VIEWS OF THE TURKISH MINISTRY OF JUSTICE ON THE DRAFT REPORT ON "*FREEDOM of EXPRESSION*" Prof. Dr. WOLFGANG BENEDEK, Prof. Dr. KATRIN NYMAN-METCALF

The representatives of the relevant units of the Ministry of Justice, the High Council of Judges and Prosecutors (HSYK), Court of Cassation, Turkish Justice Academy, Prime Ministers Directorate General for Press and Information, Supreme Council of Radio and Television, Information and Communications Technologies Authority as well as judges and prosecutors working in the relevant courts were consulted for their opinions and information while drafting the comments and considerations of the Ministry of Justice regarding the Draft Report prepared by Prof. Wolgfang Benedek& Prof. Katrin Nyman - Metcalf, independent experts of the European Commission. The relevant parts of the report that we objected were referred to in the table below in order to allow better understanding for our objections.

Overall Remarks:

The European Commission initially communicated the draft reports prepared by Prof. Wolfgang Benedek and Prof. Katrin Nyman - Melcalf to the Ministry of Justice in May (12-16 May) 2014. Two separate reports were prepared by two experts and Ministry of Justice raised objections to many findings and comments presented in the reports.

Following our objections, the Experts revised the draft reports in June 2014 and communicated the revised reports and merged two different report into one report to the Ministry of Justice. When the subject-matter report was evaluated, it was understood that majority of our objections to the previous reports were reflected in a certain extent but was striking to see that specific matters of political nature were mentioned in the report, which was supposed to be technical.

In addition to that, Constitution Court issued an important decision regarding the annulments of Article 3(4) of Law no. 5651 on Fight Against the Regulations Concerning the Publications Made on the Internet Environment and the Crimes Committed Through These Publication which may lead to substantial changes in the report.

Due to the abovementioned reasons, we request that the content of the report be readjusted according to the objections we put forward below and that the parts we object be completely removed from the report.

We request the revision of the report content and exclusion of the sections we object to in view of the justifications we list hereby.

SECTION I - WRITTEN by Prof. WOLFGANG BENEDEK

	THE COMMENTARIES AND STATEMENTS OF THE REPORT	THE OBJECTIONS OF THE MINISTRY OF JUSTICE
	I.1. Executive Summary	
	C. New Concerns	
1.	• Amendments to the Internet Law increase control of the social media, which have partly taken the role not played by traditional media in public discourse. • Indiscriminate Twitter and YouTube bans do violate principles of case law of ECtHR (Yildirim) as confirmed by the Constitutional Court.	• First of all, amendments that are subject to the report of Law no. 5651 on Fight Against the Regulations Concerning the Publications Made on the Internet Environment and the Crimes Committed Through These Publication (the Internet Law) has been nullified through Constitutional Court of the Republic of Turkey's decision of 02/10/2014 (see ANNEX 1: Constitutional Court of the Republic of Turkey's decision of 02/10/2014 and no. 2014/149 on cancelling the referred articles of the Internet Law) and its execution has been stopped. As of today, the Presidency of Telecommunication and Communication (PTC) doesn't intervene or control social media directly without court orders. We believe that the Expert should take the decision of the Constitutional Court of the Republic of Turkey's decision into consideration. Likewise; Republic of Turkey is a state of law, as Article 2 of the Constitution states. Ensuring an accessible and effective judicial supervision is crucial in states of law. Constitutional Court of Turkey is among high courts of justice in Turkey and plays a crucial role in lifting obstacles threatening fundamental rights and freedoms. The Constitutional Court of the Republic of Turkey has lifted the obstacles threatening fundamental rights and freedoms through its decisions on the Internet Law, Twitter, YouTube and so forth. Its decisions have shown that

		Turkey's judicial system functions effectively. As a result, fundamental rights and freedoms are fully preserved in Turkey, with help of judicial supervision mechanisms. One neglected element in the report was that the Constitutional Court of Republic of Turkey is an internal judicial mechanism. This has been a great success on behalf the Republic of Turkey.
2.	• Data retention provisions in the information law are likely not to be in conformity with the European acquis, in particular after the EU Court decision of April 2014 declaring the EU Data Retention Directive invalid.	• The Republic of Turkey is a party of the *"European Convention on Human Rights"* (ECHR) and Convention no. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data. International treaties have the force of law in the internal judicial system, in accordance with the Article 90 of the Constitution. Article 8 of the ECHR on respecting private and family life, which includes personal data and Convention no. 108 are executed in Turkey, without any need for any additional requirements. Moreover, inappropriate use of personal data is considered a crime by the Turkish Criminal Law (TCL). When the provisions of international treaties that Turkey is a party of and the aforementioned internal law are considered, one can see that they do not differ from the Union Acquis with regard to protection of personal data. The expression used in the report *"most probably"* which refers to assumptions and cannot be acknowledged. • The Draft Law on Personal Data Protection is sent to the Council of Ministers for signature.
3.	• High number of judges and prosecutors moved to other positions in courts and Academy of Justice within short period negatively affects professional performance and can have negative effects on FoE.	• First of all, we would like to point out that this part of the report is not relevant to freedom of expression. Fundamental rights and freedoms may only be classified in accordance with the topics provided by the ECHR. Freedom of expression is regulated under the Article 10 of the ECHR. With the Article 10 of the ECHR and decisions of European Court of Human Rights (ECoHR) taken into account, it is clear that the elements of the report do not fall under freedom of expression.

		A revision of the report is crucial. • Moreover, there are important matters to take into account concerning the reallocation of the judges and prosecutors The reallocations need to be examined under to separate topics as it was written on the report, namely, courts and the Justice Academy of Turkey. **I. Courts** It is common knowledge that the First Chamber of High Council of Judges and Prosecutors (HCJP) is responsible for allocations. The Chamber acts in accordance with provisions of the Regulation to be followed concerning Allocations and Transfers of Judges and Public Prosecutors. Also, at the beginning of new year, judges and prosecutors are informed on principal decisions to be executed within the year. The bylaws are developed in accordance with existing regulation provisions and principal decisions. When the records of the First Chamber are examined, one can see that, respectively, 3 decree law of civil judiciary in 2010, 13 decree law of civil judiciary in 2011, 10 decree law of civil judiciary in 2012, 6 decree law of civil judiciary in 2013 and 8 decree law of civil judiciary were adopted and, again respectively, 1748 judges and prosecutors in 2010, 3397 in 2011, 3278 in 2012, 2178 in 2013 and 3018 in 2014 were allocated. When the records concerning administrative justice are examined, one can see that, respectively, 1 decree law of administrative judiciary was adopted in 2010, 12 in 2011, 10 in 2012, 5 in 2013, 6 in 2014 and, again respectively, 44 judges and prosecutors were allocated in 2010, 574 in 2011, 243 in 2012, 169 in 2013 and 386 in 2014. When the records are examined, it is clear that there weren't any difference in the allocation system of judges and prosecutors. The First Chamber haven't adopted more judicial and administrative justice bylaws and allocated judges and

		prosecutors than previous years or less. • This being the case, although reallocation of certain judges and prosecutors were made to look like banishment by certain groups of the public, amendments made on the Law no. 6087 concerning High Council of Judges and Prosecutors by the bylaw of 06.03.2014 and Law no. 6526 on abolishing special courts were adopted due to judicial needs. Unrelated to the previously stated, bylaws of 21.11.2014 and 11.02.2014 were adopted with requests of judges and public prosecutors due to their health conditions and locations of their spouses. Bylaw of 16.01.2014 was the only one adopted due to extraordinary conditions. Despite the criticism for adopting 5 bylaws within 5 months, the fact that the High Council of Judges and Prosecutors that came to the office following the adoption of the new Constitution adopted 13 bylaws in 2011, 10 in 2012 and 6 in 2013 should not be overlooked. Looking back again to the year 2014, no action was taken regarding prosecutors who are engaged in the investigation of December 17th and in order not to make the impression that the aforementioned investigations was intervened with, the posts of prosecutors who undertook the investigation weren't changed. **II. In relation to the Justice Academy of Turkey** In accordance with the related by law, the judges working in the Justice Academy of Turkey are seconded to the Academy with administrative functions. These are administrative resposibilities. As soon as the assignment terminates the judges overtake their regular judge responsibilities. How such an assignment made by the institution will have a negative effect on the freedom of expression is not clear for us.
4.	• Elaboration of Data Protection Law and reforms of the Press Law regarding online news portals like other	• In law-making process, the government program, development program, decisions of the higher judicial bodies, action plan of our Ministry, Accession

	legal reforms seem to lack general transparency and therefore raise fears among part of the media.	Partnership Document, National Program of Turkey for Undertaking the EU Acquis, rulings of the European Court of Human Rights (ECtHR), opinions of HCJP, opinions of the universities, petitions of the citizens and the opinions of all relevant non-governmental organisations (NGOs) are taken into consideration. In this way, it is ensured that the stakeholders take part in and monitor all the phases of the enactment process of a draft law/legislative proposal in a transparent manner. Hence, the assessment that non-transparent methods were used in the Draft Law on Personal Data and the Press Law and this caused fear on certain segments of the press is baseless and subjective.
	I.3. General Developments since 2011	
5.	• 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	• The Law no. 6352 dated 02/07/2012 on *"Amending Some Laws for the Effectiveness of the Judicial Services and the Suspension of Cases and Punishments related to the Offenses Committed through Press"* came into effect after it was published in the Official Journal of 05.07.2012. This arrangement prescribed for the offenses committed through media organs cannot be considered as an "*amnesty*" but resembles to the practice of "*suspension*". The same clauses are also included in the articles related to the suspension of the punishments and the adjournment of the announcement of the verdict. The aim was to prevent the recurrence of the offenses by taking the offenses committed through media organs into the scope of suspension with the Provisional Article 1 of the Law. Thus, it must be stated that the arrangement in question did not have a political purpose as it was claimed in the Report but it was a technical arrangement in compliance with the general penal policy in favour of freedom of expression.

	persecution for three years. The aim of prevention of re-commission of crime, which include crimes committed via press can have a chilling effect on the freedom of expression of those affected.	
	I.4. Developments with Regard to Criminal and Security Legislation	
	A. Turkish Penal Code	
6.	• 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.	• Freedom of expression and freedom of press are well-studied topics in our country. In this respect, our country has been making progress continuously in this field. Collaborative works are carried out with the professional societies and NGOs in order to make improvements in the problematic areas being subject to criticism. The third and fourth judicial reforms have led to improvements in the legislation. A lot of trainings and projects are conducted by the High Council of Judges and Prosecutors, Justice Academy and the Ministry of Justice regarding the rights and freedoms guaranteed by the European Human Rights Convention by the judges and prosecutors in duty and that the case law and comments of the European Court of Human Rights. The developments included in the Chapter 23 and Chapter 24 have also been discussed in the Reform Action Group. In the meeting held with the participation of the Ministries of Interior, Foreign Affairs, European Union and Justice as well as the Chairmen of the EU Harmonisation Committee and the Joint Parliamentary Committees on 8 November 2014, a decision was taken for the establishment of a working group on freedom of expression. • In line with this decision, a working group was established under the Directorate General of Law of the Ministry of Justice for the revision of the legislation in the light of the international documents, consultative visit reports, progress reports, criteria of the European Convention of Human Rights (ECHR) and the decisions of the ECtHR with respect to the freedom of expression.

7.	• **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 and the judicial practice to be changed. .	• Pursuant to the Article 216/1 of the Turkish Penal Code, there must be an "*explicit and imminent danger*" in terms of the public safety in order for an act to be considered as crime. • For an act to be considered as the crime of publicly degrading the religious values which is stipulated in the paragraph 3 thereof, "*the act must be convenient for breaking the public peace*". Therefore, it is thought that the criteria stipulated in the aforementioned paragraphs are in compliance with the criteria of the ECtHR.
8.	• 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.	• The Article 285 of the Turkish Penal Code was amendment with the Law no. 6352 dated 02.07.2012. The amendment in question is not include the phrase of "***public interest***" in the article. However, when the Paragraph 6 added into the Article 285 of the Turkish Penal Code is read carefully, it will be understood that the text covers the phrase of "*public interest*" adequately and even provides a higher level of protection when compared to the phrase of "*public interest*". According to the new amendment, for a breach of confidentiality; There must be a "*breach of the right of benefiting from the presumption of innocence through the disclosure of the content of the actions taken during the investigation phase or the confidentiality of the communication or the right of privacy, and* *the disclosure made about the content of the action taken during the investigation phase must be adequate for preventing the determination of the material fact."* The Paragraph 6 added into the Article 285 with the same law includes the sentence of "***Reporting the investigation and prosecution processes as news without exceeding the limits of making news cannot be considered as crime***." This paragraph expressly protects freedoms of expression and press. It has been assessed that the Articles 285 and 286 include the concept of "*public*

		interest" in essence. Therefore, there is no need to make a separate arrangement for journalists and reporters.
9.	• 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,7 which reduces the problem in practice, but does not resolve it, because the practice can be changed any time. • Footnote: According to the Information Note of the Ministry on EU Affairs on Freedom of Expression of May 2014, in 2012 out of 277 files submitted in 2012, permission was granted only in 18 cases. According to information received from the Ministry of Justice out of 373 cases in 2013 only about 10 % were allowed to go on, which actually would mean an increase of cases.	• Any investigation into the crime addressed in the Article 301 of the Turkish Penal Code has been subject to the permission of the Minister of Justice since 30.04.2008. As it can be understood from the table and graph given in the Annex, the number of files for which the Minister of Justice granted permission is quite a few. When the table is examined, it is seen that the number of files submitted to the Ministry of Justice in relation to the Article 301 of the Turkish Penal Code was 559 in 2008, this number obviously declined by years and 304 files were submitted to the Ministry in this respect in 2014 (as of 31.10.2014). In total, 2598 files were submitted to the Ministry of Justice in this period of six years. Permission was granted to 223 files, which corresponds to about 6.97 % of the files concluded. We do not find the assessment based on the assumption that the number of permissions granted will increase upon the change of he Ministry of Justice is subjective.
10.	• 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 seem to have been recently released, while others remained in detention.	• At present, there is no one kept in the penal institutions just because of journalism activities. As it is explained in the annexed presentation on the subject in detail, the individuals referred to as the journalists under arrest were not actually arrested due to an article or work but because of such offenses as theft, looting, bank robbery and use of explosive materials etc. On the other hand, we want to state that we have found the use of a discriminatory discourse in the report by investigating the ethnical identities of

		the journalists is not appropriate in accordance with the Article 14 of the ECHR. The detainees are not classified into their ethnical identities by the Ministry of Justice.
	D. Law on Demonstrations	
11.	• According to Bianet reports received 17 persons were sentenced to a total of 31 years for shouting slogans against Prime Minister Erdogan, on the basis of the law on demonstrations **(No. 2911)** combined with other laws, for insulting the prime minister. 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.	• It is not acceptable for us that information is included in the report with no possibility to be researched or possibility to prove the contrary. Besides, our legislation does not include an offense that can be described as "***slogan against the Prime Minister***". Thus, we think that the criticism is not objective.
	E. The New Law Regulating the Intelligence Sector	
12.	• 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) Law9 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	• New arrangements made in the field of intelligence have not blocked the freedom of expression. As the developed countries and EU member states, the broad powers granted to MIT in order to maintain the security of the state and democratic public order are the same as the powers granted to the intelligence agencies in most of the Western countries. Leakage of information and documents related to the national security is an offense all over the world. Therefore, we do not agree with the assessments of the report.

	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	
	A. Press Law	
13.	• 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	• Although it was stated in the report that 604 investigations were conducted but only 94 of them were turned into public prosecution, it can be said that these figures are not high but on the contrary, the numbers of prosecutions and cases initiated are rather low considering that Istanbul is a metropolis with a population of about 17 million people. On the other hand, considering only the number of cases opened in one city and claiming subjectively that this situation "*makes an intimidating impact on the freedom of expression*" are found to be groundless.

	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, 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. 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.	• As specified above in the report, attempting to form an opinion as if there was pressure on press in Turkey by relying on a letter containing completely subjective comments is inadmissible for us.
	B. Law on the Establishment of Radio and Television Enterprises and their Media Services (new Broadcast Law)	
14.	• 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 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 on reporting on matters of public interest. It has been criticized that the mainstream	• The Law No. 6112 was adopted on 15 February 2011. As specified in the title of the article of the law, the Article 7 regulates only the times of crisis. When the content of the article is examined, it is clearly seen that the necessity of the freedom of expression and information is explicitly stated with the expression of "*In times of crisis caused by war, terrorist attacks, natural disasters and similar extraordinary situations,* ***the freedom of expression and information is fundamental;*** *and broadcast services cannot be audited in advance and cannot be ceased with decisions of the judiciary being reserved*." **Exceptionally**, the Prime Minister or the Minister to be assigned by the former is granted with the authority of imposing a broadcast ban only "*when evidently required by national security or in cases where it is highly likely that public order will be seriously disrupted.*" The aim

	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.	here is to prevent a probable delay in the issuing of the court ruling in cases where the public may suffer due to a state of exception. Besides, the ruling is still subject to judicial control. Within the period of about 4 years during which the law has been in force and the *"Gezi Park Protests"* addressed in the report and *"Kobani Demonstrations"* which took place in the South-eastern Region of Turkey in 2014 and claimed the lives of about 50 individuals were witnessed, neither the Prime Minister nor a Minister assigned by him have used this authority.
	C. Internet Law	
15.	• 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.	• Pursuant to the Law No. 6545 dated 18.06.2014 on Amending the Turkish Penal Code and Some Other Laws, penal courts of peace were abolished and replaced by the specialised courts dealing with the protection measures in Turkey. As stated in the report, currently, the judges of the specialised courts will deliver judgments on the issues related to the Internet Law. The report should be revised accordingly. • Furthermore, the amendments on the Internet Law specified in the report were annulled by the decision of the Constitutional Court dated 02.10.2014 (*See also. Annex 1: The decision of the Constitutional Court No. 2014/149 dated 02.10.2014 on the annulment of the aforementioned articles of the Internet Law*) and a decision was taken for the suspension of the execution. As of today, the Presidency of Telecommunication and Communication has no direct interference and control on internet without a court ruling. We believe that the report should also take this decision of the Constitutional Court into consideration.

16.	• **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. Again, the amendments take Yildirim hardly into account when the removal of content or denial of access based on complaints for violation 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 it is convinced that a lesser interference would not be sufficient in which case the reasons need to be specified.	• The procedure prescribed in relation to alleged breaches of rights with broadcasts made through internet is to eliminate the breach and protect the rights of those affected by the breach without delay. • It is stipulated in the Article 9/4 of the Law No. 5651 that: *"The judge renders a judgment for the prevention of access in line with this Article by blocking access only to the content of the broadcast, part or section (via URL, etc.) leading to the breach of the personal rights. If not compulsory, the judge cannot deliver a judgment to prevent the access to the whole website in question. However, on condition that the judge comes to a conclusion that the breach cannot be remedied through URL-based blocking, he/she can rule on preventing access to the whole website by providing justification."* Besides, the Article 9/6 thereof sets forth that: *"The judge should take a decision on the application made within the scope of this article within 24 hours at the latest without holding a hearing. This decision can be appealed in accordance with the provisions of the Code of Criminal Procedure numbered 5271."* This Article allows for the decision of the justice of the peace to be appealed. In other words, the decision of the relevant judge is not final but subject to the review of another judge. We think that the legal arrangement in question is not contrary to the decision taken in the case of *"Yıldırım v. Turkey"*.
	D. Twitter and YouTube Cases	
17.	• At an electoral rally in Bursa on 20 March, the Prime Minister threatened *"to wipe out twitter, regardless of what the international community says"*. A day after, on 21 March, the Telecoms Communication Agency (TIB) issued a decision on blocking Twitter, which has been the most controversial decision regarding access to the internet in Turkey so far, because the	• We would like to state that we consider the use of the criticisms expressed by the Prime Minister within the scope of the assessment made in the report, in relation to the freedom of expression is not fair. What is essential in democratic societies is that people are not condemned due to such expressions and must be able to express their thoughts freely as long as their expressions do not promote violence and hatred. In our opinion, the report displays an inconsistent attitude by denying the freedom of expression that he claims for the journalists to the Prime Minister of the Republic of Turkey. Also it is interesting that a political expression is

	total ban affected millions of people.	subject to the report and given another meaning than the normal understanding. On the other hand, the Republic of Turkey is a State based of rule of law as indicated in the Article 2 of the Constitution. In a State based rule of law, it is essential that accessible and effective judicial control is established with respect to the protection of rights and freedoms. In Turkey, the Constitutional Court is included among the supreme courts and plays a key role in removing the obstacles to the rights and freedoms. For instance, it already removed the obstacles to the rights and freedoms with its decisions on Internet Law, Twitter and YouTube. Such decisions indicate that the judicial system of our country functions efficiently. Thus, fundamental rights and freedoms are protected pre-eminently in Turkey with the help of the judicial review mechanisms. In Turkey, obstacles to the rights and freedoms have been removed owing to the effective and optimal functioning of the Constitutional Court being one of the internal dynamics of the State of which based on the principle of rule of Law. Besides, access to the internet address of *"twitter.com"* was prevented as a preventive measure in line with the Article 8 of the Law numbered 5651 as well as several court rulings delivered on the following grounds: ✓ Breach of the personal rights through the opening of fake accounts in the names of individuals pursuant to the ruling numbered 2014/18 Değ.İş. (Miscellaneous case ruling) dated 03.02.2014 of Istanbul (Anatolia) 14th Criminal Court of First Instance, ✓ Obscenity through the opening of fake accounts in the names of individuals pursuant to the ruling numbered 2014/223 Değ. İş. dated 04.03.2014 of Samsun 2nd Criminal Court of Peace, ✓ Pointing someone as a target to the criminal organisations pursuant to the writ dated 07.03.2014 with the investigation number of 2011/762 of Istanbul Chief Public Prosecutor's Office (commissioned by the Article 10 of the Anti-Terror Law), ✓ Breach of the personal rights pursuant to the ruling numbered 2014/181 Değ. İş.

		dated 18.03.2014 of Istanbul (Anatolia) 5th Criminal Court of Peace. All the addresses of the contents offered by Twitter are coded as *"güvenli-security-https"*. The decisions for preventing the access to the secure addresses can only be implemented with the cooperation of the relevant firm. Thus, the courts could not meet their URL-based blocking demands. The demands for preventing the access were conveyed to Twitter in the electronic environment. However, Twitter did not abide by the court rulings and discontinue broadcasting the relevant contents. Later on, the attempt of establishing a warn-remove mechanism with Twitter failed. In this process, the breach of the personal rights of some citizens was determined through court rulings. Therefore, Turkey was forced to implement a preventive measure by banning access to Twitter **as a last resort** for ceasing the breach of the personal rights of the relevant citizens.
	I.6. New Remedies of Relevance for Freedom of Expression	
	A. Individual Application to the Constitutional Court	
18.	• However, somehow similar to the ECHR, the Constitutional Court could become a victim of its success. Since September 2012 it has already received 16,500 cases and although it has reorganized its structure and working methods it is only able to decide around 200 cases per year. This raises the issue whether in the case of delays the ECtHR might consider the individual application as ineffective, because justice delayed is also justice denied.	• The figures given in the report in relation to the individual applications to the Constitutional Court are wrong. The number of the rulings delivered by the Constitutional Court is 4.076. Thus, the assessment that individual application to the courts is not an effective way in Turkey on the basis of the wrong information that the Constitutional Court delivered 200 rulings is not pertinent. • Furthermore, the Constitutional Court firstly devises its resolution on all the subjects, which absolutely takes time. Once the resolution is issued, the serial rulings on the same subject are delivered quickly. While the number of the rulings rendered by the court increases day by day, it is not correct to compare the work load of the ECtHR to that of the Constitutional Court of Turkey. The average decision-making duration is 1 year in the Constitutional Court and 5

		years in the ECtHR. .
	I.7. Capacity-Building Efforts on Freedom of Expression	
19.	• 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.	• This issue had already been evaluated hereinabove. (See also Mr. Benedek Report Page 3, Line 3)
	I.8. Conclusions	
20.	• 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.	• This issue had already been evaluated hereinabove. (See also. Mr.Benedek Report Page 13-14; Line 15,16)
21.	• 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.	• This issue had already been evaluated hereinabove. (See also.Mr. Benedek Report Page 5; Line 4) • Besides, the alleged lack of transparency in relation to the Draft Law on Protection of Personal Data is an abstract expression. • The Law on Protection of Personal Data was opened for signature in the Council of Ministers on the 3rd of November 2014.

	I.9. Recommendations	
22.	• 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.	• This issue had already been evaluated hereinabove. (See also Mr.Benedek Report Page 7; Line 6)
23.	• 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.	• This issue had already been evaluated below (See also Ms. Nyman Report page 19; Line 2) Furthermore, the efforts are ongoing for the updating of Law no 5953 on the regulation of relations between the employees of the press profession and their employers, in line with the current needs. Directorate General of Press and Information has kicked off a series of workshops on press labour code with the participation of non-governmental organizations, professional associations of journalists, academia and press employers. In this context, the first press labour code workshop was organized in Ankara on 25.09.2014, while the second workshop was in Erzurum on 06.11.2014. Based on the consultation with sector professionals, the press labour code no 5953 will be improved in terms of the economic and social rights of the journalists.
24.	• 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.	• This issue had already been evaluated hereinabove. (See also Mr.Benedek Report Page 6, Line 5)

SECTION II WRITTEN by Prof. Dr KATRIN NYMAN -METCALF

	THE COMMENTARIES AND STATEMENTS OF THE REPORT	OBJECTIONS of THE MINISTRY
	II. 1. Executive Summary	
1)	• 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.	• This issue had already been evaluated hereinabove. (See also Mr.Benedek Report P 2, line 1; Pages 13-16; Lines 16-17)
2)	• 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.	• Having a press card is not a legal prerequisite for engaging in journalism in Turkey. Providing the card holder with advantages in such areas as communication and transport during the conduct of journalistic activities, this card is issued by the Directorate General of Press and Information in line with the decisions of the Press Card Commission. The number of press card holders is 15.107 in our country as of 13.11.2014. However, there is a vast number of journalists who carry out their journalistic activities freely without holding a press card. According to the statutory decree numbered 231 dated 08.06.1984, the Directorate General of Press and Information carries out secretary services for the Press Card Commission and issues press card to the relevant persons in line with

		the decisions of this Commission. According to the Article 38 of the Press Card Regulation, the Press Card Commission consists of a total of 13 members including: Two members representing the Directorate General of Press and Information, Two members elected out of those having honorary press cards and continuous press cards, Two members representing the Turkish Journalists' Association, One member representing the Journalists' Association, One member representing Izmir Journalists' Association, Three members representing the Turkish Journalists' Union, One member who is a local press member representing the Journalists' Federation. One member representing the Turkish Association of Newspaper Owners. Decisions are taken by absolute majority of the total member number. As can be seen from the composition of the commission members, the Press Card Commission is an independent body which gathers the representatives of professional organisations related to press, independent journalists and press employers and takes its decisions through democratic methods. The Directorate General of Press and Information has only two members within the Press Card Commission and it is evident that the potential of two members to affect the decision in a commission consisting of 13 members in total is rather limited. Besides, the Directorate General of Press and Information is not entitled to interfere in, cancel or add annotation to the decisions of the Press Card Commission within the scope of any different arrangements.

		There are ongoing works aimed at improving the rights of the journalists. "The Draft Law on Amending the Press Law No. 5187 and Some Other Laws" prepared by the Directorate General of Press and Information is currently on the agenda of the General Assembly of the Turkish Grand National Assembly. The draft law aims at including the people working in the news portals via internet into the category applying to those working in the printed newspapers, periodicals and news and photograph agencies pursuant to the Law No. 5953. This amendment will also grant them the rights bestowed to the journalists.
	II.3. Developments to the Penal Code and Anti-terror Legislation	
	A. The Penal Code	
3)	• 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. In any event, the Press Judges suggested this fact could be behind allegations of many cases against 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.	• Further explanation is needed. The statement is not understood.
	B. Article 301 of the Penal Code: Insulting *"Turkishness"*	The title of the article in question was amended in 2008 and the article currently refers to *"insulting Turkish Nation, the Republic of Turkey, institutions and bodies of the State"*.
4)	• Article 301 of the Penal Code is proposed to be amended but this has not been done yet. It is an open	• This issue had already been evaluated hereinabove.(See also Mr. Benedek Report

	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.	page 9; Line 9)
	C. Anti-Terror Legislation	
	II.4. Imprisonment of journalists	
5)	• 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.	• A detailed presentation is provided.
	II.6 Application of principles of the European Convention on Human Rights	
6)	• 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	• It is not possible to accept the comment claiming that the desire of Turkey to implement the European case law is not genuine. If it is necessary to provide for evidence for our desire, Turkey adopted the individual application system as a result of a constitutional amendment and the rules and ruling cases specified in the ECHR were adopted in the decisions of the Constitutional Court. Considering that ruling cases of the European Convention on Human Rights and the European Court of Human Rights are binding for all the court via the Constitutional Court and the Article 50/2 of the Law numbered 6216, Turkey has actually internalised the ECHR and the ruling cases thereof.Thus, we do not find the criticism objective.

	unfortunate situation. There has been a reduction of cases recently and it is to be hoped this trend will continue.	
	II.7 Internet legislation and cases regarding Internet	
7)	• 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.	• This issue had already been evaluated hereinabove. (See also Mr. Benedek Report page 13-16; Line 15-17)
	II.8. The Regulatory Agencies	
8)	• 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	• Information and Communication Technologies Authority (BTK) does not publish the statistics related to the preventive measures of blocking access to the contents leading to an offense. This is because of the fact that there are alternative ways of access in our country as in the other EU states (access through other countries etc.) In bans of access imposed by BTK, legal and administrative information are provided separately in each internet site and proportional statistics are published at intervals in the website of *guvenliweb.org.tr* so that they can be used in social

	it is not easy to follow and understand their work.	and academic studies. This practice is encountered in many EU countries. The statistics of October 2013 can be reached through: http://www.guvenliweb.org.tr/istatistikler/files/erisimengellemeistatistikekim2013.pdf Therefore, the assessment is not pertinent in this regard.
	II.9. Media ownership	
9)	• 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.	• This assessment includes conflicting expressions. It is implied that agencies working independently without being a part of a group and those displaying a dissident attitude act in an environment of fake freedom created by the Government. This criticism is completely subjective and is not based on concrete data. It was assesed as a conspiracy theory but unfortunately not really taken serious.
10)	• 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"*.	• Turkish taxation system complies with the constitutional principles and tax payers of same conditions are accountable for the same taxation principles. • Procedures and principles as well as the auditors are designated in accordance with the Tax Procedural Law and Decree Law no. 646. So, tax audits are performed in accordance with the principles defined by the Constitution and Article 5 of the Tax Procedural Law, which are based on ensuring tax privacy, protecting tax payers' rights. They are conducted in light of unbiased criteria resulting from analyses and comparison between different groups of tax payers and industries; without any discrimination among tax payers, equally, fair-mindedly and with an impartial approach.

		• In conclusion, each and every procedure is regulated by laws and they are performed equally on tax payers who are under certain similar financial conditions. • Also, when utilizing the procedure, known by the public as *"remission of taxes"* which are laws possessing provisions to dissolve circumstanced and accumulated tax debts that are inconsistent in the system for a limited amount of time, any kind of discrimination among tax payers isn't allowed by respecting Constitutional principles. Moreover, *"equality before the law"* principle is complied with, so, tax payers who are under certain similar financial conditions benefited from these laws in the same manner. • Determination of the taxable income through tax audits and penal sanctions are regulated by the Tax Procedure Law. The subparagraph 2 of paragraph 140/1 of the Tax Procedure Law prescribes that the start of the tax audit is written to a minute and a copy is submitted to the person in the presence of whom the audit is carried out. In line with the *"Regulation on the Principles and Procedures to be Followed in the Tax Audits"* dated 31.10.2011, the minute in question should absolutely contain the subject of audit as well as the ground for auditing that subject. The lack of this information in the minute leads to a procedural deficiency and contradiction to law. Unlawful actions detected in the process of tax audit can be sued. Thus, the Tax Procedure Law has transparency and judicial control in this respect. Similarly, discretionary audits or reviews are not possible.
	II.10. Working conditions of journalists	
11)	• 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	• The Law numbered 5393 on Regulating the Relations between the Press Members and Media Owners is included in the Labour Law in relation to the journalists. Necessary arrangements have been made in this law. Since there is a special law with respect to the journalists and all the amendments are made in this law in detail, a separate arrangement within the scope of the Labour Law has not been

	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.	considered necessary. The Law contains provisions in relation to the working conditions and rights of the journalists as well as their relations with the media owners and ensures that the journalists are subject to different provisions in consideration of their positions and special conditions. Besides, considering the importance and inherent risks of the profession, the Article 15 of the "*Law numbered 6325 on Amending the Social Security and General Health Insurance Law and Some Other Laws"* published in the Official Journal numbered 28533 dated 19.01.2013 amended the Article 40 of the Law numbered 5510. With this amendment, as of the beginning of October, 2008, those working in press and media organs have been granted the right of benefiting from actual service. Thus, 90 days are added as depreciation into the total number of days for which premium is paid on behalf of the journalists or other press members for every 360 days during which they work actively. This amendment also enables those working in the press sector to early retire within the scope of actual service.
12)	• 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.	• This issue had already been evaluated hereinabove. (See also Ms. Nyman Report, Page 19, Line 2)
13)	• Even if there is a Commission 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 issue had already been evaluated hereinabove. (See also Ms. Nyman Report Page 19, Line 2)

14)	• 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.	• This issue had already been evaluated hereinabove. (See also Ms. Nyman Report Page 19, Line 2)
	II.13. Recommendations	
15)	• 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.	• This issue had already been evaluated in the detailed presentation.
16)	• The application of tax legislation should be transparent so that it is avoided that it is used to target media outlets.	• This issue had already been evaluated hereinabove. (Ms. Nyman Report Page 24, Line 10)
17)	• 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.	• We will repeat the explanations given above. Press card is not a prerequisite for the profession of journalism. In Turkey, there are 15.107 press card holders as of 13.11.2014. Directorate General of Press and Information carries out only the secretary services of the Press Card Commission. In the commission consisting of 13 members from the professional organisations of press, independent journalists' and media owners' associations, there are only two representatives from the Directorate. Press cards are issued by an independent commission in a democratic and participatory platform on the basis of completely objective data. The role of the Directorate General of Press and Information, as emphasized earlier, is to

		contribute to the gathering of the parties by providing the secretary services.