# [Commentary on the November 2020 judgments adopted by the European Court of Human Rights on the detention of the journalists of the Turkish daily newspaper Cumhuriyet](https://www.turkeylitigationsupport.com/blog/2019/8/2/commentary-on-the-may-2019-judgments-adopted-by-the-turkish-constitutional-court-on-the-detention-of-journalists-and-a-civil-society-leader)

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The European Court of Human Rights (The Court or the ECtHR), recently delivered two judgments in the cases of *[Sabuncu and](http://hudoc.echr.coe.int/eng?i=001-206212)**[Others v. Turkey](http://hudoc.echr.coe.int/eng?i=001-206212)* (application no. 23199/17) and [*Şık v. Turkey (no. 2)*](http://hudoc.echr.coe.int/eng?i=001-206411) (application no. 36493/17), respectively on 10 November 2020 and 24 November 2020. The cases concerned the initial and continued pre-trial detention of the journalists of the Turkish daily newspaper Cumhuriyet. While the Court found a violation of Articles 5 § 1 (right to liberty and security) and 10 (freedom of expression) of the Convention in both cases, it held that there had not been no violation of Articles 5 § 4 (right to speedy review of the lawfulness of detention) and 18 (limitation on use of the restrictions on rights) of the Convention.

These two cases are blatant examples of media repression in Turkey in the aftermath of the attempted *coup* of 15 July 2016. As the Council of Europe Commissioner for Human Rights stated in its third party intervention of 10 October 2017, detention and prosecution of numerous journalists have been ‘part of a broader pattern of repression against those expressing dissent or criticism of the authorities, which is currently prevailing in Turkey.’[[1]](#footnote-2) Considering also that detention and prosecution of journalists under grave charges result in a strong chilling effect on legitimate journalistic activities, the Court’s findings of violations of Articles 5 § 1 and 10 of the Convention are significant to address this practice targeting the journalists.

However, it should be also noted that the legal reasoning and the findings of the Court under Article18 of the Convention is arguably unsatisfactory, as was also argued in the strongly worded partly dissenting opinion of Judge Kūris. In both cases, the Court held that the authorities had not pursued an ‘ulterior’ purpose, despite the applicants’ allegation that the purpose of their initial and continued detention had been to subject them to judicial harassment on account of their journalistic activities. In doing so, the Court did not really engage with the contextual evidence, including that presented by the third-party interveners, unlike in *Kavala v. Turkey*.[[2]](#footnote-3) In particular, the Court did not adequately take into account that the applicants’ detention and prosecution was part of a broader pattern of repression against media, civil society and opposition politicians in the aftermath of the attempted *coup*.

**Sabuncu and *Others v. Turkey* (application no. 23199/17), 10 November 2020**

Facts

The applicants were journalists with the national daily newspaper *Cumhuriyet* (“The Republic”) or managers of the CumhuriyetFoundation, the principal shareholder of the company that publishes the newspaper, at that time.[[3]](#footnote-4)

On November 2016 the applicants were placed in pre-trial detention on suspicion of committing offences on behalf of organisations considered by the Government to be terrorist organisations, including, in particular, the PKK/KCK (the Kurdistan Workers’ Party / Kurdistan Communities Union) and an organisation referred to by the Turkish authorities as “FETÖ/PDY” (“Fethullahist Terror Organisation / Parallel State Structure”), and of disseminating propaganda on their behalf. In November they were placed in pre-trial detention. Their applications for release and objections against the orders for their continued pre-trial detention were rejected several times.

In April 2017 the Istanbul public prosecutor’s office filed a bill of indictment against the ten applicants. They were accused mainly of lending assistance to terrorist organisations without being members of them (an offence under Article 220 § 7 of the Criminal Code). It was primarily alleged in the indictment that, over a period of three years leading up to the attempted coup of 15 July 2016, the editorial stance of *Cumhuriyet* had changed as a result of the applicants’ influence, running counter to the editorial principles to which the newspaper had adhered for 90 years.

In July 2017, following a hearing, the Istanbul Assize Court ordered the release of seven of the applicants. The trial court ordered the release of the remaining three applicants in September 2017 (Ahmet Kadri Gürsel), March 2018 (Mehmet Murat Sabuncu) and April 2018 (Akın Atalay).

In the meantime, in December 2016, the applicants lodged individual applications with the Constitutional Court, alleging a breach of their right to liberty and security and their right to freedom

of expression and freedom of the press. They also maintained that they had been arrested and detained on the grounds other than those provided by the Turkish Constitution and the Convention.

The Constitutional Court found a violation of Article 19 (right to liberty and security of person) and Articles 26 and 28 (freedom of expression and freedom of the press respectively) of the Constitution in the case of Turhan Günay (January 2018) and Ahmet Kadri Gürsel (May 2019), and found no violation of the rights of the remaining eight applicants (May 2019).

While the two of the applicants, Turhan Günay and Ahmet Kadri Gürsel were acquitted respectively in April 2018 and in November 2019, the remaining applicants were convicted by the Istanbul Assize Court, and their cases are still pending before the plenary criminal divisions of the Court of Cassation

Judgment

Before the ECtHR, the applicants argued under Article 5 § 1 that their initial and continued detention had been arbitrary and not based on any concrete evidence grounding a reasonable suspicion that they had committed a criminal offence. The applicants also complained under Article 5 § 4 about the length of the proceedings before the Constitutional Court. Relying on Article 10, the applicants also alleged a breach of their freedom of expression, complaining in particular of the fact that the editorial stance of a newspaper criticising certain government policies had been considered as evidence in support of charges of assisting terrorist organisations or disseminating propaganda in favour of those organisations. Moreover, under Article 18 in conjunction with Articles 5 and 10, the applicants alleged that their detention had been designed to punish them for their criticism of the government, arguing that the purpose of their initial and continued detention had been to subject them to judicial harassment on account of their journalistic activities.

First of all, considering the Constitutional Court’s judgment finding violations in respect of the complaints of Turhan Günay and Ahmet Kadri Gürsel, the ECtHR declared those two applicants’ applications inadmissible, except in relation to their complaints concerning the time taken to examine their applications to the Constitutional Court challenging the lawfulness of their pre-trial detention (Article 5 § 4 of the Convention).

As regards the complaint under **Article 5 § 1**, the Court found that the suspicion against the applicants ‘did not reach the required minimum level of reasonableness’ and that their pre-trial detention were based on a mere suspicion, thus, it found a violation of Article 5 § 1 of the Convention.

In this vein, the Court examined, under four groups, the published materials referred to by the judicial authorities in ordering and extending the applicants’ pre-trial detention. It held that the articles and messages cited as grounds for the suspicion against the applicants: (i) constituted contributions by the journalists of *Cumhuriyet*to various public debates on matters of general interests; (ii) did not contain any incitement to commit terrorist offences, did not condone the use of violence and did not encourage insurrection against the legitimate authorities; (iii) the stance taken by the articles and messages in question was broadly one of opposition to the policies of the government of the day. Therefore, it concluded that the applicants’ acts fell within the exercise of their freedom of expression and freedom of press, as guaranteed by domestic law and the Convention.

With regard to Article 15 of the Convention (derogation in time of emergency), the Court noted that no derogating measure had been applicable to the applicants’ situation during the period of the state of emergency in Turkey. It then found that there had been a breach of Article 5 § 1 of the Convention.

Regarding the length of the proceedings before the Constitutional Court under **Article 5 § 4**, the Court held that the review by the Constitutional Court could not be described as ‘speedy’ in an ordinary context. The Court noted that the periods of detention to be taken into consideration were 16 months in the case of Akın Atalay, 14 months and 11 days in the case of Mehmet Murat Sabuncu, eight months and 29 days in the case of Ahmet Kadri Gürsel, and seven months and two days in the case of the remaining applicants. However, the Court, taking into consideration the exceptional caseload of the Constitutional Court during the state of emergency in force from July 2016 to July 2018, the complexity of the case, and the fact that the applicants’ pre-trial detention periods had all fallen within the state of emergency, found that there had been no violation of **Article 5 § 4** of the Convention. It should be also noted that the Court stressed the distinction to be made between the present case and the case of *Kavala v.* *Turkey* in which the applicant had remained in pre-trial detention for the eleven months elapsing between the lifting of the state of emergency on 18 July 2018 and the delivery of the Constitutional Court’s judgment on 28 June 2019.

As regards the complaint under **Article 10**, the Court, reiterated that ‘certain circumstances which have a chilling effect on freedom of expression do in fact confer on those concerned - persons who have not been finally convicted - the status of victim of interference in the exercise of their right to that freedom’. In that connection the Court stressed that it had made the same finding in relation to the detention of investigative journalists for almost a year under criminal proceedings brought for very serious crimes in the cases of *Şık v. Turkey[[4]](#footnote-5)* and *Nedim Şener v. Turkey[[5]](#footnote-6)*. Accordingly, the Court held that the applicants’ pre-trial detention in the context of the criminal proceedings against them, for offences carrying a heavy penalty and directly linked to their work as journalists, had amounted to an actual and effective constraint and thus had constituted “interference” with the exercise by the applicants of their right to freedom of expression guaranteed by Article 10 of the Convention. The Court then examined whether this interference was ‘prescribed by law’. In this regard, it first underlined that the applicants’ detention had not been based on reasonable suspicion, that they had committed an offence for the purposes of Article 5 § 1 (c) of the Convention, and that there had therefore been a violation of their right to liberty and security under Article 5 § 1. Moreover, the Court underscored that ‘according to Article 100 of the Turkish Code of Criminal Procedure, a person must be placed in pre-trial detention only where there is factual evidence giving rise to strong suspicion that he or she has committed an offence’, and considered in this connection that ‘the absence of reasonable suspicion should, a fortiori, have implied an absence of strong suspicion when the national authorities had been called upon to assess the lawfulness of the applicants’ detention’ (para. 230). Accordingly, the Court, considered that the detention measure in question interfering with the applicants’ rights under Article 10 was not lawful, and that it could not be regarded as a restriction of that freedom prescribed by national law. Thus, the Court found a violation of Article 10.

As regards the complaint under **Article 18** of the Convention, the Court referred to the general principles set out in its judgments in *Merabishvili v. Georgia[[6]](#footnote-7)* and *Navalny v. Russia[[7]](#footnote-8)*. However, after examining the elements relied on by the applicants in support of violation of Article 18 of the Convention, it held that those elements “taken separately or in combination with each other, [did] not form a sufficiently homogeneous whole for the Court to find that the applicants’ detention had pursued a purpose not prescribed by the Convention and representing a fundamental aspect of the case.”

**Şık v. Turkey (No. 2) (36493/17), 24 November 2020**

Ahmet Şık, a journalist by profession, worked for the daily newspaper *Cumhuriyet* at the relevant time. In December 2016, he was arrested and later placed in pre-trial detention on suspicion of disseminating propaganda on behalf of organisations considered by the government as terrorist organisations, namely the PKK (the Kurdistan Workers’ Party, an illegal armed organisation), FETÖ/PDY (Fethullahist Terror Organisation/Parallel State Structure), and the DHKP/C (People’s Revolutionary Liberation Party/Front). The domestic court, in ordering the applicant’s pre-trial detention referred to five articles of the applicants that had been published in the daily newspaper *Cumhuriyet* and several tweets posted by him. Subsequently, the domestic courts ordered several times the continuation of Mr Şık’s pre-trial detention, on the grounds that the offence of which he had been accused was among the ‘catalogue offences’ listed in Article 100 § 3 of the Code of Criminal Procedure and that he posed a flight risk.

In April 2017, the Istanbul public prosecutor’s office filed a bill of indictment against seventeen individuals including the applicant, and the applicants in the case of *Sabuncu and Others v. Turkey*. According to the indictment, ‘the newspaper Cumhuriyet had conveyed manipulative and destructive information concerning the State’ by ‘publishing articles that were glaringly at odds with the world view of its readers (some of which had been written by the applicant).’ (para. 28). The applicant, together with the applicants in the case of *Sabuncu and Others v. Turkey*, was charged with assisting terrorist organisations without being a member of them, an offence under Article 220 § 7 of the Criminal Code. On 9 March 2018 he was released pending trial. On 25 April 2018 the Istanbul Assize Court sentenced him to seven years and six months’ imprisonment for assisting the terrorist organisations the PKK, the DHKP/C and FETÖ without being a member of those organisations. The criminal proceedings are still pending before the plenary criminal divisions of the Court of Cassation

In the meantime, on 30 January 2017 Mr. Şık lodged an individual application with the Constitutional Court which was dismissed on 2 May 2019 as being manifestly ill-founded.

**Judgment**

Mr. Şık raised very similar complaints with the applicants in the case of *Sabuncu and Others v. Turkey*, and alleged that his rights under Article 5 § 1 (right to liberty and security), 5 § 4 (right to speedy review of the lawfulness of detention), Article 10 (freedom of expression), and Article 18 (limitation on use of the restrictions on rights) of the Convention had been violated.

As regards the complaint under Article 5 § 1 of the Convention, the Court found that there had been a violation of that Article on account of the lack of reasonable suspicion that the applicant had committed a criminal offence. The Court first noted that three articles cited by the domestic authorities in charging the applicant had ‘contained material which made a significant contribution to the public debate on current affairs in Turkey at the relevant time’ and that ‘the rights and duties of an investigative journalist included conveying information to the public that was relevant to debates on matters of public interest, as Mr Şık had done’ (paras. 125-126).Accordingly, the Court held that those articles could not constitute grounds for charging the applicant with the criminal acts in question. Moreover, the Court underlined that the domestic authorities could not ‘cite any specific facts or information capable of suggesting that the illegal organisations the PKK, FETÖ/PDY and the DHKP/C had issued requests or instructions to the applicant, an investigative journalist, so that he would publish this particular material with the aim of helping to prepare and carry out a campaign of violence or legitimising such violence’ (para. 128).

Furthermore, the Court observed that the published material- the articles and social media posts- grounding the suspicions against the applicant had some characteristics in common. First, they constituted contributions by Mr Şık to various public debates on matters of general interest that had already been the subject of wide-ranging public debate in Turkey and beyond. Second, those articles and posts did not contain any incitement to commit terrorist offences, did not condone the use of violence and did not encourage insurrection against the legitimate authorities. Third, the points of view expressed by the applicant itself in the articles and posts in question ‘were broadly ones of opposition to the policies of the government of the day and corresponded largely to those voiced by the opposition political parties and by groups or individuals whose political views were at variance with those of the political authorities.’The Court thus held that the applicant’s alleged acts fell within the exercise of his freedom of expression and freedom of the press, as guaranteed by domestic law and by the Convention. The Court concluded that the applicant could not be reasonably suspected, at the time of his placement in detention, of having committed the offences of disseminating propaganda in favour of terrorist organisations or assisting those organisations. The suspicions against him had not reached the required minimum level of reasonableness.

With regard to Article 15 of the Convention (derogation in time of emergency), the Court noted that no derogating measure had been applicable to Mr Şık’s situation during the period of the state of emergency in Turkey. It then found that there had been a breach of Article 5 § 1 of the Convention.

Regarding the length of the proceedings before the Constitutional Court under **Article 5 § 4**, the Court held that the review by the Constitutional Court could not be described as ‘speedy’ in an ordinary context. The Court noted that the period to be taken consideration, between the date of his individual application and his release pending trial, lasted for thirteen months and seven days and that it fell within the period of the state of emergency. The Court, taking into consideration the exceptional caseload of the Constitutional Court during the state of emergency in force from July 2016 to July 2018, the complexity of the case and the fact that the applicant’s pre-trial detention periods had fallen within the state of emergency, found that there had been no violation of **Article 5 § 4** of the Convention.

As regards the complaint under **Article 10**, the Court considered that Mr Şık’s pre-trial detention, in the context of the criminal proceedings against him for offences carrying a heavy penalty and directly linked to his work as a journalist, had amounted to an actual and effective constraint and thus constituted interference with the exercise of his right to freedom of expression.[[8]](#footnote-9) The Court then examined whether this interference was ‘prescribed by law’. In this regard, it first underlined that the applicant’s detention had not been based on reasonable suspicion that he had committed an offence for the purposes of Article 5 § 1 (c) of the Convention, and that there had therefore been a violation of their right to liberty and security under Article 5 § 1. Moreover, the Court underscored that ‘according to Article 100 of the Turkish Code of Criminal Procedure, a person must be placed in pre-trial detention only where there is factual evidence giving rise to strong suspicion that he or she has committed an offence’, and considered in this connection that ‘the absence of reasonable suspicion should, *a fortiori*, have implied an absence of strong suspicion when the national authorities had been called upon to assess the lawfulness of the applicants’ detention’ (para. 186). Accordingly, the Court, considered that the detention measure in question interfering with the applicant’s rights under Article 10 was not lawful, and that it could not be regarded as a restriction of that freedom prescribed by national law. Thus, the Court found a violation of Article 10.

As it was the case in *Sabuncu and Others v. Turkey*, the Court did not find a violation of **Article 18** in the present case. It referred to the general principles set out in its judgments in *Merabishvili v. Georgia[[9]](#footnote-10)* and *Navalny v. Russia[[10]](#footnote-11)*. However, after examining the elements relied on by the applicants in support of violation of Article 18 of the Convention, it held that those elements “taken separately or in combination with each other, [did] not form a sufficiently homogeneous whole for the Court to find that the applicants’ detention had pursued a purpose not prescribed by the Convention and representing a fundamental aspect of the case.”

1. Third party intervention by the Council of Europe Commissioner for Human Rights in the cases of Ahmet Hüsrev Altan v. Turkey (App. no. 13252/17), Alpay v. Turkey (App. no. 16538/17), Atilla Taş v. Turkey (App. no. 72/17), Bulaç v. Turkey (no. 25939/17), Ilıcak v. Turkey (App. no. 1210/17), Mehmet Hasan Altan v. Turkey (App. no. 13237/17), Murat Aksoy v. Turkey (App. no. 80/17), Sabuncu and Others v. Turkey (App. no. 23199/17), Şık v. Turkey (App. no. 36493/17), Yücel v. Turkey (App. no. 27684/17): [https://rm.coe.int/third-party-intervention-10-cases-v-turkey-on-freedom-of-expression-an/168075f48f](about:blank) [↑](#footnote-ref-2)
2. Kavala v. Turkey (App. no. 28749/18), 10 December 2019, see also Selahattin Demirtaş (no. 2) [GC], 23 December 2020. [↑](#footnote-ref-3)
3. *Cumhuriyet* was established in 1924 and is one of the oldest newspapers in Turkey. It is known for its critical stance towards the current government and for its particular attachment to the principle of secularism. It is regarded as a serious newspaper of the centre-left. [↑](#footnote-ref-4)
4. *Şık v. Turkey*, no. [53413/11](about:blank#{%22appno%22:[%2253413/11%22]}), 8 July 2014, paras. 83-85. [↑](#footnote-ref-5)
5. *Nedim Şener* *v. Turkey*, no. [38270/11](about:blank#{%22appno%22:[%2238270/11%22]}), 8 July 2014, paras 94-96. [↑](#footnote-ref-6)
6. *Merabishvili v. Georgia*[GC] (App. no.) 72508/13, 28 November 2017, paras 287‑317. [↑](#footnote-ref-7)
7. Navalnyy v. Russia ([GC], (App. no. 29580/12 and 4 others), 15 November 2018, paras. 164-165. [↑](#footnote-ref-8)
8. See *supra* note 3 and 4. [↑](#footnote-ref-9)
9. *Merabishvili v. Georgia* [GC] (App. no.) 72508/13, 28 November 2017, paras. 287‑317. [↑](#footnote-ref-10)
10. *Navalny v. Russia* ([GC], (App. no. 29580/12 and 4 others), 15 November 2018, paras. 164-165. [↑](#footnote-ref-11)