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Reporters sans frontières

CS 90247

75083 Paris Cedex 02

secretariat@rsf.org

cdevoire@rsf.org

Human Rights Inquiry Committee

Ayhan Sefer Üstün

Commission Chairperson

Grand National Assembly of Turkey

Human Rights Investigation Committee

06543 Bakanlıklar

ANKARA TURKEY

Paris, January 20, 2017

Dear Mr Üstün

We, Reporters Without Borders (RSF), an international non-governmental organization defending press freedom and the freedom of information, which are fundamental rights proclaimed by article 19 of the Universal Declaration of Human Rights, hereby express our grave concern and dismay over the cumulative effect of the emergency decrees on Turkish media, and we underline the absence of parliamentary control over the emergency decree laws in contravention of national and international law.

Since the attempted coup for an undemocratic take-over of July 15th 2016, journalists in Turkey have come under mounting legal pressures related to their work, including arrests, interrogations, suspensions and termination of positions. More than a hundred journalists have been imprisoned without trials over the past six months. 149 newspapers, TV-channels and Radio Stations have been closed and many of them have seen all their assets transferred to the State, permanently and without compensation.

Constitutional guarantees of press freedom and freedom of expression are only minimally upheld in practice. They are undermined by provisions in the penal code, the criminal procedure code, and the harsh, broadly worded emergency decree laws that essentially leave punishment of normal journalistic activity to the discretion of prosecutors. Constitutional protections are also subverted by hostile public rhetoric against critical journalists and outlets from government officials.

The scale of the investigations, prosecutions, dismissals, detentions and campaigns of private harassment directed against journalists and media outlets across the country is staggering. These measures preceded the attempted undemocratic take-over of July 15th, though they have now expanded and accelerated under cover of emergency laws. We have amassed evidence of an astonishing number of encroachments on media freedom, freedom of expression and pluralism.

This record of encroachments, prosecutions and seizures is all the more disturbing when considered in light of Turkey's expressed commitment to maintain a standard of protection of civil and political rights in keeping with the European Convention of Human Rights. Against this backdrop, the further assaults on freedom of speech, freedom of opinion and press freedom under the state of emergency signal the abandonment of basic human rights protections under Turkish law in direct transgression of Turkey's international obligations.

In our view, as shows the attached legal demonstration, the emergency decree laws go beyond what is permitted by the Turkish Constitution. They contravene the fundamental tenets of international human rights law. We are also convinced that the Government was de facto permitted to legislate alone, without any control by Parliament or the Constitutional Court in evident contravention of national and international law.

We appreciate your most urgent attention to this matter and look forward to your earliest reply.

Sincerely,



Christophe Deloire
Secretary-General
cdeloire@rsf.org

**ABSENCE OF PARLIAMENTARY CONTROL
OVER THE EMERGENCY DECREE LAWS
IN CONTRAVENTION OF NATIONAL AND INTERNATIONAL LAW**

1. Absence of Parliamentary control of emergency decrees.

The Grand National Assembly (Parliament) has failed to exercise due constitutional control of the emergency decrees.

1.1 National legal framework

The Turkish Constitution, which explicitly limits the Government's power to derogate from fundamental rights and freedoms in time of emergency, places the emergency decree laws under the ex post control of the Parliament. Such control should be effective.

Limits to the Government

- **Constitutional limits to the Government**

Articles 4, 15, 91, 120 and 121 of the Turkish Constitution set the following limits to the Government's emergency powers:

- The Government may receive and use emergency powers only in the event “*of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms*” ;
- The Government should follow a particular procedure for declaring the state of emergency and enacting decree laws, which includes prompt approval by the Grand National Assembly: Under Article 91 of the Turkish Constitution, the Government may legislate by emergency decree laws simply on the basis of a declaration of the state of emergency, approved by Parliament (Article 121 § 3 of the Constitution). Such emergency decree laws should concern “*matters necessitated by the state of emergency*” and are to be submitted by the Government to Parliament for prompt ex post approval (“*shall be submitted to the Turkish Grand National Assembly on the same day for approval*”); the time-limits and procedure for their approval are indicated in the Rules of Procedure of Parliament ;
- Certain basic rights should not be affected ;
- Limitations to other rights should be necessary and proportionate (“*to the extent required*”) and be temporary in character (“*during the state of emergency*”) ;

- **International limits to the Government**

The international obligations of the State should be respected. The scope of the Turkish Government's discretion is also limited by:

- The general principle of the rule of law, which is a founding principle of the Turkish Constitution.
- Article 90 of the Turkish Constitution which states the supremacy of international law (International Agreements such as the European Convention on Human Rights/UN Covenant on political and civil rights) vis à vis domestic law and President decrees: *“International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail”*.

- **Procedural limits to the Government**

The Government shall also abide by the Rules of procedure regarding the enactment of Emergency decree laws.

- Article 121 § 3 of the Turkish Constitution provides : *“[The emergency] decree laws shall be published in the Official Gazette, and shall be submitted to the Grand National Assembly of Turkey on the same day for approval; the time limit and procedure for their approval by the Assembly shall be indicated in the Internal Regulation”*. These decree laws have to be discussed in the committees and in the plenary sessions of the Parliament with priority and urgency.
- Article 90 § 1 of the Rules of procedure of the Grand National Assembly of Turkey reads: *“Bills of empowering acts and decrees having the force of law shall be debated in line with the rules set in the Constitution and the Rules of Procedure regarding the debate of laws, but immediately and before all other bills in the committees and the Plenary.”*

Decree laws not submitted to the Grand National Assembly of Turkey on the day of their publication shall cease to have effect on that day and decree laws rejected by the Grand National Assembly of Turkey shall cease to have effect on the day of publication of the decision in the Official Gazette.

- Article 128 of the Rules of Procedure of the Grand National Assembly of Turkey specifies: “Decree laws issued as per Articles 121 and 122 of the Constitution and submitted to the Grand National Assembly of Turkey are debated and decided upon according to the rules stipulated in the Constitution and the Rules of Procedure regarding the debate of government bills and private members’ bills, but immediately within thirty days at the latest and before other decrees having the force of law and bills in the committees and the Plenary. If the debate on the decrees having the force of law fails to be concluded in the committees, within at least twenty days, the Office of the Speaker puts them on the agenda of the Plenary.”

Absence of Parliament’s approval of the ensuing emergency decree laws.

At the time the emergency decree laws were issued, the Grand National Assembly was on summer recess. It was summoned for the approval of the declaration of the state of emergency, but not for the approval of the ensuing emergency decree laws.

According to the Government, all decree laws have been immediately submitted to the Parliament for approval, as required by Article 121 § 3 of the Constitution. However, from 1 July and until 1 October 2016, Parliament was on summer recess. Returning from recess on 1 October 2016, the Parliament, on 18 October 2016, discussed and accepted the first decree law enacted by the Government (no. 667), and started the examination of subsequent decree laws.

On 20 July 2016, Parliament was summoned for the approval of the declaration of the state of emergency, but not for the approval of the ensuing emergency decree laws, whereas, in practical terms, the latter are much more important than the former.

We do not know why the Speaker of Parliament or the President did not use their power to summon Parliament again, in order to let it discuss immediately the emergency decree laws.

When Parliament finally acted, it acted with delay: thus, Decree Laws nos. 668, 669, and 671 were approved on 8 and 9 November 2016, i.e. **more than 30 days after the end of the summer recess**; Decree Law no. 674 was approved on 10 November; other decree laws have been put on the agenda, but have not yet been discussed.

Following the declaration of the state of emergency, for over two months, the Government has therefore de facto been permitted to legislate alone, without any

control by Parliament or the Constitutional Court, which is dissonant with the clear import of the Constitution

A long delay between the enactment of the emergency decree laws and their examination by Parliament means that such measures were being implemented in the meantime unilaterally without such parliamentary control.

That being said, Parliament is now back at work, and nothing prevents it from exercising its supervisory powers in accordance with the Constitution. It should mean an effective control by the parliament shall be implemented.

1.2 International legal framework

Derogation from treaty-based human rights obligations is provided by Article 15 of the European Convention on Human Rights (ECHR) and by Article 4 of the International Covenant on Civil and Political Rights (ICCPR), which are expressed in very similar terms – they permit derogation in time of public emergency which threatens the life of the nation. Turkey is a party to both treaties.

The mechanism of derogation allows the Turkish authorities to temporarily reduce the scope of its obligations under treaty-based human rights instruments. However, there are certain conditions for the exercise of the derogation powers under the ECHR and the ICCPR:

- the right to derogate can be invoked only in emergency situations (time of war or other public emergency threatening the life of the nation);
- the State availing itself of this right of derogation has to comply with certain procedural conditions (see Article 15 § 3 of the ECHR¹, Article 4 § 3 of the ICCPR²), like the proclamation and notification requirements, as well as its national law.

¹ Article 15§3 of the ECHR : « Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed. »

² Article 4§3 of the ICCPR : « Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation. »

- the State may take measures derogating from its obligations “*only to the extent strictly required by the exigencies of the situation*”, both with respect to scope and duration, and the necessity and proportionality of those measures are subject to supervision by the European Court of Human Rights (ECtHR) and monitoring by the Human Rights Committee (HRC)³;
- certain rights do not allow any derogation;
- the derogation may not be discriminatory or inconsistent with the State’s other obligations under international law;
- the predominant objective must be the restoration of a state of normalcy where full respect for human rights can again be secured.

Furthermore, the scope of the Turkish Government’s discretion is also limited by the general principle of the rule of law, which is a founding principle of the Turkish Constitution and of international human rights law as well.

In its Recommendation 1713(2005), the Parliamentary Assembly of the Council of Europe noted that “*the need for security often leads governments to adopt exceptional measures*”, but stressed that “***no State has the right to disregard the principle of the rule of law, even in extreme situation.***”

Finally, in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*⁴, the ECtHR observed that “*the [European] Convention being a constitutional instrument of European public order [references omitted], the States Parties are required, in that context, to ensure a level of scrutiny of Convention compliance which, at the very least, preserves the foundations of that public order. **One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle.***”

The reference to “*other obligations*” under international law in the national Constitution, in the ECHR and the ICCPR means that the list of non-derogable rights includes those listed in both conventions. Furthermore, the State must comply with other international obligations (which is also expressly stated in the text of Article 15 of the Turkish Constitution), whether based on treaty or on general international law, some of which are non-derogable by definition. Thus, the list of non-derogable rights is larger than the two express lists contained in the ECHR and the ICCPR. In particular, according to the UN Human Rights Committee, **States Parties to the ICCPR may under no circumstance invoke Article 4 of the Covenant as a justification for acting in violation of humanitarian law or peremptory norms of international law and should take into consideration the developments of human-rights standards.** The Human Rights Committee also has recognised that **in order to protect non-derogable rights, certain aspects of other human rights must be non-derogable,**

³ See Venice Commission Opinion No. 865 / 2016, 9

⁴ECtHR (GC), no. 5809/08, 21 June 2016, § 145

including the prohibition against arbitrary deprivations of liberty and unacknowledged detention, and fundamental principles of fair trial, including the presumption of innocence and the right to have a court promptly determine the lawfulness of detention.⁵

Existence of “a public emergency threatening the life of the nation”

In the *Lawless* case⁶, the ECtHR gave the following definition of a “*public emergency threatening the life of the nation*”: “*an exceptional situation or crisis of emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed*”.

Article 4 § 1 of the ICCPR has been interpreted in the Siracusa Principles on the Limitation and Derogation of Provisions. Paragraph 39 of the Siracusa Principles indicates that “*a threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.*”

Limits to derogation from the States’ procedural human rights obligations during the times of emergency

The emergency decrees affect a large array of procedural rights guaranteed by the Turkish Constitution and by international human rights law, such as, in particular, the right to liberty (in relation to arrests and custody procedures and the right to be brought promptly before a court), and the right to a fair trial (in relation to access to lawyers, confidentiality of lawyer-client contacts, and extension of the search and seizure powers of the prosecuting authorities). Amendments related to the search and seizure powers and secret surveillance, and limitations on the contacts of the detainees with their relatives also affect the right to privacy, family life, respect of secrecy of communications and the home.

The Human Rights Committee in its General Comment No. 29 holds that in addition to the rights specifically listed in Article 4 of the ICCPR, **there were certain other obligations under the Covenant that are non-derogable:**

⁵CCPR, General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (2001), para. 10 et seq.

⁶*Lawless v. Ireland* (no. 3), 1 July 1961, § 28, Series A no. 3

- Right to Habeas Corpus (judicial remedy to test the lawfulness of detention, the right to judicial protection)
- Right to a fair trial, including the presumption of innocence.
- Prohibition of collective punishments

It could therefore be argued that Turkey has an obligation under Article 15 § 2 of the ECHR to act in compliance with Article 4 § 2 of the ICCPR, as interpreted by authoritative bodies, and that the right to access to justice (at least in respect to fundamentally fair process and in relation to other non-derogable rights) is also implicitly non-derogable. In the light of what was said above on the protection of procedural rights in a state of emergency situation, Turkey under the ECHR and the ICCPR cannot derogate from “fundamental principles of fair trial” or the prohibition on arbitrary detention, and cannot deny remedies against human rights violations.

Measures related to arrest and detention in custody

Article 5 of the ECHR and Article 9 of the ICCPR protect individuals against arbitrary deprivation of liberty by the State. So far, tens of thousands of suspects, comprising over a hundred journalists, have been detained in Turkey in connection with their alleged participation in the conspiracy. Two elements of Article 5 of the ECHR are particularly important in connection with those mass arrests. The first is the requirement that detention must be ordered on the basis of a “*reasonable suspicion*” against the suspect. Although the standard of proof for arresting a suspect is not the same as for a criminal conviction, the authorities have to “*furnish at least some facts or information capable of [showing] that the arrested person was reasonably suspected of having committed the alleged offence.*”⁷

Another important safeguard is the requirement that any arrested person should be “*promptly brought before a judge*” (Article 5 § 3 of the ECHR) and should have the right to request his or her release (Article 5 § 4 of the ECHR). Both §§ 3 and 4 of Article 5 speak essentially about the same basic guarantee – speedy judicial scrutiny of detention.

On the basis of Article 6 (1) of Decree Law no. 667, during a state of emergency a suspect may be held in custody without being brought before a judge for maximum of thirty days (see also Article 3 (1) of Decree Law no. 668).

⁷Magee and Others v. the United Kingdom, nos. 26289/12, 29062/12 and 29891/12, §74, ECHR 2015

On several occasions the ECtHR has underlined the importance of the guarantee afforded by Article 5 § 3 to an arrested person. The Court stated that “*such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment*”. The Court recognises however that, as in the context of anti-terrorism legislation, there exist exceptional circumstances or special difficulties justifying a longer period than normal before the authorities bring the arrested person before a judge. In case a State enters derogation under Article 15, this period can be extended. However, in the case of *Aksoy v. Turkey* the Court took the stance that a period of detention without judicial control for fourteen days without being brought before a judge did not satisfy the requirement of “promptness”, even despite the existence of a derogation.

The right to be effectively defended by a lawyer

Under the decree laws, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, guaranteed by Article 6 § 3 (c) of the ECHR, may be restricted. In particular, under Decree Law no. 668, the right of a suspect in custody to consult with the lawyer may be limited for a maximum of five days. Amnesty International reports several cases of detainees being held incommunicado for four days or more by the police, without being able to inform their families of where they were or what was happening to them. It should be recalled in this respect that “***an accused’s right to communicate with his advocate out of hearing of a third person is, as ECtHR has stated in Khodorkovskiy and Lebedev v. Russia, part of the basic requirements of a fair trial. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness***”.

Timely and unrestricted access to a lawyer of one’s choice is relevant in the context not only of Article 6, but also of Articles 3 and 5 of the ECHR (prohibition of torture and the right to liberty; see also Articles 7 and 9 of the ICCPR, which include non-derogable rights).

In the *Aksoy* judgment, the ECtHR held that “*the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.*”⁸

Moreover, in the recent case of *Ibrahim and others* the ECtHR stated: “*Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment [...] The first question to be examined is what constitutes compelling reasons for*

⁸*Aksoy v. Turkey*, 18 December 1996, §§ 65 and 84, Reports of Judgments and Decisions 1996-VI

delaying access to legal advice. The criterion of compelling reasons is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case [...]".

Closure of newspapers, TV-channels, Radio Stations and confiscation of their assets

Over the last 6 months, 149 media outlets have been closed. These measures constitute a far-reaching interference with human rights provided by the ECHR, namely the freedom of expression and the right to peaceful enjoyment of possessions.

2. Duties of the Human Rights Inquiry Committee of the Grand National Assembly of Turkey

Article 2 of the law number 3686, which determines the field of operation of the Human Rights Inquiry Committee, states that *"this law acknowledges the human rights defined in the Turkish Constitution and various international treaties and declarations such as the Human Rights Universal Declaration and European Convention on Human Rights"*.

The duties of the Human Rights Inquiry Committee are defined in the fourth article of the law number 3686:

- a. Following the developments regarding the human rights at international levels
- b. Determining the amendments in scope of human rights required for the conformity with the Turkish Constitution and related international treaties and declarations as well as proposing constitutional amendments
- c. Examining draft laws as main or secondary committee
- d. Investigating the conformity of the implementations of human rights within the Constitution and the international treaties Turkey adheres as well as holding inquiries for improvements and making proposals
- e. Investigating the petitions sent to the Human Rights Inquiry Committee and in case of a human rights violation, referring them to the departments or offices concerned
- f. Arousing attention of the members of the parliament in foreign countries in case of any violation of human rights
- g. Preparing a committee report on annual activities and results as well as the activities concerning human rights abroad

The Committee has the right to act autonomously and initiate inquiries without any present appeals. The Committee may also form subcommittees to hold inquiries.

In our opinion, parliamentary scrutiny and judicial review represent essential guarantees against the possibility of an arbitrary assessment by the executive and the subsequent implementation of disproportionate measures. The Council of Europe Commissioner for Human Rights in a report of 2001 argued that the possibility the Council of Europe member states enjoy to derogate from certain rights in emergency situations must be counterbalanced by effective domestic scrutiny: *“[it is] precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations.”*

We firmly believe that the emergency decrees should be considered unconstitutional and in contravention of international law.

We would welcome any additional or contrary information you might share.

We respectfully urge the Human Rights Inquiry Committee of the Grand National Assembly of Turkey to take immediate steps to exercise effective parliamentary scrutiny and to reverse the measures which contravene international law.

We appreciate your most urgent attention to this matter and look forward to your earliest reply.

Sincerely,



Christophe Deloire
Secretary-General
cdeloire@rsf.org

