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A Comparative Study of the Freedom of Expression in Turkey and EU

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Abstract

The concept of freedom then is significant both in communication and law. Freedom is guaranteed by the law of the land and international law and regulations. In all historical accounts, freedom and rights of individuals had been significant reasons why constitutions were made and upheld. Freedom of expression is the right of an individual to do as he/she says, write what he/she thinks is right and thus so freely with other people in social life, associations, organizations, to name a few. As such, freedom of expression is a fundamental and vital freedom and right of every individual. The freedom is an associated and it is with a container for basic rights and freedoms. Therefore, any statement relating to this freedom is faced with risks that remain missing. This study tries to attempt under a general point of view the situation of the freedom of expression in Turkey both legally and practically. The study will try to present a comparative way of the EU standards with the Turkish cases. In fact, revealing of the Turkish application may present limited point of view for subsequent studies, because of the freedom of expression is always a hot agenda and the discussions raised day by day on the issue.

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Introduction

Constituting the basis of democracy, freedom of expression is one of the oldest preserved rights. In today's world, systems that internalize the freedom of expression and preserve in whole are the examples of stable and consistent democracy. All citizens in a democratic government have every right to speak, write, publish, broadcast, assemble, demonstrate, picket, and organize in order to advance individual and group goals even when those goals are to criticize other groups or the government. They are encouraged to do so by using the free press, which includes newspapers, magazines, radio stations, television networks, and Internet, that provides them with an opportunity to stay informed of events that affect them.

As stated in the title of this article, it is required to evaluate the issue of freedom of expression in Turkey by splitting it into two parts. The first part is, with a broader method, about the grantedness[1] of this freedom in the constitutional scope with drawing attention to the international regulations on the issue. The second part is about how, as you know, the image of the freedom of expression has not been good for a long time in the eye of the ECHR. In this respect, important judgements of both the Turkish Constitutional Court and European Court of Human Rights (ECHR) will be presented with the current situation.

From this point, through actual implementations, the article tries to discuss whether the freedom of expression is continuously grounded or not in Turkey. Through the metaphors our social structure imposes on the Turkish nation, this article will attempt to exemplify how the condition of the freedom of expression is in practice. So it would be better to concentrate more on outcomes and findings because of it will make easier to understand the actual point of today.

1 The word "granted" has been used in the sense of "legally recognized".

General Characteristics and Scope of the Freedom of Expression

Concept and Scope

Within the framework of the freedom of expression we need to explain the concept of expression itself primarily. In fact, the basis of the concept arises with the thought as a privilege of being human. Freedom of expression, described as thought, belief, opinion, attitude or emotion, is expressed in their peaceful way of being or as being free of the external world, which includes oral and written and artistic impressions, personal appearance and image choice, manifestation, a protest march, meeting and organizational freedom. This freedom refers to the expression of opinions on specific topics, emotions, events and developments to allocation disseminate or express individuals against their own thoughts. So, freedom of expression can reveal itself in many forms as an expression of thought and emotion, creation of a work of art or science.

In this regard, the scope of freedom of expression is "freedom of the people can obtain freely ideas, and ensure that they are not condemned because of the ideas and opportunities to these disseminate with all the legitimate means".[2] In this context, the field that protects the expression can be considered as an external direction of freedom of thoughts.[3] Freedom of expression is specified as the intersection[4] and the core[5] of many other freedoms; it is also the source of freedom due to the presence of many rights and freedom.

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2 Mithat Sancar, "*Düşünce Özgürlüğü: Neden?*", Çağdaş Hukuk, Mayıs-Haziran, 1994, p. 9.

3 Ibid.

4 For the "intersectional freedom" concept see Özipek, Bekir Berat, (Ed.), "*Teorik ve Pratik Boyutlarıyla İfade Hürriyeti*", Liberal Düşünce Topluluğu, Ankara, 2003, ISBN: 975-97566-9-2, p. 8.

5 Freedom of expression refer to the "core freedom" see Çetindağ, A. Funda, "*Türk Anayasal Sisteminde Temel Hak ve Özgürlüklerin Sınırlanması Bağlamında Kamu Düzeni*", T.C. Ankara Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı, Master Thesis, 2004, p. 123.

An expression is not limited to the written or verbal word which is contained in photos, images or actions to express an idea or intended at providing information too. Freedom of expression comprises oral and written expression, artistic representation, and personal appearance and image preferences, and as well it covers demonstration marches, freedom of assembly and association. This freedom portrayed as a "sense of revelation or peaceful expression of the outside world of thought, belief, opinion, and attitude".[6]

In addition, the ECHR recalls that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual self-fulfillment.[7] Also, the Turkish Constitutional Court defines the freedom of expression in the following way; "*individuals can freely reach news and information, cannot be condemned because of thoughts and opinions, and freely express, defend, and be able to transfer and disseminate thoughts and opinions with either alone or in together in various ways*".[8] The Constitutional Court has also specified that the freedom of expression is the bases of pluralism, tolerance and broad-mindedness and without this freedom there will not any "democratic society" as stated by the ECHR.[9]

Freedom of thought is settled by two dimensions which are abstract and static and concrete and dynamic directions. This freedom is supposed to freedom of thought the direction of abstract aspect and the freedom of expression in concrete and dynamic. However, freedom of thought does not mean anything by itself because of the abstract side of the freedom of expression. Actually the freedom of expression is complete to freedom of

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6 Can be viewed on the following studying definition for freedom of expression. Bülent Tanör, "Siyasi Düşünce Hürriyeti ve 1961 Türk Anayasası", Öncü Kitabevi: İstanbul, 1969, p. 27. Özcan Özbey, "*İfade Özgürlüğü Kısıtlamaları*", AÜHFD, Vol. 62 N. (1), 2013, p. 96.

7 *Skałka v. Poland* App. N. 43425/98, para. 7. Retrieved from http://Hudoc.Echr.Coe.İnt/Sites/Eng/Pages/Search.Aspx?İ=001-61105#{"itemid":["001-61105"], 09.02.2014.

8 Application Number (App. N.): 2013/2602, para. 23 vd.

9 *Handyside v. UK*, App. N. 5493/72, 7/12/1976, para. 49.

thought and this is the pivotal point of the human rights problems.[10]

Thus, freedom of thought is exposed to a dichotomy as having a thought and expressing the thought.[11] Therefore, having a certain thought defines a limitless sphere, while expressing the thought is defined as a limitable sphere. But the thought, one of the intellectual activities of the individual, already cannot be limited. In all conscience, it is stated that the real valuable thing is to protect the domain of expressing the thought. The freedom of thought can only have a value in the form of expressing the thoughts. The absolute requirement is the freedom of expressing of thoughts.[12]

Sancar, objects this discrimination which is separated as "the freedom of thought" and "the expression of thought". It is seen that having a specific thought already unlimited, on the hand the dissemination of thoughts described as a limited area. The point where the author rightly criticized that thought which placed between the individual's mental activities cannot be limited unless it preserves the real value of the field for dissemination of thoughts. The thought which is take a part of the individual's mental activities already unlimited. Therefore, Sancar underlined that what is important is the protection of the disclosure of the opinion produced by the human mind.[13]

Consequently, freedom of thought may be of value in the form of dissemination of thoughts and in fact, as of content, dissemination of thoughts should be under the absolute protection. In this regard the protection of thoughts which begin

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10 Gürkan Özocak, "*Türkiye'de Mizahın Siyasi İktidarla İmtihanı: İfade Özgürlüğü ve Karikatür*", TBB Dergisi, N.(94), 2011, p. 6. Retrieved from http://tbbdergisi.barobirlik.org.tr/m2011-94-710. 13.04.2014.

11 In fact, this discrimination itself originated due to from of the Constitution itself. Freedom of thought and expression are individually arranged in the Constitution and is not intended any limitation to the freedom of thought in the Article 25. However regarding freedom of expression the Constitution Article 26 is set for a distinction as right to express and disseminate his/her thoughts and opinions.

12 Sancar, p. 8.

13 Sancar, p. 8-9.

and end in the human mind is meaningless. Therefore, the dissemination of thought which produced by the human mind must be protected.[14]

Therefore, required for understanding, dissemination and from spreading refers to the form; "*the publication of thought, dissemination, to call the thought, being offered to the suggestion of the thought, inspire, convincing in terms of the idea, the propaganda of the idea, criticism, rejection, call made against to any thought, making the fight for an idea.*"[15]

The decision of the ECHR *Handyside v. UK* is one of the important case laws concerning freedom of expression and the definition of the specified scope. According to the Court freedom of expression is "*applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.*" The court established that "s*uch are the demands of that pluralism, tolerance and broad-mindedness without which there is no "democratic society*".[16]

When considering the scope revealed by the ECHR, freedom of expression "is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".[17] Lastly the Council of the European Union published human rights guidelines on freedom of expression online and offline in 2014. According to the guidelines, "freedom of opinion and expression are essential for the fulfilment and enjoyment of a wide range of other human

14 Sancar, p. 9.

15 Quoted from Güran, Osman Can, "*Düşünceyi Açıklama Özgürlüğü: Anayasal Sınırlar Açısından Neler Değişti?*", içinde, Teorik ve Pratik Boyutlarıyla İfade Hürriyeti, Bekir Berat Özipek, (Ed.), Liberal Düşünce Topluluğu, ISBN: 975-97566-9-2, Ankara, 2003, p. 368.

16 *Handyside v. The United Kingdom*, App. N. 5493/72, 7 December 1976, p. 18, Para.26.

17 *Handyside v. The United Kingdom*, Para. 49. *Leyla Şahin v. Turkey*, App. N. 44774/98, 10 November 2005, para. 108. *The Sunday Times v. United Kingdom*, 26 April 1979, para. 65; *Vogt v. Germany*, 26 September 1995, para. 52.

rights, including freedom of association and assembly, freedom of thought, religion or belief, the right to education, the right to take part in cultural life, the right to vote and all other political rights related to participation in public affairs. Democracy cannot exist without them".[18]

Basically ECHR described the scope of the freedom of expression as; freedom to hold opinions, right to the acquisition of information, news, and thought, freedom of dissemination, transportation of thought and information.[19] Freedom of expression is arranged in Article 10 of the Convention, which is does not provide a protected area except limited oral and written expression.

Article 10 of ECHR covers the right to receive information. Hugelier specified that the article does not appear to contain the right to seek information in contrast to both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). In this direction author specified that "*generally regarded that the freedom to hold opinions and the freedom of information, are sub-categories of the freedom of expression*", and according the author there is unquestionably a connection between them.[20]

The ECHR has tried to demonstrate the scope of freedom of expression in various decisions. The category of expression falling within the scope of Article 10 has been drawn largely in the ECHR case-law. For example, the court admitted that pictures aiming to provide or express an idea or information are instances of freedom of expression. The Court agreed that "*Article 10 of the Convention does not specify that freedom of artistic expression....*

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18 Council of the European Union, "*EU Human Rights Guidelines on Freedom of Expression Online and Offline*", Foreign Affairs Council Meeting, Brussels, 12 May 2014, Retrieved from http://eeas.europa.eu/delegations/documents/euhumanrightsguidelinesonfreedomofexpressiononlineandofflineen.pdf, 23-06-2014.

19 *Handyside v. The United Kingdom*, App. N. 5493/72, 7 December 1976, Retrieved from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#{"itemid":["001-57499"]}, 23.03.2014.

20 Sara Hugelier, "*Freedom of Expression and Transparency: Two Sides of One Coin*", Jura Falconis Jg. N. 47, 2010-2011, (1), p. 63-64.

On the other hand, does it distinguish between the various forms of expression? As those appearing before the Court all acknowledged, it includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds".

The second sentence of Article 10/1 refers to *"broadcasting, television or cinema enterprises",* media whose activities extend to the field of art. The court confirmed that *"the concept of freedom of expression is such as to include artistic expression is also to be found in Article 19/2 of the International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas "in the form of art".*[21]

Not only the picture, the image is intended to express ideas and actions, even dress choices may even fall within the scope of Article 10 of the Convention.[22] According to *Oberschlick v. Austria* judgement Court agreed that "*Article 10 Protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.* [23]

In this respect, with key decisions is associated by means of freedom of expression and freedom of the press, the ECHR[24] accepted that printed documents,[25] paintings,[26] radio

21 *Müller and Others v. Switzerland,* App. N. 10737/84, 24 May 1988, para. 27, Retrieved from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57487#{"itemid":["001-57487"], 09.02.2014.

22 *Chorherr C. Autriche*, App. N. 13308/87, 25 Ağustos 1993, Retrieved from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57487#{"itemid":["001-57487"], 09.02.2014. See also *Chorher v. Austria* (1993), and Case of *Stevens v. UK* (1986) judgments.

23 *Oberschlick v. Austria,* App. N. 20834/92, 1 July 1997, para. 34, Retrieved from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58044#{"itemid":["001-58044"]}, 12.05.2014. See also, *Thoma v. Luxembourg*, 2001; Case of *Dichand v. Austria and others*, 2002; *Nikula v. Finland*, (2002).

24 Press freedom *Ürper and Other v. Turkey,* 2009; *Gözel and Özer v. Turkey,* 2010.

25 *Handyside v. The United Kingdom*, App. N. 5493/72, 7 December 1976.

26 *Muller v. Switzerland*, (1986).

broadcasts,[27] and movies[28] including electronic information systems under the protection of the Article 10.

This freedom consists of the right to impart information to others in almost all systems. Pannick and Herberg identified that "*in adopting a broad and purposive meaning of protected speech, the ECHR has held that speech through almost every known, expressive agent falls within the scope of freedom of expression.*"[29]

Therefore, the production and transmission and also tools uses for the allocation and dissemination of thought and ideas fall within the scope of Article 10. However the Court did not suffice with that in addition to in *K. v. Austria* decision has stated that the freedom of expression encompasses also the right of silence or not to express.[30] Consequently, freedom of expression also safeguards both to not to express or to keep silent.

Furthermore the modern industrial world has been largely influenced by one of the humankind's most ingenious and powerful technological developments-the Internet. The Internet, which is laden with informational content, is a most valuable and efficient resource affecting the economy, business, education, and many aspects of human activity. There is an online "virtual library" online ticket booking system, online trading, online education, and many others. The world is sliding into a virtual village with email messaging or chatting. The potent power of the Internet is undoubtedly a boon to a great many.

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27 *Groppera Radio AG v. Switzerland,* (1990).

28 *Otto-Preminger Institut-Avusturya*, (1994).

29 A Lester, D Pannick and J Herberg (Eds.), "Human Rights Law and Practice", (3rd ed), 2009, para 4. 10. 8. Quated from UK Law Commission Consultation Paper, No 213, "*Hate Crime: The Case For Extending The Existing Offences*", Appendix A: Hate Crime and Freedom of Expression under the European Convention on Human Rights, 2013, p.4, Retrieved from http://lawcommission.justice.gov.uk/docs/cp213_hate_crime_appendix-a.pdf, 20.06.2014.

30 The Commission has kept in a criminal case; the plaintiff has preserved its right to withdraw from testifying against him with reference to this right in the case of *K v. Austria.* Monica Macovei, "*İfade Özgrülüğü Avrupa İnsan Hakları Sözleşmesi'nin 10. Maddesi'nin Uygulanmasına Ilişkin Kılavuz*",İnsan Hakları El Kitapları: 2.

Having said that, the freedom of expression reflected on the Internet is the significant main right for people since the creation of the online technologies. In ancient times, people were involved in struggles to obtain freedom of speech by sharing ideas freely and expressed their thoughts in public on issues such as politics, religion and governance, not to mention their laments and censure against those in power. The democratic societies at present have guaranteed these fundamental freedoms and rights. So the Internet provides supplementary help to democratic societies to develop and guarantee such freedoms. Therefore, it is imperative to that the governments not stay behind in using modern technological developments, since it is a blessing.

In this perspective, freedom of expression is recognized as one of the essential conditions of democracy so it is required to secure. The freedom is specified at the national level, especially in terms of constitutional arrangements, as well as the granted of the international framework. Accordingly it would be much better to explain both national and international arrangements in general. Thus, it can be seen whether or not the national situation supports international guarantees with the legal framework. This is respectively important in terms of the fundamental rights and freedoms which have been incorporated into domestic law.

The Issue of Freedom of Expression on Turkish Constitutional Ground

Freedom of expression has long been observed as one of the fundamental principles of modern democracies, which is prerequisite for civil liberties are honored and regarded individual development and fulfillment. As Ralph H. Holsinger and Jon Paul Dilts explained, "*People have struggled to win the right to speak freely and critically about political, economic, religious and social issues*".[31] Thus the freedom of expression is inherently an inalienable right and the most significant freedom as it is extensively delineated in the constitution. [32]

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31 Ralph H. Holsinger and Jon Paul Dilts, "Media Law", New York, 1994, p. 18.

32 Also one of the oldest freedoms as freedom of expression is guaranteed by numerous international agreements from the 1789 French

Claims relating to freedom of expression which is one of the core values of constitutional democracy are tending to the state. This freedom which is expressed political in essence should be protected from arbitrary interference by public authorities. It has a negative character in terms of the classification of the fundamental rights and freedoms in addition obligations imposed on the state. According to the Erdoğan, "*In a country where there is the freedom of expression recognize and secure as a human right, it must protect by the overall legal regulations especially with the constitutions itself.*" [33]

Additionally, the Turkish Constitution's Article 26 sets the freedom of expression and dissemination of thought. The related Article follows as; "*Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing.*"

A parallel arrangement was introduced to include the freedom of dissemination of thoughts and ideas in the Convention. In addition, no limitation was intended for the use of instruments in the light of freedom of expression as it is in the Convention.[34] In

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Declaration of the Rights of Man and Citizen, to the European Convention on Human Rights. In the 1789 French Declaration of Article 11 freedom of thought and expression is regulated by the provisions; "*The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by the Law". Declaration of Human and Civic Rights* of 26 August 1789, Retrieved from http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf, 20.3.2013.

33 Mustafa Erdoğan, "*Demokratik Toplumda İfade Özgürlüğü: Özgürlükçü Bir Perspektif*", içinde Bekir B. Özipek, (Ed.), "Teorik ve Pratik Boyutlarıyla İfade Hürriyeti", Liberal Düşünce Topluluğu, Ankara, 2003 p. 36.

34 Monica Macovei, "*Freedom of Expression: A guide to the implementation of Article 10 of the European Convention on Human Rights*", Council of Europe, Human Rights Handbooks, No. 2, p 20-29. Retrieved from

this way, according to Article 26 of the Constitution, freedom of expression can be used "*by speech, in writing or in pictures or through other media.*" Here the "other ways" statement also safeguards social media, online communication tools or more generally what is expressed through words spread through the Internet.

In fact, the entire communication path that protects in the Article due to coverage of legal regulation should be considered as freedom of expression.[35] Nevertheless, the concept of the freedom of expression arises in the form as news, thoughts and opinions in the arrangement of Article.[36] Through the Article 26 of the Constitution has arranged to that individuals have the right to express and disseminate thoughts and opinion collectively. In this case, the freedom of expression is guaranteed to spread with mass media such as television, radio as well as visual and sensorial communication instruments as well as newspapers, magazines. Consequently, the freedom to formation of ideas or dissemination of thoughts is protected.

International arrangements also need to express in terms of the importance of the Turkish legal order. Article 90 of the Constitution lays down the hierarchical position of international agreements in the Turkish legal order. In Article 90 of the Constitution is arranged of ratification of international treaties. The article shows that importance and hierarchical place of international regulations in terms of the Turkish legal order. An amendment made in 2004, the relevant provisions,[37] endorsed that in case of conflict of Turkish laws with international agreements on fundamental rights and freedoms, the provisions of international agreements shall prevail. The Article reads as follows; "*In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."*

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http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02(2004).pdf , 20.06.2014.

35 Can, p. 326.

36 Can, p. 363.

37 Sentence added on May 7, 2004; Act No. 5170.

The provision even though subject to a number of controversies, fundamental rights and freedoms have been incorporated into domestic law (such as the UN and EC Conventions) requires the adoption of international conventions take precedence over the law.[38]

1966 UN ICCPR,[39] as well as the 1950 European Convention on Human Rights (Convention) adopted as a universal human right of freedom of expression is regulated in Article 10. The Convention Article 9 is arranged freedom of thought, conscience and religion.[40] The first paragraph of Article 10 of the Convention

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38 In accordance with the relevant provision of the Constitution, international agreements are accepted as a form of law in the hierarchy of norms. In terms, international agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional.

39 UN ICCPR Article 18th, "*1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.* " Retrieved from http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, 02.04.2014.

40 ECHR Article 9; "*Freedom of thought, conscience and religion; 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.* " Retrieved from http://www.echr.coe.int/Documents/Convention_ENG.pdf.12-02-013.

regulates on freedom of expression, and paragraph 2 contains the limitation system. The Convention Article 10 (1) reads as follows;

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[41]

Also, the Charter of Paris for a New Europe in 1990 which gives place to the freedom of expression has been described as being essential for the existence of a democratic society.[42] As the stated title of the freedom of expression is "*Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person*".[43] Additionally, the Charter affirms that *"without discrimination, every individual has the right to freedom of thought, conscience and religion or belief, freedom of expression."*[44] Likewise, the 1948 Universal Declaration of Human Rights is considered one of the

41 The Convention, Retrieved from http://conventions.coe.int/treaty/en/treaties/html/005.htm. 22-03-2013.

42 The Paris Charter, particularly the provisions relating to human rights is allocated through in the title of the "Human Rights, Democracy and Rule of Law". In Turkish version of *Charter of Paris* reads from http://www.tbmm.gov.tr/ul_kom/agit/paris_sarti.htm.

43 Whereas, the Charter an emphasis on the fundamental importance of democracy, which is regarded as the classic Western democracies adopted the representation and understanding of pluralistic democracy. Melda Sur, "*Paris Şartı'nda İnsan Hakları*", Ankara Üniversitesi SBF Dergisi, Cilt: 47 Sayı: 3, 1992. Here the relationship of democracy and freedom of expression is expressed as follows. "Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law. Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law."

44 Other fundamental rights and freedom are some of related to the freedom of the individual some of related to the collective mentioned in the Charter.See "*Charter of Paris for A New Europe*", Paris, 1990, p. 3.

most fundamental international agreements on rights and freedoms to comprise similarly the freedom of expression.[45] Freedom of expression is considered as a source or as the intersection of the freedoms which are based on many rights and freedoms, and it has a close relationship with them.[46]

Freedom of expression is described as core freedoms, because it covers a very large domain and constitutes the reason of existence of many freedoms.[47]

The expression of the thoughts, if carried out through the print media such as newspapers, books, this includes the "freedom of the press", if it is carried out by the radio, television and art, it covers the "freedom of audio-visual communication". As well, individuals coming together with other individuals expressing their views are related with "freedom of assembly" or "freedom of association".[48] If the expression of thoughts done with the communication methods such as that between people's private and confidential letters[49], announcements, brochures, and bulletins, then is in this case there is "freedom of

45 Article 19 reads as follows; "*Everyone has the right to freedom of opinion and expression; this right includes* freedom *to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*."

46 Court, Individual Case Judgement, App. N. : 2013/2602, 23.1.2014, para. 44.

47 The freedom of expression content is described ECHR as follows; Freedom to hold opinions, Right to acquisition of Information, news, and thought, freedom of dissemination / transportation of thought and Information. *Handyside v. UK*, App. N. 5493/72, (1976).

48 Ömer Korkmaz, "*Düşünce Özgürlüğü ve Sınırları*", Prof. Dr. Seyfullah Edis'e Armağan, Dokuz Eylül Üniversitesi Yayını, İzmir, 2000, p. 126.

49 See for a detailed comparative study on the issue of freedom of expression and Privacy, Sultan Üzeltürk, "*Özel Hayatın Gizliliği Hakkı, 1982 Anayasası ve İnsan Hakları Avrupa Sözleşmesine Göre*", Beta Basım Yayım, İstanbul, 2004. Also see Sultan Uzeltürk, "*Birleşik Krallık'ta Görsel ve İşitsel İletişim Özgürlüğünün Kurumsal Sınırı: Bağımsız Televizyon Komisyonu (ITC)*", İnsan Hakları Yıllığı, Dr.Muzaffer Sencer'e Armağan, C.17-18, 1995-1996.

communication".[50] In this regard the situation of the Turkish constitutional provisions will be explained as follows, and it relates to the regulation of freedom.

Freedom of Thought and Opinion

As stated above, the idea is an integral part of the expression. In this respect, the Constitution of the Republic of Turkey regulates freedom of thought as in many democratic constitutional orders. In this aspect the Constitution designated that abstract and static direction of the freedom, in the Article 25. The article arranged freedom of thought and opinion,[51] and it reads as follows; "*Everyone has the freedom of thought and opinion. No one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose; nor shall anyone be blamed or accused because of his/her thoughts and opinions*". Likewise protected scope of the freedom of thought held in Article 9 of the Convention is to express a thought. [52]

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50 Süleyman Dost ve Enver Bozkurt, "*Avrupa İnsan Hakları Mahkemesi Kararlarında İfade Özgürlüğü ve Türkiye*", Süleyman Demirel Üniversitesi İktisadi ve İdari Bilimler Fakültesi, 2002, C. 7, S. l, p. 48.

51 Özocak, "*Türkiye'de Mizahın Siyasi İktidarla İmtihanı: İfade Özgürlüğü ve Karikatür*".

52 Article 9 of the European Convention of Human Rights describe to the expression of thoughts see page 7. In addition to this, which is an important milestone in the development of universal fundamental rights and freedoms after World War II, the UN International Covenant on Civil and Political Rights is regulated to that freedom in Article 18 and 19. Article 18 of the Declaration is expressed that "*Everyone shall have the right to freedom of thought, conscience and religion*". In the first paragraph of Article 19 stated that "*Everyone shall have the right to hold opinions without interference.*" In the same Article, paragraph 2 of this freedom is expressed to include "*2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*"[52] Rest of the Article 19 reads as follows, "*... 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national*

In this circumstance, freedom of expression includes the right to have a particular opinion without the intervention of public authorities.[53] It is also required that there be a guarantee to have a particular opinion in terms of the press tools. In this way Article 31 of the Constitution, to form opinions is to guarantee the use of the mass media in the hands of public entities with the title "*Right to use media other than the press owned by public corporations.*"[54]

Freedom of the Press

The conceptual difference between the freedom of expression and freedom of the press are clear enough. In this direction, the term of expression is the *substance*, and the press is the *container* of the freedom.[55]

According to the Constitution to fulfill press freedom is a valid and vital freedom for everyone because it is the function of the press on behalf of the people who depend on the public's public inspection duty to be free. Freedom of expression constitutes one of the essential foundations of a democratic society, and the

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security or of public order (ordre public), or of public health or morals. " Retrieved from http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, 02.04.2014.

53 As stated in ECHR Art. 10 para. 1; "*This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*".

54 Article 31 of Constitution expresses that; "*Individuals and political parties have the right to use mass media and means of communication other than the press owned by public corporations. The conditions and procedures for such use shall be regulated by law.* (As amended on October 3, 2001; Act No. 4709) *The law shall not impose restrictions preventing the public from receiving information or accessing ideas and opinions through these media, or preventing public opinion from being freely formed, on the grounds other than national security, public order, or the protection of public morals and health*".

55 Zeno-Zencovich, Vincenzo, "Freedom of Expression: A Critical and Comparative Analysis", Routledge-Cavendish: USA-Canada, First published 2008, p. 1.

safeguards to be afforded to the press are particularly important.[56]

Concerning the freedom of expression in Article 26 of the Constitution the spread of this freedom is granted by such as television, radio, visual and audio communication tools as well as newspapers, magazines, printed media tools by means of mass communication mediums. Furthermore, when considered in the context of the right to disseminate thought and ideas have also arisen the close relationship of freedom of expression and press freedom.[57]

Indeed, freedom of expression is contained within a close relationship with freedom of the press, organized in a separate title in the Constitution. Provisions relating to the press and publication of the Constitution begin with regulation press freedom in Article 28. The Article granted that, "Press is free, and shall not be censored" and "the establishment of a printing house[58] shall not be subject to prior permission or the deposit of a financial guarantee".[59]

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56 Court Case of App. N.: 2013/2602, para. 46. Also see Court Cases Number with E. 1997/19, K. 1997/66, K. T. 23/10/1997),(For ECHR judgments in a similar direction. *Lingens v. Austria*, App. No: 9815/82, 8/7/1986, par. 41; *Özgür radyo-Ses Radyo Televizyon Yapım ve Tanıtım AŞ v. Turkey,* App. No: 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30/3/2006, par. 78; *Jersild v. Denmark,* App. No. : 15890/89, 23/9/1994, par. 31.

57 Sibel İnceoğlu, (Ed.), "İnsan Hakları Avrupa Sözleşmesi ve Anayasa", içinde Ulaş Karan, "*İfade Özgürlüğü Hakkı*", Beta Yayınları, İstanbul, 2013, p. 367.

58 Repealed on October 3, 2001; Act No. 4709.

59 The substance of the Article 28 is as follows. Constitution Article 28; "… *The State shall take the necessary measures to ensure freedom of the press and information. In the limitation of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply. Anyone who writes any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets or has them printed, and anyone who prints or transmits such news or articles to others for the purposes above, shall be held responsible under the law relevant to these offences. Distribution may be prevented as a precautionary measure by the decision of a judge, or in case delay is deemed*

Also, additional safeguards were introduced for the protection of press tools in the Articles 29 and 30 of the Constitution. In this regard, Article 29 is settled to the "Right to publish periodicals,

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prejudicial, by the competent authority explicitly designated by law. The authority preventing the distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order preventing distribution shall become null and void unless upheld by a competent judge within forty-eight hours at the latest. No ban shall be placed on the reporting of events, except by the decision of judge issued within the limits specified by law, to ensure proper functioning of the judiciary. Periodical and non-periodical publications may be seized by a decision of a judge in cases of ongoing investigation or prosecution of crimes specified by law; or by order of the competent authority explicitly designated by law, in situations where delay may constitute a prejudice with respect to the protection of the indivisible integrity of the State with its territory and nation, national security, public order or public morals and for the prevention of crime. The competent authority issuing the order to seize shall notify a competent judge of its decision within twenty-four hours at the latest; the order to seize shall become null and void unless upheld by a judge within forty-eight hours at the latest. General provisions shall apply when seizing and confiscating periodicals and non-periodicals for reasons of criminal investigation and prosecution. Periodicals published in Turkey may be temporarily suspended by court ruling if found to contain material which contravenes the indivisible integrity of the State with its territory and nation, the fundamental principles of the Republic, national security and public morals. Any publication which clearly bears the characteristics of being a continuation of a suspended periodical is prohibited; and shall be seized by decision of a judge."

60 Art. 29; *"Publication of periodicals or non-periodicals shall not be subject to prior authorization or the deposit of a financial guarantee. Submission of the information and documents specified by law to the competent authority designated by law is sufficient to publish a periodical. If these information and documents are found to contravene the laws, the competent authority shall apply to the court for suspension of publication.*

The principles regarding the publication, the conditions of publication and the financial resources of periodicals, and the profession of journalism shall be regulated by law. The law shall not impose any political, economic, financial, and technical conditions obstructing or making difficult the free dissemination of news, thoughts, or opinions. Periodicals shall have equal access to the means and facilities of the State, other public corporate bodies, and their agencies."

61 Art. 30- *"(As amended on May 7, 2004; Act No. 5170) A printing house and its annexes, duly established as a press enterprise under law, and press equipment shall not be seized, confiscated, or barred from operation on the grounds of having been used in a crime."*

and non-periodicals",[60] and Article 30 is organized to the "*Protection of printing facilities*".[61]

An additional regulation for the press tools is found in Article 133 of the Constitution. The article is regulated as follows; to the "*Radio and Television Supreme Council, institutions of radio and television, and public affiliated news agencies.*" According to the article located on the provision of the Constitution "*Radio and television stations shall be established and operated freely in conformity with rules to be determined by law.*"[62] So the right to dissemination of thought and ideas shows considerable overlap with the ECHR and the Constitution.[63]

Freedom of Science and Art

The establishment of relations between the freedom of expression and freedom of science and art should be noted that it is not only writing or publishing books, articles, essays, novels and stories without restrictions. Accordingly, painting, sculptures, theatre, wearing certain outfits, setting up meetings or participating in a community are also specified within the scope.[64]

The content or quality of the information or of any ideas regardless of where, how, and how correctly they explained or described, is recognized in the safeguarding area of freedom in the use of freedom of expression.[65] In this sense, expression or

62 The article continuously as; "…*(Paragraph added on June 21, 2005; Act No. 5370) The Radio and Television Supreme Council, established for the purpose of regulation and supervision of radio and television activities, is composed of nine members. The members are elected, on the basis of number of members allocated to each political party group, by the Plenary of the Grand National Assembly of Turkey from among the candidates, twice the number of which is nominated by political party groups in proportion to their number of members. The formation, duties and powers of the Radio and Television Supreme Council, and qualifications, election procedures and term of office of its members shall be regulated by law. The unique radio and television institution established by the State as a public corporate body and the news agencies which receive aid from public corporate bodies shall be autonomous and their broadcasts shall be impartial*".

63 Karan, "*İfade Özgürlüğü Hakkı*", p. 368.

64 Dost and Bozkurt, p. 48.

65 Dost and Bozkurt, p. 48.

dissemination of ideas through art and science is one of the external ways or forms of manifestation. Also, the artistic and scientific expressions are contained by the scope of this freedom by the ECHR.

On this basis also the Constitution held that, "*Everyone has the right to study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely*". Freedom of science and the arts which is arranged in Article 27 of the Constitution, held that the right to disseminate ideas related to academic and arts is reads as follows; "*The right to disseminate shall not be exercised for the purpose of changing the provisions of articles 1, 2 and 3 of the Constitution. The provision of this article shall not preclude regulation by law of the entry and distribution of foreign publications in the country".*[66]

Article 130 of the Constitution also covers academic expressions. The basic principles for higher education given by the article[67] are stated as "*Universities, members of the teaching staff and their assistants may freely engage in all kinds of scientific research and publication.*" Freedom of expression is specified as limited in terms of research and publishing research in the Article.

There are no significant differences between the Constitution and the European Convention with regard to freedom of expression in such areas as thought, science, art, and the press. Thus especially in 2001, Turkey adopted a major Constitutional package that addressed the articles on freedom of expression and amended by 34 modifications to the 1982 Constitution. It was a first constitutional reform package that intended at achieving the

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66 According to Constitution, first three provisions are not amendable or not to be proposed for amend. This limitation or irrevocable provisions are regulated in Article 4 of the Constitution. "*The provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed.*"

67 Article 130 para. 4th; "*Universities, members of the teaching staff and their assistants may freely engage in all kinds of scientific research and publication. However, this shall not include the liberty to engage in activities against the existence and independence of the State, and against the integrity and indivisibility of the nation and the country.* "

Turkish objectives under the National Programme for the Adoption of the Acquis.[68] In this case it is necessary to compare the restrictions imposed on the fundamental rights and freedoms both from the ECHR and constitutional Turkish perspective.

Limitation and Assurance Mechanisms of Freedom of Expression

Özbey pointed out that freedom of expression is one of the most important elements to being a free individual and having a free society. However, the expressions are not totally free even in democratic free countries. Even in democratic countries with a tradition of freedom of expression, legislators, judges, prosecutors and citizens will be faced with such problems as which expression should be protected, which can be punished, what freedom of expression is justified and how it should be balanced against other rights of freedom of expression. Since the answers those problems are invited to political, religious and cultural reviews.[69]

Mendel stated that freedom of expression is a "*lynchpin of democracy, key to the protection of all human rights, and fundamental to human dignity in its own right.*" The author also identified that it is not an absolute right, and every democracy has established some system of limitations or assurances on freedom of expression.[70] In a political system is expected to be granted in other words it should be taken under protection of freedom of expression by all legislations at first with the constitutions. Representing the current state of freedom of

68 Amended on October 3, 2001; Act No. 4709. These reforms were continued is 2002, 2003 and 2004 in terms of Adoption of the Acquis to EU.

69 Özbey, p. 43.

70 Toby Mendel, "*Restricting Freedom of Expression: Standards and Principles*", Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression, Center for Law and Democracy, Retrieved from http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf. Date: 22.04.2014.

expression undoubtedly should provide information about the legal framework in Turkey.

In this way people have been released their opinions, thoughts and feelings, in the broader sense of view, belief, attitude or emotion peacefully way. So called that, this grantedness or recognizing legally for the freedom prevent the arbitrary interventions by the State or public authorities. However, there are also important to remind that the application of the freedom is problematic sometimes. Obviously, it is more important the application or practice than the legality from the transformation of freedom of expression a legally granted in to the punishment in Turkey.

Constitutional Assurance and Limitation Orders

Therefore, the protection of the freedom of expression which can be considered as one of the basic principles of constitutional democracy recognized a fundamental issue of democracy.[71] Freedom of expression which is important for the development of individual autonomy, in this sense introduces a negative obligation for the governments. Accepted as a personal freedom or individual rights, freedom of the expression preserved the obligation of the state to interfere or to touch.[72] Therefore, fundamental rights and freedoms such as freedom of expression is an integral part of the democratic process which is imperative for the performing of democracy.

On the other hand, in a democratic country, there should be some boundaries of the freedoms as it is in the situation of the freedom of expression. However, these imitating boundaries should be clearly drawn by the constitutions. As indicated by Alacakaptan, even in philosophical sense may be to put forward

71 Erdoğan, "*İfade Özgürlüğü ve Sınırları*", p. 20.

72 The author is also added that elects and to be elected, establish political parties and become a member of a political party, briefly the freedom of political activity of the fundamental rights and freedoms. Mehmet Turhan, "*Anayasamız ve Demokratik Toplum Düzeninin Gerekleri*", Anayasa Yargısı 8, Ankara, 1991, p. 412.

that the idea of unlimited freedoms, there is no doubt of the validity of this idea in organized political society. [73]

Therefore, restrictions on freedom must be based on objective criteria and reasons in democracies. These restrictions must be adopted by the states that have drawn the boundaries of the margin of appreciation, without exceeding legitimate boundaries drawn with international conventions.[74]

Constitutional Assurance

It should be noted, it is not to possible to talk about existence of a constitution in a society where human rights are not properly recognize or the separation of powers is not provided.[75] So, guarantees relating to human rights are in a secure area even though with the implements of democracy will not be removed in real democracy. [76]

Constitution has been granted certain of assurances in respect of all fundamental rights and freedoms. Article 14 in particular brings important assurance for the freedoms with the heading "*Prohibition of abuse of fundamental rights and freedoms".*

The article was amended 2001[77] and it regulates that; "*None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger*

73 Noted form Alacakaptan, Özbey, p. 46. Original Article, Uğur, Alacakaptan "Fikir ve Düşünce Özgürlüğü ve Tehlike Suçları, Çağdaş Batı Hukukunda Bu Konudaki Düşünce ve Uygulamalar-Türk Uygulaması ve Değerlendirmesi", Hukuk Kurultayı 2000, C. 2, Ankara, s. 7.

74 Özbey, p. 46.

75 Ahmet Mumcu, "İnsan Hakları ve Kamu Özgürlükleri". 2. b. Ankara: Savaş Yayınları, 1994. p. 77-82.

76 İonna Kuçuradi, "Yirmi birinci Yüzyılın Eşiğinde Demokrasi Kavramı ve Sorunları", Hacettepe Üniversitesi Edebiyat Fakültesi Dergisi, Cumhuriyetimizin 75. Yılı Özel Sayısı, p. 25.

77 As amended on October 3, 2001; Law No.4709. Retrieved from http://global.tbmm.gov.tr/docs/constitution_en.pdf, 20.2.2013.

the existence of the democratic and secular order of the Republic based on human rights."

Also an assurance section of the article carries vital protection on account of freedoms and rights which is identified that; "*No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution. The sanctions to be applied against those who perpetrate activities contrary to these provisions shall be determined by law.*"

In 2001, the amendment of the Constitution made significant progress by achieving the restriction of the fundamental rights and freedoms system. The restriction of the fundamental rights and freedoms had a layered limitation system before in 2001. But today's freedom and rights can only be restricted by the "related reasons" which are the only reasons specified as regulated within the associated Article. In this aspect Article 14 of the Constitution was encountered in the form of a general limitation provision in the framework of limitation of the layering order before 2001.[78]

However, despite the changes, Article 14 has not ceased being a limiting instrument in terms of freedom of expression. In fact, the content of the article appears to prevent the elimination of the fundamental rights and freedoms. Karan, draws attention to how the reasons in the second part of the article could be restrictive to

78 General limitation of fundamental rights and freedoms according to layering limitation order was shown as; General limitations and causes (Art. 13), causes particular limitation within the related articles, prohibition of abuse of fundamental rights and freedom (Art. 14) and also preventing abusing of fundamental rights and freedoms (Art. 15). For more infromation about layering limitation order, Mehmet Sağlam, "*Ekim 2001 Tarihinde Yapilan Anayasa Değişiklikleri Sonrasinda Düzenlendikleri Maddede Hiçbir Sinirlama Nedenine Yer Verilmemiş Olan Temel Hak ve Özgürlüklerin Siniri Sorunu*", Anayasa Yargısı Dergisi, Pages 233-266, N: 19, 2002, p. 246.

the freedoms.[79] Indeed, the reason "*indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights*" is not especially for reasons that are included in the ECHR. In this case, it poses difficulties as it is freedom in terms of all basic rights and freedoms in terms of freedom of expression.

The second issue within the scope of the problem of substance is the concept of "*activities"* in the article, so there is an ambiguity in that subject.[80] At this point it is ambiguous in what ways these activities such publishing, word, thought, expression, or manner the action will emerge.[81]

As shown by the facts, it should be noted that concretization by laws is not successful in terms of Anti-Terrorism Law (ATL)[82] and

79 Karan, p. 373. In the same direction see, Osman Can, "*Anayasa Değişiklikleri ve Düşünceyi Açıklama Özgürlüğü"*, Anayasa Yargısı Dergisi, Anayasa Mahkemesi Yayınları, N. 19, 2002, p. 504.

80 Osman Can, "*Anayasa Değişiklikleri ve Düşünceyi Açıklama Özgürlüğü*, p. 511.

81 Related Article is also obscure material in terms of the other provisions of the Constitution. For example, in Article 83, which covered parliamentary immunities expressed that one of the exceptions of the immunity is cases subject to Article 14. Art. 83 2nd para.; *"…. A deputy who is alleged to have committed an offence before or after election shall not be detained, interrogated, arrested or tried unless the Assembly decides otherwise. This provision shall not apply in cases where a member is caught in flagrante delicto requiring heavy penalty and in cases subject to Article 14 of the Constitution as long as an investigation has been initiated before the election. However, in such situations the competent authority has to notify the Grand National Assembly of Turkey of the case immediately and directly…"* Retrieved from http://global.tbmm.gov.tr/docs/constitution_en.pdf, 20.05.2014.

82 This is due to the limitation of freedom of expression are frequently encountered *Anti-Terror Law*. Anti-Terror Law No. 3713 of 12 April 1991. Unchanged version of the related Act, particular Article 8 has been the subject of a lot of decisions in front of ECHR. Act No. 3713 of 12 April 1991 has undergone many changes to the present day in 2003, 2006, 2010, 2012, 2013, and in recently 2014.

Turkish Penal Law (TPL).[83] Due to the provision of the relevant legislation, it has been given many compensations to Turkey in a number of cases of the ECHR.[84] Therefore, as applicable laws, concrete borders for freedom of expression must be clear, understandable and objective, and they also must remain within other assurance criteria of the Constitution.[85]

Thus, because Article 14 prevents the abuse of fundamental rights and freedoms, it can be seen as a means of restriction. At the same time, it is for the same reasons that in Article 14 particular limitations are placed on the freedom of expression and the freedoms associated with it. Hereof, it seems to be sensitive especially in national security and matters relating to the indivisible integrity of the state. The relationship with national security issues of freedom of expression is stated in the EU Guideline on freedom of expression, and it is included as follows; "*…the protection of national security can be misused to the detriment of freedom of expression. States must take care to ensure that anti-terrorism laws, treason laws or similar provisions relating to national security (state secrets laws, sedition laws, etc.) are crafted and applied in a manner that is in conformity with their obligations under international human rights law."*[86]

Also in the Article 13 of the Constitution is presented the limitation of the freedoms as well as each area of protection of the freedom systems. In 2001, as revised by the constitutional amendments, fundamental rights and freedoms may be restricted with some conditions which are stated below.[87]

This limitations order made through the process of Turkey's compliance with EU legislation are mostly adopted by the

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83 Naim Karakaya and Hande Özhabeş, "*Yargı Paketleri: Hak ve Özgürlükler Açısından Bir Değerlendirme Geniş Kapsamlı Rapor*", Tesev Yayınları, 2013, p. 22, 67.

84 Such cases as follows; *Ersöz, Çetın, Kaya, Ülkem Basin ve Yayincilik Sanayi Ticaret Ltd. v. Turkey*, App. N. 23144/93), 1995; *Aslan v. Turkey*, App. N. 23462/94, 1994.

85 Karan, p. 374.

86 *EU Human Rights Guidelines on Freedom of Expression Online and Offline*", p. 16.

87 As amended on October 3, 2001; Act No. 4709

Convention. Before the relevant constitutional provisions, this arrangement enumerated also general limitations for fundamental rights and freedoms. General limitations were removed from Article 13, and they were used to limit the fundamental rights and freedoms with constitutional changes in 2001. Thus, restrictions on the fundamental rights and freedoms are in conformity only with the reasons mentioned in the relevant articles of the Constitution. However, this situation does not mean that there cannot be any objective limits of the fundamental rights and freedoms arising from its own nature.

Restriction of fundamental rights and freedoms Article 13 is recognized as follows;[88] "*Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality*."

In this direction, the limiting of the rights and freedoms must rely on these conditions; *by law*, *in conformity with the reasons mentioned in the relevant articles of the Constitution*; *without infringing upon their essence of the freedom and rights; shall not be contrary to the letter and spirit of the Constitution; These restrictions shall not be contrary to the democratic order of the society; These restrictions shall not be contrary to secular republic and these restrictions shall not be contrary to the principle of proportionality.*

As eligibility criteria to the requirements necessary in a democratic society and *without infringing upon their essence* are given an indication as the latest measure first mandatory restrictions on freedom of expression or the latest exceptional measures to be in the nature and limitations of remedies that can be referenced or the latest precautions.[89]

88 As amended on October 3, 2001; Act No. 4709.

89 The Court referenced to the ECHR *Janowski v. Polonya,* B. No: 25716/94, 21/1/1999, Para. 32-35 decision.

Another general assurance mechanism of the Constitution is regulated in Article 15. Suspension of the exercise of fundamental rights and freedoms is a a core protected area in terms of individuals' fundamental rights and freedoms, even in these exceptional cases. In the article, both general and specific guarantees are foreseen for a period of exceptional mechanisms. General guarantee indicated that; "*In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.*"

But the specific guarantee regulated in the second paragraph of the Article which is also amended in 2004 is stated as follows;[90] "*Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling.*"

In Turkey, especially article 14th of the Constitution may become a limiting tool rather than an assurance even the constitutional guarantees are improved through the amendments. Then, the special reasons for limitation of the constitutional rights and freedom have been increased through constitutional amendments. Therefore the general limitation regime and the special limitation reason of the freedom of expression will take into consideration of the Constitution in following title.

Constitutional Limitation Reasons

Article 25 of the Constitution arranges the freedom of thought which does not predict any limitation on the freedom.[91] However,

90 As amended on May 7, 2004; Act No. 5170.

91 Everyone has the freedom of thought and opinion. No one shall be compelled to reveal his/her thoughts and opinions for any reason or

Article 26th is granted to the freedom of expression and regulates specific limitation reasons. Therefore, any limitations on freedom of expression must be based on the following reasons by law.

The special limitation reasons for freedom of expression are; *national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary*. [92]

In addition, Article 26 ruled that, "*regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented.*"[93]

"*The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law*" as well as ordered in the Art. 26.[94]

Osman Can indicates that this freedom is primarily a subjective freedom. So, thoughts that fall within the scope of freedom based on individual perceptions are not consistent enough to make the discrimination such "valuable", "useful", "good", "ethically" or "accordance with the constitution". According to the author, to make this distinction, freedom ceases to be freedom. Besides that finds its reflection in the Turkish legal literature in a way, there is no point of emphasis only "the indispensable idea for democratic life". Osman Can indicates the idea that to limit the freedom of the institutional objective sphere after all this ideas itself repudiate that freedom of expression is individual fact above all else. Author states that "*Freedom of dissemination of thoughts is*

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purpose; nor shall anyone be blamed or accused because of his/her thoughts and opinions.

92 Article 26 is amended by Act. 4709 in October 3, 2001.

93 Repealed on October 3, 2001; Act No. 4709

94 Paragraph added on October 3, 2001; Act No. 4709

an institutional, democratic and objective freedom; but it is primarily an individual-subjective freedom".[95]

Consider the limits on the freedom of press organized in Article 28, which structures the provision press and freedom of information obligations regarding the state. The continuation of the provision grants that, the "*state shall take the necessary measures to ensure freedom of the press and information."*

In the continuance of the substance, the reasons for any limitations on freedom of the press were counted individually and were not satisfied with these reasons, and it also stated that it is subjected to the limitation reasons of Article 27 of 26 of the Constitution. The regulation statement is as follows; *"In the limitation of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply."*[96]

Therefore, the provisions relating to freedom of the press and expression continue with Article 29, which provides the right to publish periodicals and non-periodicals.[97] The Constitution is also organized so that "Protection of printing" of the press in Article 30 in addition to the related article has been amended in 2004.[98]

The right to use media other than the press owned by public corporations is regulated in Article 31, and here especially there were changes to the second paragraph of the article made in 2001.[99] Also the form of the specified constraint causes for the

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95 Can, p. 364-365.

96 See footnote 57 for the rest of the Article 28.

97 See footnote 59 for the rest of the Article 29.

98 As amended on May 7, 2004; Act No. 5170.

99 As amended on October 3, 2001; Act No. 4709. Here we should considered that therefore the other is the right regarding freedom of expression and freedom of the press which is regulated in Article 32. of Constitution. Right of rectification and reply; The right of rectification and reply, shall be regulated by law and shall be accorded only in cases where personal reputation and honour is injured or in case of publications of unfounded allegation in Article 32 of the Constitution. In Article continues;, "*If a rectification or reply is not published, the judge decides,*

right established as; *national security, public order, or the protection of public morals and health*".[100]

Limitation and Assurance Mechanisms of Freedom of Expression in the Convention

Freedom of expression is regulated in Paragraph 1 of Article 10; however paragraph 2 reveals the limitation reasons and areas of use of the Convention. In this regard, paragraph 2 of the article refers to the duties and responsibilities and gives place to limitation reasons for the freedom of expression. Causes and conditions of the limitation reasons are also shown in the Article 10 of the Convention. According to the convention, the limitation must be based on reasons which are stated in the 2nd paragraph of the Article 10. The exercise of this freedom may be restricted for the purposes of; "…in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[101]

Also the Convention contains an assurance clause for the rights and freedom which are arranged in the Convention. Article 17 of the Convention arranged the Prohibition of abuse of rights as follows**;** *"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."* In fact, Article 17 is not considered to be only a matter of freedom of expression; it is also associated with many other rights in the Convention.

The exercise of the freedom of the expression is carries with it duties and responsibilities, and according to the Convention it

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within seven days of Involved appeal by the individual, whether or not this publication is required. "

100 See footnote 56 for the rest of the Article 28.

101 See footnote 35 p. 8 for the first part of the Article.

may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society. The Commission and the Council, has found in some applications the basis of the exception in Article 10, paragraph 2 and/or Article 17 of the Convention. In this regard, many of the Court decisions have continued to connect with racist, xenophobic, anti-Semitic deniers.[102] Article 17, has also been implemented in order to prevent the exercise of freedom of expression in order to promote the use of the expression of revisionist or deniers.[103]

From another standpoint, whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society".[104]

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102 As the Commission decisions, *Honsik v. Austria*, App. N. 25062/94 , 18. 10. 1995; *Remer v. Germany*, 6. 9. 1995; *Marais v. France*, 24. 6. 1996. Retrieved from http://hudoc. echr. coe. int/sites/eng/pages/search. aspx?i=001-2362#{"itemid":["001-2362"]}, 10. 10. 2014.

103 Related that one of important case is Court considers that for facts "it is not its task to settle this point, which is part of an ongoing debate among historians about the events in question and their interpretation. As such, it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17", prg 47. . Also court "the justification of a" stated pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10". Para. 53. Case of *Lehideux and Isorni v. France*, App. No. 55/1997/839/1045, 23 September 1998, Retrieved from http://hudoc. echr. coe. int/sites/eng/pages/search. aspx?i=001-58245#{"itemid":["001-58245"]}, 12. 10. 2014.

104 Michael John Allen, Michael Allen and Brian Thompson, "Cases and Materials on Constitutional and Administrative Law", Oxford University Press, 2008, Oxford, p. 418. Also see *Handyside v. UK*, para. 49.

At that point, in terms of limitation reasons or legitimate aims there are no excessive differences between the Turkish Constitution and the Convention. Then, according to the European Court of Human Rights (ECHR), any restrictions must pass the following combination of three conditions; *prescribed by law, based on a legitimate aim and necessary in a democratic society* which are parameters on these limitation reasons. The ECHR has agreed that freedom of expression is the basic condition for the development of democratic progress of the societies and individuals, but it can be seen that the freedom is not unlimited in the Convention and Court's case law.

Notably, there are conventional restrictions on the form of the usage and on the method of freedom of expression specified, as states can require the licensing of broadcasting, television or cinema enterprises. And there is the exercise of these freedoms, since it carries with it duties and responsibilities and may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law.[105] Specifically, there are conventional restrictions on the freedom of expression subjected to the method of usage of the freedom, although the restrictions on the content of the freedom have been demonstrated with strict control in a number of principles and jurisprudence.

The *Handyside v. UK*. judgment, which is known as the Court's most important case-law for the freedom of expression, tested these principles to identify and justify intervention to the freedom of expression in each case; 1- Intervention must be based on a law, 2- Intervention must perform one of the legitimate objectives in Article 10 (2), 3- Intervention should be necessary in a democratic society and the intervention has to be legitimate, clear, accessible, foreseeable and practicable for the law.[106]

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105 See in the same direction Karan, p. 369.

106 Shortly the court try to investigate that "Is there any intervention for freedom? If are these interventions based on a justified reason?; Does prescribed by law? Is it possible to access to the law?; Are the results predictable relative law?; laws compatible with the principle of the rule of law? Is there a legitimate purpose for intervention?" for decided to violation to the freedom of expression. See Case of *Handyside v. The United Kingdom*, par. 44-45. Also Cases of ECHR *Sunday Times v. UK*, (1979) *Akçam v. Turkey*, (2011), *Rotaru v. Rumania* (2000).

Legality

In the first stage of review by the Court, it is regarded that whether the interference was prescribed by law or not. In this way the principle determined by law is twofold. In this context, restrictions on freedom of expression must be derived from the predictable, foreseeable and accessible law. Also the principle of predictability must be addressed in its relations with the prohibition of abuse of the rights which is regulated in Article 17 of the Convention. Thus, in the *Sunday Times v. UK* case, it was held that a law "*must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.*"[107]

The Court argued that subject to limitation of freedom of expression, should base on by predictable and accessible law in *The Sunday Times v. United Kingdom* case, the Court stated that certain restriction affecting the exercise of the freedom of expression must be rationally "foreseeable or predictable". The Court also signified that, *".. You cannot enjoy or exercise the right to freedom of expression if the enjoyment of such right is made conditional and subject to a law or a rule or principle abounding in uncertainties. This would be tantamount to an undue restriction, even to a denial, of such freedom of expression. I am of the opinion, therefore that the phrase prescribed by law or "prévues par la loi" in French means a law imposing restrictions which is reasonably ascertainable. The enactment might be made by statute or by common law consistently established."*[108]

The concept of the law is deliberated in both organic and substantial senses by the Court.[109] The Court also required the certainty principle to obtain the prescribed by the law. And it

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107 Case of *The Sunday Times v. United Kingdom*, App. N. 6538/74, 26 April 1979, para. 49. Retrieved from http://hudoc. echr. coe. int/sites/eng/pages/search. aspx?i=001-57584#{"itemid":["001-57584"]}, 23. 04. 2014.

108 *The Sunday Times v. United Kingdom.*

109 Ece Çelik, "*Nefret Söylemi İfade Özgürlüğünün Neresinde?*, İnönü Üniversitesi Hukuk Fakültesi Dergisi, Cilt: 4, Sayı: 2, Yıl 2013, p. 223.

signifies that the law should be adequately clear to allow individuals to govern their future behaviour.[110]

Thus, in the *Sunday Times v. United Kingdom* case declared that;[111] *"..a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able … to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable."*

However, on account of the stated restrictions imposed on the freedom of expression brought by law, there are difficulties in terms of legal security and predictability. In this respect, there is a need for objective, clear and perceptible regulations. The *Taner Akçam v. Turkey* case of the ECHR underlined that the relevant national law must be formulated with sufficient accuracy to enable the persons concerned "to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." The Court also noted that "*…Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Whilst certainty is highly desirable, it may entail excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are a question of practice*"[112] To some extent, aside from the practice, the situation in terms of freedom of expression is due to a lack of predictable, open, clear and objective laws in Turkey. Therefore, this will be discussed further in a forthcoming section.[113]

110 Council of Europe, *"The Margin of Appreciation"*, Retrieved from http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp#P126_11

111 *The Sunday Times v. United Kingdom*, para. 49.

112 Para. 87.

113 Especially see the Omnibus Law in the Turkish legislation process.

Legitimate Aim

The Convention lists a number of legitimate aims, allowing the requested right to be restricted, provided it was arranged in accordance with the law and necessary in a democratic society to do so.[114] According to the Court, other than the goals enumerated in the Convention, the aim or purposes of the intervention should determine by the States which is the responsibility of the States.[115]

The Court requires that any intervention contain legitimate purposes such as public safety, protecting public order, and crime prevention, as specified in Article 10 (2). Also, these interventions for achieving these legitimate aims are "*necessary in a democratic society*". Democratic society aims for "*a coercive-pressing social need*", and besides, the Court also pays attention to the proportionality of intervention.[116] Among other things, all kinds of "formalities", "conditions", "restrictions" and "penalties" will be brought to the freedom of expression and should be proportionate in order to obtain the desired purpose.[117]

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114 *"The Margin of Appreciation".*

115 Sultan Üzeltürk, "Özel Hayatın Gizliliği Hakkı, 1982 Anayasası ve İnsan Hakları Avrupa Sözleşmesine Göre", Beta Basım Yayım, İstanbul, 2004, p. 238.

116 The Court notes that, "*whilst the adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), is not synonymous with "indispensable" (cf. , in Articles 2 para. 2 (art. 2-2) and 6 para. 1 (art. 6-1), the words "absolutely necessary" and "strictly necessary" and, in Article 15 para. 1 (art. 15-1), the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (cf. Article 4 para. 3) (art. 4-3), "useful" (cf. the French text of the first paragraph of Article 1 of Protocol No. 1) (P1-1), "reasonable" (cf. Articles 5 para. 3 and 6 para. 1) (art. 5-3, art. 6-1) or "desirable". Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.* " Case of *Handyside v. The United Kingdom*, par. 48. See also judgments of the Court; Case of *Observer and Guardian v. United Kingdom,* (1991), Case of *Pakdemirli v. Turkey*, (2005).

117 *Handyside v. The United Kingdom*, par. 49, 55-56.

The purpose of legitimate intervention comprises the protection of national security,[118] public safety, protection of the territorial integrity of public order and prevention of crime, protection of health or morals, protection of the reputation on behalf of others, kept secret to prevent disclosure of the information and ensure the authority and impartiality of the judiciary.[119]

Thus, a legitimate aim cannot be a pretext for a measure taken for another improper purpose, as noted in Article 18.[120] Any interference with the Convention rights has to accord to such a legitimate aim and the Member State must show that the relevant legal provision pursued one of the aims laid down in, and was genuinely applied to, the applicant in a particular case. [121]

The Court will address the questioning the legitimacy of the intervention, thereby whether the intervention has been made through the aim to protect the rights contained in the second paragraph of the article. On the other hand, none of the listed exceptions and limitations grounds here are absolute concepts, and it is obvious that it was created by case law. In this regard, it is worth to mention the Court's parameters as being determined by law, necessary in a democratic society, and proportional.

Necessary in a Democratic Society and Proportionality

The ECHR investigated the interferences that are "necessary in a democratic society", "for the protection of... morals", as derived from Article 10/2.

The Court defines "by necessity in a democratic society" as being of "pressing social need". Moreover, the Court's decision serves as part of the requirements that a legitimate purpose carriage of the measures taken and appropriate to the intended goal. If it cannot

118 Cases of *Vereniging Weekblad Bluf v. Netherlands* (1995), *Hadjianastassiou v. Greece*, (1992).

119 See P. 8 for the Article.

120 Convention Article 18, *Limitation on use of restrictions on rights*; "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

121 "*The Margin of Appreciation*".

be determined whether the restrictive measures fulfill the compelling social need or it is not the last remedy then it will not be an appropriate measure of the requirements of a democratic society. Likewise, also there is no abstract evaluation investigating the existence of compelling social needs. In this way the court has taken into account various considerations such as the identity, the level of reputation of the persons who were targeted, the content of the expression, and the expression concerning a contribution to the public discussion of general interest.[122]

The ECHR stated that State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.[123] First Court has noted that, whilst the adjective "necessary", within the meaning of Article 10 (2) is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and it implies the existence of a "pressing social need".[124]

Second, states have some margin of appreciation, however, and it is not an unlimited power of appreciation. This appreciation arises from that matter of the obligations restrictions. Even so, the domestic margin of appreciation thus goes hand in hand with a European supervision.[125]

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122 ECHR decisions on this issue see *Axel Springer AG v. Germany* App. No. : 39954/08, 7/2/2012; *Von Hannover v. Germany,* App. N. 2 [BD], 40660/08 and 60641/08, 7/2/2012. One of Turkish Constitutional Court individual application case, the Court investigated that whether the intervention to the freedom fo expression is legitimate or not with the reference to the criteria setting bye *Axel Springer AG v. Germanyo* ECHR. App. N. 2012/1184 Date: 16/7/2014.

123 "*The Margin of Appreciation*".

124 *Handyside v. UK*, Para 48.

125 Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. In this respect, the Court refers to Article 50 of the Convention ("decision or . . . measure taken by a legal authority or any other authority") as well as

Thirdly the necessary democratic society means that the interference must correspond to a pressing social need and be proportionate to the legitimate aim pursued, compatible with the Convention.[126]

The Court remarked on the adjective "necessary" with the meaning of Article 10/2 in the following; "*it is not synonymous with "indispensable" (in Articles 2/2, 6/1, the words "absolutely necessary" and "strictly necessary" and, in Article 15/1, the phrase "to the extent strictly required by the exigencies of the situation"), neither has it the flexibility of such expressions as "admissible", "ordinary" (Article 4/3), "useful", "reasonable" (Articles 5 /3 and 6/ 1) or "desirable*".

Also the principle of proportionality which is known as the assessment of democratic necessity has produced the most significant principles of interpretation. This condition is known as "*… the heart of the Court's investigation into the reasonableness of the restriction*". In this direction "*the Court's main role is to ensure that the rights laid down in the Convention are not interfered with unnecessarily*"[127]

According to the Council of Europe Report, the proportionality necessitates that there should be a rational connection between a particular objective to be achieved and the means used to achieve that objective. Also, a stricter approach is appropriate where fundamental rights are at stake and contains in a four question test as*; Is there a pressing social need for any restriction of the Convention?; If so, does the particular restriction correspond to this need?; If so, is it a proportionate response to that need? Plus, In any case, are the reasons presented by the authorities, relevant and sufficient?*[128] The Convention tries to reveal the proportionality in the case of the restriction of freedom by asking these questions about the existence of certain conditions.

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to its own case-law (Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100). *Handyside v. UK*, para. 49.

126 See putting these parameters by Gilles Dutertre, "Key case-law extracts - European Court of Human Rights", Council of Europe, Publisher: Council of Europe, 2003, p. 295.

127 "*The Margin of Appreciation*".

128 "*The Margin of Appreciation*".

The Court puts the standards regarding to the necessary in a democratic society in *Handyside v. UK* judgements as; the Court considers the phrase "necessary in a democratic society" to mean "the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions".[129]

According to the Court judgement, "*it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context*".[130] Dutertre stated that the last principle of these paragraphs provides for an exception to a right, granted are to be narrowly interpreted.[131]

One of the Court's recent decisions of the ECHR is *Murat Vural v. Turkey* judgement. The Applicant were involved in physical attacks on property and especially poured paint on statues of Atatürk which are located in various places, - in schools generally in current case. The Court does not consider that the acts were of gravity for justifying a custodial sentence as provided for by the Law on Offenses Committed against Atatürk.[132] In this situation the Court decided that these sentences which are described in the Law on Offenses Committed against Atatürk and TPL[133] "*the*

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129 *Sunday Times v. UK*, para. 44.

130 *Handyside v. UK,* para. 49.

131 This principle put forward to the judgment as; *"…it provides for an exception to a right guaranteed by the Convention, is to be narrowly interpreted. Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions*". Case of *Klass and Others v. Germany,* App. N. 5029/71, Para. 42. See Dutertre, p. 295.

132 Law No. 5816, Entry into Force 31 July 1951

133 Law No. 5816 provides as follows: "Section 1: Anyone who publicly insults the memory of Atatürk or swears at him shall be liable to imprisonment for a term of between one and three years. Anyone who demolishes, breaks, ruins or dirties a sculpture, statue, monument or the mausoleum of Atatürk, shall be liable to imprisonment for a term of between one and five years. Anyone who incites another to commit any of the above-mentioned offences shall be liable to the same punishment as the person committing the offence.

penalties imposed on the applicant were grossly disproportionate to the legitimate aim pursued and were therefore not "necessary in a democratic society". There has accordingly been a violation of Article 10 of the Convention."[134]

However, in the *Sürek v. Turkey* decision of the ECHR, the Commission decided that *".....the applicant, as the owner of the review, had assumed duties and responsibilities with respect to the publication of the letters. His conviction and sentence could be considered in the circumstances a proportionate response to a pressing social need to maintain national security and public safety, a response which fell within the authorities' margin of appreciation. For these reasons....the penalty imposed on the applicant as the owner of the review could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the authorities for the applicant's conviction are "relevant and sufficient".*[135]

Section 2: In cases where the offences mentioned in section 1 of this Law are committed by two or more persons, committed in public places or committed through the media the prison term shall be increased by half. If force is used in the commission of the offences mentioned in the second paragraph of section 1 of this Law, or an attempt is made to do so, the prison term shall be doubled. Section 3: The offences mentioned in this Law shall be prosecuted by public prosecutors of their own motion. Section 4: This Law shall enter into force on the date of its publication. Section 5: The Justice Minister shall oversee the enforcement of this Law. "

Also Section 43 of the Turkish Penal Law (Law no. 5237 of 2004), in so far as relevant, provides as follows: "(1) In circumstances where, in the course of the execution of a decision to commit a particular offence, an offence is committed against a person more than once and at different times, only one punishment shall be imposed [on the offender]. However, the punishment shall then be increased by between a quarter and three quarters . . . " See rest of the Laws in Judgement of the ECHR. Case of *Murat Vural v. Turkey,* App. N. 9540/07, 21 October 2014.

134 Case of *Murat Vural v. Turkey,* para. 68.

135 *Sürek v. Turkey*, App. No. 24762/94, 8 July 1999, Para. 57 and 64. Retrieved from http://hudoc. echr. coe. int/sites/eng/pages/search. aspx?i=001-58279#{"itemid":["001-58279"]}, 20. 10. 2014.

The ECHR remarked in its *Handyside v. UK* judgment, freedom of expression establishes one of the indispensable foundations of a democratic society; subject to paragraph 2 of Article 10.[136] The Court states that the scope of the safeguard area of the freedom in *Sunday Times v. UK* Judgement as; "*it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population*".[137]

Margin of appreciation

The ECHR has been establishing certain independence to the states because of the determining scope and nature of duties arising from the Convention. This independence called that margin of appreciation or national discretion.[138] The ECHR is also assessing the margin of appreciation of the States on limiting freedom of expression. According to the Court; "*Nevertheless, Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10.*"[139] This court has an international supervisory role on the national margin of appreciation of the states. The court also stated that the supervision role in the case of *Engel and Others v. The Netherlands* as;

"*The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation, but also the decision applying it, even one given by an independent court. In this respect, the Court refers to Article*

136 *Handyside v. UK*, Para. 49.
137 *Sunday Times v. UK*, para. 65.
138 See Ali Rıza ÇOBAN, "*Strasbourg'da Herküllere İhtiyacımız Var Mı? Ulusal Takdir Yetkisi ve Evrensel Standartlar Arasında Avrupa İnsan Hakları Mahkemesi*", AÜHFD, Yıl 2008, p. 188 and more.
139 Para. 48-49.

50 (art. 50) of the Convention ("decision or... measure taken by a legal authority or any other authority") as well as to its own case-law."

Also, this supervisory role is consequent from the Article 19 since the Court is *responsible for ensuring the observance of those States' engagements* of the Convention.[140] From the perspective of the freedom of expression "*Article 10/2 leaves to the Contracting States a margin of appreciation".* The point that should be emphasized here is "this margin is given both to the domestic legislator "prescribed by law" and to the bodies, judicial amongst others that are called upon to interpret and apply the laws in force"[141] but it does not give an unlimited power of appreciation to the Contracting States.

Equally the Court distinguished that "*the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background*" in *Schalk & Kopf v. Austria* case in 2010. According to this, each state can have a narrow or wide margin of appreciation conferring to the decision in cases. Besides that the reasons for the Court granting the widest margin of appreciation to States Parties in Article 15 related questions are not explicitly indicated in the Court's judgments.[142]

Only a narrow margin of appreciation where is given by the court follow as; circumstances that the Court's defined as the narrow margin of appreciation of the States; A particularly *important facet of an individual's identity* or *existence is at stake* (*Evans v. UK*). The justification for a restriction is the *protection of the authority of the judiciary* (*Sunday Times v. UK*),[143] The rights

140 *Case of Engel and Others v. The Netherlands*, (No: 5493/72, 7/12/1976), 8 June 1976, pp. 41-42, para. 100.

141 Case of *Handyside v. The United Kingdom*, par. 48.

142 Cenap Çakmak, "*The Problem Relating to the Margin of Appreciation Doctrine under the European Convention on Human Rights*", Uluslararası Hukuk ve Politika, Cilt 2, No: 5, 2006, p. 23.

143 *In that case, the Court held that "the domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area*". Opensocietyfoundations Report, ECHR REFORM, "*Margin of Appreciation: An overview of the Strasbourg Court's margin of appreciation doctrine*", April 2012, Retrieved from http://www.

protected by Article 2 and Article 3 of the Convention are *absolute rights, generating obligations for member states which cannot be balanced either against other rights or against the pursuit of any legitimate interest*. However, the lack of consensus among member states may influence the Court's opinion that the matter is best left to individual states (*Pretty v. UK*); *Racial or ethnic discrimination* is implicated. Such as *D.H. v. The Czech Republic* (2007) case, the Court held that the margin of appreciation could not serve to justify racial or ethnic segregation in education; an "intimate aspect of private life" is at stake under Article 8.[144]

Besides that, a member state's margin of appreciation is usually wide in the following categories of cases based on ECHR Reports; Cases of *public emergency* (Article 15). The decision to derogate from the Convention in "times of war or other public emergency threatening the life of the nation" is justiciable at Strasbourg but subject to a wide margin of appreciation (*Brannigan & McBride v. UK*, 1993); Cases involving *national security*[145]; Cases involving the "*protection of morals*" (see Articles 8-11), given that this notion varies between member states (*Handyside v. UK*); Cases involving legislative *implementation of social and economic policies* (*Hatton v. UK* (2003); Cases where there *is no consensus within the member states of the Council of Europe*, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive *moral or ethical issues*; Cases where the state is required *to strike a balance between competing interests or Convention rights.*[146]

Primarily, the margin of appreciation principle is criticized because it is not derived or originated from the Convention. In

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opensocietyfoundations. org/sites/default/files/echr-reform-margin-of-appreciation. pdf, 12. 5. 2014.

144 In such cases, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate (*Dudgeon v UK*, 1981). Opensocietyfoundations Report, ECHR Reform.

145 In *Klass v Germany*, 1978, the Court granted German authorities a measure of discretion in preparing a system of secret surveillance in the fight against terrorism, which was necessary in a democratic society in the interests of national security and crime prevention. Opensocietyfoundations Report.

146 The case of *Evans v. UK.*

addition to this, the Court interpretations are different in the discretion granted to the state in each case. In this case the principles contained in the Convention have led to blurring. Çoban also underlined that this differentiation also seems to significantly undermine the predictability of court decisions and the credibility of the Court.[147] Likewise Çakmak addressed this problem as; "*regarding the freedom of expression, a narrow margin will be allowed for interference with political expression. To the contrary, interference with artistic expression on the grounds of morality will find a much wider margin of appreciation*".[148]

In this way, Bakırcıoğlu clarified that the legality of the margin of appreciation has been subject to controversy. The doctrine criticizes its inconsistent application, the absence of a detailed and systematic justification for the usage of the doctrine and also that the doctrine would result in losing sight of the aim of creating a harmonious system at the European level.[149]

Hate Speech

Hate speech is usually vital to the freedom of expression and oppression of this right. There is not any comprehensively recognized meaning of the expression "hate speech". The ECHR's case-law has recognized certain parameters making it possible to characterize "hate speech" in order to exclude it from the protection afforded to freedom of expression. The Court eliminates hate speech from protection by means of two approaches provided for by the Convention: (a) by applying Prohibition of abuse of rights (Art. 17) where the comments in question amount to hate speech and negate the fundamental values of the Convention, or (b) by applying the limitations

147 Çoban, p. 191.

148 Çakmak, p. 23. Also see Steven Greer, "*The Margin of Appreciation: Interpretation and Discretion Under the European Convention On Human Rights*", Human rights files No. 17," Council of Europe Publishing, 2000, p. 28-29. Retrieved from http://www. echr. coe. int/librarydocs/dg2/hrfiles/dg2-en-hrfiles-17(2000). pdf, 20. 09. 2014.

149 Onder Bakircioglu , "*The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*", German Law Journal, Vol. 08 No. 07, 2007, s. 731.

provided for in the second paragraph of Article 10 and Article 114 (this approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention).[150]

EU Committee of Ministers revealed that in the context of hate speech on its Recommendations No R. (97) in the following way. *"…. the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin*".[151] Thus it states concretely that "hate speech" includes breaking the dignity of certain individuals, and hence it is not under the protection of the freedom of expression. [152]

Besides that, the Human Rights Committee Report "*Covenant does not permit the general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20.*"[153]

In the same manner the evaluation available in the *Perinçek v. Switzerland* case of the ECHR. The Court pointed out that "*… It was not called upon to rule on the legal characterization of the Armenian genocide. The existence of a "genocide", which was a precisely defined legal concept, was not easy to prove. The Court*

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150 ECHR Press Release, "*Hate speech*", February 2012, p. 1. Retrieved from http://www. rgsl. edu. lv/uploads/files/ECtHR _fact_Sheet_on_hate_Speech. pdf, 23. 09. 2014. The Committee of Ministers, "Hate Speech", Recommendations No R. (97) 20*, 30 October 1997, at the 607th meeting of the Minister's Deputies*.

151 Recommendations No R. (97) 20.

152 Also See UN ICCPR, General comment No. 34, Human Rights Committee 102nd session, CCPR/C/GC/34, Geneva, 11-29 July 2011, p. 12, paag. 49, Retrieved from http://www2. ohchr. org/english/bodies/hrc/docs/GC34. pdf, 23. 09. 2014.

153 General Comment No. 34, CCPR/C/GC/34.

doubted that there could be a general consensus as to events such as those at issue, given that historical research was by definition open to discussion and a matter of debate, without necessarily giving rise to final conclusions or to the assertion of objective and absolute truths".[154] Consequently, the case in question regarding Armenian genocide and denial of the genocide did not find the restriction appropriate because of the uncertainty of the legal definition of genocide.

The Court terms "intolerant" those discourses that are hate based and that defend violence and this reveals the limits of freedom of expression in the form. The attitudes of the Court relating to hate speech in the jurisprudence *Erbakan v. Turkey* is also important for the political expression and tolerance doctrine of politicians in the eye of the ECHR. The case is expressed as follows[155] "*… tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle, it may be considered necessary in certain democratic societies to sanction or even prevents all forms of expression which spread, incite, promote or justify hatred based on intolerance…*"

In these cases, the court evaluated the criteria in terms of the content; "*It considered that the speech,…. incite recourse to violence, armed resistance, or insurrection, which was the essential point to be taken into consideration…… speech was not such as to encourage violence by inspiring a deep and irrational hatred of specific persons. The Court observed that…not*

154 Case of *Perinçek v. Switzerland*, App. N. 27510/08, ECHR 370 (2013), 17. 12. 2013. Retrieved from http://hudoc. echr. coe. int/sites/eng/pages/search. aspx?i=001-139276#{"itemid":["001-139276"]},23. 09. 2014.

155 In this case the Plaintiff Erbakan, his application to the Court on the grounds that both the right has been violated as a result violation of based on the Convention in the right to freedom of expression and fair trial. In here not to ignore the hate speech on behalf of the Court's decision, but the formal (*legality, proportionality and necessity criterias are set out for the case*) not the concrete is given through reason. Case of *Erbakan v Turkey*, App. N. 59405/00, 6. 07. 2006, Para. 56. Retrieved from http://hudoc. echr. coe. int/sites/eng/pages/search. aspx?i=003-1728198-1812055, 20. 03. 2014.

correspond to any pressing social need and that it was accordingly not necessary in a democratic society".[156]

In terms of freedom of expression and hate speech the function of Article 17 is identified in this way; expression cannot be used to destroy the rights and freedoms established by the Convention, and this case cannot be expected to have such a protection of the Convention. Regarding restrictions on the freedom of expression, the states may lean on the prohibition of abuse of rights in 17th Article of the Convention.[157] The general trend of the Court is not subject to any restrictions, rights, and freedoms that do not contain any hate speech or encourage violence or racist expressions. In these circumstances the States cannot decide to stand the prohibition of abuse of rights set out in Article 17 of the Convention.[158]

In one of the cases, Turkey's defendant of the Court stated this issue in the following way*; In order that Article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.*[159] *Therefore,*

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156 *İsak Tepe v. Turkey,* App. N. 17129/02, 2008, p. 7-8. Retrieved from http://sim. law. uu. nl/SIM/CaseLaw/hof.nsf/2422ec00f1ace923c1256681002b47f1/6a51cd58b9daa803c12574e8002c829d?OpenDocument, 20. 07. 2014.

157 Article 17; Prohibition of abuse of rights as follows, "*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*".

158 *Lehideux and Isorni v. France.* App. No. 55/1997/839/1045, 23 September 1998, Retrieved from http://hudoc. echr. coe. int/sites/eng/pages/search. aspx?i=001-58245#{"itemid":["001-58245"]}, 12. 10. 2014.

159 "*In a context of vicious terrorism such as Turkey was experiencing, the need to preclude improper use of the Convention by applying Article 17 was even more obvious, as the Turkish authorities had to prohibit the use of "expressions" and the formation of "associations" that would inevitably incite violence and enmity between the various sections of Turkish society.* " Para. 21. *United Communist Party of*

the requirements of Article 17 are strictly scrutinised, and rightly so."[160]

Current Situation of Freedom of Expression in Turkey

Having a variety of different ideas and discussing them freely among different individuals and different views offers individuals the opportunity to choose between them.[161] Freedom of thought and freedom of expression are the foundation of all. For originally all the freedoms are considered to be in the human brain, but after they explained and discussed have been introduced in legislation.[162] Interestingly, it is possible to relate the problem that is searched for in this stage to the situation regarding freedom of expression in Turkey.

As known from the ECHR court data, the image of the freedom of expression was not considered well for a long time in the eye of the ECHR. The court has delivered a judgement that the freedom of expression was violated in 224 cases between the years 1959 and 2013 in Turkey. Then, the 2nd rank belongs to the unity of 34 cases containing violations made by a government. The difference is 190 cases. According to the data of the Court, the number of the violation of freedom of expression in Turkey in the year 2013 is only 9. The same number is 3 for the following country. Turkey took place in the 1st rank. There is a gap between our country and European countries from this aspect.[163]

Most of the violation sentences of the ECHR are about the freedom of expression and the right to a fair trial.[164] There are many more cases which are not brought to the ECHR. Expressing

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Turkey and Others v. Turkey judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I, para. 16, 23.

160 *Lehideux and Isorni v. France*. Concurring Opinion of Judge Jambrek, Para. 2.

161 Özcan ÖZBEY, Avrupa İnsan Hakları Sözleşmesi Işığında İfade Özgürlüğü Kısıtlamaları, TBB Dergisi 2013 (106), s. 45.

162 Quoted from ZABUNOĞLU, DOST and BOZKURT, p. 48.

163 These rankings took from ECHR Reports, "*Overview 1959-2013 ECHR*", Violation judgments by State.

164 Report ECHR Reports "*Violations By Article and By States*", 1959-2013.

the actual situation is important for this reason; the legislations have changed and continue to change, but in Turkey the implementation has not.[165]

Out of the actual conditions with which we faced nowadays, the number of cases of the freedom of expression and the right to a fair trial is increasing gradually. Also, we are in a country where the disproportional force is used against the right for meetings and demonstration marches.[166] There are at least fifteen continuing individual criminal proceedings and as many ongoing investigations against human rights defenders, -mostly under anti-terrorism legislation and the Law on Demonstrations and Marches.[167] The ECHR accepted these collective rights as a form

165 For example due to the limitation of freedom of expression are frequently encountered Anti-Terror Law. Act No. 3713 of 12 April 1991 has undergone many changes to the present day in 2003, 2006, 2010, 2012, 2013, and in recently 2014. Here is some criticism about the changing of the laws and the practical facts in Turkey; According to the Amnesty International's Europe and Central Asia Director John Dalhuisen stated that "This legal reform will go down in the history books as yet another missed opportunity for the government to deliver genuine human rights reform." Then another criticism becomes from Andrew Gardner who is the Amnesty International's researcher on Turkey follow as; "Turkey has a history of broad and vague laws which have been applied in violation of the right to freedom of expression. Turkey's lawmakers should have put an end to this". See "Turkey: Legal reforms fall short on freedom of expression", Amnesty International, 2013, Retrieved from http://www. amnesty. org/en/news/turkey-legal-reforms-fall-short-freedom-expression-2013-04-30.

166 See ECHR Judgements; *Nurettin Aldemir and Others v. Turkey*, App. N. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, 18 December 2007. Case of *İzci v. Turkey*, App. N. 42606/05), 23 July 2013. Case of *Biçici v. Turkey*, App. N. 30357/05), 27 May 2010. See Also, Dilshod Achilov , "*What Do The 'Gezi Park' Protests Mean For Turkish Democracy*?", International Bussiness Times, June 19 2013, Retrieved from http://www. ibtimes. com/fighting-words/what-do-gezi-park-protests-mean-turkish-democracy-1314091.

167 COM (2014)700 final of 8. 10. 2014, p. 49.

of freedom of expression in *Steel and others v. United Kingdom* judgement.[168]

As well as the freedom of expression, the violation judgements in severe human rights violations such as the violation of the right to live and the torture and degrading treatment were too many. A certain amount of those judgments belong to violations created by the military regime and by state of emergency. As the number of decisions on these topics has decreased nowadays, it seems like that Turkey has solved this problem in proportion to the past.[169] Nevertheless, it is not true at all. Especially when considering the news, it can obviously be seen that we could not solve this problem exactly. The situation is only that there are the violations which cannot bring a suit in the ECHR or which cannot be claimed by using the right of individual application to the Constitutional Court.[170]

Challenges to laws on freedom of expression are spread over a wide area in Turkey including the fields of media, radio, television, internet, trade unions, associations, political parties, training, education, cinema, theater, meetings and

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168 Court argued that in the *Steel and others* case the Court found that "*the demonstrations which had led to the applicants' arrest should be viewed as an expression of their disagreement with certain activities. They therefore fell under Article 10*". According to the Court "*the authorities' detention of the other three applicants following a completely peaceful demonstration at a conference concerning a combat helicopter had been illegal and disproportionate and therefore contrary to Article 10.* " See *Steel and others v. United Kingdom*, judgment of 23 September 1998, Reports 1998-VII.

169 See explanations to Turkish Judge of the ECHR Işıl Karakaş, (a), Şirin Payzın, "*Anayasa Mahkemesi Gayri Milli Olmak Zorundadır*", Röportaj, Radikal Gazetesi, 11-05-2014, Retrieved from http://www. radikal. com. tr/yazarlar/sirin_payzin/anayasa_mahkemesi_gayri_milli_ olmak_zorundadir-1191432, 12. 06. 2014.

170 According to Isil Karakas, (b), "*democracy and improved on the human rights does not only write new constitutions and court decisions".* Also her other statements from the News as follows "*There are 18 thousand 500 cases at the ECHR against Turkey*", "*There is a person who full 14 years "arrested" (*not sentenced *) In Turkey*". Zeynep Gürcanlı, "*AİHM'in Türk Yargıcından Inanılmaz Açıklama*", Hürriyet Gündem, Retrieved from http://www. hurriyet. com. tr/gundem/16282853. asp, 10. 10. 2014.

demonstrations of emergency, martial law. Some of the laws are posing a threat to freedom of expression both as commonly performed and as a structural arrangement.[171] For example, the 5816 Law on Crimes against Atatürk;[172] the 6112 Law on Radio and Television Supreme Council[173]; Law No. 5651 on Regulating Broadcast on the Internet and Fighting Against Crimes Committed through the Internet Broadcasting;[174] the 2820 Political Parties Act[175]; Law no. 1117 on Protecting Minors from Harmful Publications must all be abolished.[176] The above lists of

171 Hüsnü Öndül (a), "*Türkiye'de İfade Özgürlüğü: Mevzuat Ve Yargi Gözlem Raporu*", İnsan Haklari Ortak Platformu, p. 10. Also Report can be accessible in English Language from http://www. ihop. org. tr/english/files/IHOP_FreedomofExpression_Comments. pdf.

172 The Law on Offences Committed against Atatürk (Law no. 5816, entry into force 31 July 1951). Öndül indicated that "*In Article 1 of the Law no. 5816 on Offenses against Atatürk, open and gross insult to the memory of Atatürk is considered as an offense. The issue can be assessed in the context of ECHR Article 8. However, the existing provision may be construed so as to consider any criticism of Atatürk as an offense as well. Hence it will be appropriate to supplement the article with the notion of freedom of criticism. As it stands now, the article has the potential of restricting freedom of expression. Hence it cannot be considered clear and predictable enough.* " Hüsnü Öndül, (b), "*Freedom of Expression In Turkey: Observations On Legislation And The Judiciary Comments And Recommendations*", Human Rights Joint Platform, May 2012, p. 8. Retrieved from http://www. ihop. org. tr/english/files/IHOP_FreedomofExpression_Comments. pdf.

173 Publication language (Article 5), outstanding in the period publications (Article 7) Publication Service Principles (Article 8).

174 Content provider's responsibility (Article 4), access provider's obligations (Article 6), the obligations of public providers (Article 7), access The decision to block and fulfillment (Article 8), the removal of content publication and the right of reply (Art. 9).

175 Articles 43, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90 , 93, 94, 95, 96.

176 The law is evaluated in general as problematic. Öndül stated that; "*As in the case of Law no. 5651, here too there is need for a legislative arrangement fully respecting international human rights law and freedom of expression. The legislation pertaining to children must be based on principles enshrined in the UN Convention on the Rights of the Child and the best interest of the child must be the starting point*".
Öndül, (b), p. 8.

acts are only the some of the problematic laws of Turkey regarding to the freedom of expression. [177]

Besides that, Law 2937 of Turkish National Intelligence Organizations (MİT) gives extensive powers to conduct investigation and receive information.[178] According to the Law of the Article 5; all institutions and entities must obey the Organization's demands for access to their data and archives, and no other law, foreign or domestic, can override this obligation. Interfering with the activities of the MİT, for instance by refusing a request for data regulated, is punishable by two to five years in prison in Article 27. These provisions violate the right to privacy since the MİT's requests are not subject to judicial scrutiny and cannot be contested; individuals and organizations whose data are sought have no means of ensuring that the requests are proportionate and necessary in Article 26.[179]

177 No 5187 Press Law, Articles 11, 19, 25, 26. 5683 Law on Residence and Travel of Foreigners in Turkey: Article 19. 10) ; Passport Law No. 5682: Article 8; State of Emergency Law No. 2935: Article 11; Emergency Regional Governor and the State of Emergency Additional Measures to be Taken During About the Decree (Decree No. 430): 1 and of Article 8; Law No. 2911 on Meetings and Demonstrations: 17, 19, 23, 26, 27, 28, 31, 32 Articles; Provincial Administration Law No. 5442: Article 11. Powers and Duties of the Police Act 2559: Additional Article 1. Military Penal Code No. 1632: In 45. Art. 5275 Law on the Execution of Sentences and Security Measures: Article 62. These findings based on Öndül, "*Türkiye'de İfade Özgürlüğü: Mevzuat Ve Yargi Gözlem Raporu*", p. 10-14.

178 According to the Article 3 NIO of the law, the Organization has the authority to receive information, documents, and data from public, financial institutions and entities with or without a legal character. Law Number: 2937, Date of Admission: 01/11/1983, Last amendments made in 2014. See detailed explanations about NIO in Pen International Reports 2014.

179 Law of MIT, Article 26; Permit investigation and prosecution, The Law can accessible only in Turkish Language, Retrieved from https://www. mit. gov. tr/2937. pdf.

This is especially the case for the ATL[180] and TPL[181] provisions which do not contain any violence opinions. And these laws of provisions are generally prohibiting propaganda. Also there are increased penalties for offenses committed through the press, and this mismatch is seen in insult.[182]

Anti-Terror Law

Generally the *Anti-Terror Law*[183] (Law no. 3713) confronts the limitation of the freedom of expression and the judgements of oppression against Turkey in the front of the ECHR.[184] In such cases in the front of the ECHR concerning with the Law, it must be remembered the *ATL* Article 6/2,[185] Article 6/5,[186] and Article Law 7/2.[187]

The ATL as a whole is also considered as a problematic law. The definition of terrorism (Article 1),[188] the terror of criminals (Article 2),[189] for the purpose of terrorist crimes (Article 4),[190] increasing

180 There are some of different names are used for the name of the Law such as Prevention of Terrorism Act.

181 Some of cases and arguments use of the name of the Law as "Turkish Criminal Law"

182 Such as Section 5,6 or 7 of the Anti-Terror Law.

183 *Anti-Terror Law* (Law no. 3713), amended by Law no. 5532, which entered into force on 18 July 2006.

184 ATL has undergone many changes to the present day in 2003, 2006, 2010, 2012, 2013, and in recently 2014.

185 The ECHR *Gözel and Özer v. Turkey*, (6 July 2010) judgement.

186 *Ürper and Others v. Turkey* (20 of October 2009).

187 *Gül and Others v. Turkey*, (June 8, 2010)

188 The definition of terrorism Article has undergone significant changes in 2003, 2006 and 2012. And the most controversial statement that ""*and is punished as members of the organization*", statements removed from the article. See Law No. 6352 dated 07.02.2012 and Article 74.

189 This Article also changed in 2012 and "person, who commits a crime on behalf of a terrorist organization, is also deemed guilty even if not belonging to a terrorist organization". "*And is punished as members of the organization*", statements removed from the article. Law No. 6352 dated 07.02.2012 and Article 74.

of the penalties (Article 5), disclosure and publishing (Article 6)[191], terrorist organizations (Article 7),[192] and the provisions of the disclosure of postponing the decisions are not given the option to turn to sanctions and suspension of the ban (Article 13).[193]

Similarly, United Nations Human Rights Committee expressed concern that numerous provisions of the ATL are also dissenting with the ICCPR. In general, the Committee criticized that especially: "*(a) the vagueness of the definition of a terrorist act; (b) the far-reaching restrictions imposed on the right to due process; and (c) the high number of cases in which human rights defenders, lawyers, journalists and even children charge under the Anti-Terrorism Law for the free expression of their opinions and ideas, in particular in the context of non-violent discussions of the Kurdish issue.*"[194]

Furthermore, the scope of the definition of terrorism in the first Article of the ATL is so vague and over-inclusive that even thoughts expressed in demonstrations and marches can be considered as terrorist activities rather than as freedom of assembly and expression. Also, it is written within the context the Articles 6 and 7 of the Law that "those who join demonstrations

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190 This provision is also amended by Law No. 5532\ Article 3, Date: 29\6\2006.

191 One of the most controversial provisions of the Law is Article 6. It is also amended several times. Amended second paragraph in 11/4 / 2013 Law No. 6459, Article 7. Amended fourth paragraph: in 29/6 / 2006, Law No: 5532, Article 5 also last sentences of the para. 4 repealed in 11/4 / 2013, Law No. 6459 Article 7. Also added an additional paragraph introduced the article (para.+ again) in 29.6. 2006, Law No: 5532, Article 5 and it is repealed in 2.7.2012, Law No:6352 with Article 105.

192 This article also amended by Law No. 5532 with the article 6 in 29.6.2006.

193 Öndül, (a) p. 10.

194 Human Rights Committee, "*Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session*", 15 October to 2 November, Retrieved from http://www.loc.gov/lawweb/servlet/llocnews?disp3_l205403397text, 02. 10. 2014.

can be accused of being terrorist or committing terror crimes for their slogans and placards in the demonstrations."[195]

ATL is the primary law that the case against Turkey grounded from Article 10 of the Convention causing violation articles by the ECHR in the following; Article 6, Paragraph 2; "*…print or publish declarations or leaflets emanating from terrorist organisations..*", Article 6, paragraph 5: "*Periodicals whose content openly encourages the commission of offenses within the framework of the activities of a terrorist organization, approves of the offenses committed by a terrorist organization or its members or constitutes propaganda in favor of the terrorist organization may be suspended for a period of fifteen days to one month as a preventive measure by decision of a judge…",* and also Article 7*; "Making propaganda for a terrorist organization.*".[196]

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195 Erdem Turkozu and Hüsnü Öndül, "*Regional Study: The Right to Freedom of Assembly in 2013*", Euro-Mediterranean RegionEuro, Mediterranean Human Rights Network, November 2013, p. 139. Retrieved from http://www.euromedrights.org/eng/wp-content/uploads/2013/11/foa2013enfull-reportweb26nov2013.pdf, 2. 09. 2014.

196 Karakaya and Özhabeş, p. 14. The Article 6 reads as follows; "1. *It shall be an offence, punishable by a term of imprisonment of one to three years, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person's . . . identity is divulged, provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target. 2. It shall be an offence, punishable by a term of imprisonment of one to three years, to print or publish declarations or leaflets emanating from terrorist organisations. . . 4. If any of the offences defined in the paragraphs above are committed through the press or the media, the owners and editors-in-chief of the press and media organs concerned who did not participate in the commission of the offence shall also be liable to a judicial fine equivalent to between a thousand and ten thousand days' imprisonment. However, the maximum limit of this punishment shall be the equivalent of five thousand days for editors-in-chief. 5. Periodicals whose content openly encourages the commission of offences within the framework of the activities of a terrorist organisation, approves of the offences committed by a terrorist organisation or its members or constitutes propaganda in favour of the terrorist organisation may be suspended for a period of fifteen days to one month as a preventive measure by decision of a judge or, if a delay is detrimental, on an instruction from a public*

There have been a series of four legislative reform packages ratified between March 2011 and April 2013. Notable are the 3rd Judicial Reform Package, ratified on July 2012, and the 4th Judicial Reform Package ratified in April 2013. In this direction the Article 6 of the ATL ratified three times during 2006, 2012 and 2013. Among the reforms were attempts to create more clarity around what can be construed as "terrorist propaganda" under the ATL. Accordingly, the 4th Judicial Reform Package is designed especially for eliminating rulings against Turkey in the ECHR for human rights violations, particularly regarding the situation of convicts charged with membership in a terrorist organization.[197]

From this aspect, the Parliamentary Assembly of the Council of Europe has stated that the investigation into the people opposing peacefully is based on the "*comprehensive and unclear laws to fight terrorism*", the long legal process durations, and the long imprisonment before the proceeding are not compatible with European standards.[198]

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prosecutor. The public prosecutor shall notify the judge of such instruction within twenty-four hours. If the judge does not approve the decision within forty-eight hours, the instruction to suspend publication shall become null and void. " Urper and Others v. Turkey; App. N. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, 2010.

197 "However, according to an amendment introduced to the fourth judicial package, no punishment will be inflicted for "being a member of a terrorist organization," once the defendant is charged for committing propaganda crimes. Charges of affiliation with a terrorist organization will no longer be held once the crimes of publishing and distributing leaflets and statements by terrorist organizations, making the propaganda of a terrorist organization and participating in illegal meetings and protest marches have been penalized." See the News, "*Turkey's 4th judicial package passes into law with critical last-minute amendment*", Hurriyet Daily News, 11.4.2013, http://www.hurriyetdailynews.com/turkeys-4th-judicial-package-passes-into-law-with-critical-last-minute-amendment.aspx?pageID=238&nid=44768

198 EC Turkish Progress Report, Enlargement, October 2014, COM (2014)700 final of 8. 10. 2014, p. 3. Retrieved from http://ec.europa.eu/enlargement/pdf/keydocuments/2014/20141008-turkey-progress-reporten.pdf.

The ATL has been changed in 2006, 2013 and 2014 with the judicial packages.[199] But the violations of freedom of expression keep occurring.[200] Because, even though the legislations have changed, we cannot see any change in jurisprudences.[201] The

199 In 2014 ATL New Democratization Package including removal was adopted and enacted Article 10 of special courts (ÖYM). See the details of judicial packages Pen International Reports. Please note that also a new judicial package passed from Turkish Parliament. 6th Judicial Package (Law No. 6572, Acceptance date: 2-12-2014) contain several problematic issues regarding the judicial organs and TPL. However the leading opposing party Republican People's Party (CHP) admitted to the Constitutional Court for suspension of the execution and annulment of the some items relating to Law 6572. The main provisions requested for annulment which they are the Law of the Court of Cassation, Criminal Procedural Law, and The Law of the High Council of Judges and Prosecutors.

200 According to the Pen International Report, "*The government's comprehensive abuse of anti-terror laws to restrict dissent is marked by the prosecution of hundreds of Kurdish activists, elected politicians, journalists, editors, students and lawyers as members of Koma Civakên Kurdistan (KCK), the alleged urban wing of the PKK. The Peace and Democracy Party (BDP) states that between April 2009 and November 2011, 7748 people were detained and 3895 were arrested in relation to the KCK investigation.* ".

201 For example, "On 12 November 2013, Anadolu University student Osman Garip was sentenced to just over a year in prison for continually 'insulting' Prime Minister Erdoğan on Facebook. The investigation was opened pursuant to an official complaint made by Erdoğan himself. Also On 25 December 2012, Prime Minister Erdoğan won compensation in a libel suit against Ahmet Altan, former editor-in-chief of the daily newspaper, Taraf, for a column that called the prime minister 'arrogant, uninformed, and uninterested. ' Altan was found to have violated Erdoğan's personal rights and was forced to pay 15,000 lira (approx. 7000 USD). On 18 July 2013, Altan was charged with defamation against the Prime Minister once again and given an 11 months and 20 days prison sentence, commuted to a 7000 lira (approx. 3300 USD) fine. The charges were brought for confronting the Prime Minister about his defence of and refusal to apologise for an airstrike which resulted in the death of 34 civilians in Uludere, Turkey. On 20 January 2014, Prime Minister Erdoğan won compensation in a libel suit against author İhsan Eliaçık who had

practice is problematic for us, as the sentences are passed too late. And even if the fairness can be provided, it always comes too late.[202]

The ECHR decided that the anti-democratic views and opinions are not protected under Article 10 of the Convention. In this respect, racist statements, ideas and news that drive racial segregation are not acceptable under the scope of Article 10's protection.[203] However, as stated by Uygun, separatist opinions

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accused Erdoğan of being a "dictator, a corrupt leader, provocateur, liar and arrogant" on his Twitter account on 18 June 2013, during the Gezi Park protests. Erdoğan was awarded 2,000 lira (approx. 900 USD) in damages. On 15 April 2013, pianist Fazıl Say was given a 10-month suspended sentence for 'insulting religious values' in a series of tweets. The tweets included a verse from an 11th-century poem by Omar Khayyam which challenged the understanding of 'heaven' in Islam. Similarly, on 25 May 2013, the Turkish-Armenian writer and linguist Sevan Nişanyan was sentenced to over 13 months in prison for alleged blasphemy in a blog post defending the controversial film 'The Innocence of Muslims' on grounds of freedom of expression. On 7 August 2013, Sedat Kapanoğlu, owner of the user-generated satirical dictionary Ekşi Sözlük, and 40 contributors to the site were charged with religious defamation, and 'committing a public order offence via press or broadcast. ' The charges relate to entries satirising the Prophet Muhammed." See Reports of the Pen International.

202 See the fair trail cases in front of ECHR Reports, "*Overview 1959-2013 ECHR*". Also EC 2014 Report stated that the work load of the judiciary as follow; "*With regard to the efficiency of the judiciary, the number of pending cases before the Court of Cassation increased to 582 642 in July 2014 compared to 544 169 in the same period of 2013. The Council of State' pending cases decreased in 2014 compared to 2013. With respect to first-instance courts, the number of criminal cases pending decreased from 1 580055 to 1401944 as of 18 August 2014. The number of pending civil cases remained approximately the same. A reliable registration system and set of indicators should be established to allow measuring the efficiency of the Turkish justice system*". COM(2014)700 final of 8. 10. 2014, p. 44.

203 *Lehideux and Isorni v. France.*

which do not incite violence and terrorism are also within the scope of the freedom of expression.[204]

One of the most important opinions of the Court underlined that; "*the fact that interviews or statements were given by a member of a proscribed organization cannot in itself justify an interference with the newspaper's freedom of expression. Nor can the fact that the interviews or statements contain views strongly disparaging of government policy. Regard must be had instead of the words used and the context in which they were published, with a view to determining whether the texts taken as a whole can be considered as inciting to violence.*" [205]

The Court's decision was that the personality of the owner of the disputed text must be evaluated in the context of the fight against terrorism.[206] The ECHR decided that to ban the publication of the author's personality is of the opinion alone and cannot be the determining factor. Such an assessment may be delayed for some of the individuals or groups that benefit from the guarantees provided by Article 10, which is difficult to accept in terms of the ECHR.[207]

The *Leroy v. France* case is considered one of the cases related to terrorism and hate speech in terms of supporting acts of violence. The case concerned the applicant's conviction for complicity in condoning terrorism, following the publication of a drawing which concerned the attacks of 11 September 2001. The applicant submitted to *Ekaitza*'s editorial team a drawing representing the attack on the twin towers of the World Trade Centre, with a

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204 Oktay Uygun, "*Avrupa İnsan Hakları Sözleşmesi ve Türk Hukukunda İfade Özgürlüğünün Sınırlanması*",Kamu Hukuku İncelemeleri, 2. Baskı, 2013, İstanbul, p.189.

205 *Özgür Gündem v. Turkey*, App. No. 23144/93, para. 63; *Sürek v. Turkey*, App. No. 24762/94, 8 July 1999, para. 12 ve 58; *Sürek and Özdemir v. Turkey*, App. No. 23927/94, 24277/94, 8 July 1999, para. 61.

206 *Turkey v. Falakaoğlu ve Saygılı*, App. No. 22147/02, 24972/03, 23 January 2007, para. 34. *Turkey v. Demirel and Ateş*, App. No. 10037/03, 14813/03, 12 April 2007, para. 37.

207 *Gözler and Özel v. Turkey*, p. 8. Retrieved from http://www.inhak.adalet.gov.tr/ara/karar/gozelveozer2010.pdf, 20. 10. 2014. *İmza* v. *Turkey,* App. no 24748/03, January 2009, para. 25, 20.

caption which parodied the advertising slogan of a famous brand: "We have all dreamt of it... Hamas did it". The drawing was published in the newspaper on 13 September 2001. [208]

In here the court decided that *"... however, considered that the drawing …supported and glorified the… violent destruction. In this regard, the Court …noted that the applicant had expressed his moral support for those whom he presumed to be the perpetrators of the attacks of 11 September 2001. Through his choice of language, the applicant commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of the victims."*[209]

It was highly problematic to define "making propaganda for a terrorist organization", "propaganda for a terrorist organization" and "terrorist organization", and because of that, it was difficult to provide a clear definition for them within the Law. Freedom of the press and freedom of expression are constitutionally guaranteed, although this may only apply partially in practice. The general case in Turkey is that the constitutional guarantees undermined by restrictive provisions of the laws such as Anti-Terror Law and the Penal Law.

Turkish Penal Law

According to the ECHR, laws which are limited to the freedom of expression must be certain, predictable and foreseeable. In this perspective, the TPL also have brought limitations to this freedom with the almost 28 articles based on the ECHR decisions.[210]

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208 *Leroy v. France,* (App. N. 36109/03), 2. 10. 2008, http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2501837-2699727#{"itemid":["003-2501837-2699727"]}.

209 *Leroy v. France.*

210 "..Section Eight: Offences against Dignity, Article 125; Insult. First Section: Offenses against Life, Article 84; Inducement to the Suicide Incentives. Eighth Section: Offenses Against Honor, Article 125; Defamation, (a- against a public officer). Ninth Section: Offenses Against Privacy and Secrecy of Life, Article 132; Violation of Privacy of Communications, Article 134; Privacy of Private Life; Article 135; Recording of personal data. Fifth Section: Offenses Against Public

Karakaya and Özhabeş prescribed that the violation of the freedom of expression mainly comes forward in the legal provisions of the Penal Law which led the ECHR to make decisions against Turkey, as seen in the following; Article 215; Praising crime and criminal; "*..anyone who openly praises an offense or praises an offender for their offense shall be sentenced to imprisonment for up to two years..*".[211] Especially amendments under the Fourth Judicial Reform Package in April 2013 make it now applicable only in cases where "clear and present danger" is posed to public order in TPL.[212] However, this clause remains

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Peace, Article 215; praising the offense or the offender, Article 216; Provoking people to be rancorous and hostile, Article 217; Provoking people not to obey the laws, Article 218; Press through Common Provisions for the Improvement of Crimes Against the Public Peace. Also Articles 220, 222, 226, 257, 267, 273, 283, 285, 286, 288, and 299 accepted as challenging provisions of the TPL. But in here one of most important article relating to the freedom of expression is Article 301 which is regulated Insulting Turkish nation, the Republic of Turkey, state institutions and organs. Same direction see the Articles 302, 305, 314, 318, 327, 329, 334, 336 of the law which are known as the opposed to the freedom of expression. Öndül, p. 10-11. See also Miklos Haraszti, "*Review of the Draft Turkish Penal Code: Freedom of Media Concerns*", Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media, Vienna, May 2005, p. 3-11. Retrieved from http://www.osce. org/fom/14672?download=true. 12. 7. 2014.

211 Freemuse, the Istanbul-based Siyah Bant and the Initiative for Freedom of Expression will be raising these and other concerns at the United Nations early next year when Turkey's human rights record will be scrutinised under the *Universal Periodic Review* (UPR). According to the 2014 Review; "*A case that arose in the period of this review includes that against actor Haldun Açıksözlü on November 2010 for his political piece 'Laz Marks', see also para. 29 above. Açıksözlü faced up to two years in prison for 'praising the offense and the offender' for references in his play to Kurdish and revolutionary leftist leaders in the 1970s and 1980s who had suffered torture in Diyarbakır prisons in where Kurdish and leftist activists were imprisoned and tortured. He was also faced with a professional ban of three months to three years.* " Retrieved from http://freemuse. org/archives/7742#9.

212 The principle of "clear and present danger" may become ineffective in the hands of the repressive comments. So eliminate to this, the case

ambiguously framed and acts as a deterrent to artistic expression touching on political issues.[213]

This is also the case for Article 216, Inciting the population hatred and hostility or contempt,[214] Article 301; Insulting Turkish nation, the Republic of Turkey, state institutions and organs, Article 318: Discouraging people from performing military service, Article 285: Violation of Confidentiality of Investigation, Article 288: Attempt to Influence Fair Trial, and Article 220, Paragraph 6; "(6) A person who commits a crime in the name of an organization without being a member of that organization is punished as a member of the organization. The punishment for membership of an organization can be reduced by up to one half."

Article 220, Paragraph 8 reads: "Anyone who makes propaganda for the organization or its objectives shall be punished by imprisonment of from one to three years. If the said crime is

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laws concerning the freedom of expression of the ECHR must implement to all practical case. See Nisan Kuyucu, "*Yargının Siyasallaşması Çerçevesinde Suçu ve Suçluyu Övme Suçu: Yeni Düzenlemenin Anlamı*", Ankara Üniversitesi SBF Dergisi, Cilt 69, No. 4, 2014, p. 807-834. Also see the case *Yalçınkaya and Others v. Turkey*, (App. No. 25764/09, 01-10-2013) one of the ECHR judgements is pertaining to the "clear and present danger" and freedom of expression.

213 Article 19, the Committee to Protect Journalists, English PEN, Freedom House, P24 and PEN International Joint Submission to the UN Universal Periodic Review of Turkey, Retrieved from http://www.scribd.com/doc/232882484/Joint-Submission-to-UPR-of-Turkey-Jan-2015.

214 "*(1) Anyone who openly incites sections of the population to enmity or hatred towards another group on the basis of social class, race, religion, or sectarian or regional difference, in a manner which may present a clear and imminent danger in terms of public safety shall be sentenced to imprisonment of from one to three years. (2) Anyone who openly denigrates a section of the population on grounds of their social class, race, religion, sectarian, gender or regional differences shall be sentenced to imprisonment of from six months to one year. (3) Anyone who openly denigrates the religious values of a part of the population shall be sentenced to imprisonment of from six months to one year, where the act is sufficient to breach public peace.* " Retrieved from http://www.tuerkeiforum.net/enw/index.php/TranslationofselectedArticlesoftheTurkishPenalCode#Section2:SmugglingofMigrantsandhumantrafficking.

committed through the media and press the sentence shall be increased by one half".[215] Through the Fourth Judicial Reform Package of Turkey, commendable steps were taken regarding various propaganda laws, especially TPL Article 220/8.[216] Propaganda has now been only illegal if it '*legitimizes or phrases, or incites others to resort to an organization's coercive, violent or threatening practices*.' A similar requirement was introduced to the law on praising offenses or offenders TPL Article 215.[217]

Also Article 220, Paragraph 7 accepted as a challenge provision of the TPL as follows; "*A person who knowingly and willingly assists the organization, but is not within the hierarchical structure of the organization is punished as a member of the organization. The punishment given for membership can be reduced by one third, depending on the nature of the assistance given.*"[218]

In Turkish law, there are some provisions in the TPL that can relate to hate speech in the 125th Article of Law.[219] In terms of

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215 Karakaya and Özhabeş, p. 14.

216 Also these amendments bring renewal to the ATL Articles 6/2 and 7/2.

217 Pen International Reports, Article 19, the Committee to Protect Journalists, English PEN, Freedom House, P24 and PEN International Joint Submission to the UN Universal Periodic Review of Turkey, "*For consideration at the 21st session of the UN working group in January/February 2015*", 14 June 2014, p. 2. Retrieved from http://www.pen-international.org/wp-content/uploads/2014/07/PEN-International-joint-submission-to-the-UPR-Turkey.pdf, 02. 10. 2014.

218 See Amnesty International Report, "*Turkey: Decriminalize Dissent Time To Deliver On The Right to Freedom of Expression*", Amnesty International Publications, First published in 2013, p. 25. Retrieved from http://www.amnesty.org/es/library/asset/EUR44/001/2013/en/2f995e94-75e3-4a73-b50c 28f7e84f46d8/eur440012013en.pdf, 20. 09. 2014.

219 Article 125 of TPL- Insult; *"(1) Anyone who undermining the honour, dignity or respectability of another person or who attacks a person's honour by attributing to them a concrete act or a fact, or by means of an insult shall be sentenced to imprisonment for a term of three months to two years, or punished with a judicial fine. In order to convict for an insult made in the absence of the victim, the act must have been witnessed by at least three persons. (2) If the act is committed by means of*

hate speech this Article is uncertain to play an active role. Also the articles criticize that unnecessarily limiting freedom of expression carries the potential of these substances because of where honour, dignity or respectability *in* the concepts of personal value judgments lay.[220]

One of the articles that could be discussed in relation to hate speech is placed in Article 216 of the TPL. The Article is about inciting the population to enmity or hatred, and as well it is about denigration issues.[221] Also with the new amendment of the TPL Article 122 regulates hate speech and discrimination.[222]

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a spoken, written or visual message addressing the victim, the perpetrator shall be sentenced to the penalties set out above. (3) If the offence of insult is committed: a) against a public official in connection with their duty; b) in response to the expression of religious, political, social, philosophical beliefs, thoughts and opinions, in response to an individual's changing or attempting to propagate their religious, political, social, philosophical beliefs, thoughts and opinions, or in response to an individual's compliance with the requirements and prohibitions of their religion; c) by reference to the holy values of a person's religion, the penalty shall be not less than one year. (4) (Amended by Law 5377 of 29 June 2005 /Article 15) Where the offence of insult was committed in public, the penalty shall be increased by one sixth. (5) (Amended by law 5377 of 29 June 2005 /Article 15) In the case of insults to public officials in connection with their efforts working as a committee, the offence shall be deemed to have been committed against all committee members. In such a case, the provisions related to concatenated offences shall be applied." Retrieved from http://www. tuerkeiforum.net/enw/index.php/ translation_of_selected_articles_of_the_turkish_penal_code#chapter_ 2_offences_against_the_person,democratic turkey Forum, 23. 09. 2014.

220 See 125 Article relating cases in front of ECHR; Case of *Aksoy v. Turkey*, App. N. 21987/93, 18 December 1996. *Abdullah Öcalan v. Turkey* App. N. 46221/99, 12 May 2005. *Güveç v. Turkey*, App. N. 70337/01), 20 January 2009. See criticism about the ratification of Ersan Şen, "*Yeni Demokratikleşme Paketi ve Yorumu-3*", http://www.haber7.com/yazarlar/prof-dr-ersan-sen/1107738-yeni-demokratiklesme-paketi-ve-yorumu-3.

221 TPL Article 216; "*(1) Anyone who openly incites sections of the population to enmity or hatred towards another group on the basis of social class, race, religion, or sectarian or regional difference, in a manner which may present a clear and imminent danger in terms of public safety shall be sentenced to imprisonment of from one to three years. (2) Anyone who openly denigrates a section of the*

Uygun emphasized that the cases concerning freedom of expression discussed in Article 216/1 should apply for a four-stage evaluation. These four-stage evaluations determine whether or not the action presents "a clear and close danger" to the public safety. The four–stages of the evolution are defined as: a- having a characteristic hostility and inciting to hatred through the content of the expression; b- due to the characteristic of the owner of the expression (such as an important political leader) it has a provocative opinion that effects a particular segment of the population; c- The form of the announcement of the expressions (such as television broadcasting, publications in national newspapers); d- the situation made of the expression (such as the presence of intense terrorist activity).[223]

Indeed, the ECHR evaluates that role of the speakers or journalists within the society. If the person is a politician or journalist who has influenced to masses two principles. First importance and necessity of the political expression and secondly, how and in what form to use these influences. The Court has given importance and sensitivity to the subject matter of the expression in the *Surek* and *Zana* judgement.[224]

Generally, the use of violence, incitement to violence, violence indoctrination, hate speech towards specific individuals, such as a call to armed insurrection by armed resistance expressions are not required in the context of these substances and judicial practice.[225]

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population on grounds of their social class, race, religion, sectarian, gender or regional differences shall be sentenced to imprisonment of from six months to one year. (3) Anyone who openly denigrates the religious values of a part of the population shall be sentenced to imprisonment of from six months to one year, where the act is sufficient to breach public peace. " Democratic Turkey Forum, Retrieved from http://legislationline.org/documents/action/popup/id/6872/preview.

222 Law No: 6529, 2/3/2014, Retrieved from http://www.resmigazete.gov.tr/eskiler/2014/03/2014031315.htm.

223 Uygun, p. 153-154.

224 Çelik, p. 234.

225 Karakaya and Özhabeş, p. 14.

Also another arrangement towards to the hate rhetoric recognized in the Law on the Establishment and Publication Services of the Radios and Televisions (Law No. 6112, Date: 15-2-2011). The relevant sections of the Law which is the broadcast service policies principles are acknowledged that the television and radio broadcasts cannot generate the hate in the society.

As highlighted in the case *Altug Taner Akcam v. Turkey* Article 301, it has a feature that threatens freedom of expression. The court stated that *"... however, the measures adopted by the Government to prevent largely arbitrary or unjustified prosecutions under Article 301 do not seem to provide sufficient safeguards."*[226] Articles relating to criminal activity for the purpose of the organization, praise, propaganda (TPL Art. 220 provisions of 6-7-8) have features that with insufficient clarity, predictability and also limiting thoughts descriptions do not contain the violence. Also, another objected provision which is known as obscenity is not defined in the law and or cannot be understood what causes a criminal offense and why it should not constitute a crime.[227] One of the most vital provisions is the Article 301 of the TPL, and because of this, it should be considered with a separate title.

Article 301

An important part of the restrictions on freedom of expression indicates that our choice is protecting the state and its institution instead of freedom. Within this context, we define that state and its institutions with the "father state" metaphor. "*The father is our parent and one cannot resist the parents*", this metaphor is burned into the memories of our children from very early ages. Yet, the Father State and its institutions have been hallowed in our culture. The source of this problem does not lie behind the constitutional or legal base; rather, the implementation and judicial practices lie in people's minds.

We need to take a look into the legislation where we suffer from the national sensitivity at most. Article 301 of the TPL, which is the focus of violations of freedom of expression, should especially

226 Altuğ *Taner Akçam v. Turkey*, App. No: 27520/07, 25 October 2011.
227 Öndül, (a), p. 13.

be considered from those metaphors burnt into our minds. There are people stating that this "famous" article has been added in order to create the crime of thought.[228] The article emerged, both in Turkey and the European Union, after a number of conspicuous cases and criminal investigations of well-known novelists and journalists such as Nobel Laureate Orhan Pamuk, Hrant Dink, Perihan Mağden, Elif Safak, and even Joost Lagendijk, chairman of the EU-Turkey Joint Parliamentary Committee.[229]

The "Turkishness" concept existing in a non-changed version of the article has been very hard to interpret. [230] We can see that the definition of "Turkishness" has not been presented in the unchanged version. From the "Turkishness" statement, "the common existence consisting of the unique and shared culture belonging to Turkish people regardless of where they live is understood. This existence is wider than the Turkish nation concept. On the other hand, it is expressed that it also includes the same culture's participants societies living out of Turkey." There have been people considering that the change made is the

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228 "Article 301 of the TPL much debated at both national and international levels, has recently been subject to an amendment aimed at clarifying its meaning and averting more distressing cases related to freedom of expression." Bülent Algan, "*The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey*", German Law Journal, Vol. 09, No. 12, 2008, p. 2238.

229 "Orhan Pamuk was tried because he said that "30,000 Kurds and one million Ottoman Armenians were killed in Turkey. " The case was then dropped by the court. Elif Safak was tried because of her expressions in her book "Father and Bastard. " She said "I am the grandchild of genocide survivors who lost all their relatives to the hands of the Turkish butchers in 1915, but I myself have been brainwashed to deny the genocide because I was raised by some Turk named Mustafa…" She was acquitted at the first hearing, as there were no elements of the crime envisaged in article 301. " Algan, 2008.

230 For detailed discussion on the "Turkishness" concept see Türkan Yalçın Sancar, "Alenen Tahkir ve Tezyif Suçları", Seçkin Yayıncılık, Ankara, 2006, 2. Baskı. Also see Mehmet Emin ARTUK, "*Türklüğü, Cumhuriyeti, Devletin Kurum ve Organlarini Aşağilama Suçu*", TBB Dergisi, Sayı 70, 2007, p. 225-227.

next step of annihilation of Turkishness.[231] In terms of the scope of protection to the "Turkish ethnic identity" of Article, the axis formed several times has been subject to criticism on the grounds of the national and international level.[232]

In order for problematic domains in terms of freedom of expression to be more meaningful and clear, Article 301 of TPL has been changed. After the EU responded to suits presented against numerous writers, journalists and well-known people, the article was amended in the year 2008.[233] However, in a certain segment of the public, the change in Article 301 has been exposed to reactions. Besides, this change has been considered to be treason. It has even been told that this change would bring the division of the country. Due to the effect of ECHR's infringement sentences or the changes promised by Turkey to the EU, the Article 301 of the TPL, the barrier in front of the freedom of expression, has been changed in 2008.[234]

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231 Translated version http://www.legislationline.org/documents/action/popup/id/6872/preview. Before amendment Article 301 stated the following: "*1. A person who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey, shall be sentenced a penalty of imprisonment for a term of six months to three years. 2. A person who publicly denigrates the Government of the Republic of Turkey, the judicial bodies of the State, the military or security organizations, shall be sentenced to a penalty of imprisonment for a term of six months to two years. 3. Where denigrating of Turkishness is committed by a Turkish citizen in another country, the penalty to be imposed shall be increased by one third. 4. Expressions of thought intended to criticize shall not constitute a crime*". Translated versions adapted from Algan, 2008, p. 2237-2240.

232 See Baskın Oran, "*Exploring Turkishness: Rights, Identity and the EU Essay Series, The Issue of "Turkish" and "Türkiyeli" (Turkey National; from Turkey)*", The Foreign Policy Centre, Retrieved from http://fpc.org.uk/fsblob/1314.pdf.

233 Article 301 of the Turkish Criminal Code was amended by the Grand National Assembly of Turkey (Turkish Parliament), on 30 April 2008, by the law no. 5759. The law has been approved by the President, and entered into force upon its publication in the Official Gazette on 8 May 2008.

234 "*During the period under review, Turkey adopted a series of judicial reform packages that aimed to harmonise domestic laws with EU norms. However, the*

Article 301 of the TPL stated that; "*Denigrating the Turkish Nation, the State of the Turkish Republic, the Institutions and Organs of the State;*

1. A person who publicly denigrates Turkish Nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the judicial bodies of the State, shall be sentenced to a penalty of imprisonment for a term of six months and two years.

2. A person who publicly denigrates the military or security structures shall be punishable according to the first paragraph.

3. Expressions of thought intended to criticize shall not constitute a crime.

4. The prosecution under this article shall be subject to the approval of the Minister of Justice."[235]

As clarified by Algan, that there are three differences between previous and actual forms of the Article. The first one is that the statements of Turkishness and Republic have been replaced with Turkish nation and Turkish Republic state statements. The sentence of 6 months to 3 years prison has been replaced with the sentence of prison from 6 months to 2 years. Finally, the inquiries based on this article have been subjected to approval by the Ministry of Justice.[236]

The Turkishness statement has been discussed widely. Another instance, in terms of the "Turkishness" debate is stated in Article 66 of the Constitution. "*Everyone bound to the Turkish State through the bond of citizenship is a Turk.*" The link connecting us together should be recognized as the citizenship connection, such as "Everyone bound for the Republic of Turkey through the bond of citizenship is a citizen of the Republic of Turkey". Also, the preamble of the Constitution is accepted as an integral part of the

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reforms fell short of fully implementing the recommendations Turkey accepted in the first cycle of the UPR. " See Pen International Reports.

235 See footnote 225.

236 Algan, p. 2240.

constitution, with the Article 176 still having the Turkishness statement.[237]

The freedom of thought cannot be limited in the Constitution. The scope of freedom of expression and how it will be limited are in harmony with the European Convention of Human Rights to a certain extent. On account of uncertainties, disproportionality and intemperance in Article 301 creates a conflict which is not suitable for the requirements of a democratic society in terms of freedom of expression which is penetrating into the core of freedom of expression.

I thought that there are similar articles in Italy (Articles 290 and 291 of the Italian Penal Code), Spain, Holland, Germany, and Austria as well as in other European countries. In the majority of these countries, this legislation exists in the form of the "offense of indignity or denigration".[238] Even though there is no significant difference, the implementation of the article of ours is more severe. In this situation, is our real problem the presence or absence of this article constituting a barrier against freedom of expression or is it the content of this article?

The 2nd clause of Article 301 does not comply with the state of law. Considering the values developed about the superiority of the law, it is stated that such a crime cannot be accepted. In the opposite case, the discussions would arise about the presence of the state of police rather than the presence of the state of law.[239]

Regardless of why this provision has been brought, the strength subjected to the approval of the Minister of Justice in Article 301 should never be used in accordance with the perspective of the

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237 (As amended on October 3, 2001; Act No. 4709) *"…That no protection shall be accorded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility with its State and territory, historical and moral values of turkishness; the nationalism, principles, reforms and civilizationism of Atatürk and that sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism;…."* Preamble of the Turkish Constitution.

238 Nezahat Yuca, "*Türk Ceza Kanunu 301.madde ve AB Uygulamaları*", TBMM Araştırma Merkezi Hukuk Bölüm, Şubat 2008.

239 Algan, p. 2241.

owner of this strength or political, personal or other expectations. It is said that the case of Hrant Dink is the most obvious example of this situation.[240] Non-Muslim Hrant Dink, being protected as minority under the provisions of Lozan Agreement, should be evaluated from the aspect of freedom of criticism and expression because of his articles, and no approval should be given for investigation. Hence, the protection of national identity being structured as upper identity in Lozan could be ensured, and the person could be protected from being the target. In 2010, the ECHR, based in Strasbourg, ruled that Turkey failed to protect the life and freedom of expression of Hrant Dink.[241] Also the Constitutional Court has found that the rights of the family of journalist Hrant Dink, who was murdered in 2007, have been violated because the murder investigation had not been conducted efficiently.[242]

It has been seen as an achievement that the Minister of Justice would give the permission of investigation. By underlining that the scope of this article is too wide, the ECHR in its ruling in *Taner Akçam* case[243] has stated that the authority of the Minister does not ensure the freedoms of thought and expression.

In the Court's opinion, "*however, the measures adopted by the Government to prevent largely arbitrary or unjustified prosecutions under Article 301 do not seem to provide sufficient safeguards. It transpires from the statistical data provided by the Government that there are still significant number of investigations commenced*

240 Algan, p. 2250.

241 *Dink vs. Turkey,* App. N. 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09, 14 September 2010.

242 Turkish Constitutional Court gives it's decided of the Hrant Dink case in 17-7-2014 and judgement published on 12 November 2014 with the Official Newspaper No. 29173. The EU pleased decision of the Court concerning investigation into the murder of Hrant Dink. TCC recognized that the murder investigation had not been conducted effectively, and that authorities failed to properly inform the family about evaluations in the case. See TCC Case App. N. 2012/848, 17-07-2014. Also the EC Progress Report, Such as many others also Dink judgement of the Turkish Constitutional Court "*highlighted the resilience of the Turkish constitutional system*", p. 13.

243 Case of *Altuğ Taner Akçam v. Turkey*, App. N. 27520/07, 25/01/2012.

by public prosecutors under Article 301 and that the Ministry of Justice grants authorisation in a large number of cases[244]*: However, the statistical information provided by the applicant indicates that the percentage of prior authorisations granted by the Ministry of Justice is much higher and that these cases mainly concern the prosecution of journalists in freedom of expression cases. Moreover, as noted by the Human Rights Commissioner of the Council of Europe, a system of prior authorisation by the Ministry of Justice in each individual case is not a lasting solution which can replace the integration of the relevant Convention standards into the Turkish legal system and practice, in order to prevent similar violations of the Convention.*"

Concerns about the consent of the Minister of Justice, the Court refers in the following way. "*In any event, the Court considers that even though the Ministry of Justice carries out a prior control in criminal investigations under Article 301 and the provision has not been applied in this particular type of case for a considerable time, it may be applied again in such cases at any time in the future, if for example there is a change of political will by the current Government or change of policy by a newly formed Government. Accordingly, the applicant can be said to run the risk of being directly affected by the provision in question.*"

From the number of investigations and prosecutions carried in this provision, it is clear that "any opinion or idea that is regarded as offensive, shocking or disturbing" can simply be the issue of a criminal examination according to the Court statistical data.[245] As it can be understood from this example, the authority of permission has been used in the wrong situation, and has not been used when required. Since it allows the consequences in

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244 According to the ECHR data "*According to the Government's contention, between 8 May 2008 and 30 November 2009 the Ministry of Justice received 1,025 requests for authorisation to institute criminal proceedings under Article 301 and granted prior authorisation in 80 cases (approximately 8% of the total requests). The Court notes that the Government did not explain the subject matter or nature of the cases in which the Ministry of Justice granted authorization".*

245 Para. 28, "The court held that even though the words used and allegations made by the defendants were offensive they were within the limits of permissible criticism."

opposite of judiciary independence and the fair trial, it creates unlawful situations.

Consequently, the administrator avoids from legal legislations allowing the thoughts, which he does not desire, internalize or accept, to be expressed. But the freedom of expression exactly protects this. This liberty protects the expression of thoughts and criticisms, which are not accepted by a certain segment of the society.

There is worry about the loss of reputation of institutions protected under the Article 301. Nowadays, it can be observed that the institutions protected by Article 301 can lose their dignity because of their own attitudes rather than activities of individuals using their freedom of expression. The ones denigrating them may be themselves, rather than us. Tolerance and respect for the equal dignity of all human beings are the very basis of a democratic and pluralist society. This explains why the Council of Europe has always attached the greatest importance to safeguarding and realizing these ideals and principles.

In addition, regarding persons who were targeted in the context of expression, as for example one of the government officials as stated in Article 301 of TPL, ECHR indicates that according to other persons government officials should be much more tolerant.

Regarding ECHR case-law, the Constitutional Court also stated that such persons as public figures, especially politicians and journalists, need to be more tolerate considering the right to information of society about these people. In this direction, particularly public officials must have the trust of the public to fulfill their duties adequately.[246] In addition to this, the safeguard of political expression is especially important in a democratic society. The government should tolerate critics against it because of the dominant position. According to Karaman, interference to political expression requires extinction of very strong excuses. In such circumstances, where there is no encouragement to

246 Turkish Constitutional Court Case of para. 49.

violence, finding limitations contrary to the covenant is probable.[247]

The metaphor of "a Turk has no friend aside from the Turk" exemplifies this situation in the best way. With this being one of the most important problems of Turkey, Article 301 remains in force. The grounded part penalizing us from the aspect of freedom of expression keeps existing. Should it be removed totally? Or, if it is removed, will the results change from the aspect of freedom of expression?[248]

Rather than removing or amending the Article 301, we need to internalize the freedom of expression, believe in freedom of thought, and the statements which we do not like should no longer be crimes. We need to stop alienating diversities. Also, another topic of Turkey that is frequently discussed are the Sunni and Shia religious sects. The scope of the freedom of expression should be able to express what others do not accept rather than the things which others do accept. It is the freedom of opposition.

Within this context, one of our most important problems is the 5 years-long imprisonment durations. When considering this problem from the aspect of freedom of expression and protest marches, it is absolutely clear that it is disproportional.[249] The

247 Ebru Karaman, "Human Rights Law", Oniki Levha Yayıncılık, İstanbul, 2014, p. 102.

248 Article 216, 8; Incitement to hatred and hostility -Halkı kin ve düşmanlığa tahrik etmek) and 215 (Praising crime and criminal) of the TPL have been retained in contradiction with the principles features of being predictability of laws and accessibility, certainty and clarity in. With these features, just as Article 301 is a threat to freedom of expression are related. Article 285 and 288 of the TPL of the public take notice serious problems in terms of rights and press freedom.

249 With the Fifth Judicial Reform Package, "*special Authority Courts and Prosecutors were removed, bringing an end to an era of anti-terror trials conducted by a judiciary given extraordinary powers; a five-year cap and more stringent evidence requirements were placed on pre-trial detention, leading to scores of releases in subsequent months; and restrictions on lawyers' rights to access investigation dossiers were lifted, ending the longstanding practice of keeping individuals in the dark about the accusations they faced*". See Pen International Reports.

people are arrested because they use their right to meetings and demonstration marches or freedom of expression. The Gezi events, which started last year and still are effective, can be given as an example. For example, the ECHR found 1 month-long imprisonment of women of Siirt, who performed protest marches, to be unfair.[250]

The institutions hallowed with Article 301 are not blessed with only the provisions, but also with the metaphors burnt into our souls. They become untouchable. Despite all that power of it with its institutions, the Father State is not comfortable with your usage of "your" freedom of expression. The laws became the tools of administration of the administrator.

After all, "The roses grow where the father strikes". The parents who entrust their children with such authorities as teachers use the metaphor of "Their meat is yours, but their bones are mine". Our women frequently hear the metaphor of "children in your womb, and a rod to your back". There is a society internalizing such a mentality in front of us.[251]

Judiciary

The independence of the judiciary is another matter of discussion, especially in the recent period in Turkey. The Parliamentary Assembly of the Council of Europe has stated that judges, prosecutors and police conducting bribery operations

250 Karakaş, (a). Also See the Case that Siti Şen, "*79-year-old Kurdish woman released from prison*", Today's Zaman, Retrieved from http://www. todayszaman. com/_79-year-old-kurdish-woman-released-from-prison_287508. html. Sitti Sen who detained and attend set out to the demonstration in Siirt out with friends. NTVMSNBC News, Retrieved from http://www. ntvmsnbc. com/id/25368589. Also see Case of *Şükran Aydin and Others V. Turkey,* App. N. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09), 27/05/2013. Retrieved fromhttp://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116031#{"itemid":["001-116031"]},10.09. 2014.

251 In 1987, A Judge in Çankırı Province who denied a woman's divorce demand with the phrase "You will not be missing abdomen of the colt (using for explain children who are in the abdomen of woman!)".

against the Prime Minister[252] and some other ministers are under pressure. This situation harms the public trust in the independent judiciary. The Parliamentary Assembly has reminded that the pressing measurements on the judiciary should be removed and the protection and ensuring of the courts' independence and objectivity is an obligation.[253] It is suggested that this is due to Turkey being a nation-state of late or also due ideological perspective.[254]

The EC Report regarding the Turkey Progress (2014) stated the case "*The response of the government following allegations of corruption in December 2013 has given rise to serious concerns regarding the independence of the judiciary and separation of powers. The widespread reassignments and dismissals of police officers, judges and prosecutors, despite the government's claim that these were not linked to the anti-corruption case, have impacted on the effective functioning of the relevant institutions, and raise questions as to the way procedures were used to formalise these*".[255]

From the aspect of freedom of expression, generally the judicial organs, particularly judges mostly do not feel themselves to be a member of an independent and secure organ. In general, it seems that they perceive themselves as the men of the state. Rather than protecting the rights of individuals, they rule in order to protect the rights of the government. This situation leads to the occurrence of the freedom pressed between the individual and government as an illusion. Also from Turkey's social and economic perspective, for ones having no financial opportunity, and no educational or cultural or infrastructural support from a

252 Now Recep Tayyip Erdoğan has been President of the Republic of Turkey however during writing of this article he was the Prime Minister of Turkey.

253 EC declared that "*With regard to impartiality, no improvements were made on the issue of practical arrangements at courthouses and during trials regarding judges, prosecutors and the guarantee of equality of arms for the prosecution and the defence. This continued to raise questions on the perception of the impartiality of judges.* ", COM(2014)700 final of 8. 10. 2014, p. 45.

254 Karakaş, (a).

255 COM(2014)700 final of 8. 10. 2014, p. 2.

certain structure, some legal assurances do not mean anything.[256]

Especially from the aspect of basic rights and liberties, and the guarantee of freedom of expression, judges must take Article 90 of Constitution into consideration.[257] This provision was brought in 2004. But our judges almost entirely avoid applying this article.[258] As an example from the recent past, the 5th Family

256 The latest example is the case in 13th May in which we lost 301 mining workers. Our Prime Minister, who gets angry when criticized, has punched a young man in the crowd, even if the government or Prime Minister don't accept this action. The young man has declared after the event that our Prime Minister has done was unwillingly. Then he almost apologized by saying that there were protestors but he is only a common citizen. It means that the common citizens cannot participate in a protestation in our country. If you use your freedom by demonstrating, all of the governmental institutions, including the Prime Minister, will stand against you. After all, "the punch comes from the Heaven" in our country. But it becomes more blessed when it comes from the hands of our Prime Minister. This young man says that if he has a job today, it is by virtue of the Prime Minister. Social-economic concerns are more important than expressing your own freely through demonstration. See the News; Harriet Alexander, "*Turkey mine explosion: PM Erdogan filmed 'slapping protester*", The Telegraph, 16 May 2014, http://www.telegraph.co.uk/news/worldnews/europe/turkey/10835557/Turkey-mine-explosion-PM-Erdogan-filmed-slapping-protester.html. Elif Shafak, "*Erdogan's slap in the face of all Turks*", The Guardian , 20 May 2014, http://www.theguardian. com/commentisfree/2014/may/20/erdogan-turks-soma-turkish. "*Turkish Prime Minister Erdoğan slapped me involuntarily, says Soma man*", Hurriyet Daily News, 15 May 2014, http://www.hurriyetdailynews.com/turkishprimeministererdoganslapped meinvoluntarilysayssomaman.aspx?pageID=238&nID=66508&NewsCatID=338.

257 Article 90 with the sentence added on May 7, 2004; Act No. 5170 regulated that; "…. . *In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.* "

258 By the ECHR It is detected as problematic (ATL Article 6/2. , 6/5. , TPL Article 301) including laws of human rights law may restrict rules

Court of Ankara has given a ruling against the provision forcing married women to use the surname of their husband. With reference to Article 90, the judge has given a ruling that a woman can sue for her own surname. The question of "Are our legislations more liberal than the provisions of international agreements?" comes into the mind. Or is this another version of being "national"? For, we generally have a national sensitivity that is coded into our laws. Almost none of the judges give rulings in the field of fundamental rights by considering international law.[259]

Nevertheless, when the point is the legal order, the international law cannot be isolated with national and non-national discrimination. At this point, Karakaş, who is the Turkish Judge of the ECHR, indicated that within the scope of the subsidiarity principle of the EU, "*if there is any violation of the right, this violation will be recovered internally, so the national-level appeals courts will solve those problems by implementing the law of European Human Rights*".[260]

The national issues have a different effect on us. There arises a dichotomy between national and non-national ones. The non-national issues are not internalized in our culture. We have a "national" sensitivity issue. Moreover, it can be said that we sometimes have a "national" obsession and also diversity is an issue that we are not familiar with.

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in terms of "*prescribed by law*" element in terms of the Constitution, Article 152 recognizes, "*the unconstitutionality of the other put forward in the courts* "clause, Article 90 of the Constitution, taking into account not operated and "*concrete norm control*" was determined not to go to the path.

259 There is evaluation regarding with the decision of the Section 9 of the Court of Cassation (Criminal Division), which is a case concerning with the freedom of expression, and in the present decision of Section different from other decisions that regarding freedom of expression previously. In the last case Section's gives ruling based on the ECHR standards and it is rely on the Article 90 of the TC. See Kuyucu, p. 815.

260 Karakaş, (a).

In such higher courts as the Court of Cassation, judges are required to take international legal provisions into account. The cases brought to the ECHR are the cases passed from the Court of Cassation after all of the circles in ordinary legal remedies have been completed. Hence, when the ECHR gives the ruling that there is a violation, this means that our judges give a ruling in opposition to the European Convention. When considering the score of Turkey from the aspect of infringements, this is a desperate situation from the side of the judiciary. When making interpretations of the laws, especially the ambiguous provisions, no interpretation is made in favor of freedoms.

The Internet

No legal regulations may be effectively carried out to curb the so called "biggest revolution of the world," because the Internet itself operates extensively, and it creates, and provides new freedoms and serves these freedoms. People are able to learn, teach, communicate, help, offer services, and as well, create ideas and countless things through the Internet. This is clearly the reason why the internet breeds freedom of expression and why legal regulations are necessary to protect the users from any unlawful contents.

The Internet belongs to the scope of freedom of expression and its general principles of Article 10. However, as stated by ECHR judgements, the internet has certain particular restrictions that have been obligatory on freedom of expression on the Internet. In the *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* judgement, the Court acknowledged that Article 10 of the Convention had to be interpreted as imposing on the States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists' freedom of expression on the Internet.[261]

The Research Division report to the Council of Europe specified the general findings of the Court on freedom of expression on the

261 Case of *Editorial Board of* Pravoye Delo *and Shtekel v. Ukraine ,* (no. 33014/05), 5 May 2011, Retrieved from www. echr. coe. int (Case-law / Case-Law Analysis / Research reports), 23. 06. 2014.

Internet as follows;[262] *general principles concerning freedom of expression apply to Internet publications, Interpretation of the Convention* "in the light of present-day conditions" *must take into account the specific nature of the Internet as a* "modern means of imparting information", *Restrictions that might prove necessary in the Internet context (Article 10/2), Press publications on the Internet: reinforcement of journalists' "duties and responsibilities", Higher level of protection of freedom of expression in the area of political, militant and polemical expression on the Internet.*[263]

Nowadays there is no strong opposition against the Government today, but it can be observed that the opposition may occur in only the social media. Let's take a look into the relationship between freedom of expression and the internet.[264]

We previously stated that the opposition came to the fore in social media, and the best example of that is Twitter and Youtube, with the latter being blocked in March 2014.[265] With the rise of audio recordings of alleged bribery by our Prime Minister, (Prime Minister at the time, but now he has become President) and some of the ministers, he showed a strong reaction against the

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262 Council of Europe Research Division, "*Internet: case-law of the European Court of Human Rights*", Council of Europe/European Court of Human Rights, 2011, p. 11. Retrieved from www. echr. coe. int (Case-law / Case-Law Analysis / Research reports), 23. 06. 2014.

263 Research Division, "*Internet: case-law of the European Court of Human Rights*", p. 11-17.

264 Access Blocked Websites (Last Updated: 28/01/2014) Almost 40 thousands web sites. EC Progress Report shared some statistical data about banning web sites as follow; "*Website bans of disproportionate scope and duration continued. In August, it was reported that more than 50000 sites were not accessible in Turkey, only 6 000 of which had been banned by court order. The Telecommunications Communication Presidency (TIB) has not published statistics on banned sites since May 2009.* " COM(2014)700 final of 8. 10. 2014, p. 52.

265 James Reynolds, "*Twitter website 'blocked' in Turkey*", 21 March 2014, http://www. bbc. com/news/world-europe-26677134. Also see Emily Kent Smith, "*Now Turkey blocks YouTube*", 27 March 2014, http://www. dailymail. co. uk/news/article-2590855/Now-Turkey-blocks-YouTube-Days-Twitter-ban-video-site-barred-leaked-audio-recording-Turkish-officials-discussing-Syria-appeared-online. html.

opposition developing in social media. A new audio recording has been released almost every day through YouTube. Twitter was an efficient public opinion tool, especially in the Gezi events. The Prime Minister at that time said he would have Twitter blocked, and then Twitter was silenced on the 21st of March as a result of the protection measures of the Presidency of Telecommunication and Communication (TİB). During that time, the President of Turkey (Abdullah Gül) criticized the bans on accessing Twitter and YouTube, publicly questioning the proportionality of the measures taken by the authorities.

The judgement to blocking this webpage coincided with local elections. In one of their declarations, the Parliamentary Assembly of the Council of Europe has stated that the block on Twitter and YouTube in an election period of Turkey is the violation of the freedom of expression.[266] EC Progress Report held that "*The human rights institutional framework needs to be strengthened further and needs to establish a track record. Legislation that further limited freedom of expression, including the law on Internet, was adopted and the effective exercise of this freedom was restricted in practice. The blanket bans on YouTube and Twitter were a matter of serious concern.*"[267]

The blocking of Internet sites has been found a violation of rights, especially freedom of expression and access to information and direct measures, in this sense has nothing to do with the right focus on human rights in the case-law of the ECHR. The Court accepted that the blocking of website "*…was not a blanket ban but rather a restriction on Internet access. However, the limited effect of the restriction did not lessen its significance, particularly as the Internet had now become one of the principal means of exercising the right to freedom of expression and information.*"[268]

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266 See COM (2014)700 final of 8. 10. 2014, p. 4,15, 33.

267 COM (2014)700 final of 8. 10. 2014, p. 63.

268 "Restriction of Internet access without a strict legal framework regulating the scope of the ban and affording the guarantee of judicial review to prevent possible abuses amounts to a violation of freedom of expression", ECHR 458 (2012), Retrieved from http://hudoc.echr.coe.int/webservices/content/pdf/003-4202780-4985142, 18. 12 2012.

Nevertheless it must be remembered that according to the ECHR "*….freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10…, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.*" [269] And the 26th article of our constitution regulated that everyone has the right to express and disseminate his/her thoughts and opinions by through other media, individually or collectively. On this topic, 15th Administrative Court of Ankara has given a ruling of the suspension of the execution. The Court issued the stay of execution after a number of objections were filed in the courts to cancel the ban. The court identified that "*the ban of the entire website was contrary to the Turkish Constitution and the European Convention of Human Rights, as it restricted the freedom of expression and communication*".

Despite this decision, the adjudication was not obeyed. In this direction, TİB has the right to object to the decision by the court that for now overturns the ban. Even if the TİB objects to the stay of execution decision of the 15th Administrative Court of Ankara, the body initially has to remove the ban before a second decision on it is made.[270] The claim has been brought to the Constitutional Court through a right to individual application without completing "the ordinary legal remedies" for Twitter. Both the Twitter and YouTube bans were consequently found unconstitutional by the Constitutional Court.[271] The Court ruled

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269 *The Sunday Times v. United Kingdom*, 26 April 1979, par. 65; *Handyside v. The United Kingdom*, par. 49. *Leyla Şahin v. Turkey*, App. N. 44774/98, 10 November 2005, par. 108. *Vogt v. Germany*, 26 September 1995, para. 52.

270 See the News for Today's Zaman, "*Constitutional Court deems new decision on Twitter ban unnecessary*", March 26 2014, retrieved from http://www.todayszaman.com/latest-news_constitutional-court-deems-new-decision-on-twitter-ban-unnecessary_343074. Html.

271 Twiteer Judgement of the Turkish Constitutional Court, App. Number; 2014/3986, 2. 4. 2014, Issued in 28961 Official Gazette of the Republic of Turkey Date 03. 04. 2014. Youtube Judgement App. Number; 2014/4705, 29/5/2014.

that the freedom of expression and the rights to provide and receive the news have been violated.[272]

The individual application to the Constitutional Court became available after the constitutional amendment in 2010. The Court gave a ruling about whether the rights and liberties provided by both Constitution and European Convention of Human Rights have been violated or not. The initial judgments of the Court were not efficient at all. But we can see nowadays that more efficient individual application judgments are given. For example; the judgments about the violation of the right to a fair trial (long imprisonment durations) and the right to elect and to be elected were effective.[273]

On the Turkey Progress Report (2014) the EC also indicated that the Constitutional Court *"...ruled on number important cases, such as YouTube and Twitter bans, as well as Hrant Dink's murder case. These decisions showed the importance of the individual application procedure introduced with the 2010 constitutional amendments. The court also overturned the number of amendments to the Law on the High Council of Judges and Prosecutors. These decisions highlighted the resilience of the Turkish constitutional system*".[274] It has been ruled that the usage of her own surname by a woman is required from the aspect of "*corporeal and spiritual existence of the individual*".

Especially about the "Twitter" ruling of the Constitutional Court, the Prime Minister, who is President of the Turkish Republic now, has stated that it was not "national", and he does not recognize the ruling of the Court. The Constitutional Court became the

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272 See the News See Reuters News "*Turkey's Twitter ban violates free speech: constitutional court*", http://www. reuters. com/article/2014/04/02/us-turkey-twitter-ban-idUSBREA311BF20140402. RT News, "*Turkey's constitutional court: Twitter ban violates free speech",* April 02, 2014, retrieved from http://rt. com/news/turkey-twitter-speech-court-921/.

273 Conscientious objection is a human right not recognizes the presence and threat, *Bayatyan v. Armenian* case, the ECHR Grand Chamber given by the binding decision after thoroughly impracticable the Penal Code Article 318 *Erçep v. Turkey;Feti Demirtas v. Turkey* judgement taking into account the need to be removed.(Conscientious Objection)

274 COM (2014)700 final of 8. 10. 2014, p. 13.

focus of anger in this topic, particularly for the Prime Minister at that time.[275] The Prime Minister countered angrily, and he declared that "*I don't find it right and patriotic that the Constitutional Court has adopted such a decision*". The Prime Minister of that period also added that "*While they are protecting an American company, our national and moral values are being disregarded.*"[276] Accordingly, the tension between the Government and the Constitutional Court has hit the headlines.[277]

Actually, the Constitutional Court has applied the international law in Twitter and YouTube judgments. It has been stated that the Court has exhibited a judicial activist approach by interpreting its authority in a wider scope. In this case, the acceptance of individual claims before all of the "ordinary legal remedies" has made the Court activist or juristocratic. But, in one of its judgments in 2010, it has been stated that *if it doesn't have any effect from the aspect of recovering the infringement or if any irreversible and severe threat would occur while the*

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275 "*Prime Minister Recep Tayyip Erdoğan made an application to the Constitutional Court on April 18 over the failure to implement court rulings requesting the removal of content violating his rights, according to a senior official from his office. He is seeking 50,000 Turkish Liras in compensation, Reuters reported. The move has been described as a "first of its kind" by the Union of Turkish Bar Associations head, who said the prime minister of Turkey had never before filed a lawsuit against the state.* " Hurriyet Daily News, "*Erdoğan 'becomes first prime minister to sue state in history*', 20 April 2014, http://www. hurriyetdailynews. com/erdogan-becomes-first-prime-minister-to-sue-state-in-history. aspx?pageID=238&nID=65303&NewsCatID=338.

276 Yigal Schleifer, "*Turkey: Ban Lifted, But Trials Continue for Twitter and Its Users*", Eoruasianet. org, http://www. eurasianet. org/node/68321.

277 Noted that time "*fearing a backlash in the local elections, the government moved to ban Twitter and YouTube prior to the vote. However, in April 2014 the court not only lifted the ban on Twitter, but created its own Twitter account (@AYMBASKANLIGI), which now has more than 100,000 followers. The court then went on to lift the ban on YouTube in May, arguing that the ban was a violation of freedom of expression".* Fevzi Bilgin, "The Turkish Constitutional Court's Struggle for Democracy and The Rule of Law", The Rethink Institute, October 2014, Retrieved from http://www. rethinkinstitute. org/turkish-constitutional-courts-struggle-democracy-rule-law/.

completion of the regular legal process, the Court can investigate the individual claims within the scope of the principle of the respect on constitutional rights.

Thus, the Constitutional Court did not exhibit an attitude limiting itself. The Court has not stated that it has no authority unless all of the regular legal processes are completed.[278] By taking the freedom of expression predicted in Article 10 of the ECHR into account, the Court has given the ruling that Twitter could not be blocked. Twitter, the voice of opposition, started to express itself again.[279]

The Ministry of Justice, along with all other governmental officials, have indicated to critics that the Constitutional Court is not the "S*uperior Court of Cassation*".[280] So, it is said that the Constitutional Court should not give an appropriate ruling, or if it does, there must be another reason laying behind that judgment. Then the gossip that the President of Constitutional Court would be a candidate in the oncoming presidential election had been

278 AİHM'si Third Section decısıon as to the admissibility of Application, *Muazzez Epözdemir v. Turkey* case Court finds that in the circumstances of this case the applicant cannot be considered as having complied with the exhaustion of domestic remedies rule laid down in Article 35 of the Convention. The application must therefore be rejected for non-exhaustion of domestic remedies under Article 35 § 1 of the Convention. *Muazzez Epözdemir v. Turkey*, App. N. 57039/00, p. 7.

279 Another case from Twitter issue is related with an internationally renowned classical composer Fazıl Say. In 2012 Say, an outspoken critic of Prime Minister Erdoğan, was charged with religious defamation under Article 216/3 of the TPL in response to a series of messages posted on Twitter. He was also charged under Article 218 of the TPL, which increases sentences by half for offences committed 'via press or broadcast'. Say, who denies the charges, faces up to 18 months in prison if found guilty. See "*Turkish composer charged over blasphemous tweets*", 11 April 2013, PEN International, retrieved from http://www.ifex.org/turkey/2013/04/11/composer_charged/.

280 Ministry of Justice made a written statement after that Twitter decision of Turkish Constitutional Court, "*Anayasa Mahkemesi Süper Temyiz Mahkemesi Değildir*", 09 Nisan 2014, http://www.aa.com.tr/tr/haberler/311541-anayasa-mahkemesi-super-temyiz-mahkemesi-degildir

spread.[281] This is a "national" suspicion situation, and especially in the most recent period, all of the events or disasters (Gezi events, the bombing event in Reyhanlı, parallel government assertions, voice records against the government, bribery scandals, and the Soma disaster) occurring in Turkey are linked to a conspiracy theory. Whenever a bad event occurs, it should not be arise from an internal reason, the government and the political institutional are not responsible from them. It is said that it was caused by exterior powers.

Then, this is not the first case about the Internet and freedom of expression in Turkey. Our access to Google has been blocked before. In its *Yıldırım v. Turkey* ruling,[282] the ECHR has not given just a ruling that only the freedom of expression has been violated. The Court has also stated that the Law No. 5651 (Regulating Broadcast on the Internet and Fighting against Crimes Committed through Internet Broadcasting, dated 2007) which provides the basis for blocking access to the web page, should be amended in accordance with Article 46 of the Convention. The Court declared that in the present case; "*In view of the insufficient guarantees provided by Law no. 5651 with regard to the blocking of Internet publications, I would also have found it established, based on Article 46, that the respondent State has a duty to amend the legislation ...*" What then is the need to evoke this after the circumstances?

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281 See an example for that kind of News Sena Alkan, "*Turkey's Most Asked Questions About Presidential Election*", http://www.dailysabah.com/politics/2014/04/18/turkeysmostaskedquestionsaboutpresidentialelection.Yavuz Baydar, "*Turkey's opposition already welcoming Erdoğan as president*", http://www.todayszaman.com/columnist/yavuz-baydar/turkeys-opposition-already-welcoming-erdogan-as-president_346447.html.

282 The case of *Yıldırım v. Turkey*, App. N. 3111/10. On 2009 the Denizli Criminal Court of First Instance, under section 8(1)(b) of Law no. 5651 on regulating Internet publications and combating Internet offences, ordered the blocking of the website http://sites.google.com/site/kemalizminkarinagrisi/benimhikayem/ataturk-koessi/at.The order was issued as a preventive measure in the context of criminal proceedings against the site's owner, who was accused of insulting the memory of Atatürk.)

As we recall from the Twitter and YouTube judgements, the following developments will clarify this case. As stated in the judgment, after 6 years passed, the Turkish Parliament amended the related Law through the omnibus law or omnibus bill. Omnibus Laws are based on Roman law and were restricted in Rome (*leges saturate, lex satura, lex per sturam*) however these are unique practice cases in Turkey's legislation tradition.[283] Through such a law, the amendment can be made on more than one act or more than one decree law. It is generally confused, and so that it cannot be understood which acts have been amended or which provisions have been changed. Also, this kind of legislation does not comply with the ECHR's guarantee on predictable, accessible and available limitation only by law. Yongalık also underlined that these kinds of legislations violate Article 36 of the Constitution, which regulates "freedom to claim rights".[284]

Consequently, through the amendments with an omnibus law, the government could easily block Twitter and then YouTube. So, from the aspect of freedom of expression through the Internet, Turkey went back in comparison with the year 2009. As mentioned before, the strong voice of opposition arises from social media, and this is limited by the obstacles. As a legal regulation of the Council of Europe "*Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems"* has accepted the Additional Protocol,[285] yet, the protocol has not been signed by Turkey.[286]

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283 Aynur Yongalık, "*13.02.2011 Tarih ve 6111 Sayılı Bazı Alacakların Yeniden Yapılandırılması ile Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu ve Diğer Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun ile KTK'nun 98.Maddesinde Yapılan Değişikliğe Genel Bir Bakış*", Anakara Barosu Ulusal Kongre: Yeni Yasal Düzenlemeler Işığında Bedensel Zararların Tamini Esasları ve Usulü Kongresi, 2013, p. 172-173.

284 Yongalık, p. 173.

285 Purpose of the Protocol "*to supplement, as between the Parties to the Protocol, the provisions of the Convention on Cybercrime, opened for signature in Budapest on 23 November 2001 as regards the criminalisation of acts of a racist and xenophobic nature committed through computer systems*". The Protocol defined "racist and xenophobic material" means as; "*any written material, any*

Of course, our Constitutional Court does not give such rulings always. Even the Twitter judgement has deficiencies in itself. For example, the issue of the surname of the woman can be evaluated as the violation of corporeal and spiritual existence of the individual rather than as a violation of principle of equality.[287] However, through annulment and claim of unconstitutionality before other courts' actions, the Court has accepted the provision (Turkish Civil Law Article 187) predicting that woman should bear the surname of her husband from the aspect of public order.[288] From this point, the subjective characteristic of individual application ruling needs to be considered here. Accordingly, the Constitutional Court can be an effective way for some of the rights. But from the aspect of some other rights, the Court must consider the rulings of the ECHR. In fact, this assessment indicates that Turkey could not develop a perspective on issues which we could not internalize.

Freedom of the Press

Being in a close relationship with freedom of expression, the freedom of press should not be subjected to penalty measures as

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image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors. 2. The terms and expressions used in this Protocol shall be interpreted in the same manner as they are interpreted under the Convention." Retrieved from http://conventions.coe.int/Treaty/en/Treaties/html/189.htm, 23.06.2014.

286 Treaty opens for signature by the States which have signed the Treaty ETS 185.Opening for signature in 28/1/2003, Entry into force in 1/3/2006. Retrieved from http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=8&DF=&CL=ENG, 23.09.2014.

287 Turkish Constitutional Court Second Section Judgment, App. N. 2013/4439, Decision Date: 06/03/2014

288 In Turkish Constitutional Court Cases regarding the Women's surnames rejected in this situation, is not violated to the equality before the law principle by the Court. Turkish Constitutional Court Judgment, Case Number: 1997/61, 1998/59; No: 61/59, Date of September 20, 1998, Issued in 24937 Official Gazette in 15.11.2002.

well as libel suits. The ECHR assesses being tolerant of critics by dividing it into two parts. This reveals a dichotomy from the aspect of the protection of personal rights of individuals. It has been stated that individuals and famous persons, especially politicians, should be more tolerant of criticism. Especially the politicians should bear the criticism more tolerantly. They have the right to be protected against libel. But this protection should be balanced with the general interest on open discussion of issues regarding the public. But our "Father State" has no tolerance for any criticism. Our metaphor in this issue is "Word belongs to the elders, while water belongs to the younger".

When considering the relationship between the freedom of the press and broadcasting with freedom of expression, we need to look at the applications, paying special attention to the freedom of the press and broadcasting. The stop or banning the broadcast by the organs of the *Radio and Television Supreme Council (RTÜK)* is the beginning of punishments. Since from 1994, many media broadcasts were silenced for 11.290 days. The reasons for these sanctions are divisive nature of publications with the stopping the broadcast for 8500 days and also stopping of the broadcast for 2200 days because of publish the reactionary nature.[289]

289 Media in Turkey was previously rated as "partly free" but the Freedom House has now ranked it as "not free" country. Deutsch Karlekar and Jennifer Dunham, "Overview Essay", Freedom House 2014 Reports, Retrieved from http://freedomhouse.org/report/freedom-press-2014/overview-essay#.VEaaEGd_ut1, 02.10.2014. Nikolaj Nielsen, "*Turkey Ranks Lowest In Europe's Press Freedom Index*", Retrieved from http://euobserver.com/justice/123992, 14.07.2014. The Economist, "*The press in Turkey: Not so free*", İstanbul, Apr 6th 2013, Retrieved from http://www.economist.com/news/europe/21575823-government finds-different-ways-intimidate-free-media-not-so-free, 12.09.2014. Lastly RTÜK issued warnings and imposed a fine of 11,000 Turkish lira (approx. 5250 USD) each on Ulusal TV, Halk TV, EM TV and Cem TV for their live coverage of the Gezi Park protests on the grounds that it comprised "content that encouraged or trivialized violence, violated broadcasting the principles of impartiality and failed to fulfil obligations not to report unverified news". On November 2013, prosecutors requested a sentence of up to 13 years imprisonment for Ulusal TV director Naci Eriş on charges of "inciting the public to

One of the judgements of the Constitutional Court is related to the annulment of some provisions of the Law 4202 amending the Press Law (5680). The Court examined that through the relative Act "*the third sentence of Supplementing Article 7 of the Law provides that if the act mentioned in the first sentence is repeatedly committed, the heavy fine mentioned above shall be doubled, and the activities of the individual or corporate body distributors shall be stopped.*"

The Court emphasized this in order to explain the conflict between suspensions, with the aim of ensuring that individuals receive information, incompatible with the requirements of a democratic society. As stated by the Court "*As to the suspension of the activities of the distributors, such suspension is in conflict with the aim of ensuring that individuals receive information, as it is the obligation of the distributors to distribute the periodical and non-periodical publications. Since such punishment is not appropriate for the aim pursued, it cannot be asserted that this kind of punishment is an obligation that could be envisaged. Without considering the aim pursued, the introduction of this kind of punishment may pave the way for an imbalance between aims and means. To restrict excessively the right to receive information, even for a limited period of time, is incompatible with the requirements of a democratic society*."

Therefore, the Court discovered that the other part of the statement reading as follows: "*... their activities shall be suspended up to three months*" *was contrary to the Constitution and had to be annulled.* From this point the Courts stated that; "*According to Article 13 of the Constitution, fundamental rights and freedoms may only be restricted for the reasons referred to in the article; they may not be contrary to the requirements of a democratic social order; and they may not be used for the aims other than those prescribed (before the October 2001 amendments). Suspension of the sales agencies injures the essence of the right to receive information. The impugned rule seeks to safeguard the right to receive information. Consequently,*

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commit offenses" through broadcasts of Gezi Park protests. See Pen International Report.

the suspension of sales agencies in certain conditions is a contradiction."[290]

However, when considering the extent of the restrictions and the application to press freedom, some issues cannot be completely observed as being in compliance with the Convention in Turkey. This case especially could return to restrictive measures against freedom of expression in practice. Especially banning a publication, and even in cases which can be a drawback confiscated by order of the competent authorities of publication are considered as the essential problem which these situation arranged in Article 28 of the Constitution.[291]

One of the most recent applications to the Constitutional Court regarding freedom of the press and freedom of expression is depicted as an important decision. The Applicant is an editor and also a columnist for a local newspaper which is branded as *Çine Madran Newspaper*. The Applicant, who wrote a newspaper article entitled "*Being Cheap*", is on trial because of libel. At the same time, in the newspapers dated 03.10.2012, a second column was published with the titled "*Vagabonds with Motorcycles*". Consequently, the second investigation initiated to the author because of current article. The Applicant allegedly committed the crime of libel against deputy district police chief, and the case was opened to a public trial. The Commission review of the Constitutional Court has decided that it is an admissibility decision for the relevant application.

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290 Turkish Constitutional Court Case Date of 05.06.1997, Number: E. 1996/70, K. 1997/53, Official Gazette: 04. 04.2003, 25069.

291 Especially publication ban, and even in cases which can be a drawback confiscated by order of the competent authorities of publication is important problem. Restrictive provisions contained in Article 28 as follow; "*Distribution may be prevented as a precautionary measure by the decision of a judge, or in case delay is deemed prejudicial, by the competent authority explicitly designated by law. The authority preventing the distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order preventing distribution shall become null and void unless upheld by a competent judge within forty-eight hours at the latest."*See Also Karan, "*İfade Özgürlüğü Hakkı*", p. 368.

The Constitutional Court mentioned freedom of expression in order to fulfill the social and individual functions by reference to the *Handyside v. UK* decision of the ECHR. According to the Constitutional Court; "freedom of expression… is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.

Also, the overseer position of the press and the public, which holds public power in a democratic system, ensures that their use within the legal limits is significant and that it plays an effective role at least for powers held by in the administrative and judicial review.

As we know, the ECHR accepted the free press as being "the context of the essential role of the press in ensuring the proper functioning of a political democracy". According to the ECHR, "whilst the press must not overstep the bounds set, inter alia, in the interest of the protection of the reputation or rights of others."[292] Also, it is nevertheless mandatory on it to inform information and ideas of public interest. Similarly, "not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of public watchdog". Although formulated primarily with regard to the print media, these principles doubtless apply also to the audio-visual media. The court elaborates on that essential role of the press in ensuring the proper functioning of a political democracy.

The Constitutional Court evaluated whether or not the impact of the issues "constituted interference". The assessment of the court is based on whether or not any intervention to the freedom. If there is any intervention, then the court will determine that whether or not the intervention established on legitimate aims and a reasonable to interference. If there is a legitimate aim, the Court examine that whether the intervention necessary for a

292 *Jersild v. Denmark,* App. No. 15890/89, 1994, Para. 31.

democratic society or not. Lastly, whether or not the proportionality is investigate by the Court.

According to the Court "While the press must not overstep the bounds set, inter alia, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders".

In this respect, the Court firstly stated that, is there any intervention to the applicant's right to freedom of expression and press as prescribed by law. Secondly, the Court requires an examination into whether the intervention's objective is legitimate. At this point the Constitutional Court indicates that the insult and libel offenses the protection of the reputation or rights of others in accordance with subsection for the protection of the reputation or rights of others taken under the provisions in accordance with Article 17 and Article 26 (2) of the Constitution.

The Constitutional Court has evaluated the content and purpose of the identity and location of persons who were targeted, the type of context, and issues such as the weight of the sanctions as a whole in the column with the title "Being Cheap". In this regard, the Court decided that the intervention to the applicant's freedom of expression and the press is not disproportional. The rights protected through Articles 26 and 28 of the Constitution are not violated in the present case, because the intervention with freedom of expression and the press has been found necessary and proportionate in a democratic society.

Constitutional Court is to provide a detailed assessment to decide whether intervention is necessary in a democratic society. The Court has examined that whether or not the principles of the proportionality, without infringing upon their essence, and pressing social need within the case. In this respect, noted that the relevant expression must be evaluated based on various factors such as the type, form, content, and timing described,

according to various factors such as the nature of the reason for restricting nature of the cause limitations.

The Court has decided it cannot say anything regarding the sanctions imposed on the applicant in order to protect the moral integrity, and this interference with the freedom of expression and the press is justified and necessary in a democratic society. Briefly for the second column of the journalist, the Court's assessment is based on whether that "the expressions do not directly target a person".

However, the ECHR has revealed that the relationship of the freedom of press and freedom of expression even in the protection of the reputation or rights of others case. The Court reiterates in *Jersild v. Denmark* case, not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.

Also the ECHR stated in the same case[293] its own opinion regarding the dissemination of the statements by the press as follows; the punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard, the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted."[294]

Also in ECHR's opinion, deterred from assisting the press in informing the public on matters of public interest will undermined the vital public-watchdog role of the press. Thus the ability of the press to afford accurate and reliable information may be adversely affected.[295]

Similarly in *Goodwin v. The United Kingdom* judgement the ECHR mentioned *the importance of the protection of journalistic sources*

293 *Denmark v. Jersild*, seri A, App. No. 298, 23 September 1994, para. 35.

294 *Denmark v. Jersild*, seri A, App. No. 298, 23 September 1994, para. 35.

295 *Goodwin v. The United Kingdom*, App. N. 17488/90, 27 March 1996, Para. 39, Retrieved from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974#{"itemid":["001-57974"]}, 12.05.2014.

for press freedom in a democratic society. The ECHR deliberates that "*the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest*".[296] However the Constitutional Court introduced a restrictive point of view for the press freedom above case. Since the Court determined that the criticisms are not clear or to whom to addressed whether the politicians, police officials and a private company owners not explicitly specified in the article.

Journalists and writers become the target of a number of limitations provision for reasons such as to insult the memory of Atatürk, Republic, the judiciary, judges and prosecutors, government, Turkish identity, the President and the security forces in Turkey. According to the Öndül, the reasons for those indicators are the series sensitivity of Turkish nation.[297]

Conclusion

Both in terms of the application and normative of laws or quality of laws, generally they are incompatible with the convention and the ECHR standards. These laws and regulations are recognized often as being designed so as to constitute a threat to freedom of expression. Nonetheless, Turkey has since made significant progress both in constitutional and legal regulations since 2001. Now, while we may say that we are in a slightly better situation than before, even so, our tests are unfinished by limiting freedom of expression because of our susceptibilities.

In *The Open Society and Its Enemies,* Karl Popper says that, "*unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the*

296 *Goodwin v. The United Kingdom*, para. 39.
297 Öndül (a), p. 12.

onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them".[298]

The metaphors around us have been integrated into our consciousness. The awareness reflects on the laws, then to the practice from the laws. As well as it is nowadays, these metaphors start to produce their own, and they legitimate themselves.[299] The freedom of expression is not a only matter of law, this is a matter of consciousness. "*If a level of consciousness creates a problem, you cannot solve this problem by using the same level of consciousness*"[300] said Einstein.

In this sense, in order to create a liberal country aiming at human dignity, the lawyers, implementers, and particularly the high courts need to interpret the rules likened to European Convention of Human Rights with this objective, and with reference to Article 90 of Constitution, they need to prefer implementing the provisions of international conventions and standards regarding to fundamental rights and freedoms.

This indicates that Turkey is not developing an attitude towards freedom in the state-freedom relationship. It clearly demonstrates that generally there has not tolerance against the opposers especially against specific groups who are express their democratic rights and freedom. Different thoughts, critics, identities, cultures, and behaviors, with a better definition, "the diversities" are not easily internalized in Turkey. Although hospitable to foreigners, Turks can be merciless against differences among themselves. The rule of law, the practices and minds are tending to safeguard the State's interest than the freedom. In light of our national sensitivity issues, when we consider someone as a "foe", it is as if we are abbreviating our freedom of expression.

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298 Cohen-Almagor, Raphael, "The Scope of Tolerance Studies on the Costs of Free Expression and Freedom of the Press", Routledge: USA-Canada, First published 2006, p. 1 vd.

299 Türkan Sancar, "*İfade Özgürlüğü Bağlamında Türk Ceza Kanunu 301. Madde*" Ankara Barosu- Ankara Üniversitesi Hukuk Fakültesi, 23 Şubat 2007.

300 Sami Selçuk, "*İfade Özgürlüğü Bağlamında Türk Ceza Kanunu 301. Madde*" Ankara Barosu- Ankara Üniversitesi Hukuk Fakültesi, 23 Şubat 2007.