SURVEILLANCE, SECRECY AND SELF-CENSORSHIP

NEW DIGITAL FREEDOM CHALLENGES IN TURKEY
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The silenced voice of journalist Can Dündar is the preface of this report.

On the morning of 24 November 2015, Can Dündar, who had been working on this document, told us he had almost finished his final draft and would send it to us before the end of the weekend. That day he attended a court hearing about his case in Istanbul, where he was accused of ‘divulging state secrets’ and detained solely for carrying out his responsibilities as a professional journalist. Such charges could see him face life imprisonment. As I write this, he is awaiting trial in Silivri prison in Istanbul.

The person chosen to present this report - *Surveillance, Secrecy and Self-censorship: New Digital Freedom Challenges in Turkey* - lost his freedom. A voice has been muted; a critical mind put behind bars; a committed journalist prevented from practising his profession. What clearer symbol could there be of the present situation of freedom of expression in Turkey?

Jennifer Clement, president of PEN International
**AKP**
Adalet ve Kalkınma Partisi or Justice and Development Party, a socially conservative party, with Islamist leanings, headed by Prime Minister Ahmet Davutoğlu and formerly headed by President Recep Tayyip Erdoğan. It had a parliamentary majority until June 2015.

**BDP**
Baş ve Demokrasi Partisi or Peace and Democracy Party. A pro-Kurdish political party in Turkey existing from 2008 to 2014 when it became the Democratic Regions Party (Demokratik Bölge Partisi) which operates solely at a local and regional level;

**ECHR**
The European Convention for the Protection of Human Rights and Fundamental Freedoms, to which Turkey is a state party.

**ECtHR**
The European Court of Human Rights which hears cases of alleged violations of the ECHR.

**ESB**
Erişim Sağlayıcılar Birliği, the Internet Service Providers Union, established under amendments to the Internet Law in February 2014. Internet service providers in Turkey which are not members of the Union are not permitted to operate.

**DNS**
Domain Name Service - a hierarchical distributed naming system for computers, services, or any resource connected to the internet or a private network.

**Ergenekon**
Ergenekon is an alleged clandestine ultranationalist group said to be working to overthrow the AKP. Its members reportedly included elements of the military and police, terrorist or paramilitary groups, nongovernmental organisations, organised crime, journalists, politicians, judges, and government officials. While significant evidence of a criminal conspiracy has been uncovered since 2007, there have been numerous allegations of fair trial irregularities. The government has also used the investigation to prosecute and silence journalists and activists critical of the government and of the trial proceedings.

**Gülen Movement**
Also known as Hizmet or Cemaat in Turkey, this is a religious and social movement led by US-based Turkish Islamic scholar and preacher Fethullah Gülen. It runs schools and educational establishments in Turkey and other countries, and is widely believed to have supporters in state institutions such as the judiciary and police. Originally allied to the AKP against the military and PKK, recent years have seen the two split, with a resultant crackdown on Gülenist sympathisers.

**ICCPR**
The International Covenant on Civil and Political Rights, to which Turkey is a state party.

**ISP**
Internet Service Provider.

**KCK**
Koma Civakên Kurdistan or Union of Communities in Kurdistan, a Kurdish political party which the Turkish authorities claim is an umbrella organisation for groups with links to the banned Kurdistan Workers’ Party (PKK) which has been engaged in armed conflict with the Turkish state since 1984. In 2009, the Turkish authorities began a crackdown on pro-Kurdish politicians, lawyers, journalists and intellectuals whom they alleged were associated with the KCK.

**MİT**
Millî İstihbarat Teşkilatı, Turkey’s National Intelligence Agency.

**OHCHR**
Office of the UN High Commissioner for Human Rights.

**PKK**
Partiya Karkerên Kurdistanê, or Kurdistan Workers’ Party. An opposition group which is engaged in armed struggle against the Turkish state to achieve greater civil and political rights and self-determination for the Kurdish population. It is banned as a terrorist organisation in Turkey and is also proscribed by the EU and several other states, including the USA, UK, Germany, France, Canada and Australia.

**TİB**
Telekomünikasyon İletişim Başkanlığı, Turkey’s Telecommunications Directorate which has the power to block websites without a court order.

**VPN**
Virtual private network – a secure, encrypted network which allows users remote from each other to communicate securely.
TIMELINE
TURKEY AND ONLINE CENSORSHIP

6 MARCH 2007  Youtube blocked in Turkey for three days for hosting videos insulting ‘Turkishness’ and Ataturk, founder of Turkey.

4 MAY 2007   Enactment of the Internet Law (Law No. 5651), authorising internet blocking when there is sufficient reason to suspect the commission of an offence.

17 AUGUST 2007  Wordpress.com blocked following a religious defamation complaint.

5 MAY 2008   Youtube in Turkey is blocked by court order which remains in place for two years. Youtube remains a top-10 site for visits through alternative Domain Name System (DNS) servers.

18 SEPTEMBER 2008  Personal website of scientist and avowed atheist Richard Dawkins (richarddawkins.net) blocked for defamation of prominent Islamic creationist Adnan Oktar.

24 OCTOBER 2008  Blogger.com and Blogspot.com blocked by court order.

5 NOVEMBER 2008  Enactment of Law No. 5809, the Electronic Communications Law (ECL), enabling control of internet.

JUNE 2010  The site google.com is blocked by a court order on the grounds that bans of specific URLs are not possible. The blanket ban is appealed to the ECtHR.

JUNE 2010  Through his personal Twitter account, Turkish President Abdullah Gül criticises the bans on YouTube and Google services.

30 OCTOBER 2010  Youtube block is lifted. The Attorney General’s ruling noted that the videos insulting to Ataturk had been removed from the site. Access to Google Apps-hosted sites remains blocked.

18 DECEMBER 2012  The European Court of Human Rights (Yildirim v Turkey) holds that the blanket website blocking authorised by Law No. 5651 violates the right to freedom of expression.

15 APRIL 2013  Pianist Fazil Say given a 10-month suspended sentence for ‘insulting religious values’ in a series of tweets including a verse by Omar Khayyam which challenged the understanding of ‘heaven’ in Islam. After a long legal battle, he was acquitted.

25 MAY 2013  Sevan Nişanyan sentenced to over 13 months in prison for alleged blasphemy in a blog post defending the controversial short film ‘The Innocence of Muslims’ on grounds of freedom of expression.
NYU researchers report that at least two million tweets mentioning hashtags related to the escalating demonstrations in Gezi Park, Istanbul, such as #direngeziparki (950,000 tweets), #occupygezi (170,000 tweets) or #geziparki (50,000 tweets) have been sent in past 24 hours.

Facebook takes down an event page calling for global solidarity protests on 8 and 9 June. The event had attracted 5000 ‘attendees’ in a matter of hours.

Sedat Kapanoğlu, owner of satirical web dictionary Ekşi Sözlük and 40 contributors to site charged with religious defamation via press or broadcast for entries satirising the Prophet Muhammad. Kapanoğlu and 39 others later received suspended sentences.

Facebook takes down the main page and profile of the Kurdish Peace and Democracy Party (BDP) in Turkey, after the posting of content relating to PKK (Kurdistan Workers Party) fighting in northern Syria and calls by an MP for the autonomy of Kurdistan.

Major scandal about money laundering within the government and alleged bribery linked to public tenders breaks.

Yenidonem.com, the website of Tera daily columnist Mehmet Baransu, blocked for publication of photographs and tapes concerning the corruption scandal.

Turkish news website T24 ordered by TİB to take down an article concerning parliamentary questions posed by an MP concerning the sale of media group Turkuvaz and alleged government bribery.

Soundcloud.com blocked after publishing recorded phone calls allegedly taking place between Prime Minister Erdoğan and a number of political figures, businessmen and family members.

Online Turkish news source Vagus.Tv blocked. Its reporting on the 17 December corruption investigation is suspected to be the cause.

Controversial amendments made to the Internet Law (No. 5651), expanding the grounds for online censorship including without prior judicial order in cases of alleged breach of privacy or for defamation.

Prime Minister Erdoğan vows publicly to ‘eradicate Twitter’.

Twitter blocked in Turkey by TİB as a ‘protection measure’; subsequently the block is approved by the courts.

Like many other users, Turkish President Abdullah Gül evades the ban and takes to Twitter to urge caution in the clampdown on social media.

Following the publication of alleged recordings of senior officials plotting a ‘false flag’ operation in Syria, YouTube is blocked nationwide.

Access to Twitter reinstated following a unanimous ruling by the Constitutional Court that the ban violated the rights of users and freedom of speech.

The ‘Law Amending the Law on State Intelligence Services and the National Intelligence Agency’ (Law No. 6532) comes into force.
3 JUNE 2014
Ruling by the Constitutional Court on 29 May that the YouTube ban violated the rights of users and freedom of speech results in restoration of access.

8 SEPTEMBER 2014
Further amendments to Internet law passed, including the extension of TİB powers to block websites without court approval on national security and public order grounds.

10 SEPTEMBER 2014
Grindr, an international networking app for gay and bisexual men, is blocked by court order.

1 OCTOBER 2014
TİB uses newly granted powers to block an article by Radikal co-ordinator and columnist Ezgi Başaran on grounds of defamation. The article criticised the rector of Istanbul Technical University (İTÜ) for ordering the removal of trees planted on campus in memory of the protesters who died during the Gezi Park demonstrations.

1 OCTOBER 2014
Following police raids on their offices on 30 September, the websites of newspapers Karşı Gazete and Gri Hat are blocked by TİB. They had recently reported on alleged co-operation between MIT and Islamist extremists in Syria.

2 OCTOBER 2014
Turkish Constitutional Court ruling overturns certain amendments made to Internet Law as unconstitutional. TİB loses the power to block websites or demand ISPs remove content without a court order. TİB also loses the power to monitor which sites individual internet users are visiting.

30 DECEMBER 2014
Arrest of journalist Sedef Kabaş for ‘targeting a person involved in an anti-terror investigation’. Although later acquitted, the prosecutor appealed her acquittal, continuing her judicial harassment.

6 JANUARY 2015
Dutch journalist Frederike Geerdink briefly detained on suspicion of ‘making propaganda for a terrorist organisation’ via her Twitter account. She is later acquitted.

27 FEBRUARY 2015
A court in Ankara blocks access to the Atheism Foundation’s website www.ateizmdernegi.org on the grounds that it ‘insults religion’.

3 APRIL 2015
Controversial amendments to the Internal Security Law enacted, giving police more powers to conduct surveillance without a warrant.

6 APRIL 2015
Access to Twitter, YouTube and Facebook blocked after images of a hostage situation involving a prosecutor who was later killed were posted. Access restored after Facebook complied with the court’s decision and removed the content.

15 APRIL 2015
Internet law amended. Ministers can now request TİB to block sites for up to 24 hours without a court order if sites fail to remove specified content within four hours.

17 APRIL 2015
Turkey briefly blocks access to the URL shortening service. No reason for the blocking was provided. TİB officials later stated that the blocking had been due to a “technical error”.

2 JUNE 2015
Journalist Can Dündar faces charges of ‘espionage’ after President Erdoğan complained about an article and video published on the Cumhuriyet website.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
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<tbody>
<tr>
<td>20 JULY 2015</td>
<td>Suicide bombing claimed by Islamic State in border town of Suruç kills over 30. Protests erupt in Kurdish areas at the perceived failure of the state to prevent the attack</td>
</tr>
<tr>
<td>22 JULY 2015</td>
<td>Two police officers found dead; PKK claims responsibility as a reprisal for Suruç bombing. Twitter briefly blocked.</td>
</tr>
<tr>
<td>24 JULY 2015</td>
<td>Turkish air force bombs PKK sites in northern Iraq in response to the killings of the police officers and carry out mass arrests including of alleged Kurdish militants.</td>
</tr>
<tr>
<td>25 JULY 2015</td>
<td>TİB blocks access to several left-wing and Kurdish sites, including Rudaw, BasNews, DiHA, ANHA, daily Özgür Gündem, Yüksekova Haber, Sendika.Org and RojNews.</td>
</tr>
<tr>
<td>27 AUGUST 2015</td>
<td>Arrest of three Vice News journalists in south-eastern Turkey. Two British nationals are released and deported, but Iraqi Kurd Mohammad Rasool remained in detention in November 2015, charged with 'working on behalf of a terrorist organisation'.</td>
</tr>
<tr>
<td>10 OCTOBER 2015</td>
<td>Bomb attack in Ankara kills at least 97 and injures hundreds. Facebook and Twitter briefly blocked.</td>
</tr>
<tr>
<td>28 OCTOBER 2015</td>
<td>Raid on Koza-Ipek media offices, followed by appointment of board of trustees, in connection with alleged terrorism offences. The board of trustees, criticised as being too close to the government, dismisses dozens of employees.</td>
</tr>
<tr>
<td>11 NOVEMBER 2015</td>
<td>Nokta magazine columnist Perihan Mağden under investigation on suspicion of ‘insulting’ President Erdoğan.</td>
</tr>
<tr>
<td>26 NOVEMBER 2015</td>
<td>Journalists Can Dündar and Erdem Gül arrested after being charged with espionage and other national security offences.</td>
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‘Democracy is like a tram ride; we will take it to our destination and then get off.’
President Recep Tayyip Erdoğan made this infamous statement (see left) to his followers in 1994, the year in which he was elected mayor of Istanbul. The tram ride has been a rough journey recently, in the run up to the parliamentary elections of June 2015, where the ruling AKP Party lost its majority, and the recent follow-up election of 1 November 2015, to where the AKP regained a slim majority, but without sufficient representatives to be able to push through Constitutional reforms increasing the powers of the President, which many commentators had predicted was President Erdoğan’s aim.

Freedom of expression, particularly online, has been one of the casualties of this rough journey. Turkey’s decision to block access to YouTube and Twitter in late March 2014\(^1\) represented a new nadir for freedom of expression in a country traumatised by a crisis of protest, corruption, and loss of faith and face. This state of affairs began with the Gezi Park protests in May 2013 and continued through the revelations of high-level corruption that began to emerge in late December 2013 right through 2014 and the deteriorating security situation following the inconclusive parliamentary elections of June 2015. According to statistics for 2014 released by the European Court of Human Rights (ECHR), Turkey single-handedly surpassed the 46 other states in the Council of Europe (CoE) in terms of cases involving violations of the right to freedom of expression.

PEN International and its Centres have been documenting freedom of expression violations in Turkey for several decades. This report is the third in a wide-ranging series analysing such violations between 2012, when PEN undertook a high-level mission to Turkey, and 2015, during which there were two parliamentary elections. This report focuses specifically on the dramatic recent increase in violations of freedom of expression in the digital sphere, through repressive legislation, attempts to shut down social media, and online surveillance resulting in numerous arrests, detentions and trials.
THE NEW ZEALOTRY—FROM GEZI PARK TO CHARLIE HEBDO

Over a period of several weeks in May and June 2013, protests against the destruction of a park for development were subjected to police intervention with tear gas, water cannon and plastic bullets; municipal authorities set fire to the tents of those occupying the park, and seized the tents of others. More than 5000 people were arrested over the next few months in cities all over Turkey. Over 150 journalists were attacked during the protests, according to Bianet statistics, and more than 80 journalists and commentators critical of the government were fired or forced to resign from their jobs. The potential for the online sphere to act as a thriving hotbed of dissent was demonstrated in dramatic fashion during the protests, when social media flared up as a catalyst for popular discontent, much as it had done across the Middle East and North Africa in 2011.

On 17 December 2013, an investigation into corruption implicated the government of Prime Minister Recep Tayyip Erdoğan and the ruling Justice and Development Party (AKP). On 17 December, Istanbul police carried out early morning raids on several homes, detained 52 people and confiscated approximately $17.5 million in cash. The money was allegedly the proceeds of corruption and bribery (in the construction, bid-tendering and development sector of the economy), fraud, money-laundering and gold smuggling. 14 people were arrested, all of whom had close ties to the AKP; some of those suspected of wrongdoing were Erdoğan’s own son and family members of cabinet ministers. Three cabinet ministers resigned, and Erdoğan immediately undertook a purge of the prosecutors and police leading the corruption investigation, specifically targeting individuals believed to be sympathisers of the faith-based Gülen movement (also known as Hizmet in Turkey) inspired by Turkish Islamic scholar-in-exile Fethullah Gülen who he accused of forming a ‘parallel structure’ aimed at bringing down the AKP.

Hizmet and the AKP were former allies working to reduce the power of the military in politics but fell out in 2012 when elements of the judiciary believed to be Gülen followers summoned the Minister of Intelligence to testify about alleged links with the PKK. Relations progressively soured until November 2013 when Erdoğan took steps to close down private ‘prep’ schools, many of which were run by the Gülen movement and which were a source of funds and recruitment. The corruption scandal soon followed, and continued in early 2014 by the release of leaked documents and audio recordings on YouTube, including one of an exchange about getting rid of millions of dollars, reportedly between Erdoğan and his son Bilal. Erdoğan declared ‘war’ on Hizmet, which resulted in the reassignment of at least 2,000 police, judges and prosecutors.

By March 2014, the internet was playing host to a raft of seemingly damning audio recordings of senior government officials and their families. It was in this increasingly charged atmosphere that the blocking order for Twitter was conceived by the Turkey Telecommunications Directorate (TİB), even in the absence of any court order to block all of Twitter.com. The blocking order was issued one day after then Prime Minister Erdoğan’s vow ‘to rout out’ the micro-blogging site. The block on YouTube followed a couple of days later, leaving only Facebook and Google accessible out of Turkey’s most visited four websites. Notably, the Turkish authorities implemented both website blocks just as the political campaign for nationwide local elections, widely described as a referendum on Erdoğan’s rule just months before the Presidential election in which he was a candidate, was reaching fever pitch.

This marked a turning point for Turkey; online censorship was no longer confined to attempts to dictate public morality as it had been since the internet law was first introduced in 2007, it was now a bona fide part of the government’s arsenal of restrictions on political discourse. The AKP, once lauded for breaking down the anti-democratic practices of the old military establishment in Turkey, was itself becoming chief architect of the country’s most significant challenges to freedom of expression and political thought to date.

‘They want to take control of the internet, where independent people, individuals or small groups can come together, and groups of journalists who have fewer resources and a new amateur spirit can have their voices heard. In Turkey the internet is seen as a place where things can be done independently, and they want to take the internet under control now because they fear that.’

Yasemin Çongar, P24 co-founder, speaking to PEN in September 2014
The new zealousy was proven early in 2015, after the murderous attack on the offices of Charlie Hebdo in Paris led to blocks against websites carrying images of Charlie Hebdo cartoons, and court cases against journalists who reproduced them.25

But this recent regime of online censorship and mass surveillance was implemented against a backdrop of longstanding, serious abuses of the judicial process and attacks on freedom of expression by Turkish authorities, taking the form of politically-charged anti-terror and corruption investigations and trials. A trio of high-profile, complex and interwoven cases, first instigated in 2007 and involving large numbers of Turkish citizens, media organisations and individual journalists, forms the context for the current ramping up of attempts to control freedom of expression.

**ANTI-TERROR, CONSPIRACY, THE MEDIA AND THE JUDICIARY**

First, the Ergenekon trials: in June 2007, a cache of arms was discovered in a suburb of Istanbul alleged to be connected to a coup being planned against the ruling AKP-led government of Turkey by a clandestine, secularist organisation known as Ergenekon. Twenty-three indictments have been brought26 and over 250 defendants have been convicted, many receiving given long sentences, including several journalists.27 There have been numerous due process issues with the trials, including prolonged pre-trial detentions about which PEN International has repeatedly expressed concern.28 The first set of appeals against convictions in the Ergenekon case were heard on 6 October 2015.29

Secondly, the KCK trials: between April 2009 and November 2011. According to the Peace and Democracy Party—BDP, a pro-Kurdish rights political party active in Turkey until it was dissolved in 2014, 7748 people were detained and 3895 were arrested in relation to the government’s investigation of the Koma Civakên Kurdistan (KCK), an alleged umbrella organisation for groups with links to the banned Kurdistan Workers Party (PKK), which is engaged in armed opposition to the Turkish state and is regarded as a terrorist group in Turkey, through arrests and prosecutions of journalists and others of a range of political persuasions, and through the insidious control of mainstream media.30

There were several waves of investigation, each aimed at targeting a separate alleged ‘wing’ of the organisation, such as the ‘committee of leadership’ (46 of the 50 under trial in this wave are lawyers31), the ‘political wing’ (including publishers, academics and translators alongside politicians32) and the ‘press wing’ (which implicates 44 journalists33). All were charged under the Anti-Terror Law, including several, such as academic Ayşe Berkay, publisher Ragip Zarakolu and his son, translator Deniz Zarakolu, and Professor Büşra Ersanli, whom PEN considers to have been held solely for the peaceful exercise of their right to freedom of expression and assembly. The ‘press wing’ and main trials were sent to the Constitutional Court for review in November 2014; the cases were still believed to be pending in September 2015.34

Finally, the OdaTV trials: in March 2011, investigative journalists Ahmet Şık and Nedim Şener were among 14 people arrested in connection with the criminal investigation against OdaTV, a news portal known for its criticism of government policies and accused of being the ‘media arm’ of the alleged Ergenekon conspiracy. Şık was arrested in March 2011, when the authorities seized the draft of his book The Imam’s Army, which explored links between the police and the worldwide religious Gülen movement. Şener had also written about the Gülen movement, as well as exploring its links to the Ergenekon investigation. Both men were accused of ‘knowingly and willingly aiding and abetting an illegal organisation’ and of ‘membership of an armed organisation’, which they denied.

Forensic examinations concluded that evidence presented in court had been introduced into their computers by viruses and there was no evidence the two men had opened or read them. The pair were released on bail on 12 March 2012. An ECHR ruling35 in July 2014 found Turkey guilty of violating their “right to liberty and security” (article 5(3) of the Convention) by keeping them in pre-trial detention for more than a year without providing “detailed reasons.”36 PEN called for their release and for the charges against them to be dropped, as they relate solely to their peaceful exercise of their right to freedom of expression. The trial continues; the next hearing is scheduled for 17 February 2016.37

By 2014 the authorities in Turkey had extended their power over every major media actor in Turkey, through arrests and prosecutions of journalists and others of a range of political persuasions, and through the insidious control of commercial media through a nepotistic system of contracts and ownership.38 As PEN highlighted in its report on the Gezi Park protests, this unhealthy nexus between the government and media has meant that the freedom of expression of newspapers, and their journalists, frequently falls victim to the business interests of their owners who wish to maintain good relations with the administration.39

This system is not new: previously it was the secularist, military establishment that intimidated writers and editors. According to Freedom House, following the military coup of 1980 and the development of liberal economic policies under then-Prime Minister Turgut Özal, family ownership in the media market was replaced by corporate holding companies (albeit still with a strong family component) that benefited hugely from their close relationships with the government.40 When the
SURVEILLANCE, SECRECY AND SELF-CENSORSHIP

AKP defeated the military’s stranglehold of Turkey, it also appropriated the system of tutelage that had long dominated the media, replacing pro-military figures with its own supporters throughout the mainstream media. The upshot has been near total domination of the media scene. Indeed, it has increasingly been media bosses who have independently endorsed a regime of editorial self-censorship. 40

‘[Since media owners and bosses in Turkey are businessmen with other business interests who have turned to the industry to support their other activities, and since the government is a central factor dictating the conditions and profitability of these activities, these bosses easily give in to the government’s demands and threats.’ Former Yeni Şafak columnist and writer Murat Menteş, speaking to PEN in the Gezi Park report. 41

DIGITAL FREEDOM—THE KEY BATTLEGROUND

The one area in which the government did not have total control was the internet: individuals and sacked journalists were increasingly using online content in blogs and social media to express their ideas and often their discontent, much to the annoyance of the authorities. For example, journalist Nazlı Ilıcak, after losing her job at pro-government newspaper Sabah after criticising the government’s handling of the 17 December 2013 corruption inquiry, said she would simply keep up her criticism on Twitter and on independent websites, pointing out that her half-million followers were more than Sabah’s circulation. 42 Recent years have also seen the emergence of independent online news outlets such as Bianet 43 and T24. 44

As a result, from mid-2013 onwards, digital freedom emerged as the key battleground for freedom of expression in Turkey—one that the establishment showed every intention of dominating. Recognising this, PEN International began documenting the digital freedom violations highlighted in this report, using PEN’s 2012 Declaration on Digital Freedom [see box] as a framework.

CHAPTER 1

Restrictions on Individuals’ Right to Freedom of Expression Online in Turkey details how the Turkish authorities have resorted to persecuting individual journalists and other writers for their online writings. The number of defamation cases—both civil and criminal—brought by officials, in particular President Erdoğan, has sky-rocketed. 45 An increasing number have also been prosecuted for religious defamation in relation to material posted online or via social media. Such cases have a chilling effect on writers’ freedom of expression, and are driving journalists to self-censor.

In addition, since the start of 2015, and in particular in the period between the June and November parliamentary elections, journalists in Turkey, both Turkish and foreign, have been subjected to increasing persecution to prevent them from reporting freely and openly. Chapter 1 also shows how journalists who have reported on conflict or Kurdish issues have been arrested under Turkey's problematic Anti-Terror laws, and while some have been released, others such as Vice News journalist and translator Mohammad Rasool, an Iraqi national, remain in detention. At the same time, media outlets known to be critical of the government have been targeted for takeover.

Since February 2014, three key laws have been amended, increasing the ability of the government both to censor online material and for the national intelligence services and police to surveil the population without accountability for possible abuses.

CHAPTER 2

Online Censorship in Action outlines three separate sets of amendments to the 2007 Internet law which have increased the ability of authorities to censor online material. New grounds of defamation and the invasion of privacy were added in February 2014, and the protection of public order and national security in September 2014. These new grounds for censorship granted the authorities the power to exercise extraordinary control over the public discourse online at times of political crisis. Legitimate discussions, well within the public interest, about political corruption or attempts at political criticism and satire could now be buried using claims of defamation or an invasion of privacy; mass explosions of public protest could be reined in under the guise of protecting public order; and significant controversies over Turkey’s regional or Kurdish policies could now be stifled on grounds of national security.

Despite the fact that some of the 2014 amendments were overturned by the Constitutional Court in October 2014, further legislation came into force in mid-April 2015 which was very similar to the provisions which had just been struck down just six months before. 46 The Telecommunications Directorate (TIB) was given authority to order websites shut down or content removed within four hours at the request of government officials. 47 Domain or service providers that do not submit the necessary information to help locate suspects or that do not enforce a decision to block or remove content face sanction and fines and possible revoking of licences. 48

Chapter 2 also demonstrates how the authorities were not slow to use the legislation to increase online censorship of matters of great public interest, including the deteriorating security
situation in the run up to both parliamentary. YouTube and Twitter were blocked in March 2014, following a corruption scandal which broke in December 2013; access was restored only through challenges in the courts. On 6 April 2015, an Istanbul court gave an order to block access to 166 websites, including Facebook, Twitter and YouTube, for publishing a photograph of slain prosecutor Mehmet Selim Kiraz. Over 30 students and activists were brutally killed in Suruç, a small town on the border to Syria, on 20 July 2015 in a suicide bombing. The massacre was followed by restrictions on freedom of expression and assembly. The government blocked Twitter for several hours until Twitter complied with a Turkish court order requiring it to remove all images of the massacre. Police in Suruç responded to the protests against the killings with force, including tear gas and water cannon, and all gatherings were banned. Local authorities in other cities similarly banned protests. Following a bomb attack on 1 October 2015 in Ankara that killed at least 99 and injured hundreds more, the government once again rapidly moved to restrict news coverage and access to social media.

CHAPTER 3

Surveillance and the use of digital evidence: the practice surrounding both mass and targeted surveillance in Turkey, highlighting where the right to privacy is at risk. Legislative changes since 2014 expand the powers of security agencies to monitor telecommunications. The MIT law - which governs the activities of the national intelligence agency - was amended in 2014 to expand the powers of MIT to conduct surveillance, raising the prospect of unlawful invasion of privacy. Whistle-blowing about the agency was criminalised, posing a direct threat of heavy jail terms for journalists, writers, editors and publishers and the law also removed accountability for agency officials who commit violations.

Another law known as the Internal Security Package was passed in March 2015. In addition to worrying provisions regarding the policing of demonstrations and apprehension of suspects without a judicial order for up to 48 hours, it also expanded the length of time by which police monitoring of telecommunications could take place without a court order from 24 to 48 hours.

Chapter 3 shows how the existing and new legislation and practices have facilitated what one activist has termed the ‘rise of the digital Gestapo’ and points to evidence that software facilitating data mining and surveillance has already been put in place. Finally, Turkish writers discuss the impact the knowledge of such practices has on their freedom to write and how it drives them into self-censorship.

‘Of course [surveillance] has had an impact. For one, people speak on the phone less; they constantly create new email accounts and communicate via them. Until recently, they would engage in behaviour like refraining from keeping CDs around the house or periodically wiping their computers’ hard drives. It’s actually embarrassing for a journalist to have to take precautions like these. However, one inevitably ends up having to resort to such methods and when we did things like this, our sources and the kind of stories we could cover ended up being limited, because we couldn’t communicate or conduct research in the same way. We eventually got used to living this way. We had to somehow try to continue engaging in journalism regardless.’

Investigative journalist İsmail Saymaz describing to PEN the impact that surveillance has had on him and many of his colleagues in the media.

CHAPTER 4

Private Sector and Politics: the impact of Turkish legislation on internet businesses operating in Turkey and their responses. Since the major online and social media companies are based outside Turkey, the government has been unable to tame them by applying the same kind of financial tactics that it has used against the Turkish print and broadcast media in the past. Instead, the government has sought to pressure the likes of Facebook and Twitter through judicial channels. Turkey’s two-week ban on Twitter during late March and early April 2014 and temporary
bans on Facebook, Twitter and YouTube from 6-7 April 2015 have been short, sharp demonstrations of the authorities’ appetite for wholesale website closures should social media companies refuse to comply with demands. While requests for content removal for YouTube peaked in mid-2013 around the time of the Gezi Park protests, there has been a steady rise in requests to Twitter and Facebook for content removal. At the same time, there have been large numbers of requests for provision of user details in recent years. Although most companies rarely provide content of private communications, they do routinely provide user data.

In 2014, PEN Norway returned to Turkey to interview Turkish journalists, publishers and activists, observe at trials (a long tradition for Norwegian PEN and other Centres) and document events subsequent to the 2012 mission. In October 2014, PEN Norway issued a report concluding that while some of the concerns raised with then President Gül have been addressed; others are unchanged or worse and new concerns have arisen.

The report also highlights how the legal framework and current practices regulating the use of the internet violate Turkey’s obligations to protect freedom of expression under international law and its own constitution. It ends, in Chapter 5, with a set of recommendations which, if implemented, would go a long way to address these shortcomings and restore respect for freedom of expression in Turkey.

**RECOMMENDATIONS TO THE GOVERNMENT OF TURKEY**

**ON REFORM OF LEGISLATION**

- Ensure Turkish law respects international human rights principles and reflects ECtHR case law;
- Comprehensively reform counter-terrorism legislation, including Article 6/2 and 7/2 of the TMK and Articles 220/6, 220/8 and 314 of the TCK, to narrow definitions of ‘terrorism’, ‘organised crime’, and ‘propaganda’, and to ensure that the genuine purpose and demonstrable effect of any restriction on freedom of expression is necessary and proportionate to protect a legitimate national security interest;
- Amend Law 5651 to ensure that freedom of expression is protected online, and that any blocking of websites, IP addresses, ports, network protocols or types of use (e.g. social networking) is justified in accordance with international standards and must be subject to judicial approval before implementation;
- Amend Law No 6532 (on State Intelligence Services and National Intelligence Agency) and Law 2559 (on the Powers and Duties of the Police) so that surveillance of communications is permissible and only occurs under the most exceptional circumstances and exclusively under the supervision of an independent judicial authority;
- Ensure that legal safeguards governing surveillance are in line with the 13 Principles on the application of human rights protections to communications surveillance and meet the three-part test of legality, necessity and proportionality;
- Provide access to remedy and reparation for individuals who have suffered unjustified intrusions into their privacy.

**ON TRANSPARENCY OF BLOCKING STATISTICS**

- Require TIB to make blocking statistics publicly available on a regular basis as the administrative body did between May 2008 and May 2009.

**ON DIGITAL MASS SURVEILLANCE**

- As an urgent matter, enact data protection legislation that complies with international standards on the right to privacy and establishes an independent data protection authority;
- Remove the requirement for mandatory SIM card registration;
- Recognise and take steps towards compliance with the International Principles on the Application of Human Rights to Communications Surveillance;
- Take steps to implement effective controls to prevent the use of private surveillance industry products to facilitate human rights abuses.

**ON AN INDIVIDUAL’S RIGHT TO FREELY EXPRESS THEMSELVES**

- Cease the abuse of anti-terror legislation and the penal code to prosecute journalists, bloggers, activists and other civil society actors;
- Release all individuals held for the peaceful exercise of their right to freedom of expression; drop charges pending on others for similar reasons.
ON ACCOUNTABILITY

• Amend all legislation to ensure judicial control over the actions of state security services, particularly the intelligence service and the police.

TO OTHER STATES

• Emphasise in relations with Turkey the importance of respect for human rights and the rule of law;

• Encourage Turkey to implement the recommendations above;

• Position respect for human rights and rule of law as a key element of Turkey’s stability in a regional context and a strategic priority in all states’ regional policies.

TO THE COUNCIL OF THE EUROPEAN UNION

• Set a firm date to discuss Chapter 23 of the EU Acquis concerning Justice and Fundamental Rights;

• Agree on conditions that Turkey needs to fulfill to open this Chapter;

• Communicate those opening benchmarks to the Turkish government.

TO INTERNET AND SOCIAL MEDIA COMPANIES OPERATING IN TURKEY

• Challenge any content blocking orders restricting the right to legitimate freedom of expression;

• In the absence of appropriate and effective controls to prevent abuse, desist from supplying software which could be used in mass surveillance in a violation of the right to privacy;

• Design and implement corporate responsibility policies that demonstrate how they respect human rights;

• In line with the UN Guiding Principles on Business and Human Rights, ensure that any such policy includes a due diligence process to identify, prevent and mitigate negative effects on human rights, and remediation processes to respond to any identified adverse human rights impacts.

The measures outlined in this report have not only put journalists behind bars, put others out of work and driven others to self-censor, but also reduced the flow of unbiased information to voters in Turkey in the weeks running up to the November 2015 election, a time when informed public debate on serious matters of such as the economy and the security situation is all the more necessary. With every indication that the government resorted to a raft of repressive measures in order to stifle independent media in advance of the elections, Turkey’s bumpy democracy tram ride looks set to continue.

BACKGROUND

PEN International and its Centres around the world have a long history of engagement with the challenges to freedom of expression in Turkey. The freedom of expression problems in Turkey are chronic, systemic and constantly evolving. For example, despite commitments by Turkey in 2010 to bring its legislation and practices in line with international standards, resulting in a series of Reform Packages implemented over the next four years, the situation in Turkey has in many ways deteriorated. In 2012 and 2013, Turkey held more journalists in custody in relation to their work than Iran, China, or Eritrea. Most journalists were jailed on charges under Turkey’s broadly worded anti-terror Legislation and penal code, and many of them spent months, even years, in detention without conviction.

Turkey is consistently one of the worst offenders on the PEN Writers in Prison Case List; at the time of PEN’s high-level mission to Turkey in November 2012, there were more than 70 journalists and writers in prison in Turkey, with another 50 on trial. The numbers dropped in 2014, mostly because of conditional releases—Turkey’s Fifth Judicial Reform Package put a five-year cap on detentions without a verdict and dismantled its problematic Special Authority Courts. Conditional releases carry with them the prospect of re-incarceration if trials end in convictions—a strong incentive for self-censorship. The legislation continues to permit pre-trial detentions for up to five years, and the trials themselves are frequently years long, creating a further burden on defendants.

Since 2012, PEN’s focus on freedom of expression in Turkey has taken the form of missions, reports, research and analysis conducted in Turkey with a wide range of Turkish writers, activists and experts. The delegation in 2012 was led by the President of PEN International and included PEN’s International Secretary and Treasurer, an International Vice-President and Chair of the Writers in Prison Committee and representatives from eight PEN Centres, including PEN Turkey. The mission took place in both Istanbul and Ankara and included meetings with Turkish officials including then president Abdullah Gül.
‘Today, the situation in Turkey is more complicated than ever…. The military has been pushed back into the barracks, but the atmosphere between the secularists and the religious society is more tense than ever. The judiciary continues to misuse its own laws. The Anti-Terror Law, which gives the authorities the possibility to hand down ridiculously heavy sentences, remains largely unchanged, and the conflict with the Kurds – after a period of relative calm (the so-called Kurdish Opening) – has reached a new critical point as events in Syria unfold.’

Eugene Schoulgin, Vice President, PEN International

In May 2013, an environmental protest in Gezi Park in Istanbul set off months of demonstrations across the country and resulted in a crackdown by police and the judiciary—more than 5000 people were arrested, over 70 journalists lost their jobs, more than 150 attacked. In January 2014, English PEN and PEN International published a joint report on the Gezi Park Protests, highlighting a number of disturbing developments, notably in the digital sphere:

‘At its best, the Gezi Park protests involved the peaceful coming together of myriad opposition groups in a creative public forum. A culture of protest and dissent has been established amongst a previously politically disenfranchised younger generation. The emergence of social media and its enormous impact as a vehicle of news and commentary has also done much to challenge the traditional print and broadcast media’s self-censorship, but is now threatened by a controversial internet law.’

Also in March 2014, leading writers from Turkey and around the world signed their names to an open letter from PEN International and English PEN, expressing grave concern at the nationwide block on access to Twitter and YouTube from Turkey. Influential writers including Orhan Pamuk and Günter Grass joined PEN to call on the Turkish authorities to respect freedom of expression as a universal and fundamental human right, and to create an environment in which all citizens are able to express themselves freely online without fear of censorship or punishment. The campaign was featured heavily in the Turkish and international media, making the front page of The Guardian, La Repubblica and Radikal as well as the Turkish prime time news on channels including CNN Türk.

This current report, focusing specifically on the most recent form of systemic online repression and surveillance of Turkish writers, publishers and activists, is thus the third in a series of analyses by PEN on the freedom of expression challenges in Turkey. Such close attention reflects PEN’s deepening concerns about the situation in Turkey since late 2012, the result of events both in Turkey and abroad and the aggressive responses of Turkish authorities at all levels.

REPORT METHODOLOGY

Between late August and early October 2014, PEN’s Turkey Researcher spent five weeks in Turkey conducting research on digital freedom issues in Turkey. The research updated concerns raised by PEN International and other international and Turkish NGOs in a strongly worded and comprehensive joint submission concerning Turkey to the UN Human Rights Council Universal Periodic Review, in June 2014.

Numerous interviews were conducted with writers, academics, journalists and organisations and followed up by phone and email interviews from London. While in Turkey, the Researcher and PEN’s International Policy and Advocacy Officer attended the Internet Governance Forum (IGF) in September, an annual meeting convened by the United Nations Secretary-general, bringing together governments, civil society, and others as equal partners to discuss public policy issues related to the internet. On the sidelines of that meeting, they organised an event with Turkish writers hosted by the Swedish Consulate in Istanbul entitled “Freedom of Expression in the New Turkey” with writers Mehmet Altan and Bejan Matur which drew attention to the increased repression of writers, bloggers and journalists critical of the Turkish government on both online and offline media. This field research has been supplemented by telephone and email interviews and in-depth desk research.
In September 2012, PEN International adopted its Declaration on Digital Freedom as the principles that guide PEN's work on digital media issues, an increasingly significant component of PEN's freedom of expression work. In this section of the report, recent digital freedom issues in Turkey and a number of emblematic cases are examined through the prism of the PEN Declaration. The growth of the online sphere has radically changed the landscape for freedom of expression in Turkey. Previously, the primary means for disseminating opinions and ideas lay in the hands of the traditional media and, by extension, the media owners: subject as they were to editorial influence and control by Turkey's military establishment in the past and by the AKP government in more recent history.

The breaking of the traditional media's monopoly on opinion-shaping by Twitter, Facebook and YouTube—as well as by a broad range of blogging platforms and independent online news outlets—has posed a serious challenge to the Turkish political establishment. The majority of these new media platforms are difficult to control given their lack of centralised editorial policy or the virtual immunity of their owners to government pressure. Moreover, many of those commenting in the online sphere are journalists who have lost their jobs, activists and individual members of the public, all of whom find it increasingly difficult to have their voices heard in the traditional media. Social media in particular represent an important vehicle for these people to have their voices heard.

**DECLARATION ON DIGITAL FREEDOM**

PEN International promotes literature and freedom of expression and is governed by the PEN Charter and the principles it embodies—unhampered transmission of thought within each nation and between all nations.

PEN recognises the promise of digital media as a means of fulfilling the fundamental right of free expression. At the same time, poets, playwrights, essayists, novelists, writers, bloggers, and journalists are suffering violations of their right to freedom of expression for using digital media. Citizens in many countries have faced severe restrictions in their access to and use of digital media, while governments have exploited digital technologies to suppress freedom of expression and to surveil individuals. The private sector and technology companies in particular have at times facilitated government censorship and surveillance. PEN therefore declares the following:

1. **All persons have the right to express themselves freely through digital media without fear of reprisal or persecution.**
   a. Individuals who use digital media enjoy full freedom of expression protections under international laws and standards.
   b. Governments must not prosecute individuals or exact reprisals upon individuals who convey information, opinions, or ideas through digital media.
   c. Governments must actively protect freedom of expression on digital media by enacting and enforcing effective laws and standards.

2. **All persons have the right to seek and receive information through digital media.**
   a. Governments should not censor, restrict,
or control the content of digital media, including content from domestic and international sources.

b. In exceptional circumstances, any limitations on the content of digital media must adhere to international laws and standards that govern the limits of freedom of expression, such as incitement to violence.

c. Governments should not block access to or restrict the use of digital media, even during periods of unrest or crisis. Controlling access to digital media, especially on a broad scale, inherently violates the right to freedom of expression.

d. Governments should foster and promote full access to digital media for all persons.

3. All persons have the right to be free from government surveillance of digital media.

a. Surveillance, whether or not known by the specific intended target, chills speech by establishing the potential for persecution and the fear of reprisals. When known, surveillance fosters a climate of self-censorship that further harms free expression.

b. As a general rule, governments should not seek to access digital communications between or among private individuals, nor should they monitor individual use of digital media, track the movements of individuals through digital media, alter the expression of individuals, or generally surveil individuals.

c. When governments do conduct surveillance—in exceptional circumstances and in connection with legitimate law enforcement or national security investigations—any surveillance of individuals and monitoring of communications via digital media must meet international due process laws and standards that apply to lawful searches, such as obtaining a warrant by a court order.

d. Full freedom of expression entails a right to privacy; all existing international laws and standards of privacy apply to digital media, and new laws and standards and protections may be required.

e. Government gathering and retention of data and other information generated by digital media, including data mining, should meet international laws and standards of privacy, such as requirements that the data retention be time-limited, proportionate, and provide effective notice to persons affected.

4. The private sector, and technology companies in particular, are bound by the right to freedom of expression and human rights.

a. The principles stated in this declaration equally apply to the private sector.

b. Companies must respect human rights, including the right to freedom of expression, and must uphold these rights even when national laws and regulations do not protect them.

c. Technology companies have a duty to determine how their products, services, and policies impact human rights in the countries in which they intend to operate. If violations are likely, or violations may be inextricably linked to the use of products or services, the companies should modify or withdraw their proposed plans in order to respect human rights.

d. Technology companies should incorporate freedom of expression principles into core operations, such as product designs with built-in privacy protections.

e. If their operations are found to have violated the right to freedom of expression, technology companies should provide restitution to those whose rights were violated, even when governments do not provide remedies.

Adopted at the PEN International Congress Gyeongju, South Korea September 2012
All persons have the right to express themselves freely through digital media without fear of reprisal or persecution.

Article 1, PEN Declaration on Digital Freedom
As a consequence of the difficulty in controlling online content, criminal charges and civil suits have emerged as strategies for reinining in these forms of expression. As more and more people use the internet, so the numbers of cases featuring an online element has risen. This chapter covers some of the most significant examples of these attempts to punish online speech, including religious defamation, criminal defamation and national security or anti-terror charges being most prominent. (Cases more directly related to the problem of surveillance are dealt with in Chapter Four.)

One legal provision to note is the use by prosecutors of Article 218 of the Turkish Penal Code (TPC) to penalise digital users more harshly in conjunction with other criminal charges. Article 218 is used to impose longer sentences and fines on ‘unlawful expression’ online, as it mandates an increase of 50 per cent in punitive measures imposed for ‘crimes committed via press or broadcast’. Article 218 can have severe consequences for individuals posting to a small group of followers or readers on social media and blogs, as they can end up facing the same heavy penalties designed for major publications and broadcasters.
WHAT PROTECTIONS FOR FREEDOM OF EXPRESSION EXIST IN TURKEY?

The right to freedom of expression is enshrined in Article 19 of the Universal Declaration of Human Rights as well as in a number of international treaties to which Turkey is a state party, including Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 of the ECHR.

According to international law, it is only possible to restrict the right to freedom of expression under certain conditions and for specific reasons. Article 10 of the ECHR sets these limitations out as follows:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Detailed guidance is provided in General Comment No. 3471 of the UN Human Rights Committee which oversees the implementation of the ICCPR, the reports of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the judgments of the ECtHR.

The right to freedom of expression is protected under Article 26 of Turkey’s constitution, but the restrictions imposed on this right are broader than those which are permissible in international law (outlined above) and include the protection of “...the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation.”72

RELIGIOUS DEFAMATION

Religious defamation is defined as a criminal offence under Article 216/3 of the Turkish Penal Code, which imposes a sentence of up to a year in prison for ‘publicly denigrating the religious values of a section of the public’. The offending speech must also be considered to be ‘conducive to the disturbing of the public peace’ in order for Article 216/3 to have been violated.73

Article 216/3 has been increasingly used in recent years to crack down on expressions of criticism, ridicule and satire towards Islam and the Prophet Muhammad. The majority of these cases are brought against blogs and social media posts, as the largely conservative traditional media avoids publishing such unorthodox material.

The rise in cases of religious defamation in Turkey has led to freedom of expression advocates dubbing Article 216/3 the new Article 301 for the chilling effect it is intended to have on discussions surrounding Islamic values. Article 301 criminalises insult to the Turkish state, people and, formerly, Turkishness. It was used to bring many writers including Orhan Pamuk,74 Elif Shafak75 and Hrant Dink76 to trial for their views on the Armenian Genocide, prior to a 2008 amendment.77 Since 2009, PEN has seen a marked shift in the number of cases involving Article 301 to those involving 216/3. In 2009, there were no recorded religious defamation cases reported, but in 2013, at least 42 individuals were charged with this offence.78

WHAT DOES INTERNATIONAL LAW SAY ABOUT RELIGIOUS DEFAMATION?

The right to freedom of thought, conscience and religion is recognised in the UDHR and the ICCPR79 as well as of the ECHR.80 The UN Human Rights Committee, the independent body of experts that provides the definitive interpretation of the International Covenant on Civil and Political Rights (ICCPR), has clarified there are no permissible limits on freedom of thought and conscience or the freedom to have or adopt a religion or belief of one’s choice for individuals.81 This includes the right to replace one’s current religion or belief with another or to adopt atheistic views.82

However, there are permissible limitations on the freedom to manifest religion or belief. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence should be prohibited by law83 including manifestations of religion or belief that amount to propaganda for war or advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence.84

The UN Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence recommended the repeal of blasphemy laws ‘as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion,’ pointing out that ‘the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule.’85
The Special Rapporteur on freedom of religion or belief has also confirmed that, according to his experience, blasphemy laws typically have intimidating effects on members of religious minorities as well as on critics or dissenters and he has repeatedly called for such laws to be repealed.86

SATIRISING RELIGION WITH A TWEETING GOD

İlker Yaşar, Bülent Yılmaz and Ufuk Çalışkan - the managing editor, owner and internet editor respectively of left-wing daily BirGün - were convicted of religious defamation on 25 November 2014. Yaşar and Yılmaz were both handed punitive fines of 4,500 Turkish Lira ($US1900), which were commuted from a pair of seven-month and 17-day prison sentences. Çalışkan was handed a suspended sentence.87

Their convictions resulted from the publication in August 2013 of a pair of articles authored by a Twitter user who writes anonymously under the handle of ‘Tannı CC’,88 which roughly translates to ‘Almighty God’. Both articles were reportedly narrated from the perspective of a creator god, making light-hearted reference to the deity’s supposed political affiliations and views on current affairs. The articles were removed from the BirGün website by court order at the conclusion of the trial.89

As the European Court pointed out in the case of Handyside v UK, ‘Freedom of expression... is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.’90

Turkish authorities have a responsibility to safeguard minority or contrarian religious beliefs in respect of their obligations under the ICCPR and ECHR. Yaşar, Yılmaz and Çalışkan appealed their conviction; PEN International is unaware of any ruling as of November 2015.

CRITICISM OF THE PROPHET MUHAMMAD

Sevan Nişantyan, a member of Turkey’s Armenian minority, is a controversial figure in Turkey for his harsh critiques of Kemalism and Islam and for his outspoken opposition to the denial of the Armenian Genocide.

One of the biggest controversies in which Nişantyan has been involved relates to a blog post he made in September 2012. Writing in his personal blog, Nişantyan criticised the government’s call to introduce a new ‘hate speech’ bill in response to the release of the inflammatory anti-Islam short film The Innocence of Muslims. Writing in defence of the right to freedom of expression, Nişantyan criticised the government’s attempts to prohibit criticism of the historical Muhammad:

‘It is not a hate crime to ridicule an Arab leader who centuries ago claimed to have contacted God, and who derived political, financial and sexual gain from this. This is a kindergarten-level test of the thing called “freedom of expression.”’91

The public prosecutor’s office charged Nişantyan with religious defamation under Article 216/3 of the Turkish Penal Code. On 22 May 2013, an Istanbul court found Nişantyan guilty of religious defamation and sentenced him to 15.5 months in prison.92 His appeal is not known to have been heard as of November 2015. He is currently in prison for violations of planning regulations.93

In his defence, Sevan Nişantyan stated he did ‘not foresee how any public interest can be gained by tying the right to express facts to whether the feelings of a group of people have been hurt.’94

Nişantyan’s comments fall well within the realm of legitimate historical and religious criticism, which has an important place in a democratic society. As such, PEN considers him to have been prosecuted in violation of his rights to peaceful expression as guaranteed by Article 19 of the ICCPR and Article 10 of the ECHR, to which Turkey is a state party.

TWEETING CLASSICAL POETRY AND PROFESSING ATHEISM

Internationally renowned classical composer, concert pianist and writer Fazıl Say, is an outspoken critic of Prime Minister Erdoğan. He was charged with religious defamation in 2012 under Article 216/3 of the Turkish Penal Code in response to a series of tweets and retweets after an individual submitted a complaint that the tweets publicly degraded the holy values of three major religions – Judaism, Christianity and Islam. The public prosecutor also sought an increased sentence for the offence under Article 218 which increases sentences by half for offences committed ‘via press or broadcast’.

Say’s lawyer Meltem Akyol denied that his tweets were degrading to religious values, highlighting the fact that one of those included in the indictment was not only a re-tweet, but a direct quotation from a verse written by Omar Khayyam. Another simply stated ‘I am an atheist and I am proud to be able to say this so comfortably’.

On 15 April 2013, Say received a ten-month suspended jail sentence for his comments. Less
than two weeks later, on 26 April, the 29th Criminal Court in Istanbul annulled the decision to suspend the sentence. The sentence was re-imposed at a retrial in September 2013, which Say appealed. The case attracted a considerable amount of comment and criticism, both domestically and internationally, including from NGOs such as PEN International. Even the government was divided: Egemen Başuş, the former minister for EU affairs, has been reported as saying that the case against Say should be dismissed, describing the tweets in question as ‘his right to babble’. In November 2014, the Prosecutor of the Supreme Court of Appeal recommended that his conviction and sentence be overturned, and on 26 October 2015, the 8th Criminal Chamber of the Supreme Court of Appeals ruled by a majority vote (4 to 1) that his tweet should be regarded as freedom of thought and expression and should not be punished. However, unless the initial court accepts the Supreme Court’s ruling, the judicial process could still continue.

EKŞİ SÖZLÜK

Ekşi Sözlük or ‘Sour Dictionary’ is a ‘virtual community, user-generated online dictionary’, the entries for which are largely written under pseudonyms by a contributor base of over 50,000 people. Ekşi Sözlük’s subject matter is unrestricted, exceeding the limits of a conventional dictionary with entries on current and historical events and people and disputed political issues, notable quotations from popular figures, and references to popular and internet culture. Contributors often impart their personal views in entries, which tend to be written with a humorous or satirical slant. With well over 500,000 visitors a day, Ekşi Sözlük is one of the largest social media sites in Turkey.

On 7 August 2013, 39 Ekşi Sözlük contributors and website owner Sedat Kapanoğlu were charged with religious defamation under Article 216/3, and ‘committing a public order offence via press or broadcast’ under Article 218 of the Turkish Penal Code.

On 15 May 2014, Sedat Kapanoğlu was found guilty of religious defamation and given a suspended sentence of ten months in prison. Of the 39 contributors to the Ekşi Sözlük website, one was found guilty and handed a suspended sentence of seven and a half months in prison, one was acquitted of all charges and 37 had their trials postponed for a period of three years. If they do not commit a crime under Article 216/3 of the Turkish Penal Code within that three-year period, the charges against them will be dropped.

RESPECTFUL RESPONSES TO THE CHARLIE HEBDO POST-SHOOTING CARTOONS

After the shocking attack on journalists at the French satirical magazine Charlie Hebdo on 7 January 2015, Turkish authorities were among the first to take umbrage when their citizens expressed support for Charlie Hebdo. On 14 January, after Turkish newspaper Cumhuriyet announced it would publish part of the most recent edition of Charlie Hebdo in Turkish, armed police blocked off access to the newspaper’s entrance and searched distribution trucks, despite failing to produce a court order, although the editor said they had decided not to republish the controversial cartoon. Cumhuriyet staff subsequently reported receiving death threats. Turkish satirical magazines Penguen and Leman were reportedly subjected to threats on social media after the Charlie Hebdo shooting.

On 15 January, a criminal investigation was launched against columnists Hikmet Çetinkaya, Ceyda Karan and Cumhuriyet under Article 216 of the Turkish Penal Code, as they had included small images of the cartoon in their columns. As of November 2015 Charged with religious defamation, Çetinkaya and Karan were still on trial in early December 2015.

On 16 January 2015, Turkish President Recep Tayyip Erdoğan made the following comments on Charlie Hebdo and Cumhuriyet:

‘Our religion does not permit terrorism; there is no place for terrorism within it. And no one has the right to get up and hold Muslims to account for acts of terror committed in abuse of our religion … Violating the limits of another’s freedoms means unleashing terror there. There is a limit to freedom of thought….

‘Certain publications from our country are insulting our prophet by taking extracts from them. What country are you in? Ninety-nine per cent of this country is Muslim. Not only Muslims, you cannot insult what anyone considers sacred in this way…. As long as you do things like this, you invite sedition….
Unfortunately, steps like these, are aimed at disrupting the nation’s unity ... When the sensitivities of Muslims on the subject of their prophet are so clearly in the open, persistently going after them is absolutely unrelated to freedom of thought.\textsuperscript{108}

On 27 February, a first instance civilian court in Ankara imposed a blanket ban on the websites of Charlie Hebdo and Turkey’s first atheism association and, citing blasphemy laws, blocked pages on news website T24, which also published the controversial Charlie Hebdo cartoon. Individual pages on two of Turkey’s most popular web forums, Ekgist Sözlik (Sour Dictionary) and Inci Sözlik (Pearl Dictionary) were also blocked.\textsuperscript{109}

PEN does not consider any of the articles or tweets which are the subject of the prosecutions above to amount to hate speech or incitement to violence. As such, their publication on the internet falls squarely within each individual’s right to freedom of expression as protected by the ICCPR and the ECHR. As such, PEN is concerned that the Turkish authorities may be seeking to limit legitimate discussion and satire of religion by prosecuting individuals and creating a climate of fear in which people think twice before commenting on religion – particularly Islam – online.

**DEFAMATION**

Criminal defamation has increasingly been used by high-ranking politicians in Turkey to penalise critical and dissenting views. Defined as a criminal offence under Article 125 of the Turkish Penal Code,\textsuperscript{110} defamation carries a maximum sentence of two years in prison. Defamation of the president allows for a higher maximum sentence of four years.\textsuperscript{111} Denigration of ‘the Turkish nation, the state of the Republic of Turkey, the Turkish Parliament, the government of the Republic of Turkey and the legal institutions of the state’ is prohibited under Article 301 of the Penal Code.

During his time as prime minister, President Erdoğan brought a raft of defamation cases against writers and intellectuals like İlhan Elicaık, Ahmet Altan and Can Dündar\textsuperscript{112} for their legitimate if harsh criticism of him and his policies. Since 2013, Erdoğan has also been bringing increasing numbers of such cases against ordinary members of the Turkish public who have engaged in harsh criticism of him via their social media accounts. In April 2015, the website Bianet recorded details of 56 cases of defamation brought by Erdoğan and his family against journalists and members of the public; 29 of these cases had been brought by Erdoğan himself (21 while he was prime minister and another eight since his election as President in August 2014), while another seven had been brought by his son Bilal, and three had been lodged jointly by members of Erdoğan’s family.\textsuperscript{113} This litigious culture creates a chill on free expression in Turkey, where writers and ordinary members of the public are afraid of criticising Erdoğan or engaging in political speech about him, particularly now, as President, a conviction could result in up to four years in prison – a situation which the ECtHR has found incompatible with the protection of freedom of expression in the ECHR.\textsuperscript{114}

### WHAT DOES INTERNATIONAL LAW SAY ABOUT CRIMINAL DEFAMATION?

Although respect of the rights or reputations of others is a permissible restriction on the right to freedom of expression, there is growing international consensus that criminal defamation infringes fundamental rights to freedom of expression. The UN and the Organisation for Security and Co-operation in Europe (OSCE) have recognised the threat posed by criminal defamation laws and have recommended that they should be abolished.

The UN Human Rights Committee has said that ‘At least with regard to comments about public figures, consideration should be given to avoiding penalising or otherwise rendering unlawful untrue statements that have been published in error but without malice. ... States parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.’\textsuperscript{115}

International human rights standards put a high value on uninhibited expression in the context of ‘public debate concerning public figures in the political domain and public institutions.’\textsuperscript{116} The Human Rights Committee has been clear that the ‘mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties’.\textsuperscript{117}

The OSCE Parliamentary Assembly has repeatedly called for the abolition of all laws that provide criminal penalties for the defamation of public figures or which penalise defamation of the state or state organs.\textsuperscript{118} The UN, OSCE and Organisation of American States (OAS) Special Mandates have gone even further, stating: ‘Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.’\textsuperscript{119}
ECtHR case law has repeatedly found against Turkey in criminal defamation cases. For example, in addition to Altuğ Taner Akçam v. Turkey,120 in Tuşalp v Turkey,121 a defamation suit brought by Erdoğan against journalist Erbil Tuşalp the ECtHR found that his criticism of Erdoğan fell within the scope of political debate and was in the public interest, and reiterated that freedom of expression applied to information or ideas that offend, shock or disturb. The judgment also found that the limits of acceptable criticism are wider for a politician than a private individual. Political satire has been found to be a form of protected speech. In the case of Alves da Silva v Portugal,122 the European Court defined satire as ‘a form of artistic expression and social commentary which, through its exaggeration and distortion of reality, naturally seeks to provoke a reaction.’

LEVENT PIŞKIN

Levent Pişkin is a lawyer and LGBTQI rights activist who was taken to court by then Prime Minister Erdoğan for both civil and criminal defamation over a tweet he made in July 2013.123 In the tweet, Pişkin parodied Erdoğan’s dismissive attitude towards Turkey’s long-suffering Alevi population in a speech made by Erdoğan on 17 July 2013 in which he said:

‘If Alevism means loving Ali [the Prophet Muhammad’s cousin and son in law], then I’m a perfect Alevi. Because I love Ali a lot... However, I have nothing to say for those who profess to be Alevis and who are distant to Ali’s lifestyle.’

Erdoğan’s statements were poorly received by Turkey’s Alevis at the time who deemed it a typical example of Erdoğan’s refusal to accept Alevism on its own terms as a heterodox religious tradition. Pişkin responded with a tweet which played on this criticism, making light of the perceived insincerity of Erdoğan’s appropriation of the Alevi identity by applying it to the LGBTQI community. Significantly, Pişkin’s tweet came amid a highly publicised political debate about the omission of LGBTQI rights from a new draft Turkish constitution. Pişkin told PEN that his tweet was a statement of ‘both criticism and irony but also a political demand.’124 In the criminal case, Pişkin was handed a fine of 1,500 TL ($US645), which was suspended for a period of five years. Erdoğan was awarded damages in the civil case of 10,000 liras in April 2015.125

Pişkin’s case shows the vulnerability of individual members of the public sharing their legitimate opinions on social media. Speaking to PEN, Pişkin described the impact of the case on his life:

‘It is already very difficult being gay in Turkey. With this case I was forced to come out to everyone because not everyone knew I was gay. I had to come out to my father, not by choice but simply because I was forced to by the circumstances. And now I can’t find work as a lawyer. I’ve been unemployed for a year, with things getting really bad after the case.’

‘Of course now, because [Erdoğan] has become president, criticism of him opens you to up to much harsher punishments. When writing something you have to think 50 times because the sentences are so much harsher.’126

CARTOONS

Musa Kart is a Turkish caricaturist who faced criminal defamation charges in 2014 for a cartoon127 he drew of then Prime Minister Erdoğan. In the cartoon, published in the Cumhuriyet newspaper and website, Erdoğan is depicted standing watch while two masked thieves empty a safe full of cash. ‘No need to rush’, says one of the smiling thieves, ‘We have a holographic watchman’.

The cartoon made satirical reference to the 17 December 2013 corruption investigation, which implicated high-ranking AKP officials in Erdoğan’s inner circle, as well as to Erdoğan’s appearance at an İzmir election rally in 2014 as a hologram.128

Kart was found not guilty of defamation by a Turkish court in October 2014, with the judge citing Kart’s freedom to engage in political criticism when delivering his verdict.129 Erdoğan’s lawyers have appealed the decision, and the case could go to Turkey’s Supreme Court of Appeals.

Two other cartoonists, Bahadir Baruter and Özer Aydoğan who draw for the satirical weekly Penguen, were sentenced to 11 months and 20 days in prison on 24 March 2015 after conviction of defaming President Erdoğan in a cartoon published on 21 August 2014. The complainant argued that a hand gesture of an official seen welcoming the incoming president to the presidential palace was insulting as it implied the president was homosexual. The prison terms were reduced to fines.130
Can Dündar

Can Dündar is a journalist, documentary filmmaker and member of PEN Turkey who has become one of Turkey’s most prominent voices in a career spanning more than three decades.

Dündar was sacked from his position as a columnist for Milliyet following a series of articles critical of the government during the 2013 Gezi Park protests. He has since worked as a columnist for Cumhuriyet – of which he is now the editor-in-chief – and BirGün, and for a time as the host of a current affairs programme on Artı Bir TV.

In May 2014, then Prime Minister Erdoğan lodged a complaint for defamation against Dündar in connection with an article for Cumhuriyet printed on 18 April 2014 entitled “Erdoğan will be put on trial”, which made reference to the 17 December 2013 corruption investigation. Dündar argued that Erdoğan’s position of power was by no means permanent and that he must eventually face trial, drawing parallels with the leader of the 1980 military coup General Kenan Evren, who was put on trial in 2012 for his role in the coup. He was charged with defamation on 7 August 2014; the trial is ongoing.

In February 2015, Erdoğan lodged another complaint against Dündar about an interview conducted by Dündar with one of the prosecutors who led the 17 December 2013 investigation into alleged corruption amongst Erdoğan’s inner circle. Dündar has also been charged under anti-terror legislation for his reporting (see below).

PEN International believes that the articles and cartoons for which the individuals referred to above have been convicted or are facing trial for constitute legitimate freedom of expression, including permissible political criticism. PEN is calling for these charges to be dropped and for the ongoing judicial harassment of well-known investigative journalists like Can Dündar to cease.

Other Criminal Charges Under the Anti-Terror Law and Turkish Penal Code

Anti-Terror Legislation

Although national security is a permissible restriction on freedom of expression under the ICCPR, the limitations allowed are clearly defined and any restriction on national security grounds must meet the criteria of being provided by law and necessary. National security is also a permissible restriction under the ECHR, with the same criteria of legal provision and necessity.

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, following a 2006 mission to Turkey, concluded that Turkey’s anti-terror related offences “may put severe limitations on the legitimate expression of opinions critical of the Government or State institutions, on the forming of organisations for legitimate purposes, and on the freedom of peaceful assembly.” The Special Rapporteur has developed his own definition of terrorism and has suggested that any definition which goes beyond it would be problematic from a human rights perspective.

Turkey has long been criticised for its use of Anti-Terror Legislation to crush lawful dissent by regional and international bodies including the Council of Europe’s Commissioner for Human Rights, the Special Rapporteur on Human rights while Countering Terrorism, the OSCE and by numerous NGOs and civil society organisations including PEN International. Although in recent years, some changes have been introduced in a series of Judicial Reform packages, a raft of vaguely worded articles remain which can and have been widely used to prosecute and imprison writers including journalists and others for their legitimate expression, including when posted online or shared on social media.

Part of the problem lies in the overbroad definition of terrorism in Article 1 which specifies terrorism only in relation to its aims without any requirement for there to be deadly or other gravely violent actions against others carried out in the furtherance of these aims.

Problematic articles include Article 314 (Membership of a terrorist organisation); Article 220/6 (Committing a crime in the name of a terrorist organisation); Article 220/7 (Assisting a terrorist organisation); Article 7/2 (Making propaganda for a terrorist organisation); and
Article 6/2 (Printing or publishing of declarations or statements of terrorist organisations). Despite some amendments in recent years, these articles continue to allow the prosecution of legitimate expression, as is shown below.

**SEDEF KABAŞ**

On 30 December 2014, police possessing a ‘general search warrant’ from the public prosecutor raided the home of Turkish journalist and anchor-woman Sedef Kabas, on grounds that she had ‘targeted a person involved in an anti-terror investigation’ in a late November 2014 tweet. In the tweet in question, she had called on her followers to ‘never forget’ the prosecutor who had dropped all charges in the controversial 17 December 2013 corruption investigation into high ranking AKP figures and their families. The decision to drop the charges had met with outrage by Turkey’s opposition.

During the raid, police seized Kabas’s phone, laptop and tablet before taking her in for questioning. Her Twitter account was blocked. After being questioned, Kabas was charged by the public prosecutor, although a judge rejected the charges in a pre-hearing the same evening on grounds that it violated press freedom. Despite the judge’s decision, Kabas was summoned to court on 5 January 2015, when she faced questions about resisting arrest despite the absence of any complaint from the police about her conduct during the raid on her house.

Kabas spoke to PEN shortly after this happened:

‘Firstly, the lawyers say that you can’t have something called a general search warrant. Because it isn’t clear what is being searched for. Secondly, there was no official notification or request for me to go into questioning; they just sent the police directly to my door. This too is actually against due process for the offence in question. Thirdly, those who came were plainclothes police officers; in other words, I didn’t know who they were at first. It was only later that they showed their IDs. But you can’t help but be surprised; you’ve done no crime, you haven’t done anything at all. I found it difficult to process: who are you people? Why are you here? In spite of these concerns, the public prosecutor came and authorised a general search warrant. I’ll tell you what was written there: “making targets of officials involved in the fight against terrorism”. And based on that, the police were sent to my house, which, in turn, was raided. I said to them, “Feel free to search [the house] however you please; I have nothing to hide. In fact, I actually showed them that I had sent the tweet from my phone. Normally, photographic evidence from the phone would have sufficed but they seized my phone. They took my laptop, which I never use to tweet, only for work, as well the iPad my son uses to watch cartoons.

‘Afterwards, they said that they had to take me with them too... the prosecutor pressed charges on the grounds that that tweet comprised “a threat” that I had made. The same evening, I was taken in front of a judge and there the on call judge rejected the prosecutor’s charges on grounds of press freedom.’

On 17 January 2015, Kabas was formally charged with “targeting a person involved in an anti-terror investigation”, with the public prosecutor seeking up to five years in prison under Article 6(1) of the Anti-Terror Law. On 30 April 2015, her case was sent to the High Criminal Court after the Istanbul 22nd Criminal Court ruled a lack of jurisdiction; she was acquitted of the charge on 6 October 2015, but the Istanbul Prosecutor appealed against her acquittal, so her ordeal continues. Kabas also faced another charge of resisting the police in connection with her arrest; she was acquitted of this charge in May 2015.

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There’s no defamation, threat or targeting of individuals there whatsoever. Instead, there’s criticism, the expression of a thought there – if we don’t criticise things like this then what are we writing for? If something like this is done with the aim of intimidating us, it shouldn’t scare us from freely expressing our thoughts. In other words, we should not give in, we should not feel intimidated: this is the whole point.’

PEN considers Kabaş’s tweet to fall well within the realms of legitimate comment. As a journalist, it is imperative that Kabaş is able to express her opinions on high profile cases concerning the public interest. Her comment regarding the prosecution has legitimate value in a country where the judiciary is frequently subjected to accusations of being politicised, including by President Erdoğan himself.

TARGETING ANTI-GOVERNMENT MEDIA OUTLETS FOR TAKE-OVER

On 28 October 2015, just days before the 1 November parliamentary election, following a court order for the seizure of the assets of Koza-Ipek, a private holding company which owns several media outlets known to be critical of the government and linked to the Gülen movement, on suspicion of ‘terror financing’ and “terror propaganda”, police raided the Istanbul headquarters of the company’s media outlets, dispersing protestors outside with tear gas and water cannons Court-appointed trustees took over management of Koza-Ipek and up to 71 journalists were summarily dismissed. The company has lodged a legal challenge against the appointment of the trustees.

REPORTING ON CONFLICT AND KURDISH ISSUES – A RISKY BUSINESS FOR JOURNALISTS

Some topics are particularly sensitive for reporting on in Turkey. In 2015, there has been a rise in the number of journalists arrested for reporting on conflict such as Turkey’s involvement in the war in Syria and the rising tensions in the mainly-Kurdish areas of south-eastern Turkey. The cases below, of journalists who publish work on the internet, are emblematic of this trend.

On 6 January 2015, the Turkish police briefly detained Frederike Geerdink, a Dutch journalist based in the south-eastern city of Diyarbakır, on suspicion of ‘making propaganda for a terrorist organisation’ via her Twitter account. According to Geerdink’s tweets, eight heavily armed members of the Diyarbakır Police Force Anti-Terror Squad searched her home before taking her into custody. She was taken home after being briefly questioned.

Geerdink’s arrest led to significant criticism in the international media and by international NGOs, including PEN International. Dutch Foreign Minister Bert Koenders, who was on an official state visit to Turkey at the time threatened to cut short his visit if she were not released. Geerdink described the experience as ‘very intimidating’ and after her detention, revealed on Twitter that it had made her nervous about talking to others on the telephone:

Geerdink was subsequently charged with ‘propaganda in favour of an illegal organisation’ under Article 7/2 of the Anti-Terror Law, in connection with her reporting and tweets about the PKK. Her trial in Diyarbakır began on 8 April 2015. However, the prosecutor called for her acquittal, stating that her statements on Twitter should be viewed as part of her freedom of expression, and that the publishing of her articles on her Facebook page should be seen as journalistic activity. He said, ‘[n]o evidence has been found on the suspect carrying or hanging the pictures, signs or logo of the terrorist organisation or wearing a uniform that carries those’.

She was acquitted of the charge on 13 April 2015, but the Chief Prosecutor immediately appealed against the acquittal.
Geerdink’s brief detention and prosecution is testament to the vulnerability of journalists covering the Kurdish issue in Turkey. Short, simple messages posted on social media – which even a prosecutor later recognised as firmly within the remit of legitimate freedom of expression - can be readily deemed ‘terrorist propaganda’ simply because they might align with the ideological sympathies of Kurdish nationalist groups.

Can Dündar, the editor-in-chief of Cumhuriyet is also facing a charge under national security laws in addition to the defamation cases against him (see above).

On 2 June 2015, President Erdoğan submitted a criminal complaint demanding Dündar’s trial and imprisonment in relation to an article and video published on the Cumhuriyet website on 29 May 2015.

The video, subsequently removed from the website following a court order, showed Turkish gendarmerie officials in the southern province of Adana discovering large quantities of ammunition on civilian trucks reportedly belonging to Turkey’s National Intelligence Agency in January 2014. The trucks were allegedly bound for the Syrian border.

Following the publication of the video, Erdoğan was openly critical of Dündar, accusing him and Cumhuriyet of engaging in espionage on live television.

According to Hurriyet, the criminal complaint alleged that the newspaper ‘joined the actions’ of the ‘parallel organisation’ - followers of US-based Islamic cleric Fethullah Gülen in the judicial and security organs and used ‘fabricated evidence to create a perception in the scope of a planned setup as if the Republic of Turkey has been helping terrorist organisations’.

In the complaint, Erdoğan’s lawyer reportedly demanded two life sentences for Dündar, accusing him of ‘forming an illegal organisation, crimes against the state, obtaining confidential information pertaining to national security, political and military espionage, unlawfully making confidential information public and attempting to influence a trial’.

PEN believes that lodging such charges against Can Dündar is an attempt to punish him for journalistic work about Turkey’s role in ongoing war in Syria. As such, PEN is calling for the charges against him and Erdem Gül to be dropped and for them to be released immediately and unconditionally.

Tension in the south-east of Turkey rose during the summer of 2015 after a suicide bombing on 20 July attributed to the armed group calling itself Islamic State killed over 30 Kurdish and Turkish activists in the town of Suruç. The PKK killed two police officers in retaliation for the bombing, considering the authorities had not done enough to prevent it, which was followed by Turkish aerial attacks on PKK positions in Turkey and Iraq. As a result, the PKK ended the fragile ceasefire in place since 2013 and resumed armed attacks against police and military targets.

This heightened tension has led to further attacks on journalists. On 27 August, three Vice News journalists – Britons Jake Hanrahan and Philip Pendlebury along with their Iraqi Kurdish colleague Mohammed Ismael Rasool – were arrested whilst reporting on the situation in south-eastern Turkey. Hanrahan, Pendlebury (who were released on 3 September and deported) and Rasool were subsequently charged with ‘working on behalf of a terrorist organisation [Islamic State] apparently because Mohammed Ismael Rasool had encryption software on his computer that is also used by Islamic State militants’. This case represents a worrying trend increasingly seen across the globe, where states view the very use of encryption as tantamount to evidence of criminal activity, and some countries move to regulate its use in ways which may be tantamount to a ban.

The UN Special Rapporteur on freedom of opinion and expression has recommended that states should ‘promote strong encryption and anonymity’, and should ensure that ‘[l]egislation and regulations protecting human rights defenders and journalists should also include provisions enabling access and providing support to use the technologies to secure their communications’. He reiterated that restrictions on encryption and anonymity that limit the right to freedom of expression ‘must be provided by law and be necessary and proportionate to achieve one of a small number of legitimate objectives’.

Shortly after the arrest of the Vice News journalists, on 6 September 2015, Frederike Geerdink (see above) was briefly arrested for a second time, tweeting that she was in custody. Released shortly afterwards, she was deported from the country.

Two other journalists were arrested in November 2015. The editor-in-chief, Cevheri Güven, and managing editor, Murat Capan of Nokta magazine, arrested when police raided their offices, were charged with ‘attempting to overthrow the government by force’ after the magazine’s front cover declared the result of the 1 November elections was ‘the start of civil war in Turkey’.

PEN International is calling for the immediate and unconditional release of Rasool, Güven and Capan, and for the dropping of all charges against the three.
All persons have the right to seek and receive information through digital media.

Article 2, PEN Declaration on Digital Freedom
While the March 2014 blocks on YouTube and Twitter carried great significance as spectres of future political censorship in Turkey, they were by no means the first instances of website blocks in the country. Prior to March 2014, Turkey had blocked access to over 40,000 websites as a result of a 2007 Internet law which provided for the denial of access to ‘harmful’ content online.\textsuperscript{177} Significantly, the grounds set out for blocking access to websites in the 2007 law were overwhelmingly moral in character. The presence of content “sufficiently suspected” of violating the Turkish Penal Code articles on obscenity\textsuperscript{178} (including but not limited to pornography), prostitution,\textsuperscript{179} child abuse,\textsuperscript{180} suicide,\textsuperscript{181} illegal drugs,\textsuperscript{182} harmful substances\textsuperscript{183} and illegal gambling\textsuperscript{184} would be enough for a website block to be enacted, either independently by TiB or upon a court order.\textsuperscript{185} On the insistence of Turkey’s secularist opposition, an additional ground for blocking access to websites was also included in the 2007 law: offences against the memory of the founder of the Republic of Turkey, Mustafa Kemal Atatürk.\textsuperscript{186}
This regime of online censorship was instigated with the explicit aim of protecting Turkish families and children, as was a state-run, optional ‘family filter’ that was launched in November 2011. While this resulted in large swathes of the internet falling behind what some commentators dubbed a ‘great firewall’ for internet users in Turkey, the 2007 law did not include specifically political categories as reasons for censorship. However, some website blocks were imposed – such as on the far-left Atilim paper and the pro-Kurdish Fırat News Agency - under provisions of the Anti-Terror Law relating to ‘making terrorist propaganda’, despite the fact that website blocks and this is not one of the categories listed in the Internet Law for which bans may be imposed.

But in 2014, following a series of major crises, the government passed two separate sets of amendments to the Internet Law, adding four new grounds to online censorship in Turkey—defamation and the invasion of privacy in February 2014, and the protection of public order and national security in September 2014 shortly after Erdoğan was elected President (the latter clause had originally been included in the February amendment but had been removed at the request of then-President Gül). Significantly, these four new grounds for censorship granted the authorities the power to exercise extraordinary control over the public discourse online at times of political crisis. Legitimate discussions, well within the public interest, about political corruption or attempts at political criticism and satire could now be buried using claims of defamation or an invasion of privacy; mass explosions of public protest could be reined in under the guise of protecting public order; and significant controversies over Turkey’s regional or Kurdish policies could now be stifled on grounds of national security.

Since the passage of the amendments to the Internet Law, authorities in Turkey have engaged in a number of politically-motivated access blocks and content-removal requests, with affected sites including YouTube, Twitter, Karsi Gazete, GriHat, and Radikal. Notably, websites like T24, Vagus.Tv, Soundcloud, and opposition deputy chairman Umut Oran’s personal website were also subjected to politically motivated censorship while the amendments to the Internet Law were still being discussed in January 2014.

The September 2014 amendments to the Internet Law were overturned by Turkey’s Constitutional Court in October 2014 following a legal challenge, removing the power granted to TBİ to block websites without a court order and to request access to stored user data. In response, on 25 December 2014, Turkey’s communications minister revealed plans to grant TBİ the same powers of censorship in legislation in a new omnibus bill of amendments to various laws, which was subsequently proposed by AKP deputies to the Grand National Assembly on 19 January 2015. Sections of this bill were approved during the early months of 2015 and came into effect in mid-April 2015. The newly amended Internet Law gives the prime minister and other cabinet ministers the power to ask TBİ to block access to websites with immediate effect on grounds of national security and public order. TBİ must seek court approval within 24 hours and a judge must decide within 48 hours whether to continue or lift the bans. In the absence of a court decision, the ban will automatically be lifted. These amendments threaten to politicise further a regulatory process that is already extremely vulnerable to political influence. All that will stand in the way is an increasingly pliable judiciary. The 2015 amendments have been challenged before the Constitutional Court, but no decision had been reached in early September 2015.
Speaking to PEN, Doğan Akın, the owner and editor-in-chief of T24, one of Turkey’s most popular online news sites, said this concerning the future of online censorship in Turkey:

‘There isn’t a great deal of mystery around how these legal instruments will be used. The removal of a lot of content is going to be requested; a wall is going to be built in the path of journalism. They have constructed a system of internet regulation that is so far from what should be present in a state where the rule of law holds sway; now it’s time for that system to be implemented.’

**BLOCKS UNDER THE INTERNET LAW**

- In order to prevent crime or to protect life, property, public health, national security or public order, if instructed by the Prime Minister’s office or the ministries, TİB can order content, hosting and access providers to block access to or take down online content in cases of emergency within four hours. Individuals or legal entities alleging a violation of privacy can also apply to TİB for a block on content.

- Within 24 hours, the order must be brought before a judge of the Criminal Court of Peace. The judge has 48 hours to confirm or reject the order. In the absence of a decision, TİB’s order is invalidated.

- Access may only be blocked to the infringing content or section of the website. However, TİB may order blocking of access for the entire website ‘if it concludes that only blocking access to the infringing content or section would be insufficient to prevent the infringement, or only blocking access to the infringing content would not be technically possible’.

- Criminal proceedings can be initiated against those who produce or spread infringing content. A judge can demand information on individuals subject to such criminal proceedings from content, hosting and access. A judicial fine of 60,000 to 1,000,000 Turkish Lira (approximately US$23,000 to 390,000) may be imposed on providers who fail to provide requested information.

- If the provider fails to comply with an order to block access to or take down infringing content, an administrative fine of 50,000 to 500,000 Turkish Lira (approximately USD 19,000 to 190,000) may be imposed.

- Criminal investigations against TİB employees can only be launched with the authorisation of the TİB Director, or in the case of the TİB Director, from the relevant minister – which calls into question the accountability of the organisation, given the Director is appointed by the joint decree of Prime Minister, the Minister for Transport and Communication and the President.

According to online censorship monitor Engelli Web, which relies on user reports to aggregate information on website blocks, over 106,000 web pages were blocked in Turkey in early November 2015. Of these, the vast majority – over 100,000 - have been blocked by TİB; over 2,700 others have been blocked by court order. This was a rise of some 41,000 blocks since January 2015, when 65,000 blocks were recorded. The exact number of blocked websites is widely considered to be much higher, and figures relating to the grounds for these blocks are unknown as Turkey’s telecoms authority TİB has refused to release statistics to the public regarding online censorship since 2008 and attempts to obtain this information through freedom of information requests have been unsuccessful.

Currently TİB only provides information on the percentage of bans in various categories, rather than the total number of bans in each category. According to information released in September 2014, obscenity-related blocks constituted 84 per cent of the total; child-related blocks were at 10 per cent, prostitution at 4.6 per cent, Atatürk-related blocks were close to 0.04 per cent, and other categories make up the remaining 1.2 per cent.

In the absence of such information, it is difficult to accurately ascertain the extent of online censorship in Turkey. This lack of transparency allows TİB to quietly suppress vast areas of the internet from access by Turkish users with minimal accountability. While some of the blocks –for example of child pornography - may be legitimate under international law, the lack of transparency combined with the broadly worded grounds for censorship set out
in the Internet Law makes for a chillingly silent regime of censorship of media organisations and individuals, including censorship of material that is protected under international standards on freedom of expression.

Some of these cases of illegitimate censorship are documented below as illustrations of the kinds of violations which are occurring behind the firewall the Turkish authorities have imposed in the name of protecting morals and national security.

CENSORSHIP OF REPORTING ON THE 17 DECEMBER CORRUPTION SCANDAL

Vagus.Tv is an independent online news platform featuring articles and videos about current events in Turkey. It was set up as a source of alternative news in June 2013 by veteran journalist Serdar Akinan after he lost his job as a columnist at the Turkish mainstream newspaper Aksam, he believes as a result of his criticism of the authorities in his reporting.220

In January 2014 access to the Vagus.Tv website was suddenly blocked after its extensive news coverage was blocked as a result of Decision No: 2012/656 January 2014. But when Akinan’s legal team looked up Decision No: 2012/656, they found that it made no reference to Vagus.Tv. Seeking to clarify the matter, Akinan got in touch with the public prosecutor who had signed off on the decision. The public prosecutor confirmed that Vagus.Tv had nothing to do with his investigation or the decision taken on 16 January.222

In the absence of any legal order to block access to Vagus.Tv, it would appear that someone from within TİB, which is tied to the Information Technology Directorate (BTK), requested that we remove that content. Yet all we had done was publish a question submitted in parliament by the deputy leader of the main opposition party in Turkey. Afterwards they said that they had made a mistake. The BTK director Tayfun Acarer wrote to me in embarrassment, apologising. But I don’t think it was a mistake. I think it was the first indication, the first sign of the new system that was being constructed. For a while now, I’ve seen a great deal of self-censorship within the internet media, especially since the 2011 elections. In light of the new system of censorship, this sort of thing is only going to increase”.227

The Vagus.Tv episode exposed a number of serious procedural improprieties regarding online censorship in Turkey that allowed authorities to unlawfully exceed the powers granted to them. While the website block was eventually lifted, the fact that no investigation was made when serious misconduct was so apparent raises serious questions about censorship authority in Turkey.

On 31 January 2014, online news portal T24 reported that it had received a warning from TİB to remove a report about a parliamentary question submitted by Republican People’s Party (CHP) Deputy Chairman Umut Oran.224 The report referred to questions asked by Oran relating to the 17 December 2013 corruption investigation.225 The authorities stated that access to the T24 link would be blocked if the news portal did not comply with the content removal request.226

T24’s owner and veteran journalist Doğan Akın spoke to PEN about the block:

‘The names of a great number of businessmen were mentioned here, in what was a simple parliamentary question. All we did was publish that parliamentary question. TİB, which is tied to the Information Technology Directorate (BTK), requested that we remove that content. Yet all we had done was publish a question submitted in parliament by the deputy leader of the main opposition party in Turkey. Afterwards they said that they had made a mistake. The BTK director Tayfun Acarer wrote to me in embarrassment, apologising. But I don’t think it was a mistake. I think it was the first indication, the first sign of the new system that was being constructed. For a while now, I’ve seen a great deal of self-censorship within the internet media, especially since the 2011 elections. In light of the new system of censorship, this sort of thing is only going to increase’.227

Turkish authorities shut down the websites of two outspoken newspapers, Karsı Gazete and Giroots, on 2 October 2014 after both portals were raided by police who forced them to remove content regarding alleged corruption in the Turkish state.228 Both newspapers had published key reports about the 17 December 2013 corruption investigation.
Karşı Gazete journalist Emre Erçiş said they have no information on the source of the access problem, adding:

‘When the site administrators enquired through an online system whether any decision to block [the website] has been taken by the Telecommunications Directorate (TİB), a message appeared on the system saying that there has not been any ban on access to the content of the website by TİB. In addition, we posted images and video footage of the police raid on www.sansursuzhaber.com, and now that news portal is also experiencing the same problems with access.’

CENSORSHIP BY THE INTERNET SERVICE PROVIDERS UNION

Radikal columnist Ezgi Başaran had access to an article blocked on 1 October 2014 by Turkey’s Internet Service Providers Union (ESB) which is required to implement blocking orders from TİB. The ESB did not inform either Radikal or Başaran in advance. In it, she had criticised the rector of Istanbul Technical University (İTÜ). An İTÜ statement said the column had ‘destroy[ed] the reputation of the 241-year-old university’. According to Hurriyet, after Başaran challenged the closure in court, the court issued a decision to ban the article permanently. Radikal has reportedly appealed the decision. Her column reportedly criticised the removal of trees that were planted on campus in memory of the protesters who died during the Gezi Park protests, the increasing number of security guards on campus and the failure to allocate an adequate budget for the opening of the social science faculty.

CENSORSHIP OF FREEDOM OF BELIEF ONLINE

Sites promoting atheism have previously been subject to unwarranted censorship in Turkey – for example, UK scientist Richard Dawkins’s website was blocked in 2008 by a court order, after a creationist complained that Dawkins’s criticism of his sending creationist textbooks to schools in Europe was defamatory. The block was lifted in 2011 by court order. More sites have been affected since the revisions to the Internet Law in 2014 and 2015, for example, www.ateizmdernegi.org, the website of Turkey’s Atheists’ Association was blocked by a court order in February 2015. The association has challenged the block.

Just as the rising tension with the PKK and Islamic State throughout the summer of 2015 following the suicide bombing in Suruç on 21 July 2015 led to attacks on journalists (see Chapter above), the authorities in Turkey also moved to restrict public access to news by blocking sites and social media. Twitter was a notable example – ‘the publication of visual material related to the terror attack’ by newspapers and televisions and on websites was banned by Suruç Magistrate of Peace the day after the bombing. Twitter was able to remove 50 of 107 articles required by the court, but failed to remove the remaining articles within the four-hour deadline required by the amended Internet Law, a demonstration of how arbitrary a time limit had been imposed under the law. Several ISPs blocked the entire site until the articles were removed, leading to a lifting of the ban after a couple of hours.

By 17 August 2015, at least 309 news sites, ‘mirror sites’ (sites on the internet which store the contents copied from another site), websites of pro-Kurdish or left-wing organisations and social media accounts had been blocked by court order, according to researchers Dr. Kerem Altiparmak of Ankara University and Istanbul Bilgi University Professor Dr. Yaman Akdeniz. The listed URLs included 123 websites, 177 Twitter accounts, eight Facebook pages and a YouTube channel.

INTERNET FILTERING AND RESTRICTION OF ACCESS TO INFORMATION

Mass censorship under the Internet Law is not the only means by which the government of Turkey controls what can be accessed online inside Turkey. In parallel to the access blocks that affect all internet users in the country, Turkey additionally offers an optional ‘family’ filtering service, which restricts the content available to a significant portion of the country’s internet users, from families that have opted in directly to the service to individuals browsing the internet via connections in libraries, schools, universities and internet cafes. This state-run, family-friendly internet filtering service has been in place since November 2011 and has received heavy criticism as a result of its discriminatory and homophobic filtering practices. Subscribers to the service may opt in to either a ‘family filter’ or a ‘child filter’ and while the latter, in the interests of child protection, denies access to content such as internet forums and social media sites that require personal information, both filters controversially prevent access to a wide range of non-adult content relating to sexual orientation and gender identity, to evolution, and to some minority websites.
Notably, the websites of Turkey’s biggest LGBTQI-rights organisations, Kaos GL and Lambda Istanbul, are amongst the web pages blocked by these filters, a move which has led to a legal challenge to the filter system by the Alternative Information Technologies Association on the grounds that the filters ‘discourage diversity by imposing a single type of family and moral values’. That the decisions regarding permissible content are made by an 11-person board co-ordinated by Turkey’s Ministry for Family and Social Policies is revealing. A previous Minister for Women and Social Policies described homosexuality as an ‘illness that needs to be treated’. That such attitudes have been translated into censorship of online content relating to LGBTQI issues is extremely concerning in a country where many members of the LGBTQI community find it hard to find likeminded individuals, especially in rural areas. Such bans not only violate the right to freedom of expression, which encompasses the right to freely receive information, but also violate the right to non-discrimination.

Speaking to PEN, Ömer Akpınar, an editor for Kaos GL, described the impact that these filters have on the LGBTQI community in Turkey:

‘From the 90s to today, the internet has actually changed a lot in the lives of the LGBTQI community. Whether we’re talking about our ability to access information or our ability to come together and organise as groups; these efforts to organise primarily happen online, particularly at universities. So whenever there are restrictions on the internet, it has a particularly large impact on the LGBTQI movement. Ultimately, you can’t easily access information on what LGBTQIs stand for, whether LGBTQIs have human rights just by looking through school books or by browsing brochures out there in the mainstream. You need to be able to find these things online.

‘While the internet is an area that is being heavily restricted, in many instances it also happens to be the first space where LGBTs express themselves more comfortably. While there are a great deal of LGBT websites like Kaos GL online, access to information really isn’t that easy. It isn’t enough that these websites are allowed to exist online, it’s important that they can be accessed, shared and promoted too.’

INTERNATIONAL LAW AND ONLINE CENSORSHIP IN TURKEY

Freedom of expression in Turkey is safeguarded by the Constitution and by the various international treaties to which Turkey is a state party. The Turkish Constitution also underlines the importance of proportionality, a concept that had been adopted by ECtHR case law.

The only permissible restrictions on freedom of expression under the ECHR are national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Any such restrictions must be provided by law and must conform to the strict tests of necessity and proportionality. ECtHR jurisprudence also imposes a thorough, three-part test to which any restriction on freedom of expression, such as online censorship, must adhere: the restriction must be a) provided by national law, accessible and written in a way that its consequences can be foreseen; b) for a legitimate aim and c) necessary, as shown by the three tests of ‘suitability, pressing social need and proportionality’. Do the laws behind online censorship in Turkey hold up to these tests?

These strict criteria for restriction are often violated when online content is censored in Turkey. The Anti-Terror Law does not specifically provide for internet blocking, but rather prohibits ‘spreading propaganda for terrorist organisations’. Blocks imposed under the Anti-Terror law therefore do not meet the criteria of provision under national law, and indeed, a website block against Frat News Agency was lifted in July 2014 based on this reasoning.

The Internet Law fails to meet the criterion of permitting an individual to foresee the consequences, as there is no clear definition contained within it.

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over what constitutes public morality, defamation, invasion of privacy, and threats to public order or national security. While case law has previously ruled in the public interest when determining whether an invasion of privacy has occurred, the public interest is mentioned nowhere in the Internet Law, and public interest arguments are frequently ignored by the courts in cases of online censorship. Threats to public order and/or national security or public morals are not defined in any detail in the Internet Law. As a result it is difficult to predict whether a website block is likely, or whether a block would be of a specific page or of the whole site.

It also seems reasonable to conclude that wholesale blocks are simply unsuitable for the purpose intended, given the ease with which vast numbers of social media users in Turkey have been able to circumvent bans on Twitter and other social media (see Chapter 4 on Business and Freedom of Expression) – a clear demonstration of how unwieldy such access blocks can be.

According to ECtHR case law, a ‘pressing social need’ must be shown to exist in order for an infringement of the right to freedom of expression to be considered necessary. Furthermore, it is stipulated that any pressing social need must be implemented under Turkish law by the ‘least restrictive alternative’ available.

By omitting a test of necessity, the Internet law leaves the process for blocking access to websites open to abuse and provides inadequate protection for the right to freedom of expression. During research for this report, PEN did not see any test of necessity applied in any decisions relating to the blocking of access to websites.

The ‘least restrictive alternative’ principle also presents a compelling challenge to some of the grounds for censorship. With the introduction of a selection of state-run family filters in 2011 that consumers could opt into, the government provided a less restrictive alternative to the wholesale censorship of content on grounds of public morals, which affects all internet users in Turkey. With the introduction of the family filters – notwithstanding the concerns about what may be blocked by them - individuals wishing to protect themselves or their families from coming across ‘obscene’ or adult content have the means to do so. In light of this, it is difficult to justify wholesale blocks based on adult content, with particular emphasis on written blogs about sex and sexuality, given the availability of a less restrictive alternative to wholesale censorship in the shape of a voluntary filter.

One final area of concern is the practice of ‘over-blocking’ - blocking access to websites in their entirety because a tiny fraction of content has been deemed to be illegal. This approach was condemned by the ECHR in the case of Ahmet Yıldırım v Turkey (2012) and formed part of the reasoning for the lifting of YouTube and Twitter bans by the Turkish Constitutional Court in 2014. This kind of ‘over-blocking’ also fails the test of necessity, as there is very often a less restrictive alternative available to the censors (targeting specific web pages or URLs with illegal content rather than entire websites). Over-blocking is a particularly serious issue when applied to web sites where large numbers of individuals share legitimate content that they themselves have created, as this represents a gross infringement of the right of those individuals to freedom of expression. Over-blocking of news websites, blogs and online newspapers (such as Grihat or Karşı Gazete) because of a small number of news stories or blog entries is similarly concerning. While the Internet Law encourages specific URL blocks rather than wholesale site blocks with regard to defamation and privacy, a more positive obligation not to over-block needs to be written into the law to ensure that online censorship is not disproportionately applied in future.
All persons have the right to be free from government surveillance of digital media.

Article 3, PEN Declaration on Digital Freedom
In 2014 and 2015, Turkey passed legislation mirroring many of the worst Western surveillance practices that seriously threatens the fundamental rights and freedoms of tens of millions of Turkish citizens. From the use of false names attributed to leading figures in the Turkish media by Turkey’s National Intelligence Agency (MIT) which bypassed the legal requirements for the names of surveillance targets to be made available to judges issuing wiretapping orders, to the use of email correspondence between senior editors and journalists – apparently obtained through surveillance – as ‘proof’ of alleged terrorism offences, Turkey’s new surveillance legislation provides no protection against a repeat of the worst practices of the recent past. Although Turkey’s Constitutional Court has intervened on a number of procedural issues to curtail the wide discretion and extraordinary powers granted to authorities by Turkish legislators, the haste with which the introduction of laws such as the 2015 amendments to the Internet Law (which almost replicated articles struck down by the Constitutional Court just weeks earlier) have suggested that this last bastion of judicial protection may be beginning to crumble.
‘LAW AMENDING THE LAW ON STATE INTELLIGENCE SERVICES AND THE NATIONAL INTELLIGENCE AGENCY’ (THE MIT LAW)

Following the 17 December 2013 corruption scandal that threatened the ruling AKP, widely believed to have been leaked by supporters of Fethullah Gülen, the government introduced hastily-drafted legislation to strengthen the powers and reduce the accountability of the National Intelligence Agency (MIT). The ‘Law Amending the Law on State Intelligence Services and the National Intelligence Agency’ (No. 6532) entered into force with presidential endorsement on 26 April 2014. This law gives MIT wide-ranging powers to conduct surveillance and collect information. For example, Article 3 gives MIT the authority to collect information, documents, and data from public and financial institutions. All institutions and entities must comply with MIT demands for access to their data and archives, and no other law foreign or domestic can override this obligation. Refusing a request for data is punishable by two to five years in prison. As noted in PEN International et alia’s Joint Submission to the 2015 UN Universal Periodic Review of Turkey, ‘These provisions violate the right to privacy. Because MIT’s requests are not subject to judicial scrutiny and cannot be contested, individuals and organisations whose data is sought have no means of ensuring that the requests are proportionate and necessary.’

The MIT law also contains direct threats to journalists, writers, editors and publishers and users of social media, setting out punishments for seeking, distributing and publishing information about MIT: ‘any unauthorised person receiving, obtaining, stealing, falsely using, forging, or destroying information or documents related to MIT functions or activities will be punished by four to ten years in prison’, a clause which criminalises whistle-blowing. The distribution of information or documents related to MIT ‘by radio, television, social media, magazine, book, or any other form of media’ is punishable by three to nine years in prison.

Furthermore, the amendments further reduced the accountability of MIT officials who commit human rights violations. The existing law stated that criminal investigations into the activities of MIT members or other civil servants appointed by the prime minister to execute a specific duty must be approved by the prime minister. The new law takes a step further by stating that ‘public prosecutors who receive complaints about MIT’s personnel shall first inform the Undersecretary of MIT, the head of the agency. If the Undersecretary finds the complaints to be related to MIT’s duties and activities, the investigations concerned will be suspended and can only be resumed with the prime minister’s approval’.

‘There wasn’t any need for [laws like these] to be passed for us to know that we are under surveillance. Your telephones are listened to; you’re tailed when necessary; your social and professional life can be scrutinised; you can be profiled. Through fanciful theories and irrelevant associations they can put together a criminal case against you. Given that this was the existing situation, there’s nothing in this new law that will necessarily make such cases more prevalent; it simply expands the scope of surveillance practices available [to the security services].’

Investigative journalist and UNESCO Press Freedom Award winner Ahmet Şık speaking to PEN International in September 2014

THE INTERNAL SECURITY LAW

On 27 March 2015, parliament passed 69 articles of a hotly debated bill known as the Internal Security Package, Law No. 6638 on Amending the Law on the Powers and Duties of the Police, the Law on the Gendarmerie Organisation, Duties and Authorities, and Some Other Laws, introduced by parliament in November 2014 widely criticised by opposition parties, the Turkish Bar Association and NGOs such as Human Rights Watch. Just days later, on 3 April 2015, it became law. The hastily drafted measures followed the death of up to 50 people in protests in south-eastern Turkey on 6 and 7 October 2014. The protests came in the wake of the siege of the Syrian Kurdish city of Kobane, which is very close to the border with Turkey, by the armed group calling itself Islamic State. The Turkish government’s approach to the siege had been widely criticised by Kurdish political groups.

The law contains very worrying provisions that empower the police to conduct searches without prior authorisation, detain suspects for up to 48 hours without the authorisation of a prosecutor, expands their authorisation to use firearms in a public place, and increases the penalty under
The combination of amendments to the Internet Law, the Law on the Powers and Duties of the Police and the new MIT law, coupled with existing legislation such as on the registration of SIM cards, has created an exceptionally toxic environment for freedom of expression in Turkey. Journalists and other writers have told PEN of the impact these laws are having on them and other activists. Their concerns include inadequate data protection laws, the lack of accountability for the use and misuse of data, the use of mass surveillance for profiling and as a form of intimidation, the lack of judicial oversight of targeted surveillance by security forces, and the consequent increase in self-censorship.

**MASS SURVEILLANCE IN TURKEY – THE RISE OF THE ‘DIGITAL GESTAPO’**

Articles 20 and 22 of the Turkish Constitution specify that any action that could potentially interfere with freedom of communication or the right to privacy must be authorised in writing by the judiciary. This is reflected in Turkish procedural law, which specifies that judicial permission is necessary for technical surveillance to be lawful.

However, despite these legal guarantees, a number of surveillance scandals that have received widespread media attention in Turkey have rocked public confidence in the authorities’ resorts to such measures. Coupled with the strengthening of the powers of MIT and the police to conduct surveillance without a court order, these have led to a widespread perception that surveillance orders are granted against those who are engaged in completely legitimate activities with far too much ease and that intelligence agencies will use information collected to obtain and renew surveillance orders against journalists including Yasemin Çongar, Ahmet Altan, Mehmet Altan, Amberin Zaman and Markar Esayan, point to a culture of inadequate checks on authorities seeking to collect surveillance data on individuals about whom there is no reasonable suspicion of criminal behaviour.

An investigation into the use of fake names in this case was shut down initially by the prime minister, although the investigation was reopened following a Constitutional Court ruling which found that stopping the case constituted a violation of the journalists’ rights. MIT now faces culpability for failing to inform the journalists that they had been surveilled after the unsuccessful conclusion of their investigation, and for using fake names for the people they were surveilling when they had sufficient...
information to provide their real names, both of which they are obliged to do under Turkish law.\textsuperscript{271} The judges involved in the case, meanwhile, could also face culpability for colluding with members of MİT in the case.\textsuperscript{272}

Writer and journalist Yasemin Çongar, one of the journalists surveilled by MİT under a fake name, on the trumped-up grounds that she was a foreign spy, spoke to PEN about being the target of surveillance:

‘When we received the court files we saw that they were listening to all five of us, and the intelligence service MİT applied for permission to do so using code names for us. MİT would not tell the courts who we were; it did not give the authorities our names or professions. So nowhere did they refer to us as “journalists monitored as part of a secret investigation”. My code name was “Elizabeth”; Mehmet Altan was “Pastor.” They would listen to people under strange or foreign code names, and managed in this way to extend the surveillance period by six months or perhaps a year at a time.

‘Later, when we pursued this matter, MİT responded that it began to listen in on these phone numbers under suspicion of espionage, explaining that it suspected us in this way because we communicated with a large number of foreigners! This case exposed collusion between a terrifying clique within the judiciary and MİT itself, in total violation of the constitution.’\textsuperscript{273}

There are also concerns at reports that Deep Packet Inspection (DPI) tools are being used by internet companies in Turkey. DPI systems allow the monitoring of the content of internet communications during transmission. Those known to have been bought and implemented in Turkey include Phorm (which provides a ‘behavioural monitoring service’ which has raised privacy concerns in other countries) which could allow the profiling of a user’s religious, political, sexual and other interests.\textsuperscript{274} Reports also indicated in 2014 that TİNET, Turkey’s largest ISP, was tendering for a comprehensive DPI system (thought to be Procera) which must, among other things control and classify service types like WAP, HTTP, Email, HTTP Browsing, HTTP Streaming, Messenger (MSN, Yahoo), Hotspot, TOR and control and classify VPN tunnel models.\textsuperscript{275}

While DPI systems are marketed for commercial purposes, to target online advertising, once in place, such software would allow the government to access ‘credit card information, direct messages on social sites and virtually any online content running on the Turkish infrastructure’.\textsuperscript{276} Under the Internet Law, TİB has the authority to require internet service providers to install software on their systems necessary to provide information requested by TİB and can revoke their licences to operate should they fail to comply. It also has the authority to require ISPs to provide information on individuals ‘suspected of crimes’. Such developments have been described by journalist, blogger, academic, activist and government critic Gurkan Ozturan as the rise of a ‘digital Gestapo’.\textsuperscript{277}

Speaking to PEN, investigative journalist İsmail Saymaz described the impact that such revelations have had on the Turkish public:

‘It is perfectly normal that people in Turkey feel concerned about being profiled through surveillance. You even see this fear of being followed, this fear of being surveilled in people when they go to the corner store. There was already a profile of citizens who feared the state, who felt helpless in the face of a draconian understanding of government. What could be more normal than for those people to feel a very reasonable sense of paranoia in the face of a police and judicial apparatus that has always looked to shape the political sphere?

‘But the thing is, the people who were subjected to that, until very recently, were Kurds, leftists, political groups. It was always that way. Whereas now, the issue of surveillance doesn’t just cover the classic, so-called enemies of the state. It has become clear that it covers a far wider portion of society. In a country where the prime minister says, ‘they even listened to me!’ Who can judge the man who
runs the corner store from feeling afraid, from asking why the powers that surveilled the prime minister wouldn’t surveil him?’

**DATA PROTECTION AND ACCOUNTABILITY**

Under the terms of the Internet Law, Internet Service Providers (ISPs) are not required to monitor the information that goes through their networks, nor do they have a general obligation to seek out illegal activity. However, the minimum amount of time that hosting providers must store user data has been increased from six months to at least one year, with the exact amount (up to two years) to be established under new bylaws that must be approved by the Information and Communications Technologies Authority (BTK). This also includes ‘Mass Use Providers,’ such as internet cafes and any place that supplies free WiFi, such universities, hospitals, and pastry shops which must also store data on their users and implement blocking orders. The law also provided that all data must be made available to TIIB upon request under punishment of fines of 10,000 to 500,000 Turkish Lira (US$ 3,300 to 165,000) although this provision was overturned by the Constitutional Court ruling of October 2014. Given the procedural concerns with surveillance in Turkey outlined above, and in the absence of a comprehensive data protection law, there are serious concerns that intelligence agencies will be able to access data relating to internet usage habits of all citizens for a period of up to two years.

Turkey does not currently have a specific data protection law. Instead, data protection is ensured by general provisions in several pieces of legislation, including Article 20 of the Turkish Constitution, the Turkish Civil Code, the Code of Obligations and the Turkish Criminal Code. A draft law aiming to harmonise Turkish legislation with European conventions and directives has been in the pipeline for over a decade now, following a lengthy campaign from digital rights activists. Under the draft law, data collectors must provide users with information about the identity of the organisation collecting the data; the types of personal data being collected; the purposes of the data collection; privacy practices; third parties to which the data collectors will disclose personal data; the rights of the user; how and where the personal data will be retained; how to make an inquiry or file a complaint; and how to access and/or correct the personal data. Additionally, data collectors must limit the use of personal data to activities absolutely necessary for the identified purpose(s) of data collection; provide users with an option to use a pseudonym or remain anonymous if possible; and delete or anonymise personal data once the stated purposes of the data collection have been fulfilled. Data collection must always be voluntary, informed, explicit and unambiguous. Consent, meanwhile, can be withdrawn at any time by the user.

While these provisions represent important safeguards for internet users against corporate surveillance and the misuse of their personal data for commercial purposes, the draft law, which was sent to Parliament on 26 December 2014, has been criticised for allowing wide and vague exemptions for governmental agencies accessing data. Other problematic aspects of the draft law include an overly broad definition of user consent which does not meet EU criteria of being explicit; the lack of independence of the proposed Personal Data Protection Board (PDB) where a majority of members are elected by the Council of Ministers, and the Chair is also selected by the Council; and the possibility of sharing user data with other countries in some circumstances, subject to the decision of the PDB.

Academic Erkan Saka described the issues with the draft data protection law in a conversation with PEN:

‘The aim of this new law isn’t the protection of personal data. The state wants to turn this into a case of saying, ‘I’ll protect the citizens’ data.’ In other words, there’s a bit of a twisted logic going on here. Activists in Turkey wanted individuals’ data protected by this law - so our data wouldn’t be sold on to anyone. Yes, this law can prevent certain commercial sales but it also means that this data is going to be opened up to the state. In other words, we’re going to be seeing an advanced form of surveillance here. This law just sets up the legal foundations for this.

‘The fear that people in Turkey have right now isn’t that they will be profiled by corporate entities. Rather their fear is that the state will be able to profile them directly.’

**ACCOUNTABILITY**

With many crucial considerations omitted from the bill, the Internet Law lacks provisions to ensure accountability and to ensure the protection of privacy. The law contains no language to ensure that only the proper authorities have access to data, or that those authorities can use that data
only for the purposes of justifiable prevention, detection or criminal prosecutions. The law does not describe when collecting data is necessary or the procedure to access it. In fact, access to data is not made dependent on the prior review by a court or by an independent administrative body. Although the provision to allow TİB to arbitrarily obtain information from hosting and internet service providers was overturned by a Constitutional Court ruling in October 2014, the fact that other agencies already have wide ranging powers to request information and are granted immunity for violations poses a grave threat to fundamental privacy rights.

For example, the MIT law erodes accountability for violations of privacy. First, it removes liability from MIT officials for violations. Requests made by MIT to a person or institution are deemed superior to all other legal obligations, with individuals complying with such requests being relieved of legal liability for violations of the law created by compliance. MIT also is given discretion in determining whether or not its own employees have committed any crimes. (The justification for the introduction of this law was that negotiations undertaken at the time between Turkish intelligence services and Abdullah Öcalan, the leader of the armed Kurdistan Workers’ Party (PKK), in order to end a decades-long conflict, needed a secure legal footing, in order to proceed without risk of prosecution under Turkey’s terrorism laws.)

Under Article 12, MIT reports directly to the prime minister’s office, which shares its own report internally (all relevant information and documents classified as state secrets) with the Turkish Parliament’s Security and Intelligence Commission. Direct parliamentary oversight of the security services – a check on potential abuses considered essential by international civil society organisations like PEN - is therefore considerably weakened.

**INTIMIDATION AND FEAR OF PROFILING LEAD TO SELF-CENSORSHIP**

One of the main arguments against the use of mass surveillance is that it poses a fundamental threat to freedom of expression and freedom of thought. A study by PEN American Center on the impact of state surveillance on US-based writers showed that a significant number were pushed to self-censorship in their browsing habits, in their personal and professional communications, and in their willingness to pursue research about certain subjects.

While conducting research for this report, PEN talked to numerous writers, journalists and activists in Turkey who relayed similar experiences of self-censorship as a result of surveillance concerns. Such worries appear to have been exacerbated by Turkey’s recent history of political trials, in which digital evidence featured prominently.

On 3 March 2011, academic and political analyst Coşkun Musluk was arrested on suspicion of involvement in the Oda TV case, linked to the alleged Ergenekon conspiracy (see Glossary). Musluk, who was held under pre-trial detention for almost a year, was completely oblivious to the fact that members of the Turkish security services had been investigating him for some time. It was only upon reading the indictment levelled against him and his co-defendants that Musluk discovered the extent of this investigation:

‘They took my columns, the emails I wrote to journalists, the messages I sent to my girlfriend, my entire address book (including everyone’s names and numbers) and even a conversation I had on Instant Messenger; and put these in the court documents. They put them under the “activities committed in support of the Ergenekon-controlled, armed, terrorist organisation PKK” section and in the appendices. Regardless of the fact that none of this constituted anything like proof of criminal activity. They then picked and chose excerpts from these to put in the indictment.

‘They included the email correspondence I had with a Kurdish journalist in exile, the emails I wrote to [writer and journalist] Barış Terkoğlu. In one bit of correspondence I was talking to a friend about the Kurdish issue. I said that the PKK was an institution and that like all institutions it would be resistant to change. They took this sentence and included it in the appendix as “propaganda for a terrorist organisation”. They did this with a conversation between two people, dubbed it terrorist propaganda.’

Coşkun Musluk’s account is far from unique in Turkey’s recent history. Investigative journalist Zeynep Kuray was one of 46 journalists from the Kurdish media arrested in December 2011. She was accused of being part of the ‘press wing’ of the Koma Civaken Kurdistan (KCK), (see Glossary), which at the time was still engaged in an active armed conflict with the Turkish state ongoing since 1984. The indictment, seen by PEN, in the case made reference to telephone conversations and
email correspondence she had with her editor at the Firat News Agency, one of the largest Kurdish-language media outlets. She is accused of taking orders from her editor (described as the leader of a terrorist organisation) about which news stories to cover. Records of their communications are placed alongside ‘offending’ articles including investigative pieces on the alleged sexual harassment of Turkish Airlines employees and on the alleged use of chemical weapons by the Turkish military. In the eyes of the prosecution, her news stories were acts of terror; the hierarchy of a news agency interpreted as the hierarchy of a terrorist group.

Zeynep Kuray’s lawyer Tamer Doğan spoke to PEN about the way the investigation against her was conducted:

‘In the case in which Zeynep was involved, they constructed an organisational structure then arbitrarily placed people in it. They did the whole thing back to front. You’re supposed to first find the people and ascertain if they’ve committed any crimes. These guys just went in looking to force people into this structure that simply didn’t exist. Then all these people were left having to protest their innocence when all the evidence against them was comprised of digital evidence and telephone conversations…that proved nothing.’

The cases against Musluk and Kuray, both of whom remain on trial, highlight the insidious threat that surveillance poses in Turkey. Even more worryingly, proof has emerged of digitally fabricated evidence being used to incriminate writers and journalists in these trials. Technical experts called in to testify in the Oda TV wing of the Ergenekon trial have found proof that Trojan viruses were used to plant supposedly incriminating documents connecting various writers and journalists to a criminal conspiracy.

Investigative journalist and UNESCO Press Freedom Award winner Ahmet Şik spoke to PEN about the use of digital evidence in Turkey. Like Coşkun Musluk, Şik was detained for almost a year under the auspices of the Oda TV wing of the Ergenekon investigation and remains on trial:

‘Whether we look at Oda TV or the other politically controversial trials, there’s a common set of factors present when it comes to digital evidence. Every time, we see an attempt to create a perception of criminality by use of evidence that doesn’t feature names or signatures; the authorship of which is unclear; and which [technical] reports indicate has been planted on the computer by means of computer hacking.

‘These latest amendments aren’t actually that different to what was in place previously - the only difference is that they make it easier to know who has done what. The prosecutions that were previously conducted based on fabricated evidence will now be based on your internet usage habits. Yes, it might be prescribed by law, but is it really legal? To me, it’s an indication of a regime of oppression.’

INTIMIDATION

Yasemin Çongar talked to PEN about the feeling of intimidation that surveillance is designed to instil:

‘Of course, this incessant pursuit and intimidation did not surprise us greatly because the state, or rather, the deep state, has always been interested in surveillance and fear tactics. We can observe the smear campaigns orchestrated by a core team of campaigners close to these entities. They even wrote about my husband, accused me of being a CIA agent, or having served in the Israeli army at the age of 21. What else can I say! The only time in my life I visited Israel was as part of a group of journalists; I was around 35 years old. You can see how there is no limit to the lies they are willing to circulate as part of these smear campaigns.

‘They are running a great campaign of attrition, calling me an agent or a spy. We know then that there is no limit to the evil they will perpetrate to silence a dissenting voice, or to overshadow journalistic activity which does not suit their interests.'
In Turkey journalism becomes a thing for which you risk facing such attacks, and losing your family life, your privacy, and your personal happiness. Maybe a person can take accept these risks for a time, but not forever. Sometimes you find yourself having to think more of your child, your spouse, your private life. So of course you can’t be journalistically free.

‘When you spy on journalists in this way and justify it by claiming an investigation into espionage, when you constantly present them as people who might have committed treason, who might have run murky operations and shady networks, then beyond the evil that you do them, you empower others who believe you to take action. This is a very provocative thing; we all know how many journalists have been murdered in this country.

‘More importantly, when you watch and follow a journalist you intimidate and frighten them. Even if they are unaware of your pursuit, you are able to bring out into the open not only their whole private life – all the conversations with their spouse, child, lover; matters of health and things they would rather keep private – not only these matters, but their journalistic sources, their fellow journalists, the conversations held with colleagues, their bosses, the paper’s management; in fact all the relationships that ought to be entirely protected by the principle of privacy. In the process, you gain the ability to interfere with these matters as you see fit. Moreover, you do none of this in a transparent manner, and in compliance with the law.’

The use of surveillance as a tool of intimidation was elaborated on by Ahmet Şik:

‘In reality, the KCK and Oda TV cases were political cases; it is difficult to talk about a fair trial being conducted in relation to them. A strategy was drawn up in these cases whereby people would be cast as guilty in the public eye through a process of character assassination. From KCK to Ergenekon, there was a complete lack of proper evidence in many of these cases. In particular, it seems that playing on certain cultural codes was chosen in order to capture the legitimacy that should have been established by presenting concrete evidence. Maybe if something like this had happened in America, people would have risen up against it because of the way in which private correspondence was used to smear people. But here, completely the opposite happened…. ‘

‘The real worry here is that further to expanding the existing mechanisms of censorship in the mainstream media to the rest of the media, there’s also a desire to intimidate those oppositional movements that came about with the Gezi Park protests and which the government fears the most. These practices open the door to the criminalisation of those oppositional movements who express their political demands in a completely appropriate manner. It is designed to intimidate those groups who might take to the streets.’
PROFILING

The use of mass surveillance data to profile individuals for their political and ideological beliefs and to render them susceptible to persecution by the authorities is one of the most significant concerns that people have about surveillance in Turkey. Barış Büyükkakyl, an activist at the Istanbul branch of the community-operated digital workspace Hackerspace, talked to PEN about concerns related to profiling:

‘The real problem is the legitimisation of this surveillance and its entry into law. Once it is enshrined in law, and the legality of the data gathering is accepted, the information will be material that can be bought and sold, and therefore natural to categorise. At this point, after collection this activity will seem normal. Let us say you buy two books from Kitappyurdu [a Turkish online book retailer] or Amazon—Marxist-Leninist works or the works of a certain philosopher. After a while, what with a book being such a telling thing, you will have a profile, and your books will be that profile. You might not be a Marxist-Leninist, but your profile will be set in their eyes; for them you are the member of a certain group, and they file you away that way. Once they have legitimised and completed this categorisation, they will process you. In the right circumstances, they will say, go seize him/her from this address.’

SELF-CENSORSHIP

The proliferation of self-censorship in the way people communicate, browse and conduct research online is one of the most significant effects of surveillance according to many of the writers, journalists and activists we spoke to during research for this report. Writer and journalist Coğkun Muslu, who like Ahmet Şik was imprisoned for almost a year, described a similar process of self-censorship in his private communications to that described by Ismail Saymaz in the Introduction section of this report:

‘I never thought that I was committing any crime but I had nevertheless developed a certain process, a certain discipline in my communications: I was never insulting on the phone, I would never use slang or profanity in my conversations. I would always speak as if there were a third person on the line. When I wrote to my girlfriend [who is now my wife], I would never allow my writing to exceed a certain point of raciness. Even with her, I would conduct my private conversations on a certain level because I knew that they could one day bring this up. I always wrote with the thought that others could see what I was writing, I always spoke with the thought that other people could hear what I was saying.

‘I would try to write without bending my ideas but the impact that this had was inescapable. I think the impact that this kind of thing has is inescapable for everyone. I came to think that people could use the things I was doing for the worse. With many of the things I thought, either I wouldn’t give more information than necessary in the emails I wrote or I would refrain from writing certain things entirely in my email communications. In the past, I would write emails that were pages long.

‘I started getting lawyers to read the articles I was writing; I had never done this before. This is a horrible thing; for a person to feel the need for their lawyers to check the articles that they write. But now that is exactly what I do. I went through this change in my life and it’s still something that continues. This has become something of a way of life for me. It has become my modus operandi.’
Blogger and digital activist Ahmet Sabancı related the impact that surveillance has on the rest of society:

‘We can see the kind of impact that surveillance has from looking at children. There’s a difference between a child who is oblivious to being watched while playing on its own and a child who is conscious of its parents’ gaze. Because a person being watched will try their best to act perfectly; they’ll feel a sense of fear at being watched and will try not to do anything wrong. This applies to every person. When people become aware that they are being watched on the internet, they think the same thing - I don’t want to get in trouble, I don’t want to be punished, I don’t want to be profiled by the government. No matter how much they say that this isn’t the case, they go through it. After a point, it begins to find its way under their subconscious.’

SURVEILLANCE AND INTERNATIONAL LAW

The right to privacy is protected under Article 17 of the ICCPR. The UN Human Rights Committee clarified in its General Comment No. 16 that individuals must be protected from ‘any unlawful and arbitrary interferences with their privacy, family, home, or correspondence’, and national legal frameworks must provide for the protection of this right. The Committee also said that ‘[e]surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations, should be prohibited’ and that the gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law.’ In its General Comment 34, the Committee has clarified that ‘States parties must respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources’.

UN Special Rapporteur on Freedom of Expression has expressed concern that the evolution of communications techniques and technologies has changed the way in which communications surveillance is conducted by States. He has recommended that legislation must stipulate that State surveillance of communications must only occur under the most exceptional circumstances and exclusively under the supervision of an independent judicial authority and urged states to refrain from compelling identification of users as a precondition for access to communications, including mobile telephony. The provision of communications data by the private sector to States should be sufficiently regulated to ensure that individuals’ human rights are prioritised at all times. He also recommended that ‘[a]ccess to communications data held by domestic corporate actors should only be sought in circumstances where other available less invasive techniques have been exhausted’ and should be monitored by judicial oversight.

It is clear from the above that Turkey’s use of both targeted and mass surveillance does not comply with its obligations under international law to respect the right to privacy. When coupled with problematic national security legislation that is abused to permit the detention and imprisonment of individuals for legitimate free expression ‘offences’, sometimes on the basis of information obtained from surveillance undertaken without judicial oversight or accountability or even possibly illegally planted on defendants’ computers, there are serious concerns that the current wave of violence and unrest will see yet more innocent people swept up and arbitrarily detained.
The private sector, and technology companies in particular, are bound by the right to freedom of expression and human rights.

Article 4, PEN Declaration on Digital Freedom
CHAPTER 4
ONLINE SERVICE PROVIDERS AND FREEDOM OF EXPRESSION IN TURKEY

Turkey has experienced a dramatic explosion in social media usage in recent years. With over 32 million accounts, Turkey has the fourth most Facebook users of any country in the world and is the eighth largest Twitter market with over 11 million active users. During the Gezi Park protests of summer 2013, this expansive social media landscape was transformed into a vibrant sphere for citizen journalism, news-sharing, political discourse and dissent. On 31 May 2013, the day the demonstrations in Gezi Park erupted into a nationwide protest movement, the total number of tweets sent daily in Turkey skyrocketed from the normal 9–11 million to 15.2 million, with approximately 90 per cent of geo-located tweets with protest hashtags coming from within Turkey.

It was during this period of unrest that the Turkish government first started to target social media in its public statements, with then Prime Minister Recep Tayyip Erdoğan decrying social media as ‘the worst menace to society.’ The Communications Minister of the time, Binali Yıldırım, followed Erdoğan’s lead, stating that social media companies that did not comply with government requests to crack down on ‘cyber-crime’ would face ‘an Ottoman slap.’ Tensions between the government and social media giants have been simmering ever since.

The government’s frustration at not being able to control social media ostensibly lies at the root of this tension. The Turkish government has been able to exert significant control over much of the mainstream media in recent years, with critics pointing to direct government interference in the ownership of many of Turkey’s biggest media outlets as a major factor in the development of a press characterised by a culture of rampant self-censorship.
This climate of self-censorship in the mainstream media, which has intensified greatly in recent years, played a crucial role in transforming the social media sphere into a space where urban, educated youth migrated to impart and receive news unconstrained by government influence. And yet by becoming an outlet for mass anti-AKP sentiment, social media had apparently become, in the eyes of many high-ranking AKP officials, a tool for those trying to bring the party down. The two major flashpoints in the relatively young history of social media in Turkey - the Gezi Park protests and the December 2013 corruption investigation - have both been decried as coup-attempts by President Erdoğan,319 reviving memories of the 1997 coup for his political allies and electoral base. Social media, as a catalyst and amplifier for these political crises, has thus come to be perceived as an existential threat that must be brought under control.

Since the major social media companies are based outside Turkey, the government has been unable to tame them by applying the same kind of financial tactics that it has used against the Turkish print and broadcast media in the past. Instead, the government has sought to pressure the likes of Facebook and Twitter through judicial channels. Turkey's two-week ban on Twitter during late March and early April 2014320 and temporary bans on Facebook, Twitter and YouTube from 6–7 April 2015321 have been short, sharp demonstrations of the authorities' appetite for wholesale website closures should social media companies refuse to comply with demands. The companies' own transparency figures show that, at least in the case of Facebook and Twitter, both the numbers of requests for content restriction and the number of items restricted have risen dramatically since 2013 (see table below).

Despite the growing number of blocks requested an implemented, the ease with which vast numbers of internet users were able to circumvent the Twitter ban demonstrates how grossly ineffective such access blocks can be. In the 24 hours following the implementation of the Twitter ban on 20 March 2014, over 2.5 million tweets were posted from Turkey at an astounding rate of approximately 17,000 tweets per minute.322 Turkish internet users were able to circumvent the block on access to Twitter in enormous numbers by using a number of simple digital circumvention techniques that were widely publicised at the time of the block, including by some internet or social media companies themselves,323 such as accessing the internet through a foreign-based Virtual Private Network (VPN), changing one’s Domain Name System (DNS) settings or even by using SMS-based technology to send and receive tweets. The block on access to YouTube, which was applied not long after the blocking of Twitter, was evaded by large numbers of users with equal ease.

Content removal requests 2013 to 2015

<table>
<thead>
<tr>
<th>Period</th>
<th>Facebook</th>
<th>Twitter</th>
<th>Google</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total Pieces of Content Removed or Withheld</td>
<td>Removal requests</td>
<td>Percentage where some content withheld</td>
</tr>
<tr>
<td>Jan-Jun 2013</td>
<td>-</td>
<td>4</td>
<td>0%</td>
</tr>
<tr>
<td>Jul-Dec 2013</td>
<td>2,014</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Jan-Jun 2014</td>
<td>1,893</td>
<td>121</td>
<td>30%</td>
</tr>
<tr>
<td>Jul-Dec 2014</td>
<td>3,624</td>
<td>1,820</td>
<td>50%</td>
</tr>
<tr>
<td>Jan-Jun 2015</td>
<td>Not yet published</td>
<td>1,667</td>
<td>34%</td>
</tr>
</tbody>
</table>

Compliance rate for requests from government agencies or law enforcement: Not yet published.
The cat and mouse game between those who wish to communicate freely through social and other forms of digital media and the Turkish authorities looks set to continue.

The new legal requirements and subsequent orders and requests for partial or wholesale blocks, as well as requests for user information, have left online and social media companies in a complex ethical situation. On the one hand, they have the demands of the authorities and a desire to continue making their services available to Turkish users. On the other hand, lies a social responsibility to uphold the fundamental rights and freedoms of their users. Below, we take a look at some of the policies implemented by several of the biggest online service providers, including social media companies, operating in Turkey:

FACEBOOK

Facebook achieved a four-star rating in the 2015 Who has your back? Report by the Electronic Frontier Foundation (EFF) which documents “the practices of major Internet companies and service providers, judging their publicly available policies, and highlighting best practices”.²²² It follows many industry best practices in respect of requiring a warrant before disclosing information, informing users about government data demands,²²³ and disclosing its data retention policies and does disclose some information regarding content removal requests²²⁴ but nevertheless there are some concerns as to whether it is doing all it can to protect the right to freedom of expression.

In its transparency report, Facebook only provides figures for the number of pieces of content restricted. It does not give information about the number of requests made by court order, or by other agencies, nor about the reasons cited for such requests. It also does not give information about its compliance rate with such requests.

In recent years, Facebook appears to have zealously policed content relating to the Kurdish issue and the PKK. While it is perfectly understandable for social media companies to remove content that promotes terrorism or the use of violence, it is also important that such policies respect political speech and the freedom of the media.

Facebook closed the pages of dozens of Kurdish politicians between 6 July and 12 August 2013, including popular figures such as Sirri Süreyya Önder and Altan Tan. Facebook’s Europe Policy Director Richard Allan justified the closures on grounds that the accounts in question had praised persons or organisations on the international terrorism list.²²⁵ While PEN has not been able to access the content of all these pages, it is concerned that Facebook is reported to have considered such ‘praise’ to include the juxtaposition of the honorific term ‘Sayın’ (Mister) before the name of the jailed PKK leader Abdullah Öcalan, the posting of his pictures and the use of the term ‘Kurdistan’ to refer to territory that falls within the borders of the Republic of Turkey and has removed postings containing them.²²⁶

More recently, Facebook closed the account of Kurdish media outlet Rudaw on grounds that they had published a series of photographs showing the house in which jailed PKK leader Abdullah Öcalan had been raised.²²⁷

PEN is concerned that by such actions, Facebook may be having an adverse impact on individual users’ right to post material which is within the permissible grounds of freedom of expression.

GOOGLE

Google, which provides content to users through products including YouTube, Google+ and Blogger has provided statistics in its 2014 transparency report for requests for removals over several years, including reasons given for requests. In the period January to June 2014, the majority of requests were for defamation or obscenity/nudity, although some 40 requests (8 per cent) were for criticism of the government and another 10 were on unspecified national security grounds. In the same period, its compliance rate was 38 per cent for requests in the form of a court order, and 30 per cent for requests from other agencies.

Reasons for removal requests in January to June 2014

<table>
<thead>
<tr>
<th>Reason</th>
<th>%</th>
<th>Total Removal Requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defamation</td>
<td>31%</td>
<td>153</td>
</tr>
<tr>
<td>Obscenity/Nudity</td>
<td>30%</td>
<td>146</td>
</tr>
<tr>
<td>Privacy and Security</td>
<td>15%</td>
<td>74</td>
</tr>
<tr>
<td>Reason Unspecified</td>
<td>11%</td>
<td>52</td>
</tr>
<tr>
<td>Government Criticism</td>
<td>8%</td>
<td>40</td>
</tr>
<tr>
<td>National Security</td>
<td>2%</td>
<td>10</td>
</tr>
<tr>
<td>Religious Offense</td>
<td>1%</td>
<td>4</td>
</tr>
<tr>
<td>Copyright</td>
<td>0%</td>
<td>2</td>
</tr>
<tr>
<td>Bullying/Harassment</td>
<td>0%</td>
<td>2</td>
</tr>
<tr>
<td>Hate Speech</td>
<td>0%</td>
<td>2</td>
</tr>
<tr>
<td>Violence</td>
<td>0%</td>
<td>1</td>
</tr>
<tr>
<td>Adult Content</td>
<td>0%</td>
<td>1</td>
</tr>
</tbody>
</table>

Source: Google transparency report²²⁸

Google achieved a three-star rating in the EFF’s Who has your back? 2015 Report. EFF judged Google to fall short in the provision of information to users about government data demands. According to its policy, Google will provide notice to users about
government data requests and, in most cases, will make sure the notification happens before the data is turned over but does not pledge itself to providing notice after an emergency has ended or a ban has been lifted. It also does not fully disclose its data retention policies although it does give some information about requests for the supply of stored data in Turkey. Although according to the figures given, Google says that it rarely complies with requests for such data, what is clear is that since the beginning of 2014, the Turkish authorities have massively stepped up the number of requests to Google to supply stored information on users.

Microsoft has a stated commitment to respecting all of the human rights described in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the ILO Declaration on Fundamental Principles and Rights at Work. It aims ‘to bring the power of technology to bear to promote respect for human rights throughout the world’. However, it has lagged behind other companies in providing information on requests for content removal, having published its first report on the matter only in mid-2015, covering the period January to June 2015. The lack of such a report led to it being granted only three stars in the EFF’s Who has your back? 2015 Report, which was published before Microsoft published its content removal report. The report, which states that the majority of requests are for the removal of links to search results on Bing, but states that the company may also receive requests for the removal of content for other Microsoft consumer online services, including OneDrive, Bing Ads and MSN. The report indicates that no requests were received from Turkey in that period. However, the degree to which Turkish agencies are requesting information on users and accounts can be seen from the bi-annual reports on Law Enforcement Requests. The number of accounts/users specified has dropped from a high of over 14,000 in 2012, to a low of less than 8,000 in 2014, but looks set to rise again in 2015. What is noticeable is the number of cases where no data is disclosed because Microsoft has rejected the request because it did not meet legal requirements.

**Number of accounts/users in Turkey where data sought from Google 2011-2014**

Source: Google Transparency Report
LAW ENFORCEMENT REQUESTS MADE BY TURKEY TO MICROSOFT 2012 TO JUNE 2015

TWITTER

Turkey has the most egregious record of any country for requesting Twitter to pull content. Between January and June 2015, Turkish requests based on court orders formed almost 90 per cent of the world total; Turkish requests from government agencies constituted over 50 per cent of the global total. The 125 accounts eventually withheld as a result of these requests constituted almost 80 per cent of the world total; the 1,667 tweets withheld were over 70 per cent of the global number removed.338

Over the course of 2014, Turkish officials asked Twitter to remove content from almost 3,000 Twitter accounts, including through issuing almost 400 court orders directing Twitter to take down messages due to ‘defamation’ and the ‘violations of personal rights’ of both private citizens and government officials. Twitter blocked 79 accounts and removed over 2,000 tweets as a result of these requests.339

There were more orders and requests for removal of content in the first half of 2015 than in the whole of 2014, although Twitter complied with a smaller percentage of requests. While Twitter broadly complies with legal decisions in the countries where it operates, it does submit objections of its own depending on whether it thinks removal requests are justified. In March 2014, said in March 2014 that the blanket ban imposed on Twitter was in response to the company’s “defiance” in failing to comply with hundreds of court rulings since the start of the year.340

A significant example is the case of prominent Turkish journalist Celi Sağer, the managing editor of the newspaper Today’s Zaman. In September 2014, an email from Twitter warned Sağır that his account faced possible removal.341 An attached criminal complaint filed against Sağır listed alleged violations of Turkish law which allowed for the restriction of his account.

On applying to the court, Sağır learned that the complaints were filed on behalf of President Erdoğan, his son Bilal, his daughter Sümayye, and one of Erdoğan’s advisers. The journalist’s tweets were alleged to ‘incite hatred and animosity’ against Erdoğan, his family members, and his adviser, and to subject them to public humiliation. The complainants asked the court to order blocks on all accounts linked to Sağır’s handle (@CSagir), but also all future accounts that he might open. The court partially agreed, issuing an order that Sağır’s current Twitter accounts should be shut down - the first time that this had happened to a declared account (as opposed to an anonymous one).342

According to Berivan Orucoglu, Sağır, who mainly posts sarcastic and critical tweets about government officials, insisted that he has never insulted anyone, pointing out that Erdoğan and his family could have lodged a defamation complaint or the request could...
have been for the removal of the tweets in question, rather than his entire account. Two other Twitter accounts he opened were also later subjected to court orders for closure, apparently on the grounds that they constituted ‘disobedience’ to the court order – effectively equivalent to an indefinite ban on the use of Twitter. Twitter filed an objection with the Turkish courts, on the basis that the order contravened press freedom, which is guaranteed by the Constitution. Twitter blocked access to some of Sağır’s tweets in March 2015, after Prime Minister Davutoğlu sued him for defamation.

**PEN/Twitter Interview**

In early 2015, PEN conducted an interview with a representative from Twitter, who wishes to remain anonymous, about the company’s Turkey policies, its reaction to various website blocks and its views on its responsibilities to protect the fundamental rights and freedoms of its users:

**PEN:** Where do you draw the line when it comes to complying with content removal requests? Do you differentiate between types in your policies regarding data requests?

**Twitter:** A lot of information about how we address the needs and concerns of our users in Turkey and protect them is in the public domain now, particularly because of events in 2014 and subsequent occasions when we were blocked.

During the first block—and still today—our highest priority was to ensure that Twitter access was still available to our users in Turkey. In Turkey we have a strong base of users who use Twitter for a wide range of purposes, not just political activism, so it is vital for us that all users have access to the type of information they seek in a timely manner.

But, although it is important for us to ensure access, we don’t treat Turkey differently from any other country. We engage with the Turkish authorities to the same extent that we do in any other country where we are trying to grow our presence and user base. We engage in many of the same conversations as we have in London, or Berlin, or elsewhere.

Twitter is an open communication platform that doesn’t take sides in discussions concerning the free flow of information, save where the relevant tweets or accounts breach our own terms of service in the first instance. Where we have a legally-backed notification that content is illegal within a particular jurisdiction, we can and do, in certain circumstances, move to withhold that content just within the country in question. The first time we did so was in Germany for a Nazi-affiliated account; we’ve done it in France for anti-Semitic speech, when notified of its illegality by the Public Prosecutor. We have done it in Turkey as well, as you can see. We look for legal documentation – a legislatively-backed notification from a lawful authority of that country. And we don’t withhold content in a country without publishing the fact that we have done so, and also publishing the relevant legal documentation.

**PEN:** Do you comply with all Court Orders coming out of Turkey? There are concerns surrounding the impartiality of the judiciary. Do you treat communications from the Telecommunications Directorate and Court Orders in the same way?

**Twitter:** Our own internal legal team as well as outside counsel evaluate all government requests and court orders. There is a vigorous process by which we assess and process these requests. As a matter of public record, we have challenged many courts orders, and had some success, in the past. These things are judged case-by-case. We don’t have a 100 per cent compliance with all of the requests that come from any government, not least Turkey.

**PEN:** It has been suggested (Freedom House Report) that your policies are shifting in response to increasing government pressure. How would you respond to such criticism?

**Twitter:** I don’t think we are. We don’t change our policies due to pressure from governments but as our business and user needs evolve. In fact we make every effort to update and fine-tune our policies globally as we face new challenges and circumstances to ensure that we are sufficiently well equipped to protect the voices of our users.

In the past year there has undoubtedly been increased pressure from a wide range of governments, particularly because of the challenge of extremism arising from conflicts such as that in Syria. We now face increased pressure to remove content from a wide range of governments. But we are working hard to respond whilst ensuring we don’t take steps that deprive our users of a platform that they find gives them a voice.

**PEN:** What was the impact on Twitter of the block in Turkey, financially, in terms of online traffic, or otherwise?

**Twitter:** No platform wants to be blocked anywhere in the world. Our objective is to be available for people anywhere, including other countries where we are currently blocked. It is not really a question of measuring impact in numerical terms, whether that is in users or dollars. The main impact was in strengthening our resolve to defend the core values of our company while remaining available to users in Turkey.

**PEN:** To what extent do you feel a responsibility to uphold the fundamental freedoms of users in countries where authorities are trying to limit what they can read or write or say?
Twitter: Our success as a company is dependent on being a trusted venue for users to express themselves and for their voices to be heard. As a company we work hard to ensure that, even where there are technical or other restrictions in place, users have other means of using the platform, such as via SMS or VPN. We actually highlighted some of those methods at the time of the block in Turkey. We tweeted those details in English and Turkish from our official account.

Another aspect is user privacy. As you can see in the transparency report, user details are not something we share. In terms of difficult conversations that we have across the world, that is usually the primary subject matter.

PEN: To what extent do you agree with the notion that Twitter has an important role to play in democratisation and the advancement of Human Rights across the world? Many people, especially in countries such as Turkey, use it to share news where there are great issues with freedom of the press.

Twitter: It is without doubt the case that it has become an important tool for people in those situations in a number of countries, not just Turkey. Obviously it is great to be part of something that provides that tool; but it is just a tool. It shouldn’t be the measure of how free people are. It should not be the sole means of guaranteeing their freedom to speak out. We do ensure voices are heard. That is something that is hugely important to us, and it is the case. But we are just one aspect of that.

PEN: How do you handle requests concerning journalists who are in a particularly sensitive position with regard to their relations with government authorities? There does appear to be a conflict in Turkey between certain journalists and news outlets on the one side, and the government authorities on the other.

Twitter: Looking back on the last period, you will have seen efforts on our part to challenge requests that we receive, and court orders where we believe that it is important that the individual’s rights are vindicated. Aside from that legal aspect, we do try to have conversations with a broad range of people within Turkey, including government representatives as well as those from the NGO community, academia and journalists.

Our top priority is to continue to be transparent in what we do. It is important to us as a company that we use the Chilling Effects channel\(^\text{[84]}\) to highlight situations where we do ultimately have to withhold content, but also that we constantly keep our users themselves notified of any requests that we receive and our legal efforts to overturn inappropriate orders.

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BUSINESSES’ RESPONSIBILITIES IN PROTECTING HUMAN RIGHTS

Businesses have a responsibility to uphold and protect human rights. Although international human rights law and standards do not directly impose legal obligations on businesses, business activities may have an adverse effect on the rights of others. The UN Guiding Principles on Business and Human Rights, published in 2011, sets out a ‘global standard of practice that is now expected of all States and businesses with regard to business and human rights’. Although not legally binding in themselves, the Guiding Principles elaborate on the implications of existing standards and practices for both States and businesses.\(^\text{[85]}\)

Principle 13 states that ‘[t]he responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts’.

Principle 15 elaborates that in order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (a) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.
Between February 2014 and April 2015, the Turkish government passed a series of amendments to the Internet Law and created a new national security law that amplified greatly its existing powers to surveil the population. The largely unchecked enhancement of powers granted by these amendments, especially when viewed alongside Turkey’s other laws, poses one of the most ominous challenges to human rights as a whole in Turkey.

Freedom of expression is regarded as a fundamental human right in international law, and is closely related to the enjoyment of a number of other key human rights, particularly freedom of thought and opinion, freedom of religion and belief, the freedom to impart information and ideas through the media (freedom of the press) and the right to privacy.

It plays an indispensable role in the development of a healthy intellectual and political discourse within a democratic society, especially through the media and the arts. While PEN focuses primarily on violations of the right to freedom of expression, it should be underscored that other rights also may be affected by mass surveillance, the interception of digital communications and the collection of personal data. These include the rights to freedom of peaceful assembly and association; and to family life – rights all linked closely with the right to privacy and, increasingly, exercised through digital media. In this regard, the International Principles on the Application of Human Rights to Communication Surveillance (also known as the Necessary and Proportionate Principles) to which PEN International is a signatory, are instructive in their application of the long established three part test of legality, necessity and proportionality to digital surveillance. The links between mass surveillance and these other effects on human rights, while beyond the scope of the present report, merit further consideration.
Blocking measures or filtering tools used at state level to silence politically motivated speech on the Internet, or if the criteria for blocking and/or filtering is secret, or if the decisions of the administrative bodies are not made publicly available for legal challenge could constitute a violation of Article 10 of the ECHR. Lack of judicial and administrative transparency with regards to the blocking orders issued by the courts and by TIB continues to be a major problem. Furthermore, TIB’s decision not to reveal the blocking statistics is a step backwards, and in the absence of information, openness, and transparency it is difficult to monitor and assess the legal practices of the current regulatory regime in Turkey.

When conducted in compliance with the law, including international human rights law, surveillance of electronic communications data can be a necessary and effective measure for legitimate law enforcement or intelligence purposes. Revelations about digital mass surveillance have, however, raised questions around the extent to which such measures are consistent with international legal standards and whether stronger surveillance safeguards are needed to protect against violations of human rights. Specifically, surveillance measures must not arbitrarily or unlawfully interfere with an individual’s privacy, family, home or correspondence. Governments must take specific measures to ensure protection of the law against such interference.

The Turkish courts have an extremely poor track record of upholding international principles on matters of political expression. Criminal defamation charges continue to be brought against prominent voices in the media at the behest of high ranking government figures. Religious defamation cases continue to be brought and national security laws continue to be used to curtail reporting on sensitive issues. Given the vulnerability of legitimate political criticism and satire to be interpreted as defamatory by the Turkish courts and the absence of a public interest derogation in the Internet Law for content deemed to be an invasion of privacy, we are already seeing scenarios where the Internet Law is applied in a manner incompatible with Turkey’s freedom of expression obligations. Indeed, the authorities’ repeated demonstrations of their readiness to over-block socially useful websites like YouTube and Twitter point to a staggering disregard for the democratic vibrancy of such sites, where a myriad political views and diverse works of cultural expressions are able to find a home.

Given the overzealous application of the Internet Law against material of significant value in a democratic society, it is clear that at the very least the Turkish authorities need to be reminded of their positive obligations to uphold fundamental rights and freedoms in their decisions via much needed legal reforms which adhere to these principles. In the meantime, judges, particularly in the Constitutional Court, should take Turkey’s existing legal protections for freedom of expression, both domestic and international into account when ruling on cases with an online content. Yet even this is likely to afford inadequate protection to individual rights as the judiciary in Turkey grows ever more politicised and subject to government influence.

With this in mind, PEN makes the following recommendations to the government of Turkey, to the international community and content, hosting and access providers:

**TO THE GOVERNMENT OF TURKEY:**

**ON REFORM OF LEGISLATION**

- Ensure Turkish law respects international human rights principles and reflects ECHR case law;
- Comprehensively reform counter-terrorism legislation, including Article 6/2 and 7/2 of the TMK and Articles 220/6, 220/8 and 314 of the TCK, to narrow definitions of ‘terrorism’, ‘organised crime’, and ‘propaganda’, and to ensure that the genuine purpose and demonstrable effect of any restriction on freedom of expression is necessary and proportionate to protect a legitimate national security interest;
- Amend Law 5651 to ensure that freedom of expression is protected online, and that any blocking of websites, IP addresses, ports, network protocols or types of use (e.g. social networking) is justified in accordance with international standards and is subject to judicial approval before implementation;
- Amend Law No 6532 (on State Intelligence Services and National Intelligence Agency) and Law 2559 (on the Powers and Duties of the Police) so that surveillance of communications is permissible only occurs under the most exceptional circumstances and exclusively under the supervision of an independent judicial authority.
- Ensure that legal safeguards governing surveillance are in line with the 13 Principles on the application of human rights protections to communications surveillance and meet the three-part test of legality, necessity and proportionality;
- Provide access to remedy and reparation for individuals who have suffered unjustified intrusions into their privacy.
ON TRANSPARENCY OF BLOCKING STATISTICS

• Require TIB to make blocking statistics publicly available on a regular basis as the administrative body did between May 2008 and May 2009.

ON DIGITAL MASS SURVEILLANCE

• As an urgent matter, enact data protection legislation that complies with international standards on the right to privacy and establishes an independent data protection authority;
• Remove the requirement for mandatory SIM card registration;
• Recognise and take steps towards compliance with the International Principles on the Application of Human Rights to Communications Surveillance;
• Take steps to implement effective controls to prevent the use of private surveillance industry products to facilitate human rights abuses.

ON AN INDIVIDUAL’S RIGHT TO FREELY EXPRESS THEMSELVES

• Cease the abuse of anti-terror legislation and the penal code to prosecute journalists, bloggers, activists and other civil society actors;
• Release all individuals who are held for the peaceful exercise of their right to freedom of expression, and drop pending charges brought against others for similar reasons.

ON ACCOUNTABILITY

• Amend all legislation to ensure that there is judicial control over the actions of state security services, particularly the intelligence service and the police.

TO OTHER STATES

• Emphasise in their relations with Turkey the importance of respect for human rights and the rule of law;
• Encourage Turkey to implement the recommendations above;
• Acknowledge that respect for human rights and the rule of law in Turkey are a key element of its stability in a regional context and should therefore be a strategic priority in all states’ regional policies.

TO THE COUNCIL OF THE EUROPEAN UNION

• Set a firm date to discuss Chapter 23 of the EU Acquis concerning Justice and Fundamental Rights;
• Agree on the conditions that Turkey needs to fulfil to open this Chapter;
• Communicate those opening benchmarks to the Turkish government.

TO INTERNET AND SOCIAL MEDIA COMPANIES OPERATING IN TURKEY

• Challenge any content blocking orders which restrict the right to legitimate freedom of expression;
• In the absence of appropriate and effective controls to prevent abuse, desist from supplying software which could be used in mass surveillance in a violation of the right to privacy;
• Design and implement corporate responsibility policies that demonstrate how they respect human rights;
• In line with the UN Guiding Principles on Business and Human Rights, ensure that any such policy includes a due diligence process to identify, prevent and mitigate negative impacts on human rights, and remediation processes to respond to any identified adverse human rights impacts.
For PEN analysis of these events, see The Gezi Park Protests: The Impact on Freedom of Expression in Turkey, published in January 2014

For example, journalist and MP Mustafa Babay, arrested in July 2008, was sentenced to 34 years and eight months in prison under national security provisions of the Turkish Penal Code. He was released on 4 December 2013 after the Constitutional Court ruled his continued detention violated his parliamentary immunity. For more information see http://www.pen-international.org/newsitems/ mustafa-babays-release-after-four-years-imprisonment-highlights-need-for-judicial-reform/

The ECHR also found Turkey guilty of denying the pair’s lawyers access to documents required for their defence and pointed out that the main offence allegedly committed by Sik and Sener, “bringing pressure to bear on the judicial authorities in charge of a criminal investigation,” does not offer grounds for preventive detention under Turkey’s Code of Criminal Procedure.
http://www.cpbf.org.uk/body.php?subject=media%20manifesto&doctype=special&id=3245


The Gezi Park Protests: The Impact on Freedom of Expression in Turkey, PEN International, op.cit

https://freedomhouse.org/sites/default/files/Turkey%20Report%20-%20Feb%202014.pdf


The Gezi Park Protests: The Impact on Freedom of Expression in Turkey, PEN International, op.cit

http://www.nytimes.com/2014/01/12/world/europe/in-scandal-turkeys-leaders-may-be-losing-their-tight-grip-on-news-media.html

http://bienet.org/english


http://bienet.org/bienet/medya/164185-erdogan-i-elestiren-kendini-mahkemede-buluyor-iste-davalar

https://www.tbmm.gov.tr/kanunlar/k6639.html

New Article 8(1)/of the internet law http://www.resmigazete.gov.tr/eskiler/2015/04/20150415-1.htm


Interview with PEN International, September 2015


See PEN International's annual Case Lists for 2012 and 2013

Ibid


Legislation governing the Special Authority courts contained a series of possible restrictions to procedural safeguards for defendants such as prolonged custody and pre-trial detention limits and restrictions on access to lawyers which led to violations of the right to a fair trial. See for example http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11495&LangID=E#fshash.6tykJUHJ.dpdf


The Penal Code can be accessed at http://www.legislationline.org/documents/action/popup/id/6872/preview

http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

The full Article 26 of the constitution states: "Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing. The exercise of these freedoms may be restricted for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary."


116 UN Human Rights Committee, General Comment 34, Op. cit. para 38

117 Ibid, para. 38

118 Warsaw Declaration, 1997; Bucharest Declaration, 2000; Paris Declaration, 2001


121 http://hudoc.echr.coe.int/eng?i=001-109189["itemid":"�"�"�"]

122 http://hudoc.echr.coe.int/eng["itemid":"�"�"�"]


124 Interview with PEN International, September 2014


126 Interview with PEN International, September 2014


131 http://www.bbc.co.uk/news/world-23628066


134 http://www.pen-international.org/newsitems/turkey-criminal-complaint-against-journalist-can- dundar-must-be-dropped/


137 “Terrorism means an action or attempted action where: 1. The action: (a) Constituted the intentional taking of hostages; or (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and 2. The action is done or attempted with the intention of: (a) Provoking a state of terror in the general public or a segment of it; or (b) Compelling a Government or international organization to do or abstain from doing something; and 3. The action corresponds to: (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or (b) All elements of a serious crime defined by national law.” Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, on Ten areas of best practices in countering terrorism, UN Doc A/HRC/16/51 (22 Dec 2010), paras 26-28. Available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf

138 ‘Terrorism is any kind of act done by a person or persons belonging to an organization with the aim of changing the characteristics of the Republic as defined in the Constitution, the political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening, destroying or seizing State authority; eliminating fundamental rights and freedoms, damaging the internal and external security of the State, public order or general health by means of coercion and violence; pressure, intimidation, deterrence, suppression or threats.’ Anti-Terror Law, No. 3713, entered into force 12 April, 1991


144 Telephone conversation with Sedef Kabas, January 2015

145 http://www.foxnews.com/world/2015/01/16/turkish-prosecutors-seek-prison-for-tv-presenter-for-tweet-on-government/


Ibid

Interview with PEN International, September 2014


Turkish Restrictions On The Internet The Highly Debated New Law In Turkey Enters Into Force And Is Subsequently Amended

http://cyberlaw.stanford.edu/page/wilmap-turkey


Email from Esin Attorney Partnership, İstanbul, Turkey, 13 September 2015


For an analysis of current data protection laws and regulations see Data protection in Turkey: overview, Practical Law, 1 September 2014, http://uk.practicallaw.com/7-520-1896


http://uk.practicallaw.com/7-520-1896


Interview with PEN International, September 2015


Interview with PEN International September 2014


Article 8, MIT Law

Article 6, MIT Law


Interview with PEN International, September 2015

http://www.pen-international.org/newsitems/turkey-mark-international-womens-day-by-dropping-charges-against-ayse-berktay-busra-
ersanli-and-zeynep-kuray/

Interview with PEN International, September 2014

http://outforbeyond.blogspot.co.uk/2012/01/guide-to-understand-odatv-trial-2-were.html


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Interview with PEN International, September 2014

Interview with PEN International, September 2014

Interview with PEN International, September 2014

Interview with PEN International, September 2014

Interview with PEN International, September 2014


Ibid. Para 81

Ibid. Para 88

Ibid. Para 85

https://freedomhouse.org/sites/default/files/The%20Struggle%20for%20Internet%27s%20Freedom.pdf
A Breakout Role for Twitter? Extensive Use of Social Media in the Absence of Traditional Media by Turks in Turkish in Taksim Square Protests, Pablo Barbera and Megan Metzger, 1 June 2013, http://www.aljazeera.com/indepth/opinion/2013/06/201361212350593971.html

http://www.wired.co.uk/news/archive/2013-06/03/turkey-social-media


http://www.bbc.co.uk/news/world-europe-26873603

http://www.ft.com/cms/s/0/12ef52a-a-dc5-11e4-a6f7-00144feab7de.html


http://www.theguardian.com/world/2014/mar/21/how-to-get-around-turkeys-twitter-ban


https://www.eff.org/who-has-your-back-government-data-requests-2015#google-report

https://www.facebook.com/about/privacy/other

https://www.eff.org/who-has-your-back-government-data-requests-2015#google-report


http://arsiv.taraf.com.tr/haber-yazdir-130577.html [Turkish]

http://rudaw.net/english/middleeast/turkey/10112014

http://www.google.com/ transparencyreport/removals/government/TR/?hl=en


https://www.google.com/ transparencyreport/userdatarequests/TR/


http://www.microsoft.com/about/corporatecitizenship/en-us/ transparencyhub/cm/


https://transparency.twitter.com/removal-requests/2015/jan-jun


http://www.thenational.ae/world/turkey/turkey-calls-twitter-biased-after-blocking-social-media-site


Ibid.

http://cyber-rights.org.tr/docs/Twitter_ihtar_EN.pdf


https://lumendatabase.org/blog_entries/763


Among many authorities see: İncal v Turkey [1998]; Arslan v Turkey [1999]; Özgür Gündem v Turkey [2000]; Yurdatapan v Turkey [2008]; Yalçın Küçük v Turkey [2008]; Tugpul v Turkey [2012]; Ahmet Yıldırım v Turkey [2012]

See ongoing high profile cases involving government critics such as Ahmet Altan, İhsan Eliaçık and Can Dündar

Imposing Silence: The Use of India’s Laws to Suppress Free Speech

MAY 20 2015

In 2015, PEN International in partnership with PEN Canada and the International Human Rights Program (IHRP) at the University of Toronto Faculty of Law released a ground-breaking report calling on India to repeal overbroad and vaguely worded laws that enable censorship in the world’s largest democracy. Imposing Silence: The Use of India’s Laws to Suppress Free Speech finds that overreaching legislation and longstanding problems with the administration of justice have produced cumbersome legal processes that deter citizens from exercising their right to free expression. The resulting chill silences political criticism and often discourages marginal voices from speaking out on sensitive social, cultural, and religious matters.

To read this report please go to:

The Gezi Park Protests: The impact on freedom of expression in Turkey

MARCH 14 2014

In The Gezi Park Protests: the impact on freedom of expression in Turkey, PEN assesses the violations of the right to freedom of expression and to freedom of assembly during last year’s protests, detailing numerous examples of intimidation, judicial harassment and violence against writers and journalists by the authorities in Turkey, and shedding light on the mechanisms by which the mainstream media in Turkey is pushed towards self-censorship.

To read this report please go to:

Honduras: Journalism in the Shadow of Impunity

JANUARY 22 2014

Journalists who cover organized crime, government corruption and other sensitive issues are increasingly facing threats and lethal attacks in Honduras, with almost complete impunity for perpetrators, said PEN International in a new report released today in partnership with PEN Canada and the International Human Rights Program (IHRP) at the University of Toronto Faculty of Law.

The report – Honduras: Journalism in the Shadow of Impunity – documents the rise in violence against journalists following the coup d’état that ousted President José Manuel Zelaya in June 2009, and the failure of both state and international mechanisms to investigate and punish those responsible. Since June 2009 at least 32 Honduran journalists – most working for the broadcast media – have been killed and many more continue to work in a climate of fear and self-censorship.

To read this report please go to:

The PEN Report: Creativity and Constraint in Today’s China

MAY 3 2013

On World Press Freedom Day, PEN International launched The PEN Report: Creativity and Constraint in Today’s China. The culmination of five years of collaborative research among PEN members inside and outside of China, the report is a frank assessment of the climate of freedom of expression in the world’s most populous state. It also provides first-hand accounts of life under the weight of Chinese censorship through personal essays by 10 of China’s leading dissident writers.

To read this report please go to: