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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

TURKEY

OPINION

ON THE MEASURES PROVIDED IN THE RECENT EMERGENCY DECREE LAWS WITH RESPECT TO FREEDOM OF THE MEDIA

Adopted by the Commission
at its 110th Plenary Session
(Venice, 10-11 March 2017)

on the basis of comments by:

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I. Introduction

1. On 9 November 2016 the Committee on Political Affairs and Democracy of the Parliamentary Assembly of the Council of Europe requested the opinion of the Venice Commission on the measures provided in the recent emergency decree laws of Turkey with respect to freedom of the media.

2. Mr Christoph Grabenwarter, Ms Regina Kiener, Mr Martin Kuijer and Ms Herdis Kjerulf Thorgeirsdottir were invited to act as rapporteurs for this opinion. On 6 and 7 February 2017, a delegation of the Venice Commission visited Ankara and held meetings with the State authorities, judicial bodies, politicians, lawyers, journalists and NGO representatives. The Venice Commission expresses its gratitude to the Turkish authorities for the excellent organisation of the visit.

3. The present opinion was prepared on the basis of the comments submitted by the rapporteurs based on the English and French translations of the emergency decree laws (see CDL-REF(2016)061 and CDL-REF(2017)11), provided by the Turkish authorities, as well as the English translation of the Penal Code of Turkey (see CDL-REF(2016)011). These translations may not always accurately reflect the original version in Turkish on all points; therefore, certain issues raised may be due to problems of translation. The Venice Commission also took note of the written Memorandum prepared by Turkish authorities for the visit of the rapporteurs to Ankara (hereinafter – the Government's Memorandum, see CDL-REF(2017)010).

4. The present opinion was adopted by the Venice Commission at its 110th Plenary Session in Venice (10-11 March 2017).

II. Background information

5. Following the failed *coup d'état* of 15 July 2016, the Turkish Government declared the state of emergency and started legislating through emergency decree laws. Since then 21 such decree laws have been enacted (nos. 667 – 687). The duration of the emergency regime has been extended twice.[1] The primary aim of the emergency decree laws was to dismantle the "Gülenist network"– a secret organisation which penetrated the State apparatus and to which Turkish authorities attributed the organisation of the attempted coup (referred to by the authorities as "Fetullahist Terrorist Organization/Parallel State Structures" or "FETÖ/PDY"). A detailed description of those measures can be found in the Venice Commission's Opinion CDL-AD(2016)037 on the Emergency Decree Laws Nos. 667 – 676 adopted following the failed coup of 15 July 2016, (hereinafter – the Opinion on the Emergency Decree Laws).[2]

6. The purpose of the present opinion is to examine how the emergency regime affected the freedom of the media in Turkey.[3] Generally, the level of media freedom is defined by a combination of numerous factors, apart from the legal framework – economic, political, self-regulation, etc. Even indirect methods of financial pressure may create tangible chilling effects and lead to self-censorship.[4] However, the Venice Commission has no capacity to evaluate all

[1] In the notification by the Turkish authorities, dated 5 January 2017, the Secretary General of the Council of Europe was informed that the state of emergency has been extended for another period of three months till 19 April 2017.
[2] See §§ 180-182 and §§ 51-152
[3] The situation as regards the freedom of the media in Turkey has been a matter of concern even before the coup – see *inter alia* the country profile on the web-site of an international NGO "Reporters Without Borders" (https://rsf.org/en/turkey) which contains "freedom of speech ratings" of the country for the previous years. See also the Memorandum by the Commissioner for Human Rights of the Council of Europe, CommDH(2017)5, of 15 February 2017, p. 12
[4] Thus, for example, the delegates of the Venice Commission were informed about the selective withdrawal of State-funded "official advertisements" from some regional newspapers, for which those advertisement revenues constituted

those factors; furthermore, it has no fact-finding capacity and cannot assess individual cases.[5] It will therefore concentrate on those measures, relevant to the freedom of expression, which were ordered by the emergency decree laws, or are their immediate consequence. Essentially, the present opinion will examine three groups of questions:

- the mass liquidation of media outlets ordered by the emergency decree laws,
- the criminal prosecutions of journalists during the state of emergency period, accompanied by the application of the new rules of criminal procedure, and
- the new procedural mechanism introduced by Decree Law no. 685 – the "inquiry commission" which is tasked with reviewing individual measures applied, pursuant to the emergency decree laws, to private persons and legal entities (including media outlets).

7. The first group of questions to be examined refers to the mass liquidation of media outlets ordered by Decree Laws nos. 668, 675, 677, and 683. Media outlets have been closed because they "belong to, connect to, or [have] contact with" the "FETÖ/PDY" (Article 2 of Decree Law no. 668).[6] *In toto*, since July 2016 190 media outlets (including publishing houses, newspapers and magazines, news agencies, TV stations and radios)[7] were closed, leaving over 2.500 journalists and media workers without jobs.[8] In addition to the closure of the media outlets concerned, the decree laws ordered the expropriation of all their assets.[9] Pursuant to Decree Laws nos. 675 and 679, the closure of 23 of those media outlets was annulled.

8. The second group of questions to be examined in the present opinion relates to the area of criminal law and criminal procedure. The emergency decree laws have not modified the substantive norms of criminal law; however, *de facto* criminal prosecution of journalists, bloggers and political activists since the declaration of the state of emergency has intensified. During the state of emergency, more than 150 journalists have been arrested and detained on account of their publications which allegedly contained apology of terrorism or other similar "verbal act offences", or for "membership" of armed organisations.[10] In addition, Decree Laws nos. 667 and 668 introduced certain new procedural rules aimed at simplifying the task of the investigative bodies, prosecution and courts.[11]

9. The third group of questions relate to Decree Law no. 685 which created an inquiry commission, tasked with the examination of cases of those media outlets which have been liquidated by earlier decree laws.

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one of the main sources of income. See also: H. Thorgeirsdóttir, "Self-Censorship among Journalists: A (Moral) Wrong or a Violation of ECHR law?" (2004) E.H.R.L.R. (No. 4), pp. 383-399.

[5] For a comprehensive overview of various factors affecting the situation with the media freedom in Turkey, which also includes the analysis of pre-existing regulations and practices (i.e. those which do not have direct link with the emergency decree laws), see the Memorandum by the Commissioner for Human Rights of the Council of Europe, CommDH(2017)5, of 15 February 2017. This document also contains the analysis of specific cases related to individual journalists and media outlets.

[6] Subsequent decree laws use slightly different formula.

[7] Those figures were provided in the Government's memorandum, see pp. 79 et seq. According to the Memorandum of the Commissioner for Human Rights, mentioned above, "a total of 158 media companies had been closed down as of 11 January 2017. These included 45 newspapers, 60 TV and radio stations, 19 periodicals, 29 publishing houses and 5 press agencies" (p. 40).

[8] Pursuant to Decree Law no. 668 of 27 July 2016, 131 media outlets, including 45 newspapers, 16 TV channels, 3 news agencies, 23 radio stations, 15 magazines and 29 publishing houses were ordered to close because of alleged connections with "FETÖ/PDY". By Decree Law no. 675 of 29 October 2016 another 2 press agencies, 10 newspapers and 3 magazines were closed. By Decree Law no. 677 of 22 November 2016, 7 newspapers, 1 journal and 1 radio station were closed. Those media outlets which have not been closed down directly by the decree laws may be liquidated by a decision of a "commission to be established by the minister in the relevant ministries" (see Article 2 p. 4 of Decree Law no. 668).

[9] See, for example, Article 2 § 3 of Decree Law no. 668; subsequent decree laws provide for the same measure.

[10] See, in particular, §§ 8 - 12 of the Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002.

[11] Those measures were partly repealed in January 2017 by Decree Law no. 684.

10. The Venice Commission will examine these three groups of questions chiefly through the prism of the European Convention of Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR). The Commission will also refer, where necessary, to other sources of international human rights law (such as the International Covenant on Civil and Political Rights, the ICCPR) and to the Turkish Constitution. The Commission stresses that it ultimately belongs to the ECtHR to assess compatibility of the emergency measures with the ECHR.

III. Key observations on the current emergency regime in Turkey

11. To a large extent, the present opinion is built on the Opinion on the Emergency Decree Laws. In that opinion the Venice Commission examined the legal framework of the emergency regime in Turkey. Recommendations made in that opinion are still relevant today; they may be summarised as follows.

A. Summary of the previous recommendations of the Venice Commission

12. The Venice Commission, once again, condemns the attempted coup and acknowledges the right of a democratically elected government to defend itself.[12] The original decision to declare a state of emergency could be justified under the terms of Article 120 of the Turkish Constitution, Article 15 of the ECHR and Article 4 of the ICCPR. However, the Venice Commission is not persuaded that the further prolongation of the state of emergency was necessary. In general, the longer the situation persists, the lesser justification there is for treating a situation as exceptional in nature.[13]

13. During the emergency regime the government should take only such measures which are connected to the reasons and goals behind the state of emergency.[14] This is of particular importance given the fact that the criteria used to assess the links of concerned individuals and legal entities to the "FETÖ/PDY" (or other organisations which allegedly represent a threat to national security) have not been made public, at least not officially.[15] The "connections" with "terrorist organisations" are loosely defined and not individually substantiated.[16] So far it has not been possible to effectively challenge this lack of verifiable evidence of such "connections" in individual cases before the domestic courts.[17]

B. Excessive use of the emergency powers to regulate issues which go beyond the purpose of the state of emergency

14. Two earlier recommendations are particularly important for the purposes of the present opinion.

15. First, the Venice Commission reiterates that structural (general) measures or individual measures with a permanent effect should as a rule be introduced and discussed in a normal manner, and not by means of adopting emergency decree laws.[18] In the context of the present opinion the Venice Commission observes that, for example, Decree Law no. 680 introduced several *permanent* changes to Law no. 6112 on radio and television; in particular it gave to the regulatory authority (the Supreme Council) a right to suspend broadcasting temporarily, or, in cases of repeated violations, permanently (new Article 7, as amended by Article 17 of the

[12] See §§ 7, 38, 39 and 225 of CDL-AD(2016)037
[13] *Ibid.*, § 41
[14] *Ibid.*, §§ 79-80, 85
[15] *Ibid.,* § 129
[16] *Ibid.,* §§ 128-131, §§ 134-140
[17] *Ibid.,* §§ 80, 203-205, 214-216, 220-223, and 227
[18] *Ibid.*, §§ 89-90, and § 227

Decree Law). It also formulated a new principle of coverage of terrorist attacks, which prescribes that such coverage should not "produce results serving the interests of terrorism" (Article 18 of the Decree Law). Another amendment concerns the examination by the Supreme Council of broadcasting licence applications; it gives to the Supreme Council quasi-unlimited discretion to reject such applications on the grounds of national security and public order, on the basis of information (provided by the national intelligence bodies) that top executives of the media outlet concerned (and even its "partners") have "affiliation" or "relation" to a terrorist organisation (Article 19 of the Decree Law).

16. In the opinion of the Venice Commission, these amendments may be seen as problematic in themselves. Thus, the vagueness of the formula used by Article 18 (prohibiting coverage which "produces result serving the interests of the terrorism") may result in its overbroad interpretation, and will certainly create a chilling effect amongst journalists covering terrorism-related topics.[19] Rejection of broadcasting licence applications on the sole basis of information (which may or may not be confirmed by factual indications) about "affiliations" or "relations" of certain individuals with terrorist organisations is also subject to criticism, since it essentially gives the secret services discretionary power to block broadcasting licence applications, a power easily abused for political reasons.

17. Most importantly, the Venice Commission notes that these amendments were introduced by an emergency decree law, and not by an ordinary law carefully prepared and properly deliberated in Parliament before adoption. These amendments contaminate ordinary legislation with concepts developed by the Government for the purposes and in the context of the emergency situation. This confirms that there is a real risk of "permanentisation" of the emergency rule, to the detriment of the normal democratic political process.

18. Secondly, the Venice Commission reiterates that there must always be a strict and genuine link between the reasons justifying the state of emergency and the measures taken through the emergency decree laws. Under Article 15 of the ECHR any extraordinary limitations of human rights are permissible only "to the extent strictly required by the exigencies of the situation". Similarly, under the Turkish Constitution (Article 121 § 3) emergency decree laws must concern "matters necessitated by the state of emergency". In the current context, the Venice Commission does not find that this is always the case, which is very problematic.

19. For example, Decree Law no. 687 of 9 February 2017 has repealed Article 149/A of Law no. 298 of 1961 on Fundamental Principles of Elections and on Electoral Role. This provision refers to the possibility for the Supreme Electoral Board of sanctioning the lack of respect by private radios and television channels – during the elections period – of the general principles of broadcasting: conformity to the Constitution, integrity of the territory, protection of the national sovereignty, Republic, public order, public interest, protection of morals, prohibition of incitement to violence, protection of private life and honour of persons, and in particular, the principle of impartial broadcasting and the duty not to broadcast on behalf of a political party and not to be the instrument of a particular thought or conviction (Article 5 of Law no. 2954, read in conjunction with Article 55/A of Law no. 298). Pursuant to Decree Law no. 687, therefore, private radio and television broadcasters may no more be subjected to sanctions by the Supreme Electoral Board if they fail to be impartial and politically neutral during the elections period.

[19] One of the goals of all terrorists is to beget fear amongst the population; any coverage containing even minimal information about the extent and the nature of the attack may create this result and will, therefore, "serve the interests of the terrorism". Even interviewing a third person who promotes political ideas broadly similar to those propagated by the terrorists may be seen as a breach of Article 18, even if this person is in favour of peaceful and lawful means of achieving those goals.

20. The Venice Commission fails to see how the lifting of the possibility of sanctioning is necessitated by the state of emergency and is "strictly required" by its exigencies so as to justify regulation through an emergency decree law. In this connection the Venice Commission observes that the Turkish State is entering a difficult phase of constitutional reform. This reform is aimed essentially at strengthening the President's powers.[20] The Decree Law no. 687 seems to have an unwarranted impact on the campaign for the constitutional amendments. The Venice Commission recalls, in this respect, that fair access to the broadcasting media, both public and private, to all sides of the referendum campaign, and the balanced and neutral coverage by the public broadcasters is necessary to assist voters in making an informed choice.[21]

C. Effects of the state of emergency regime on the media coverage of the upcoming referendum

21. More generally, the Venice Commission reiterates that, "[…] the circumstances of the referendum must guarantee the freedom of voters to form an opinion. This requires *inter alia* that […] sufficient information is given to the voters, and that enough time is left for public debate".[22] In the run-up to a crucial referendum it is particularly important to have a healthy and pluralistic media scene where opposite points of view can be discussed without fear of reprisals. As the Venice Commission will demonstrate below, the current situation with the freedom of media has seriously deteriorated, largely due to the effect of various emergency measures, and does not allow for a proper public debate on the future constitutional design of Turkey. Thus, from this perspective, the timing for the constitutional reform raises concerns.

IV. Certain general principles regarding the freedom of the media

22. The Turkish Constitution protects the right to freedom of expression under several provisions: freedom of thought and opinion (Article 25); freedom of expression and dissemination of thought (Article 26); freedom of the press (Article 28), right to publish periodicals and non-periodicals (Article 29), and protection of printing facilities (Article 30). In the words of the Turkish Constitutional Court, the "freedom of the media is one of the main elements which constitute the foundation of a democratic society and among the essential conditions for the development of the society and the individuals".[23]

23. For that very reason, the media has been called the "public watchdog" in the case-law of the ECtHR.[24] Restrictions on the media are usually examined with the closest scrutiny by international human rights bodies in light of the essential role of a properly working mass media in a democratic society.[25] States parties should take particular care to encourage independent and diverse media. The freedom of expression encompasses the statements of thoughts which are in the nature of criticism as well. Permissible limitations to the freedom of expression are limited to situations in which the expression incites violence and/or hatred,[26] in case the

[20] The essence of the constitutional amendments proposed for referendum of 16 April 2017 is analysed in the Opinion on the amendments to the constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, CDL-AD(2017)005.
[21] CDL-AD(2010)013, Joint Opinion on the Election Code of Georgia as amended through March 2010, § 48; see also CDL-AD(2002)023rev, Code of good practice in electoral matters, Guidelines and Explanatory Report, para. I.2.3.c.
[22] CDL-AD(2016)029, Azerbaijan – Opinion on the draft modifications to the Constitution submitted to the Referendum of 26 September 2016, § 8 (further references omitted)
[23] Turkish Constitutional Court in its judgment of 14 December 2016, no. 2016/186, § 19.
[24] ECtHR, 23 September 1994, *Jersild v. Denmark* (no. 15890/89); Series A no. 298, § 31; ECtHR, *Bladet Tromsø a. Stensaas v. Norway*, 20 May1999 [GC], no. 21980/93, ECHR 1999-III, § 59.
[25] See, for example, HRC, 19 March 2009, *Mavlonov and Sa'di v. Uzbekistan*, no. 1334/2004, § 8.3.
[26] See, for example, ECtHR, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 115, ECHR 2004-XI; *Féret v. Belgium*, no. 15615/07, § 73, 16 July 2009.

expression is gratuitously offensive,[27] etc. However, it should be reiterated that a polemical and aggressive tone, a degree of exaggeration or even provocation will be ordinarily accepted in the case-law of the ECtHR.[28] The same holds true for the case-law of the Turkish Constitutional Court which considers that "harsh statements which are used during the course of explaining and disseminating the ideas should be taken/accepted naturally".[29]

24. Freedom of the media has a paramount importance within the ICCPR system. According to the UN Human Rights Committee, "a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society."[30]

25. Regardless of the violation of specific human rights guarantees, attention must be drawn to the "chilling effect" which the measures taken under the state of emergency may have on the media freedom in general. This effect is also a factor which plays a role in assessing the proportionality/necessity – and thereby the justification – of any sanctions imposed.[31] Moreover, states are under an obligation to create a favourable environment where different and alternative ideas can flourish, allowing people to express themselves and to participate in public debates without fear.[32]

26. The rights guaranteed under Article 10 of the ECHR may be derogated from under Article 15 of the ECHR,[33] through a notification made to the Secretary General of the Council of Europe.[34] However, derogation does not remove the application of the ECHR completely; any extraordinary limitations are permissible only "to the extent strictly required by the exigencies of the situation".[35] While the ECtHR leaves a wide margin of appreciation to the State concerned in the times of emergency,[36] the notion of necessity/proportionality is still of relevance,[37] which presupposes the advancement of adequate and sufficient reasons by the authorities.[38] Likewise, it implies the establishment of procedural safeguards against arbitrariness.[39]

27. Similarly, under the Constitution of Turkey (see Article 121 § 3), the scope of the emergency decree laws is limited to "matters necessitated by the state of emergency", and under Article 15 § 1, suspension of constitutional rights is only permitted "to the extent required by the exigencies of the situation". In this respect the Constitution of Turkey is based exactly on the same philosophy as the ECHR.

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[27] See ECtHR, *Otto Preminger Institut v. Austria*, no. 13470/87, 20 September 1994, § 49
[28] See ECtHR, *Handyside v. United Kingdom,* no. 5493/72, 7 December 1976, § 49; *Kuliś v. Poland*, no. 15601/02, § 47, 18 March 2008.
[29] Judgment of 14 December 2016, *ibid.*
[30] CCPR, General Comment No. 34, p. 13; see HRC communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005, p. 6.8.
[31] See, among others, ECtHR, *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002 II; *Cumpănă and Mazăre,* cited above, § 114; *Dammann v. Switzerland*, no. 77551/01, § 57, 25 April 2006; *Kudeshkina v. Russia*, no. 29492/05, § 99, 26 February 2009.
[32] See ECtHR, *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, § 137, 14 September 2010.
[33] Except Article 7, which is non-derogable provision under Article 15 of the ECHR (see, for example, ECtHR, *S.W. v. United Kingdom,* no. 20166/92, 22 November 1995, § 34).
[34] The Turkish authorities made such notification (see CDL-AD(2016)037, §§ 55 et seq.).
[35] A notion which also seems to be reflected in Article 1 of Decree Law no. 668: "measures that shall necessarily be taken".
[36] ECtHR, *Ireland v United Kingdom*, no. 5310/71, § 207, 18 January 1978
[37] ECtHR, *Brannigan and McBride v United Kingdom*, nos. 14553/89 and 14554/89, § 54, 26 May 1993.
[38] ECtHR, *Aksoy v Turkey*, no. 21987/93, § 78, 18 December 1996.
[39] ECtHR, *Lawless v Ireland* (3), no. 332/57, § 37, 1 July 1961.

28. Finally, the UN Human Rights Committee has likewise stressed that not only the emergency itself, but the "specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation," and has expressed concern over insufficient attention being paid by derogating states to the principle of proportionality.[40]

V. Liquidation of media outlets

A. Whether the liquidation of media outlets amounted to an interference with their freedom of expression

29. As follows from the text of the emergency decree laws, media outlets have been closed because of their alleged "connections" with the "FETÖ/PDY" (and other organisations considered "terrorist" or "decided to be in operation against the national security of the State by the National Security Council"). A distinctive feature of this measure is that it is not, formally speaking, associated with any particular *act* attributed to the media outlets concerned.

30. In most freedom of expression cases under Article 10 of the European Convention it was possible to link the sanction at issue to a "verbal act": a published text, an oral statement, an image, a footage, etc. In the present case, in the absence of individualised decisions and any precise information, it is impossible for the Venice Commission to tie this measure (liquidation) to specific comments, articles, statements or radio broadcasts – either individually or even collectively.

31. This lack of clarity, however, does not remove this situation from the ambit of Article 10 of the ECHR. While it is impossible to identify the particular publications (broadcasts, etc.) which led to the liquidation of media outlets, it is absolutely clear, from the language of the emergency decree laws, that those legal entities have been liquidated *as media outlets*, i.e. essentially in connection with their publications and their specific functions.[41] In the opinion of the Venice Commission this is sufficient to attract protection of Article 10 of the ECHR.[42]

32. Many official interlocutors whom the delegation of the Venice Commission met in Ankara argued that the measures taken by the authorities had nothing to do with freedom of expression because the action was taken in the fight against terrorism. To the great regret of the Venice Commission, such rhetoric reflects profound misapprehension of the concept of free speech. Where the authorities take measures against mass media or journalists in connection with their publications, statements, broadcasts etc. a question under Article 10 *always* arises, even if the authorities pursue a legitimate aim (fighting against propagation of terrorist ideas). Certain types of speech may be legitimately supressed, but the authorities are always bound to examine those cases through the prism of Article 10 of the ECHR (and similar provisions of Turkish Constitution or of the international human rights law).

B. Compliance with Article 10

33. To comply with the European freedom of expression standards set forth in the ECHR under Article 10, any restriction on the freedom of expression must cumulatively meet the following conditions; it must be provided by law ("lawfulness"); it must address one of the aims

[40] CCPR, General Comment No. 29, § 4

[41] That being said, the Venice Commission acknowledges that if media outlets were merely a façade for money laundering or alike operations, its liquidation would not fall within the ambit of Article 10. However, in the current context, where no specific indication of such unlawful activities is provided by the authorities and where this ground is not even mentioned in the emergency decree laws, an opposite presumption (that media outlets were essentially liquidated because of their publications) appears to be more plausible.

[42] The provisions with respect to "media service providers" constitute an interference with the freedom of electronic media (see Decree Law no. 680 of 6 January 2017).

set in Article 10 § 2 ("legitimate aim"), and must be necessary to achieve that legitimate aim ("necessity"). As to the criterion of "legitimate aim" the Venice Commission is prepared to give the Turkish authorities the benefit of doubt, and to admit, notionally, that the liquidation of media outlets was done "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime". In the current opinion the Venice Commission will work on that assumption. Regarding the "lawfulness" and "necessity" of those measures, the Venice Commission would like to make the following observations.

1. Lawfulness

34. The criterion of "lawfulness" refers, first, to the existence of a *legal basis* for the interference, and, second, to a certain *quality of the law*. *In casu*, the liquidation of numerous media outlets was ordered by several emergency decrees having the force of law.

35. The Venice Commission recalls, at the outset, its earlier observation that the Law on the State of Emergency of 1983 (the 1983 Law) does not permit the permanent dissolution of legal entities, but only provides for a temporary *suspension* of the activities of associations, after considering each individual case.[43]

36. Furthermore, speaking of the "quality of law", the ECHR has often reiterated that "the law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".[44] A broadly similar principle of legal certainty is also reflected in the case-law of the Turkish Constitutional Court.[45] The question is whether the "persons concerned" – the media outlets and their owners, shareholders, managers, etc. – could reasonably foresee the "consequence" of their "actions", and adapt their behaviour accordingly.

37. In the Government's Memorandum the Turkish authorities stressed that even before the enactment of the emergency decree laws the legislation contained provisions prohibiting various forms of speech. In particular, they cited Article 8 of Law no. 6112 (on radio and TV services) which proscribes seditious, inflammatory speech, propaganda of terrorism, and alike.[46]

38. It may not be excluded that the authorities, when putting a particular media outlet on the list of entities to be liquidated, had in mind some specific publications or other similar acts imputed to those media outlets. Thus, according to the Government's Memorandum, an assessment of these "connections" was being made on the basis of a combination of several grounds, which included, first of all, the content of the publications of the media outlets concerned, but also the use of those media outlets as vehicles for collecting funds for terrorist organisations or for money laundering.[47] In their further comments the Government submitted that "it is evident that media outlets had foreseen that they would be imposed administrative and judicial sanctions once they made publications favoring terrorist organizations before the coup attempt of 15 July".

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[43] See § 72 of CDL-AD(2016)037

[44] ECtHR, *The Sunday Times v. the United Kingdom* (no. 1), § 49, 26 April 1979, Series A no. 30, p. 31.

[45] "The principle of certainty is related to legal security, as required by this principle the individual should know which concrete act and fact leads to which legal sanction or consequence and which power of intervention these acts cause. Only under these circumstances, the individual could foresee his/her responsibilities and act accordingly. The legal security requires that the norms be predictable, the individuals trust the state in all their acts and procedures and the state avoid any methods which will harm this feeling of confidence in legal arrangements" (Judgment no. 2016/186 of 14 December 2016).

[46] Pp. 51 - 53

[47] P. 51

39. However, under the emergency decree laws, the media outlets have been liquidated not because of their previous wrongful behaviour and not with reference to the previously existing legal provisions; thus, the liquidations cannot be seen as a form of an "administrative and judicial sanction" for specific violations of the law. The liquidations were based on a *new criterion* ("connections", "affiliations" etc. to the "terrorist organisations" and other organisations which are declared by the National Security Council to pose a security threat) and where done through a *new expedited procedure*.

40. Hence, even if the liquidated media outlets were implicated in the past in some illegal acts (such as propaganda of terrorism or money laundering), those acts have not been referred to neither in the decree laws nor in any other official document. Moreover, the reason for the liquidation of the media outlets was formulated too vaguely. Neither the emergency decree laws, nor any other official document develop the terms of "connections", "affiliations" in more detail.[48] In the Opinion on the Emergency Decree Laws the Venice Commission already expressed concern that such broad definitions imply that any sort of link to the "FETÖ/PDY" (or other "terrorist organisations") may lead to the liquidation of the legal person concerned. Whatever are the exact terms in Turkish, it is clear that these formulas are not specific enough to assess where the line is to be drawn between innocent media outlets and those that had been implicated in some unlawful activities.

41. In sum, if the purpose of the Turkish authorities was to sanction the media outlets for their past behaviour, the "lawfulness" of this measure under Article 10 of the ECHR is questionable. In addition, arguably, this situation may also raise an issue under Article 7 of the ECHR, which is an un-derogable right under Article 15 thereof.

42. Alternatively, mass liquidations of media outlets may be seen as a *preventive measure*. One may argue that the media outlets have been liquidated not for what they have done, but for what they *might do in the future*.

43. However, even from this perspective the lawfulness of this measure remains problematic. Emergency decree laws defined the reason for the liquidation of media outlets ("connections" etc. to "terrorist organisations") and applied it *immediately* to the specific legal entities. The only legal basis of the decree laws was Article 121 § 3 of the Turkish Constitution, which gives the Government a very general mandate to issue emergency decree laws during the state of emergency "on matters necessitated by the state of emergency".

44. Such use of *ad hominem* legislation has already been criticised in the Opinion on the Emergency Decree Laws.[49] In the present context the Venice Commission considers that Article 121 § 3 may hardly be seen as constituting a sufficient "lawful basis" for the Government's actions *vis-à-vis* media outlets. Any other interpretation would mean that Article 121 § 3 gives the Government unfettered powers to legislate at their own will, and that would be a very dangerous supposition. The Venice Commission has repeatedly held that "even in a state of public emergency the fundamental principle of the rule of law must prevail."[50]

45. In any event, the Venice Commission has serious concerns about the necessity of this measure, as demonstrated below.

[48] Emergency decree laws use different formulas for defining which media outlets should be liquidated. Thus, Decree Law no. 668 orders liquidation of those media outlets "which belong to, connect to, or contact with" the "FETÖ/PDY". Decree Law no. 677 ordered liquidation of "media organs […] that have membership to, affiliation or connection with the terrorist organizations".
[49] CDL-AD(2016)037, §§ 86, 91 and 227 p. 3
[50] CDL-AD(2011)049, Opinion on the draft law on the legal regime of the state of emergency of Armenia, § 44

2. Necessity

46. As explained by the Ministry of Justice of Turkey in Ankara during the visit of the Venice Commission delegation, ordinary tools (such as Law no. 6112) had already been applied to various media outlets before the July 2016 coup, but that they had been largely ineffective. Some media outlets had already been sanctioned on various occasions (examples were given of media outlets having been sanctioned under Law no. 6112 more than ten times), but this had not prevented them to continue with their broadcasts. In addition, the application of the ordinary tools was too cumbersome and too slow. According to the authorities, "FETÖ/PDY" is an exceptional threat because of its enormous financial reserves and extremely well organised structure, and has an impressive capacity to resist application of ordinary sanctions. Also, terrorist organisations passed encrypted messages via the media they controlled. According to the authorities, these circumstances necessitated development of a new criterion ("connections" to "terrorist organisations") and use of fast-track procedures (liquidation by lists attached to the decree laws or, in some instances, by decisions of regulatory authorities empowered to take such decisions by the decree laws).

47. As a starting point, the Venice Commission stresses that Article 10 § 2 of the ECHR requires an assessment of an expression in its context and in the light of all the circumstances of the concrete situation. Also, the UN Human Rights Committee states that "permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible" with Article 19 § 3 of the ICCPR.[51] This is why prior restraints (which are aimed at supressing future publications, broadcasts, etc.) call for the most careful scrutiny on the part of the ECtHR – it is very difficult to assess the "dangerousness" of a future speech and to conduct a meaningful balancing exercise.[52]

48. The Venice Commission is prepared to acknowledge that it could be necessary, in times of emergency, for a State to take *preventive* measures based on more or less extensive presumptions about future behaviours. Thus, the authorities may wish to avoid a panic reaction among the population, or stop hate speech that foments inter-community violence. Temporary suspension of broadcasting or a temporary ban on distribution of printed press may be justified in such extreme situations, even though, in normal conditions, such measures are not likely to withstand a (strict) judicial scrutiny.[53]

49. However, this logic is not applicable *in casu*. There should be an immediate need for such preventive measures to *prevent certain media content*. From the text of the emergency decree laws it is not possible to learn what sort of danger the liquidation of media outlets was supposed to address. The existence of any potential threat, represented by the media outlets at issue, should be demonstrated with reference to some specific facts – for example, be inferred from the content of the specific previous publications of the media outlet concerned. When speaking about the dismissal of public servants, the Venice Commission insisted that such decision should be based on a "*combination of factual elements which clearly indicate that the public servant acted in a way which objectively cast serious doubts on his or her loyalty to the democratic legal order*" (§ 131). The Government's decision to liquidate media outlets did not refer to any such specific factual elements.[54] The Government asserted that certain mass media were used to pass "encrypted messages" to the members of the illegal networks; the

[51] CCPR, General Comment No. 34, § 43
[52] ECtHR, *Ürper and others v. Turkey*, no. 14526/07, § 39, 20 October 2009
[53] See the discussion on the prior restraints in CDL-AD(2015)004, Opinion on the draft Amendments to the Media Law of Montenegro, §§ 14 et seq., with particular reference to the ECtHR judgement in *Editions Plon v. France*, no. 58148/00, 18 May 2004, § 42.
[54] Vague reference to "connections" with the "terrorist organisation" is not a factual assertion, since it does not describe the character of those connections, and, moreover, does not refer to any *specific evidence* confirming the existence of such connections and their nature.

Government gave several examples of such "encrypted messages".[55] The Venice Commission took note of those assertions; however, they are still being examined by the courts in Turkey, and, in any event, interpretation of those images and footages as "encrypted messages" to the organisers of the coup is at least subject to doubt.

50. The Venice Commission does not assert that all closures of media outlets were unjustified. Some of those measures might have been justified by the "exigencies of the situation", but the problem is that the closures were done directly by the decree laws and without individualized decisions based of verifiable evidence.[56]

51. There are multiple other reasons why, in the opinion of the Venice Commission, mass liquidation of media outlets appears to have been unnecessary and unjustified by the "exigencies of the situation". The Venice Commission reiterates its earlier observation about the permanent character of those measures.[57] The t*emporary* suspension of the activities of media outlets allegedly linked to the "Gülenist network" would not be less effective and would be more consistent with the obligations of Turkey under the ECHR (§ 180). It appears that such temporary suspension of operations of a media outlet is possible even under the ordinary rules of the Turkish law.[58] Other measures could also have been envisaged, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles.

52. Moreover, one might discuss whether a legal entity *as such* can have a connection to a terrorist organisation (unless it is directly owned by members of the organisation or the organisation itself). In case there is a connection between an employee or a member of the editorial board of the legal entity and a terrorist organisation, the State has less intrusive means of intervention (i.e. criminal law, administrative sanctions, etc.), than the total closure of the legal entity.

53. Another argument speaking against such measures relates to the pre-eminent role of the media in a democratic society. The Venice Commission previously observed that mass dismissals of public servants (especially in the Army and Police) may be legitimate, accepting that public servants have a *duty of loyalty* towards the State. However, unlike public servants, the journalists, newspapers, TV stations etc. have no such duty. Quite the contrary, one of the journalistic virtues is to keep a critical attitude towards the authorities and the politicians. Due to the role of the media as a "public watchdog" they enjoy a higher level of protection than any other business; in addition, in assessing the impact of those measures the authorities should also take into account a potential *chilling effect* these measures may have on the media market as a whole, and not only on the particular group of journalists or their readers.[59]

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[55] As an example of such "encrypted message" the Government referred to a commercial published in the electronic version of the *Zaman* newspaper (liquidated for connections to "FETÖ/PDY") "which was aired exactly 9 months and 10 days before the coup attempt" (see: https://www.youtube.com/watch?v=MtjEtEgUYgk). This commercial, in the opinion of the Government, "clearly conveyed the message of a possible coup to organization members". Another example of "encrypted message" given by the Government was an image published in *Sızıntı* magazine (allegedly linked to "FETÖ/PDY"), depicting "a person in military uniform opening the door into a flower garden". The Government also refers to an "example of a newspaper caption 'another possibility exists'". Finally, the Government referred to the TV series "Souls Dedicated to Order" aired on *Samanyolu* channel (allegedly linked to "FETÖ/PDY"), where the assassination of Russian Ambassador in Ankara during an art exhibition was depicted long before it has actually happened.

[56] See § 181 of CDL-AD(2016)037

[57] *Ibid*., §§ 79, 85, and 227 p. 2

[58] See, for example, *Medya FM Reha Radyo Ve Iletisim Hizmetleri A.S. v. Turkey* (dec.) no. 3284/02, 14 November 2006. In this case the ECtHR examined a one-year suspension of the broadcasting license of a radio programme. The ECtHR considered such ban to be a very severe sentence; however, it acknowledged that such massive restrictions had a dissuasive effect, which could be seen as necessary since the message diffused by the radio unequivocally called for violence and armed resistance.

[59] H. Thorgeirdottir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the ECHR,* Martinus Nijhoff Publishers, Leiden/Boston, 2005.

54. Finally, the Venice Commission reiterates its position that measures ordered within the state of emergency should have a *sufficiently close nexus* to the reasons for which the state of emergency has been declared.[60] This nexus defines the permissible scope of the emergency measures *ratione temporis* and *ratione materiae*; that being said, a pre-existing problem may sometimes become an imminent danger and justify an emergency measure.

55. In the aftermath of the coup, some media outlets were liquidated (and journalists arrested) for articles, broadcasts etc. which have taken place essentially *before* the coup.[61] In the opinion on the Emergency Decree Laws , the Venice Commission acknowledged that the emergency powers may also be applied to other "terrorist organisations" other than "FETÖ/PDY".[62] However, according to Human Rights Watch, the Turkish authorities used Decree Law no. 668 to shut-down 23 TV and radio stations, amongst which were several stations popular among Kurds, Alevis and supporters of opposition parties.[63] It is not clear whether those shut-downs are related or limited to the "reasons and goals behind the state of emergency". That being said, the Venice Commission reiterates that its task is not to examine specific cases, and that Turkish Parliament and the courts ought to be better placed to decide whether the Government went beyond its powers and applied emergency measures to those media outlets and journalists or to those cases which were not sufficiently related to the situation which gave rise to the declaration of the state emergency or to its subsequent development.

56. In assessing the proportionality of interference, the ECtHR often examines procedural safeguards which may prevent arbitrariness. In the Opinion on the Emergency Decree Laws the Venice Commission has already expressed concern over the non-respect of even minimal due process guarantees before the impugned decisions had been taken, as well as about unavailability of *ex post* remedies. To a certain extent, the question of *ex post* administrative and judicial remedies is addressed by the newly adopted Decree Law no. 685; the Venice Commission will analyse this aspect of the situation in Section VIII below.

57. In sum, the Venice Commission considers that mass liquidation of media outlets by emergency decree laws (and hence without individualised reasoning) is incompatible with Article 10 of the ECHR, even taking into account the very difficult situation in which the Turkish authorities found themselves after the failed coup.

VI. Confiscation of property

58. The closing down of media outlets was accompanied by the confiscation of all their assets, without compensation. Confiscation of property implies an interference with the right to peaceful enjoyment of possessions as protected by Article 1 of Protocol no. 1 to the ECHR. As mentioned before, even though this is a derogable right, and even though during the emergency regime the State's margin of appreciation is considerably larger, the principle of proportionality still applies.

59. All criticism expressed above in relation to the liquidation of media outlets *a fortiori* applies to the confiscation of their assets. It was done on the basis of very vague criteria, established by the Government through *ad hominem* emergency decree laws and applied immediately, without examination of the individual circumstances of each entity concerned. This method excludes any meaningful analysis of the necessity of this measure.

[60] CDL-AD(2016)037, §§ 64 – 69
[61] For background information, see Human Rights Watch, Silencing Turkey's Media: The Government's Deepening Assault on Critical Journalism, 2016
[62] CDL-AD(2016)037, § 68
[63] Human Rights Watch, op. cit., p. 1.

60. It is settled case-law of the ECtHR that the taking of property without payment of an amount reasonably related to its value, as a rule, constitutes a disproportionate interference which could not be considered justifiable under the Convention.[64] There are obvious exceptions to this rule. For example, no need to offer reasonable financial compensation would arise if the authorities confiscate illegal goods, or proceeds of crime. However, such an exception does not seem to apply in the case at hand, since the decree laws do not imply that the confiscated property was or will be used in any criminal activity. Indeed, the Government in their Memorandum claimed that the organisations liquidated by the decree laws have been allegedly involved in financing terrorism or money-laundering.[65] However, this assertion is impossible to verify, since the decree laws themselves do not refer to these legal grounds, and there are no individualised decisions demonstrating that those organisations were indeed involved in such practices.

61. Even if it was the case, instead of definitely confiscating all assets of organisations, it may suffice to temporarily freeze large amounts on their bank accounts or prevent important transactions, to appoint temporary administrators and to allow only such economic activity which may help the organisation in question to survive until its case is examined by a court following normal procedures, where the origin of those assets and funds and their possible use will be established with certitude.

62. Finally, the Venice Commission notes that the liquidation of the media outlets extinguished all obligations of those media outlets before third persons, who may have had nothing to do with any terrorist activity – such as, for examples, unpaid salaries and work-related benefits of proof-readers, cameramen, make-up stylists, drivers, cleaners, etc. Such "collateral damage" cannot be explained by the reasons and goals behind the emergency decree laws, even accepting, for the sake of argument, that liquidation as such was necessary. In the opinion of the Venice Commission the State at the very least should have accepted financial liabilities of the definitely liquidated media outlets, probably with some narrowly formulated exceptions (such as liabilities towards members of terrorist organisations).

VII. Use of the criminal justice system against journalists

A. Substantive rules of the Penal Code

63. In March 2016 the Venice Commission adopted an Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey (CDL-AD(2016)002, Opinion on the Penal Code). This opinion examined several provisions of the Turkish Penal Code which are most often applied to the journalists. All the recommendations made in the Opinion on the Penal Code are still valid today, and even *a fortiori*, since even though the emergency decree laws did not modify the provisions of the Penal Code, in practice the criminal prosecution of the journalists under certain provisions of the Penal Code has admittedly intensified during the period under examination.[66]

[64] ECtHR, *Lithgow and others v. the United Kingdom*, nos. 9006/80 etc., §§ 120-122, 8 July 1986; ECtHR, *The Former King of Greece v. Greece*, no. 25701/94, § 89, 23 November 2000

[65] Pp. 24 and 51

[66] At least, this is demonstrated by the significant growth of the number of journalist detained pending criminal proceedings against them – see the Memorandum of the Commissioner for Human Rights, cited above, p. 83. The Turkish Government provided statistical data which shows no increase in the prosecution under most commonly used provisions defining "verbal act offences" (such as insulting the President, or degrading the Turkish nation, etc.) during the period of emergency. However, that data does not include prosecution under the heading of "membership" of illegal armed organisations, terrorist propaganda or "acting on behalf" of such organisations, while those provisions, reportedly, have been massively used to prosecute the journalists for their writings in the past six months.

64. As the delegates of the Venice Commission were assured at the official meetings in Ankara, the "connections" criterion which is used to activate the administrative measures under the emergency decree laws has no bearing on the substantive meaning of the criminal law provisions. That being said, the intensification of the criminal prosecution of journalists may result from an overly broad construction of the existing provisions of the Penal Code.

65. There is no need to repeat all the recommendations made in the Opinion on the Penal Code in this respect. One, however, needs to be reiterated in the context of the emergency regime - it concerns the notion of "membership" of a criminal/armed organisation, or of acts committed "on behalf of" such organisation, or "aiding and abetting" it (those concepts are contained in particular in Articles 220 and 314 of the Penal Code).[67]

66. During the visit to Ankara the rapporteurs learned that after the declaration of the state of emergency many journalists had been prosecuted and placed in detention as *members* of various terrorist groups, exclusively on the basis of the *content* of their publications. The Government, in their Memorandum, argued, by contrast, that the journalists were detained not because they were journalists, but for being members of a terrorist organisation or for "making propaganda in favour of them".[68]

67. A "verbal act" may be analysed from two points of view: as a self-sufficient ground for prosecution, or, alternatively, as auxiliary evidence that the person concerned is involved in another unlawful activity (for example, in the recruitment of new members to an illegal armed organisation). The line dividing these two aspects of "verbal acts" is a fine one. The Venice Commission recalls that where the *only* evidence which led to the criminal conviction of the applicants for "membership of" (or "aiding and abetting") a terrorist organisation was the content of their public speech (in various forms), the ECtHR tended to consider those cases as falling within the ambit of Articles 9, 10 and/or 11 of the ECHR.[69]

68. The Venice Commission cannot assert whether charges of "membership" of a terrorist organisation (or similar charges), which often entail harsher sentences, are well-founded in each specific case. However, it reiterates that "the expression of an opinion in its different forms should not be the only evidence before the domestic courts to decide on the membership of the defendant in an armed organisation".[70]

69. The Venice Commission stresses that the Penal Code of Turkey and the special anti-terror legislation have several *specific provisions* which permit to combat inflammatory or seditious speech, propaganda of terrorism, and other similar "verbal act offences" (see, in particular, Articles 215, 216, 220 § 8, 217, 299, 300 and 301 of the Penal Code and Article 7 § 2 and Article 8 § 2 of the Anti-Terrorism Law no. 3713). Such verbal acts may be, in principle, legally reprehensible, and, *in extremis*, even criminally punishable.[71] Still, a judge applying those specific provisions should be aware of their dimension under Article 10 of the ECHR. This awareness reduces the risk that acceptable forms of expression would be suppressed by means of the criminal law. By contrast, when the same publications are treated under the

[67] See CDL-AD(2016)002, §§ 12 and 128
[68] P. 9
[69] See, for example, ECtHR, *Gül and others v. Turkey*, no. 4870/02, §§ 32 et seq., 8 July 2010; ECtHR, *Yılmaz and Kılıç v. Turkey,* no. 68514/01, §§ 54 et seq., 5 May 2013. See also, *mutatis mutandis*, the observations made by the Venice Commission in the Report on counter-terrorism measures and human rights (CDL-AD(2010)022), §§ 29 et seq.
[70] CDL-AD(2016)002, § 107
[71] The UN HRC states in this respect that "States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as 'encouragement of terrorism' and 'extremist activity' as well as offences of 'praising', 'glorifying', or 'justifying' terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. […] Journalists should not be penalized for carrying out their legitimate activities." CCPR, General Comment No. 34, § 46.

heading of "membership" of a terrorist organisation, "aiding and abetting" it, or acting "on behalf of" it, the risk of unjustified interference in the freedom of speech is much higher.[72]

70. In their later submissions the Government informed the Venice Commission that "in accordance with the paragraph of Article 7/4 of the Anti Terrorism Law No. 3713, added by the law No. 6459 dated 11.04.2013, being punished for propaganda alone is not deemed sufficient to constitute the crime of membership to an organization". This clarification is important and the Turkish authorities have to ensure that this approach is also reflected in the practical application of the Penal Code, and that "verbal act offences" (related to different forms of expression of opinion) are clearly distinguished from the concepts of "membership" in illegal organisations, aiding and abetting terrorism etc.

71. The Government also claimed that "despite being journalists, many people who had an armed conflict with the security forces, threw molotov cocktails to the police, slaughtered innocent people and planned terrorist activities, were identified along with the evidence". Indeed, where a person who is a journalist by profession is involved in such acts, no Article 10 question arises, and such person may be legitimately prosecuted as a member of a terrorist organisation. However, the focus of the Venice Commission's attention is not on those situations, but on the cases where the "membership" accusation is derived essentially from the substance of the publications of the person concerned.

72. The above does not mean that the Venice Commission uncritically approves the use of those specific provisions of the Penal Code which deal with "verbal act offences". Some of them are dangerously vague (which may raise an issue under Article 7 of the ECHR) or set excessively high penalties. All criticism expressed in this regard in the Opinion on the Penal Code remains valid (see in particular §§ 125 et seq., on Articles 216, 299[73] and 301). However, in the current context the first step to improve the situation with the journalistic freedom would be to construct the notion of "membership" *very narrowly*. Radical dissidents and fierce critics of the regime may be sanctioned for exceeding the limits of permissible speech, notwithstanding the little scope under Article 10 § 2 of the Convention for restrictions on political debate, but at least they should not be placed on the same footing with the members of terrorists groups.[74] The Venice Commission thus considers that the "membership" concept (and alike) should not be applied to the journalists, where the only act imputed to them is the content of their publications.

B. Pre-trial detention of journalists

73. According to TGS (Journalists' Union of Turkey), TGC (Journalists Association of Turkey) and DİSK (Confederation of Progressive Trade Unions of Turkey), during the state of emergency, 210 journalists were detained; while some of them have been since released, more

[72] In his Memorandum, cited above, the Commissioner for Human Rights of the Council of Europe, speaking of the continuous detention of the *Cumhuriyet* journalists, emphasises "the lack of material evidence establishing any link whatsoever between the suspects and these ['terrorist'] organisations, aside from a non-contextual reading of newspaper articles critical of the government" (p. 87).

[73] The Venice Commission observes that in its recent judgment (of 12 December 2016, no. 2016/186) the Constitutional Court of Turkey held that Article 299 was not unconstitutional; the Constitutional Court reasoned that defamation against the President, who represents the State, should be regarded as an offence against the State and not only as committed against him individually; the dignity of the State was at stake in addition to the personality of the President (see §§ 13 and 16). Yet, the Constitutional Court acknowledged that freedom of expression as protected under Article 26 of the Constitution protects harsh criticism (§ 19); that the limits of criticism are wider with regard to public figures yet the President should not have to tolerate attacks against his "honour or reputation". At the same time the Constitutional Court remained convinced that the said provision did not pose any obstacle to express ideas and thoughts that the essence of the right is not infringed on. With all respect due to the Constitutional Court of Turkey, that judgment unfortunately overlooks the danger of a "chilling effect" of such norms for the unrestrained political debate, which is essential for any healthy democracy.

[74] ECtHR, *Feldek v. Slovakia*, no. 29032/95 § 74, 12 July 2001

than 150 remain detained. Pre-trial detention of journalists (and other media workers) on suspicion of terrorist offences has previously been condemned by the European Parliament.[75]

74. The first question which arises in connection with the emergency decree laws relates to the new rules of criminal procedure introduced by them. The Opinion on the Emergency Decree Laws commented on the most pertinent issues in this regard.[76] In particular, the Venice Commission stated that "in the area of criminal procedures, the extension of the time-limit for pre-trial detention without judicial control to up to 30 days is highly problematic; arrests of suspects should be ordered only on the basis of 'reasonable suspicion' against them; limitations on the right of access to a lawyer may be imposed only in exceptional situations in individual cases, where the existence of security risks is convincingly demonstrated, for a very limited lapse of time and, ultimately, should be subject to judicial supervision."[77]

75. The scope of application of Decree Law no. 668, which introduced those new rules, was limited to offences contained in Parts 4 – 7 of the Fourth Chapter of the Turkish Penal Code. Given the criticism the Venice Commission expressed in Opinion on the Penal Code on, *inter alia*, Articles 299 and 301, it is positive that the scope of application of Decree Law no. 668 did not extend to Part 3 of the Fourth Chapter of the Penal Code, which contained some of the problematic provisions.[78]

76. The Venice Commission further welcomes amendments introduced by Decree Law no. 684 of 23 January 2017, in which the Turkish Government reduced the maximum period in custody without bringing the suspect before a judge to 7 days (with a possible extension to 14 days) and removed the possibility to restrict access to a lawyer for 5 days. These amendments go in the right direction, even though the maximum time-limit for bringing a detained person before a judge remains quite long, even after the reduction.

77. In this respect, the question of the legal characterisation of the acts imputed to the journalists arises again. While Decree Law no. 668 was in force in this part, if a journalist was accused of *membership* of an illegal armed organisation (i.e. under Article 314, alone or in conjunction with Article 220), then the new rules of criminal procedure would apply, to the detriment of the procedural rights of the defence. That reinforces the previous recommendation of the Venice Commission that the concept of "membership" should be interpreted narrowly and should not be applied to journalists in connection with the content of their writings (see paragraph 72 above).

78. Even if the new rules of criminal procedure are not applicable (for example, where the only accusation against the journalist is based on Article 216 – "Provoking hatred …"), a journalist may nevertheless be detained on the basis of the *ordinary* rules of the Criminal Procedure Code. It should be stressed in this regard that, while the emergency decree laws temporarily amended certain procedural rules (such as the time-limit for bringing an arrested person to the judge), nothing suggests that the authorities intended to change the rules which define the grounds for pre-trial detention of suspects. The ECtHR has previously held that Turkey had violated Articles 5 §§ 3 and 4 of the Convention by detaining two journalists on the basis of reasons that were neither "relevant" nor "sufficient" to justify its length.[79] These judgments

[75] Resolution of 27 October 2016 on the situation of journalists in Turkey (2016/2935(RSP)), §§ 3 and 4
[76] See §§ 151-176
[77] *Ibid.*, § 227
[78] Chapter 3 contains Article 299 ("Insulting the President of the Republic"), Article 300 ("Degrading the Symbols of State sovereignty") and Article 301 ("Degrading the Turkish Nation").
[79] See ECtHR, *Şık v. Turkey* and *Nedim Şener v. Turkey*, nos. 53413/11 and 38270/11, 8 July 2014. The reasons given for the pre-trial detention of Mr Şık were the production of a book which was sharply critical of a judicial investigation and contributing to another book that spread propaganda on behalf of Ergenekon (an organisation whose members were convicted of plotting a coup d'état in 2013). Mr Şener was suspected of aiding and abetting the organisation by covering up its activities and manipulating public opinion. Interestingly enough, in the case of those two journalists, they have been detained for denouncing the "Gülenist conspiracy".

should serve as a yardstick concerning the pre-trial detention of journalists; however, given the rise in the arrests of the journalists during the emergency period, it appears that the Turkish authorities do not follow that case-law.[80]

79. The Venice Commission recalls that the necessity for the pre-trial detention is to be assessed essentially in the light of the *future risks* which the accused may represent for a *normal course of justice*. Those future risks include absconding, tampering with evidence, re-offending and alike.[81] Pre-trial detention should not pre-empt a possible sentence of imprisonment.[82] The gravity of the offence imputed to the suspect is a relevant element for assessing such risks, but, when journalists are concerned, the mere content and tone of the media coverage, commentary, statement etc. should not be considered – taken alone – as sufficiently grave in order to justify pre-trial detention. Custodial measures of this kind are liable to create a climate of self-censorship for any journalist wishing to comment (critically) on the actions of State bodies and officials.

80. The Venice Commission acknowledges that in the times of emergency, and especially in the immediate aftermath of a major nationwide crisis,[83] the authorities may be given more leeway in assessing those "future risks". However, the authorities should not lose this perspective completely, and should not justify the detention orders only by the legal characterisation of the offence imputed to the defendant (as a "terrorism-related" offence or alike). In the opinion of the Venice Commission, any decision ordering the arrest and detention of a journalist, and especially prolonging such detention, should contain an assessment (at least precursory) of *specific facts* which reasonably demonstrate that the detention is necessary for the normal progress of the case and that other preventive measures (such as reasonable bail, for example) would not achieve this goal. The Venice Commission is particularly concerned by the collective arrests of the journalists after the declaration of the state of emergency.[84] Issuing collective detention orders is an indicator that no meaningful assessment of risks individually posed by each arrested person has been conducted.

81. Last, but not least, the Venice Commission observes that during the visit to Ankara the delegates of the Venice Commission learned that the arrested journalists often remain in the dark about the specific reasons for their arrests and continuing detention. The only information communicated to them consists of general stereotyped references to the provisions of the Penal Code and Anti-Terrorism Law which served as a legal ground for their prosecution/detention. The Venice Commission stresses, in this respect, that detention orders should not be based essentially on secret materials available only to the prosecution. The defence would not be able to exercise the right of appeal, guaranteed by Article 5 § 4 of the ECHR, and the courts will not be able to examine the necessity for the pre-trial detention under Article 5 §§ 3 and 4, if the requirement of Article 5 § 2 of the ECHR is not met in the first place: this provision obliges the authorities to communicate to the detainee "the reasons for his arrest and of any charge against him", which includes the right to know "the essential *factual* grounds

[80] The Venice Commission stresses that in that case the ECtHR also considered the detention through the prism of Article 10, in view of the chilling effect that detentions of journalists may have on the freedom of speech, and concluded that such detention (even without ultimate conviction) as such amounted to unjustified interference in the applicants' freedom of expression.

[81] See ECtHR, *Zherebin v. Russia*, no. 51445/09, §§ 56-63, 24 March 2016.

[82] See ECtHR, *Idalov v. Russia*, no. 5826/03, § 145, 22 May 2012, with further references.

[83] As the Venice Commission stated in the Opinion on the Emergency Decree Laws, § 62, the analysis of the necessity and proportionality of emergency measures and their compliance with the rule of law requires a dynamic approach: what is justified in the immediate aftermath of a major public crisis may not be needed several months later.

[84] Thus, for example, on 25 July 2016 arrest warrants were issued for 42 journalists, and on 27 July 2016 another 47 journalists (of the *Zaman* newspaper) were arrested. On 16 August, *Özgür Gündem* newspaper was closed down and 24 journalists were taken in custody. 12 employees of *Cumhuriyet* newspaper were arrested on 31 October 2016.

for his arrest" (emphasis added).[85] These grounds should be communicated to the defence under Article 5 § 2, should be then made available to the judicial authorities and, finally, should be reflected in the decisions taken by the courts under Article 5 §§ 3 and 4 of the ECHR.

82. In the paragraphs above the Venice Commission described the test to be applied in deciding on the necessity for pre-trial detention. However, it is equally important to see *who* applies that test to each specific case. The Venice Commission recalls that detention orders are issued in Turkey by the "criminal peace judgeships", which were established in June 2014, and which are, in the words of the Commissioner on Human Rights, "at the nexus of some of the most problematic decisions, including detentions, media bans, appointment of trustees for the takeover of media companies or internet blocking".[86] The Venice Commission draws attention of the Turkish authorities to the criticism regarding the system of the "peace judgeships", expressed in its Opinion on the duties, competences and functioning of the criminal peace judgeships (CDL-AD(2017)004, §§ 102 et seq.). An effective application of the principles developed by the ECtHR under Article 5 is impossible without a substantive revision of the system of judicial review of detention matters.

VIII. Creation of the inquiry commission (Decree Law no. 685)

83. As stressed in the Opinion on the Emergency Decree Laws, one of the most problematic aspects of the emergency regime in Turkey was the (un)availability of judicial remedies.[87] In the context of the present opinion that meant that, until recently, it was unclear whether the media outlets liquidated directly by the decree laws could complain about the liquidation before the courts.[88]

84. In the Opinion on the Emergency Decree Laws the Venice Commission supported the proposal made by the Secretary General of the Council of Europe concerning the creation of an independent *ad hoc* body for the examination of individual cases of dismissals, subject to subsequent judicial review.[89] The Venice Commission therefore welcomes the fact that the Turkish authorities have sought to remedy this situation in Decree Law no. 685 which was adopted in January 2017. This Decree Law creates a 7-member administrative commission competent to deal with all dismissals and liquidations during the period of emergency.[90] It also provides for a judicial appeal against the decisions taken by that commission.[91] Article 2 (1) (c) clarifies that the Decree Law is also applicable for the subject-matter of this opinion.

85. That being said, the Venice Commission has described this future *ad hoc* body in the following terms:

> *"The essential purpose of that body would be to give individualised treatment to all cases. That body would have to respect the basic principles of due process, examine specific evidence and issue reasoned decisions. This body should be independent, impartial and*

[85] ECtHR, *Lazoroski v. the former Yugoslav Republic of Macedonia*, no. 4922/04, § 52, 8 October 2009
[86] Memorandum, p. 69
[87] See §§ 206 et seq. and, in particular, § 227
[88] As explained by the Turkish authorities, a certain number of media outlets have been liquidated by the decisions of the competent administrative entities, such as, for example, the Supreme Council for Radio and Television. Those liquidations, according to the Turkish authorities, could be challenged before the administrative courts.
[89] CDL-AD(2016)037, § 228
[90] The delegates of the Venice Commission were explained that the newly created inquiry commission will not deal with dismissals and liquidations ordered not directly by the emergency decree laws but by the decisions of the administrative entities.
[91] ECtHR President G. Raimondi referred to this development during his speech at the opening of the Judicial Year on 27 January 2017: "I would note that this week's developments in Turkey are encouraging. The creation, by legislative decree, of a commission with responsibility for examining the appeals lodged in response to the decisions taken since the attempted coup d'état is an excellent initiative, particularly since a judicial appeal will lie against the decisions taken by that commission."

be given sufficient powers to restore the status quo ante*, and/or, where appropriate, to provide adequate compensation. […].”*[92]

86. It remains to be seen whether the newly created inquiry commission satisfies these criteria. The Venice Commission observes that the executive appoints 5 out of 7 members of the inquiry commission, while the quorum for taking decisions is 4 members. A member may be easily removed from the inquiry commission by the latter's own decision (Article 4).[93] The inquiry commission's term will be two years; during this time this commission is expected to review over 130,000 dismissals and several thousands of cases of liquidation of private entities. Examination will be conducted on the basis of documents in the case-file, seemingly without participation of the person concerned, and certainly without participation of the public or the media. Article 6 introduces a confidentiality clause, which may be construed as affecting transparency even in the context of a written procedure.[94] It is unclear how a liquidated media outlet is supposed to argue its case, since at the time of submitting an application to the commission, the entity would not be aware of the reasons underlying the authorities' decision to liquidate it in the first place. Hence, it would be necessary to introduce at the very least an obligation of the relevant administrative entities to disclose to the applicants and to the inquiry commission the reasons (which include the factual elements)[95] for the liquidation.

87. The decisions of the commission are subject to appeal before “the Ankara administrative courts which are identified by the High Council of Judges and Prosecutors.” However, there is no requirement that those decisions should be supported with evidence, reasoned and/or published. Furthermore, it is unclear what sort of remedies that inquiry commission will be capable of giving; in particular, whether it would have the power of restoring the *status quo ante*, of returning the assets and restoring the company in the trade registers.

88. It remains to be seen whether this commission, in view of its size, composition, duration of its mandate and principles of functioning, will be able to give individualised treatment to all cases, and issue reasoned decisions based on verifiable evidence. It is very positive that an appeal to an administrative court (and ultimately to the Constitutional Court) lies against decisions of this commission. Furthermore, this inquiry commission does not need to have all attributes of a judicial body, provided that there is an appeal to a court afterwards.[96] However, if the commission is not capable of issuing reasoned and individualized decisions, it is unclear what would be the role of the administrative courts and of the Constitutional Court in this scheme. If the purpose of the commission is to serve as an effective filtering mechanism and

[92] CDL-AD(2016)037, § 222

[93] Article 4 (1): “[…] However, a member shall be dismissed by the Commission, if it is found that:
a) the member fails to attend a total of five Commission meetings within one calendar year, without any reason that could be accepted by the Commission, […]
d) an investigation or prosecution is initiated against the member for offences listed in Articles 302, 309, 310, 311, 312, 313, 314 and 315 of the Turkish Criminal Code (Law no. 5237, dated 26 September 2004),
e) an administrative investigation against the member is initiated by the Prime Ministry or a permit for investigation against the member is issued on the ground that the member concerned is a member of, or have relation, connection or contact with terrorist organizations, or structures/entities, or groups established by the National Security Council as engaging in activities against the national security of the State.”

[94] See in this respect, *mutatis mutandis*, CDL-AD(2007)016, Report on the Democratic oversight of the Security Services, §§ 195 – 217.

[95] A mere reference to the “connections” to the terrorist organisation would not be sufficient in this context.

[96] Especially in the field of administrative law, judicial functions are frequently assigned to administrative authorities, which themselves do not meet all requirements of Article 6 of the ECHR. According to the established case-law of the ECtHR, this does not in itself mean that the Convention is breached. In such situations the ECtHR simply requires that domestic law provides for the possibility to have all aspects (both legal and factual) of the decision taken by the administrative authority to be reviewed by a judicial institution, which does fully comply with the requirements of Article 6 of the ECHR. This is called the doctrine of full review. See M. Kuijer, *The Blindfold of Lady Justice – Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*, Wolf Legal Publishers 2004, pp. 133-136.

thus to disburden the judicial system, this commission should be capable of producing a result different from the lists annexed to the emergency decree laws.

89. Finally, the Venice Commission draws the attention of the Turkish authorities to the time aspect of the newly introduced scheme; the maxim ”justice delayed is justice denied” is often used, but in this case it is of particular importance. The potential work-load of the inquiry commission (which has not yet started operating) is enormous. In such conditions, cases concerning liquidated media outlets should be among those which are given priority treatment. First, every such decision affected a large number of individuals (especially employees and owners of the media outlet). Second, and most importantly, those cases have a political dimension which transcends the particular interests of the owners/employees of the legal entities concerned. These considerations are of particular importance in view of the fact that the parties will be obliged to turn to the inquiry commission before they can seize a judge to review their cases. If free media in Turkey are effectively silenced over a prolonged period of time, the very foundation of the democratic state governed by the rule of law is affected.

90. In sum, the Venice Commission considers that the newly created commission will be a useful legal mechanism only if certain basic procedural requirements are met – in particular, if the commission issues reasoned individualised decisions based on verifiable evidence.[97]

IX. Conclusions

91. It is firmly embedded in the case-law of the European Court of Human Rights and underscored by the Venice Commission time and again that freedom of political debate is at the very core of the concept of democratic society. The ability to openly discuss political matters in the media becomes even more crucial when the state of emergency has been prolonged, and where a major constitutional reform is launched.

92. The Venice Commission acknowledges that certain extraordinary measures may have been required in the immediate aftermath of the failed coup of 15 July 2016. However, such measures as mass liquidations of media outlets on the basis of the emergency decree laws, without individualized decisions, and without the possibility of timely judicial review, are unacceptable in light of the demands of international human rights law, and extremely dangerous. The same concerns the intensification of criminal prosecutions of journalists based on their writings, under the heading of “membership” of terrorist organisations, and their arrests without relevant and sufficient reasons. Instead of restoring democracy those measures may further undermine it.

93. The Venice Commission regrets that, in the current situation, the Turkish media cannot effectively exercise their public watchdog role and check on the need for the extension of the emergency rule and for the planned changes to the Constitution. The Venice Commission, therefore, calls the Turkish authorities to:

- supplement Decree Law no. 685 with a provision requiring that individuals and legal entities affected by the emergency measures (including the liquidated media outlets) be made aware of the specific reasons for those measures and the factual basis thereof, in order to enable them to make their case before the inquiry commission, and that decisions of the inquiry commission be individualised, reasoned and based on verifiable evidence;
- ensure that the inquiry commission has the powers to restore the *status quo ante* and that it has the power to grant priority treatment to the most urgent applications, including those introduced by the media outlets;

[97] Admittedly, the obligation to give reasoned decisions should exist only in cases where the inquiry commission rejects an application lodged by the media outlet.

- ensure that the journalists are not prosecuted under the heading of “membership” of terrorist organisations (and alike), where the charges against them are essentially based on their writings;
- ensure that where journalists are prosecuted essentially because of their publications, pre-trial detention is not imposed on the sole ground of the gravity of the charges which are derived from the content of their publications; the authorities should be able to demonstrate “relevant and sufficient” reasons for the detention of journalists, in line with the case-law of the ECtHR on the matter, and such detentions should remain an exception;
- Repeal any measure taken by emergency decree laws which is not strictly necessitated by the state of emergency.

94. The Venice Commission remains at the disposal of the authorities for any assistance they may need in this respect.