



**L'Association Européenne
Pour la Défense des Droits et des Libertés
(ASSEDEL)**

**Third Party Intervention in the Case Of
Türköne v. Turkey (App. No. 70430/17)**

March 2021



Adresse : L'Association européenne pour la défense des droits et des libertés
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Introduction

1. ASSEDEL is of the opinion that the Mümtazer Türköne case should be evaluated within the larger context of the Turkish government's crackdown (before or after the July 15, 2016 coup attempt) on media outlets, especially the ones alleged to have links with the Gülen Movement. In this third-party submission, ASSEDEL would like to bring to the Esteemed Court's attention that Mr. Türköne worked as a columnist for the Zaman Daily, which was taken over by the government in March 2015 and shut down after the coup attempt over links with the Movement. We also want to underline that the accusation and the charges brought by the prosecution against the applicant was/is not substantiated to the slightest degree to persuade an objective observer that the applicant had committed the crime of terrorism with which he was charged. The applicant's articles, which were submitted by the prosecution as the main body of evidence to secure his conviction under Anti-Terror legislation, should be examined and evaluated in accordance with his exercise of the right to freedom of expression protected under Article 10 of the Convention. In addition, ASSEDEL wants to present its evaluation regarding the speediness of the review of the applicant's case by the Turkish Constitutional Court.
2. ASSEDEL kindly reminds the Court that the submissions as third-party interveners concerning a group of ten applications against Turkey and relating to the freedom of expression and right to liberty of journalists of the Commissioner for Human Rights (hereinafter, the "Commissioner")¹ and of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (the "Special Rapporteur")² are absolutely relevant in this case as well.
3. The Commissioner and the Special Rapporteur were both deeply concerned by Turkey's crackdown on the press, which predates, but has significantly accelerated since the controversial coup attempt of July 15, 2016. They both consider that Turkish authorities have arbitrarily arrested, detained, and prosecuted journalists and media professionals merely for exercising their rights to freedom of expression based on vaguely worded anti-terrorism legislation and state of emergency (SoE) decrees. Turkey's suppression towards dissidents has triggered international condemnation, and Turkey's own judiciary has proven unable, or unwilling, to ensure an adequate safeguard against Turkey's continuing violations of its citizens' rights to freedom of expression and opinion.

Crackdown on the Gülenist Media Outlets Before the SoE Period

4. After the 2013 Gezi protests and the 17-25 December 2013 corruption scandal that implicated the then-Prime Minister Erdoğan's closest associates and his family, the Turkish government initiated a harsh crackdown on the dissident media and press, particularly on the media and press linked to the Movement.

¹ CommDH(2017)29

² Intervention of United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression <https://www.ohchr.org/Documents/Issues/Expression/AmicusFiling-ECHR-Turkey-UNSR.pdf>

5. The Human Rights Watch report entitled “Silencing Turkey’s Media, The Government’s Deepening Assault on Critical Journalism”³ summarizes the government's position with clarity:

“Accusing the Gülen Movement of having established a “parallel structure” within the state exercising control over the judiciary, the police and parts of bureaucracy, Erdoğan viewed the arrests and the investigation in connection with the corruption allegations as a Gülen-linked plot against him. His government responded to the corruption allegations by reassigning thousands of police officers, prosecutors and judges suspected of being Gülen supporters, and tightening control over the judiciary. Since the scandal, the AKP government has taken legal steps against journalists, media workers and media executives with alleged ties to the Gülen movement based on anti-terrorism legislation which Human Rights Watch has repeatedly warned is often arbitrary and abusive.”

6. Aiming to fight against this “parallel structure”⁴, the Turkish government established the Criminal Peace Judgeships which became operational on June 28, 2014.
7. Within this intimidation campaign and the fight against dissident media⁵, Turkey’s third largest media outlet, Koza İpek Holding, was confiscated; the entire management of 22 companies, including a media group with two national TV networks and two national daily newspapers and one radio station, was unlawfully seized on October 18, 2015. The government appointed trustees to run the companies and turned its media outlet into a government mouthpiece overnight. The sole ‘legal’ pretext for this decision was a request by the Finance Ministry’s Financial Crimes Investigation Board (MASAK) based on a flawed “reasonable suspicion” and a request from the Ankara Chief Public Prosecutor’s Office to the investigating judge. After that, the trustees took control of the media outlet and changed its editorial policy. Many journalists including chief editors were summarily fired after the takeover. Turkish authorities shut down the media businesses of Koza İpek Holding on March 1, 2016.
8. On March 4, 2016 Turkish authorities ordered the seizure of the Feza Publishing Company, which owned Zaman, the country's then-best-selling daily; the Today’s Zaman English-language daily; and the Aksiyon weekly news magazine. The legal pretext underpinning the seizure was Article 133 of the Code on Criminal Procedure (CMK), which states that “if there is evidence that a crime has been committed within the framework of activities of a company, and if necessary to reveal the material truth during the investigation and trial, the judge or the court may appoint a trustee for the management of the company’s business.” Despite the fact that the Turkish constitution clearly and strictly prohibits the application of this procedure to media outlets, the

³ Human Right’s Watch report, “Silencing Turkey’s Media, The Government’s Deepening Assault on Critical Journalism”, p. 13. https://www.hrw.org/sites/default/files/report_pdf/turkey1216_web.pdf

⁴ Erdoğan’s accused the Gülen Movement of acting like a parallel structure within the state. He stated in Ordu Province on July 20, 2014 that “appointments have been made in order to fight with the parallel structure...the appointments have been made in relation to the criminal peace judgeships...We will see what will happen both in the police and the judiciary” [translation]. Başbakan Erdoğan: Paralel Yapıyla Mücadele Etmeyen Bedelini Ağır Öder [in Turkish], STAR (July 22, 2014), <https://www.star.com.tr/politika/basbakan-erdogan-paralel-yapiyla-mucadele-etmeyen-bedelini-agir-oder-haber-915819/>

⁵ HRW report, “Silencing Turkey’s Media” p. 57. and also see, Stockholm Center for Freedom’s submission for the 35rd Session of the Working Group on the Universal Periodic Review of the United Nations <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=7360&file=EnglishTranslation> a

government transgressed the plain provision of the Constitution and went on to appoint trustees to run the Feza Publishing Company. As in the case of Koza Ipek, the editorial stance of Feza Publishing media outlets were turned staunchly pro-government after the takeover⁶.

9. On March 8, 2016 Turkish authorities seized the country's then-largest privately run news agency, the Cihan News Agency.
10. On March 12, 2016 Cihan Medya Dağıtım, a major newspaper distribution and delivery company, was also seized by the government as part of the government's crackdown on Gülenist media infrastructures. The company immediately announced that it would not distribute critical newspapers after the takeover.
11. On March 12, 2016 Irmak TV, which was critical of the government, was seized by the government.

Eradication of Press Freedom During the SoE Period

12. After the declaration of the state of emergency (SoE), all Gülenist-linked media which had already been taken over by the government have been shuttered and their assets liquidated through decree-laws.
13. The UN Special Rapporteur noted his concerns regarding media freedom in his preliminary observations following his visit to Turkey in November 2016.⁷ The Special Rapporteur stated:

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

14. In his report on that mission to Turkey⁸, the Special Rapporteur observes that over 100 media outlets were closed during the first six weeks of the state of emergency. Until his report was released, a total of at least 177 media outlets were closed; 231 journalists were arrested (over 150 journalists had already been in prison); nearly 10,000 journalists and media workers were dismissed; and the press cards of at least 778 journalists were cancelled. The government attacked the publications that take investigative journalism seriously as part of their role as a public watchdog. Government's suppression of freedom of expression maintained mainly through anti-terror legislation or the provision of the Criminal Code protecting the President against insult or some other SoE measures. The Special Rapporteur states that many of the closures affected outlets allegedly connected

⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey (A/HRC/35/22/Add.3), para. 40.

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session35/Documents/A_HRC_35_22_Add_3_E.docx

⁷ Preliminary conclusions and observations by the UN Special Rapporteur on the right to freedom of opinion and expression to his visit to Turkey, 14-18 November 2016:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20891>

⁸ The Special Rapporteur's report (A/HRC/35/22/Add.3), para. 31.

to the Gülenist Movement, such as the largest circulation *Zaman*, but some of the closures involved media outlets without any such evident connections.

15. The Commissioner states in his “Memorandum on freedom of expression and media freedom in Turkey”⁹ that the situation regarding media freedom and freedom of expression in Turkey as of 2017 was characterised by numerous blatant violations of principles enshrined in the European Convention on Human Rights (ECHR), the case-law of the Court and, standards of the Council of Europe as well as other relevant international standards. He also notes that these violations created a distinct chilling effect manifesting itself not only in self-censorship in the remaining media which is not controlled by or sympathetic to the government, the ruling political party, but also among ordinary citizens. This led to an extremely unfavourable environment for journalism and an increasingly impoverished and one-sided public debate.
16. As mentioned above, the government crackdown on the Gülenist media dates back to the pre-coup era. The government had already intervened to judicial independence and redesigned the judicial apparatus namely after 2014 HSYK Elections (High Judicial Council) with a view to eliminating the dissident media since then. The ulterior motive behind the decisions taken by Criminal Peace Judgeships against dissident media, namely the Gülenist media, is crystal clear.
17. Freedom of expression had been deteriorated in parallel with the erosion of the rule of law and independence of the judiciary. On July 16, 2016, even though the identities of the soldiers participated in the failed coup attempt was unknown, the HSYK convened to suspend 2,745 judges and prosecutors, including some of its own members¹⁰. During the SoE period, approximately four thousand members of the judiciary (almost one-third of the total number of the judges and prosecutors) were dismissed from public service¹¹. All of them were prosecuted, and more than half of them were detained.
18. As an inevitable consequence of such an oppressive atmosphere, the survivors of the purge in the judiciary could not have the possibility to rule on their free conscience, especially in the notorious “FETÖ” trials. In this vein, the Commissioner underlines in his abovementioned third-party intervention that *“under the emergency decrees, almost one fourth of the members of the judiciary were dismissed by the HSYK without any individualised reasoning, and that the Constitutional Court decided to dismiss two of its judges for having connections with the FETÖ, understandably creating an atmosphere of fear among the remaining judges and prosecutors.”*
19. The Commissioner notes that he received numerous reports of the executive's direct or indirect interference with the assessment of judicial authorities. He states that he was particularly shocked by the 3 April 2017 decision of the HSYK to suspend the judges of the 25th Istanbul Assize Court who had ordered the release of 21 journalists, most of them were former reporters or columnists in the Gülenist media, pending their trial along with the prosecutor who initially requested their release. Eventually, none of these journalists

⁹ CommDH(2017)5

¹⁰ [Turkey's top judicial board suspends 2,745 judges \(aa.com.tr\)](http://Turkey's_top_judicial_board_suspends_2,745_judges(aa.com.tr))

¹¹ <https://www.aa.com.tr/en/july-15-coup-bid/turkey-3-947-judges-prosecutors-sacked-since-coup-bid/2038601>

were released as the Istanbul Chief Prosecutor's Office ordered their re-arrest on the same day, in some cases based on different charges within the scope of a new investigation involving no different evidence from the previous ones.

Accusations against journalists in Turkey in the Eyes of an Objective Observer and Freedom of Expression

20. The Special Rapporteur concluded in his report on his mission to Turkey¹² that;

“The crackdown affects media outlets affiliated with the Gülen movement and journalists working or having previously worked for such outlets, journalists perceived to have connections to the Gülen movement, and independent, oppositional or minority media outlets and journalists accused of affiliation with the Gülen movement, despite little to no evidence to support these accusations. Dozens of journalists working for such outlets have been imprisoned while many others have been left unemployed, despite distant if any evidence of connection to the movement, let alone activities unlawful under Turkish law and subject to limitation under human rights law.”

21. Moreover, the Special Rapporteur states in his third-party submission¹³ that;

“The Special Rapporteur is very concerned about Turkey's arbitrary employment of the antiterrorism legislation and state-of-emergency decrees to silence critical voices and limit freedom of speech. Turkey's anti-terrorism legislation and state-of-emergency decrees have granted broad discretion to the executive branch, which holds unbridled prosecutorial authority with little to no judicial oversight. The post-attempted coup environment in Turkey is especially concerning to the Special Rapporteur, as the Government appears to have used the attempted coup as an opportunity to purge Turkish society of all dissenting voices.”

22. The Court's findings in the case of Atilla Taş, Turkey's renowned singer, who had also been a columnist for the Meydan daily (considered to be a Gülenist media) is considerably relevant in this context (Atilla Taş c. Turquie, [72/17](#)). In that case, the Government did not present any specific evidence to demonstrate that his participation in a demonstration to protest against the appointment of an ad hoc trustee to run the newspaper Bugün was of an illegal or violent nature. Furthermore, the Court noted that at the material time there was no court ruling which concluded that the newspaper in question was controlled by a terrorist organization. That newspaper was being considered as a dissident newspaper. Consequently, the Court considered that the applicant's mere participation in a peaceful meeting couldn't convince an objective observer that the applicant might have committed the terrorist offense in question. The Court ruled that such a charge against the applicant was linked to the exercise of his rights under the Convention, in particular Articles 10 and 11 (§, 134, Atilla Taş c. Turquie).

23. In that case, the Government's arguments that applicant's written expressions were to be understood as incitement to violence as they had served as the basis for the attempted coup and the interests of the Gülenist network. The Court did not accept such an argument, given that the content of the applicant's writings can in no way be interpreted as a call for the use of violent methods and that the words of the applicant certainly did not fall within the terrorist indoctrination, condoning the perpetrator of an attack,

¹² The Special Rapporteur's report (A/HRC/35/22/Add.3), para. 39.

¹³ The Special Rapporteur's intervention, para. 30.

denigrating victims of an attack, calling for the financing of terrorist organizations or other similar behavior. The Court concluded that although it may be regarded as a severe criticism of the policies of the government and of the President of the Republic, the content of the applicant's written expressions cannot convince an objective observer that the charges brought against the applicant are reasonable, which might lead to the justification of his pre-trial detention. The Court considered that the "reasonableness" of the suspicion shall not be extended so far as to infringe the applicant's right to freedom of expression guaranteed by Article 10 of the Convention (§, 135, Atilla Taş c. Turquie).

24. As analysed above, the detention of journalists who worked for Gülenist-linked media were not free from political clout. The applicant was detained on 4 August 2016 just two weeks after the botched coup attempt. As part of government's oppression against the dissident media, it is highly likely that the same ulterior arbitrary motives prevailed in the applicant's detention on remand and trial, as he was a prominent columnist of the shuttered Zaman daily, and known for his critical stance against the ruling party.
25. On the other hand, the Court emphasized in Atilla Taş that the deprivation of liberty suffered by the applicant constituted an interference with the rights under Article 10 of the Convention. As for the lawfulness of the interference in terms of Article 10 § 2 of the Convention, the Court noted that, in absence of "strong" suspicion of having committed an offense according to Article 100 of the Code of Criminal Procedure and of any ground for which a person may be subject to deprivation of liberty enumerated in Article 5 § 1 of the Convention, the interference with the rights and freedoms of the applicant under Article 10 § 1 of the Convention cannot be justified under Article 10 § 2 since it was not provided for by the law.
26. Without speculating the proper facts of the Türköne application, ASSEDEL believes that the Court's findings and interpretation in the Atilla Taş case would be relevant in the instant case as well.

The Speediness of the Constitutional Court in SoE Period

27. The applicant lodged an individual application with the Constitutional Court on 28 March 2017. The Constitutional Court rejected this application on 27 November 2019. The procedure before the Constitutional Court lasted for 30 months, out of which 16 months was loitered after the end of the SoE period.
28. The Court found no violation with regard to the speediness requirement in applications of Demirtaş ([14305/17](#)), Mehmet Hasan Altan ([13237/17](#)) and Şahin Alpay ([16538/17](#)) respectively for a duration of thirteen, fourteen and sixteen months of detention within the SoE period at the Turkish Constitutional Court. According to the Court such a long period of proceedings cannot be considered as 'speedy' in an ordinary context. However, taking into account the Turkish Constitutional Court's exceptional caseload following the declaration of the state of emergency, the Court found these durations acceptable in terms of Article 5 § 4 of the Convention. Nevertheless, the Court found a violation in the Kavala ([28749/18](#)) case whose application before the Constitutional Court lasted about fifteen months, ten months of which continued after the end of the state of emergency.

29. Given that the highly excessive period lasted before the Constitutional Court and that the finding of the Court in the Kavala case accordingly, we see no need to speculate much on the instant case regarding the speediness requirement of the judicial proceeding before the Constitutional Court.
30. However, ASSEDEL wants to request the esteemed Court to take note of the following arguments that may differ from the arguments to be presented for the subsequent cases, especially for cases where the duration of the proceedings would be shorter compared to the instant case.
31. ASSEDEL is of opinion that the Turkish government should not be exempted from non-performance of speedy review of judicial complaints on the pretense of claiming that the judiciary has a heavy burden of caseload due to exceptional circumstances.
32. The Turkish Constitutional Court declares in its annual report that it has been able to deal with approximately 90% of applications it received within the last four years¹⁴. The Constitutional Court employs a priority policy for urgent cases, similar to what the ECtHR does in such cases. Therefore, the caseload-excuse is a far cry from being convincing considering that the Constitutional Court concluded its reviews regarding the vast majority of such cases within the said period, except the case of Mr. Türköne which lasted 30 months. We believe that the political pressure on the Court seems to be the only plausible reason for the Court's failure to review the foregoing case within a reasonable time – if otherwise it has not lost its impartiality towards, and was heavily biased against, the applicant.
33. Furthermore, the extraordinary caseload of the judiciary has been originating from merely the misuse of the judiciary to further oppress tens of thousands innocent people. The Turkish judiciary has been heavily occupied due to the repressive and increasingly authoritarian measures of the Turkish government against the Kurdish politicians, dissidents, and the alleged members of the Gülen movement in the past few years. For instance, aligning itself with the government's repression on dissidents, the Turkish judiciary considers many legal activities such as subscription to Zaman Daily, having an account at Bank Asya, using the Bylock encrypted messaging application as evidence for criminal charges.
34. Judicial authorities have initiated criminal prosecutions against 612 thousand persons and detained 292 thousand of them after the failed coup attempt¹⁵. More than 82 thousand individuals have been detained for using and downloading Bylock. Depicting it as a regular communication application, the UN Working Group on Arbitrary Detention concluded several times that the use of this application constitutes merely an exercise of one's right to freedom of opinion and freedom of expression¹⁶. In the same vein, the UN Human Rights Committee does not accept it (CCPR/C/125/D/2980/2017, § 9.4) as a

¹⁴ See, 2019 Annual Report of the Turkish Constitutional Court, p. 180;

https://anayasa.gov.tr/media/6790/2019-yillik-rapor_kucuk.pdf

¹⁵ <https://www.yenisafak.com/gundem/fetoden-612-bin-kisiye-islem-3587006>

¹⁶ A/HRC/WGAD/2018/42, § 88,

https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session82/A_HRC_WGAD_2018_42_AEV.pdf

sufficient basis for arrest and detention of an individual¹⁷. The Turkish government uses the judiciary as a tool to silence and arbitrarily persecute the dissidents, critical voices and journalists that amount to tens of thousands of victims before the judicial authorities.

35. Furthermore, as a direct consequence of the Turkish judiciary's sheer flawed approach, the UN Working Group on Arbitrary Detention has stated that the detention pattern established by the Turkish judiciary in the post-coup period "under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity"¹⁸. It is undeniable that the Turkish Constitutional Court played a role in the exacerbation of the human rights situation in Turkey.
36. After all, the caseload before the Constitutional Court is a direct result of the Turkish government's policies that eroded the rule of law in the country. Rather than taking a clear position through some pilot judgments with regards to the grave human rights violations, the Court preferred to justify and condone the brazen violations committed through the lower courts, which appears to be stemming from the political pressure. The general principle of law stipulates that no one shall be heard, if he/she invokes his/her own guilt (*nemo auditur propriam turpitudinem allegans*). The well-known doctrine of the "fruit of the poisonous tree" also suggests that the Constitutional Court be not allowed to avail itself of the caseload-excuse, the generation of which it's been an accessory to. Thus, ASSEDEL believes that the exceptional caseload of Turkish judiciary in the SoE period should not be seen as an excuse for protracted judicial proceedings.
37. ASSEDEL believes that the case of Mr. Türköne provides an opportunity to the Esteemed Court to give a clear message to the Turkish Constitutional Court that has departed from the Court's case-law in political cases in which it retards the examination on purpose.

¹⁷ CCPR/C/125/D/2980/2017, § 9.4,

https://tbinternet.ohchr.org/Treaties/CCPR/Shared%2520Documents/TUR/CCPR_C_125_D_2980_2017_28518_E.docx

¹⁸ Opinion no 2020/47, para 101.

https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session88/A_HRC_WGAD_2020_47_Advance_Edited_Version.pdf