reasons of defamatory or otherwise unsuitable content. When traditional media becomes less independent and more (self-)censored, it is social media that fills the need for a truly free debate – as is seen in Turkey in recent years.

II.8. The Regulatory Agencies

Regulatory agencies for communications everywhere have an increasingly important role with convergence, liberalisation, the growing importance of social media and other trends. This means that it is important that these agencies operate with maximum transparency, applying principles such as proportionality and necessity just as courts do. Although Turkey has modern regulatory agencies, based on European and international practices, there is room for improvement, mainly as far as the independence and transparency of the agencies is concerned. There are three main bodies for communications (plus a competition authority): the Radio and Television Supreme Council RTÜK; the Information and Communication Technologies Authority BTK; and the Telecommunications Presidency (TIB).

RTÜK is a regulatory agency, modelled on the European model of such agencies. It has just celebrated 20 years of its existence and its creation more or less coincided with the introduction of private broadcasting in Turkey. RTÜK is a member of the European Platform of Regulatory Agencies (EPRA) and participates actively in this network. The Agency has modern premises and is well equipped. As one of few regulators in Europe (including France and Serbia) it aims to monitor all programmes, although in reality the monitoring is not quite 100%. RTÜK also handles complaints. It is moving somewhat more toward a complaints-driven process but still sees the ex officio monitoring as essential. Sanctions start with warnings after which fines may be imposed, suspension or cancellation of licence is rare. RTÜK is set up under Law 6112 on Media Services, which incorporates the Audiovisual Media Services Directive to a large extent. This Law was adopted in 2011 and replaced the 1994 Law that created the agency.

Some commentators criticised RTÜK for bringing an excessive number of cases based on obscenity, having an unduly restrictive view on what is obscene or otherwise unsuitable.

29 Recently, in May 2014, the Council of Europe published a Guide to how freedoms apply in cyberspace.

30 In the Yildirim case in the ECtHR the Turkish ban on Google sites was found disproportional and not necessary.

However, this is most probably rather an expression of the polarisation of society also when it comes to values than a deficiency in the work of the agency or direct political pressure. There are large divisions in Turkish society on cultural and social values. RTÜK admitted that they try to act based on what are the real concerns of people but that this is difficult, not least because of the mentioned divisions. Moving from more ex officio cases to mainly reacting to complaints should better reflect real concerns, but in a polarised society the concerns of some will not be accepted by others. Decisions of RTÜK can be appealed to the Administrative Court. If some decision is overturned, this is used as an indicator to not make similar ones in the future and in the same way, the court´s approval of a decision helps to make it part of the benchmarks that RTÜK makes for broadcasters.

The work of RTÜK is quite transparent even if there is always room for improvement on how to make decisions and processes easily accessible to the public. However, for the BTK and TIB there appears to be a need to operate under greater transparency as their working methods are not easily accessible to observers. They do publish decisions in accordance with legal provisions on this and have policies on transparency but several commentators claimed that it is not easy to follow and understand their work. As they deal with notice and takedown of internet content and as there is bound to be different views on whether to block certain content and to what extent, with as much transparency as possible of the working methods, the deliberations held, etc., speculation is minimised and it also makes it easier on appeal to know what arguments to bring. The need to motivate any decision explicitly is also useful for the authority as it concentrates the minds and can help to keep decisions proportionate. Legal provisions on transparency may not be enough, if there is still a perception that the work is not easily accessible, but policies of outreach may be needed. Freedom of expression on modern media is a difficult balance in every country and it is essential that society understands the actions of relevant authorities.

BTK and TIB stressed that they do not monitor internet content and only act on complaints, often following court decisions finding content in contravention with laws. The agencies maintain a hotline for complaints and normally engage in a dialogue with the content or service provider to get content taken down. TIB, the responsible agency has legal as well as technical experts on its staff: the first assess the complaints and see if there is reason to ask for content take-down – the technical experts find out the owner/operator of the site (via open sources) and assess possibilities to take down and/or block content in case the relevant party does not remove it voluntarily. The agency was eager to stress that they do consider proportionality in all instances and that the high-profile cases like the Twitter ban or the reaction against Google in the Yildrim case were due to the relevant parties not reacting to take-down requests.

In addition to emphasising transparency, it is important for the regulatory authorities to increase their independence from the Government and strengthen also the perception of independence. The Supreme Board of RTÜK for example is appointed by Members of Parliament with a certain number of members that can be appointed by the majority and a (smaller) number by the parliamentary minority. Although the qualifications set out in law for

the members are similar to those in many countries and the idea is that they should be professional and act independently, the perception is one of politicisation – with members having to please "their" Members of Parliament. With a more independent method of appointing the board it would be easier for them to explain their work and avoid the suspicion that they are acting on political orders from any one side. The same is true for the telecommunications organs.

In addition to the sector-specific agencies there is a Competition Authority in Turkey. It appears to work well and in line with European standards, the law creating it (in 1997) is based on EU standards. Competition law is an area of law, which is very similar all over the world and especially between European countries.

It is currently under discussion in Turkey whether the Competition Authority shall also deal with sector-specific issues.[31] The Authority has appealed a decision that they should do so. This discussion does not directly affect the main topic for this report and there are different solutions in different European countries, so it is not possible to prescribe one solution as best European practice. On the one hand, modern technological developments such as convergence, digitalisation and others mean that competition authorities are getting more competence also over e.g. media related issues. On the other hand, media still entails a need to consider special issues such as media content, impartiality and plurality and so on. It has been expressed that in competition law, people are customers – in media law they are also audience, and the concerns and need of protection for one group are different than that for the other. Currently the Competition Authority deals with quite a lot of cases that involve media but are restricted to how they can act on these, for the above stated reasons.

II.9. Media ownership

The ownership situation is problematic with no outlook for improvement in any near future. Most interlocutors agreed that this is a major problem and an area where international recommendations have not been followed. The problem is that powerful conglomerates own all sorts of businesses, including media, and there are more or less direct links between different areas of economic activity. The Government reportedly puts pressure on companies to buy media outlets in exchange for other positive treatment like winning contracts for construction or similar - it being understood that they will use the media outlets in a fashion that is to the liking of the Government. In this way, the Government can ensure favourable media treatment while still keeping the media outlets nominally at arm's length. For example, in order to get important public works contracts the owners of groups containing construction companies as well as media do not want the media outlets to upset politicians or public officials, for fear of this affecting totally different business prospects. The underlying problem here is the lack of respect for editorial freedom. Pressure is exerted and even if it is not, there is a real risk of self-censorship for fear of such pressure.

31 Currently they give opinions to RTÜK and discuss cases quite frequently, but leave sector specific issues to the sector specific agencies.

Legally there are currently no effective tools to deal with media ownership. The broadcasting legislation contains some rules on media ownership but only concerning terrestrial broadcasting, which leaves out many important channels in the modern media market, and even these rules are rather permissive in that up to four media outlets may be owned for the same territory. Only incorporated legal entities can own broadcasters and with no more than 50% of foreign ownership, however just relating to direct ownership. Although there is no reason to doubt the professionalism of the Competition Authority its area of competence is limited. It cannot normally act on cross-sectoral concentrations as this mainly does not fall under competition law (in any country).[32] Especially for evaluating and dealing with abuse of dominant position, but also linked to agreements between undertakings, the definition of the relevant market is essential. Dominance across different markets does not fall under competition law. The work of the Competition Authority may have an indirect effect in that media outlets avoid becoming so big that they are dominant in the sense of competition law, which can be achieved by big groups owning many things designing suitable solutions.

There would be a need for specific legislation or other rules to prevent the kind of powerful media groups that dominate the media landscape in Turkey. This would be quite a complicated legislative task and currently there appears to be no initiatives. Quite the opposite: we were told by several interlocutors that the Government and forces closed to it have used leverage they have through various holdings and assets to actively interfere in media ownership (including the most important news agency, Anatol). At the local level, it has happened that mayors have forced closure of newspapers on spurious grounds like lack of proper licences, in the same manner as for local restaurants or shops.

Our interlocutors confirmed that there are also media outlets in Turkey that are more independent. It is not theoretically impossible to operate without being part of some important group. However, such media outlets are of lesser importance and do not include any of the outlets with the biggest reach. Instead, they have a "dissident" image and according to some are allowed to operate without much interference to illustrate a falsely positive image of media freedom in the country. Minority media (like for example Greek newspapers) are among the few publications that are owned by journalists. They are often small with a limited reach, but do enjoy editorial freedom and independence. Having been banned from receiving support from the various public funds that exist, this has changed in recent years so the situation for minority media has improved, even if the financial situation is often difficult because of the limited market of the media. Even if funding possibilities in theory do exist, there is still discrimination against minority media and some minority representatives also mentioned that they resent that their greater freedoms and possibilities are presented as if it is a gift to be grateful for, rather than a right.

32 Among media related decisions of the Competition Authority can be mentioned fines on newspapers for anti-competitive agreements related to newspaper distribution, involving the main media groups. The system of media planning agencies that deal with advertising distribution to (printed) media has also been challenged under rules on abuse of dominant position, as it proved almost impossible for a new entrant to enter the newspaper market (in 2008).

Recognising that the problem of the ownership structure of media in Turkey is a major issue and one which does not have an easy and quick solution is not a reason to avoid dealing with it. Legal tools must be provided by special legislation, suitably sector-specific legislation. There are precedents from different countries on legislation setting out special rules for media ownership. In such legislation any appropriate bans or prescriptions can be made. It should be carefully considered what issues need to be dealt with and the appropriate legislation should be suggested.

The problems are exacerbated by a lack of transparency regarding media ownership. This means that the reasons some issues may or may not be reported are not known, which leads to speculation, lack of credibility of media and a difficult working situation for journalists who may not know what is off limits and why. Officials in regions, towns and at other levels as well as linked to central Government and in addition public officials and not just politicians may be "protected". Furthermore, business people with links to one or other owner may be able to affect media content, for example making it impossible to investigate allegations of corruption, lacks in safety standards, poor working conditions and so on.

Ownership rules must be able to deal with the *real* ownership and thus go beyond only the surface, to include also constructions made to hide real ownership. There are many examples from different counties, usually containing rules on how many percentage of ownership of a legal person is to be regarded as ownership, if ownership by close relatives is to be considered as well, etc. –designed to make special constructions to camouflage ownership as difficult as possible. Also, the maximum transparency and accessibility to documents is important to deal with the tangled web of ownership. If it is easily seen who is the owner of a media outlet, it is possible to determine risks of undue influence and similar. Currently there are almost no rules in media legislation, including the broadcasting law that give authority to regulators to monitor media ownership. Even if regulatory decisions are published they are sometimes incomplete, with reference to business secrets of the concerned parties.

In addition to the tangled web of ownership, there are allegations that tax legislation is applied selectively as a tool for punishment of "uncomfortable" media – or as a reward, through "tax forgiveness". The lack of transparency on application of tax law enables this. The threat of action based on tax law or something similar is there is the background, should the media outlet become too influential. It was clear from our discussions that even if exact allegations of risks and threats are by nature hard to evaluate, there is a climate of mistrust and suspicion. Allegations voiced also include hidden influences on supposedly independent media from those attempting to create or support the "parallel state", especially the supporters of the nemesis of the Prime Minister, Fetullah Gülen.

In this context a brief comment can also be made on digitalisation, which is handled by RTÜK. The process of digital switchover is ongoing in Turkey but has suffered delays as all four tenders for national digital platforms (and one of seven for regional ones) were cancelled by the Administrative Court. Until now three of these decisions have been upheld by the Council of State and one is pending. The Competition Authority is also conducting a formal

market inquiry that should be completed at the end of 2014. These factors may mean that the entire process may need to be redone, with either a new tender process or perhaps a new method of licensing. RTÜK is currently analysing the Court decisions. Speculation on why there have been these obstacles to the process include that existing broadcasters are worried about digitalisation and do not like it, as it disturbs there existing situation including their existing dominance. They are not interested to make the big investments needed and at the same time do not want others to come into the market in important positions in the changed landscape of digital broadcasting. In any event, Turkey is aware of the necessity to deal with the issue and to do it soon, so if it is not possible to do it via a tender, allocation through law may be used to get the process started. There is a transition plan and although the date of 17 June 2015 that is set for the switchover may not be realistic, the delay should be as small as possible. As a remark on this issue, it can be said that the process of digitalisation is complex and delayed in many countries around the world. How exactly the launch is handled varies even among EU members. It appears as if Turkey by and large is in line with the various processes used in other countries, where there are various examples of ad hoc procedures and involvement of different organs and processes than in other licensing matters. Maximum transparency can be underlined also in this context.

II.10. Working conditions of journalists

It was agreed by most interlocutors that the working conditions for journalists in Turkey are generally poor. The competitive environment and problems for traditional media with it being out-competed by social media with many journalists losing their jobs, means that media owners are not interested in improving the situation as they will have no problem to find replacements for any journalists who leave (including because they are pushed out if they are too "difficult"). Journalists who are fired often do not find new positions because of an informal "blacklisting" and as many publications prefer untrained journalists, less likely to cause trouble. Only about 1% of journalists are unionised so unions are uninfluential. There is a lot of difference between the role and job security of different categories. Some very influential columnists have very secure positions and can influence politicians, while a large majority of journalists have insecure labour conditions and worry about not just political pressure but also pressure from their owners.

There are under current Turkish law two legal possibilities to organise working conditions for journalists: either under special conditions for journalists or under general labour law. In the latter case, there is no concession for special conditions of journalist and there are less privileges for them – the conditions are more at par with other professions while the working conditions specific for journalists offer various more beneficial conditions. It appears as if owners can decide which law to apply with their being no guarantee that the law for journalists shall apply even to individuals who clearly are within the category of journalists.

In such a working situation it is not surprising that many commentators pointed to a high level of self-censorship. Journalists fear for their jobs and the threat may be political or linked to media owners or just to a fear of displeasing editors. To underline the precarious situation for

journalists, the important Press Card is issued by a government body, which is not in line with best international practice. It is hard to obtain and presents a potential means of government influence over who is regarded as a journalist. Even if there is a Commission[33] consisting of representatives of journalists associations and similar that deals with the cards, the fact that it is under the auspices of the Prime Minister´s office – the Directorate on Press and Information – means there is no perception of independence. This perception is not refuted by the Commission having a membership of professionals, but there should not be any government involvement in such a Commission.

The question of working conditions for journalists is complex to the extent that such conditions partly are to be set by the media owners as part of their freedom to conduct business. However, this does not mean that there are no considerations of a legal and human rights nature linked to the conditions. Partly, this follows from accepted social and economic rights that affect the organisation of the labour market. Perhaps even more importantly in the particular case of media in Turkey, the conditions are negatively affected by some legal provisions as well as by the ownership structure of the media market. There is a lack of proper editorial freedom due to pressures of a mixed political-economic nature that means that media owners operate based on other considerations than those linked to the media content. Journalists risk losing their positions if they act outside of strict confines set for them and the structure of the media market means that it may be nearly impossible to get new employment.

In the modern society and media environment, accreditation of journalists has lost a lot of its reason for existing. Access to information should be a general access for all citizens, regardless of purpose, so journalists have no special rights in this respect. Also when it comes to access to debates and events, with so many important events being supported by on-line material accessible for everyone, the accreditation also here is less relevant. With groups such as bloggers, citizens journalists, social networking commentators and similar often having a big audience and being an important source of information and news for many people, the distinction between these groups and professional journalists becomes increasingly blurred. In such a situation it is not suitable to exaggerate the importance of accreditation and the special status of certain journalists over others. In Turkey the situation is especially unfortunate, as it is very hard to get the Press Card and with it the most coveted status as accredited journalist.[34] It takes twenty years to get a permanent Press Card and any such card (also the temporary ones) presupposes an employment contract with a media house. This means that young journalists, free-lance journalists and other persons who may fit into the new categories of media persons mentioned above are excluded from a document to which too much importance is attached. There is thus a double problem in what has been said here: the Press Card is given undue prominence and obtaining it is too difficult.

33 The Commission has 13 members from the largest journalists´ associations, trade union, professionals in the media field and also 2 members from the Prime Ministers Directorate General for Press and Information.

34 We were informed that there is a possibility to get accredited to events even without the Press Card but all interlocutors nevertheless agreed on the importance of the Press Card.

However, the main problem in this respect is how the Press Card is issued. Namely, this is done by a Commission under the Prime Minister´s media department. This opens up for at least a possibility for the Government to exert pressure by withholding or providing the important Card according to political preferences. In any event, there is a perception that this is the case and this alone can serve as a reason for self-censorship, not least given the difficult labour conditions for journalists. We were told that it has got easier to get the Press Card, but the restrictive rules still exist and can thus have a chilling effect even if perhaps practice has got a bit more lenient on the demands made.

II.11. Media (Press) Self-Regulation

There is no system of press (media) self-regulation. Journalists´ associations have made codes of ethics, but these are not applied in any consistent fashion although some newspapers have their own ombudsmen, even if few and not too powerful (and growing less powerful). The polarisation of the media (as of society) means that there is no realistic outlook for a self-regulatory system as different publications are not able to work together. Various elements of real or potential political pressure on media mean that there is a high instance of self-censorship of media. Journalists we discussed with told that it is possible to e.g. criticise the government but only in a general and demagogic manner, not on specific issues. Such rules and limitations are not necessarily set out anywhere but journalists and editors are well aware of the limits within which they should operate.

Very many of our interlocutors, especially from media and civil society, stressed the problem of polarisation of the Turkish society. As it was expressed, government media or government supporters can see nothing good at all with opposition arguments and vice versa. In such a climate, it is very difficult to get any agreement on voluntary rules or solutions of any kind. There is mistrust so that also legitimate decisions may be immediately mistrusted and it is very difficult to have a dialogue. It is quite clear that there will not be any self-regulation or functioning codes of ethics in such a polarised situation as “one side” would mistrust any rules set up or implemented by or with the participation of the “other side”.

Journalists´ own attitude was mentioned as a contributing factor to the difficulty to implement international best practices for journalism. Many journalists see themselves rather as “ideological agents” than objective news reporters. They may have clear agendas, especially the important columnists, and the interplay of pressure and influence between politicians and media (including media owners) is not always straight-forward. This has been a characteristic of Turkish society for a while and if any trend is seen recently it is toward more Government pressure and less of media being the more powerful player. At the same time, the growing importance of social media means that such trends do not have the kind of important influence that they would have had earlier.

As a small compensation for not having any self-regulatory system as such, some major newspaper have their own ombudsmen, employed by the paper with the role to keep a critical eye on the content of the paper. There are few such ombudsmen, fewer than some years ago,

and most of them are older, which was stated by one of them as an indication that the idea is losing its attraction perhaps in a general sharpening of media content. The motivation to have such ombudsmen whose main task is to criticise the very publication they work for is to show a sense of responsibility and indicate the prestige of the paper in question.

II.12. Conclusions

As concluding remarks, it may be said that a number of improvements have been made in recent years in the sphere of freedom of expression in Turkey as far as legislative changes are concerned. The Constitutional Court ruling that overturned the ban on Twitter is a positive sign (as is the introduction of individual complaints to the Constitutional Court), giving hope that at least in some instances the independence of judiciary is respected. The fact that previously taboo subjects can be discussed is also a positive sign. Fewer journalists are imprisoned, with many having been released recently although this positive trend, which was observed in May 2014 appear to have been reversed already later in 2014. Journalists confirmed that it is possible to criticise the government or individual ministers, so there is no censorship as such, but such critical remarks can only be made in a general, demagogical fashion and not on specific issues: self-censorship and interference in the editorial freedom will set up such limits.

The general picture for freedom of the media is not positive. The media scene – as well as society in general – is increasingly polarised. This means that cooperation between media actors is not possible, ethical principles are not generally applied. The courts and other institutions often do not appear to respect principles of proportionality and necessity in a democratic society and the way laws are applied have a chilling effect on the freedom of expression. The government uses various means to put pressure on the media (not least on-line media) and does not respect the independence of the judiciary, nor principles of editorial freedom of media. The ownership structure of media is such that there are various ways in which pressure can be exerted and there are no signs that this tangled web will be untangled in any near future or that politicians will refrain from trying to influence media through different means. Given the increasing importance of social media there are signs that such media will be targeted in the near future, as politicians do not accept a society with less control over media content.

Working conditions for journalists are poor, which (together with the complex ownership situation) leads to self-censorship. Collaborative mechanisms such as self-regulation are however almost non-existent as the society and media are so polarised that such initiatives are not possible.

II.13. Recommendations

- No journalists should be imprisoned for their journalistic activity: it is essential that courts interpret the changed Penal Code and Anti-Terror legislation in a strict manner to avoid punishment for legitimate expressions of freedom of expression. Defamation cases should not be initiated by politicians or public officials other than in very extreme circumstances.

- Specific legislation (and/or where possible, secondary legislation) on ownership issues in the media area, with restrictions on cross-ownership, more comprehensive rules on detecting real ownership and increased transparency should be introduced. Ownership legislation should target real (including indirect) ownership and complement general competition law. Initiatives for legal regulation of media ownership should be taken without delay.
- The application of tax legislation should be transparent so that it is avoided that it is used to target media outlets.
- Legislation on regulatory agencies for communications should ensure maximum transparency of any procedures and decisions.
- Appointment processes for regulatory agencies should be structured so as to minimise political influence over appointments.
- Media should examine any initiatives for self-regulation, to overcome to current polarised media climate if at all possible.
- Although there are limited possibilities to affect working conditions in private companies concrete measure that can be taken to improve the working conditions of journalists is to ensure that the labour laws are properly followed and social guarantees extended to journalists.
- It should be considered if the system of the Press Card could eventually be abolished and journalists be judged as such based on the substance of their work. This would support a more vigorous labour market. What should be done without delay is to change the criteria for obtaining the Press Card, making it a real possibility for all professional journalists, and ensure that it is issued by an independent body without direct links to the Government.