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**Freedom of Speech
in Turkey's Social Media:
Democracy "alla turca"**

To me, social media is the worst menace to society.
(Prime Minister Recep Tayyip Erdoğan, 5 June 2013)

1. INTRODUCTION

According to current estimates published by the World Bank, 45 out of every 100 Turkish citizens have in some way access to the Internet. This number is comparable to that of Tunisia (42) and Egypt (44), and considerably higher than that of Libya (15).¹ The importance of social media in the 2011 'Arab Spring' has been the subject of a large number of studies. It was therefore not surprising that the Turkish government was exceedingly distressed by the use of social media by opposition groups before and during the Gezi Park-protests of the summer of 2013, and during the corruption scandal involving (the families of) some of the Ministers, including President (then MP) Erdoğan, in the winter of 2013-2014. The government responded in both of these crises with *ad hoc* bans on social media, like Twitter and YouTube, and recently also with an amendment to the Turkish Internet Law in February 2014, enabling a tighter government control on shared content on the Internet. What does all this mean for the freedom of speech in the social media of a country that, at least formally, is still a candidate for the accession to the EU?

This article intends to give an overview of the various restrictions on the freedom of speech in the media in general and social media in specific, as imposed by the Turkish government. It will also examine the changes to the regulation applicable to the use of the Internet made by the 2014 amendment of the Internet Law, and analyze the effect of these restrictions on the democratic caliber of Turkey. Since there are no clear international standards for the freedom of speech or media freedom and pluralism, the legal situation and practice in Turkey will be compared to standards enshrined in international treaties to which Turkey is, or claims it wants to be, bound to: the ECHR and the Charter of Fundamental Rights of the EU, and standards adopted by NGOs that focus on the protection of human rights and in particular the freedom of expression and information. For this purpose, the article will first set out what is to be understood from definitions as

¹ World Bank, Internet access (per 100 people): <http://data.worldbank.org/indicator/IT.NET.USER.P2>, accessed on 16 June 2014.

'freedom of speech and information' and 'media pluralism' according to these standards, and accordingly what role (social) media could play in modern democratic societies, to continue with an historic overview of the development of the Turkish legislation on media in general and on social media in particular, concluding with an evaluation of the present state of the freedom of speech, media freedom and media pluralism in Turkey.

2. FREEDOM OF SPEECH, MEDIA FREEDOM AND MEDIA PLURALISM AS FUNDAMENTAL EUROPEAN RIGHTS

2.1. *The role of the media in modern democracies*

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.

The above quote, taken from a letter written by James Madison (1822), fourth President of the United States and Father of the United States Constitution, says it all. Without transparency and accountability of the government, a government cannot be said to be democratic. The prime role of the media as a 'public watchdog'² can therefore be said to be providing the citizens with information about the functioning of the government, in order to enable the citizens to form an opinion on whether or not this government is (still) representing their interest (Baker 2002, 132-133). In this respect, it is vital that citizens be exposed to diverse perspectives and antagonistic perspectives, which can only be attained through media pluralism.³ For this reason, freedom of expression, and especially media freedom and pluralism are of significant importance in democratic societies. This is also the main conception on which the work of international organizations such as the Reporters Without Borders⁴ and partly also the work of Amnesty International⁵ is based.

The significance of the media as a means to broadcast or even to impose certain ideas becomes apparent when analyzing the use of propaganda and the strict state-monopoly on the media in dictatorships of the past like Nazi-Germany or Russia in the time of Stalin. However, also recent examples show us that the use of media to propagate any kind of thought is essential to political struggles in which the goal is to convince the audience to back up a particular idea. In a 2007 interview the UK Minister President Gordon Brown even went as far as to openly support the government's systematic use of the media in the battle of ideas with the militant jihadis of Al Qaeda, when he declared that it may be necessary to use the media to mount a propaganda effort to win people over to

² ECtHR, Case of Thorgeir Thorgeirson v. Iceland, Application no. 13778/88, para. 63.

³ Not so according to a study by Woods (2007), which analyzed over 2,000 articles in newspapers in China, Colombia, Egypt, Germany, India, Lithuania, and Russia, published in the first months after the September 11 terrorist attacks, which showed that whereas in highly democratic countries the media reports on 9/11 were all very similar, the debate in countries with a lower level of democracy was much more pluralistic.

⁴ <http://en.rsf.org/>, Who we are.

⁵ <http://www.amnesty.org/en/freedom-of-expression>.

the cause of the 'West'.⁶ Another recent example of the importance of the use of media is the role social media played in the so-called 2011 'Arab Spring', which led to a change of regime in Tunisia, Egypt and Libya. Media and state intervention in the media has therefore not lost any of its significance in the past decades, but has with the introduction of new media even become more important than ever.

2.2. Freedom of speech and media pluralism according to the Council of Europe

The Council of Europe observed on many occasions that diversity and pluralism in the media is an essential element of the freedom of speech. Not only because the freedom of speech becomes meaningless if there are only few sanctioned outlets available to speak one's mind, but also because it is only through information provided by a variety of media that the public can form its own opinion on the functioning of their governments. The ECtHR has therefore held that "freedom of expression constitutes one of the essential foundations of [...] society [...] applicable not only to 'information' or 'ideas' that are favorably received, [...] but also those that offend, shock or disturb the State or any sector of the population [...] without which [pluralism] there is no 'democratic society'."⁷ The ECtHR has further held that "Article 10 protects not only the substance of the ideas and the information expressed, but also the form in which they are conveyed."⁸ The scope of the definition used by the Council of Europe encapsulates thus *structural or external pluralism* (a diversity of media supply, through the plurality of independent and autonomous media), as well as qualitative or *internal pluralism*, which regards the diversity of media types and contents.⁹

2.3. Freedom of expression and media pluralism in the EU

Freedom of expression, media freedom and media pluralism are rights that are also protected by the EU in various Directives and the Charter of Fundamental Rights¹⁰ next to being the subject of various instruments of soft-law such as Council Conclusions, EU discussion documents and EU funded studies and projects.¹¹ According to the Commission, freedom of expression is one of the essential foundations of the EU, and one that can only be exercised in a free and pluralistic media environment, including through independent media governance.¹² In other words, media freedom and pluralism require a

⁶ Gordon Brown, BBC Sunday AM program, 1 July 2007, http://news.bbc.co.uk/1/hi/programmes/sunday_am/6258416.stm.

⁷ ECtHR, Case of Handyside v. The United Kingdom, Application no. 5493/72.

⁸ ECtHR, Case of Oberschlick v. Austria, Application no. 11662/85 (Oberschlick no. 1).

⁹ Council of Europe, Committee of Ministers, Recommendation no. R (99) 1 on measures to promote media pluralism and its Explanatory Memorandum, 19 January 1999, and Council of Europe, The Activity Report of the Committee of Experts on Media Concentration and Pluralism MM-CM, submitted to the 4th European Ministerial Conference on Mass Media Policy, Prague, December 1994.

¹⁰ Article 11 of the Charter of Fundamental Rights of the EU, covering the freedom of expression and the freedom and pluralism of the media.

¹¹ For an overview of EU action in the field of Media Freedom and Pluralism, see the relevant website of the European Commission at <http://ec.europa.eu/digital-agenda/en/media-freedom-and-pluralism>.

¹² <http://ec.europa.eu/digital-agenda/en/media-freedom-and-pluralism>.

degree of regulation, in order to ensure that the media can serve the right of the freedom of expression.

The origins of the EU regulation of the media can be traced back to the 1974 *Sacchi* case, in which the Court of the (then) EEC decided that “the transmission of television signals, including those in the nature of advertisements, comes [...] within the rules of the Treaty relating to services”,¹³ through the Television Without Frontiers Directive,¹⁴ to the Audiovisual Media Services Directive that is presently in force.¹⁵ An analysis of these legal instruments shows that the interpretation of the right to media pluralism under EU law has so far remained limited to safeguarding the existence of a diversity of media linked with transparency of ownership and the free provision of services (*external pluralism*). This narrow interpretation of media pluralism is understandable considering the lack of specific EU competence on media pluralism in the founding Treaties and secondary legislation. In cases in which, in spite of the lack of competence, EU institutions have tried to use EU competence in other policy areas such as competition law in order to further qualitative media pluralism—that is pluralism with respect to diversity of media types and contents—, this has remained an exception, or has even been neutralized by later decisions.¹⁶ Nevertheless, even though media pluralism is not be one of the aims of competition law, it may be considered a natural by-product of the EU’s safeguarding of the competition by the combating abusive behavior of dominant firms and the prevention of concentrations that could distort the internal market.¹⁷

One could think that with the Lisbon Treaty and, through it, the EU Charter of Fundamental Rights gaining binding force in 2009, the interpretation of media pluralism used by the EU would have changed. However, it has to be borne in mind that the Charter of Fundamental Rights, which as specified above does indeed cover the Freedom of expression and information, and even stipulates that the pluralism of the media as a common good that needs to be protected, may only be applied when EU law is implemented, and that the Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.¹⁸ A recent example of the meaning the EU gives to media pluralism can be found in the 2013 Conclusions of the

¹³ Case 155-73, Judgment of the Court of 30 April 1974, Giuseppe Sacchi, Reference for a preliminary ruling: Tribunale civile e penale di Biella – Italy, para. 6.

¹⁴ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298 of 17 October 1989.

¹⁵ Audiovisual Media Services Directive, Directive 2007/65/EC of 11 December 2007 amending Council Directive 89/552/EC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332 of 18 December 2007.

¹⁶ Joined cases T-528/93, T-542/93, T-543/93 and T-546/93, Judgment of the Court of First Instance of 11 July 1996, *Metropole Télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v. Commission of the European Communities*, in which the Court of First Instance annulled decision 93/403/EEC of 11 June 1993 of the European Commission in which it took into account that a dominant position in the media market could constitute a threat to the variety of independent sources with educational, cultural or humanitarian content.

¹⁷ Ariño, *Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps, Communications & Strategies*, no. 54, 2004, p. 117.

¹⁸ Article 6(1) TEU and Article 51(a) and (b) of the Charter of Fundamental Rights of the EU.

Council of the European Union and the representatives of the governments of the Member States on media freedom and pluralism in the digital environment, which emphasizes that in this regard particular attention should be paid to the possible negative effects of both excessive concentration in the sector and the strengthening of gatekeepers' positions. Therefore, unless the Treaties are amended in such a way as to give the EU explicit competence in the field of media pluralism, any transformation in the interpretation of media pluralism and the way it is protected by EU law is not foreseeable in the near future.

2.4. Convergence of the protection of media pluralism in the EU and under the ECHR

Despite their different origins, the overlap of the rights protected by the ECHR and the Charter of Fundamental Rights becomes obvious on the reading of the two documents. This does not come as a surprise, considering the fact that the ECHR has functioned as a 'source of inspiration' for the interpretation of fundamental rights as principles of EU law before the coming into force of the Charter of Fundamental Rights of the EU. However, as already analyzed above, the interpretation of similar rights under the Charter and the ECHR may vary. It is for this reason that Article 52(3) of the Charter of Fundamental Rights of the EU stipulates that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the interpretation and scope of the Charter's rights should be the same as those laid down by the ECHR.

Notwithstanding this provision in the Charter, practice has shown that the Court of Justice of the EU (CJEU) does not always take the ECHR or its interpretation by the ECtHR into account in its judgments involving fundamental rights. Whereas in a 2010 judgment the CJEU held that where there is an overlap of Charter rights and ECHR rights the Court of Justice should follow the case-law of the ECtHR,¹⁹ a survey of the CJEU's judgments in the period 2009-2012 showed that out of the 122 judgments in which the Court of Justice made *some* reference to provisions of the Charter, in only 27 the Court engaged substantially with arguments based on provisions of the Charter, and out of these 27 cases the case law of the ECtHR was only referred to in 10 of them! (de Búrca 2013, 174). In the cases in which a referral was made to the ECtHR, it was only because the Court of Justice found that the judgment of the ECtHR was not applicable to the case before them.²⁰ This serves to show that in spite of Article 52(3) of the Charter, in general the CJEU does tend to follow its own line of reasoning when dealing with cases involving fundamental rights. A convergence of the interpretation of media pluralism by the CJEU and the ECtHR can therefore not be expected until the accession of the EU to the ECHR, which the EU has postponed successfully until now.

Whatever may be the differences in the extent to which the EU and the Council of Europe have the power to adopt legal instruments for the protection of the freedom of expression, media freedom and media pluralism, the message conveyed by these and other relevant international organizations is that for a democracy to function well, the public requires free, unhindered access to information from various sources to constitute an

¹⁹ J McB v. L, Case C-400/10 PPU MCB [2010] ECR I-8965, para. 53.

²⁰ Otis, Case C-199/11, Judgment of 6 November 2012.

opinion and free, unhindered access to various outlets to spread their views. It is the governments' task to create a suitable environment to guarantee a genuine exercise of the freedom of expression with appropriate regulation. Governments should abstain from taking measures that may impede the exercise of the freedom of expression, as this would unquestionably make their democratic legitimacy imputable.

2.5. *(Social) media and modern democracy*

The 2011 happenings in Tunisia, Egypt and Libya showed once more how crucial media can be in the struggle for power. When unrest began to break out, the regimes chose to first protect television and radio stations as they were used as a means to keep the citizens (mis-)informed about what happened and for what reasons (Soengas Pérez 2013, 147). However, the regimes did not foresee how the Internet had created alternative ways in which information and opinions could be spread and reached by the citizens. Therefore, the sudden uprising based on information that could be spread in real time by anonymous citizens on the Internet and the organization of the uprising through social media took the regimes (and the world) by surprise. The importance of the Internet, and the virtual 'soapboxes' created on the Internet through social media²¹ in the Arab Spring, but also for other events such as the election of US President Obama, has led to researchers showing a growing interest in social media as a tool to politically involve (younger) people. Notwithstanding the fact that a number of small-scale studies have suggested that though the spread of the use of social media among citizens only has a positive effect on individuals who would be politically involved anyhow, even without the use of social media (de Zúñiga, Jung and Valenzuela 2012; also Vitak et al. 2011), more recent and large-scale studies have shown that there is indeed a positive relation between social media and political engagement (Xenos, Vromen and Loaderc 2014). Therefore, it is safe to say that the use and the role of the Internet and social media for the sustainment of democracy is two-fold. First of all, it provides citizens that would otherwise not have access to information or access to an outlet to use their freedom of expression with the information and the outlet they are entitled to in a democratically governed state. Second, classic media such as the newspaper and even the radio have lost some of their attractiveness for nowadays public. Newspaper readership declines steadily,²² and it is through the Internet and social media that parts of the population that would otherwise not become politically involved can be reached and can find the inspiration they need in order to participate in the democratic process. Consequently, access to the Internet and social media fall within the scope of the freedom of expression and media pluralism as analyzed above. In a time that more and more communication takes place digitally, it is perhaps even more correct to say that the Internet and the social media may very well hold the key to the freedom of expression in the time to come.

²¹ The term 'social media' is used here to describe space and tools on the Internet, used to organize and discuss issues (Harvey 2013, 1386).

²² Great Britain Parliament, House of Lords, Select Committee on Communications, *The Ownership of the News*, p. 12.

3. MEDIA FREEDOM AND PLURALISM IN TURKEY

Even though Turkey is not a Member State of the EU (yet), the above enquiry into media pluralism as a human right protected by the EU and the Council of Europe is not without importance for Turkey. Turkey has ratified the ECHR as early as in 1954, and is therefore bound by the ECtHR's interpretation of Article 10 ECHR. With regard to the binding force of EU law for Turkey, Turkey aspires to accede to the Union, an aspiration that has been recognized and acknowledged by the EU with the acceptance of Turkey as a candidate country in 1999²³ and the official opening of accession negotiations in 2005.²⁴ The Negotiating Framework provides that the advancement of the negotiations will be guided by Turkey's progress in preparing for accession, in particular against the economic and political Copenhagen criteria.²⁵ The first criterion explicitly mentioned in the Framework is the stability of institutions guaranteeing democracy, the rule of law, human rights as guaranteed by the ECHR and the constitutional tradition common to the Member States, and respect for and protection of minorities.²⁶ The progress made by Turkey in the alignment of the Turkish law and practice with the Copenhagen criteria is closely monitored by the Commission, which publishes its findings in a yearly Progress Report. It is therefore in the interest of Turkey, both as signatory of the ECHR and as candidate for accession to the EU, to observe the freedom of expression and to protect and further pluralism in the media.

3.1. Turkey's democratic substance in the 20th century

With the substance of Turkey's democracy presently being such a hot potato in Turkish politics and the Turkish society as a whole, giving a truly independent overview of the development of democracy in Turkey is a difficult, if not impossible, task. However, without such an overview the precariousness of the democracy and the importance of the protection of democratic rights in Turkey would not be understandable. Therefore, without going into too much detail, the following contains a synopsis of the development of democracy in Turkey and the role the media played in this development, from the founding of the Republic to the entry of Turkey's present government. The relation of Turkey's current government with democracy and the media will be dealt with thereafter.

3.1.1. The founding of the modern Republic. The Turkish Republic was founded in 1923, whereas its present Parliament was already founded in 1920 by the revolutionary groups that fought for the independence of Turkey against imperialist forces. After Turkey and Germany had lost the First World War in 1918, the last Ottoman Sultan Vahideddin had 'invited' British, Italian and French troops to help rule the empire. The British invited the Greek to help rule the eastern part of what is now Turkey. However, the population of Anatolia, the middle and east of what is now Turkey, and part of the Ottoman army

²³ Presidency Conclusions, Helsinki European Council, 10 and 11 December 1999, para. 12.

²⁴ Council Negotiating Framework, 3 October 2005.

²⁵ The Copenhagen criteria are now also found in the Treaties, Article 49 read in conjunction with Article 6(1) TEU.

²⁶ Council Negotiating Framework, para. 6.

that did not accept this occupation, organized by General Mustafa Kemal who had previously commanded the Turkish troops in Gallipoli, set up a provisional government in the smallish Anatolian town Ankara in 1920. From 1920 to 1923, these rebels managed to push the foreign groups outside the borders of nowadays Turkey, and in 1923 the Republic of Turkey was proclaimed in Ankara.

3.1.2. One party, two parties, military coup: da capo al fine? The Republican People's Party established by Mustafa Kemal 'Atatürk' (a name given to him by the Turkish people) was for a long time the only political party in Parliament, with only two opposition parties established during his life. The first one, the *Terakkiperver Cumhuriyet Fırkası* or Progressive Republican Party, was established in 1924. However, this party was accused of having supported the Kurdish uprising in the Anatolian province of Dersim, and it was closed in 1925, within a year of its establishment. The second one, the *Serbest Cumhuriyet Fırkası* or Free Republican Party, was established in 1930 on the wish of Atatürk, as a reaction to European criticism of the anti-democratic government of Turkey (Kinross 1964, 450). The underlying idea was that by establishing an opposition party the opposition could be kept in hand. However, the support by a large conservative crowd was so massive, and tensions between the two parties rose to such a level, that the president of the party closed the party down three months after its establishment (Ruysdael and Yücel 2001, 214-215). It was only in 1946, after Turkey had become involved in a number of international organizations and projects such as the NATO and the Marshall Plan, that a second party could be established (Akşin 2008, 240). This party, the Democratic Party, then came to power only four years later in 1950.

■ Turkey's 'Democrat Party' and the 1950s laws limiting the freedom of the press – It is very well possible that the DP won the election because of their moderate approach to secularism. Whereas Atatürk's Republican People's Party has always been clear in its ambitions remove all remnants of religion from the public atmosphere, the DP rejected such a strict interpretation of secularism (Geyikdağı 1984, 69). At the onset of the decade of DP government, this government was thus considered to foster freedom of thought, not in the least because of the adoption of two laws introducing a liberal reform of the regulation of the media.²⁷ However, due to a poor economic policy, poverty was soon on the rise under the DP government. Attacks on the government by opposition media were widespread, which lead to the DP changing its mind about the scope of the freedom of the press.

The Party Program of the second DP government stated that the 1950 Media Law had left a lacuna in the regulation of the freedom of expression that was abused by some members of the media to spread false rumors, defamation, gossips and even to blackmail (the government), for which reason the government proposed an amendment of the legislation regulating the media (Dağlı and Aktür 1988, 169). These amendments came in installments, the first being the 1953 amendment of the 1950 Law making it easier to prosecute members of the media that had insulted members of the government. 1954 saw

²⁷ Media Law, Law no. 5680 of 15 July 1950, and the Law Regulating Relations between Employees and Employers in the Media Sector, Law no. 5953 of 13 June 1952, recognizing journalists' right to form trade unions, to insurance, contracts, holidays and leave.

the introduction of two more amendments, the first one being the nomination of courts that would thereafter specialize in media-related cases and the second one opening the way for criminal prosecution of members of the media that had damaged the "honor, integrity, dignity or reputation of persons or published details about these persons' personal or family life without obtaining prior permission". In case the injured person would be a state-official the penalties foreseen by the law could be as much as doubled according to this law.²⁸ The law furthermore did not provide the accused with the right to prove the allegation published in the media.²⁹ The penalties for defamation were doubled and the scope of liable persons broadened with two further laws in 1956.³⁰

Despite the draconic measures against the media, however, journalists continued to criticize the government. Additionally, the continuing economic downturn proved fertile soil for religious activism by Islamist members of the Democratic Party, and tension between government and the opposition rose to such a level that the military found it necessary to take over in 1960. All MPs of the Democrat Party were arrested, the Democrat Press was closed down and political organization was largely forbidden. The media were found to be largely backing the military intervention, and the measures of the DP restricting the freedom of the press were therefore soon lifted.

■ First military coup: partial restoration of the freedom of the press – When democracy was reinstated in 1961, the military government left behind a new Constitution in which the 'Second Republic' was proclaimed. In many aspects this 1961 Constitution can be said to have been the most liberal ever in Turkish political history, safeguarding the freedom of the press, recognizing the right to establish and be a member of labor unions, and giving a broader interpretation to religious freedom (Faucompret and Konings 2008, 9-11; also Eaman 2009, 277). However, these freedoms also carried the seeds of a growing polarization of the Turkish society in the decade following the establishment of the Second Republic (Dokupil 2002, 79). Radical groups from right as well as left-wing politics freely spread their thoughts, and violent clashes between ultra-left and ultra-right groups soon became everyday routine, posing a threat to public order and stability.

■ Second military coup – The Demirel government then in power proved incapable of managing the situation, for which reason the army presented the Turkish President in 1971 with a memorandum demanding the establishment of a strong and credible government. As a result of this coup by memorandum, Prime Minister Demirel resigned, and a series of unstable governments formed by the President followed. The 1961 Constitution was amended in such a way as to curb fundamental rights such as press freedom and media autonomy (Grigoriadis 2009, 30). In fact, the International Press Institute reported on December 1971 that among the totalitarian countries in its area, it was in Turkey that the picture of press freedom has darkened the most.³¹ The years that followed the second

²⁸ Law no. 6334 on Criminal Offences committed through publication or radio broadcasts (*6334 sayılı neşir yoluyla veya radyo ile işlenecek bazı cürümler hakkında kanun*).

²⁹ Yıldız, *Demokrat Parti İktidarı (1950-1960) ve Basın*, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, Cilt: 51 Sayı: 1 (1996), pp. 493-494.

³⁰ Law no. 6732 amending various aspects of the Media Law and Law no. 6733 amending Law no. 6334 on Criminal Offences committed through publication or radio broadcasts, both laws of 7 June 1956.

³¹ IPI report of 30 December 1971, as quoted in a newspaper article in a special to *The New York Times* of 31 December 1971 (see Hamilton 2001, 271).

military coup in the Republic's history were characterized by terrorism in the east of Turkey, high rates of inflation, and weak coalition governments that were not able to function for regular periods (Dokupil 2002, 86). It was in such a political and social climate that people, especially elderly people in rural areas, naturally turned to religion and began fostering the memories of the great Ottoman Empire. They saw these thoughts conveyed by the newly established 'National Salvation Party', a party that advocated traditional Islamic moral values, industrialization, human rights and the elimination of inequalities in society and in the country as a whole. Notwithstanding its positive views on the freedom of thought and religion, it did not favor the freedom of the press, and according to one of the articles of the party's program the press should respect national, spiritual and moral values as determined by the party.³² However, the younger urban population, especially the part of the youth that studied at university, was divided in right-wing and left-wing camps. Political killings committed by both sides were the order of the day—estimates on how big the number of killings actually was are difficult to make as different sources provide numbers that vary greatly. Official US sources estimate that 2,000 people were killed in 1978-1979 (Pittman 1988, 80). Law enforcement was almost inexistent because of the involvement of the police (Ahmad 1993, 171). The internal violence made it also increasingly difficult for Turkey to maintain its role in the NATO, at a time that the Middle East was in disorder over the revolution in Iran.

■ Third military coup and the 1982 Constitution – It was in this tense domestic and foreign climate that the military carried out its third coup on 12 September 1980. This proved to be the most drastic military intervention in the history of the Republic, with the Generals remaining in power until 1983. During the 1980-1983 *junta*, martial law was applicable. Social and political rights were restricted, curfew was established. The four biggest political parties were closed down and the leaders of the political parties put in jail. It was only in 1983 that the Generals reinstated democracy, after having replaced the 1961 Constitution with a brand-new one in 1982 which remained in force until the present day.³³ The 1982 Constitution provided for the freedom of thought and expression, and for the right to propagate his or her opinion through speech, writing or any other means.³⁴ Article 28 of the Constitution, which deals explicitly with the freedom of the press, provides furthermore that the press is free and shall not be censored. It continues by determining that it is a task of the State to guarantee the freedom of the press and the freedom of information, and that any limitation of the freedom of the press should take the fundamental rights of the freedom of thought and expression into account.

However, modern and EU/ECHR conform these provisions may sound, Article 28 also specifies a great number of reasons for which the freedom of the press may be limited, and that in rather vague terms. For example, it provides that "anyone who writes or prints any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State [...], which tend to incite offence, riot or insurrection,

³² Milli Selamet Partisi, Art. 19.

³³ The 1982 Constitution is, however, still regarded by many as the product of a military coup which should be replaced by a civilian Constitution. A parliamentary 'Conciliation Commission' responsible for the drafting of a new Constitution was installed in 2011. In spite of the fact that its mandate would originally expire on 31 December 2012, it is still in place; so far it has not been able to deliver a first draft.

³⁴ Articles 25 and 26 of the 1982 Turkish Constitution.

or which refer to classified State secrets [...], shall be held responsible under the law relevant to these offences". With regard to seizure of publications, the article provides that such is permitted by a decision of a judge in case of ongoing investigations or prosecutions of offences prescribed by law, and, in situations where delay could endanger the indivisible integrity of the State with its territory and nation, national security, public order or public morals and for the prevention of offence by order of the competent, non-judicial, authority designated by law. An example of how the military, and the government that they installed in 1983, wished to control the media can be found in the 1983 establishment of the Supreme Board of Radio and Television (*Radyo ve Televizyon Üst Kurulu, RTÜK*), in which both representatives of the government and the military were seated. The hard hand of the military during the three years of military rule and their continuing influence in the government in the years that followed, together with the establishment of special State Security Courts that were authorized to prosecute crimes against ideological and philosophical principles, succeeded in suppressing any remaining opposition and depoliticizing the society, at least for some time (Cremer 2012, 299).

The Özal government that followed the *junta* in 1983 is remembered for its attempts to modernize and open up the economy (for which cause he even applied for membership of the European Economic Community in 1987) (Jenkins 2008, 147), next to his encouragement of the activities of religious groups in the combat of the 'communist' danger (Derviş et al. 2004, 12-13; also Esposito 1998, 195-198). Both of these subjects had far-reaching consequences and both of them are central to the present article. The closely state-monitored project of depoliticization of the society together with the entry of the market economy paved the way for a trend to extensively cover financial and economic news in the media (Tunç 2011). Whereas during the early days of the Özal government the financial news was mostly positive, the economy soon began to stagnate and even deteriorate towards the end of the 80s (Ahmad 1993, 207-211). The reinstatement of religious education at school, the reopening of religious schools, and an overall leniency if not encouragement of the state towards religious groups and their involvement in society and the economy proved to provide fertile grounds for the rebirth of political Islam. The leader of the 1960s National Salvation Party, Erbakan, reestablished his political party, this time with the name of the Welfare Party (*Refah Partisi*). This party succeeded in securing to take the lead in the 1995 elections, with Erbakan becoming the country's first outspoken Islamist Prime Minister (Cremer 2012, 300, fn. 47).

■ Last military intervention: a first proof of the importance of media pluralism in Turkey – Erbakan remained in power until the army interfered in 1997, pressuring him to resign as Prime Minister and for his party and other Islamist parties to be closed down. The army did however not take over the government, as the support for such a rigorous military intervention was missing. This support had been present under a large part of the population before and during the 1980 *junta*, but since then Turkey and the Turkish media landscape had changed. Before and during the 1980 coup, media was state-controlled and saw to it that but one central uniform message was conveyed to the public (Wuthrich 2010, 224). Because of the *junta*'s decision to stop subsidizing newspaper paper in January 1980, the price of publishing a newspaper had increased, for which reason many newspapers that would still be allowed to be published went bankrupt, and the newspaper sector thus ended up being held entirely by just a few powerful businessmen (Kuyucu 2013,

148). Radio and television broadcast rights were also held by one public broadcaster TRT (*Türkiye Radyo Televizyon Kurumu*). However, this situation changed radically in the 1990s when Turkish citizens began illegally receiving broadcast signals through satellite from a number of foreign (but also domestic) stations broadcasting Turkish content (Uce and De Swert 2010, 66; also Ogan 2001, 120-121). In order to legalize and control broadcasted content, in 1993 the Constitution was amended in such a way as to allow for the establishment of private radio and television broadcasters. In 1994 a law regulating the establishment of broadcasters and the content of the broadcast of television and radio programs passed through parliament.³⁵ The new law and the change in the Constitution now made it possible for private commercial television and radio channels to establish themselves and broadcast within the Turkish territory. The market economy thus entered the media and the citizens got accustomed to a wider variety of information from which they could choose. In this changed atmosphere, military coups were no longer possible as was also communicated to the public in a television sketch in which a general announces on one of the private TV channels that he is taking over the government while other, opposing generals on other TV channels claim that the government is theirs (Toprak 2005, 174). Therefore, the entry of media pluralism made it impossible for the army to intervene in democracy as much as they were accustomed to in the past era of monistic, state-controlled media. For this reason, the 1997 intervention in Turkey can be regarded as the first proof of the importance of media pluralism in Turkey, or in other words: the entry of commercial media in Turkish society was the strongest catalyst in the creation of citizen consumers (Wuthrich 2010, 228, fn. 53).

3.1.3. The close of the century and the rise of the phoenix. Legalizing the establishment of private channels and the broadcast of other than state-provided content, the 1994 Television and Radio Law can be regarded as fostering democracy. However, the Law also intended to regulate broadcasted content, and contained provisions similar to those applying to printed media, with a very narrow concept of permitted broadcasts. According to its fourth article, broadcasts could not be contradictory to among other things the existence, independence and unity of the Turkish Republic, the national and spiritual values of society, the general morality, civil peace and structure of the Turkish family. Infringement of this provision would first lead to a warning by the RTUK and immediate temporary closure, and in case of reoccurrence of the infringement to closure up to a year.³⁶ Almost all national television and radio stations have been closed down for various periods (Human Rights Watch 1999, 30-31). At the same time, the press was owned by a small number of businessmen, as described above. Therefore, though the number of media outlets had grown, the information the outlets spread grew more and more alike. The Turkish society was growing weary of the patronizing, restrictive attitude of the authorities, not only with regard to the media but in a number of aspects of life. On top of the governments' prohibitory attitude came the 2001 economic crisis that hit Turkey hard, and that the government seemed to be unable to deal with. It was for these reasons that the Justice

³⁵ Law 3984 of 20 April 1994 on the Establishment and Broadcast of Television and Radio Channels (*3984 sayılı Radyo ve Televizyonların Kuruluş ve Yayınları Hakkında Kanun*).

³⁶ Article 33 of the Law.

and Development Party (*Adalet ve Kalkınma Partisi*, AKP) was able to gain the support of a large part of the secularist population, as well as the religiously oriented part of the population which used to be the electorate of former PM Erbakan. Even though the AKP's leader Erdoğan was a well-known pupil of Erbakan's, and had played a role in Erbakan's political parties, Erdoğan's promises of democratization, demilitarization and EU accession were responded with a majority vote in the 2002 elections that allowed him to become Prime Minister and lead Turkey into the 21st century with an AKP-led coalition-government.

3.2. *AKP's Turkey and the regulation of the media: new beginning or recurring pattern?*

Turkey changed the millennium in a state of financial, political and economic crisis. Accession to the EU was seen by many as a solution to this recurring pattern in Turkey, as the EU would bring economic and political stability. The people's vote for AKP in the 2002 election was a sign that it trusted the AKP would be able to bring about this accession, and in the first years of the AKP government its implementation of the IMF advised economic reform package and democratizing packages earned it praise from the Turkish people as well as from the EU (Yeşilada and Rubin 2011).³⁷ However, soon after the first AKP government was installed, the first indications that the democratization had slowed down or even stopped, and that measures were taken to limit the freedom of expression again, began to be perceived (Narbone and Tocci 2009, 22-23).

The 2002 amendments made to the 1994 Television and Radio Law³⁸ were introduced as a measure necessary to align the Turkish law with the EU's *Television Without Frontiers* Directive, to narrow down the vague definitions that were the legal basis for the shut downs of radio and television channels under the 1994 law, and to make an end to the shut downs of the channels for once and for all (Çakır and Gülnar 2008, 217). However, the 2002 amendments did not improve the 1994 law, it made it worse. The vague definitions of the 1994 law made way for new, but just as vague definitions that could apply to identical infringements. Furthermore, the penalties on infringing the law were raised to such a level that poorer minority and/or regional channels will go into bankruptcy. Finally, the amendments made the provisions of the 1994 law also applicable to publications on the Internet.³⁹ Therefore, based on the same vague provisions that did not take the characteristics of the Internet into account, sites could be barred in Turkey, based on a decision taken by the RTUK. Though the 2004 Press Law⁴⁰ removed publications on the Internet outside the scope of the Press Law, because of the preservation of Article 31

³⁷ For indications of the EU's support for the AKP's reforms, see the European Commission's yearly Progress Reports especially in the years 2005 to 2008, http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm.

³⁸ Law no. 4676 of 15 May 2002 and Law no. 4771 of 3 August 2002 amending provisions in various laws (*4676 Sayılı Radyo Ve Televizyonların Kuruluş Ve Yayınları Hakkında Kanun (Rtük)*, and *4771 sayılı Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun*).

³⁹ Article 26 of Law no. 4756 and Annex Article 9 to Law no. 5680 read in conjunction provide that "any publication in writing, graphics, signs, image and the like containing lies, defamation and other punishable content shall be punished in accordance with Law no. 5680"; see Çankaya and Batur Yamaner 2012, 265.

⁴⁰ Law no. 5187 Press Law (*5187 sayılı Basın Kanunu*).

of the RTUK law this Board was still competent to supervise content published on the Internet. This independence of the RTUK was however tampered with in a 2005 amendment, from which time onwards the composition of the Board would reflect the division of the seats in Parliament, a step that seriously politicized the authority that censored the media (Çakır and Gülnar 2008, 217, fn. 64).

3.2.1. Turkey's regulation of the Internet and social media. The 2007 Law no. 5651 Regulating the Publication on the Internet and Suppression of Crimes committed by means of such Publication is Turkey's first law specifically dealing with the Internet and Web content. This law transferred RTUK's competences regarding the Internet to the Telecommunications Communication Directorate TIB, an authority that had been established within the body of the Ministry of Transport, Maritime Affairs and Communications, in 2005 to monitor the use of wiretaps by the police forces and the secret service. The law allows the TIB to block access to a site on request of persons listed in the law—including the government— if "sufficient suspicion" that one of the offences listed in Article 8 of the law is committed. From November 2007 (when the law entered into force) to May 2008, 5,629 sites have been blocked by the TIB. From May 2008 onwards, the TIB refused to publish specific statistics related to the blocking of website based on the Law no. 5651 (UNESCO 2011, 50; Deibert et al. 2010, 347-354). Sometimes the blocking decision of the TIB concerned websites the blocking of which did not related to the freedom of expression, such as websites that provide a place and opportunity for gambling, however also websites that are often used to express opinions are targeted. From 2007 to 2010 access to YouTube was blocked on and off because of content that was said to insult the memory of Atatürk,⁴¹ despite YouTube's willingness to remove the particular content that was found insulting. Access to sites could also be blocked for reasons that were not listed in Article 8 of Law 5651. Research conducted in 2008 showed that blocking decisions have also been based on the sites containing insults against the state organs and/or private persons, crimes related to terrorism, unfair trade, or violation of articles of the Constitution related to the freedom of religion, expression, thought and freedom of the press.⁴² The Turkish practice had become so restrictive that in the end of 2012 the ECtHR found that the Turkish law was in direct violation of the protection of the right to freedom of expression as per Article 10 ECHR.⁴³ The Turkish government was called upon to revise its Internet Law in order to bring it in line with ECHR standards.

While as a result of the ECtHR's ruling in *Yıldırım* preparatory work to draft a new Internet Law started in 2013, this would also be the year in which it became clear that the current government⁴⁴ will by no means introduce a law that favors a less restrictive approach to the free expression of thoughts on the Internet. In a time that the censorship and self-censorship in order to please the government or the media bosses have soared in

⁴¹ According to Law no. 5816 on Crimes against Atatürk, publications insulting the founder of the Turkish state is considered an offence.

⁴² Nebil, 5651 Dışı Site Erişim Kapatmalarında Sorun Var, 1 May 2008, <http://www.turk-internet.com/portal/yazigoster.php?yaziid=20850>.

⁴³ *Yıldırım v. Turkey* (18 December 2012), Application no. 3111/10.

⁴⁴ This article is updated until January 2015. General elections are expected to take place in Turkey in the spring or summer of 2015. The government referred to here is the government that was elected in 2011.

Turkey (Arsan 2013), the Internet and its social media pose an obstacle to the Turkish government, and is in the same time perceived by the opposition as the last bulwark of the freedom of expression. During the Gezi protests in the heart of Istanbul in the summer of 2013, for example, the violent suppression of the protests by the police, leading to several casualties and numerous injuries under the protesters, were not given much or even any attention in the traditional media (with one news channel even becoming famous for the broadcast of a documentary on the life of penguins during the evening of the worst protests, and seven national newspapers carrying the exact same front-page news another day).⁴⁵ The relatively few journalists working for traditional media who did cover the protests had to count on losing their jobs as a result of their criticism and the tension this created between their editors and the government (Amnesty International 2014, 30). Therefore the public and the protesters depended on the Internet and social media in order to broadcast what was happening. For that reason, Twitter and YouTube were again blocked, and several people who sent tweets or posted content on other social media reporting police violence or requesting medical aid presently face criminal charges accusing them of having incited the public to break the law.

Before the government could recover from the blow administered to it during the Gezi protests, tweets and YouTube videos posted by anonymous sources accused three ministers and the (then) Prime Minister together with their family of having embezzled large amounts of money. The timing of these actions, right before the local elections in Turkey, sent the government in frenzy. Social media were immediately blocked, and a law making amendments to the 2007 Internet Law was pushed through Parliament in February 2014, endowing the TIB with wide-ranging new powers to block and regulate the Internet.⁴⁶ Due to Article 9/A, added to the 2007 Internet Law with the 2014 amendment, the blocking of access due to the violation of privacy can now be directly filed by any person to the TIB, which can immediately with an administrative decision block access to a site. On 10 September 2014, the latest amendment to the 2007 Internet Law was adopted in Parliament. The amendments to the Internet Law were part of a 'package deal law' called "Law amending the Labor Law and other Laws and Statutory Decrees, and providing for a renewed procurement procedure for certain procurements".⁴⁷ This law, while focusing mainly on amendments in the Labor Law, also provided for an increase in the number of reasons for which the TIB can block an Internet site. One of these reasons is the vague term of 'national security', another one is 'to prevent a crime from being committed'. Furthermore, the 'package deal law' gives the TIB the power to gather and store Internet user data independently of any official judicial investigation. From September 2014 onwards, therefore, TIB is no longer dependent Internet service providers sharing those data with the TIB on a relevant court order. While the broadening of competences of the TIB is alarming in itself, the expectation that the TIB will in time be run by Turkish National

⁴⁵ 2 June 2013, CNN Turk broadcasted a documentary on penguins while CNN International broadcasted life from Gezi Park; 7 June 2013, seven national newspapers featured PM Erdoğan's answer to the Gezi protests: "I would gladly give my life in order to answer any democratic demands".

⁴⁶ <http://www.tbmm.gov.tr/kanunlar/k6518.htm>; see also <http://www.reuters.com/article/2014/02/18/us-turkey-government-idUSBREA1H1XL20140218>.

⁴⁷ *Kanun no. 6552, İş Kanunu ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına İle Bazı Alacakların Yeniden Yapılandırılmasına Dair Kanun, Resmi Gazete Sayı: 29116, 11 Eylül 2014.*

Intelligence Agency MIT as (then) PM Erdoğan has expressed it to be his wish, will remove the last disguise of independence of Internet regulation in Turkey. Therefore, far from taking the ruling of the ECtHR into account, the latest amendments to the Turkish Internet Law does not guarantee the freedom of expression any more than the law in its original version.

3.2.2. Latest developments in Turkey's media landscape. In the present political climate in Turkey, publications regarding any civil freedom need to be updated almost on a monthly basis. This holds also true with publications on the freedom of expression and media freedom and pluralism. Whereas in the past years the ire of the government was mainly directed to media and journalists that had ties with the opposition, or that were paying attention to minority issues,⁴⁸ the covering of the before-mentioned embezzlement scandal in December 2013 by conservative media owned by or linked to the Gülen movement that had before then always been in praise of the government and the AKP in general has led to the movement's newspapers and television channels being included in the range of media that is closely scrutinized by the prosecution and the government. From 14 December 2014 onwards, journalists and media executives that are known for their ties with the movement were arrested in large numbers. Some of them have been released, others await their trial in prison on charges of attempts to plot a coup against the government.

This does not mean that media censorship is now limited to the media and journalists belonging to the so-called 'parallel state' said to be administrated by the Gülen movement. Censorship of opposition media continues at full speed. A Dutch journalist, stationed in the Turkish city of Diyarbakir which is mainly populated by Kurds, was detained briefly by the Turkish police on 6 January 2015 on claims that she had spread propaganda for a terrorist organization. In a reaction, (now) President Erdoğan said that the publicity given to the detainment was just another attempt at tarnishing Turkey by using press freedom, when Turkey is doing nothing else than taking measures against terrorism. He continued by claiming that nowhere in Europe or in other countries is there a media that is as free as the press in Turkey...

On 14 January 2015 the distribution center of *Cumhuriyet* newspaper was raided in the early hours to prevent the distribution of the newspaper that would carry pages, including the cover, of the first edition of the French satire weekly *Charlie Hebdo* after the 7 January attack. The raid was ordered by a press prosecutor but was not sustained by a court order. The raid took about one hour, and only when the police was convinced there was nothing 'illegal' in the content of the newspaper (the newspaper had decided not to print the cover of *Charlie Hebdo* after all) the trucks were allowed to distribute the newspaper. The day after the raid, a criminal investigation was launched against two columnists of *Cumhuriyet* for "insulting religious values" by publishing a scaled-down version of the cover of *Charlie Hebdo* in their columns. The outcome of the investigation is unknown, but the launch of it already has its own effects on the freedom of the press in Turkey.⁴⁹

⁴⁸ See e.g. with regard to Kurdish media, Sinclair and Smets 2014.

⁴⁹ Amnesty International, "Turkey: Criminal Probe into Newspaper's Coverage of *Charlie Hebdo* a Chilling Blow to Freedom of Expression", 15 January 2015, <http://www.amnesty.org/en/news/turkey-criminal-probe-newspaper-s-coverage-charlie-hebdo-chilling-blow-freedom-expression-2015>.

On the very same day as the raid on *Cumhuriyet* newspaper, the TIB, using the competences conferred to it with the September 2014 amendment of the Internet Law, warned social media and in particular Twitter and Facebook that it would administratively block all websites publishing content related to Syrian-bound trucks belonging to the Turkish intelligence agency, and allegedly carrying arms, that were stopped near the Syrian border by a prosecutor in January 2014. Twitter and Facebook quickly complied and removed the content the same day.

These and other developments have lately led the European Parliament to officially voice its concern on the freedom of the media in Turkey. On 15 January 2015 the MEPs adopted a resolution in which they express concerns about the backsliding in democratic reforms, in particular the government's diminishing tolerance of public protest and critical media, and urge the Turkish government to address media freedom as a matter of priority and provide an adequate legal framework guaranteeing pluralism in line with international standards, in order to retain financial pre-accession assistance from the EU.

4. THE FUTURE OF MEDIA PLURALISM AND FREEDOM OF EXPRESSION IN TURKEY

Though it is true to say that Turkey is a modern nation in which all types of media are available, traditional media such as the printed media, television and radio (albeit radio to a lesser degree) are owned directly or indirectly by a small number of media tycoons, most of which are known to be close to the government. Therefore, Turkey cannot be said to have a plurality of independent and autonomous media. Furthermore, and as a result of the lack of *structural* media pluralism, a serious deficiency in diversity of media types and contents can be perceived. This situation is exacerbated by a government regarding social media and the Internet as a media sector that tries to circumvent government control of the media, and that seeks to discourage the use of social media by the public, in order to force the public to rely on media sources that are in their control.

Considering the historical development of the culture of state-censorship and self-censorship in Turkey from the establishment of the Republic to the present day as analyzed above, the continuation of this adversarial approach to the media under the present government, notwithstanding its promises to democratize and modernize the society, does not come as a surprise. Even though the EU and the Council of Europe time and again criticize the suppression of the freedom of expression in the media, it requires a great deal of optimism to expect any imminent positive change in this situation in Turkey.

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