National Security, State of Emergency and Restrictions on Freedom of Expression
- The example of Turkey

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Spring 2019

RV600G Legal Science with Degree Project (bachelor’s thesis), 15 hp
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Abstract

Matilda and Natalie

Article 10 of the European Convention on Human Rights is a fundamental ground of a democratic society and freedom of the press is one of the rights protected under Article 10 which enjoy great protection in order to serve the purpose of their role in contributing to a democratic society. Article 10 is, however, not an absolute right and may thus be restricted in accordance with Article 10(2) and the aim of protecting national security and in accordance with derogation under Article 15.

Turkey is one of the States with the highest rate of violations of Article 10 and it often claim the interest of protecting national security. Turkey declared a State of emergency in July 2016 and accordingly derogated from its obligation of the Convention. Unfortunately, the difficulties of freedom of expression and of the press intensified even further during this period. Because of this, Turkey has been used as an example in this thesis in order to establish the extent of legitimate restrictions under Article 10(2) with the aim of protecting national security and Article 15 or the Convention. During the derogation period, media houses were shut down and journalists were put in detention on vague grounds. Concerns have been expressed about these measures following the derogation and the European Court of Human Rights has ruled in two cases concerning freedom of expression in Turkey during this period and found a violation of Article 10 in both cases.

The conclusion found is that the wide margin of appreciation given to States regarding restrictions on freedom of expression reflects that the area is of such a complex manner that there is not always a right or wrong way even in similar situations. The wide margin of appreciation and the press’ great protection under Article 10 creates a conflict of interest between freedom of expression and State security. However, the margin is not as wide with regard to the press and matters of public concern as it is with regard to other expressions due to that restrictions on the press may harm the State rather than fulfilling the purpose of protecting it. Whether a restriction is deemed legitimate or not is decided on a three part test based on the circumstances of each specific case and the nature of the restriction. Some guidance as to which circumstances that are most relevant has been provided through the Court’s case law, such as the width of the expression, if it was information of public concern, if the purpose of the aim was unjustified and if the publication contained incitement to violence. The lege lata in the Court’s jurisprudence today may however not be as foreseeable as it is expected to be.
## Table of content

1. Introduction 3
   1.1 Background 3
   1.2 Purpose and research questions 4
   1.3 Delimitations 4
   1.4 Method and material 5
   1.5 Disposition 5
2. The content and definition of Article 10 7
   2.1 Introduction 7
   2.2 The scope of freedom of expression 7
   2.3 Freedom of the press 8
   2.4 Summary 10
3. Restrictions on the right to freedom of expression 12
   3.1 Introduction 12
   3.2 Restricting freedom of expression for the protection of national security 13
      3.2.1 Prescribed by law 13
      3.2.2 National security 13
      3.2.3 Necessary in a democratic society 15
   3.3 Restricting freedom of expression through derogation under Article 15 16
      3.3.1 Time of war or other public emergency threatening the life of the nation 16
      3.3.2 Strictly required by the exigencies of the situation 17
      3.3.3 Inconsistent with the other obligations under international law 18
      3.3.4 Notifying the Secretary General 19
   3.4 Summary 20
4. Restrictions on the right to freedom of expression with regard to Turkey 21
   4.1 National security claimed by Turkey 21
   4.2 Derogation by Turkey 24
      4.2.1 Observations of Turkey’s State of emergency 25
      4.2.3 The Court’s review 27
   4.3 Summary 29
5. Analysis 31
   5.1 National security 31
   5.2 Derogation 33
6. Conclusion 37
7. Bibliography 39
1. Introduction

1.1 Background

Matilda and Natalie

Turkey is one of the Contracting States (States) with the highest rate of violations of the right to freedom of expression under Article 10 of the European Convention on Human Rights (the Convention), shown by statistic made between the years of 1959 and 2015.\(^1\) One of the most frequently used justifications for restricting freedom of expression under Article 10(2) of the Convention claimed by Turkey is the aim of protecting national security.\(^2\) With regard to national security, the European Court of Human Rights (the Court) has stated that States that are taking measures to protect national security have a wide margin of appreciation.\(^3\) Despite this, the Court has in the vast majority of cases regarding Turkey and national security found a violation of the right to freedom of expression.\(^4\) The difficulties to uphold the right to freedom of expression in Turkey intensified further during the State of emergency declared in 2016 and through the emergency decrees following it.\(^5\) Article 10 of the Convention is not one of the most frequently expressed Articles in derogations, nevertheless it is one of the rights that is most violated in times of emergency.\(^6\) A clear example of this is the situation in Turkey 2016, where the Government brought criminal charges against journalists, human rights defenders, writers and social media users. Several media outlets were also shut down or trustees were appointed to administer them. In April 2018, more than 150 journalists were still detained.\(^7\)

The State of emergency in Turkey was based on the attempted military coup during the night between 15 and 16 July 2016. The attempted coup was carried out by members of the Turkish armed forces who called themselves “Peace at Home Council” and it was aimed at overthrowing the democratically elected parliament, the Government and the President.\(^8\) The parliament building and the presidential compound among others were bombarded, the hotel where the President was staying was attacked, the Chief of General Staff was held hostage, television channels were attacked and shots were fired at demonstrators. More than 300 people were killed and over 2,500 were injured during the coup attempt.\(^9\) The Turkish authorities blamed the network with links to Fethullah Gülen, a Turkish citizen considered to be a leader of a terrorist organisation called FETÖ/PDY (Gülenist Terror Organisation/Parallel State Structure) and a numerous of criminal investigations were initiated in relation to suspected members of the organisation.\(^10\) On behalf of this, the Government of Turkey declared a State of emergency on 20 July 2016, initially for a period of three months as from 21 July 2016. It also gave notification

\(^3\) Leander v Sweden App no 2948/81 (ECtHR, 26 March 1987) para 59.
\(^4\) Mendel (n 2) 48.
\(^5\) Memorandum on freedom of expression and media freedom in Turkey, Muižnieks (n 1) para 20.
\(^8\) Şahin Alpay v Turkey App no 16538/17 (ECtHR, 20 March 2018) para 14.
\(^9\) ibid para 15.
\(^10\) ibid para 16.
to the Secretary General of the Council of Europe (the Secretary General) of a derogation from the Convention under Article 15. The State of emergency was later extended for several periods of three months.\(^{11}\) It ended at 19 July 2018 and accordingly, Turkey withdrew its notification of derogation.\(^{12}\)

These incidents raise the question of whether Turkey’s restrictions during its State of emergency were valid and more generally which measures Turkey has taken in order to restrict freedom of expression.

1.2 Purpose and research questions

Matilda and Natalie

This study serves the purpose of determining the legitimate scope of restricting freedom of expression. The focus is on restrictions through the legitimate aim of national security under Article 10(2) and derogation under Article 15 of the Convention. Freedom of expression is considered to be an important function in a democratic society\(^{13}\) and the paper therefore strives to identify when and how a limitation on such an important part of a democratic society may be deemed illegitimate. As a result of Turkey having restricted freedom of expression on a remarkable number of times, Turkey is a good example to use in order to demonstrate which restrictions that are deemed to be legitimate and not. The paper thus has a particular focus of Turkey. The paper further focuses on freedom of the press due to its important role of being a “public watchdog” in a democratic society\(^{14}\) and to impart information and ideas on matters of public interest as well as on matters relating to the function of the judiciary.\(^{15}\)

The following questions will be addressed in order to fulfil the purpose of the study:

- To what extent may a State restrict Article 10 of the Convention under the legitimate aim of national security with particular regard to freedom of the press?
- To what extent may a State derogate under Article 15 of the Convention from its obligations under Article 10 of the Convention with particular regard to freedom of the press?
- In consideration of these questions, which restrictions in the context of Turkey have been deemed legitimate by the Court?

1.3 Delimitations

Matilda and Natalie

The extent of Article 10 of the Convention in its full form will not be touched upon in this thesis. Instead the focus on Article 10 is only with regard to the possibility of restricting freedom of expression, and freedom of the press in particular, with the legitimate aim of national security. Since the purpose of the study is to clarify the scope of freedom the States have in accordance with Article 10 and 15 of the Convention to restrict freedom of expression, Article

\(^{11}\) ibid para 17 and 18.
\(^{13}\) De Haes and Gijsels v Belgium App no 19983/92 (ECtHR, 24 February 1997) para 37.
\(^{14}\) Axel Springer AG v Germany App no 39954/08 (ECtHR, 7 February 2012) para 79.
\(^{15}\) De Haes and Gijsels v Belgium (n 13) para 37.
15 will only be analysed in the context of Article 10. Turkey’s restrictions on freedom of expression and the State of emergency declared in July 2016 has a particular focus in this study, however case law regarding other States are also included in order to answer the legal questions.

The study only focuses on the relevant provision of the Convention, other international regulations concerning freedom of expression and derogation in time of emergency are not considered.

1.4 Method and material
Matilda and Natalie

The method used is a legal dogmatic method for the purpose of establishing the scope of the lege lata with regard to restrictions on the right to freedom of expression in accordance with Article 10 and 15 of the Convention. The legal dogmatic methodology is partly a question of an abstract task to first determine the general rule that is applicable in a particular situation and to explain the general rule and its relevance in the context. It also includes explaining how the legal rule should be applied to the current situation, in other words, the concrete application of the legal rule.

The purpose of a legal dogmatic method is to reconstruct the solution of a legal problem by applying a legal rule. The starting point for this is the generally accepted sources of law, primary legislation. The general accepted sources of law are found in Article 38(1) of the Statute of the International Court of Justice (ICJ). These sources are international conventions, international customs, the general principles of law recognized by civilized nations, judicial decisions and doctrine. These are thus, as far as it is possible, the main sources of law in this thesis.

In order to establish the lege lata, it is first of all necessary to analyse the relevant Articles of the Convention and how they are interpreted and applied by the Court. These issues are mainly dealt with within the case law of the Court and thus that is the main source of law in this thesis. Additionally, legal instruments issued by the Council of Europe and the European Commission are used to interpret certain criteria and to deepen the comprehension of the situation in Turkey. In order to clarify the reasoning of the Court, legal books and articles are used occasionally. Finally, the Constitution of the Republic of Turkey and certain decree laws followed by the State of emergency as well as documents concerning Turkey’s derogation are touched upon in order to analyze the measures taken during the derogation.

1.5 Disposition
Matilda and Natalie

The first chapter of this study includes an introduction to the background of the legal issue and the purpose and the aim of the study. Included in the first chapter is also the method and material used to answer the research questions and the delimitation of the legal area at hand.

The second chapter describes the content and definition of Article 10 of the Convention along with a sub-chapter describing the area of freedom of the press.

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16 The law as it exists.
18 Ibid 21.
19 Statute of the International Court of Justice (ICJ) (adopted 26 June 1945, entered into force 18 April 1946) art 38 (1).
The third chapter illustrates the possibility of an interference with Article 10 of the Convention in accordance with Article 10(2) under the legitimate aim of national security and Article 15 of the Convention and under what conditions such interferences are legitimate. It further describes the concept of margin of appreciation in relation to restrictions on Article 10.

The fourth chapter specifically describes restrictions on Article 10 of the Convention in accordance with Article 10(2) under the legitimate aim of national security and Article 15 of the Convention with regard to Turkey. Moreover, Turkey’s notification of State of emergency and observations on Turkey’s compliance with its obligations under the Convention are illustrated.

The fifth chapter consists of an analysis of the above mentioned parts with the aim of finding the answer to the legal issue at hand, that is, how far the scope of the *lege lata* reaches with regard to the right to restrict the freedom of expression in accordance with Article 10 and 15 of the Convention.

Last is the conclusion with the findings of the study.
2. The content and definition of Article 10

2.1 Introduction

Matilda

The right to freedom of expression under Article 10 of the Convention includes, inter alia, the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority. In other words, it includes both a right to express oneself and a right to receive expressions from other people. It further states that the exercise of the freedoms may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law, are necessary in a democratic society and serves a legitimate aim. The focus of this paper is national security as a legitimate aim.

The Court stated in the case of Rekvényi v Hungary that freedom of expression constitutes one of the fundamental grounds of a democratic society and is one of the basic conditions for its continued development.\(^{20}\) Article 10 is, however, a complex right when it comes to implementation and enforcement. Just as freedom of expression constitutes an essential foundation of a democratic society, it may also threaten to devastate it. Words can be used to threaten the rule of law and promote fascism and totalitarianism. Views on what may be justifiable measures to restrict such expressions, in order to ensure respect for the rights and freedoms of others, vary.\(^{21}\)

2.2 The scope of freedom of expression

Matilda

Article 10 is applicable to information, opinions and ideas which may be received as favourable, inoffensive or as a matter of indifference as well as to those that may offend, shock or disturb. Those are the requirement of pluralism, tolerance and broadmindedness and without them there is no democratic society.\(^{22}\) Thoughts and opinions on public matters are vulnerable and even the possibility that authorities or private parties not subject to proper control or that have the support of the authorities, will interfere may impose a severe burden on the free formation of ideas and democratic debate.\(^{23}\)

All forms of expressions are protected within the meaning of “receive and impart information and ideas” and the obvious ones may be oral and printed expressions. However, also artistic expressions are protected. Those who perform artistic expressions have been viewed by the Court as contributing to the exchange of ideas and opinions, which is an essential part in a democratic society.\(^{24}\) Due to the important connection between the freedom of expression and democracy, work and publications that relates to a debate on a matter of general concern and constitutes political and militant expressions, are entitled to a high level of protection under

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20 Rekvényi v Hungary App no 25390/94 (ECtHR, 20 May 1999) para 42(i).
22 Handyside v the United Kingdom App no 5493/72 (ECtHR, 7 December 1976) para 49.
23 Altuğ Taner Akçam v Turkey App no 27520/07 (ECtHR, 25 October 2011) para 81.
24 Karatas v Turkey App no 23168/94 (ECtHR, 8 July 1999) para 49.
Article 10.\textsuperscript{25} Political speech enjoy a greater protection than for example issues of morality and commercial speech.\textsuperscript{26}

The last sentence of Article 10(1) provides that the right to freedom of expression shall not prevent the States from requiring the licensing of broadcasting, television or cinema enterprises. This is unique since nothing similar to this appears in the provisions of freedom of expression of other big human rights treaties.\textsuperscript{27} Establishing conditions or restrictions on broadcasting, television or cinema may, however, result in an interference with the freedom of expression which may not correspond to one of the legitimate aims permitted under Article 10(2) even though the aim might be legitimate under the third sentence of Article 10(1). Nevertheless, the compatibility of an interference must be assessed based on the requirements of Article 10(2).\textsuperscript{28}

With regard to broadcasting, television or cinema, the States have a positive obligation to produce legislation and administrative framework in order to guarantee effective pluralism.\textsuperscript{29} They should not allow powerful economic or political groups to hold a position of dominance over the audio-visual media since that may put pressure on broadcasters and eventually limit their editorial freedom. That would undermine the fundamental role of freedom of expression in a democratic society specifically with regard to imparting information and ideas of general interests. This applies also where the dominant position is held by a State or public broadcaster in which it can only be justified if it can be shown that there is a pressing need for it.\textsuperscript{30}

Under Article 10(2) it is stated that the exercise of the freedoms may be subject to formalities, conditions, restrictions or penalties. Incitement to violence is a particularly important factor for the Court to take into consideration when determining if a restriction is legitimate. In \textit{Roj TV A/S v Denmark} the Court had to decide whether or not the applicant’s rights under Article 10 of the Convention had been violated or not. The applicant had broadcasted an organisation, classified as a terrorist organisation in the State, on television, and by virtue of this its license had been withdrawn.\textsuperscript{31} The Court concluded that the applicant’s broadcast in fact had included incitement to violence and therefore the activities fell within the scope of Article 17 and could not afford the protection of article 10.\textsuperscript{32} The Court pointed out that statements, whether verbal or non-verbal, which are directed against the underlying values of the Convention, for example by stirring up hatred or violence, are not protected under Article 10.\textsuperscript{33}

### 2.3 Freedom of the press

\textit{Matilda}

Freedom of the press is one of the essential rights protected under Article 10. Within the term press, both print media as well as audio-visual media are included. Audio-visual media is commonly acknowledged to have a much more immediate and powerful effect than the print media due to it having the means of presenting information through images.\textsuperscript{34} Freedom of the press is considered to be important in a democratic society since its role is to impart information

\begin{footnotesize}
\textsuperscript{25} Lindon, Otchakovsky-Laurens and July \textit{v} France App nos 21279/02 and 36448/02 (ECtHR, 22 October 2007) para 48.
\textsuperscript{26} \textit{Vgt Verein Gegen Tierfabriken v Switzerland} App no 24699/94 (ECtHR, 28 June 2001) paras 69-71.
\textsuperscript{27} Schabas (n 21) 466.
\textsuperscript{28} \textit{Demuth v Switzerland} App no 38743/97 (ECtHR, 5 November 2002) para 33.
\textsuperscript{29} \textit{Centro Europa 7 S.R.L. and Di Stefano v Italy} App no 38433/09 (ECtHR, 7 June 2012) para 134.
\textsuperscript{30} Ibid para 133.
\textsuperscript{31} \textit{Roj TV A/S v Denmark} App no 24683/14 (ECtHR, 17 April 2018) para 6 and 15.
\textsuperscript{32} Ibid paras 47-48.
\textsuperscript{33} Ibid para 31.
\textsuperscript{34} \textit{Jersild v Denmark} App no 15890/89 (ECtHR, 23 September 1994) para 31.
\end{footnotesize}
and ideas on matters of public interest as well as matters relating to the functioning of the judiciary. Due to this, the press has a vital role as a “public watchdog” in a democratic society. In addition to the function of the press to impart information and ideas, the public also has a right to receive that information and those ideas. In that respect, the press has a responsibility to report on opposition gatherings and demonstrations. The safeguards to be afforded to the press are therefore considered to be of particular importance. Neither national courts nor the Court should substitute their own views for those of the journalists as regards the reporting techniques to be adopted in a particular case. Journalists have been provided a degree of exaggeration and even provocation as well as great protection under Article 10 provided that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. Furthermore, when it comes to a public debate on an important issue, journalists are not required to prove the verity of their expressions, only that they acted with reasonable caution.

However, journalists have not been granted an unrestricted freedom of expression even in matters of serious public concern. They cannot overstep certain boundaries, particularly when it comes to the reputation and rights of others. As an example, in the case of Egeland and Hanseid v Norway, concerning photographing a convicted person as that person left a hearing where a judgment of 21 years was pronounced, the Court stated that even though the pictures were taken in a public place and during a public event, the publication represented an especially intrusive portrayal of that person. The Court therefore found that the interests in restricting the publication of the photographs weighed heavier than the interest of the press in informing people on a matter of public concern. The boundaries of acceptable criticism are, however, wider as regards politicians acting in their professional capacity than for private individuals. In the case of Lingens v Austria, the Court said that a politician freely and knowingly lays himself open to close examination of his words and must thus display a great degree of tolerance. The protection of reputation must therefore be weighed in relation to the interests of an open discussion of political issues.

In a somewhat more recent case, Lopes Gomes da Silva v Portugal, concerning a journalist who had been convicted of libel through the medium of the press on account of an editorial comment he had written about a politician, the Court found that the conviction of the journalist was not proportionate. The journalist had written, inter alia, that the politician was ideologically grotesque. The Court stated that the editorial clearly was made in a political debate on matters of general interest, which is an area in which restrictions on freedom of expression should be interpreted narrowly. Supplementary, in connection with the editorial, provocative opinions

35 De Haes and Gijsels v Belgium (n 13) para 37.
36 Axel Springer AG v Germany App (n 14) para 79.
37 Lingens v Austria App no 9815/82 (ECtHR, 8 July 1986) para 41.
38 Najafi v Azerbaijan App no 2594/07 (ECtHR, 2 October 2012) para 66.
39 Jersild v Denmark App (n 34) para 31.
40 Axel Springer AG v Germany App (n 14) para 81.
41 Prager and Oberschlick v Austria App no 15974/90 (ECtHR, 26 April 1995) para 38.
42 Radio France and Others v France App no 53984/00 (ECtHR, 30 March 2004) para 37.
43 Braun v Poland App no 30162/10 (ECtHR, 4 November 2014) para 50.
44 Kaperzyński v Poland App no 43206/07 (ECtHR, 3 April 2012) para 57.
45 De Haes and Gijsels v Belgium App (n 13 ) para 37.
46 Egeland and Hanseid v Norway App no 34438/04 (ECtHR, 16 April 2009) para 61.
47 ibid para 63.
48 Lingens v Austria App (n 37) para 42.
49 Lopes Gomes da Silva v Portugal App no 37698/97 (ECtHR, 28 September 2000) para 10.
previously expressed by the politician was published. Due to the placement of the editorial alongside expressions made by the person which the editorial referred to, readers were able to form their own opinion. The Court attached great importance to that fact. It concluded that the conviction of the journalist was not proportionate to the pursuit of a legitimate aim, having regard to the interests of a democratic society in safeguarding and maintaining freedom of the press.50

An important factor in the protection of the press is to enable them to protect the confidentiality of their sources. In legal proceedings, they are therefore entitled to refuse to reveal the identity of their sources.51 The Court said in the case Goodwin v the United Kingdom, concerning the protection of journalistic sources, that the protection of journalistic sources is a fundamental condition for the freedom of the press. Without such protection, sources may be frightened from helping the press in informing the public on matters of public concern. Consequently, the role of the press as a “public watchdog” may be undermined and the press may not be able to provide accurate and reliable information.52 A State may only order a disclosure of sources if there is an overriding requirement in the public interest and if the circumstances are sufficiently important and serious.53

Lastly, States can have both positive and negative obligations with regard to the freedom of expression and freedom of the press. In situations where the State has a negative obligation, the question to assess by the Court will be whether there has been an interference of the right by the State. If the Court establishes that an interference has occurred, the assessment proceeds to Article 10(2) and whether the restriction was legitimate.54 In cases were an alleged interference is done by a private actor, the State may hold a positive obligation to protect the right.55 In the case of Özgür Gündem v Turkey, the Court held that Turkey had a positive obligation to investigate and provide protection when journalists and staff of a newspaper that supported the Kurdistan Workers Party (PKK) were victims of violence and intimidation.56 States may also have a positive obligation to facilitate access to various media and guarantee a diversity of content which reflects a variety of opinions encountered in the society.57 Moreover, States should guarantee that the media is free and pluralistic.58

2.4 Summary

Matilda

The right to freedom of expression includes freedom to hold opinions and to receive and impart information and ideas. Article 10 is applicable to expressions which may be received as favourable, inoffensive or indifference as well as to those that may offend, shock or disturb. All forms of expressions are protected within the scope of Article 10. Work and publications that relates to a debate on matters of general concern and constitutes political and militant expressions, are entitled to a high level of protection under Article 10.

50 ibid paras 33-36.
51 Van der Heijden v the Netherlands App no 42857/05 (ECHR, 3 April 2012) para 64.
54 Schabas (n 21) 453.
55 Palomo Sánchez and others v Spain App nos 28955/06, 28957/06, 28959/06 and 28964/06 (ECHR, 12 September 2011) para 59.
56 Özgür Gündem v Turkey App no 23144/93 (ECHR, 16 March 2000) paras 42-46.
57 Centro Europa 7 S.R.L. and Di Stefano v Italy (n 29) para 130.
The right to freedom of expression shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The establishment of such conditions may, however, result in an interference with the right to freedom of expression which may not correspond to one of the legitimate aims permitted under Article 10(2) even though the aim might be legitimate under the third sentence of Article 10(1). The compatibility of such interferences must be assessed based on the other requirements of Article 10(2).

The freedoms protected under Article 10 may be subject to formalities, conditions, restrictions or penalties. Expressions or publications which contain incitement to violence are not protected under Article 10 and may thus be legitimately restricted.

Freedom of the press is one of the essential rights protected under Article 10. It is considered to be important in a democratic society due to its role to impart information and ideas. Journalists have been provided great protection under Article 10, however they cannot overstep certain boundaries, particularly when it comes to the reputation and rights of others. The boundaries of acceptable criticism are, however, wider as regards politicians acting in their professional capacity than for private individuals.

The press is entitled to refuse to reveal the identity of their sources in legal proceedings, States may only order a disclosure of sources if there is an overriding requirement in the public interest and if the circumstances are sufficiently important and serious.

Lastly, with regard to the freedom of expression and the freedom of the press, States may have both positive and negative obligations.
3. Restrictions on the right to freedom of expression

3.1 Introduction

Matilda

The right to freedom of expression is not an absolute right in the sense that it may be restricted in accordance with Article 10(2) and Article 15 of the Convention.

The Court has the important role of deciding whether an interference with the right to freedom of expression had a legitimate aim and was necessary in a democratic society. However, the States have a certain margin of appreciation in deciding whether there exist a pressing social need requiring them to restrict the right to freedom of expression. The Court has stated that States themselves are better suited to deal with that question than international judges. The reason for that is that each State has its own legal system, morals and values and are most likely better suited to decide on what constitutes an appropriate response. It is a challenge for the Court to ensure that each State fulfils its obligation under the Convention and at the same time give them a margin of appreciation by taking into account the national circumstances.

The doctrine of margin of appreciation was first used in cases involving derogation under Article 15. The first case in which the Court expressly stated and relied on the concept of margin of appreciation was in Ireland v the United Kingdom, in which the Court stated that Article 15 leaves the national authorities a wide margin of appreciation with regard to choosing the measures necessary to overcome an emergency. Article 15 of the Convention is subject to a wide degree of margin of appreciation due to the fact that national authorities are in continuous contact with the pressing needs during a time of emergency. Although the measures taken during a time of emergency are subject to a margin of appreciation, they nevertheless remain justiciable by the Court.

The margin of appreciation with regard to Article 10 may not be uniformly determined since the width varies depending on the legitimate aim pursued, the scope, the duration, the effect it has, the nature of the expression concerned and competing interests. The States are given a wider margin of appreciation with regard to issues of morality and commercial speech yet a narrower margin of appreciation is applied when it comes to political speech. The Court need to respect domestic cultural traditions and values and at the same time provide for a judicial review. What regards the aim of protecting national security, the States have a wide margin of appreciation. In the case of Leander v Sweden, the Court stated that the margin of appreciation with regard to the means used in order to protect national security was wide and that the State may assess whether there exists a pressing social need. The margin of

59 Handyside v the United Kingdom (n 22) paras 48-49.
61 Ireland v the United Kingdom App no 5310/71 (ECtHR, 18 January 1978) para 207.
63 Ireland v the United Kingdom (n 61) para 207.
64 Greer (n 62) 9.
66 The Sunday Times v the United Kingdom (No. 2) App no 13166/87 (ECtHR, 26 November 1991) para 59.
67 Vgt Verein Gegen Tierfabriken v Switzerland (n 26) paras 69-71.
69 Leander v Sweden (n 3) para 59.
appreciation with regard to Article 10(2) is however constrained by three factors\(^{70}\) which are examined below.

### 3.2 Restricting freedom of expression for the protection of national security

**Natalie**

Article 10(2) may be used by a State in anytime to limit the rights under the article, however in order for the interference of Article 10 to be legitimate it must fulfil the three part test laid forward under Article 10(2) of the Convention, stating that the restriction must be prescribed by law, necessary in a democratic society and pursue a legitimate aim.

In Article 10(2) of the Convention it is stated that States have the possibility to restrict freedom of expression through the interest of national security. The interest to protect national security may however interfere with the right to freedom of expression in a disproportionate manner, creating a non-legitimate restriction of the freedom of expression. This part considers the three criteria laid forward under Article 10(2) and when a restriction with the legitimate aim of national security is proportionate and not.

#### 3.2.1 Prescribed by law

**Natalie**

The condition prescribed by law requires that the measures taken are either stated in national primary legislation, secondary legislation that is authorized by primary legislation or in international law.\(^{71}\) In *B.V v The Netherlands* the Court stated that the criteria “prescribed by law” is interpreted to mean written law as well as unwritten law and that “the “law” is the provision in force as the competent courts have interpreted it”.\(^{72}\)

The law must in addition be foreseeable as developed by the jurisprudence of the Court. In *Centro Europa 7 S.R.L. and Di Stefano v Italy* the Court stated that “a rule is ”foreseeable” when it affords a measure of protection against arbitrary interference by the public authorities (...)".\(^{73}\) The Court has also stated that for the “prescribed by law” criteria to be sufficient, the foreseeability criteria must also entail the possibility of an effective review.\(^{74}\)

#### 3.2.2 National security

**Natalie**

The meaning of the term ”national security” is somewhat vague which is reflected in the wide margin of appreciation States have with regard to defining it.\(^{75}\) Based on the Court’s case law it is defined to include protection of State security, constitutional democracy from espionage, terrorism, support of terrorism and separatism.\(^{76}\) With regard to Article 10(2) and the legitimate aim of national security it is generally through a test of proportionality that the Court finds a violation.\(^{77}\) In doing so, the Court considers the circumstances of the case. For example if there

\(^{70}\) Greer (n 62) 9-10.

\(^{71}\) *Gropera Radio AG and others v Switzerland* App no 10890/84 (ECtHR, 28 March 1990) para 68.

\(^{72}\) *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010) para 83.

\(^{73}\) *Centro Europa 7 S.R.L. and Di Stefano v Italy* (n 29) para 143.

\(^{74}\) *Glas Nadezhda Eood and Elenkov v Bulgaria* App no 14134/02 (ECtHR, 11 October 2007) para 113.

\(^{75}\) ‘National security and European Case law’ (2013) para 4


\(^{76}\) ibid para 5.

\(^{77}\) ibid para 47.
was information of public interest as in Sürek and Özdemir v Turkey, where no justification could be made under the legitimate aim of national security in reason of that.  

Moreover if it was in the interest of national security with regard to the national defense as in Hadjianastassiou v Greece where the applicant, who was an air force officer bound by an obligation of discretion, had leaked information about a weapon that threatened to damage the national security. In that case, the State could not be considered to have overstepped its margin of appreciation which is left to the domestic authorities in matters of national security. Other aspects considered by the Court are if there was incitement to violence, the severity of the sentencing and the medium used. Incitement to violence is a particularly important factor for the Court to take into consideration when determining if a State has taken measures outside of its margin of appreciation or not, since expressions containing incitement to violence are not protected under Article 10 due to the fact that Article 17 of the Convention prohibits abuse of rights.

In Vereniging Weekblad Bluf! v the Netherlands the Court had to answer the question of whether the withdrawal of the publication of a six year old confidential report constituted in a breach of Article 10. The Court found no reason to doubt that the interference made by the State were to protect the interest of national security, this due to the fact that the information leaked could harm the proper effectiveness of the institution to act in secrecy while performing internal security services. The Court further recognised that it is in line with a democratic society and the rule of law that such institutions may exist and may need the State to take measures to protect it. However, even though such an institution enjoy a high margin of protection, the Court had to decide if the information was of such a sensitive nature that the measures taken were justified. In its conclusion the Court stated that the measures taken was not necessary in a democratic society, since the information had already been accessible to a large number of people, therefore the legitimate aim of national security was no longer justified, creating a violation of Article 10.

In Şener v Turkey the applicant was the owner of a weekly review which got suspended on the ground that one article in the paper contained separatist propaganda. The Court found the legitimate aim claimed by the State, national security, to be justified due to the sensitive security situation in the area at the time. In its assessments the Court had to look at if there had been a pressing social need justifying the interference. In order to establish if a pressing social need existed the Court looked at if the interference was proportionate to the legitimate aim pursued, if the reasons to justify the measures by the State were relevant and sufficient and the nature and severity of the penalties imposed. Since the suspension affected the applicant’s possibility to work and contribute to the public debate, the Court found the measures to be disproportionate creating a violation of Article 10.

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78 Sürek and Özdemir v Turkey App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) para 61.
79 Hadjianastassiou v Greece App no 12945/87 (ECtHR, 16 December 1992) paras 46-47.
80 ‘National security and European Case law’ (n 75) paras 48-58.
81 Roj TV A/S v Denmark (n 31) para 31.
83 ibid paras 34-36.
84 ibid para 41.
85 ibid paras 45-46.
86 Şener v Turkey App no 26680/95 (ECtHR, 18 July 2000) para 7.
87 ibid para 35.
88 ibid para 39.
89 ibid paras 46-47.
In *Observer and Guardian v United Kingdom* the question was whether the injunctions made by the United Kingdom on the publication of a book containing detailed information from a former spy of the State constituted a violation of Article 10 of the Convention or not. The United Kingdom prohibited the book in 1986, and in 1987 it was instead published in the United States.\(^{90}\) Yet the book remained prohibited in the United Kingdom for almost two years after that. The Court decided the case based on the three part test. The first criteria, that the measure must be prescribed by law was considered to be fulfilled, since there existed applicable principles which were forceable.\(^{91}\) With regard to the second criteria, that the interference must be made under one of the legitimate aims under Article 10(2) of the Convention, the Court found two legitimate aims, the maintenance of the authority of the judiciary and national security. It found the legitimate aims incontrovertible.\(^{92}\) With regard to the last criteria, if the measures were necessary in a democratic society or not, the Court developed its reasoning a bit further. It stated that one must look at the nature and content of the book, the involvement of the interest of national security, the margin of appreciation and whether or not the measures taken were proportionate to the legitimate aims pursued. The Court stated that during the period when the book was not yet published in the United States, the actions were relevant, sufficient and proportionate creating no violation of Article 10 of the Convention.\(^{93}\) After the United States had published the information, the Court took a new stand stating that the measures could still be seen relevant yet not sufficient since the purpose of the measures to protect national security was already diminished by the publication in the United States.\(^{94}\) The Court clarified that the aim of national security did no longer prevail and that continuing the restrictions after it was already published and accessible prevented the press from exercising their right and duty to provide information of public concern which was already available.\(^{95}\) Therefore it constituted a violation of Article 10 of the Convention.\(^{96}\)

### 3.2.3 Necessary in a democratic society

*Natalie*

The last criteria of the three part test is that the interference with the rights protected under Article 10 of the Convention must be necessary in a democratic society. The States do not have unlimited power to decide the necessity of the interference with the freedom of expression, since the domestic margin of appreciation goes hand in hand with European supervision. The Court thus has the role to preserve that the aim of the measures were necessary in a democratic society.\(^{97}\)

The Court has stated that the wording of ”necessary” is to be interpreted to include a ”pressing social need”.\(^{98}\) To determine whether the measures taken were necessary to address a pressing social need, the Court must first look at if the reasons put forward by the national authorities to justify the measures were relevant and sufficient. The term “relevant” is ordinarily used in order to assess to what extent the reasons justifies the restrictions\(^{99}\) and if the measures were

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91 ibid paras 51-54.
92 ibid para 56.
93 ibid paras 63-65.
94 ibid para 68.
95 ibid para 69.
96 ibid para 70.
97 *Handyside v the United Kingdom* (n 22) para 49.
98 *The Sunday Times v the United Kingdom (No. 1)* App no 6538/74 (ECtHR, 26 April 1979) para 59.
99 Mendel (n 2) 39.
proportionate to the legitimate aims pursued. In other words, the nature and severity of the penalties imposed. The Court has from its case law developed a system to decide on this. In order to identify if there existed a pressing social need for the measures to be taken, the Court takes into consideration the specific facts and circumstances of each case. In addition, it considers that the measures taken by the State were based upon a pleadable assessment of the relevant facts at hand. An interference with the freedom of expression must moreover be reasonable, proportionate and justified by relevant and sufficient reasons.

A majority of cases are decided based on this part of the three part test, that is, whether or not the restriction was necessary in a democratic society. This will in some cases be decided by the narrowest of margins. In assessing the proportionality, the Court allows the States a margin of appreciation which varies due to the circumstances surrounding the case.

3.3 Restricting freedom of expression through derogation under Article 15

Article 15, unlike Article 10(2), only allows for restrictions on the freedom of expression in accordance with a State of emergency and for the period of time that the emergency is declared. The idea that human rights may be suspended is offensive and unacceptable to many, however, without a possibility of derogation in time of emergency, it would be much harder to obtain the States’ compliance with the Convention. In some cases it has been found that unlimited freedom of expression may be more harmful than beneficial.

Although Article 15 allows the States to restrict the freedom of expression, a derogation in accordance with Article 15 is limited and contains formal requirements. These requirements are examined more thoroughly below, apart from the non-derogable rights listed under Article 15(2) which are protected from derogations at all times. The reason for that is that Article 10 is not a non-derogable right. The purpose of Article 15(2) is to protect certain rights and secure that they will continue to apply during time of war or public emergency, irrespective of any derogation made by a State.

3.3.1 Time of war or other public emergency threatening the life of the nation

The first condition under Article 15 is that the Article can only be invoked in time of war or other public emergency threatening the life of the nation. Until this day no State has relied on

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100 Cumpănă and Mazăre v Romania App no 33348/96 (ECtHR, 17 December 2004) para 90.
101 Ceylan v Turkey App no 23556/94 (ECtHR, 8 July 1999) para 37; Salov v Ukraine App no 65518/01 (ECtHR, 6 September 2005) para 115; Dabrowski v Poland App no 18235/05 (ECtHR, 19 December 2006) para 36.
102 Lingens v Austria (n 37) para 43.
103 Oberschlick v Austria App no 11662/85 (ECtHR, 8 July 1986) para 60.
104 Vogt v Germany App no 17851/91 (ECtHR, 26 September 1995) paras 52-53.
105 Philip Leach, Taking a case to the European Court of Human Rights (Oxford University Press 2017) 467.
106 Schabas (n 21) 587.
108 Article 2 (the right to life) except in respect of deaths resulting from lawful acts of war; Article 3 (the prohibition of torture and other forms of ill-treatment); Article 4(1) (the prohibition of slavery or servitude); and Article 7 (no punishment without law). Protocol no. 6 Article 1 (abolishing the death penalty in peacetime), Protocol no. 13 Article 1 (abolishing the death penalty in all circumstances), and Protocol no. 7 Article 4 (the right not to be tried or punished twice).
war as a ground for derogation and the Court has not been required to interpret the meaning of it. In Lawless v Ireland (No. 3) the Court stated that the natural and customary meaning of the wording “other public emergency threatening the life of the nation” was sufficiently clear. The wording were to be interpreted as ‘an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed (...). The emergency must be actual or imminent and the crisis of danger should be exceptional in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order, are inadequate.

In Aksoy v Turkey the Court established that each State has a wide margin of appreciation to decide if there is a presence of an emergency threatening the life of the nation. There is no case law today specifying the need for the emergency to be temporary, instead there are cases demonstrating that there is a possibility for a public emergency to continue for years. Further, it is each State’s responsibility to determine whether the life of the nation is threatened by a public emergency and which measures that are necessary to take in order to combat such an emergency. The Court concluded in Mehmet Hasan Altan v Turkey that the attempted military coup and its aftermath did pose severe danger to the democratic society and thus created a threat against the life of the nation.

In Brannigan and McBride v United Kingdom the Court made a similar statement saying that the States have a wide margin of appreciation in deciding if there is a threat against the life of the nation, however the States do not have unlimited freedom to decide this. Moreover the Court expressed that when exercising its supervision, the Court takes into consideration all relevant factors, as the nature of the rights affected, the circumstances leading to the derogation and the duration of the emergency situation. In its conclusion, taking into consideration the extent and impact of terrorist violence in the area at the time, the Court stated that there could be no doubt that a public emergency existed at the relevant time.

In Irland v United Kingdom the Court found the circumstances of the case to be of such a clear nature that it was “perfectly clear” that an emergency threatening the life of the nation existed at the time. This was due to the violence and terrorism in the area at the time.

3.3.2 Strictly required by the exigencies of the situation Matilda

A State may take measures derogating from its obligations under the Convention only to the extent strictly required by the exigencies of the situation. The Court has previously stated in the case of Ireland v the United Kingdom that a State threatened by a public emergency is, in first hand, the one responsible for deciding what measures that are necessary in attempting to

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110 Lawless v Ireland (No. 3) App no 332/57 (ECtHR, 1 July 1961) para 28.
111 Ireland v the United Kingdom (n 61) para 205.
113 Aksoy v Turkey App no 21987/93 (ECtHR, 18 December 1996) para 68.
114 A. and Others v the United Kingdom App no 3455/05 (ECtHR, 19 February 2009) para 178.
115 Mehmet Hasan Altan v Turkey App no 13237/17 (ECtHR, 20 March 2018) para 92.
117 ibid para 47.
118 Ireland v United Kingdom (n 61) para 205.
119 ibid para 212.
overcome the emergency. As previously mentioned, the national authorities are considered best suited to assess what measures that may be necessary during an emergency and the national authorities are given a wide margin of appreciation in this respect. The liberty to decide what is strictly required is however not unlimited since the Court is empowered to rule on whether a State has gone beyond the extent strictly required by the exigencies of the situation.\textsuperscript{120}

For the Court to assess whether the measures taken were strictly required by the exigencies of the situation, it examines the complaint on the merits.\textsuperscript{121} With regard to Article 10 of the Convention, the Court stated in \textit{Mehmet Hasan Altan v Turkey} that the existence of an emergency threatening the life of the nation shall not serve as an excuse for limiting freedom of political debate. Measures taken by a State of emergency should instead seek to protect the democratic order from threats and protect, inter alia, pluralism, tolerance and broadmindedness.\textsuperscript{122}

In the case of \textit{Lawless v Ireland (No.3)} the Court examined the Irish law provisions governing detention without trial, finding that they were complemented with safeguards and thus concluded that they were compatible with the exigencies of the situation.\textsuperscript{123} In the case of \textit{Brannigan and McBride v the United Kingdom}, the Court held that the United Kingdom, which had authorised detention of suspects for up to seven days without judicial control, had not exceeded what was strictly required by the exigencies of the situation.\textsuperscript{124} However, in the case of \textit{Aksoy v Turkey}, where the applicant had been held in detention for fourteen days without judicial supervision, the Court found that it exceeded what was strictly required. It stated that the period of time was exceptionally long.\textsuperscript{125} The Court has also expressed that when dealing with special legislation created to combat an emergency threatening the life of the nation, the provisions of the legislation cannot be torn out of the context without leading to an arbitrary outcome.\textsuperscript{126}

Lastly, factors important to take into account when determining if the measures were strictly required by the exigencies of the situation were settled by the Court in \textit{Brannigan and McBride v the United Kingdom} and \textit{A. and Others v the United Kingdom}. The Court stated that when determining whether the measures taken went beyond what was strictly required, it will give weight to factors such as the nature of the rights affected by the derogation and the circumstances leading to the emergency as well as the duration of the emergency situation.\textsuperscript{127}

\textbf{3.3.3 Inconsistent with the other obligations under international law}

\textit{Natalie}

The third condition under Article 15 is that any measures taken by the State during a State of emergency may not to be inconsistent with the State’s other obligations under international law. The Court has stated that it will consider this part of Article 15 of its own motion if necessary.\textsuperscript{128} In the context of Article 15(3) each State is bound by the substantive and procedural

\textsuperscript{120} ibid para 207.
\textsuperscript{121} \textit{Mehmet Hasan Altan v Turkey} (n 115) para 94.
\textsuperscript{122} ibid para 210.
\textsuperscript{123} \textit{Lawless v Ireland (No. 3)} (n 110) paras 37-38.
\textsuperscript{124} \textit{Brannigan and McBride v the United Kingdom} (n 116) para 66.
\textsuperscript{125} \textit{Aksoy v Turkey} (n 113) para 78.
\textsuperscript{126} \textit{Ireland v the United Kingdom} (n 61) para 243.
\textsuperscript{127} \textit{Brannigan and McBride v the United Kingdom} (n 116) para 43 and \textit{A. and Others v the United Kingdom} (n 114) para 173.
\textsuperscript{128} \textit{Lawless v Ireland (No. 3)} (n 110) 40.
requirements for a lawful derogation. In a conclusion made by the Commission in their report of the case of Cyprus v Turkey the Commission stated that Article 15 requires a formal and public act of derogation. If the concerned State do not follow these requirements and cannot justify its lack of a formal derogation, Article 15 cannot apply.\footnote{Cyprus v Turkey App nos 6780/74 and 6950/75 (Commission Report, 10 July 1976) para 527.}

In Brannigan and Mcbride v United Kingdom the applicant argued that the State did not fulfil the criteria of 15(1) of the Convention to not be inconsistent with other obligations under international law. This due to the fact that the State was party to the International Covenant on civil and political rights (ICCPR)\footnote{International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).} and had failed to comply with its obligation there under to submit an official proclamation of derogation, in accordance with Article 4 ICCPR.\footnote{Brannigan and Mcbride v United Kingdom (n 116) paras 67-68.} The Court acknowledged that the national authorities had taken steps to give notice of derogation under both Article 15 of the Convention and Article 4 of ICCPR. The Court further stated that the actions were formal in character, made public and the intentions as regards the derogation was well in keeping with the notion of an official proclamation. The conclusion made were therefore that the applicant had no basis for the statement.\footnote{ibid para 73.}

In A. And others v United Kingdom the Court had to decide if the measures adopted to protect the interest of national security fulfilled the criteria to not be inconsistent with other obligations under international law. This due to the fact that the applicants claimed the measures taken to be discriminatory in breach of Article 14 of the Convention. The Court concluded that the derogation measures were disproportionate since they unjustified discriminated between nationals and non-nationals.\footnote{A. And others v United Kingdom (n 114) para 190.}

In Sakik and Others v Turkey the question of derogation in accordance with Article 15 was inapplicable \textit{ration loci}\footnote{By reason of the place. Because of the relevant place or territory.} since the measures taken took place outside the territory of region where the State of emergency had been proclaimed. The Court found that it would be against the object and purpose of Article 15 to extend its effects to a territory not explicitly named in the notification of derogation.\footnote{Sakik and Others v Turkey App no 87/1996/706/898-903 (ECtHR, 26 November 1997) para 39.}

### 3.3.4 Notifying the Secretary General

Matilda

A State that need do derogate in accordance with Article 15 from its obligations under the Convention must notify this derogation. Article 15(3) states that any State making use of the right of derogation must keep the Secretary General informed of the measures it has taken and the reasons for them. It must also inform the Secretary General when these measures no longer are operated and the Convention is being fully executed again. There are two main purposes of informing the Secretary General. Firstly, the derogation becomes public when informing the Secretary General and secondly, the other States get informed through the Secretary General since the Secretary General must communicate to the other States as soon as possible any information transferred to him in pursuance of Article 15(3).\footnote{Greece v the United Kingdom App no 176/56 (Commission Report, 26 September 1958) para 158.}
The notification to the Secretary General is usually done by sending a letter with copies of the legal texts under which the emergency measures will be taken together with an explanation of the purpose of the measures.\textsuperscript{137} Regarding the timeframe for when notification need to be given, the Commission has stated that the notification does not need to be made before taking measures, however, the State must give notification without any unavoidable delay. A delay of three months before giving notification has been considered too long.\textsuperscript{138} However, a notification twelve days after the measures entered into force has been considered sufficient.\textsuperscript{139} The Court has stated that it will try if a State’s notification complies with the formal requirements set out in Article 15(3) regardless of it being contested by another State or not.\textsuperscript{140}

3.4 Summary

Matilda

The States enjoy a certain margin of appreciation in deciding whether they need to interfere with the right to freedom of expression and if so, in what way they need to interfere. Both Article 10 and Article 15 of the Convention are subject to a wide degree of margin of appreciation.

Article 10(2) may be used by a State in anytime to limit Article 10, however it must fulfil the three part test laid forward under Article 10(2). The restriction must be prescribed by law, meaning that the measures are stated in written or unwritten primary legislation that is foreseeable and provides the possibility of an effective review. It must also pursue a legitimate aim, in this thesis the aim of protecting national security, and be necessary in a democratic society, which requires that the measures taken were due to a pressing social need. When the Court makes an assessment, it considers the nature of the interest, if the expression included incitement to violence, the severity of the measures and the medium used. Incitement to violence is a particularly important aspect.

Article 15 provides the States the possibility of restricting the freedom of expression for the period of time that a State of emergency is declared. Certain rights in the Convention are protected from derogation at all times, Article 10 is not one of them. A derogation is possible during an emergency threatening the life of the nation and that has been interpreted to include an exceptional crisis or emergency affecting the whole population and constitutes a threat to the community. There is no case law specifying that the emergency need to be temporary.

The measures taken during a derogation must only be to the extent strictly required by the exigencies of the situation. When the Court assesses this question, it considers the nature of the rights affected by the derogation and the circumstances leading to the emergency as well as the duration of the measures. Moreover, a derogation must not be inconsistent with the State’s other obligations under international law. If these requirements are not met, measures taken by the State may be in breach of international law obligations since there is no justification possible under Article 15. Lastly, States must communicate a derogation to the Secretary General and inform when the derogation is terminated. The notification does not need to be made before taking measures, however the States need to give notification without any unavoidable delay.

\textsuperscript{137} Lawless v Ireland (No. 3) (n 110) para 47.
\textsuperscript{138} Greece v the United Kingdom (n 136) para 158.
\textsuperscript{139} Lawless v Ireland (No. 3) (n 110) para 47.
\textsuperscript{140} Aksoy v Turkey (n 113) paras 85-86.
4. Restrictions on the right to freedom of expression with regard to Turkey

4.1 National security claimed by Turkey

Natalie

As previously mentioned, Turkey is one of the States with the highest rate of violations of Article 10 while claiming national security and is therefore a good example when examining restrictions for the purpose of protecting national security.

The case of Sürek and Özdemir v Turkey concerned whether or not the applicants’ penalties for publishing an interview with a member of an illegal organisation violated Article 10 of the Convention. One of the applicants owned the company in charge of the publication and the other applicant was the editor in chief of that company. The national authorities in Turkey ordered a seizure of all copies of the text, stating that the interview included a declaration by terrorist organisations and spread separatist propaganda. The national court convicted both applicants to severe fines and one of the applicants to a six month prison sentence. The national court stated in its reasoning that several factors of the text, for example one part praising Kurdish terrorist activities, created a disseminated propaganda against the indivisibility of the State.

Both applicants turned to the Court and claimed that their right to freedom of expression under Article 10 of the Convention had been violated. The Government of Turkey argued that the interference with Article 10 of the Convention was justified under the provisions of the second paragraph of the Article with regard to the legitimate aim of national security.

In the reasoning for its judgment the Court referred to the three part test in order to decide if the interference with the right to freedom of expression was legitimate. With regard to the first criteria, prescribed by law, the Court accepted that the measures taken were prescribed by law since they were based on section 6 and 8 of the 1991 Act. With regard to the criteria of a legitimate aim, it concluded that since the measures taken were based on the 1991 Act, which had the purpose of protecting national security, the legitimate aim of national security was justified. Also, since the situation in south-east Turkey at the time was sensitive and the separatist movement had resources to rely on the use of violence, the measures taken against the applicants could be seen as to have been in support of the aim of protecting national security.

Lastly, with regard to the third criteria, necessary in a democratic society, the Court had to take into consideration all circumstances of the case. It stated that in order to determine whether the interference was in accordance with Article 10 or not it must look at whether the interference was proportionate to the legitimate aim of national security and whether the reasons invoked by the Turkey to justify it were “relevant and sufficient”. In assessing all relevant factors of

141 Mendel (n 2) 48.
142 Sürek and Özdemir v Turkey (n 78) para 11.
143 ibid para 16.
144 ibid para 17.
145 ibid para 36.
146 ibid para 41.
147 ibid para 43.
148 ibid para 47.
149 ibid paras 50-51.
150 ibid para 57.
the case the Court considered the wording of the text in the interview and confirmed that the
text as a whole could not be considered to incite to violence of hatred.\textsuperscript{151} On top of that, it
confirmed that the public has the right to receive information and the press is one of the best
tools to provide the public with the means of discovering and forming an opinion.\textsuperscript{152} The nature
and severity of the penalties imposed were factors taken into account as well when assessing
the proportionality of the interference.\textsuperscript{153} The Court stated that since the article did not in itself
call for violence or hatred and the fact that the front person was a member of a terrorist
organisation was not sufficient in itself for Turkey to rely on national security. Therefore, the
Court concluded that the measures taken had been disproportionate to the aim pursued. The
criteria of necessary in a democratic society was furthermore not fulfilled, creating a violation
of Article 10 of the Convention.\textsuperscript{154}

In the case of Sürek v Turkey (No. 2) the applicant was the owner of a company that owned a
weekly review published in Istanbul each week. The applicant was convicted to pay a fine of
54,000,000 Turkish lira for publishing a report with the identity of two officials making them
terrorist targets.\textsuperscript{155} The Government of Turkey argued that the applicant had violated the
Terrorism Act of 1991 by publishing the identities of the officials. The applicant stated that the
aim of the report was to inform the public, which is a fundamental part of a democratic
society\textsuperscript{156} and that the information had already been published in other newspapers.\textsuperscript{157}

With regard to criteria one and two of the three part test the Court recognised that the measures
taken by Turkey were prescribed by law in section 6 of the 1991 Act.\textsuperscript{158} Besides that due to the
sensitive situation in the area at the time the measures taken to protect the aim of national
security is legitimate under Article 10(2) of the Convention.\textsuperscript{159} The third part of the test,
necessary in a democratic society, needed a deeper analysis. The Court firstly affirmed that the
text of the report could not be regarded as incitement to violence against the officers\textsuperscript{160} and the
seriousness of the information was of such a nature that the public had a legitimate interest in
knowing both the nature of the conduct and the identity of the officers.\textsuperscript{161} Since the report had
already been published in other newspapers, the interest in protecting the identity of the officers
had been substantially diminished and the possible damage which the restriction was meant to
prevent had already been done.\textsuperscript{162} The Court therefore concluded that there had been a violation
of Article 10 of the Convention since there had not been a fair balance between the interest of
the officials and the freedom of the press. The interference had therefore been disproportionate
to the legitimate aim pursued.\textsuperscript{163}

With regard to incitement to violence there has been a number of cases concerning Turkey. In
the case of Incal v Turkey the question was whether or not the conviction of the applicant for
calling upon citizens to oppose the authorities’ harassment of Kurdish traders violated Article

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{151} ibid para 61.
\item \textsuperscript{152} ibid para 58.
\item \textsuperscript{153} ibid para 62.
\item \textsuperscript{154} ibid paras 63-64.
\item \textsuperscript{155} Sürek v Turkey (No. 2) App no 2412/94 (ECtHR, 8 July 1999) para 13.
\item \textsuperscript{156} ibid paras 11-12.
\item \textsuperscript{157} ibid para 14.
\item \textsuperscript{158} ibid para 25.
\item \textsuperscript{159} ibid para 29.
\item \textsuperscript{160} ibid para 37.
\item \textsuperscript{161} ibid para 39.
\item \textsuperscript{162} ibid para 40.
\item \textsuperscript{163} ibid para 42.
\end{itemize}
\end{footnotesize}
10 of the Convention by being incitement to violence. The conviction was prescribed by the Turkish law on the prevention of terrorism, however the Court concluded that the conviction of the applicant was disproportionate to the aim since it did not include incitement to violence and was therefore unnecessary in a democratic society. There had accordingly been a breach of Article 10.164

In Ceylan v Turkey the applicant had written an article encouraging workers to speak out on the terrorist Acts of Turkey. The applicant was charged of incitement to hatred and hostility and sentenced to one year and eight months’ imprisonment and to pay a fine.165 The Court found the measures taken against the applicant to be disproportionate and unnecessary in a democratic society since the article did not encourage violence.166 However, in Sürek v Turkey (No. 3), the Court came to the conclusion that no violation of Article 10 had occurred. The applicant had been convicted of spreading separatist propaganda through a review of which he was the owner167 and sentenced to pay a fine.168 The measures imposed on the applicant was found to be “relevant and sufficient” with regard to answering a “pressing social need”.169 In addition the Court acknowledge that the States have a wide margin of appreciation and that the interference with Article 10 of the Convention was proportionate to the legitimate aim since the Article had called for use of force.170

The question of severity of sentencing was brought into light in Zana v Turkey. The applicant, a former mayor, made a statement in an interview in support to the PKK national liberation movement and was sentenced to twelve months’ imprisonment.171 The Court acknowledged that it was extreme tension in the area at the time.172 It also stated that by cause of the circumstances of the case, the fact that a former mayor expressed support of a terrorist organisation in a major national newspaper, had to be regarded as likely to aggravate an already intensive situation in the region.173 With this reasoning, the Court came to the conclusion that no violation of Article 10 of the Convention had been made since the penalty against the applicant could be seen as answering a ”pressing social need” and was sufficient and relevant having regard to all circumstances of the case and the wide margin of appreciation given to the States.174

In Karataş v Turkey the Court reviewed the medium used. The case concerned the publication of a book of poetry. The applicant, who was the publisher of the book, got prosecuted for spreading propaganda against the ‘indivisible unity of the State’.175 The Court affirmed that the poems had a political dimension. However, the fact that the poems were published to a small audience limited the impact on national security substantially according to the Court. It further noted that the conviction was not regarding incitement to violence yet rather for having disseminated separatist propaganda.176 For these reasons the Court found the nature and the

165 Ceylan v Turkey App (n 101) para 9 and 11.
166 ibid para 38.
167 Sürek v Turkey (No. 3) App no 24735/94 (ECtHR, 8 July 1999) para 38.
168 ibid para 14.
169 ibid para 42.
170 ibid para 43.
172 ibid para 59.
173 ibid para 60.
174 ibid paras 61-62.
175 Karataş v Turkey (n 24) para 10.
176 ibid para 52.
severity of the penalty disproportionate and therefore a violation of Article 10 of the Convention had occurred.\footnote{ibid para 54.}

4.2 Derogation by Turkey

Natalie

In the Constitution of the Republic of Turkey Article 120, it is stated that:

In the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairmanship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months.\footnote{The Constitution of the Republic of Turkey (adopted 7 November 1982) TUR-010, art 120.}

Further, Article 121 reaffirms that:

In the event of a declaration of a state of emergency under the provisions of Articles 119 and 120 of the Constitution, this decision shall be published in the Official Gazette and shall be submitted immediately to the Turkish Grand National Assembly for approval. (…) The Assembly may alter the duration of the state of emergency, extend the period, for a maximum of four months only, each time at the request of the Council of Ministers, or may lift the state of emergency (…).\footnote{ibid art 121.}

On 20 July 2016 Turkey declared a nationwide State of emergency as from 21 July 2016 for a period of ninety days in accordance with Article 120 of the Constitution and Article 3 § 1 (b) of the Law on the State of Emergency (Law No. 2935). In its derogation, Turkey did not clarify which Articles in the Convention it derogated from.\footnote{State of emergency declared in Turkey following the coup attempt on 15 July 2016’ (24 July 2016) \url{https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168069538b} accessed 23 April 2019.} Turkey communicated the derogation to the Secretary General in accordance with Article 15 of the Convention.\footnote{‘Joint Declaration by the Grand National Assembly of Turkey’ (24 July 2016) \url{https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations} accessed 16 April 2019.} In the period between 28 July 2016 and 22 January 2018 the Secretary General registered 31 Decrees with Force of Law made by Turkey during the State of emergency.\footnote{List of Decrees with force of law issued under the state of emergency’ (4 May 2018) \url{https://rm.coe.int/iets-005-tur-decl-annex-list-of-laws-04-05-2018/16807e80de} accessed 16 April 2019.}

On the 2 August 2016, the Secretary General registered Turkey’s Decree with Force of Law No 668 (Law 668). Law 668 entered into force in Turkey on the 27 July 2016 under the title Decree Law on Measures to be taken under the State of Emergency and Arrangements made on certain Institutions and Organisations. The law was a result of the Council of Ministers in Turkey meeting under the chairmanship of the President of Turkey to decide on certain measures to be taken under the State of emergency pursuant to Article 121 of the Constitution of the Republic...
of Turkey and Article 4 of Law No 2935 on State of Emergency.\textsuperscript{183} In Article 121 of the Constitution of the Republic of Turkey Part three, Chapter two, it is stated that the measures to be taken during a State of emergency and how the measures should be made must be regulated by the Law on State of Emergency. Moreover, that the Council of Ministers ‘may issue decrees having the force of law on matters necessitated by the state of emergency’.\textsuperscript{184}

Article 1 of Law 668 clarified that the aim of the law was to define the procedure and principles relating to the measures to be taken to fight against the attempted coup and terrorism under the State of emergency. Part two of the law defined the measures taken. For example, closing down radio organisations, television organisations,\textsuperscript{185} newspapers and periodicals, which were listed in the annex, and their publication and distribution channels.\textsuperscript{186}

As previously mentioned, according to Article 119 and 120 of the Constitution of the Republic of Turkey Part three Chapter two, the time period for a State of emergency may not exceed six months. However, in Article 121 it is stated that the Turkish Grand National Assembly may modify the duration of the State of emergency and extend the period for a maximum of four months, each time at the request of the Council of Ministers, it may also lift the State of emergency.\textsuperscript{187} On 8 August 2018, the representative of Turkey notified the Secretary General with the decision made by Turkey to withdraw the notification of State of emergency.\textsuperscript{188} Turkey had prior to this extended the State of emergency seven times from the first communication in 2016.

4.2.1 Observations of Turkey’s State of emergency

\textit{Natalie}

On the 28 July 2016, just one week after Turkey’s communication of its derogation, Amnesty International expressed concern for the civil society and the assault on media freedom in its reports of the situation in Turkey.\textsuperscript{189} Prior to the reports, Amnesty International visited Istanbul and Ankara to document on human rights violations. From its research it established that grave violations on human rights had occurred in Turkey since the derogation, such as 131 media outlets and publishing houses being shut down as a result of Law 668.\textsuperscript{190}

Further, in a memorandum on the human rights implications of the measures taken under the State of emergency in Turkey, the Commissioner for Human Rights declared the derogation legitimate due to the coup attempt and the situation in Turkey at the time of derogation.\textsuperscript{191} The measures taken during this period did however directly or indirectly interfere with human rights,

\textsuperscript{183} Decree Law on the measures to be taken under the state of emergency and arrangements made on certain institutions and organizations- Decree with force of law No. 668 (27 July 2016).

\textsuperscript{184} The Constitution of the Republic of Turkey (n 178) art 121.

\textsuperscript{185} Decree Law on the measures to be taken under the state of emergency and arrangements made on certain institutions and organizations- Decree with force of law No. 668 (n 183).

\textsuperscript{186} ibid.

\textsuperscript{187} The Constitution of the Republic of Turkey (n 178) art 121.

\textsuperscript{188} ‘Declaration contained in a letter from the Permanent Representative of Turkey, dated 8 August 2018, registered by the Secretariat General on 9 August 2018’ (n 12).


\textsuperscript{190} ibid.

\textsuperscript{191} Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Mužnieks, Council of Europe Commissioner for Human Rights, CommDH(2016)35, 7 October 2016, para 7.
affecting a very large number of persons. For example, the Commissioner observed in particular that, at the time of the visit in 2016, more than 31,844 persons were in detention. There is no official figure of the number of civil servants who were suspended or dismissed, yet at least a hundred media establishment were dissolved and liquidated without any judicial proceeding.\textsuperscript{192} With regard to the high number of persons arrested, detained and suspended, the Commissioner recommended the Turkish authorities to immediately start revoking the emergency decrees.\textsuperscript{193} In addition, the Commissioner recognised the open communication made by Turkey to the Secretary general even during a State of emergency period and the Turkish authorities cooperation. Further, he welcomed and supported the ongoing dialogue between the Council of Europe experts and the Turkish Ministry of Justice with regard to the measures taken and with the focus on the human right aspects.\textsuperscript{194}

In 2017, another memorandum concerning the freedom of expression and media freedom in Turkey was created. The reason for the memorandum was the fact that Turkey was one of the countries with the highest rate of violations of Article 10 of the Convention, shown by statistic made between the year of 1959 and 2015.\textsuperscript{195} By reason of this and the fact that the deterioration of freedom of the media and freedom of expression in Turkey intensified further during the State of emergency. The Commissioner recognized that the measures adopted under the decree laws gave the Turkish authorities almost limitless discretion, without any judicial control, to restrict the freedom of expression. This due to the fact that the decree laws only required a "connection" to a terrorist organisation in order for Turkey to justify restricting the freedom of expression and the press. This resulted in more than 150 media outlets being closed and the number of journalists in jail increased.\textsuperscript{196} The Commissioner also expressed that neither the coup attempt, nor any other terrorist threats in Turkey at the time, could justify the restrictions made on the freedom of expression. The measures represented not only an unprecedented offence on freedom of the media, but also a ‘disavowal of the rule of law and its process’.\textsuperscript{197}

In late 2016, the Venice Commission was requested by the Committee on Political Affairs and Democracy of the PACE on its opinion on the emergency decree laws in Turkey with particular respect to freedom of the media.\textsuperscript{198} The Venice Commission came to the conclusion that some measures may have been necessary in view of the circumstances. However, the fact that mass liquidations of media outlets were executed in Turkey without the possibility of timely judicial review, was unacceptable in light of international human rights law. On top of this, the Venice Commission determined that detention of journalists on the basis of the decree laws justifying such a detention if the journalist had connection to or membership in a terrorist organisation, may be more harmful for a democratic society rather than it is fulfilling the purpose of protecting it.\textsuperscript{199}

\textsuperscript{192} Ibid para 9.
\textsuperscript{193} Ibid para 12.
\textsuperscript{194} Ibid para 10.
\textsuperscript{195} Memorandum on freedom of expression and media freedom in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights (n 1) para 7.
\textsuperscript{196} Ibid para 20.
\textsuperscript{197} Ibid para 41.
\textsuperscript{199} European Commission for Democracy through Law (Venice Commission), 'Turkey Opinion on the Measures provided in the recent emergency decrees laws with respect to freedom of the media' (Opinion) CDL-AD (2017) 007 (adopted 10-11 March 2017) para 92.
4.2.3 The Court’s review

Matilda

The Court has so far ruled in two cases that concerned alleged violations of Article 10 by Turkey during its declared State of emergency in 2016. These cases are Şahin Alpay v Turkey and Mehmet Hasan Altan v Turkey.

The case of Şahin Alpay v Turkey concerned a journalist who worked at a newspaper which was closed down after the adoption of Law 668 in July 2016. The applicant also lectured in comparative politics and Turkish political history at a private university in Istanbul and was known for being critical towards the Turkish Government’s policies. He was arrested due to a criminal investigation initiated with regard to suspected members of FETÖ/PDY and he and several other staff of the newspaper were brought before the Istanbul 4th Magistrate’s Court. The applicant stated that he had joined the newspaper in order to be able to express his opinions and that he had not been aware of the threats posed by FETÖ/PDY until the attempted military coup.

The Magistrate’s Court found that the articles written by the applicant had promoted the terrorist organisation and ordered a pre-trial detention of the applicant. The applicant also lodged an individual application with the Constitutional Court. The Constitutional Court held that there had been a violation of the right to freedom of expression and of the press. Despite this, he was not released.

The Court started by assessing Turkey’s derogation under Article 15 of the Convention and considered the question of whether the conditions under Article 15 were satisfied in the present case. The Court firstly noted that the notification of derogation by Turkey did not distinctly mention which Articles that were to be subject of the derogation. However, the Court also noted that none of the parties had submitted that the notification of derogation may not satisfy the formal requirements under Article 15(3). It therefore accepted that the formal requirements had been satisfied. It further noted that the Government of Turkey held that the attempted military coup and the events afterwards posed severe danger to the democratic constitutional order and human rights which amounted in a threat to the life of the nation within the meaning of Article 15. Additionally, the applicant did not dispute this. The Court agreed and also considered that the attempted military coup established the existence of a “public emergency threatening the life of the nation” within the meaning of Article 15.

The Court moreover assessed whether there had been an interference and observed that the criminal proceedings brought against the applicant were still ongoing and he had been in pre-trial detention for more than one and a half years. Further, the Court noted that the Constitutional Court had held that the applicant’s detention resulted in an interference with the right to freedom of expression and of the press. It endorsed this finding by the Constitutional

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200 Şahin Alpay v Turkey (n 8) paras 12-13.
201 ibid para 19.
202 ibid paras 21-22.
203 ibid para 29.
204 ibid para 31.
205 ibid para 39.
206 ibid paras 72-73.
207 ibid paras 76-77.
Court and considered that the pre-trial detention constituted an interference with the right to freedom of expression within the meaning of Article 10 of the Convention.208

The Court then examined the criteria under Article 10(2), that is whether the interference was prescribed by law, pursued a legitimate aim and was necessary in a democratic society. Neither the applicant nor the Government of Turkey disputed that the pre-trial detention of the applicant had a legal basis in the relevant provisions of the Criminal Code (the CC) or that the interpretation of those provisions covered the articles written by the applicant. The question was whether the interpretation and application of the relevant provisions of the CC might have reduced their accessibility and foreseeability. The Court found serious doubts as to whether the applicant could have foreseen his pre-trial detention based on the relevant Articles. It did however not find it necessary to settle this question do to its findings concerning the necessity of the interference. Regarding the legitimate aim, it stated that it accepted that the measures had a legitimate aim in intending to prevent disorder and crime.

With regard to the necessity of the situation, the Court observed and agreed with the conclusion made by the Constitutional Court stating that the pre-trial detention of the applicant due to his expressions, constituted a severe measure which could not be viewed as a necessary and proportionate interference in a democratic society.209 The Court moreover stated that when the expression do not contain incitement to violence, the State cannot restrict the right of the public to be informed by the media. That right cannot even be restricted with reference to the protection of national security.210

The Court took into account the difficulties of the aftermath of the attempted military coup in Turkey. However, it considered one of the principal characteristics of democracy to be the possibility of resolving problems through public debate and that democracy prosper on freedom of expression. For these reasons, the State of emergency must take measures which seek to protect the democratic order from threats and all efforts must be made to safeguard values such as pluralism, tolerance and broadmindedness.211 Criticism of the government and publication of information that may endanger national interests should not impose criminal charges for serious crimes such as being a member of, or assisting, a terrorist organisation, attempting to overthrow the government or the constitutional order or scatter terrorist propaganda. Even in cases concerning particularly serious offences, pre-trial detention must only be used as a measure of last resort where no other measures are adequate. A pre-trial detention for expressing critical views will intimidate the civil society and silence dissenting opinions even if the detainee later is acquitted.212

The Court concluded that there had been a violation of Article 10 of the Convention due to the continued detention of the applicant213 and stated that ‘a measure of pre-trial detention that is not “lawful” and has not been effected “in accordance with a procedure prescribed by law” on account of the lack of reasonable suspicion cannot be said to have been strictly required by the exigencies of the situation (...)’.214

208 ibid paras 168-170.
209 ibid paras 174-177.
210 ibid para 179.
211 ibid para 180.
212 ibid paras 181-182.
213 ibid para 184.
214 ibid para 183 and 119.
The Court made the same conclusion in the case of *Mehmet Hasan Altan v Turkey*. That case concerned an economics professor and journalist. He was known for holding critical views on the Turkish Government’s policies and before the attempted military coup in Turkey, he worked with a political discussion programme at a television channel that was shut down following the adoption of Law 668. He was arrested on suspicion of having links to the terrorist organisation FETÖ/PDY and attempting to overthrow the Government or to prevent it from discharging its duties in accordance with relevant Articles of the CC. The Istanbul Magistrate’s Court ordered pre-trial detention of the applicant and later sentenced him to aggravated life imprisonment for attempting to overthrow the constitutional order. The applicant lodged an individual application with the Constitutional Court. It held that there had been a violation of the right to freedom of expression and of the press. He was however not released.

The Court stated exactly the same things as it did in the case of *Şahin Alpay v Turkey* and found that there had been a violation of Article 10 of the Convention in this case as well.

4.3 Summary

Matilda

Turkey is one of the States with the highest rate of violations of Article 10 while claiming national security. In *Sürek v Turkey (No. 2)* the Court concluded that the information was of such a public interest that the aim of protecting national security was not sufficient to claim as justification for the measures adopted. In *Sürek and Özdemir v Turkey* the Court found a violation of Article 10 due to that the publication did not call for violence or hatred and the fact that the front person was a member of a terrorist organisation was not sufficient in itself in order to rely on national security. In *Sürek v Turkey (No. 3)*, the measures adopted were however proportionate since the publication included incitement to violence. If the claim of incitement to violence do not hold up, the penalties will most likely be disproportionate. The criteria that is most often not fulfilled is the criteria of necessary in a democratic society since States tend to go outside their margin of appreciation by taking measures that are disproportionate to the legitimate aim.

Turkey declared a State of emergency as from 21 July 2016 and did not clarify which Articles in the Convention it would derogate from. Between July 2016 and January 2018, the Secretary General registered 31 Decrees with Force of Law made by Turkey. On 8 August 2018, Turkey notified the withdrawal of a State of emergency and had prior to this extended the State of emergency seven times.

Amnesty International stated that grave violations on human rights had occurred in Turkey since the derogation, and the Commissioner for Human Rights stated that the measures taken by Turkey directly or indirectly interfered with human rights and that the Turkish authorities should immediately revoke the emergency decrees. He further stated that neither the coup attempt, nor any other terrorist threats faced by Turkey, could justify some of the measures taken in restricting the freedom of expression. The Venice Commission also expressed its opinion on the emergency decree laws. It concluded that liquidations of media outlets without

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216 ibid para 19 and 24.
217 ibid para 33.
218 ibid paras 34-35.
219 ibid para 53.
220 ibid paras 197-214.
the possibility of timely judicial review, is unacceptable in light of international human rights law and that the detention of journalists may be more harmful for a democratic society rather than it is fulfilling the purpose of protecting it.

The Court has ruled in two cases concerning alleged violations of Article 10 by Turkey during its State of emergency in 2016. The case of Şahin Alpay v Turkey concerned a journalist who was put in pre-trial detention for more than one and a half years. The Court accepted that the formal requirements of a derogation were satisfied and that it existed an emergency within the meaning of Article 15. The applicant’s detention however resulted in an interference with Article 10 and the Court found serious doubts as to whether the applicant could have foreseen his pre-trial detention, however it did not examine this further. It accepted that the measures had a legitimate aim, nevertheless it held that the pre-trial detention could not be regarded as necessary and proportionate in a democratic society. The Court also stated that pre-trial detention must only be used as a measure of last resort. It found a violation of Article 10 of the Convention and stated that the pre-trial detention could not be seen to have been strictly required by the exigencies of the situation. It made the same conclusion in the case of Mehmet Hasan Altan v Turkey.
5. Analysis

The analysis consists of two parts, one dealing with the question of national security and one with the question of derogation.

5.1 National security

As has been explained throughout the thesis, the right to freedom of expression is not an absolute right and may be restricted in accordance with Article 10(2) or 15 of the Convention. With regard to one of the research questions of this study - to what extent a State may restrict Article 10 under the legitimate aim of national security in relation to freedom of the press, one must take into consideration several factors.

First of all, the right to freedom of expression is considered to be a cornerstone in a democratic society, and a fundamental right to receive and impart information and ideas. In addition, freedom of the press plays an important role in a democratic society in being a "public watchdog" and inform the society with information of public interest. This is needed in order to have a society of pluralism, tolerance and broadmindedness, without which there is no democratic society. Nevertheless, States have a possibility to restrict the freedom of expression in accordance with article 10(2) of the Convention. The reason for that is that Article 10 may also constitute a threat against the society, in particular the national security, if abused in order to weaken the rule of law or democracy in the society. Therefore, journalists and the press do not have unlimited protection under Article 10 of the Convention, not even in serious matters of public concerns since the interest of protecting the national security must always be taken into consideration as well. By reason of this, this area of the law is much more complex in its nature than one would first think.

It is, however, not in an unlimited manner States have the right to restrict the freedom of expression. In order for an interference with Article 10 of the Convention to be legitimate, the State must provide that all criteria are fulfilled under Article 10(2) of the Convention, otherwise the State has violated its negative obligation under the Convention not to interfere with the rights. This is where the fine line of what constitutes a legitimate interference of Article 10 or not arise. One could think that it would be outlined in a clear manner how and to what extent States may limit this scope of rights, yet by analyzing the case law from the Court it is noticeable that the last criteria of Article 10(2), that the measures taken by the State must be necessary in a democratic society, are more or less decided on the principle of margin of appreciation. This could be criticised in the aspect of weakening the rule of law, arguing that the Court’s judgments are not predictable, but rather depending on all the circumstances of each case. It may create a too broad margin for the States to act on their own mission while relying on the interest of national security and that it is necessary in a democratic society. It may also create uncertainty for the States of whether they are acting in compliance with Article 10(2) or not, as seen in Observer and Guardian v United Kingdom where the State did not violate Article 10 at first, yet when the United States published the information the legitimate aim of national security relied upon by United Kingdom were no longer sufficient due to the change of the circumstances.

The principle of margin of appreciation reflects that the area of freedom of expression is of such a complex manner that there is not always a right or wrong way even in similar situations regarding restrictions of the freedom of expression and the press. With regard to restricting freedom of expression with the interest of protecting national security it is more likely that the State has the facts to provide the evidence for if there existed a pressing social need in order to
take measures or not, than the Court. That gives the State a wide margin of appreciation when it comes to protecting national security. This is problematic due to the fact that States can take measures against the right to freedom of expression and later claim the interest of national security retroactively, arguing that they had to take these measures at the time due to the situation at hand. The Court on the other hand, may not have the same ability to provide facts or understand the situation to the same extent due to it not being present in the State during the claimed situation. In addition, the Court must pursue its role of supervising the States’ obligations under the Convention objectively and protect the rights of the Convention in a proportionate manner, by reflecting both the States’ margins of appreciation and the importance of their compliance with the Convention. This creates a conflict of interest between the interest of protecting the States’ national security and the obligation to uphold the right to freedom of expression. In order to define if there has been a legitimate interference with the freedom of expression under the aim of protecting national security, the Court uses a proportionality test to decide if the State’s margin of appreciation has been disproportionate or not. Throughout the case law of the Court in cases involving Turkey claiming the aim of protecting the interest of national security, the Court has discussed these criteria in conjunction with the criteria of Article 10(2).

In Sürek and Özdemir v Turkey the Court mentioned incitement to violence as an important factor as to why the restriction constituted a violation of Article 10 of the Convention since incitement to violence is not protected under Article 10. Due to that the article did not include incitement to violence, the interference created a disproportionate restriction on the freedom of expression. In Roj TV v Denmark the outcome was that no violation of Article 10 had occurred since the publication included incitement to violence. From these cases it is clear that incitement to violence is frequently argued by Turkey in order to rely on Article 17 of the Convention. Regarding this matter it is important to remember the functioning of Article 10(2) of the Convention, namely that States may restrict freedom of expression if another interest such as national security must be prioritized. By reason of this one could argue that the legal system is lacking a vital step in its functioning of protecting human rights, since States can take measures against freedom of expression before their actions have been approved as legitimate. States may claim that a publication or expression included incitement to violence and therefore restrict it without any particular risk of it not being legitimate until the Court makes a ruling on the matter.

In cases where no incitement to violence has been found, States are not given a wide margin of appreciation since the legitimate aim of national security is more likely to have lost its purpose. Instead the Court often conclude that the State do not have enough evidence to rely on the interest of national security in order for the Court to decide that the measures were relevant and sufficient. The conclusion drawn from this is that the scope of restricting freedom of expression does not go beyond the need for there to be a pressing social need in order for the State’s measures to be necessary. It must also exist a relevant threat, incitement to violence or other harmful action towards the society and the measures taken must be sufficient and not exaggerated in order to protect the national security. If this is not the case, a violation of Article 10 has occurred.

In Sürek v Turkey (No. 2) it is interesting to point out that the Court decided that the society’s right to receive the information was viewed to weigh heavier than the interest of protecting national security. The Court seems to always take into consideration all circumstances to try to find a fair balance of which interest that is more relevant to protect at the specific time, freedom of expression or national security. In this case, the Court found it to be an unfair balance between the interest of protecting national security and the measures adopted against the applicant, creating a disproportionate interference to the legitimate aim pursued. It is notable that the Court in its argumentation stated more or less that “the harm has already been done”
and therefore the measures taken were disproportionate since the damage the restriction was trying to prevent had already been diminished. All circumstances of a case seem to be relevant in order for the Court to come to a decision, and in particular whether the restrictions will serve a real purpose or not. With regard to this, the requirements of restricting Article 10 must be unclear even from the perspective of the States and it must be difficult for States to calculate when it is too late to try to protect the national security and the measures instead will end up being disproportionate.

In Karatas v Turkey the Court concluded that since the publication was directed to a small audience it limited the impact it would have on national security. Moreover, the reason for the conviction was that the applicant had spread separatist propaganda, not that the publication included incitement to violence and because of this the measures taken by the State was disproportionate. It is thus of great importance which ground a conviction is made on in order to rely on the aim of protecting national security. An expression or publication which include incitement to violence is much easier to restrict on the basis of national security without the risk of the restriction not being proportionate. The potential impact the restricted publication or expression could naturally also play a large role in deciding the scope of Article 10(2) of the Convention with regard to the freedom of expression and the press.

5.2 Derogation

Matilda

It has been stated by the Commissioner for Human Rights, the Venice Commission and Amnesty International that violations of Article 10 the Convention occurred in Turkey during the State of emergency. For example, media outlets and publishing houses were dissolved and liquidated without any judicial proceeding and people were put in detention. These measures face the risk of constituting a violation of Turkey’s negative obligations with regard to the freedom of expression and the press. However, the whole idea of a derogation clause under the Convention is to allow the States to restrict human rights in order to protect the nation in times of emergency and thus the question to be answered in this thesis is to what extent the right to freedom of expression and the press may be infringed under Article 15 and what constitutes a violation.

For a derogation to be legitimate under Article 15, the State need to fulfil certain criteria. During the coup attempt in Turkey, the parliament building and the presidential compound among others were bombarded, the hotel where the President was staying was attacked, the Chief of General Staff was held hostage, television channels were attacked and shots were fired at demonstrators. More than 300 people were killed and over 2,500 were injured. The situation in Turkey at that time may undeniably be considered as an exceptional situation of crisis affecting the whole population and the organised life of the community considering the actual threats posed towards the Government and the deaths and injuries of many people. Both the Court and the Commissioner for Human Rights has confirmed that the attempted coup in Turkey and its aftermath resulted in a public emergency threatening the life of the nation within the meaning of Article 15. However, Turkey’s derogation lasted for about two years. Although there is no case law specifying the need for the emergency to be temporary, Turkey’s derogation was primarily based on the attempted military coup, which was only carried out for one day. It is reasonable to assume that the attempted coup also caused an emergency threatening the life of the nation for a long time to come, however it is noteworthy that the basis of the emergency has not been more thoroughly examined by monitoring bodies throughout the last two years since two years is a long time for human rights to be restricted. The Commissioner for Human Rights did recommend Turkey to immediately withdraw its emergency laws, although not for the reason of they not fulfilling the criteria of Article 15, but because of the violations of human
rights that were carried out in his opinion. The reason for the State of emergency not being more thoroughly examined may have its basis in the wide margin of appreciation given to the States in deciding what constitutes an emergency threatening the life of the nation. The Court has the possibility of making its own assessment in court, however it did not choose to do so in the case of Şahin Alpay v Turkey or Mehmet Hasan Altan v Turkey, possibly because it simply regarded it as a matter of course.

The margin of appreciation given to the States under Article 15 is wide due to them being considered best suited to deal with questions on derogation since they are in continuous contact with the posed threats. This is a reasonable and understandable way of thinking, however it leaves an almost unrestricted freedom to the States to decide on what constitutes an emergency threatening the life of the nation when the Court accepts that there existed such an emergency purely, or at least mostly, due to that being the State’s position on the matter and it not being contested by any other party, as it did in Şahin Alpay v Turkey and Mehmet Hasan Altan v Turkey. One must not forget that the States’ freedom to decide what constitutes a threat of the nation, is at the expense of the right to freedom of expression of many people and it should thus be more carefully evaluated by the Court and other legal bodies.

The States also have a wide margin of appreciation with regard to what measures that are strictly required by the exigencies of the situation and necessary in order to combat the threat, which was stated in the case of Ireland v the United Kingdom. However, the margin of appreciation with regard to the measures required is, compared to the margin of appreciation with regard to what constitutes an emergency threatening the life of nation, a bit smaller in practice. The Court has stated that the existence of an emergency threatening the life of the nation shall not serve as an excuse for limiting freedom of political debate. Measures taken by a State of emergency should seek to protect the democratic order from threats and protect pluralism, tolerance and broadmindedness. The Court recounted this in Şahin Alpay v Turkey and Mehmet Hasan Altan v Turkey and it seems to be an important aspect, especially when it comes to restricting the press due to its important role in contributing to those values. By imposing criminal charges on journalists for provoking or criticising the government, one may risk harming the democracy and the values mentioned above. Restricting the freedom of the press by measures as pre-trial detention of journalists on lack of reasonable suspicion, even though they may later be acquitted, is probable to result in a frightened society where the freedom of expression of many people will be infringed by fear. Moreover, the Venice Commission stated that detention of journalists due to the fact of decree laws justifying such a detention if the journalist had a connection to or membership in a terrorist organisation, may be more harmful for a democratic society rather than it is fulfilling the purpose of protecting it. This statement is well in line with the views of the Court. The only sure legitimate reason for restricting the press, or rather the public’s right to be informed by them, through imposing criminal charges during a derogation seem to be if the expression included incitement to violence, even if the emergency legislation states something else.

In earlier case law from the Court it has however stated that the emergency legislation cannot be torn out of its context without leading to arbitrary results. During the State of emergency in Turkey, several decree laws were adopted. This raises the question of how well these laws corresponded with Turkey’s margin of appreciation. Law 668 made it possible to shut down more than hundred media establishments in order to protect the life of the nation, with the argument of possible connection to a terrorist organisation. Although the decree laws need to be interpreted in light of the emergency situation at hand, States must ensure that the measures taken under the decree laws are necessary, proportionate and for a legitimate purpose even during an emergency threatening the life of the nation. It is highly questionable if Law 668 upheld these criteria. Law 668 was rather undermining the rule of law in the sense that it enabled
Turkey to take measures which were prescribed by law, however the law itself was not proportionate and necessary. As was stated by the Commissioner for Human Rights, the emergency laws provided the Turkish authorities almost limitless discretion, without any judicial control, to restrict the freedom of expression.

With regard to the nature of the measures allowed during a derogation, the Court stated in the case of Lawless v Ireland (No.3) that detention without trial governed with various safeguards may be compatible with what is required by the exigencies of the situation and in the case of Brannigan and McBride v the United Kingdom it stated that detention without judicial supervision for up to seven days do not exceed what is strictly required. However, in the case of Aksoy v Turkey, fourteen days without judicial supervision was viewed as an exceptionally long time and thus exceeded what was strictly required. In the case of Şahin Alpay v Turkey, the applicant was held in pre-trial detention for more than one and a half year, although he had had some judicial supervision. The Court stated in that case that even in particularly serious offences, pre-trial detention must be a measure of last resort. Criticism of the government and publication of information that may endanger national interests should not impose criminal charges for serious crimes such as being a member of, or assisting, a terrorist organisation, attempting to overthrow the government or the constitutional order or scatter terrorist propaganda. The pre-trial detention of a journalist which lack reasonable suspicion thus constitute a violation of Article 10 of the Convention even though it may be prescribed by law.

The measure taken in Şahin Alpay v Turkey had a legal basis in national legislation, however, as was just demonstrated, a measure that is prescribed by law may still exceed what is strictly required by the exigencies of the situation. The Court found serious doubts as to whether the applicant could have foreseen his pre-trial detention based on the relevant law. However, it did not find it necessary to settle this question, which is unfortunate since it thus gives no further guidance as to the legality of the emergency laws. It did however state that “a measure of pre-trial detention that is not “lawful” and has not been effected “in accordance with a procedure prescribed by law” on account of the lack of reasonable suspicion cannot be said to have been strictly required by the exigencies of the situation (…)’.

With regard to the mass liquidations of media establishment, they had a legal basis in Law 668. The liquidation of media establishments was not touched upon in the relevant cases, however, the Venice Commission stated that the mass liquidations of media outlets executed in Turkey without the possibility of timely judicial review, was unacceptable in light of international human rights law. The Commissioner for Human Rights also expressed that neither the coup attempt, nor any other terrorist threats faced by Turkey, could justify the measures taken. Journalists have been granted great protection under Article 10 given that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. When the Court makes an assessment, it will weigh the interests in restricting the publication against the interest of the press in informing people on a matter of public concern and establish if it is proportionate, having regard to the interests of a democratic society in safeguarding and maintaining freedom of the press. Given the wide protection provided to the press in informing the public on matters of public concern, the importance of the press in maintaining a democratic society and that it has a duty to report on oppositions and gatherings, it is most likely that the liquidations of media establishment constituted a violation of Article 10. States also have an obligation to guarantee that the media is free and pluralistic and by liquidating certain media, the pluralism of media is of course being highly reduced. However, when a State derogated under article 15 it is allowed to make certain restrictions on human rights in order to protect the nation. It is not possible to evaluate this question further since there is no case law established on this subject with regard to Turkey’s derogation. The statements of the Venice commission and the Commissioner for Human Rights together with previous statements by the Court
regarding the media, do however indicate an answer to the question of whether the mass liquidations of media establishments constituted a violation.

For a derogation under Article 15 to be applicable, the State must inform the Secretary General. Turkey did notify the derogation and its termination of it along with copies of the legal text under which the measures were to be taken. Turkey did however not choose to mention which Articles in the Convention it would derogate from. In Şahin Alpay v Turkey and Mehmet Hasan Altan v Turkey, the Court took notice of the fact that the notification of derogation by Turkey did not distinctly mention which Articles that were to be subject of the derogation. Specifying which Articles that will be subject of a derogation do not seem to be a requirement of a lawful derogation since it has not been discussed by the Court in its previous judgments regarding derogations. It is therefore notable that the Court took notice of the fact that Turkey’s derogation did not specifically mention this. The Court did however not feel the need to examine this question further since it was not being contested by either of the parties. It therefore accepted this matter on its own motion since it has stated that it will examine the question of whether the formal requirements of a derogation are fulfilled regardless of it being contested by any other party. A plausible reason for that may be that the measure exceeded what was strictly required by the exigencies of the situation and it was thus not important to examine the formal requirements further. It is however unfortunate since it gives no further guidance as to the formal requirements for a lawful derogation.
6. Conclusion

Matilda and Natalie

The extent of which a State may restrict the freedom of expression and the press with the legitimate aim of national security under Article 10(2), or under Article 15 through derogation is compound by many aspects. In consideration of these questions, Turkey’s restrictions on Article 10 are good examples to look at in order to see which restrictions that are legitimate or not in this context.

From the jurisprudence of the Court it has been clarified that for the substantive requirement of Article 10(2) to be fulfilled there must exist a pressing social need in the society. In order for the substantive requirements under Article 15 to be met the State must be under an emergency threatening the life of the nation. States are given a wide margin of appreciation under the substantive requirements and almost limitless freedom to decide what constitutes an emergency threatening the life of the nation since there is no monitoring body that need to approve the decree laws and the measures before they are put into action, they are controlled retroactively. The same applies to measures for the protection of national security. In practice there is no time limit for a derogation, leaving a wide margin of appreciation for States to decide the extent of the derogation. Moreover, the measures taken to protect the interest of national security under Article 10 or 15 of the Convention must be in accordance with the formal requirements of the three part test.

Throughout the Court’s case law many cases regarding restrictions on freedom of expression have been decided on the last criteria of the three part test namely the condition of necessary in a democratic society. The importance of that condition applies to both restrictions under Article 10(2) and Article 15 with regard to freedom of expression. Whether the measures were necessary in a democratic society or not will be weighed against the State’s margin of appreciation with regard to protecting the nation and the relevancy, sufficiency and proportionality of the measures taken in doing so.

The right to freedom of expression is a very complex right and the extent of a lawful restriction under Article 10(2) for the aim of protecting national security and Article 15 depends on all circumstances in each specific case. By examining the Court’s jurisprudence regarding national security, it is clear that important circumstances are the width of the publication, if it contains information of public concern, if the purpose of the aim is unjustified and if the publication contains incitement to violence. Incitement to violence is also an important circumstance with regard to restricting freedom of expression during a derogation. Detention of journalists are probable to result in a violation of Article 10 even during a State of emergency unless the expression or publication included incitement to violence or it can be demonstrated that the detention was made as a last resort. The circumstances surrounding the case do however need to be weighed against the nature of the restriction. What is regarded as necessary in a democratic society and strictly required by the exigencies of the situation also depends on the situation in the State at the time of the restriction. It therefore varies and there is no case law that can be applied to all types of national security situations or emergencies.

Journalists are given a wide protection under Article 10 due that they have an important role as a public watchdog and to serve the purpose of informing the public on matters of public concern in order to uphold a democratic society. Important aspects of a democratic society are throughout the case law of the Court considered to be pluralism, tolerance and broadmindedness and journalist play an important part in contributing to those. Restrictions on the freedom of the press are therefore a delicate matter which need to be carefully weighed against the protection of the State. The States are provided with a wide margin of appreciation at the same time as
journalists and the press enjoy great protection. This creates a conflict of interest between freedom of expression and State security. However, it is certain that the margin of appreciation is not as wide with regard to the press and matters of public concern as it may be with regard to other expressions due to the importance of the press to contribute to a democratic society and restrictions on the press may risk worsening the situation even further rather than contributing in protecting the State.

To conclude, the extent of restricting Article 10 with the legitimate aim of national security or through derogation under Article 15 of the Convention with regard to freedom of the press depends on all the circumstances of each specific case and the nature of the restriction. Although some guidance has been provided through the case law as has been demonstrated above, the lege lata in the Court’s jurisprudence today may not be as foreseeable as it is expected to be. With regard to which restrictions in the context of Turkey that have been deemed legitimate by the Court, the answer depends on the circumstances of the case, the wide margin of appreciation, the nature and proportionality of the measures taken with regard to the situation at hand and the necessity of the measures. The Court has often found a violation due to the criteria of necessary in a democratic society not being fulfilled and Turkey has managed to exceed its margin of appreciation by taking measures as pre-trial detention that were not necessary even in time of emergency.
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