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Civil Society Support Programme - II
Monitoring Judicial Practices in Turkey and
Strengthening EU Human Rights Mechanisms

TURKEY FREE EXPRESSION TRIAL MONITORING REPORT

July 2019

*Report by the International Press Institute (IPI)
based on data collected by the Media and Law Studies Association (MLSA)*

MLSA

Media and Law Studies Association
Medya ve Hukuk Çalıřmaları Derneđi



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Introduction

Given the unprecedented number of journalists currently behind bars in Turkey, trial monitoring has become an important activity for Turkish civil society over the past few years. At the time of this writing there are 135 journalists behind bars, with dozens of others facing criminal prosecution¹. Although some domestic and international observers have published in-depth reports on the trials of a few publicly known intellectuals, systematic data on the procedures and fairness of the Turkish courts in free expression trials more broadly were previously lacking.



The use of criminal law to target journalists, activists and academics critical of government and to restrict freedom of expression has had a chilling effect in society.

To fill this data gap and analyse the extent to which Turkish courts protect the fundamental rights of journalists and others exercising their right to freedom of expression, the International Press Institute (IPI) and the Media and Law Studies Association (MLSA) are carrying out a comprehensive trial monitoring programme across Turkey supported by the Civil Society Support Programme II.

Trial monitoring and data collection for this project are organized and carried out independently by MLSA. In a second step, the data provided by MLSA are analysed by IPI in periodic reports on trends and key findings for research and advocacy purposes.

The trial monitoring programme began in June 2018. An initial report published in January 2019 covering 90 court sessions involving 71 separate trials found that Turkish courts systematically ignore domestic and international standards set for securing the right to a fair trial².

This July 2019 Turkey Free Expression Trial Monitoring Report was written by IPI on the basis of data provided by MLSA. It covers the monitoring period between February 20 and May 31, 2019. It aims to raise concerns and awareness about the severity of alleged crimes that journalists are accused of, as well as about lengthy detentions and fair trials violations, in a context in which the use of criminal law to target journalists, activists and academics critical of the government and to restrict freedom of

¹ See <https://freeturkeyjournalists.ipi.media/>

² "Justice Monitoring Report: Freedom of Expression Trials in Turkey, June-December 2018", available at https://freeturkeyjournalists.ipi.media/wp-content/uploads/2019/01/MLSA_IPI_Trials_Turkey_Jan2019.pdf.

expression has had a chilling effect in society³. Additional IPI trial monitoring reports will be published regularly over the course of the monitoring programme.

The data presented in this report show that Turkey continues to criminally persecute journalists for their work. Most of the defendants are charged with terrorism-related offences. Yet despite the gravity of the accusations, indictments cite insufficient and untenable evidence: In 81 percent of the cases monitored in this period, the cited evidence directly related to defendants' professional occupation, such as published articles, photographs or social media posts. And although the evidence does not support the charges, journalists are frequently held in lengthy pre-trial detention. Moreover, the data suggest continued breaches of the right to a fair trial during court proceedings, including as relates to the right to a lawful judge, the secrecy of judicial deliberations, the publicity of the verdict announcement and conditions in the courtroom.

The findings suggest that the Turkish judicial system, including courts at various instances, continues to violate fundamental rights to liberty, freedom of expression and fair trial guaranteed in the Turkish Constitution, the European Convention and the jurisprudence of the ECtHR. The data collected reinforce the argument that Turkish courts are failing to provide an effective domestic remedy for rights violations, the exhaustion of which is a precondition for application to the ECtHR. Journalists and others targeted for exercising freedom of expression are therefore being denied effective protection of their rights.

Methodology

IPI and MLSA's Legal Unit designed a methodology to systematically collect data that would support already available anecdotal evidence that trials of journalists and others concerning the right to free expression fail to meet the standards of the right to a fair trial. The methodology consists of trial monitoring, observation and reporting.

MLSA oversees the implementation of the trial monitoring as well as the organization and preparation of the trial monitors. MLSA has recruited and trained more than 20 trial observers from various professional backgrounds including journalists, civil society professionals and students. The trial observers took part in a full-day trial monitoring training provided by experts from the Bar Human Rights Committee of England & Wales (BHRC).

In order to facilitate the work of the trial observers and produce a consistent set of objective data on observed trials, IPI and MLSA's legal unit created an electronic trial monitoring form. The form is based

³ See, e.g., "Progress Arrested: Report on the December 2018 IPI Press Freedom Mission to Turkey", available at <https://freeturkeyjournalists.ipi.media/no-progress-toward-media-freedom-in-turkey-ipi-report-finds/>.

on trial monitoring reference materials published by the Organization for Security and Co-operation in Europe (OSCE). It is in the form of a standard electronic template where observers can highlight and comment on the presence or absence of specific criteria in relation to the conduct of a fair trial.

The collection of the data commenced on June 1, 2018 and is ongoing. The dataset in this report covers 86 hearings of 492 defendants held between February 20 and May 31, 2019. The data were collected by 13 observers⁴ at various court instances in seven cities: Ankara (8 hearings), Batman (1), Denizli (3), Diyarbakır (7), Erzurum (1), Istanbul (62) and Izmir (4). The trials observed were chosen from among freedom of expression-related cases, with a focus on journalist trials. The observers filled in the electronic form, which instantly created an electronic database of their observations, and their answers were reviewed by MLSA editors. The data were further processed using Google Sheets and Tableau software and used as a basis for the present report.

Domestic legal protection

The Turkish legal system guarantees all basic rights and freedoms as enshrined in international treaties, including the right to personal freedom and security in Article 19 and the right to freedom of expression in Article 26 of the Constitution of the Republic of Turkey (the Constitution). In addition, Article 90 of the Constitution gives legally binding force to international treaties that are duly in force. The constitutionality of transposed international treaties cannot be challenged before the Constitutional Court, which means that international treaties take precedence over domestic statutes in the event of conflict, and thus the violation of transposed international instruments means the violation of the Turkish legal order.



In the specific case of pre-trial detention of journalists, European Court of Human Rights has stated that such detention may create a climate of self-censorship for the detained journalist as well as for other journalists carrying out their work.

⁴ Alican Uludağ (9), Aslı Ece Koçak (8, all hearings observed prior to April 1), Barış Kop (1), Cansu Pişkin (10), Çiçek Tahaoğlu (7), Deniz Tekin (8), Eda Narin (2), Elif Akgül (11), Eylem Sonbahar (9), Mustafa Murtezaoğlu (1), Sevda Aydın (7), Tansu Pişkin (3), Zeynep Sila Sarıkaya (10).

Article 13 of the Constitution permits derogation from human rights guarantees only by law. However, the law in question should not violate the “spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality”. In addition, Article 15 allows for partial or full suspension of the exercise of fundamental rights and freedoms in the event of war, general mobilization, a state of siege or a state of emergency, if obligations under international law are not violated. And even under these extraordinary circumstances, there should be no violation of the following basic rights: the individual’s right to life (except where death occurs as a result of acts compatible with the law of war); the right to physical and spiritual integrity; freedom of religion, conscience and thought; the rule that no one may be compelled to reveal his or her beliefs or blamed or accused on account of them; the prohibition of retrospective punishment; and the presumption of innocence.

Moreover, the European Convention on Human Rights (the Convention) in Article 5 prohibits arbitrary and unjustified deprivations of liberty⁵. There is a vast amount of case law of the European Court of Human Rights (ECtHR) in relation (not only) to Turkey and violations of the right to liberty (Article 5) and freedom of expression (Article 10). Especially relevant for this report is that the ECtHR has repeatedly stated that pre-trial detention in relation to the right to freedom of expression is a “real and effective constraint” on Article 10 of the Convention⁶. In the specific case of pre-trial detention of journalists, the ECtHR has stated that such detention may create a climate of self-censorship for the detained journalist as well as for other journalists carrying out their work⁷. Justifying pre-trial detention in relation to the exercise the freedom of expression would be permissible only “where other fundamental rights have been seriously impaired, for example, in the case of hate speech or incitement to violence”.⁸

Furthermore, the ECtHR in its *Şahin Alpay v. Turkey* ruling noted that criticism of governments and the publication of information about leaders of the country “should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda”. This report shows that, despite this ruling, most journalists and activists are charged with such serious offences⁹. The ECtHR also stated that even if such serious charges are brought, pre-trial detention shall be used as a last resort¹⁰. Pre-trial detention of defendants, and especially its length and weak justification, is one of the many alarming issues highlighted in this report.

⁵ *S., V. and A. v. Denmark*, § 73; *McKay v. the United Kingdom*, § 30

⁶ *Şık v. Turkey*, §85; *Nedim Şener v. Turkey*, § 96.

⁷ *Şık v. Turkey*, § 111; *Nedim Şener v. Turkey*, §122.

⁸ *Cumpănă and Mazăre v. Romania*, § 115.

⁹ *Şahin Alpay v. Turkey*, § 181.

¹⁰ *Şahin Alpay v. Turkey*, § 181.

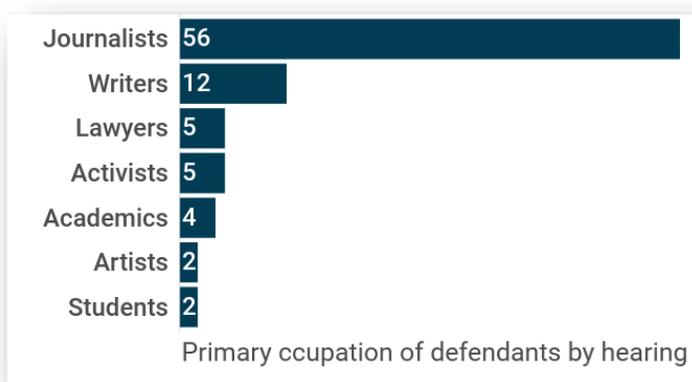
Findings

Defendants and charges

MLSA observers attended 86 hearings (69 case files) in the period from February 20 to May 31, 2019.

In most of the hearings, defendants were journalists (56 hearings), followed by writers (12 hearings) and lawyers (five hearings), activists (five hearings), artists (two hearings), and students (two hearings)¹¹.

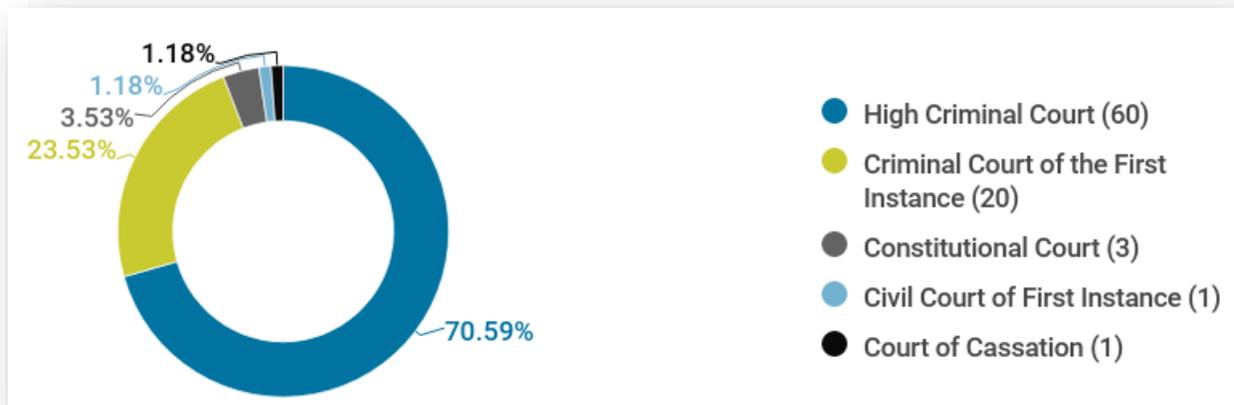
Altogether, 70 percent of charges in the observed time frame were related to terrorism offences (60 out of 86 hearings). The most common charges were propaganda for a terrorist organization (29 out of 86) and membership of a terrorist organization (21 out of 86). Other terrorism-related charges were establishment and/or management of an armed



organization; knowingly and wilfully helping the organization without being part of the hierarchical structure within the armed terrorist organization; revealing the identity of persons involved in fight against terrorism; printing and publishing the publications of terrorist organizations; committing crime on behalf of the terrorist organization without being a member.

The non-terrorism-related charges were: insulting the president; violation of personal rights; incitement of hatred and violence; violation of the law on demonstrations; humiliation of the Turkish nation, Republic and the state's institutions and organs; publishing and/or dissemination of the information that should remain confidential to protect the security of the state; and attempting to abolish the constitutional order.

¹¹ We are giving here the number of hearings instead of number of defendants, since in some cases there is more than one defendant charged at the same time.



Trial monitors observed proceedings at different court levels. Most of the hearings attended were at the level of the High Criminal Court (60) and the Criminal Court of First Instance (20). The fact that so many journalists are tried before the High Criminal Court, which handles first-instance cases for certain grave crimes, shows that authorities are using the most serious types of criminal charges to prosecute journalists.

Pre-trial detention

Forty out of the 492 defendants were being tried while in detention (18 hearings). Of this total:

- In 17 hearings defendants faced charges related to terrorism;
- In nine hearings the evidence presented consisted of articles written or published by the defendants; in five hearings defendants' social media posts; and in four hearings the fact that defendants had a secure communications app called ByLock installed on their mobile phones¹²;
- A total of 26 defendants were in pre-trial detention for longer than 12 months;

¹² The Turkish authorities have linked ByLock to followers of the Gülen movement, which the Turkish government considers responsible for the July 2016 coup attempt.

- Twenty-six of the 40 defendants were held in Silivri prison, a high-security prison near Istanbul designed for perpetrators of the most serious crimes, such as murder. Often, defendants in pre-trial detention are held in a solitary confinement. According to Turkish law, solitary confinement is reserved for inmates imprisoned for life without parole or convicted of heading terrorist organizations, and prisons can also use solitary confinement as a disciplinary measure. The Turkish authorities do not observe these rules. For example, Selçuk Kozağaçlı, a defendant in one of the observed trials, has been imprisoned in solitary confinement for more than a year despite not fulfilling any of the above criteria, which constitutes a violation of the prohibition on torture and cruel, inhuman and degrading treatment¹³.
- These findings confirm that pre-trial detention continues to be applied beyond its legitimate scope in Turkey and in contravention of ECtHR rulings.

In 11 out of the 86 hearings observed there were active arrest warrants for the defendant(s) in the trial, which means that they are to be arrested at “first sight” and will be held in pre-trial detention going forward.



Evidence presented

The evidence presented in most of the cases (81 percent) was directly related to the professional occupation of the defendants, such as written and published news stories and articles (53 hearings), social media posts (21), or phone calls with sources (nine). Statements of the accused/witnesses (15), and statements of secret witnesses (3) constituted another category of common evidence. In addition, the types of evidence also included participation in funeral and commemoration activities, Twitter group membership, travelling abroad or the signing of a petition by Academics for Peace. The nature of the evidence based on which defendants are facing years of imprisonment including pre-trial detention offers further indication that the ongoing crackdown on Turkish media and civil society is driven by a desire to silence critical voices. The ECtHR has stated repeatedly that governments must tolerate close scrutiny by the press and public, and that journalists or activists should not face prosecution for articles critical of the government and its officials¹⁴.

¹³ Lawyers Watch Canada, available online at <https://www.lwrc.org/ws/wp-content/uploads/2019/03/LRWC-re-Selcuk-Kozagach.19.02.19.F.pdf>.

¹⁴ *Lingens v. Austria*, § 42, *Castells v. Spain*, § 46.

Hearing outcomes

Of the 86 hearings observed, 18 were final. In 11 cases the defendants were convicted, in four cases they were acquitted, and in three cases there was a partial acquittal. From among the 11 final hearings that ended in a conviction, in two hearings the court ordered a non-suspended prison sentence for membership in or aiding a criminal organization (*örgüte bilerek isteyerek yardım etmek, örgüt yöneticiliği* and *örgüt üyeliği*). In the first of these two cases, there were 18 journalists on trial, all of whom received a sentence ranging from two to 18 years¹⁵. In the second case, which was the trial of a printing press owner and his employees, there were seven defendants sentenced, of whom five defendants received a sentence of seven years and six months in prison, and two were given three years and nine months¹⁶. Of the other cases ending in a conviction, in six hearings deferred prison sentences of maximum one year and six months were given, while in the other three hearings a monetary punishment was imposed.

Right to a lawful judge

In 20 percent of the cases (17 out of 86) the presiding judge changed during the proceedings; in 33 percent of the cases (28 out of 86) a member of the judicial panel changed during the proceedings. These changes occurred despite the fact that the Turkish Constitution guarantees the right to a lawful judge in Articles 36 and 37. This right stipulates that judges who rule on a specific case should be selected based on objective criteria predetermined by law. The fact of frequent changes to the panel of judges contravenes the principle of the lawful judge and put the impartiality and independence of courts in jeopardy.



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¹⁵ Case Nr. 2018/12766. Date of the final hearing: March 20, 2019. Ahmet Mandacı and Zehra Özdemir - 2 years 13 months 15 days; Ayşegül Çağatay, Yağmur Ereren, Didem Baydar Ünsal, Yaprak Türkmen - 3 years 9 months, Barkın Timtik-18 years 9 months, Özgür Yılmaz and Ebru Timtik - 13 years 6 months, Şükriye Erden - 12 years, Süleyman Gökten - 10 years 6 months, Naciye Demir - 9 years, Behiç Aşçı - 12 years, Selçuk Kozağaçlı - 10 years 15 months, Engin Gökoğlu and Aytaç Ünsal -10 years 6 months, Ayçan Çiçek - 9 years, Ezgi Çakır - 8 years.

¹⁶ Case Nr. 2018/143 Esas. Date of the final hearing: March 11, 2019. İhsan Sinmiş, Erdoğan Zamur, İrfan Karaca, Kasım Zengin, Mahmut Abay for “membership in the criminal organization” – 7 years and 6 months; Mehmet Emin Sümeli and Musa Kaya for “aiding the criminal organization”- 3 years and 5 months.



Courtroom conditions

In 52 percent of the hearings (43 out of 83) MLSA observers noted that the session was adversely affected by at least one of the following conditions of the court room:

- Hard to hear what the judicial panel said (20)
- Courtroom was too small, not enough space for the audience (15)
- Poor SEGBİS¹⁷ connection, hard to hear (four)
- Hard to see the judicial panel or defendants (room too big) (three)
- No separate section for the defendants and audience (one)
- Courtroom too crowded (one)
- Observers could not enter the court room (one)

¹⁷ SEGBİS is a video-conference system that has frequently been used instead of granting journalists the right to appear physically in court, particularly in cases involving Kurdish journalists. For more on use of the SEGBİS system in journalists hearings see "Analysis: Use of courtroom video link violates Turkey journalists' rights", available at <https://freeturkeyjournalists.ipi.media/analysis-use-of-courtroom-video-link-violates-turkey-journalists-rights/>.

Independence of deliberations

Forty-seven percent of judges' deliberations (36 hearings out of 76 for which data on this point are available) did not take place in private but were held in open court with prosecutors, defendants and the audience present. Pursuant to Article 227 of the Turkish Criminal Procedure Code, deliberations should take place only among participating judges. In order to guarantee the court's independence and impartiality, no other person can participate in the deliberations even if they have the purpose of consultation.

In two hearings, after the court took a break for deliberation, it announced the verdict without letting the audience, including the press, back into the court room¹⁸. In another two hearings of the same case, the court in one the hearings did not let defence lawyers and defendants in pre-trial detention inside the courtroom while announcing the interim decision¹⁹. In the second hearing the court reached the verdict without hearing statements about the merits of the case and announced it in the absence of defendants, who are in pre-trial detention, and their lawyers²⁰.

Defendants' presence in courtroom

MLSA's observers reported that the SEGBİS courtroom video link was used for defendants in only two of the hearings observed during this period. This is a marked contrast to our previous trial monitoring report, in which defendants in 34 percent of the observed hearings were not physically present in the courtroom and were forced instead to submit their defence from prison via SEGBİS. However, due to factors in this round of data collection such as geographical location of the trials, data from this period are not sufficient to make any conclusion about changes in SEGBİS use.

Travel restrictions

Even if journalists on trial are not tried whilst in detention, the ongoing court proceedings are frequently accompanied by restrictions of their freedoms, such as a ban on travel outside the place of residence or outside the country. Travel bans abroad have been imposed on defendants in 17 cases²¹. If the proceedings last more than year or even two, this constitutes a considerable restriction

¹⁸ Case Nr. 2018/185; 2018/29.

¹⁹ Case Nr. 2018/12766

²⁰ Case Nr. 2018/12766

²¹ Case Nr.: 2016/41 Esas; 2017/102; 2017/120; 2017/168; 2017/322; 2018/12766; 2018/143 Esas; 2018/284; 2018/316; 2018/42; 2018/57; 2018/6925; 2018/89; 2018/9 Esas; 2019/53; 2918/181; 314/269.

on their private and professional life. Besides travel bans, the courts imposed on several defendants the duty to report regularly to a police station (11)²² and house arrest (one)²³.

Disrespectful conduct of judges towards defendants

Disrespectful conduct by judges toward defendants was noted down by MLSA's observers in 12 hearings. In eight hearings judges addressed defendants as "sen" rather than "siz", the latter being the standard way of addressing someone who is not a friend or a child²⁴. In six observed hearings, the presiding judge often interrupted speeches of defendants or their lawyers, and on numerous occasions told them to wrap up²⁵.

Selected arbitrary actions of the court and prosecutors

In addition to the quantitative data collected by filling the online form, MLSA's observers also noted the following situations raising concerns regarding guarantees of a fair trial.

- In one case involving 29 defendants the court rejected requests by the defence on the grounds that they would "disrupt the structure of the hearing that the panel foresaw"²⁶.
- In the case of Max Zirngast, Hatice Göz, Mitatcan Türkten, Burçin Tekdemir, the court limited the time granted to lawyers to present their defences²⁷.
- In one case involving 19 defendants the prosecutor kept interrupting the defence's statements and eventually left the courtroom in protest²⁸.
- Several cases observed illustrate the practice of holding defendants at length in pre-trial detention, in many cases without appearing before a court. Osman Kavala, a prominent philanthropist and civil society organizer, was taken into custody in November 2017 but appeared for first time in front of a judge in late June 2019 (601 days after his arrest)²⁹. In other case, journalist Kibriye Evren was detained seven months prior to her hearing, even

²² Case Nr.: 2018/165; 2018/175; 2018/185; 2018/12766; 2018/316; 2018/57; 2018/6925; 2018/89; 2018/9 Esas; 2918/181; 314/269.

²³ Case Nr.: 2018/12766.

²⁴ Case Nr.: 2016/41 Esas; 2018/709; 2018/12766; 2018/143 Esas; 2018/467; 2018/57; 2019/53; 314/269.

²⁵ Case Nr.: 2018/181; 2018/116; 2018/12766; 2018/143 Esas; 314/269; 2019/709, 2016/41 Esas

²⁶ Case Nr. 2018/68

²⁷ Case Nr. 2019/709

²⁸ Case Nr. 2018/9

²⁹ Case Nr. 2018/1073

though evidence against her had not yet been collected. At the same time, other defendants arrested in the same operation, and accused of similar offenses, were released after two days in pre-trial detention³⁰. The detention of Kibriye Evren is backed by statements from secret witnesses and a recently found document from 2012, which has suddenly become the main piece of evidence³¹.

- A group of journalists who were tried in the Cumhuriyet newspaper case (Akin Atalay, Murat Sabuncu, Bülent Utku, Ahmet Şık, Önder Çelik, and Kadri Gürsel) filed individual applications before the Constitutional Court on December 26, 2016, related to their pre-trial detention. The court did not rule on their application until two years and five months later, on May 2, 2019. During this time, the applicants' cases were concluded, and they were convicted³². In its ruling, the Constitutional Court delivered a ruling in which it concluded that the rights of Kadri Gürsel as well as Murat Aksoy, a defendant in a separate case, had been violated by their arrest, but found no rights violation regarding the other applicants despite the closely similar circumstances.

About the International Press Institute (IPI): Founded in 1950, IPI is a global network of editors, journalists and media executives dedicated to furthering and safeguarding press freedom, promoting the free flow of news and information, and improving the practices of journalism.

About the Media and Law Studies Association (MLSA): MLSA is a Turkish non-profit (registered as Medya ve Hukuk Çalışmaları Derneği) founded in late 2017 to respond to an urgent yet growing need for going back to democracy and normalization in Turkey.

³⁰ Case Nr. 2018/827

³¹ Case Nr. 2018/827; See also: <https://freeturkeyjournalists.ipi.media/trials-calendar/kibriye-evren-2-2-2/>

³² Case Nr. 2016/50971

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