ISSN:1309-6826

TÜRKİYE ADALET AKADEMİSİ

İFADE ÖZGÜRLÜĞÜ ÖZEL SAYISI

Special Issue on Freedom of Expression

TÜRKİYE ADALET AKADEMİSİ

DERGİSİ

ÖZEL SAYI • Şubat 2016 - Sayı 25 - Yıl: 7

Bu yayın, Türk Yargısının İfade Özgürlüğü Konusunda Kapasitesinin Güçlendirilmesi Avrupa Birligi-Avrupa Konseyi Ortak Projesi kapsamında hazırlanmıştır.

This publication has been prepared within the framework of the European Union-Council of Europe Joint Project on Strengthening the Capacity of Turkish Judiciary on Freedom of Expression.

25

Üç ayda bir yayımlanan ulusal hakemli dergidir.

www.taa.gov.tr

2016

TAAD

TÜRKİYE ADALET AKADEMİSİ DERGİSİ

"Adalet İçin Bilgi"

"Knowledge for Justice"

İFADE ÖZGÜRLÜĞÜ ÖZEL SAYISI

Special Issue on Freedom of Expression

25

Bu yayın, Türk Yargısının İfade Özgürlüğü Konusunda Kapasitesinin Güçlendirilmesi Avrupa Birligi-Avrupa Konseyi Ortak Projesi kapsamında hazırlanmıştır.

This publication has been prepared within the framework of the European Union-Council of Europe Joint Project on Strengthening the Capacity of Turkish Judiciary on Freedom of Expression.

ÖZEL SAYI • Şubat 2016 - Sayı 25 - Yıl: 7

www.taa.gov.tr

ISSN: 1309-6826

SAHİBİ/OWNER
Yılmaz AKÇİL
Türkiye Adalet Akademisi Adına, Türkiye Adalet Akademisi Başkanı
(On behalf of the Justice Academy of Turkey, President, Justice Academy of Turkey)
Danıştay Üyesi / Member, Council of State

*

GENEL EDİTÖR/GENERAL EDITOR
Ertan AYDIN
Bilimsel Çalışmalar ve Enformasyon Daire Başkanı
(Head of Scientific Studies and Information Department)

*

EDİTÖR/EDITOR
Dr. Veli KARATAŞ - Hâkim / Judge

*

SORUMLU YAZI İŞLERİ MÜDÜRÜ/EDITOR IN CHIEF
Fethullah SOYUBELLİ - Hâkim / Judge

*

YAYIN KURULU/EDITORIAL BOARD
Mustafa ARTUÇ
Türkiye Adalet Akademisi Başkan Yardımcısı
(Deputy President, Justice Academy of Turkey)

Ertan AYDIN
Bilimsel Çalışmalar ve Enformasyon Daire Başkanı
(Head of Scientific Studies and Information Department)

Ahmet ŞANSAL
İnsan Kaynakları ve Destek Hizmetleri Daire Başkanı
(Head of Human Resources and Support Services Department)

Prof. Dr. İlhan ÜZÜLMEZ
Öğretim Üyesi / Faculty Member

Prof. Dr. İbrahim AYDINLI
Öğretim Üyesi / Faculty Member

KAPAK TASARIM/DESIGN
Özgül EMEKÇİ ÖZBUDAK

*

*

YAYIN YÖNETİM MERKEZİ
PUBLICATION MANAGEMENT CENTER
Türkiye Adalet Akademisi
Ahlatlıbel Mah. İncek Şehit Savcı Mehmet Selim Kiraz Bulvarı Çankaya/Ankara
Tel: 312 489 81 80 • **Faks:** 312 489 81 01
E-posta: bilimsel.dergi@taa.gov.tr
Web: www.taa.gov.tr

BASKI
Yorum Matbaacılık - Sertifika No: 13651
Başkent OSB Recep Tayyip Erdoğan Blv. No: 12 - Malıköy - Sincan / ANKARA - Tel: (0-312) 395 21 12

SUBMISSION AND PUBLICATION GUIDELINES

1. Journal of Justice Academy of Turkey (Türkiye Adalet Akademisi Dergisi) is a peer-reviewed journal that publishes nationally reviewed articles in Turkish.
2. Journal of Justice Academy of Turkey is a quarterly journal published in January, April, July and October.
3. All submitted articles must not have been published in another publication. Simultaneous submissions are not accepted. Responsibility for submission lies entirely with the author.
4. Articles must be uploaded on the website: www.taa.gov.tr in the "Send Article" section. Authors may contact the general editor or editors in case of uploading problems.
5. Articles must include a Title (12 words maximum), an Abstract between (150-250 words) and Keywords (5-8 words). Peer-reviewed articles must include English, French or German translations of the Title, Abstract and Keywords.
6. Main body of the articles and footnotes must be written in 12-point, footnotes in 9.5-point "Times New Roman." The text must be justified and must have 2.5 cm margins on all sides.
7. Articles submitted to the journal must have an "Introduction", "Main Body" and "Conclusion." Footnote references must be used.
8. Articles must be between 3.000-10.000 words including Bibliography.
9. The academic title and the name of the author must be centred under the title with capitalised initial letters. The profession, tittle and e-mail address of the author must be given in a footnote.
10. Articles must be approved by the Editorial Board and at least one peer-reviewer.
11. Authors and reviewers receive royalties and review payments under the "Regulation on Publication and Editorial Board of the Justice Academy of Turkey." Two free copies of the journal are delivered to authors of articles published in the journal.

ADVISORY BOARD *

Prof. Dr. Abdurrahman EREN
Prof. Dr. Adem SÖZÜER
Prof. Dr. Ahmet BİLGİN
Prof. Dr. Ahmet GÖKÇEN
Prof. Dr. Ahmet GÜRBÜZ
Prof. Dr. Ali Şafak BALI
Prof. Dr. Arzu OĞUZ
Prof. Dr. Aydın BAŞBUĞ
Prof. Dr. Aydın GÜLAN
Prof. Dr. Ayhan DÖNER
Prof. Dr. Ayşe Füsun ARSAVA
Prof. Dr. Ayşe NUHOĞLU
Prof. Dr. Bahri ÖZTÜRK
Prof. Dr. Bahtiyar AKYILMAZ
Prof. Dr. Bilge ÖZTAN
Prof. Dr. Cem BAYGIN
Prof. Dr. Cemal ŞANLI
Prof. Dr. Cumhur ŞAHIN
Prof. Dr. Çiğdem KIRCA
Prof. Dr. Doğan SOYASLAN
Prof. Dr. Durmuş TEZCAN
Prof. Dr. Ejder YILMAZ
Prof. Dr. Ekrem Buğra EKÎNCİ
Prof. Dr. Emine AKYÜZ
Prof. Dr. Ender Ethem ATAY
Prof. Dr. Enver BOZKURT
Prof. Dr. Erkan KÜÇÜKGÜNGÖR
Prof. Dr. Ersan ÖZ
Prof. Dr. Faruk TURHAN
Prof. Dr. Feridun YENISEY
Prof. Dr. Fethi GEDIKLI
Prof. Dr. Fügen SARGIN
Prof. Dr. Halil AKKANAT
Prof. Dr. Hamdi MOLLAMAHMUTOĞLU
Prof. Dr. Hamide ZAFER
Prof. Dr. Hasan AYRANCI
Prof. Dr. Hasan BACANLI
Prof. Dr. Hasan İŞGÜZAR
Prof. Dr. Hasan Tahsin FENDOĞLU
Prof. Dr. Hasan TUNÇ
Prof. Dr. Hüseyin HATEMİ
Prof. Dr. İbrahim AYDINLI
Prof. Dr. İbrahim ÖZBAY
Prof. Dr. İhsan ERDOĞAN
Prof. Dr. İlhan ÜZÜLMEZ
Prof. Dr. İsmail KAYAR
Prof. Dr. İsmail KIRCA
Prof. Dr. İzzet ÖZGENÇ
Prof. Dr. Kadir ARICI
Prof. Dr. Kamil Ufuk BILGIN
Prof. Dr. Kayıhan İÇEL
Prof. Dr. Kemal ŞENOCAK
Prof. Dr. Kudret GÜVEN
Prof. Dr. M. Fatih UŞAN
Prof. Dr. Mehmet Akif AYDIN
Prof. Dr. Mehmet DEMİR
Prof. Dr. Mehmet Emin ARTUK
Prof. Dr. Mehmet Emin BİLGE
Prof. Dr. Mahmut KOCA
Prof. Dr. Mehmet ÖZDAMAR
Prof. Dr. Melikşah YASİN
Prof. Dr. Metin FEYZIOĞLU
Prof. Dr. Metin TOPÇUOĞLU
Prof. Dr. Muharrem KILIÇ
Prof. Dr. Muharrem ÖZEN
Prof. Dr. Murat ATALI
Prof. Dr. Murat DOĞAN
Prof. Dr. Musa Kazım ARICAN
Prof. Dr. Mustafa AKKAYA
Prof. Dr. Mustafa ATEŞ
Prof. Dr. Mustafa AVCI
Prof. Dr. Mustafa ERDOĞAN
Prof. Dr. Mustafa Fadıl YILDIRIM
Prof. Dr. Mustafa KOÇAK
Prof. Dr. Nevzat KOÇ
Prof. Dr. Nihat BULUT
Prof. Dr. Nuray EKŞİ
Prof. Dr. Oğuz SANCAKDAR
Prof. Dr. Osman DOĞRU
Prof. Dr. Osman İSFEN
Prof. Dr. Ömer ANAYURT
Prof. Dr. Ramazan ÇAĞLAYAN
Prof. Dr. Mehmet Refik KORKUSUZ
Prof. Dr. Selçuk ÖZTEK
Prof. Dr. Sururi AKTAŞ
Prof. Dr. Süha TANRIVER
Prof. Dr. Şafak Ertan ÇOMAKLI
Prof. Dr. Turan YILDIRIM
Prof. Dr. Vahit DOĞAN
Prof. Dr. Veli Özer ÖZBEK
Prof. Dr. Veysel BAŞPINAR
Prof. Dr. Yaşar Hakan PEKCANITEZ
Prof. Dr. Yavuz ATAR
Prof. Dr. Yener ÜNVER
Prof. Dr. Yılmaz ÇOLAK
Prof. Dr. Yusuf KARAKOÇ
Prof. Dr. Yusuf Şevki HAKYEMEZ
Prof. Dr. Yusuf Ziya TAŞKAN

* The members of the advisory board have been listed alphabetically.

İÇİNDEKİLER/CONTENTS

Türkiye Adalet Akademisi Dergisi;

Veri Tabanlarında Taranmaktadır.

MAKALELER / ARTICLES

AVRUPA İNSAN HAKLARI MAHKEMESİ KARARLARINDA İFADE ÖZGÜRLÜĞÜ[1]

FREEDOM OF EXPRESSION IN THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS[1]

Professor Dr. Hasan Tahsin FENDOĞLU[2]

ÖZET

AİHM, kendisine gelen davalara uygulamak üzere oluşturduğu içtihatlarla bazı ölçütler belirlemiştir. Sınırlama, kanunla düzenlenmiş olmalı, meşru amaçlardan birisi için yapılmış olmalı, demokratik toplumda gerekli olmalı ve kullanılan araç müdahalenin amacıyla orantılı olmalıdır. Orantılılık ölçütünde akit devletler, söz konusu temel hakka mümkün olduğunca az kısıtlama getirmeli, mevzuatı belirlenen amaçları gerçekleştirmek için dikkatli bir şekilde hazırlamış olmalı, kanun hakkaniyete aykırı olmamalı ve temelsiz düşüncelere dayanmamalıdır. Orantılılık ölçütünün denetiminde ve belirtilen hususların belirlenmesinde sınırlamaya ilişkin gerekli ve yeterli sebepler verilmiş olmalı, daha az sınırlayıcı bir önlemin mevcut olup-olmadığı araştırılmalı, karar verilirken yöntem bakımından adil bir süreç izlenmiş olmalı, kötüye kullanmaya karşı koruyucu önlemler alınmalı ve müdahale hakkın özünü zedelememelidir. AİHM, akit devletin, AİHS'deki bir hak ve özgürlüğe müdahalesinin gerekli olup-olmadığına karar verebilmek için araç amaç orantısını aramaktadır. Aynı amacı elde etmek için daha az sınırlayıcı alternative bir hak ve özgürlük varsa veya müdahale ile bu amaç elde edilemezse AİHM, AİHS'nin ihlal edilmiş olduğuna karar vermektedir. 1982 Anayasasının 13'üncü, 14'üncü ve 15'inci maddelerinin değişikliklerinde özellikle AİHS ile uyum sağlanmasına büyük çaba gösterildiği anlaşılmaktadır. Akit devletlerin takdir yetkisini AİHM denetlemektedir. Takdir yetkisi kavramı, AİHM'nin elinde etkili ve esnek bir silah olup, karşılıklı iddia ve çıkarları değerlendirme ve dengeleme tekniği olarak kullanılmaktadır. AİHM'nin bir amacı da devletin yasaları ile uygulaması arasında uyum sağlamaktır.

Anahtar Kelimeler: Avrupa İnsan Hakları Sözleşmesi, Avrupa İnsan Hakları Mahkemesi, Orantılılık, Sınırlama, Takdir Yetkisi, 13'üncü madde, Araç-Amaç Dengesi, İnsan Hakları, Anayasa, Hakkın Özü, Avrupa Mutabakatı, Terör.

---

1 This topic has beeen prepared by making reference to 'Constitutional Law, Yetkin, 2015, Ankara, p.368-388, Fendoğlu H.T., and it has been updated on this publication'

2 Head of the Department of Constitutional Law of the Law Faculty of University of Hacettepe

ABSTRACT

Contracting states should be restrict as little as possible to the fundamental rights on question on the criteria of proportionality, they should be prepare to realise the objectives set in legislation carefully, the law should not be contrary to equity and it should not be based on unfounded thoughts. Limitations should be regulated by law, must be made for one of the legitimate aims, must be necessary in a democratic society and must be proportionate to means-end. European Court of Human Rights, precedents some criterias to cases, created by applying brought before them. In the determination of the points should be given proportionality of the audit and the necessary and sufficient reasons for the limitations, must be given a legal decision process in terms of method, should be taken preventive measures against abuse and intervention should not be injure the essence of the right. European Court of Human Rights, seeking the means-end ratio, rights and freedoms of intervention is necessary to decide whether on the European Convention on Human Rights at the Contracting States. European Court of Human Rights decides that there has been violation if there is less restrictive alternative to the rights and freedoms for to achieve the same purpose or this aim can not be achieved by the intervention. It is understood that considerable effort especially 13th, 14th and amendment of article 15 of 1982 Constitution, ensuring compliance with European Convention on Human Rights. European Court of Human Rights audits discretionary powers of the Contracting States. European Court of Human Rights uses the concept of discretionary powers as effective and flexible arm as mutual claims and interests assessment and balancing techniques. The aim of European Court of Human Rights ensure compliance between state laws with practice.

Keywords: European Convention on Human Rights, European Court of Human Rights, Proportionality, Limitation, Discretionary Powers, Article 13, Balance of Meansend, Human Rights, Constitution, the Essence of Right, European Reconciliation, Terrorism.

♦♦♦♦

A. OVERALL

The Council of Europe was founded on 5.5.1949 and Turkey is one of its founding members. The Council of Europe has two main organs; the Committee of Ministers which is composed of the ministers of foreign affairs of member states meeting twice a year and the Parliamentary Assembly which is made up of the parlementarians of member states, is the advisroy body. In the Council of Europe, there are also expert committees.

The European Convention on Human Rights which has been signed by 10 states on 4 November 1950 in Rome and entered into force on 3 September 1953, imposes obligations to parties. Turkey has ratified the convention by a law dated 10.3.1954[3]. The Convention is legally binding and it could not be subject to a plea of uncosntitutionality[4].

The European Court of Human Rights consists of a number of judges equal to the number of member states and it gives binding decisions on individual applications[5]. The Convention makes a distinction between two types of application: individual applications and inter-State applications. In order to lodge an individual application, two conditions are required: exhaustion of domestic remedies and existence of a violation of an human right. As known, the ECHR and its Additional Protocols constitue a whole. The ECtHR has always indicated that the Convention and its Covenants constitute a whole.

The Convention embodies only personal and political rights and not social and economic rights, and it has an effective mechanism of control. The European Social Charter which has been adopted in 1961 and entered into force in 1965 is made in order to cover economic and social rights that are not covered by the ECHR. This Charter guides member states and it also predicts to control them. Turkey is one of the first signatories of this charter. The Grand National Assembly of Turkey approved this charter[6].

Turkey has signed and approved most of the approximately 130 conventions of the Council of Europe in the field of human rights. The ECHR is the 'Constitution of the European order[7]'. The power of coercion of the Convention rests with the Committee of Ministers. States shall ensure that not only citizens but everyone could benefit from the Convention[8]. The

---

3 O.J. 19.3.1954, No.8662

4 See below. 1982/90.

5 For UN Protection Mechanisms (UN Human Rights Council, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights) see. Kaboğlu, *Constitutional Law,* p. 265–267. Regional scale (OECD, African Charter, Aian Continentı, Arabian Charter) see İbid. p. 267–270. For ECHR see.İbid. p. 270–278. For ONG see. İbid. p. 279–281..

6 Kn. no. 3581, OJ. 4. 7. 1988, S. 20215. http://www.tbmm.gov.tr/komisyon/kefe/docs/sosyalsart.pdf (2.12.2014). For details concerning social rights see. Bakırcı, Kadriye, '' Social Rights in 1961 and 1982 Constitutions and the Project of Constitution of 2007' Dedicated to *Aliefendioğlu, p. 357-378''.*

7 Selçuk, Sami, *The European Convention on Human Rights and Its Application in Turkey*, p. 400.

8 Gölcüklü, Feyyaz - Gözübüyük, Şeref, *the European Convention on Human Rights and Its Application*, Ankara1994, p. 27-28.

deliberation of the ECHR has been given priority in the General Assembly, it has been adopted by unanimity and it constitutes a part of the domestic law and applies automatically; and it can not be subject to a plea of unconstitutioanlity. Even adopted after the Convention, its provisions can not be modified by a law or Constitution unilaterally[9].

As to the complaints lodged before it, the Court's mechanism is the following: The European Court looks for a friendly settlement of the case before examining its merits. If it is impossible to resolve the case, the Court, after taking observations of the parties, prepares a report and sends it to the concerned states and to the Committee of Ministers. The decision of the Court is final and binding.

Actually, the Court has two problems; the first one is the increase of the number of applications before it and the inadequacy of its renovated actual structure. The second one is, the uncertainity of the European Charter of Human Rights prepared by the European Union which is not a binding declaration, but in the futur, it could be embodied in the EU Convention and then become binding to be applied by the European Court in Luxembourg. Therefore, there might be two different courts and two law systems in the field of human rights. In the European Charter of Human Rights, there is no limitation to rights[10]. We wish that the European Union has a heart, social conciousness and courage[11].

Turkey, as one of the founding members of the Council of Europe, is party to most of the human rights conventions within the Council of Europe and to the additional protocols to the ECHR except the Additional Protocols no. 4, 7 and 12. Thus, as a state party to the Convention, Turkey engaged to accept the competence of the ECtHR and ensured a constitutional guarantee in the article 90/5 of the Constitution that follows: *'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.'* The constitutional amendment made on 7 May 2004, changed the Constitution as follows: '*In the case of a conflict between international agreements, duly put into effect, concerning fundamental*

9 Selçuk, *The European Convention on Human Rights and Its Application in Turkey,* p. 403.

10 See. Türmen, Rıza, *" The Scope and Limits of Fundemental Rights and Freedoms According to the European Convention on Human Rights''*, Review of the Court of Cassation, C. 28, January-April 2002, pg. 1-2, 192-213, 212, p.213.

11 Redlich, Attanasio, Goldstein, *Understanding Constitutional Law,* p. 10 ve 21.

rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail'. In this respect, the domestic courts, giving their desicions, must take into account the fundemental rights and freedoms emobodied in the ECHR and the case-law of the ECtHR, interpreting these rights and freedoms. When considered from this point of view, the Court of Cassation, the Council of State and domestic courts, have begun to give decisions in conformity with the provisions of the ECHR in order to ensure the direct application of the Court's case-law. Turkey is making considerable progress as to the quality of the complaints, the number of the applications and the enforcement[12] of Court's decisions.

The Additional Protocols no. 3 and 5 to the Convention, changing the text of the Convention have been embodied in the text of the Convention. The Additional Protocol no. 6, adopted on 28.4.1983, concerns the abolition of the death penalty, and it has been signed by Turkey on 15 January 2003; thus, each member state of the Council of Europe- which has 44 members- has signed this Protocol. The Additional Protocol no. 7 adopted on 22 November 1984 concerns foreigners' rights and comparative law. The other protocols concern the working principles of the Court[13].

B. HUMAN RIGHTS IN THE SYSTEM OF THE ECHR

Where the ECHR has set the limitations on the article 10/2 of the Convention, the article 19 of the International Covenant on Civil and Political Rights; set up a 'three stages rule'; '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 for the rights of others and the respect of their reputation, the protection of national security, public order, public health and morals '.

The article 20 of the Covenant on Civil and Political Rights, stipulates certain principles as to the limitations: Accordingly, 'Any advocacy of national, racial or religious hatred[14] that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. Furthermore, the interference shall be (1)

---

12 The most important problem in Turkish law is the practice rather than the theory. In Turkey, it could be considered that there is mal practice. The legislation must be interpreted in the light of the international law and the Turkish judiciary must be developped.

13 For Additional Protocols see. *Turkish Constitutional Texts*, Adalet Publications, Ankara, 2013, 2 nd edition,

14 For hate speech see Emanuel, *Constitutional Law*, p. 520.

prescribed by law and (2) the interference shall pursue **legitimate aim** (such as, national security and territorial integrity, public security, public health and moral, the protection of rights and freedoms, the maintenance of public order or in order to ensure the authority and independence of th judiciary). (3) the interference must be **necessary in a democratic society**. The interference must answer a pressing social need or it must have a valid reason. (4) The means used must be '**proportionate**' to the legitimate aim.

As to the criterion of proportionality; 1. The interference shall limit the fundamental right in question as little as possible. 2. The interference shall be prepared attentively in order to realise the aims pursued. 3. The interference should not be contrary to equity 4. It should not be based on unfounded thoughts.

In the control of the criterion of proportionality and the determination of these requirements, the following questions must be answered: 1. Is there **sufficient and necessary** reasons for the limitation? Is it possible to take **less limitative** measures? 3. Was the method pursued **fair**? 4. Is there preventive measures against abusive actions? 5. Did the interference injure the essence of the right[15]? The ECtHR applies these criteria when it examines the complaints. The Court, applies the principle of proportionality[16] (means-aim ratio). The Court, in a judgment, qualified the ECHR as "Constitutional instrument of European public order in the field of human rights[17]". The ECtHR, controls the proportionality means-aim in order to examine whether the interference to the right or freedom was necessary. European Court of Human Rights decides that there has been violation if there is less restrictive alternative to the rights and freedoms for to achieve the same purpose or this aim can not be achieved by the intervention.

---

15 For details, see. Fendoğlu, '' Limitations of Fundamental Rights and Freedoms In Conjunction with the Constitutional Amendement of 2001 (Article 13 of the Constitution)'', it has been exposed in the Semposium called 'The Effects of the Constitutional Amendments on the Rights and Freedoms'' organized fort he 40th foundation anniversary of the Constitutional Court''.

16 For examples of the criterion of proportionality of the ECtHR, see. Sunday, The content and limits of the freedom of expression in the Turkish Constitution and the European Convention on Human Rights, Ankara, 2001, p. 101; Metin, ThE criterion of proportionality, p.92.

17 Human Rights Law Journal (HRLJ) 1990, 113.

Examples of proportionality

The first example is the decision *Glasenapp/Germany*. In its decision, the Court (1984) mentionned that the article 17 of the Convention has been introduced in order to protect the supremacy of law and the system of democracy and that any interference to the rights will only be possible in case of 'necessity'[18].

The second example ise the case *Campbell/UK* (1993) (Article 8 of the Convention). The case *Campbell/UK* concerns an application lodged against UK before the Commission, by a detainee who complains of the fact that the penitantiary administration opened and read a letter sent to him. According to the Court's decision, the detainees' letters could be read in case of **reasonable suspicion** and the administration **should not abuse this right**. In its decision, the Court held that the administration's interference was disproportionate and it mentioned that the control of the letters must be *proportionate to the aim* pursued. This criterion has been used in the cases concerning the article **10** of the Convention about the freedom of expression.

The third example is the case *Gerger/Turkey* [19](1999). Mr. Gerger has been sentenced to one year and eight months imprisonment and a fine of 208,000,000 Turkish Liras according to the Article 8 of the Prevention of Terrorism Act, because of a message that he sent to the memorial ceremony held for Deniz Gezmiş and his friends. The Court held that the Article 10 of the Convention has been violated in this case because of the minimal attendance to the memorial ceremony, the limited effect of the ceremony on the national security-public order-territorial integrity and the absence of violence-use of weapons or incitement to violence and that the conviction of Mr. Gerger was disproportionate to the aims pursued. The Article 17 of the Convention mentioned that as individuals States should not abuse its right. States and/or individuals should not injure the essence of the rights and freedoms.

According to Article 10 of the ECHR, freedom of expression has two main elements: Freedom of access to information and ideas and the freedom to promote them. According to this article, '' Everyone has the right to freedom of expression. This right should 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.'' '' The

---

18 http://hudoc.echr.coe.int/eng#{"fulltext": (1984),"], Application no. 9228/80, STRASBOURG, 28 August 1986, ["GRANDCHAMBER", "CHAMBER"] (04.01.2016); p. 209 this article is seen as a guarantee against anti-democratic movements; Türmen.

19 For this case, see. Gerger/Turkey: No. 24919/94, 8 July 1999 (www.echr.coe.int/Eng/Edocs/ Subject_Matter_1999_Table_eng. htm (1999 table).

exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, 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.''

In international law, the freedom of expression is set forth in the Article 10 of the ECHR and in the Article 19 of the Universal Declaration of Human Rights. The European Charter of Fundemantal Rights, stipulates that '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. The freedom and pluralism of the media shall be respected.' The Article 10 of the ECHR stems from the Article 19 of the UDHR which has been adopted on 10 December 1948. According to UDHR, '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.'

The article 19/2 of the International Covenant on Civil and Political Rights which is the complementary part of the Universal Declaration of Human Rights, is as follows: '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'.

According to the ECtHR, (Castells/Spain), 'The freedom of expression constitutes one of the essential foundations of a democratic society, and it is the prerequisite for the progress of the democracy and the self-fulfilment of individuals. The 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; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"[20].

[20] According to the ECtHR, the freedom of expression constitutes one of the essential foundations of a democratic society, and it is the prerequisite for the progress of the democracy and the self-fulfilment of individuals. The 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; Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society. Castells v. Spain, 23.4.1992., for another decision see Incal/Turkey, 9.6.1998. bkz. www.echr.coe.int

According to the ECtHR, for the political pluralism six criteria are required[21]. (1) The content of the expression is important. Which is determinant for the violation is violence, hatred, hostility and intolerance speech. Hatred speech should not be legitimized[22]. (2) Did the concrete situation on the time of the expression constitute a danger? (3) How and where did the speech take place? (4) If nobody listened the speech, there will be no violation (5) Who is the interlocutor of the speech? Public officials (because of their functions); politicians must be patient because of their functions and the governement must be more patient[23]. (6) It is important to know who made the speech. Acoording to the ECHR, if the personal opininon does not include (i) violence (ii) hatred towards a person or a group[24] (iii) or intolerence, there will be no violation.

Some examples;

1. The French leader Le Pen qualified the increasment of Muslims in the France as an important danger for French people, then, upon complaint before domestic courts, he has been sentenced to pay damages, the dispute has been brought before the ECtHR and the Court dismissed the application[25].

2. Public officials have the possibility to take moderate and convenient penal measures against slander or false accusations[26].

3. Belgian political leader Feret, published banners and notices ironizing immigrants in Belgium and upon complaint its parliamentary immunity has been abolished, he has been sentenced to imprisonment and the case has been brought before the ECtHR. The Court rejected his case.[27]

4. In Incal case, the Court found a violation concerning a penalty imposed for an undistributed article[28].

---

21 For details, see. Sibel İnceoğlu, 'Pluralism in the Decisions of the European Court of Human Rights', TBBY, Ankara, 2010, p. 83-129.

22 See. Sürek v. Turkey, 8.7.1999.

23 Lingens v. Austria, 8.7.1988. The ECtHR, in this decision, mentioned that it was impossible to prove expressions such as "the basest opportunism", "immoral" and "undignified" and to prove the accuracy of judgment values.

24 For hate crimes, see.Şahin, The freedom of expression, p.424-444.

25 Le Pen v. France, 20.4.2010. The ECtHR, in its decisions, could mention that the number and the judgment day of the application were important.

26 İncal v. Turkey.

27 The Court, held that the imprisonment sentence given to Belgian political leader was in conformity with the ECtHR, and it held that Mr. Feret was wrong because of his hostility against migrants. Feret v. Belgium, 16.7.2009. For Belgian constitutional law, see. Lucas Prakke and Constantijn Kortmann, Constitutional Law, p. 75-132.

28 Incal v.Turkey

5. The ancient mayor of Diyarbakır, said in 1997 that 'he's supporting the movement of national liberation of PKK' and he has been convicted according to article 312 of the Criminal code and the ECtHR held that there is no violation[29].

6. The applicant Mr. Sürek, owner of a weekly review, has been convicted for use of labels such as 'fascist Turkish army', 'the TC murder gang' and 'the hired killers of emperialism' and for glorifying the violence by domestic courts and the ECtHR confirmed this decision[30].

7. Gündüz supported sharia and he has been convicted in Turkey but the ECtHR held that his conviction was disproportionate, the broadcasting was balanced and that during live broadcast it was not possible to rectify the expression, that the speech was not dangerous and that it was within the freedom of expression[31].

8. In Herri Batasuna case, the ECtHR held that the decision of the Spanish Constitutional Court of glorifying violence was in conformity with the ECHR[32].

9. Oya Ataman lodged an application before the ECtHR and she complained of the use of tear gas by the police and the Court considered that it was important for public authorities to show a certain degree of tolerence towards peaceful gatherings and the Court held that there is violation[33].

10. As a leader of a political party Hasan Celal Güzel, was convicted for a statement that he made and then, the ECtHR held that there was no violation

---

29 The Court held that the imprisonment decision was in conformity with the Convention and it rejected the application because of the expression of the applicant who said 'I am supporting the national dependance movement of PKK' and has been punished according to article 312 for praising violence.; Zana v. Turkey, 35.11.1997.

30 Sürek v. Turkey, 8.7.1999 the ECtHR confirmed the decision of the domestic court that convicted the applicant to imprisonment for glorifying the violence and for the use of labels such as 'fascist Turkish army', 'the TC murder gang' and 'the hired killers of emperialism'.

31 Gündüz v. Turkey

32 the ECHR held that the decision of the Spanish Constitutional Court on glorifying violence was in conformity with the ECtHR , Herri Batasuna v. Spain, 30.6.2009

33 In Oya Ataman decision, the ECtHR, held that there is a violation because of the use of the use of tear gas by police and it mentioned that peaceful meetings must be tolerated; Oya Ataman v. Turkey, 5.12.2006. The power of police in Turkey has set forth by the national security act no. 6638, entered into force in 4 April 2015, which is a bag bill of 27 March 2015. Accordingly, the police, could carry out a strip search or a car search without a warrant. The police could suspend persons who endanger the safety of lifle and property. According to the act no. 6638 dated 27 March 2015, the police has power to use arms where it is strictly necessary and proportionally, in order to neutralise any person who attacks or prepares to attack to himself or others, offices, residences, public buildings, schools, sanctuaries, vehicles, open or closed areas where people gathered. See. O.J. 4.4.2015. 29316.

and it emphasized that the freedom of expression was wide in this case because of the fact that the applicant was a leader of a political party[34]. The Court ensures a large protection to the freedom of pres.[35]

11. The Court considered that the national authorities enjoy a wide margin of appreciation in matters of obscenity and morals. The Court considering that domestic auhtorities are better placed than international judge and emphasizing that there is no unique moral conception in Europe, is respectful and highly conservative towards moral conception[36].

12. The ECtHR is also conservative concerning **religious values of the majority** such as morals. The Court gives decisions protecting religious values and considers that the violation of religious values is an abusive violation of the spirit of tolerance[37].

13. In its judgment Hasan and Eylem Zengin, after examining the content of the **religious culture and ethics classes** the Court hold that there is a violation because of the absence of pluralist and objective conduct of the State and it considered that the State must respect parents'convictions[38].

14. The Court, in its judgment **Leyla Şahin**, rejected the application of the applicant[39].

---

34 Guzel v. Turkey, 24.7.2007.

35 The ECtHR ensures a large protection to the freedom of press and a limited protection to politicians.

36 According to the ECtHR, national authorities enjoy a wide margin of appreciation in matters of obscenity and morals and there is no unique moral conception in Europe, and it must be respectful towards moral conception. İnceoğlu, p. 108. see. Müler and others v. Switzerland, 25.5.1988; Open Door and Well Women v. Ireland, 29.10.1992. Because of the fact that obscenity is a violation reason, according to the law no. 6112, the subject is brought before the Constitutional Court. Certain articles on obscenity, foreign capital, one year condition for tenders, monopolistic corporation and the power of Prime Minister's Office in time of crisis, of the Act of the Radio and Television High Council, have been subject to a plea of unconstitutionality and the Constitutional Court rejected this application (E: 2011/44, K: 2012/99, KT: 21.6.2012). (AMKD, Tome 50/2, Ankara 2013, p. 881-956).

37 According to the ECtHR, religious values of the majority are important such as morals; religious values must be protected; violation of religious values is an abusive violation of tolerance spirit; Otto Preminger Institut v. Austria, 20.9.1994. İ. A v. Turkey, 13.9.2005.

38 Hasan ve Eylem Zengin v. Turkey, 9.10.2007. see. Zengin, "Evaluation of the Judgment Hasan and Eylem Zengin", SÜHFD, 2011, Tome, 19, no. 2, p. 41.

39 Leyla Şahin v. Turkey, 10.11.2005.

The following consequences could be deduced from the ECtHR's case-law on freedom of expression;

1. The case-law on judiciary.- According to ECtHR, judicial officials may be criticized. The press may cover the events examined by judicial authorities but any defamation to judges is not allowed. It is not allowed to mislead the criminal court. The complaints relating to length of detention must be submitted in six months at the latest[40].

2. The case-law on media.- The journalist does not have an obligation to disclose the source. The report may be exaggerated or provocative.

4. The case-law on member of professions.- The members of professions may make public declarations.

5. The case-law on public officials. Public official may declare its personal opinions. A public official's promotion must not be blocked because of its opinions. The public official could answer the critics.

6. Case-law on politicians.- Politicians and government may be subject to critics more than other persons. The actual system of the State may be questionned. The freedom of expression is larger on politics.

7. The case-law on military matters.- Defamation to military officer can not be regarded as defamation to army. It is not allowed to hang poster or to distribute tracts during military assembly.

8. Case-law on demostrations, protest and violence.- Attending to a demonstration can not be sanctionned. An appeal to non-violent resistance may be made.

9. Case-law on terror.- Sociological statements that are not the terrorist organisation's speech are allowed but declarations supporting terrorist organisations are not. According to ECtHR, the publication of an accessible book could not be blocked. The right to receive information can not be limited. The repetition of opinions can not be prohibited. Historical realities could be expressed in a subjective manner. Subjective opinions could be declared. Opinions could be expressed roughly. Attacking expressions may be used. Opinions may be written in a hostile manner.

The group receiving the declaration and the manner of expression of the statement must have taken into account. There is a right to have information

[40] Ekinci-Bahadır, "Six Months Rule in the Applications Before the Court", p. 361.

about different perspectives concerning the facts. There can be broadcasting about public persons. Associations may be criticized. A person can criticize his/her employer. The State has a positive obligation to ensure the freedom of expression. The requests must be made in good faith. The freedom of expression is transfrontslier. Attacking sacred values and moral values is not permitted.

Ban on lawyer advertising is possible. Declarations intending to increase hate and hatred can be prohibited. The academic works that do not include appeal on violence can not be prohibited[41].

According to the sytem of the ECHR, some rights could be subjet to limitations. It could be explained in the following manner;

The first one is the limitations included in the right. For example, according to the Article 4 of the Convention, forced labor is prohibited but in case of naturel disasters, the individual could be obliged to give service. Likewise, according to aritcle 5 of the ECHR, the individuas are free but in case of existence of some conditions, he/she can be detained.

The second one concerns limitations on persons who have special statutes. For example, according to Article 11 of the Convention, the freedom of assembly of security forces (soldiers, police etc…) could be limited.

The third one concerns the limitations imposed by states for legitimate aims according to Articles 8-11 of the Convention.

The fourth one is that according to Article 15 of the Convention, a membe state may take measures derogating from its obligations under the Conventions in case of war.

The fifth one concerns the prohibition of abuse of rights according the Article 17 of the Convention.

The sixth one concerns the impossibility to restrict rights and freedoms for any purpose other than those for which they have been according to Article 18 of the Convention[42].

---

41 For details about freedom of expression see. Redlich, Attanasio, Goldstein, Understanding Constitutional Law, p. 29-30, 497. For internet freedom see. İbid. P. 567.

42 See Türmen. 'The content and limitations of the fundamental rights and freedoms according to the ECHR' p. 198.

C. The ECtHR and 1982/13

In the amended versions of articles 13, 14 and 15 of the Constitution in 2001, it is clearly understood that the legislator took into account the conformity with the Convention. It is clear that these amendments are important for our relations with the EU. This effort has been doubled with the introduction of the right to individual application before the ECtHR (JO, 19438-21 April 1987)[43], the declaration recognizing as compulsory the jurisdiction of the Court (JO-20295, 27 September 1989)[44], the declaration giving to Turkey the right to be a candidate and the approval of the national program.

The Constitutional Court, making the constitutional review, uses the ECHR as a subsidiary norm (not as a direct norm).

In subparagraph 2 of Articles 8-11, the Convention stipulates the possibility to make limitations of the rights by member states. In the system of ECHR, which is important is not the content in the first sub-paragraph but the limitations set forth in the second one. The ground of the ECtHR's decisions is the second sub-paragraph, that is to say, the problem of conformity of the intereference of member states with the Convention[45].

In this respect, the ECtHR, by its case-law formed in 50 years, has determined some criteria. These criteria are as follows: **(a)** the interference must have a kegal basis

(b) The interference must have a legitimate aim. **(c)** The interference must be necessary in a democratic society. These three criteria must have been explained briefly;

a. The interference must have a legal basis

According to the subparargraph 2 of Articles 8-11, the state should make the interference by a legal provision. The aim of this is the prevention of the arbitrary. Furthermore, the legal provision must meet two criteria. **The first one** is the accessbility of the provision by the individuals. **The second one** ise the precision and the foreseeability of the provision.

In Sunday Times/UK (1979)[46] and Silver/UK judgments, the Court formed these criteria and the case-law is well established.

---

43 For related documents see. International Conventions on Fundamental Rights and Freedoms and Decisions of the Constitutional Court referring to these conventions, Ankara, 1997, The publication of the Constitutional Court, no 35, p. 485-488.

44 İbid, p. 488-491.

45 See Türmen, "The content and limitations of the fundamental rights and freedoms according to the ECHR ", p. 199.

46 Sunday Times/United Kingdom see. 26 April 1979, Seri A, No. 30, Doğru, p. 163192

b. The interference must have a legitimate aim

The legitimate aim is defined in the subparagraph 2 of the Article 8-11 of the ECHR. These are national security, territorial integrity, public order, the prevention of crime, the protection of health or morals and the protection of the rights and freedoms of others, the economic wellbeing, the independence of the judiciary and the prevention of the disclosure of the information received in confidence.

The article 10 of the Convention stresses that the exercise of these freedoms carries with it duties and responsabilities. It may be interpreted as limiting the freedom of expression but the case-law of the ECtHR is not developed in this sense. According to ECtHR, the freedom of expression is important for the protection of democracy. For this reason, 'the limitations to the freedom of expression must be interpreted strictly and the necessity to limit must be explained persuasively'. This situation is clearly mentionned in the The Observer and Guardian/UK (1991) judgment of the Court. Three limitations to the freedom of expression: a) The territorial integrity of the state must be respected b) confidential documents should not be disclosed. c) the independence and impartiality of the judiciary must be protected. In this subject, the ECtHR takes into account the aim of the member state. For example, a limitation made for protecting the public order should not be justified for the protection of morals[47].

c. The interference must be necessary in a democratic society

In its judgment Olsson/Switzerland (1988), the Court clarified this criterion. The notion of necessity implies the existence of a 'pressing social need' and the proportionality[48]. The prerequisite is the existence of a functioning democracy.

The Court mentioned this in the decision gender education/Danemark (1976).

In its decision Dudgeon/UK (1981), the Court emphasisesd that 'tolerence and open-mindedness' are two main indicators of a democratic society.

The Court, in its jdgement Klass/Germany (1987)[49], explains the risks inherent to destruction of democracy under the democracy image.

---

47 See Türmen. 'The content and limitations of the fundamental rights and freedoms according to the ECHR', p.200

48 See Türmen. 'The content and limitations of the fundamental rights and freedoms according to the ECHR' p. 201

49 Klass and others/Germany See. 06.09. 1978; Serial A, No. 28, Doğru, p. 141161.

D. THE ECtHR and THE MARGIN OF APPRECIATION OF THE STATE

The Court, when it examines the 'necessity of the intereference in a democratic society' takes into account some elements; these are the margin of appreciation and European consensus. That is to say;

1. The doctrin of margin of appreciation of the ECtHR

The ECtHR, when it examines the 'proportionality' recognizes the margin of appreciation of the State but it controls this margin of appreciation. As known, the text of the ECHR does not include the margin of appreciation. The Court adopted this notion under the influence of French Council of State.

This notion has been widely discussed in the doctrine and two different ideas saying that 'the Court forms a cultural diversity' and 'this violates the ECHR' appeared[50]. The basis of the margin of appreciation in the ECHR is the Article 1. As it is mentionned, the ECtHR controls the margin of appreciation of member states. The first decision of the Court concerning the margin of appreciation is Lawless/Ireland (1961)[51], the second one is the judgment Ireland/UK (1978)[52]. The Court in this judgment explained the doctrine of the margin of appreciation. The third judgment of the Court concerning the margin of appreciation is Klass/Germany[53]. In this judgment, (the government carried out a telephone tapping for security reasons). In this judgment the Court mentioned that it was possible to have recourse to the margin of appreciation except the Article 15 of the Convention.

2. The European Consensus

Because of the absence of a 'European Consensus', the Courts accepts that member states have large rights. The Standard of the ECtHR is the 'European Consensus'.

The Court has never defined the 'European Consensus[54]'. The Court, up to 1979, interpreted widely the margin of appreciation when the point in question is the national security. After 1979, the Court limited the margin of appreciation of states and it adopted an expansive attitude. The comparison

---

50 See Türmen. 'The content and limitations of the fundamental rights and freedoms according to the ECHR' p. 202

51 For Lawless/Ireland judgment see. 01.07. 1961; Serial A, No. 3, Doğru, p. 1-24

52 For Ireland/ United Kingdom judgment see. 18.01.1978; Serial A, No. 25; Doğru, p. 75-140

53 Klass and others/Germany See. 06.09. 1978; Seri A, No. 28; Doğru, s. 141161.

54 See Türmen. 'The content and limitations of the fundamental rights and freedoms according to the ECHR', p.204

of the judgments Dudgeon/UK (1981) and Handyside/UK will clarify the situation[55]. Subsequently, the Court, adopted a new criterion called 'the nature of the activities involved'. The Court mentions the following, ''the content of the margin of appreciation is only affected by the aim of the interference. This case concerns the very intimate side of the private life. For this reason, in order to be legal according to Article 8/2 of the Convention the interference of public authorities must have serious reasons.''

1. In the judgment **Sunday Times/UK** (1979)[56], the freedom of expression and the case-law on the margin of appreciation of the State are of capital importance.

Sunday Times/UK judgment (1979) is as follows; In 1960's a medicine administered to pregnant women in UK caused malformation in babies and then an action was lodged against the producer of the medicine and during this period, the Sunday Times published articles. The courts decided to suspend the publication and the decision became final and Sunday Times lodged an action before the ECtHR. The Court accepted the application. In its judgment the Court, emphasised that the government has a certain margin of appreciation under the Court's control and it mentioned that it will be narrow and limited if it's matter of freedom of expression.

2. The ECtHR referring to the criterion '**to conduct reasonably and in good faith'** in **Handyside** judgment mentioned that it will control this.

3. In the decision **Sosyalist Parti/Turkey**[57] (1998), (ECHR, 11/2), The Court emphasised that its control will be exercised on laws and judicial decisions of contracting parties.

4. In its judgment **Sürek/Turkey**[58] (1999), (ECHR, Article 10), the Court mentioned that the limits of the freedom of expression are the incitement to use of force or violence.

---

55 Dudgeon is an homosexual living in Ireland. Homosexuality was a crime. He asked the nullity of the law which makes certain homosexual acts criminal offences as well as the threat of detention. The Court accepted his case and held that the margin of appreciation of the state was broad.

56 The ECtHR held that the States' margin of appreciation is limited; For Sunday Times/ United Kingdom judgment see.26.04. 1979, Seri A, No. 30, Doğru, 163-192.

57 Case of Socialist Party and Others (25 May 1998), 20/1997/804/1007 için see. www.geocities.com/vbicak/socialist.htm

58 For Sürek/Turkey judgment (1999) için see. www.geocities.com/vbicak/surek.htm

CONCLUSION

The interference of the state to the freedom of expression is possible may exist if some conditions are present.

The ECtHR determined some criteria in view of the cases lodged before it during 50 past years. Accordingly, the interference must be prescribed by law, it must have a legitimate aim, it must be necessary in a democratic society and it must be proportional to this aim. In case the contracting states who do not conform to these criteria, th Court cans issue decision of violations. In the applications lodged before the ECtHR, the constracting states hinder in general, the criteria of proportionality. In the proportionality criteria, contracting states must limit the right in question as little as possible and prepare carefully the laws in accordance with the mentioned aims and the law provsions must not be unfair and ill-founded.

In the control of the proportionality criterion and in determining these elements, **pertinent reasons** of the limitation must be mentionned and it must be examined whether it was possible to have recourse to a **less limitative** measure, the process of decision must be **fair**, the measures against abuse of right must be taken and the interference must not affect the **substance of the right**[59]. The ECtHR, when it examines violation complaints, uses the abovementioned criteria[60]. In a judgment, the ECtHR, qualified the ECHR as 'the constitutional means of the European public order[61]'. The Court, in order to decide about the necessity of an interference, examines the proportioanlity between the means and the aim. The Court issues a decision of violation if it establishes that it was possible to obtain this aim by a less limitative measure or that it was not possible to obtain this aim by interference. It is understood that by introducing amendments to articles 13, 14 and 15 of the Constitution, an effort has been made for complying with the ECHR. The Constitutional Court applies the ECHR as subsisdiary norm in the control of constitutionality. The Article 10/2 of the Convention, even if it recognizes a margin of appreciation

---

59 For details, see. Fendoğlu, '' Limitations of Fundamental Rights and Freedoms In Conjunction with the Constitutional Amendement of 2001 (Article 13 of the Constitution)'', it has been exposed in the Semposium called 'The Effects of the Constitutional Amendments on the Rights and Freedoms'' organized fort he 40th foundation anniversary of the Constitutional Court''.

60 For examples of the criteria of proportionaltiy, see. Sunday, Reyhan, The Content and Limits of the Freedom of Expression in the European Convention and in the Turkish Constitution, Ankara, 2001, p. 101; Principle of Proportionality, p.92.

61 Human Rights Law Journal (HRLJ) 1990, 113.

to the authorities of the contracting state parties, this margin of appreciation has limits. The contracting states' margin of appreciation is controlled by the ECtHR. In this regard, the judgment Handyside/UK (1976) is a decision on freedom of expression (Article 10). The notion of margin of appreciation which is an efficient and flexible arm on the Court's hands is a method used in the appreciation and balancing of the arguments and interests. The aim of the ECtHR is ensuring the compliance between laws and application of laws. The criteria of the Court depend on the circumstances of the case, the European consensus and the period in question.

♦♦♦♦

BIBLIOGRAPHY

Bakırcı, Kadriye: ''Social Rights in 1961 and 1982 Constitutions and the constitution proposal of 2007'', Yılmaz Aliefendioğluna Armağan, p. 357-378.

Emanuel, Steven L.: Constitutional Law, Twenty-Ninth Edition, Wolters Kluver, USA, 2011.

Fendoğlu, Hasan Tahsin: The Limitation of Fundemental Rights and Freedoms in the context of the constitutional amendment of 2001 (Article 13 of the Constitution)", It has been presented as a declaration within the Semposium called 'the reflections of the constitutional amendment of 2001 on the rights and freedoms'' organized for the 40th years of foundation of the Constitutional Court on 26-27 April 2002 in Antalya.

Fendoğlu, Hasan Tahsin: Constitution and Human Rights, İ.Ü. Hukuk Fakültesi Yayını, Malatya, 2013.

Gölcüklü, Feyyaz - Gözübüyük, Şeref: The European Convention on Human Rights and Its Application, Ankara 1994. Human Rights Law Journal (HRLJ) 1990.

İnceoğlu, Sibel: " Pluralism in the Case-Law of the European Court of Human Rights", Publication of the Union of Turkish Bar Associations, Ankara 2010.

Constitutional Court: The Judgments of the Constitutional Court Reffering To International Conventions on Human Rights and Freedoms and International Conventions on Human Rights and Freedoms, Ankara, 1997, Publication of the Constitutional Court, No. 35.

Kaboğlu, İbrahim Ö.: Constitutional Law Classes (General Principles), Revised and Simplified Version, 10th edition, Legal, İstanbul, 2015.

Şahin, Kemal: Freedom of Expression on its Human Rights and Freedoms Dimension, Reasons and Limits, XII Levha, 2009, İstanbul.

Lucas Prakke and Constantijn Kortmann (Editors): Constitutional Law of 15 EU Member States, Kluver, Deventer, 2004.

Metin, Yüksel: The Criteria of Proportionality, An Analysis of Comparative Constitutional Law, Seçkin Publications, Ankara, 2002, pp. 1+263.

Norman Redlich, John Attanasio, Joel K. Goldstein: Understanding Constitutional Law, Third Edition, New York, 2004, Publishing of LexisNexis).

Selçuk, Sami: "Avrupa İnsan Hakları Sözleşmesi ve Türk Uygulaması", ss 399-428.

Sunay, Reyhan: The Content and Limits of the Freedom of Expression in the European Convention on Human Rights, Ankara, 2001.

Türmen, Rıza: 'The Scope and Limits of the Fundemental Rights and Freedoms according to the European Convention on Human Rights' Review of the Court of Cassation', C. 28, January-April.

2002, Sy. 1-2, 192-213. Texts of the Turkish Constitution, Adalet Publishing House, Ankara, 2013, 2nd edition.

Zengin, M. Ali: 'The Assesment of the ECtHR's judgment on the case Hasan and Eylem Zengin'. SÜHFD, 2011, Volume, 19, no. 2.

www.tbmm.gov.tr

www.echr.coe.int

RADYO VE TELEVİZYON YAYINCI KURULUŞLARINA UYGULANAN İDARİ YAPTIRIMLAR HAKKINDA DANIŞTAYIN İFADE VE BASIN ÖZGÜRLÜĞÜ YAKLAŞIMI

Council of State's Freedom of Media and Speech Approach about the Administrative Sanctions Imposing on Radio and Tv Broadcasting

Assoc.Prof. Dr. Selami DEMİRKOL* – Dr. Emrah ÖZCAN – Emre ERMAN*****

ÖZET

İfade ve basın özgürlüğü, demokratik toplumun zorunlu dayanaklarından biri ve kişilerin kendilerini geliştirmelerinin önde gelen şartlarındandır. Bu özgürlüğün kullanıldığı alanlardan biri olan radyo ve televizyon yayıncılığının toplumun bilgilendirilmesi konusunda vazgeçilmez bir rolü bulunmaktadır. Bu nedenle radyo ve televizyon yayınları alanında ifade özgürlüğü ve bu özgürlüğün sınırlandırılması meselesi büyük önem arz etmektedir. Tüm özgürlükler gibi ifade özgürlüğünün sınırsız olduğu kabul edilemez. Bir özgürlüğün layıkıyla yaşanabilmesi için hakkın sınırlarının açıkça düzenlenmesi, bu sınırların aşılmasının ve kötüye kullanılmasının önüne geçmek adına gerekli tedbirlerin alınması ve sınırlamaların demokratik toplumun gereklerine uygun ve ölçülü olması gerekmektedir. Bu çerçevede çalışmada radyo ve televizyon yayınlarında ifade ve basın özgürlüğüne getirilen bir sınırlama olarak değerlendireceğimiz idari yaptırımların yargısal denetiminde Danıştayın yaklaşımı, bu yaklaşımın Avrupa İnsan Hakları Mahkemesi'nin ifade ve basın özgürlüğü konusunda getirdiği kriterlere uygunluğunun değerlendirilmesi amaçlanmaktadır.

Anahtar Kelimeler: İfade Özgürlüğü, Basın Özgürlüğü, İfade Özgürlüğünün Sınırları, Radyo ve Televizyon Üst Kurulu, Radyo ve Televizyon Yayınları Hakkında Uygulanan İdari Yaptırımlar.

ABSTRACT

Freedom of speech and media are cornerstones of democratic societies and priorities for individuals to develop themselves. Radio and television boradcasting, fields of these freedoms, have indispensable role for the enligthenment of a society. Hence, issue of freedom of speech in radio and TV broadcasting and restriciting of this freedom have crucial importance. Like all kinds of freedoms, there are limitations and restrictions for freedom of speech too. For the proper utilizitation of a freedom, it is required to regulate the restrictions of a right clearly and respectfully to the requirements of democratic society and take needed measures to prevent trangressing

* Danıştay Üyesi, selami.demirkol@danistay.gov.tr
** Danıştay Tetkik Hâkimi, emrah20985@hotmail.com
*** Danıştay Tetkik Hâkimi, emre_erman@hotmail.com

the restrictions and abusing the rights. Within this scope, this study aims to handle the Council of State's approach in the judical audit of administrative sanctions as the restrictions to freedom of speech on radio and TV broadcasting and conformity of Council of State approach to the European Court of Human Rights' standards for the freedom of speech and media.

Keywords: Freedom of Speech, Freedom of Media, Limitations of Freedom of Speech, Supreme Council of Radio and Television, Administrative Sanctions on Radio and TV broadcasting.

♦♦♦♦

"Cehennemin en karanlık yerleri, buhran zamanlarında tarafsız kalanlara ayrılmıştır."

Dante Alighieri

INTRODUCTION

'The freedom of expression and of the press' are known as the most important human rights and freedoms such as the right to life. Compared to other rights, the importance of these rights stems from the fact that the idea constitutes the basis of other rights and freedoms of individuals and for this reason it is a *sine qua non* condition. Within the mechanism of the European Convention on Human Rights (ECHR), the freedom of expression and of the media is known as the basic foundation of democracy and the self-developement of individuals. The freedom of expression and of the press is one of the essential features of liberal democracies that respect plurality of ideas and the development of opinions without harming others. Concerning this freedom, more than the primacy among other rights, what is important is the possibility to restrict and the degree of admissibility of the limits of the restrictions to this freedom. In this respect, radio and Tv broadcasting associations are at the center of this actuality. The sanctions imposed on broadcasters for the use of the freedom of expression and of the press and the limitations imposed on them is another detail.

In this article, the approach of the Council of State on the freedom of expression and media about the administrative sanctions imposed on radio and television broadcasting associations will be examined.

First of all, for introducing the topic, we will deal with the developements on the freedom of expression and the importance of radio and television broadcasting for the freedom of expression and secondly, we will examine the apporach of the European Court of Human Rights (ECtHR), concerning the freedom of expression for radio and television boradcasting. Thirdly, we will

examine the apporach of the Council of State on the freedom of expression and of the press concerning radio and television broadcasting that constitutes the subject matter of this article.

This will be made by the method of referring to the administrative sanctions imposed to broadcasting associations by the Radio and Television Supreme Council because of the contreversies that could appear. Thus, the subject matter of the article is the possibility to examine the administrative sanctions as limits to freedom of expression and of the press. In this context, whether the administrative sanctions have been imposed according to the ECtHR's criteria will be assessed, the points taken into account by the Council of State when it exercises its control on the administrative sanctions and its trial criteria will be highlighted and in conclusion the consequences will be summed up and the wishes concerning the Turkish administrative justice will be mentionned.

I – THE FREEDOMS OF EXPRESSION AND OF THE PRESS IN GENERAL

According to the Universal Declaration on Human Rights, every individual has a right to freedom of opinion and expression. The aim is to ensure that every individual could express its opinions without interference. In general, in the societies where the freedom of expression exist really, individuals shall express their opinions without censorship or limitation. The expression of opinions by individuals without any interference is important for the social consensus. Moreover, the freedom of expression has its place in the ECHR among fundamental rights and freedoms. From this point of view, '..the freedom of expression may be defined as the possibility for individuals to receive informations freely, to form a conviction by their own assessment and to impart their conviction by using a communication instrument or to abstain from sharing their convictions[1]'.

The freedom of press such as the freedom of expression has three main components:

1. The freedom to receive information and opinions.

2. The freedom to have a conviction.

3. The freedom to impart informations and opinions.

Furthermore, in order to talk about the freedom of expression and of the press, 'the individuals shall freely receive opinions and ideas, make their choice among these ideas and opinions (to form a conviction) and shall have the

[1] The Project of Freedom of Expression and Media in Turkey, Manual Prepared for 8th Round Table, p.1

freedom to impart their opinion or idea freely with others[2]'. The first condition for the existence of the freedom of expression and of the press is to survey, obtain and freely learn of the news, ideas and informations. News, ideas and informations constitute the raw material of the freedom of expression.

The article 10 of the Convention, emphasizes this condition and mentions that this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities. The Convention mentions that the right to receive and impart informations is regardless of frontiers and thus the content of this right was extended. The Court emphasized that firstly, the government is banned from hindering the receipt of these infromation and opinions by third persons. The obligation of the State is a negative obligation and it is based upon the non-interference of the State to the exercise of this freedom. The protection ensured can not be monopolised to a group of information, ideas or opinions but it does not involve all areas[3]. The freedom of expression of individuals could be banned or restricted when the conditions are met. The states could limit the freedom of expression for reaching legitimate aims. The states have a margin of appreciation for limitations. It should be mentionned that, this margin of appreciation is subject to control. In this respect, the final decision is given by the ECtHR. This will be absolutely controlled by domestic courts and finally by the ECtHR.

Either domestic courts or ECtHR, when realizing this control, will examine the following criteria:

1. The legal basis of the interference

2. The existence of a legitimate aim of the interference or the limitation.

3. The proportionality of the aim and the means used.

4. This interference must be necesary in a democratic society.

These four criteria are used in the control of legality of the interference to the freedom of expression and press. These criteria are taken as a standard by administrative judicial authorities and the Council of State for the litigations brought before them. This is made by the ECtHR's judgments. We will try to explain ECtHR's, Council of State's and administrative judicial authorities' approach and case-law on the administrative sanctions applied to radio and television broadcasting associations in a detailed manner.

[2] Age., p.2.
[3] Age., p.2.

II- ECtHR's APPROACH TO FREEDOMS OF EXPRESSION AND OF THE PRESS CONCERNING RADIO AND TELEVISION CONFLICTS

The freedom of press of radio and television broadcasting is one of the main components of the freedom of expression. The ECtHR, in its judgments, after having emphasized that the freedom of expression is one of the basic foundations of the democratic society stresses the importance of the guarantees that must be ensured to the organs of the press. The freedom of the press is the freedom to transmit the news and opinions concerning the public. Furthermore, it is the public's right to receive these informations and opinions. When the freedom of expression is at stake, the margin of appreciation of national authorities will be limited. The ECtHR's opinions concerning the freedom of the press, having been developped for written media are valid for audio-visual media as well[4]. The ECtHR, always emphasized that the freedom of expression guarantees not only the subject and content of the information and opinions but also the method of communication. In this sense, the 'expression' protected by the article 10 of the ECHR, is not limited to written or oral words but it also includes images illustrating an opinion or giving an information as well as audio publications[5]. Sings and marchs, sound-waves, electromagnetic waves (records, audio-cassettes, telephones etc.) are the means of expression. Expression may include secret signs, pictures or drawings.[6] Moreover, all manuscritpts, typewritten documents or documents written in computer, leaflets, banners, letters etc. as well as electronically transmitted opinions conceived as written[7] by the interlocutor are means of expression. Even clothings are in the scope of this article[8]. The Court recognizes a large area of freedom to the press[9]. According to the ECtHR, the scope of the freedom of the press shall be enlarged as to authorize the immoderation

4 Doğru, Osman – Nalbant, Atilla, The European Convention on Human Rights, Mediation and Important Judgments, Tome 2, Pozitif Matbaa, Ankara, 2013, p. 207.

5 Groppera Radio Ag and others/Switzerland, 28/03/1990, No:10890/84 (Unless Indicated otherwise Access to the judgments of the ECtHR: HUDOC Database); Radio France and Others/France, 30/03/2004, No:53984/00, Hudoc; Jersild/Danemark, 23/09/1994, No: 15890/89.

6 Küçük, Adnan, ''Components of the Freedom of Expression'', Publication of **Liberal Düşünce Topluluğu**, Ankara, 2003, p. 70.

7 Özbey, Özcan, "Restrictions on the Freedom of Expression In the Light of the European Convention on Human Rights", **TBB Dergisi**, 2013/106, s. 44.

8 Macovei, Monica Freedom of Expression, Manual on Human Rights No:2, s. 24.(Access: http://www.yargitay.gov.tr/abproje/belge/kitaplar/AIHS_mad10_Ifade.pdf) (Access Date: 25.10.2015)

9 Harris-O'boyle-Warbrick, **Law of the European Court of Human Rights**, Şen Press, Ankara, 2013, p. 478

and provocation because of the fact that this freedom is closely associated with the democracy[10]. Because of this, the ECtHR held that the article 10 of the Convention has been violated in a case concerning Müslüm Gündüz, a member of a sect who has been sentenced to prison for criticism in a television programme and for having qualified contemporary institutions as 'atheistic', for having criticisized laic and democratic principles and having appealed to the application of the rules of sharia and for spreading hatred based on religious affiliation. The Court determined that the applicant represented the opinions of a sect known by the public and that he took actively part to an active debate in front of the public. This pluralistic debate's aim was to present views of this sect -even unsual-, according to which the democratic values are not compatible with the Islamic conception. This matter was the object of a wide debate in Turkish media. The Court considered that the expressions of the applicant can not be regarded as 'hate speech' based on call for violence or religious intolerence. According to the Court, the only fact to defend sharia without call for violence cannot be regarded as 'hate speech'[11]. The freedom of expression is not only applicable to 'informations' or 'images' thar are favorably received but also to those that offend, shock or disturb[12]. Pluralism, tolerance and open mindedness principles without which there is no democratic society, require this[13]. According to the Court, there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself. In this context, in a democratic society, in order to ensure an audio-visual pluralism, it is not sufficient that many channels exist or potential broadcasters have the possibility to access to this area. Moreover, it must be ensured to different political movements an effective intervention possibility to this area[14]. As a result of the importance given by the ECtHR to the freedom of expression, the Court emphasizes that the state has an active role in order to ensure the freedom of expression. In this sense, the Court held that it is not sufficient

10 Radio France and others/France 30/03/2004, No: 53984/00.

11 Gündüz/Turkey, 04/12/2003, No: 35071/97.

12 Thoma/Luxembourg, 29.03.2001, No: 38432/97, (reporter: Uran. Peri, " The Approach of the European Court of Human Rights and Turkish Constitutional Court to the Freedom of Press", Periodical of **Turkish Bar Association**, 2015/120, p. 95.)

13 Medya FM Reha Radyo ve İletişim Hizmetleri A.Ş. /Turkey, 14.11.2006, No: 32842/02.

14 Manole and others/Moldova, 17/09/2009, No: 13936/02; Centro Europa S.R.L. and Di Stefano/Italy, 07/06/2012, No:38433/09, (Reporter; Doğru-Nalbant, a.g.e., s. 213)

that the state does not interfere in the exercise of the freedom of expression but it is necessary that the state takes certain positive measures[15]. The Court concluded that the state has failed to take adequate measures because of the fact that there was attacks against the newspaper and its staff, which ceased publication and that although that was known by the national authorities, their applications were not answered[16]. Certainly, the obligation of the State is valid for radio and television broadcasting. Because of this reason, the Court emphasized that it was not sufficient that the state interfere in the area of audio-visual media. The Court concluded that the state has an obligation to take legislative and administrative measures ensuring an effective plurialism in this area. In many documents adopted by the Committee of Ministers this role has been mentioned[17]. The ECtHR, in radio and television broadcastings, adopting all these explanations, emphasized that the broadcasters when they exercise their freedom of expression, they must ensure certain functions and responsabilities. Radio and television broadcastings are giving results more quickly than the press and this result is more effective[18]. Because of this reason, their functions and responsabilities must be more effective.

According to the Court, in a programme where there is incitation to hatred, violence or uprising speech, the state may take necessary measures in order to set aside the disorder and to prevent the commission of crimes. In such a case, even a serious measure such as the suspension of the broadcast authorization for one year may be regarded as reasonable[19].

On the other hand, according to the ECtHR, media must be very attentive for not being a means for the incitement to violence and hatred when it broadcasts the opinions of the representatives of terrorist organisations[20]. The subparagraph 1 of the article 10 of the Convention reading: 'This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.', recognizes a large margin of appreciation to states in the field of radio and television broadcasting. However, the Court makes a strict interpretation of this right. The late addition of this provision in the proceedings of the preparatory studies, stemmed from technical reasons

15 Bozkurt, Enver-Dost, Süleyman " Freedom of Expression and Turkey in the Judgments of the European Court of Human Rights'', SDÜ Periodical of the Faculty of Economics and Social Sciences, Y:2002, T:7, No:1, p. 59.

16 Özgür Gündem/Turkey, 16.03.2000, No:23144/ 93.

17 Doğru-Nalbant, a.g.e., s. 213.

18 Jersild/Danemark, 23.09.1994, No:15890/89.

19 Medya FM Reha Radyo ve İletişim Hizmetleri A.Ş./ Turkey, 14.11.2011, No:32842/02.

20 Sürek/Turkey, 08.07.1999, No:26682/95.

such as the limited number of frequencies and the monopolistic right of many European states over broadcasting and television.[21] In the beginning, by the subjection of the radio and television broadcastings to an authorization regime, this provision construed more restrictively has been applied more liberally by the restrictive construction of the regime of authorization in paralel with technologic and democratic developments[22].

Nowadays, with the prominence of the right to access to information, the regime of authorization or license is not seen as a limit to the freedom to give information. The foundation of the regime of authorization or license was limitations in the publication area such as technical inadequacy and the limited nature of wavelengths. However, nowadays, these limitations do not exist due to technologic developments. Therefore, the reason for being of the regime of authorization has been disappeared. Of course, we may talk about the need to regulate the audio-visual area by public authorities but it became difficult to consider this system as 'regime of authorization[23]'. The last point about the ECtHR's approach to the freedom of expression of radio and television broadcasting is the ECtHR's mention as to the breach of the freedom of expression by the public monopole. According to the ECtHR, such a monopole harms the freedom of expression that is the guarantee of the communication of public information and opinions to the public[24]. This situation will abolish the pluralism. Thus, such a monopole is incompatible with the freedom of expression[25]

III- THE COUNCIL OF STATE'S APPROACH TO THE QUESTION OF FREEDOMS OF EXPRESSION AND OF THE PRESS IN RADIO AND TELEVISION CONFLICTS

In Turkey, the radio and television broadcasting is subject to authorization according to the subparagraph 1 of article 10 of the Convention. The Radio and Television Foundation and Broadcasting Law no. 3984 dated 13/04/1994 enacted the private radio and television broadcasting instead of the public broadcasting monopoly. This system of authorization enacted by the Law no. 3984 includes technical regulations of the broadcasting foundations and

---

21 Monica Macovei, age., s. 22.

22 The ECtHR, in the judgment Informationsvrein Lentia Informationsverin and others, considered that the view consisting in limited number of frequency and channels can not be accepted. Lentia and others/Austria, 24.11.1993, No:13914/88.

23 Doğru-Nalbant, a.g.e., s. 213-214.

24 Verain Gegen Tierfabrikan Schweiz/Switzerland, 30.06.2009, No:32772/02.

25 Informationsverin Lentia and others/Austria, 24.11.1993, No:13914/88.

regulations as to the conformity of the broadcasts to this law[26]. The independent administrative authority organized for ensuring the control of radio and television broadcasting and to apply these regulations in Turkey is the Radio and Television Supreme Council. The systematic enacted by the law no. 3984 has been identically regulated by the law no 6112 called The Foundations and Broadcasting Services Ensured by Radio and Television that abolished the law no. 3984 and in its article 8 and 26, the questions of frequency affectation and broadcasting license. In the article 32 of the Law no. 6112, the administrative sanctions to be applied by the Radio and Television Supreme Council for the breaches of the broadcast principles have been mentioned. According to this provision, among the administrative sanctions to be applied to the broadcaster there is administrative fine, suspension for the broadcasting and the annulment of the license. As mentioned in the previous sections, the press is the fundamental means that ensures the effective transmission of the information, convictions, news and opinions to public. The radio and television broadcasting has a crucial importance because of the fact that its effects are on a wide area and quickly. Because of this reason, it is important to create an effective freedom of expression system in the radio and television broadcasting area[27].

At this point, administrative sanctions mentioned in the Law no. 6112, are the regulations restricting the freedom of the press which is one of the appearances of the freedom of expression. In this conncetion, when ensuring the judiciary control of these administrative sanctions, it must be ensured that the criteria of the ECHR and developed by the Court are not breached and in this sense the tribunals must apply this three stage test to each case before rendering their decisions. The recent decisions of the Council of State show that the references to the ECtHR's judgments are increased, and that the adminisatrative sanctions for broadcasting breaches are considered as a matter of freedom of the press. Furthermore, another point is that the ancient approach of the Council of State that does not consider the ECtHR's judgments

---

[26] Şahin, Yahya, "Freedom of Expression and Its Restrictions in the Judgments of the Council of State", The Project on the Reinforcment of the Roles of High Judicial Bodies According to European Standards, The TextSubmitted to the 5th Round Table, (Access: http://www.yargitay.gov.tr/abproje/belge/sunum/rt5/Sahin_DanistayIfadeOzgurlugu.pdf) (Access Date: 24.10.2015)

[27] Zuhal Aysun Sunay, "Limitation of the Freedom of Expression by the Preventive Suspension of the Radio and Television Broadcasting In The Light of the Judgments of the ECtHR and the Council of State", **Periodical of the Faculty of Law of Anadolu University**, T.1, No.2, 2015, p. 96

as a cause for reopening of procedure does not exist. In the past, the Council of State rejected the applications for reopening of procedure when the facts discussed by the ECtHR were same as the facts subject to the main case, there is not an impossibility for the claimant to prove its case, there is not an evidence that may change the judgment, there is not an unfairness relating to the stages of the proecdure, there is a judgment given by the common assesment of the administative tribunal and the Council of State in the violation decision thus where there is not a cause for the reopening of proceedings[28]. However as a result of the confirmation of the persistance decisions by the Council of State's plenary sessions o the chambers for administrative cases[29], this approach has been abandoned[30]. This section of the study concerns the criteria used by the Council of State in the radio and television conflicts and the criteria used fort he determination of administrative sanctions to private radio and television broadcasting and the references made to the case-law of the ECtHR. The decisions will be classified under chapters, the approach of the Council of State in similar cases will be examined, the titles will be chosen according to most conflictual areas and most recent judgments of the Council of State will be examined.

A- Incitation to Violence - Hate Speech

The Council of State considers the expressions which do not incite to violence and which do not constitute hate speech and which are not against the political regime or system and their communication via radio and television within the limits of the freedom of expression and of the press.

At this point the Council of State, in a judgment in line with the ECtHR's judgments, emphasized that the 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 and that the individuals should have the guarantee not to be sanctionned for such expressions; the freedom of expression is one of the essential foundations of tolerance and broadmindedness without which there is no "democratic society", that it must be determined that any administrative or judidical interference is made in conjunction with a pressing social need,

---

28 13th Chamber of the Council of State, 29.06.2009, E:2008/8090, K:2009/7195 **(Unless Indicated Otherwise: Uyap Information System)**

29 See. Council of State Plenary session of the chambers for administrative cases 30.10.2013, E:2010/1285, K:2013/3325

30 See. 13th Chamber of the Council of State 02.12.2014, E:2014/2898, K:2014/3906

that the interference has a legitimate aim; the public authorities' reasons for the interference must be sufficient[31].Where the interference does not respond to a pressing social need, it can not be regarded as necessary in a democratic society and when the pressing social need is analysed, the quality of the person who used the expression, the identity of the person who was targeted, his/her notoriety, the content of the statement, the contribution of the statements to the general interest must be taken into account.

In the abovementioned judgment the Council of State mentionned the restrictions to the freedom of expression. According to this judgment; even no restirction has been made to the content of the freedom of expression, the national authorities have an extended margin of appreciation concerning racism, hate speech, war propaganda, incitation or provocation to violence, call to uprising or justifying terrorist activities and boundary matters, ensuring its control the court must assess the expressions and and the circumstances of the case as a whole and take into account the words and expressions and their signification in order to determine whether they are inciting to violence and the context. After these findings, the expressions used and considered as a breach by the attendant to the programme have been examined.

In the conflict, the statements that were subject of the administrative sanction are as follows: 'I will tell you what touched us. In 1924, god's commandments and the ecclesiastical courts were abolished, all mausoleums were closed and then an alphabet and dress reforms were adopted''. 'It has nothing to do with the religion, is it?'. '' All these things are related to religion''. '-No. You are living individually your religion…'' (…), ''I'm telling that this country is a religious one. I want to live my life according to Islam, I want the Islamic law to be applied, it means that the divorce, the marriage, the heritage, the civil law must be made according to Islamic rules, I am a muslim, Islam requires this (…), '' If a muslim considers the clothes of his/her prophet's dress as demon, his/her ideas are worthless.These persons take a lot of themselves'', ''Now, you have a problem with the regime and every regime has the right to defend itself, so you are not surprised for what happened'' '' I am not suprised, I did not get angry, I didn' feel bad about it'', ''In this case, you don't have a right to talk about the regime'', ''the regime must be abolished. I say that.'' ''In such a case, the regime thinks that you have to be abolished.'' (…), '' Mr. Müslim, at this point, I will tell you this. Some people listening to your statements say that, with this kind of statements, Müslüm Gündüz gives a life kiss to the regime, but you say that you would really like to abolish the regime whereas certain persons say that the regime used people like Müslüm Gündüz for retarding and preventing its abolition.

[31] 13th Chamber of the Council of State 26.11.2014, E:2013/1727, K:2014/3711

In the judgment, a place has been made to the decoded text and to the attendant's role in the 28 Februabry period's supposed manipulations and it is mentionned that he was invited to the program subject of the breach concerning the repercussions of these manipulations to the actual period. Furthermore, it was mentionned that the concerned person's ideas are publicly known and particularly his statements against the regime did not include incitation or appeal to violence or hate speech and in this connection taking into account the broadcast season of the program and the statements, is is seen that its aim was to enlighten the period and the inform the public on it; that opposing views took place and the information of the public has been made in a pluralist way; that the restriction made by the administrative sanction did not respond to a pressing social need and that it was not necessary and that it was not legitimate to restrict the freedom of the press of a broadcasting which was made within the freedom of press that is one of the best ways to impart different political ideas with the public in order to constitute a conviction. In conclusion the decision was overruled[32].

B- Statements Praising or Approving Terrorist Activities

The Council of State holds that the expressions used are not protected by the freedom of expression, concerning the expressions praising or approving the terrorist activities or their means where the content of these expressions are legitimizing, encouraging or affirming these activities.

The Council of State, upheld the decision of an administrative tribunal that approved an administrative sanction imposed to a television programme that showed the PKK as organization acting in legitimate ways rather than a terrorist organization, for the breach of the broadcasting principles embodied in the Law[33].

In another conflict, the Council of State quashed a decision of the administrative tribunal and considered that the expressions used in the television programme according to which kurdish people may obtain its rights by terrorist activities and that these activities defined as 'climbing a mountain' were justified, legitimized and encouraged and that such an approach and expressions can not be considered as making part of the freedom of expression and mentioned that the freedom of opinion was guaranteed in the Constitution, the ECHR and law provisions and that it included the freedom to receive and impart informations and opinions[34]. On the other hand, the Council of State considered that the expressions which do not praise the terrorrist

[32] 13th Chamber of the Council of State 26.11.2014, E:2013/1727, K:2014/3711
[33] 13th Chamber of the Council of State, 15.12.2012, E:2013/58, K:2014/506
[34] 13th Chamber of the Council of State, 20.02.2014, E:2014/4829, K:2014/4500

activities and its methods were guaranteed in the freedom of expression. Thus, the Council of State considered the statement 'Mr./Esteemed Öcalan' as a part of the freedom of expression and it quashed the judgment of an administrative court that was against this approach[35].

C- Broadcastings Violating Broadcast Bans

The Council of State is of the view that the breach of the broadcasting ban requires administrative sanctions where these sanctions are imposed for having breached broadcasting ban imposed by judicial tribunals. Thus, in a case lodged before it, the Council of State, although the broadcasting of the news concerning Atlas Jet Airways on the airplane accident that happened in Isparta in 2007, has been suspended (interim measure) by a decision of the 14th İstanbul Civil Court (2012/16 D), the claimant broadcasting company continued to broadcast and that the following expressions such as ''now, this is one of the biggest scandals of the Turkish aviation even the biggest one. 57 persons died. Subsequently to this accident, the Civil Aviation General Direction stated that it was pilot's error and closed the debate… We see that incapable, unlicensed students aviated the planes and one of them caused the accident'' constituted negative comments about pending procedures and have gone beyond the limits of the aim to give information and inform the public, and the court upheld the decision which rejected the case lodged against the administrative sanction for the breach of the principle according to which 'the broadcasting can not be against the supremacy of law, justice and imparitality[36].

On the other hand, the Council of State examines whether the prosecution has begun concerning the broadcasting bans. At this point, because of the fact that an investigation starts subsequent to the prosecution and the broadcasting ban ends, the Council of State is of the view that no ban of broadcasting will be imposed subsequently to this date[37].

35 13th Chamber of the Council of State, 23.12.2014, E:2013/3195, K:2014/4595

36 13th Chamber of the Council of State, 26.12.2012, E:2011/2853, K:2012/3485

37 13th Chamber of the Council of State, 03.02.2012, E: 2011/2853, K: 2012/3485 Güneş Okuyucu Ergün, "Confidentialty of the Investigation", **Periodical of the Faculty of Law of the Ankara University,**

D- The presumption of innocence- The Conflict Between the Freedom of the Media and the Right to Receive and Impart Information

The principle according to which the freedom is the principle and the limitation is the exception is valid for the right to impart information such as all fundamental rights and freedoms. The confidentiality of the investigation proceedings is an obligation for reaching the reality in conformity with the principles of accuracy of the criminal justice, honesty and human rights. As we see its examples in our country, the presumption of innocence is occasionally breached by the violation of the principle of confidentiality by broadcasting on the media, the suspects, evidences or images of the scene. The information of the public concerning judicial cases and the presentation of these cases by the press are the requiremetns of a modern society; however, informing people on the facts related to the prosecution and investigation 'by conducting an effective investigation in order to determine delinquants and the right to defence' are two concurring interests[38].

At this point, the analysis of the decisions of the Council of State showed that its vocation for similar publications was to make an interpretation in favor of the presumption of innocence by taking into account the possbility to intervene for the broadcaster where the speaker has no connection with the broadcaster, the content of the broadcast, the form of presentation concerning the pending investigations.

The Council of State upheld the judgment of an administrative tribunal according to which the broadcasting principle to respect the presumption of innocence has been violated in a case lodged against the warning sanction imposed to the complainant company under the article 33 of the Law no. 3984 that embodies the following principle 'everyone shall be presumed innocent until proved guilty before the court' embodied in the article 4 of the same law, for the following expressions: "...It has been stated that X, who was detained for 7 months in 2001 for contreband and who was elected independent deputy from Mardin in 2002, directed the organisation, (…) that he dispatched and administrated the organisation and he was accepted as the leader of the organisation, (…) this is a big shame. You will be surprised if you know about the cases lodged against the persons who were deputy in Turkey and who are actually deputies. The existence of the cases lodged against these persons who are governing the country and who are arguing to govern it, is a shame for all of us. But, these persons are accepting to live with this shame. Because of this reason, they considered as an esacape to be elected

[38] Güneş Okuyucu Ergün, "Confidentialty of the Investigation", **Periodical of the Faculty of Law of the Ankara University,**No. 59(2), 2010, p.248

as deputy (…). In Turkey, we have deputies in the General Assembly against whom cases for fraud, forgery were lodged. I beg your pardon but you elected these persons and sent them to the Assembly, to the Parliament. Most of you did not even know their names. Because, their chairman appreciated this. You voted without knowing the persons. The party sent this person to the Assembly. Here, one of these persons is this gentleman (…)[39]"

In another case, the Council of State quashed a decision of an administrative tribunal that cancelled an administrative sanction imposed to a television programme where the following statements have been used in a news untitled 'the reach of arms of the octopus: the connection between the prostitution gang and Ergenekon': 'During the operation, the cyrptologists of TÜBİTAK such as midshipmans have been taken into custody. In a document that was supposedly Hasan Ataman Yıldırım's who was the retired lieutenant accused of being a member of Ergenekon, it was shown that TÜBİTAK was one of the concerns of Ergenekon'. In the screen, it was mentioned (written and oral), explain the project to M.M. Furthermore, we must use M. More efficiently. If he will not be promoted in TÜBİTAK, we will place him in another place. It is argued that, M.M. who has been detained for being a spy and who was cryptolog in TÜBİTAK, referred to in the note of Yıldırım was Merdan M. (In thse screen it is mentioned, 'Is M.M. significates Merdan Metin?).We must give him new functions and that this broadcasting has violated the principles according to which everyone shall be presumed innocent until proved guilty before the court and that these news included accusations against persons whose trial was pending and the culpability was not proved. It is argued that during the investigation M. has been questionned about the note of the accused in Ergenekon. 14 soldiers among whom was commodore Şafak Yürekli, it has been taken a decision of cow until 8 November. Commodore Yürekli was accused in the Poyrazköy case. The decision of the administrative court that anulled the administrative sanction has beeen overruled because of the fact that in the bill of indictement, it was argued that the accused of Ergenekon has leaked information to Şafak Yürekli and that in this respect the news involved accusations about persons whose culpability was not proven, brought persons under suspicion and that it breached the principle of broadcasting as to which everyone is innocent until proven guilty[40]. In this decision, particularly, it has been observed that the presentation of the news influenced the merits of the case.

In another case, the Council of State upheld a decision that rejected the cancellation claim of an administrative sanction because of the fact that the

[39] 13th Chamber of the Council of State, 20.11.2014, E:2014/3811, K:2014/3667
[40] 13th Chamber of the Council of State, 03.12.2012 tarih, E:2012/942, K:2012/3509

attendants of a television programme accused some persons without judicial decision and the presenter of the programme did not defend the reights of the accused persons despite the fact that he defended the channel and thus he breached the article 4/k of the Law no. 3984[41].

On the other hand, the plenary session of the chambers for administrative cases of the Council of State has recently given a different decision on the presumption of innocence. This decision is particularly important for the broadcaster's liability and it is in line with the decisions of the 13th chamber.

In the case in question the basis of the suspension of broadcasting was the expressions used by a deputy of the main opposition party during a press release in a phone call within an investigation interesting the public. Within the press release made during the live broadcast, it is seen that the expressions of the deputy of the main opposition party breached the principle as to which 'everyone has the right to be presumed innocent until proved guilty by a judicial decision and the principle that bans the broadcasting that incite to commit crime and spreading fear' caused the broadcasting suspension.

In its decision, the plenary session of the chambers for administrative cases reminded the ECtHR's view according to which requesting the press to become distanced from the content of a quote was not compatible with the function to inform the public about the opinions and ideas that exist during a certain period and that the santions applied were not porportionate to the aims and thus there were not necessary in a democratic society. Because of these reasons, the plenary sessions of the chambers for administrative cases mentionned that the administration and the judicial authorities must interprete the provisions of the Law no. 3984 that are the subject matter of this case in conformity with the case-law of the ECtHR concerning the freedom of expression and the function of the written of the visual media to inform the public. It also emphasized that the Law no. 3984 did not involve any regulation about the obligation of the broadcaster to impart its opinions or to choice an opinion when it carries out its function to give information; that the broadcaster has liability in this respect, that this is incompatible with the impartiality of the journalism and at the outset, it decided that the administrative sanction was in breach of law because of the broadcater's sanction for not informing the press release of a deputy of the main opposition party and that was not necessary in a democratic society and was in breach of the Artivcle 10 of the ECHR[42].

---

41 13th Chamber of the Council of State, 20.11.2012 tarih, E:2011/3457, K:2012/3169

42 Council of State Plenary session of the chambers for administrative cases, 30.04.2015, E:2013/2149, K:2015/1685

As seen, the Council of State's assesement differed depending on the broadcast of the broadcaster and particularly it did not considered the breaches of the presumption of innocence that are not making part of the liable broadcasting within the right to inform.

E- The Privacy of the Private Life- The Freedom of Expression, The Conflict Between The Right to Receive/Impart Information

The privacy of the private life is one of the grey areas of the freedom of expression such as the presumption of innocence. At this point when the Council of State issues its judgments, takes into account the social situation of the person subject of the publication and the quality of the information. At this point, the Council of State, upheld a judgment that rejected the broadcaster's request of annulation of an administrative sanction because of the broadcasting of the voice records of the conversation between Mukaddes Eruygur who is the wife of Şener Eruygur one of the accused of being a member of Ergenekon and the clinic chief of GATA, during the TV program called 'evening news'. The Council of State decided that the the right to respect for private life guaranteed in the article 4 of the Law no. 3984, has been breached because of the recording of a conversation-even illegal- and broadcasting of these records and images by television and this constituted the breach of the personal rights[43].

In another conflict, taking into account the expressions of a journalist who attended a television program and talked about a medical report which mentioned that the leg of X was 7 centimeters shorter than the other one and used other expressions, the Council of State emphasized that there is no hesitation as to the fact that the normal limit of criticism against politicians, writers, artists or other public persons was wider than other individuals. At this point, taking into account the fact that X was the manager of a club, the Council of State considered that he was a public person and in reality, it was argued that X had taken a false medical report for not serving in the army and that it was subject of a long debate, it did not concern an information relating to his private life. In conclusion, the Council of State quashed the decision of the administrative tribunal which rejected the complaint because of the fact that the critics were within the limits of the freedom of expression[44].

[43] 13th Chamber of the Council of State, 21.11.2012, E:2010/3745, K:2012/3258
[44] 13th Chamber of the Council of State, 31.12.2014, E:2013/2894, K:2014/4670

As explained above, in the first case the Council of State did not considered the broadcasting of the voice records obtained illegally within the freedom of expression but in the second case, it considered the boadcasting of a debate concerning a well-known person's life within the freedom of expression.

CONCLUSION

The freedoms of expression and of the press are of essential importance for individual's rights in democratic societies. These freedoms having their privilegied places, could be subject to limitations. The legality of these limitations is controlled by the judicial authorities according to their criteria. Both the ECtHR and the Council of State and administrative tribunals, apply to the conflicts four criteria explained above.

Accordingly, for the limitation of the freedoms of expression and of the press, the interference must be prescribed by law, the law must be clear and foreseeable and the rules must be understandable.

The legitimate aim of the interference supposes that the interference is not used for other interferences by analogy, that the aim can is not used for another aim and the state will decide for the necessary measure and regulation for a democratic society.

The aim searched by the interference and the means must be proportionate. Furthermore, the criteria of necessity in a democratic society explains that the freedom of expression is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive but also to those that offend , shock or disturb such are the demands of pluralism, tolerance and broadmindeness.

These four criteria developped by the ECtHR are applied by Turkish administrative judicial authorities and checked in the conflicts.

In terms of work, concerning the conflicts of the administrative sanctions imposed on radio and television broadcasters by administrative authorities the Council of State emphasized that everyone has the right to impart his/her opinions and convictions by statements, writing or images individually or collectively without interference of public authorities and that this could be subject to licensing of broadcasting.

The subparagraph 1 of the Article 26 of the Constitution emphasizes the scope of the exercise of the freedom of imparting opinions and the subparagraph 2 of the same article sets forth that the exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding basic characteristics of the Republic and

the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, witholding information duly classified as a state secret, protecting the reputation or rights and private family life of others, or protecting Professional secrets as prescribed by law or ensuring the proper functioning of the judiciary.

From this point of view, concerning this type of conflicts, the Council of State ensures its control by taking into account the expressions used in the publication, the hour of the broadcasting, whether it has been broadcasted as a public service and its sense of responsability, whether human rights and existing legal regulations have been taken into account.

In conclusion, the Council of State and the administrative tribunals when ensuring their judicial supervision on the limitations to the freedoms of expression and of the press, they apply the ECtHR's criteria.

♦♦♦♦

BIBLIOGRAPHY

Books and Articles

BOZKURT, Enver-DOST, Süleyman "The Freedom of Expression and Turkey in the Judgments of the ECtHR", **SDÜ Periodical of the Economics and Social Sciences Faculty**, Y:2002, T:7, NO:1, p. 47-74

DOĞRU, Osman –NALBANT, Atilla, European Convention on Human Rights, Mediation and Important Judgments, 2. Tome, Pozitif Press, Ankara, 2013.

ERGÜN OKUYUCU, Güneş, "Confidentialty of the Investigation", **The Periodical of the Faculty of Law of the Ankara University,** No.. 59(2), 2010, p.243-275

HARRİS-O'BOYLE-WARBRİCK, **Law of the European Convention on Human Rights**, ŞenPress, Ankara, 2013,

KÜÇÜK, Adnan, The Components of the Freedom of Expression, Publication of Liberal Düşünce Topluluğu, Ankara, 2003.

ÖZBEY, Özcan, "Restrictions to the Freedom of Expression In the Light of the European Convention on Human Rights", **TBB Review**, 2013/106, s. 41-92.

SUNAY, Zuhal Aysun, "The Restriction of the freedom of expressionby the preventive suspension of radio and television broadcasting In The Light of the Judgments of the Council of State and ECtHR", **Periodical of Faculty of Law of the Anadolu Univerity**, T.1, No.2, 2015, p. 95-117

The Project on Freedom of Expression and of the Media in Turkey, Manual Prepared for the 8th Round Table URAN, Peri, The Apporach of the Turkish Constitutional Court and the European Court of Human Rights to the Freedom of Press", **Periodical of theTurkish Bar Association**, 2015/120, p. 87-130

Web Sources

HUDOC Database, (Access:http://hudoc.echr.coe.int/tur)

MACOVEİ, Monica The Freedom of Expression, Manual of Human Rights No:2, p. 24.(Access:http://www.yargitay.gov.tr/abproje/belge/kitaplar/AIHS_mad10_Ifade.pdf) (Access Date: 25.10.2015)

ŞAHİN, Yahya, "The Freedom of Expression and Its Limitations in the Judgments of the Council of State" . The text submitted in the 5th round table on the Project of Reinforcment of the Roles of High Judicial Bodies In the Light of the European Standards, 2010.

(Access:http://www.yargitay.gov.tr/abproje/belge/sunum/rt5/Sahin_DanistayIfadeOzgurlugu.pdf) (Access Date: 24.10.2015)

BASIN ÖZGÜRLÜĞÜ KAPSAMINDA DEVLETİN GÜVENLİĞİNE VE SİYASAL YARARLARINA İLİŞKİN BİLGİLERİ AÇIKLAMA SUÇU

The Crime of Disclosure of Information Relating to Public Security and Political Interests of the State Within the Framework of Freedom of Press

Ebru YAVUZ YAYLA* – Dr. Mehmet YAYLA**

ÖZET

"Devlet sırları", ulusal güvenlikle bağlantılı bir kavram olup kısaca, devletin güvenliğinin ve devamlılığının sağlanması için gizlenen bilgiler olarak tanımlanabilir. Devlet sırlarını korumanın en önemli yollarından bir tanesi, bunların hukuk düzeni içerisinde korumaya tabi tutulmasıdır.

Türk Hukukunda, ifade özgürlüğünün bir görünüş biçimi olan basın özgürlüğünü sınırlandırma nedenlerinden biri de ulusal güvenliktir ve bundan dolayı basın özgürlüğü ile devlet sırları arasında ters ilişki mevcuttur.

Bu çalışmada, öncelikle devlet sırları ile basın özgürlüğü arasındaki ilişki açıklanacak; sonrasında Türk Ceza Kanunu'ndaki devletin güvenliğine ve siyasal yararlarına ilişkin bilgileri açıklama suçu, basın özgürlüğü, Avrupa İnsan Hakları Sözleşmesi ve Basın Kanunu kapsamında ele alınacaktır.

Anahtar Kelimeler: Basın Özgürlüğü, Basın Kanunu, Ulusal Güvenlik, Devlet Sırları, Devletin Güvenliğine ve Siyasal Yararlarına İlişkin Bilgileri Açıklama Suçu.

ABSTRACT

"State secrets" are related to national security and can briefly be described as the secrets kept to provide the security and stability of the State. One of the most significant ways of securing "State secrets" is to protect them within the system of law.

One of the restrictions on the "freedom of press" which is a form of the "freedom of expression" in Turkish law is national security, and thus, there is an inverse correlation between "State secrets" and "freedom of press".

In this essay, firstly, the relation between "State secrets" and "freedom of press" will be clarified; then, the crime of "disclosure of information relating to public security

* Gazi University Public Law Department PhD candidate, ebruyavuz1981@yahoo.com. The ideas and opinions expressed herein are solely those of the author and the article has been based on open sources. No classified documents have been used.

** Dr, Military Court of Cassation Deputy Chief Prosecutor, meh_yayla@yahoo.com. The ideas and opinions expressed herein are solely those of the author and the article has been based on open sources. No classified documents have been used.

and political interests of the State" in the Turkish Penal Code will be considered within the framework of freedom of press, the European Convention on Human Rights and the Code of Press.

Keywords: Freedom of Press, Code of Press, National Security, State Secrets, the Crime of Disclosure of Information Relating to Public Security and Political Interests of the State.

INTRODUCTION

In this age, press is the most effective means of expressing opinions in writing. One of the most fundamental forms and crucial elements of freedom of expression is freedom of the press[1]. Freedom of press is defined as the right to freely collect and receive news and information, interpret and criticize them, and disseminate such news and information[2]. Freedom of press enables the users of printed media (authors, publishers) to express and disseminate their thoughts, and the public to receive information. According to this, freedom of press has two dimensions: an individual dimension relating to the users of media channels, and a public dimension relating to the public's right of receiving news and information[3].

As with all freedoms, freedom of press is not unlimited. Constitutions and international conventions regulate the reasons for which freedom of press may be restricted. One such reason is national security.

National security is an umbrella concept that includes the security of the

1 ARTUK, Mehmet Emin – GÖKÇEN, Ahmet – YENİDÜNYA, A.Caner, *Ceza Hukuku Genel Hükümler [Criminal Law General Provisions]*, 4th Edition, Turhan Kitabevi, Ankara, 2009, p. 428.

2 DÖNMEZER, Sulhi, *Basın ve Hukuku [The Press and Its Law]*, 4th Edition, İstanbul, 1976, p. 41; KARACA, Nuray Gökçek, *Gazetecinin Basın İş Kanunu'ndan Doğan Hakları ve Sorumlulukları: 5953 Sayılı Basın İş Kanunu ve Uygulaması [The Rights and Responsibilities of Journalists Arising out of the Code of Press: The Letter and Practice of the Code of Press no. 5953]*, İstanbul, 2010, p. 23; ÖZKORKUT, Nevin Ünal, "Basın Özgürlüğü ve Osmanlı Devletindeki Görünümü" ["Freedom of Press and Its Appearance in the Ottoman State"], *Ankara Üniversitesi Hukuk Fakültesi Dergisi [Ankara University Law School Journal]*, vol. II, Issue 3, 2002, p. 67; BELLİ, Doğan Bülent, *Basın Yolu ile Kişilik Haklarına Saldırılardan Doğan Hukuki Sorumluluk [Legal Liabilities of Infringement of Personal Rights via the Press]*, Ankara, 2008, p. 60; ÜZÜLMEZ, İlhan, "Suçsuzluk Karinesi ve Basın Özgürlüğü" ["Presumption of Innocence and Freedom of Press], *Fahiman Tekil'in Anısı'na Armağan [Homage to the Memory of Fahiman Tekil]*, İstanbul, 2003, p. 935; SAVAŞÇI, Bilgehan, "Haberleşme Özgürlüğünün Kovuşturma Evresinde Sınırlandırılması" ["Restrictions on Freedom of Communication during the Prosecution Phase"], *Türkiye Barolar Birliği Dergisi [Journal of the Union of Bar Associations of Turkey]*, Issue 96, 2011, p. 270.

3 SUNAY, Reyhan, *Avrupa Sözleşmesinde ve Türk Anayasasında İfade Hürriyetinin Muhtevası ve Sınırları [Content and Limits of Freedom of Expression in the European Convention and Turkish Constitution]*, LDT Yayınevi, Ankara, 2001, p. 134

State. State security may be defined as the right of the entity known as the State to maintain its existence in a lawful, social and independent manner, protected against any and all internal and external threats[4]. Observing the fine line between freedom of press and national security is important both in terms of protecting freedom of expression as one of the fundamental rights and freedoms, and of ensuring the safety and security of the society that comprises the State.

This essay consists of an introduction, two chapters, and a conclusion. The first chapter discusses basic concepts; the second chapter will provide an analysis of the crime of "disclosure of information relating to public security and political interests of the State" in art. 329 of the Turkish Penal Code, which will be considered within the framework of freedom of press, European Convention on Human Rights (ECHR), European Court of Human Rights judgments (ECtHR) and the Code of Press.

I. BASIC CONCEPTS

A. THE CONCEPT OF PRESS

Means of mass communication are used to disseminate news and information acquired from various sources to the public at large[5]. These means include printed media such as newspapers, magazines and books; radio and television, cinema films, records, audiovisual recordings, audiovisual disks, computers and the Internet[6].

Press means the entirety of written communications published on a regular basis. Press is also one of the most effective means of using freedom of expression in modern democracies.

According to art. 2, par. 1, subpar. (a) of the Code of Press no. 5187, a "printed work" is defined as writings, pictures and similar articles printed by any printing means or duplicated via other means for mass publication, and the services of news agencies. In this essay, the term "press" will be used solely to refer to books, newspapers, magazines, pamphlets and other printed means of mass communication.

---

4 ACAR, Ünal – URHAL, Ömer, *Devlet-Güvenlik İstihbarat-Terörizm [State-Security Intelligence-Terrorism]*, Adalet Yayınevi, Ankara, 2007, p. 128

5 *Türkçe Sözlük [Dictionary of Turkish]*, Atatürk Kültür, Dil ve Tarih Yüksek Kurulu Yayınları, Ankara, 2010, p. 1451

6 SALİHPAŞAOĞLU, Yaşar, *Türkiye'de Basın Özgürlüğü [Freedom of Press in Turkey]*, Seçkin Yayınları, Ankara, 2007, p. 23

B. THE CONCEPT OF FREEDOM OF PRESS

Freedom of press is one of the critical elements of freedom of expression, and is defined as the right to freely collect and receive news and information, interpret and criticize them, and disseminate such news and information[7]. Accordingly, freedom of press encompasses the rights to freely collect news, information and thoughts; interpret, criticize and disseminate them, and to publish such news and information. According to art. 3 of the Code of Press no. 5187, *“This freedom includes the rights to acquire, disseminate, criticize and interpret information, and create works.”*

Dissemination by press is a specific type of expressing opinions, yet creates a category of freedom that is different from the freedom to express thoughts[8]. The 1982 Constitution provides for freedom of expression in art. 26, but includes separate provisions for freedom of press in art. 28. According to paragraphs 1 and 2 of that article: *“The press is free, and shall not be censored. Founding of a printing house shall not be subject to prior permission or the deposit of a financial guarantee. The State shall take the necessary measures to ensure freedom of the press and information”.*

The European Convention on Human Rights does not consider freedom of press as a separate form of freedom, rather classifying it as one of the forms in which freedom of expression is used. The Convention’s art. 10 on freedom of expression states that: *“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.”*

In its press-related judgments, the European Court of Human Rights reiterates that freedom of expression is one of the pillars of a democratic society, and states that protection afforded to the press is especially important[9]. Freedom of press is the freedom to impart news and information of public concern on one side, and the right of the society to receive such news and information on the other. According to the Court, this is the only way that the press can fulfil its role of “public watchdog” that is essential to the people’s right to receive information[10].

7 See Note 1.

8 SALİHPAŞAOĞLU, p. 26.

9 DOĞRU, Osman – NALBANT, Atilla, *Ĩyãl·ý I l·ĩfl·ǊP !ǾǊdzǇl· Sözleşmesi Açıklama ve Önemli Kararlar [European Convention on Human Rights Annotations and Important Judgments]*, Vol. 2, 1st Edition, Pozitif Matbaa, Ankara, 2013, p. 206

10 DOĞRU – NALBANT, p. 207

C. THE CONCEPT OF STATE SECURITY

"Security" is defined as "the ability to maintain law and order in the society, enabling individuals to live free from fear; safety"[11]. Security is a setting of legal, social, financial and personal peace that is free from all danger. Security is important for all animate and inanimate objects, but holds special importance for private citizens and legal entities (including the State).

The key objective of the democratic legal system is to provide welfare and happiness to the individuals comprising its society at the highest level, and to ensure their security[12].

While transitioning from nomadic lives to settlements, human tribes needed to organise to meet requirements that were getting more complex and diverse. Security arose as a concern as people began to live collectively and establish governments. When governments rose to the level of states, the protection of the society and the State was delegated to organised protective forces; these forces then had internal and external organisational structures developed in order to protect the State against organised internal and external threats over time[13].

The State is required to ensure security and to guarantee the fundamental rights and freedoms of the individual. In return, the individual is required to abide by social rules and laws in order to fulfil his/her duty against the State and society. The State and the nation complement each other and are interdependent. The State has duties towards the nation; reciprocally, the nation has duties towards the State. The State's reason of existence is to serve its citizens. It is in the best interests of the individual and the society to protect the State, as it exists for them. It may thus be inferred that protecting and ensuring the security of the State is among the duties of the individual and the society. Although the State is able to protect itself against internal and external threats through its bodies, it is incumbent upon the society and the individual to protect and preserve the State as an entity.

---

11 *Türkçe Sözlük [Dictionary of Turkish]*, p. 817

12 KARCILIOĞLU, N.Kaan, "Demokratik Sistemin Unsuru Olarak İfade Özgürlüğü ve Ceza Hukukunun Etkisi" ["Freedom of Expression as an Element of the Democratic System and the Influence of Criminal Law"], *Uğur ALACAKAPTAN'a Armağan [Dedicated to Uğur ALACAKAPTAN]*, İstanbul Bilgi Üniversitesi Yayınları, Vol. 1, 1st Edition, June 2008, p. 451

13 *Devletin Kavram ve Kapsamı [The Concept and Scope of the State]*, MGK Genel Sekreterliği Yayını no: 1, Ankara, 1990, p. 40

The State is required to provide security to its citizens within and outside national borders. Art. 5 of the Constitution of the Republic of Turkey states: *"The fundamental purposes and duties of the State are to protect the independence and integrity of the Turkish nation, the indivisibility of the country, the Republic and democracy; ensure the welfare, peace and happiness of individuals and the society; remove political, financial and social barriers that restrict the fundamental rights and freedoms of individuals in a manner not compatible with the principles of justice and social rule of law; and to provide the conditions needed for the material and immaterial advancement of the people."* This article defines the main duties of the State and includes its duty to provide security within and outside national borders. The primary duty of the State is to ensure the survival and sustainability of the State and the nation.

Art. 2 of the Law on National Security Council and General Secretariat of the National Security Council no. 2945 states: *"National Security is the protection of the constitutional order, national being and integrity of the State, its political, social, cultural and financial interests at the international level, and its conventional law against any and all internal and external threats"*[14].

[14] There are various definitions of national security in legal doctrine. "National security is not the protection of a specific ideology or political principle against opposing views, but the protection of the State and the country against internal and external subversive elements." (TANÖR, Bülent, *Siyasal Düşünce Hürriyeti ve 1961 Türk Anayasası [Freedom of Political Thought and the 1961 Turkish Constitution]*, İstanbul, 1969, p. 146); "National security is the safeguarding of the entire social establishment against high-level internal and external threats and interference. Threats and actors against national security may be widespread and long-term mass movements directed against the existence of the State or its normal workings. Threats and actors that intend to destroy, subvert or damage the political, social and economic structures and mechanisms of the society cannot be linked to national security. If this concept is made to include all acts of societies, it will be confused or even integrated with public order, which must be regulated and protected through normal laws." (DURAN, Lütfi, "Sosyal Hareketler ve Milli Güvenlik" ["Social Movements and National Security"], *İktisat ve Maliye [Economics and Finance]*, Vol. 17, Issue: 4, July 1970, p. 170); "National Security consists of internal and external security ... external security is the protection of the State and the country against threats from other countries and states in times of peace and war ... while internal security is the protection of the State against armed revolt and subversive activities..." (BİLGEN, Pertev, *1961 Anayasasına Göre Sıkıyönetim [Martial Law According to the 1961 Constitution]*, İstanbul, 1976, p. 70-75); "... the protection of the State and the country against internal and external threats in times of peace and war; safeguarding the entity of the State against internal and external threats that may arise within national borders..." (YAYLA, Yıldızhan, *İdare Hukuku-2 Ders Notları [Administrative Law-2 Course Notes]*, 1978-1979, İstanbul, March 1979, p. 11).

The security of the State has a scope wide enough to include the security of the entities that live within the borders of the State[15]. Since such security is expansive in scope, the preferred term has been national security rather than just State security. National security is not limited to the internal and external security of the State; includes the national security policies of the State as well. State security and national security are two complementary concepts that need to be considered and evaluated as a whole, and they both serve the same goal.

State security includes internal security as well as external security against threats to the State, and encompasses the individuals living within the borders of the State[16]. Although State security is divided into external and internal security, this is only for convenience purposes, as State security is a whole.

State security has legal, political, social, economic and cultural aspects that ensure the survival of the people as well as of the State and the constitutional regime; it is concerned with long-term, continuous, internal and external threats and acts, and State security targets activities that are not confined to a specific region but concern the survival of the State and nation as a whole, or, even if confined to a region, affects the entire population and threatens or destroys the establishment.

1- Internal Security

Internal security first calls for the security and peace of the citizens against potential threats and dangers within national borders, and then extends to the protection of movable and immovable properties of the State and citizens against the same[17].

A State with no internal security usually fails at establishing external security. Internal security is the duty of the State as an entity. The State often delegates this duty to its law enforcement organisations.

It is not possible to enumerate and constrain the reasons that endanger the internal security of the State. These may vary according to time and situation, and may be the result of a wide variety of internal and external reasons.

---

15 ACAR-URHAL, p. 129

16 ACAR-URHAL, p. 129

17 Inferred from Article 5 of the Constitution, the main internal duties of the State are to "build safety, security and justice in the country, and protect and ensure the continuity of the fundamental freedoms of its citizens". ÇINAR, Bekir, *Devlet Güvenliği İstihbarat ve Terör [Security of State, Intelligence and Terrorism]*, Sam Yayınları, Ankara, 1997, p. 61

2- External Security

External security means that the State is not under the mandate, supervision or control of other states and institutions, and is protected against actual or possible attacks by other states[18]. Maintaining independence against external threats is among the main duties of a state. The responsibilities of the State include establishing and developing protection or defence forces against external threats, and maintaining them ready for deployment under all circumstances.

D. NATIONAL SECURITY AS THE LIMIT OF FREEDOM OF PRESS

According to art. 28, par. 3 of the 1982 Constitution, articles 26 and 27 shall apply to restrictions on freedom of press. National security is specified among the reasons for which freedom of press can be restricted in art. 26. According to par. 2 of art. 26: *"The exercise of this right may be limited for the purposes of the protection of national security, public order, public safety, the protection of the pillars of the Republic and the indivisible unity of the State with the country and nation, protection of information duly classified as state secrets ..."*

Provisions on the restriction of freedom of press are provided in art. 3, par. 2 of the Code of Press no. 5187. Accordingly: *"The exercise of the freedom of press may be subject to restrictions as are necessary in a democratic society, 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 state secrets, or for maintaining the authority and impartiality of the judiciary."* The similarity between the restriction in the Code of Press and the legitimate aims specified in art. 10, par. 2 of the ECHR indicates that the ECHR was the basis of the restrictions in the Code. Like the 1982 Constitution, the Code of Press envisages national security as one of the reasons for restricting freedom of press.

E. THE CONCEPT OF STATE SECRETS

The State is an organisation composed of individuals, a legal entity and a legal person. The State is the largest of all political institutions, an institution of institutions; as such, it incorporates some legal values beyond those of individuals. However, the State cannot be imagined separately from the individuals acting on its behalf. State authority is exercised by individuals, and

[18] YAYLA, *İdare Hukuku-2 Ders Notları [Administrative Law-2 Course Notes] (1978-1979)*, p. 11.

it is individuals who maintain the state order and make the State's legislation[19]. Therefore, the subject of whether the State can engage in acts that are kept secret from the individuals that comprise it is under debate.

Today, there is no doubt that the concept of state secrets is closely related to fundamental rights and freedoms. Human rights are based on two key concepts: personal freedom and security, and freedom of thought. These two areas are the foundation of all rights and freedoms, and are protected as the core essence or non-negotiables of human rights[20].

Freedom of thought is considered a product and the driving force of the Age of Enlightenment, and will remain essential for as long as humanity exists[21]. Freedom of thought is the freedom on which many other rights and freedoms are built. All conventional freedoms are named after freedom of thought. Freedom of thought is the source of freedom of expression, freedom of press, and freedom of communication. There is an inverse relationship between the government's discretion and state secrets, and the freedoms of expression, communication and press, of which freedom of thought is the source. The wider the scope of government discretion and state secrets, the narrower are freedoms. However, the continuity and security of the State, which is constructed on a social convention, is crucial to the interests of its individuals. This necessitates keeping some information and documents, the disclosure of which would threaten and jeopardise the continuity and security of the State, as secrets. At the same time, the scope of secrets must be kept very narrow. One of the instruments most effective in preventing government transparency and individuals' access to information and documents held by the authorities is restrictions imposed on the pretext of state secrets. The

---

19 ALACAKAPTAN, Uğur, "Devletin Güvenliğini İlgilendiren Suçlar" ["Crimes Concerning the Security of the State"], *Ceza Hukuku Reformu [Criminal Law Reform]*, 1st Edition, Umut Vakfı Yayınları, İstanbul, 2001, p. 652-654; AKBULUT, İlhan, "Türk Ceza Hukukunda Yeni Gelişmeler Işığında Devletin Şahsiyetine Karşı İşlenen Suçlar ve Ülke Bölücülüğü Suçu" [Crimes against the Entity of the State and the Crime of Separating the Country in the Light of New Developments in Turkish Criminal Law"], *Bilgi Toplumunda Hukuk, Ünal TEKİNALP'e Armağan [Law in the Information Society, Dedicated to Ünal TEKİNALP]*, Vol. 3, 1st Edition, Beta, İstanbul, 2003, p. 696

20 HAFIZOĞULLARI, Zeki, "Liberal Demokratik Bir Hukuk Düzeninde İfade Hürriyetinin Sınırı" ["The Limits of Freedom of Expression in a Liberal Democratic Legal Order "], *Türkiye Barolar Birliği Dergisi [Journal of the Union of Bar Associations of Turkey]*, Issue 55, 2004, p. 86 vd.; KORKMAZ, Ömer, "Düşünce Özgürlüğü ve Sınırları" ["Freedom of Thought and Its Limits"], *Prof. Dr. Seyfullah EDİZ'e Armağan [Dedicated to Professor Seyfullah EDİZ]*, Dokuz Eylül Üniversitesi Yayını, İzmir, 2000, p. 119

21 *Türkiye'de Düşünce Özgürlüğü [Freedom of Thought in Turkey]*, (Ed.: İbrahim Ö. KABOĞLU) Türkiye Genç İşadamları Yüksek Kurulu-1994, İstanbul, 1997, p. 19.

current notion of the State envisions that state secrets must be kept to an absolute minimum in regard for human rights and freedoms.

State secret is a confidential area that is recognized by all states and contains information that must be kept in confidence for the security and high interests of the State. This notion serves the security of the State, and ultimately the security of the society and the individuals comprising it[22]. Foreign relations and national security are vital for the security and survival of the State[23].

Today, some states use laws to determine the scope, classification and statute of limitation of state secrets and the powers to classify certain information, while others resort to administrative directives. Although states prefer to determine their secrets according to existing regulations, the principles of respect for fundamental rights and freedoms, rule of law and government transparency require that state secrets are determined through a law.

Currently, there is no law in Turkey that prescribes what state secrets are, who are authorised to classify information as secrets, the related decision-making authorities, and the statute of limitations that apply to state secrets. However, there is a "State Secrets Draft Law" that has been a work-in-progress for years and is yet to be adopted. This Draft contains provisions on state secrets and information and documents barred from disclosure by competent authorities[24]. Although the Draft also determines the authorities which will decide whether information and documents held by public offices and institutions can become state secrets, it has not been made into a law yet.

---

22 KAYA, Cemil, "State Secret as An Instrument to Maintain State Security", *Selçuk Üniversitesi Hukuk Fakültesi Dergisi [Selçuk University Law School Journal]*, Vol. 14, Issue 1, 2006, p. 33

23 MARSH, Norman S., Access to Government-Held Information: An Introduction, in Ed. Norman S. Marsh, *Public Access to Government-Held Information: A Comparative Symposium*, Stevens&Son Ltd., London, 1987, p. 9

24 According to Article 3 of the Draft, state secrets are "Information and documents that, if disclosed, will damage the foreign relations, national defence and national security of the State, endanger the constitutional order and foreign relations, and as such must remain secret." Art. 4 lists the information and documents to be kept secret as follows: "Information and documents which, although not classified as state secrets, may endanger the economic interests of the country, intelligence services, military services, administrative investigations and prosecution, or are classified as confidential by competent authorities, shall be regarded confidential information and documents." According to Art. 6 of the Draft, the authority to classify information and documents as state secrets is vested in the State Secrets Council composed of the Undersecretary of the Prime Minister as president and the undersecretaries of Justice, Defence, Internal Affairs and Foreign Affairs as members. Art. 8 of the Draft reserves the provisions in the Law of Criminal Proceedings no. 5271 with respect to the disclosure of state secrets to courts.

II. THE CRIME OF DISCLOSURE OF INFORMATION RELATING TO PUBLIC SECURITY AND POLITICAL INTERESTS OF THE STATE (ARTICLE 329 OF THE TURKISH PENAL CODE)

A. GENERAL INFORMATION ABOUT THE CRIME

Art. 329 of the Turkish Penal Code no. 5237 defines the crime of negligent or deliberate disclosure of information that needs to be kept in confidence for the security of the State or its internal and foreign interests. The first paragraph of art. 329 defines the deliberate disclosure of state secrets: "Persons who disclose information that needs to be kept in confidence for the security of the State or its internal and foreign interests shall be sentenced to imprisonment between five to ten years", while the third paragraph determines the punishment for negligent disclosure: "If the act is committed in negligence, the person shall be sentenced to imprisonment between six months to two years in the case specified in the first paragraph, and to imprisonment between three to eight years in any of the cases specified in the second paragraph." The second paragraph of the article defines the aggravated status of the crime as follows: *"If the act is committed during war or jeopardises the war preparations, war activities or military moves of the State, the person shall be sentenced to imprisonment between ten to fifteen years."*

B. PROTECTED LEGAL INTERESTS

The crime defined in art. 329 of the Turkish Penal Code is intended to protect information that concerns the primary interests of the State, which are, in essence, state secrets. The legal interests protected by this crime are "state security", "internal and foreign political interests of the State" and "national defence".

C. ELEMENTS OF CRIME

1. Objective Elements of Crime

a. Offender

The article contains no provisions about the qualifications (Turkish or foreign national) of the offender; therefore, anybody can be an offender of this crime[25]. The law is explicit when it intends to limit offenders to certain

[25] GÖZÜBÜYÜK, Abdullah P., *Alman, Fransız, İsviçre ve İtalyan Ceza Kanunlariyle Mukayeseli Türk Ceza Kanunu Açıklaması [Annotations on the Turkish Penal Code in Comparison to German, French, Swiss and Italian Penal Codes]* , Vol. 1, 3rd Edition, Kazancı Yayınevi, Ankara, 1982, p. 518; ÖGEL, Ragıp, "Casusluk Suçları" ["Crimes of Espionage"], *Adliye Ceridesi [Journal of the Judiciary]*, 31st Year, 1940, p. 1040.

groups or individuals; the norm in question contains the wording "persons". Therefore, any person or a member of press will be subject to the norm regardless of capacity.

With respect to printed works, the offender of the crime is explained in art. 11 of the Code of Press no. 5187.

The owner of the work is liable for crimes committed in periodical or non-periodical printed works.

In the case of periodicals, if the owner of the work is unknown, lacks criminal capacity at the time of publication or cannot be prosecuted in Turkey due to living outside of the country, or if the possible punishment has no effect on a previous sentence to which the offender had been convicted; then the managing director or other persons who report to the managing director, such as editor, editor-in-chief or press advisor, will be held liable. However, if the work is printed in spite of objections of the managing director or any of his reportees, the person making the publication will be held liable.

In the case of non-periodicals, if the owner of the work is unknown, lacks criminal capacity at the time of publication or cannot be prosecuted in Turkey due to living outside of the country, or if the possible punishment has no effect on a previous sentence to which the offender had been convicted, the publisher will be held liable; if the publisher is unknown or lacks criminal capacity at the time of publication, the printer will be held liable.

b. Subject of the Crime (Act)

The subject of the act is "information that needs to be kept in confidence for the security of the State or its internal and foreign interests", or, state secrets[26].

Determining the subject of the act may require technical and specialised information in some cases, when the judge may appoint an expert. The concrete subject of the crime must be established beyond a doubt.

---

[26] ÖZÜTÜRK, Nejat, *Türk Ceza Kanunu Şerhi ve Tatbikatı [Annotations and Implementation of the Turkish Penal Code]*, Vol. 1, Balkanoğlu Matbaa, Ankara, 1966, p. 391-392; ÖGEL, p. 1040; The Council of Chambers of the Military Court of Cassation ruled in the judgment dated 02.10.1997 no. 1997/98-114 E.K. that "The maps drawn by the defendants showing the positions of Border Outposts, Border Company and Border Battalions and the locations of their ammunition depots and fortifications reflect the actual locations of these elements, and as such are considered 'information that must be kept secret'." (Library of the Military Court of Cassation, Council of Chambers 1997 Judgments Binder)

c. The Act

The crime is to "disclose information that needs to be kept in confidence for the security of the State or its internal and foreign interests"[27]. "To disclose" means to "provide information pertinent to a subject; state, reveal, divulge, explain; interpret or explain the meaning of an utterance or writing"[28].

ca. Disclosing a State Secret

The disclosure may be to specific persons or to the public. If the secret has been divulged to specific persons, their duty is to keep this secret in confidence. With regard to members of press, a person who comes to knowledge of a state secret must refrain from disclosing such secret in print. Otherwise, a crime will have been committed. Secrets that have not become public or are discovered through other means or events do not cease to be secrets. However, if the disclosure is not to specific persons but to the public at large, the information can no longer be considered secret and conveying this information to others cannot constitute the crime of disclosure[29]. The Council of Chambers of the Military Court of Cassation, in its judgment dated 2.10.1997 no. 1997/98-114 E.K., states that *"...the concept of disclosure means that a secret of the State is told to one or more persons; if the secret is not told to other persons or those persons have not received this information even though it has been notified to them, no 'disclosure' will have occurred and this crime will not have been committed";* stating that one objective element of the crime is the receipt of the secret by the notified party[30]. On a concurring note, the ruling of the Second Chamber of the Military Court of Cassation dated 19.10.1972 no. 1972/203-242 E.K. states that: "For this crime to have occurred: A) A disclosure in the meaning of the law must be present; B) The disclosed document or information must be pertinent to the security or the national or international interests of the State, be kept confidential due to such interests, or be prohibited from publication or disclosure by competent authorities... There is no doubt that the crime will have been consummated

---

27 EREM, Faruk, *Ceza Hukuku Hususi Hükümler [Special Provisions in Criminal Law]*, Vol. 1, Ajans-Türk Matbaası, Ankara, 1968, p. 53; ÖGEL, p. 1040-1041; GÖZÜBÜYÜK, Abdullah P., *Alman, Fransız, İsviçre ve İtalyan Ceza Kanunlariyle Mukayeseli Türk Ceza Kanunu Açıklaması [Annotations on the Turkish Penal Code in Comparison to German, French, Swiss and Italian Penal Codes]*, Vol. 1, p. 507-508

28 *Türk Dil Kurumu Türkçe Sözlük [Dictionary of Turkish]*, p. 13

29 AKGÜÇ, Atıf, "Casusluk Suçu" ["The Crime of Espionage], *Siyasi İlimler Mecmuası [Journal of Political Sciences]*, 10th Year, Issue 118, 1941, p. 482

30 Library of the Military Court of Cassation, Council of Chambers 1997 Judgments Binder

when state secrets are disclosed. Disclosure in the meaning of the law is the conveyance of a secret belonging to the State to one or more persons. The nofitication of the secret is not enough; the recipient must acknowledge receipt; in other words, become aware of the secret. Based on the nature of the substantive act in the charges concerned, there is no doubt that the conveyance of a secret by the defendant to one or more persons is out of the question. However, by creating a medium conducive to the acquisition of secrets through his acts, it is obvious that the defendant has provided an opportunity for the counterparty to achieve the same result, thereby disclosing state secrets... As explained above, the recipient must access and become aware of state secrets for any state secret to be considered disclosed"[31].

As understood from the above judgments, a person who is in lawful or unlawful custody of a piece of confidential information does not need to know the content of such information for the crime of disclosure of state secrets to have occurred. It suffices that the person knows that the information is a secret. On the other hand, the recipients of a secret must discover the content of the secret for disclosure to have occurred.

Determining whether the information was a secret must take into consideration the date on which the disclosure took place. The secrecy of a piece of information cannot be determined according to its status at a prior or later date. This assessment requires that objective criteria arising out of the nature of the information and subjective criteria arising out of the implicit or explicit intentions of the State are considered together.

If through an individual act the secrecy of the information is not abrogated completely or partially, in an absolute or relative manner, disclosure will not have occurred. Acts of simple indiscretion that provide incomplete and inaccurate information about all or part of the secret cannot be considered disclosure. Similarly, inferences or assumptions that are close to the truth, dangerous or potentially harmful cannot be considered disclosure[32].

---

31 Library of the Military Court of Cassation, Second Chamber 1972 Judgments Binder

32 EVİK, V. Sonay-EVİK, A.Hakan, "Devlet Sırrını ve Yayılması Yasaklanan Bilgileri Açıklama ve Elde Etme Suçları" ["The Crimes of Disclosing and Obtaining State Secrets and Information Prohibited from Dissemination"], *Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi [Atatürk University Erzincan Law School Journal]* , Vol. VIII, Issue 3-4, Erzincan 2004, p. 130

cb. Reason to Know the Secret

The reason that the secret is known is immaterial. Regardless of the reason for which the secret is known, it is incumbent upon the holder to keep it in confidence. Even if the secret is known due to a legitimate reason such as job or service or has been acquired by coincidence, disclosure will be a crime if it is not based on authority or position[33].

cc. Partial or Full Disclosure

As long as the disclosure threatens the security or national and international political interests, it will constitute a crime regardless of whether it is a full or partial disclosure[34]. Disclosing encryption keys, passwords, codes and hints that lead to the disclosure of the secret may also constitute a crime. The Second Chamber of the Military Court of Cassation, in its judgment dated 19.10.1972 no. 1972/203-242 E.K., states that *"In the response written after an analysis of the messages sent by the Ministry of Foreign Affairs, the General Staff argues that the 'disclosure of the basis of the encryption system' constitutes a disclosure of information that must be kept secret for the sake of the security and international political interests of the State even though no violation has occurred, it is not possible to concur with this opinion. The encryption system is a key that is used to discover the contents of encrypted messages. Although this too needs to be kept in confidence, the mere disclosure of this key cannot be considered the disclosure of information that must be kept secret for the sake of the security and international political interests of the State unless the content of the associated documents were discovered as a result of this disclosure. Given that it is not clear whether the operatives of the Romanian secret service were able to discover the content of the documents kept in the offices of military attachés, and that no documents containing information that must be kept secret for the sake of the security and international political interests of the State were present in the encryption room of the embassy, it is not possible to rule that the crime has occurred"*, resolving that the mere disclosure of the encryption key cannot constitute a crime, which would have only come into existence had such disclosure revealed state secrets[35].

33 ÖGEL, p. 1040; EVİK-EVİK, p. 130
34 EVİK-EVİK, p. 130
35 Library of the Military Court of Cassation, Second Chamber 1972 Judgments Binder

cd. Date of Disclosure

As long as the information must be kept secret, the date of disclosure is immaterial to the substance of the crime. If the secret has become public, for example by way of publication in a magazine or newspaper, disclosing the secret from that point onwards will not be a crime. In this case, the information ceases to be a secret, and all persons are relieved of the obligation to keep the secret in confidence. However, if the disclosure is not public, or has been made to a limited number of people and has not become public, disclosure of the secret will be criminal. According to the judgment of the 9th Criminal Chamber of the Court of Cassation dated 19.4.1995 no. 1995/1732-2785 E.K., *"In order for the elements of the crime specified in art. 136 to have occurred in the impugned case, the information that must be kept in confidence for the security or the national or international interests of the State or be prohibited from publication or disclosure by competent authorities had to maintain its status of secret at the time of acquisition and disclosure, and had to be disclosed by the offender in deliberation. If a piece of information has already become public at the time of disclosure and publication, it ceases to be a secret and cannot be considered information that must remain secret or is prohibited from publication and disclosure. Although the impugned article titled "The story of a desertion" that appeared in the 5.2.1994 issue of the* Özgür Gündem *newspaper had been prepared by the General Staff and classified as confidential to be distributed to relevant personnel only. An assessment of its content based on the above explanations shows that it cannot be regarded confidential information in accordance with art. 136/1 of the Turkish Penal Code, and there is no certainty that it was published despite its secret status. The defendant's conviction for printed thoughts rather than his/her acquittal from a charge whose substantial elements are not present"* were grounds for overturning the sentence handed to a defendant being tried for disclosing confidential documents in the press.

The European Court of Human Rights also states that the publication of a piece of information may be restricted for national security. However, in order for an expression of thought to be denied the protection of the ECHR, the restriction must be necessary in a democratic State and create a pressing social need. In this respect, the Court ruled that the seizure of books, newspapers and magazines that contain information which is classified as state secrets and, when published, jeopardises natonal security will be a violation of art. 10 of the ECHR if such publications are already freely obtainable or mostly obtained, having become public, thereby having lost the necessity in a democratic society and a pressing social need[36].

[36] HAZAR, Zeynep, "Basın Özgürlüğü ve Ulusal Güvenlik" ["Freedom of Press and National Security"], *Gazi Üniversitesi Hukuk Fakültesi Dergisi [Gazi University Law School Journal]*, Vol. XVII, Y. 2013, Issue 1-2, p. 1539.

In the *Observer and Guardian v. United Kingdom* case, the Court ruled that while the seizure of a book that contains information classified as state secrets prior to the publication of the book could be permissible, the fact that the book had been previously published in the US followed by the UK, such measures were no longer relevant. According to the Court, the interference was no longer necessary in a democratic society once the book had been published[37]. The Court made a similar judgment in the *Weekblad Bluf! v. The Netherlands* case. In the impugned case, the Court held that the seizure of the *Bluf!* magazine for publishing a report of the Dutch National Security Service after the concerned issue was initially seized and then reprinted and distributed in secret was in violation of the ECHR. The Court argued that the documents had become public once the magazine was distributed[38].

---

37 HAZAR, p. 1539

38 HAZAR, p. 1539; in the *Verenigung Weekblad Bluf!* case, the Court looked into the conflict between national security and freedom of expression based on various facts. The applicant, an association established in Amsterdam, was the publisher of the weekly magazine *Bluf!* which appealed mostly to a left-leaning audience. In 1987, *Bluf!* had acquired one of the periodical reports issued by the National Security Service of the Netherlands. The report, dated 1981, was marked "Confidential". The report contained information about the activities of the Dutch secret service at the time. Some of the information concerned the Dutch Communist Party and anti-nuclear movements, the plans of the Arab League to establish an office in The Hague, and the activities of the Polish, Romanian and Czechoslovakian secret services in the Netherlands. The editor of the magazine announced in an editorial that the report would be published as a supplement to the April 29th issue. On the same day, the director of the secret service wrote a letter to the prosecutor's office, saying that the distribution of the report would mean a violation of the penal code. The director emphasised the confidentiality of the information contained in the report: *""Although, in my opinion, the various contributions taken separately do not (or do not any longer) contain any state secrets, they do - taken together and read in conjunction - amount to information whose confidentiality is necessary in the interests of the State or its allies. This is because the juxtaposition of the facts gives an overview, in the various sectors of interest, of the information available to the security service and of the BVD's activities and method of operation."* As a result of this, the offices of *Bluf!* were searched before the magazine was printed and distributed on the orders of the investigation judge, and the April 29th issue of the magazine and its supplement were seized. That night, *Bluf!*'s workers reprinted the issue in secret and distributed approximately 2500 copies to citizens in the streets of Amsterdam the next day. Authorities did not interfere with distribution. In May 1987, the investigation judge closed the investigation on *Bluf!* employees without pressing any charges. Meanwhile, the publisher had requested the return of seized copies, which was denied. In March 1988, Dutch courts agreed with the plea of the prosecutor to withdraw all copies of *Bluf!*'s issue in question from circulation. The courts based this decision on national security concerns and argued that the uncontrolled availability of the materials in question were in violation of law and public interests. MACOVEİ, Monica, "İfade Özgürlüğü, Avrupa İnsan Hakları Sözleşmesinin 10'uncu maddesinin Uygulanmasına İlişkin Klavuz" ["Freedom of Expression, a Guide to the Implementation of Art. 10 of the European Convention on Human Rights"] *İnsan Hakları El Kitabı [Human Rights Handbook]*, Issue 2, p. 72-75. http://www.anayasa.gov.tr/files/insan_haklari_mahkemesi/el_kitaplari/AIHSmad10Ifade.pdf, accessed on 11.4.2015.

Assessing whether the interference (seizure and withdrawal from circulation) was "necessary in a democratic society" to protect "national security", the ECtHR reached the following conclusion: *"It is open to question whether the information in the report was sufficiently sensitive to justify preventing its distribution. The report was marked simply "Confidential", which represents a low degree of secrecy. (...) The withdrawal from circulation ... must be considered in the light of the events as a whole. After the newspaper had been seized, the publishers reprinted a large number of copies and sold them in the streets of Amsterdam, which were very crowded. Consequently, the information in question had already been widely distributed when the journal was withdrawn from circulation. (...) In this latter connection, the Court points out that it has already held that it was unnecessary to prevent the disclosure of certain information seeing that it had already been made public or had ceased to be confidential. (...) The information in question was made accessible to a large number of people, who were able in their turn to communicate it to others. Furthermore, the events were commented on by the media. That being so, the protection of the information as a state secret was no longer justified and the withdrawal of issue no. ... of Bluf! no longer appeared necessary to achieve the legitimate aim pursued. (...) In short, as the measure was not necessary in a democratic society, there has been a breach of art. 10"*[39].

Another case brought before the European Court of Human Rights where "national security" was submitted as the reason for restricting freedom of expression and the time of disclosure was discussed is *Observer and Guardian v. United Kingdom*. In 1986, the *Observer* and *Guardian* newspapers announced that they would be publishing details of the contents of the book *Spycatcher*[40] by Peter Wright, a retired member of the British Security Service. The book had not been published at the time of the announcement[41].

The Attorney General sought permanent injunctions restraining the newspapers from making any publication of *Spycatcher* material. In June 1986

---

39 MACOVEİ, p. 74,75

40 Wright's book included allegations of improper and criminal conduct on the part of the intelligence service and its officers. Among others, the book claimed that MI5 "bugged" all diplomatic conferences at Lancaster House in London throughout the 1950s and 1960s, as well as the Zimbabwe independence negotiations in 1979, diplomats from France, Germany, Greece and Indonesia, as well as Mr Kruschev's hotel suite during his visit to Britain in the 1950s, and was guilty of routine burglary and "bugging" (including entering Soviet consulates abroad); that MI5 plotted unsuccessfully to assassinate President Nasser of Egypt at the time of the Suez crisis, plotted against Harold Wilson during his premiership from 1974 to 1976; and (contrary to its guidelines) diverted its resources to investigate left-wing political groups in Britain.

41 MACOVEİ, p. 68, 69

ex parte interim injunctions were granted to the Attorney General restraining any further publication of the kind in question pending the substantive trial of the actions. In July 1987, *Spycatcher* was published in the United States and copies were brought to Britain. Regardless of this fact, the injunction imposed on the newspapers remained effective until October 1988[42].

The Observer and *The Guardian* applied to the ECtHR regarding the injunctions. The UK Government submitted that the information accessed by Peter Wright was classified as state secret at the time of the injunctions. The publication of this information would reveal the identities and jeopardise the safety of intelligence service officers and third parties, harm relationships with allied countries, institutions and persons, all of whom would lose their confidence in the British intelligence service. The Government also argued that other retired or active members of the intelligence service could seek a similar course of action. For the period after the publication of the book, the injunctions were necessary for the Government to convince allied countries that the British intelligence service was able to safeguard the information it held. According to the government, the only way to ensure this was to clearly demonstrate that officers who threaten to violate their obligation of maintaining secrecy for life can be dealt with decisively under law. Therefore, this course of legal action was necessary[43].

The ECtHR said the following about prior restraints: *"...prior restraints are such that they call for the most careful scrutiny on the part of the ECtHR. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."* The ECtHR ruled that temporary injunctions could be justified prior to the publication of the book, but became unnecessary once the publication was made. The information was no longer secret after the book was published in the United States. Therefore, the pressing social need to keep the information contained in *Spycatcher* away from public eyes as state secrets was no longer valid. Under these circumstances, one could not speak of an "adequate" need to keep injunctions in effect[44].

42 MACOVEİ, p. 69
43 MACOVEİ, p. 70
44 MACOVEİ, p. 70-72

ce. Means of Disclosure

The crime can be committed by any suitable means or methods. When disclosure is to specific people (regardless of who they are), the crime can be committed by speech, graphics, visual tools, facial expressions and other means of description, or actual materials (such as by showing or giving an original document). The disclosure does not have to be made in secret. Even though the disclosing party may intend to make general suggestions about the secret, if specific people have been informed fully or partly of a secret without a justifiable reason, the crime will have been committed. The disclosing party does not need to know the secret themselves; giving or conveying something that contains the secret to others is enough for the act to be criminal. The act of conveyance itself removes the secret nature of the information in relation to the recipients. Therefore, persons acquiring information in this way are also obligated to maintain its secrecy[45].

If persons reveal a secret they have discovered by accident to others, they will be responsible for the crime of disclosure. Disclosure may be in the form of publication as well. Publication is disclosure to the general populace, allowing anyone who wants to find out the secret. This causes the secret to become public. After publication, the information ceases to be a secret, and all persons are relieved of the obligation to keep the secret in confidence.

2. Subjective Elements of Crime

According to the provision, the crime can be committed in two ways: deliberate or negligent[46]. For the crime in the first paragraph, intent is required and adequate. Intent is to deliberately disclose to others a piece of information known to be secret and for which the offender has no authority to disclose[47]. In legal doctrine, some argue that the disclosing party must be aware of the fact that the information is secret and pertains to the security or internal or foreign political interests of the State, while others argue that although knowledge of secret status is essential, the offender does not need to be aware of its pertinence to security or internal or foreign political interests. There is no need to establish whether the offender was aware that the disclosed information pertained to the security or internal or foreign political interests of the State[48].

---

45 ÖGEL, p. 1041; EVİK-EVİK, p. 131

46 EREM, *Ceza Hukuku Hususi Hükümler [Special Provisions in Criminal Law]*, Vol. 1, p. 53; ÖGEL, p. 1041

47 EVİK-EVİK, p. 133; EREM, *Ceza Hukuku Hususi Hükümler [Special Provisions in Criminal Law]*, Vol. 1, p. 53

48 ÖGEL, p. 1042

It is also possible to commit the crime of disclosing state secrets in negligence. According to par. 3 of the provision, the punishment for negligent disclosure is more lenient than that for deliberate. Negligent crimes are punishable in cases clearly specified by the Turkish Penal Code. art. 22, par. 2 of the Turkish Penal Code, negligence is defined as "committing a crime without foreseeing its consequence described in law due to the violation of the obligations of care and diligence." One feature of negligence is that the occurrence of one of the objective elements of crime (actus reus) as described in the law is not foreseen. However, this alone is not enough for the criminal liability of the offender. The elements of "necessary care and diligence" are also sought. Therefore, the possibility to foresee that an act which is described in the law can be committed must exist in order to speak of negligence[49]. In each specific case, the court will determine violation of the obligation of care and diligence, in other words, the negligence of the offender[50].

The judgment of the Fourth Chamber of the Military Court of Cassation dated 25 June 2002 no. 2002/697-707 E.K. rules the following about the defendant's negligence in negligent disclosure of state secrets[51]: *"The crime of negligent disclosure in the final paragraph of art. 136 of the Turkish Penal Code takes place when information pertaining to the security and internal or foreign political interests of the State which must remain confidential (secrets) are discovered by other parties as a result of negligent conduct and not with the intent of espionage. Experts appointed by the military court to assess whether the map and the information it contained were classified as information that must be kept confidential (state secret) according to art. 136 of the TPC stated that the information at hand could not reveal the full details of the campaign plans, did not constitute a full disclosure of the plan and did not require changing the plan in its entirety, while noting that the map did indeed contain some confidential information. However, the main consideration is whether the*

---

49 **ÖZGENÇ**, İzzet; *Türk Ceza Kanunu Gazi Şerhi (Genel Hükümler) [Gazi Annotations to the Turkish Penal Code (General Provisions)]*, 2nd Edition, Seçkin Yayıncılık, Ankara, 2007, p. 318

50 The judgment of the Fourth Chamber of the Military Court of Cassation dated 10.1.2007 no. 2007/1-1 E.K. rules that negligence must be established according to the specific facts of the case: "It is necessary to determine whether the offender had the intent of giving the disclosed information constitutes an act which is punishable by art. 329/3 of the Turkish Penal Code on the basis of negligence. ... the intent of the defendant in giving the CDs was not clearly established and remains doubtful, ... therefore, the failure to determine which specific instances described in the law have occurred or establish whether a situation of 'negligence' is present renders the reasoning of the judgment invalid and the judgment is overturned on the basis of procedural error." Library of the Military Court of Cassation, Fourth Chamber 2007 Judgments Binder

51 Library of the Military Court of Cassation, Fourth Chamber 2002 Judgments Binder

defendant was engaged in negligent, indifferent or faulty conduct. Considering that mission conditions were unfavourable, the battery of the GPS location device was depleted, the ground team failed to warn the defendant and his team in clear and certain terms that the mission was concluded when they were in ... due to terrain properties, and that the entire team was operating in the region for the first time; the incident is deemed to have occurred due to significant human error. The defendant had brought the map to the mission in order to make more accurate surveys and measurements; therefore he cannot be considered to have engaged in negligent, indifferent or faulty conduct that resulted in the map being captured. Consequently, the charges brought on the defendant are unfounded and the defendant's act has not resulted in another criminal act."

The third paragraph of the article defines negligent commission of the crime and explains that negligent disclosure occurs when secrets pertaining to the security and internal or foreign political interests of the State are discovered by other parties as a result of negligent conduct and not with the intent of espionage. The reasoning of the provision states that "The act punishable by this article is receipt of information pertaining to the security and internal or foreign political interests of the State which must remain confidential by the person making the disclosure", which is significantly different from the act described in the article. The act in the law is different from the act described in its reasoning. The words "... receipt of information ... by the person making the disclosure" give the impression that the recipient of the information is going to be punished rather than the disclosing person.

It must be noted that the legislature presents its final and binding opinion with the text that is voted and adopted by the legislature, completes the procedural phase, and is published in the Official Gazette. Non-adopted reasonings and draft work are not binding. Therefore, only the published text must be subject to the principle of lawfulness. Reasonings and draft work are exempt from this requirement. In conclusion, although the reasoning of the article is not binding upon those who enforce or interpret the law, it must be taken into consideration that the reasoning is irrelevant to the act described in the law and must be changed.

3. Element of Unlawfulness

In order for an act to be punishable, it must not only meet the typical requirements in the law, but also be prohibited by the legal system. In other words, even if all the elements of a crime are present, if the act is not unlawful,

no crime will have occurred. Therefore, an act must fit the definition of a crime in the law, and must contain a reason for unlawfulness.

The situation in which a member of press or a publisher finds himself or herself while exercising his/her right to inform the public must be assessed with respect to lawfulness as defined in art. 26, par. 1 of the Turkish Penal Code.

Said article states that "Persons exercising their rights cannot be punished", thereby considering the exercise of one's right as a reason for lawfulness[52]. The reasoning for the article clarifies that the right may be based on laws, bylaws, directives, circulars, or, provided that it is recognized and regulated by law, the performance of an occupation. The reasoning also states that an exception is when the right can be exercised directly; if the right can only be exercised by applying to an authority, there can be no right to speak of.

In order for a right to constitute a reason for lawfulness, the following conditions need to have occurred[53]:

1) Use of a subjective right[54],

2) The holder's ability to exercise the right directly,

3) The holder's exercise of the right within the limits of the source of the right,

4) The presence of a mental connection between the exercise of the right and the crime committed.

---

52 ÖZGENÇ, İzzet; *Türk Ceza Kanunu Gazi Şerhi (Genel Hükümler) [Gazi Annotations to the Turkish Penal Code (General Provisions)]*, 2nd Edition, Seçkin Yayınevi, Ankara, 2005

53 PARLAR, Ali - HATİPOĞLU, Muzaffer, *Açıklamalı – Yeni İçtihatlarla 5237 sayılı Türk Ceza Kanunu [Turkish Penal Code no. 5237 with Annotations and New Jurisprudence]*, Vol. 1, 3rd Edition, Seçkin Yayınevi, Ankara, 2010, p. 468; ÖZBEK, Özer – KANBUR, Mehmet Nihat – DOĞAN, Koray - BACAKSIZ, Pınar – TEPE, İlker, *Türk Ceza Hukuku Genel Hükümler [Turkish Penal Code General Provisions]*, 5th Edition, Seçkin Yayınevi, Ankara, 2014, p. 322; DEMİRBAŞ, Timur, *Ceza Hukuku Genel Hükümler [Criminal Law General Provisions]*, 7th Edition, Seçkin Yayınevi, Ankara, 2011, p. 288-294; ARTUK – GÖKÇEN – YENİDÜNYA, op. cit., p. 423-425; CENTEL, Nur – ZAFER, Hamide – ÇAKMUT, Özlem, *Türk Ceza Hukukuna Giriş [Introduction to Turkish Criminal Law]*, 3rd Edition, Beta Yayınevi, İstanbul, October 2005, p. 333-341

54 A legally recognized and protected right must exist in order to be able to claim a subjective right. The exercise of this right must be left to the discretion of the holder. The right may arise from criminal law, public and private law, a court order, an administrative decree, or customs and habits. Timurbaş, op. cit., 289, 290

With respect to crimes committed via the press, legal doctrine[55] and court judgments[56] argue that the right to impart information is a reason for lawfulness of some acts, and giving information is a natural consequence of freedom of press for journalists and writers. In order for the right to impart information to become a reason for lawfulness, the news must be truthful and current, there must be public interest in reporting the news, and there must be a mental connection between the news given and the crime committed[57].

A provision of law that enables the performance of a profession or art grants the person a subjective right related to the performance of the profession. A journalist making a written or verbal statement exercises a right that is related to the rights to impart information, freedom of communication, comment and criticism which are contained within freedom of expression by their nature. However, if the limits of the source of the right are exceeded, the act will no longer be lawful. The limits of the right may be a consequence of public interest or general and exceptional public law provisions that are imposed for a specific period of time or for special reasons[58].

The explanations above show that the legal interest protected by art. 329 of the Turkish Penal Code is related to the exercise of a right as a reason for lawfulness. First, the relationship between national security and public interest and the legal interest protected by the crime must be established; then, it must be explained whether "exercising one's right" can be a reason for lawfulness in the commission of that particular crime.

According to art. 28, par. 3 of the 1982 Constitution, provisions of articles 26 and 27 apply to restrictions on freedom of press. National security is a reason for restricting freedom of press according to par. 2 of art. 26, which states: *"The exercise of this right may be limited for the purposes of the protection of national security, public order, public safety, the fundamental characteristics of the Republic and the indivisible unity of the State with its country and nation; ... protection of information duly classified as state secrets."*

---

55 ÖZBEK – KANBUR – DOĞAN – BACAKSIZ, op. cit., p. 338 et seq.; DEMİRBAŞ, op. cit., p. 294,295; ARTUK – GÖKÇEN – YENİDÜNYA, op. cit., p. 425 et seq.; CENTEL – ZAFER – ÇAKMUT, p. 342 et seq.; AYDIN, Murat, *TCK'nın Genel Hükümleri Açısından Basın Suçlarında Sorumluluk [Liability in Press Offences with Regard to the General Provisions of the Turkish Penal Code]*, Adalet Yayınevi, Ankara, November 2009, p. 146

56 For a number of court rulings on the subject, see ÇETİN, Erol, *Son Değişikliklerle Basın Hukuku [Latest Amendments in the Code of Press]*, 4th Edition, Seçkin Yayınevi, 2008, p. 277 et seq.

57 ÖZBEK – KANBUR – DOĞAN – BACAKSIZ, op. cit., p. 338

58 Timurbaş, op. cit., 291

Provisions on the restriction of freedom of press are provided in art. 3, par. 2 of the Code of Press no. 5187. Accordingly: *"Exercising one's freedom of press may be subject to restrictions as are necessary in a democratic society, 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 state secrets, or for maintaining the authority and impartiality of the judiciary."* The similarity between the restriction in the Code of Press and the legitimate aims specified in art. 10, par. 2 of the ECHR indicates that the ECHR was the basis of the restrictions in the Code. Like the 1982 Constitution, the Code of Press also envisages national security as one of the reasons for restricting freedom of press. The limits of freedom of press with respect to art. 329 are defined by protection of national security and information duly classified as atate secrets.

The State is an organisation or a legal entity composed of individuals. The most significant consequence of the State being a legal entity is the necessity to ensure its continuity. The State is separate and different from the government and public officials, and is continuous. Governments, administrations, rulers, even regimes may change, but the State is constant[59].

The State is the largest of all political institutions, an institution of institutions[60]; as such, it incorporates some legal values beyond those of individuals. As an entity, the State protects its existence and continuity while fulfilling some functions that serve the purpose adopted by the sovereignty. These elements of existence and various functions create a shield of legal protection in layers and as a whole. Among crimes committed against the State, the act of "disclosing information pertaining to the security or internal and foreign political interests of the State" target the very existence and continuity of the State, and are severely punished.

Crimes against all interests arising out of the existence, continuity and activities of the State are regarded crimes against the State, which include the act defined in art. 329 of the Turkish Penal Code. Provisions on crimes against the State protect the existence, continuity and order of the State, thus protecting its substantial interests[61].

---

59 KAPANİ, Münci, *Politika Bilimine Giriş [Introduction to Political Science]*, 2nd Edition, Ankara Üniversitesi Hukuk Fakültesi Yayınları no: 31, Ankara, p. 22-23

60 DAVER, Bülent, *Siyasal Bilime Giriş [Introduction to Political Science]*, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları no: 251, Ankara, p. 156

61 ÖZEK, Çetin, "Devletin Şahsiyeti Aleyhine Cürümlerin Genel Prensipleri" ["General Principles of Crimes against the Personality of the State"], *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası [İstanbul University Law School Journal]*, Vol. 32, Issue 2-4, p. 603-604

"Interest" is used in the sense of "benefit, utility, gain, profit"[62]. The concepts of national interests and state interests are sometimes used interchangeably. It is difficult to make a clear distinction between these concepts. Some categories of interests may be different; they may overlap or clash with each other. Similarly, "interests of the individual" sometimes intersect with "national interests" and "interests of the State".

The interests of the nation and the individuals comprising the nation have the greatest implications for the State. The State is founded on the idea of providing for the needs of people. The common interests of the individuals comprising the society is the vital component that keeps the society unified[63]. Scholars of the concept of state have variably considered "common interest" as a cause for establishing an organised and regulated society, a factor that requires collective living, and sometimes an effect of collective living, or a consequence. It can be argued that national interests must serve this common interest.

National interests are the set of values that are considered beneficial to the security and happiness of the nation and must therefore be provided for. The scope of national interests is extensive and diverse to contain all national goals, and continuous. National interests, considered material and moral values that need to be attained and preserved for the continuity and security of the State and the welfare of the nation, can be defined in different ways that bear similarities in content[64].

National interests stem from the reason for the formation of the society, therefore the State's reason for being, and are not variable as they have a distinct set of properties. Constancy can only be ensured by longevity regardless of internal or external relations. From this perspective, national interests are continuous. However, they are subject to revisions and amendments as disruptive changes occur over time or a condition of the interests materialises

---

62 *Türk Dil Kurumu Türkçe Sözlük [Dictionary of Turkish]*, 10th Edition, 4. Akşam Sanat Okulu Matbaası, Ankara, 2005, p. 1368; DEVELLİOĞLU, Ferit, *Osmanlıca-Türkçe Ansiklopedik Lûgat [A Lexicon of Ottoman and Turkish]*, 24th Edition, Aydın Kitabevi, Ankara, 2007, p. 614

63 While Aristotle says that "The purpose of the State is not only to bring people together, but also to ensure that people live well together", Rousseau, in his quest for the best form of government, says "The most important indication of all is the continuity of the system and the happiness of the people. People form a political partnership among themselves to fulfill these purposes." AKIN, İlhan F., *Devlet Doktrinleri [State Doctrines]*, Samim Güniz ve Sadık Özaygen Basımevi, İstanbul, 1962, p. 175

64 *Milli Güvenlik Siyaseti ve Stratejisi [National Security Policies and Strategy]*, Harp Akademileri Yayınları, Harp Akademileri Basımevi, İstanbul, 1996, p. 20-23

and needs to be developed, because the nation is perpetual. The continuity of national interests is one reason that they are included in constitutions and as guiding principles[65].

National interests are defined as follows in the Preamble to the 1982 Constitution: *"Determining to attain the everlasting existence, prosperity, material and spiritual wellbeing of the Republic of Turkey, and the standards of contemporary civilisation as an honourable member with equal rights of the family of world nations; the absolute supremacy of the will of the nation, the fact that sovereignty is vested fully and unconditionally in the Turkish nation and that no individual or body empowered to exercise this sovereignty in the name of the nation shall deviate from the liberal democracy indicated in the Constitution and the legal system instituted according to its requirements ... 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 civilisationism of Atatürk and that sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism ..."*

Since the State is the political organisation among people in a nation, all protected interests serve to ensure the existence and continuity of the organisation. The interests of the State provide the legitimate grounds for punishing members of the society. It is not possible to regard these interests as one with personal interests, and consider the State a person to argue that its personal interests are being protected. Interests that accumulate around the existence and continuity of the State are also the interests of individuals and the society.

The State is comprised by the society, which is in turn comprised by individuals. The State finds its existence in the society composed of individuals; thus, the State is held synonymously with the society that creates it. As a result, it can be argued that any violation of the State's interests is also a violation of the interests of the society.

The above explanations beg the question: *"If a journalist or publisher discloses information pertaining to the security or internal and foreign political interests of the State, is it in the best of interests to hold freedom of press and the right to impart information harnessed by freedom of expression protected by the Convention and the Constitution, or national security in higher regard?"*

---

65 *Milli Güvenlik Siyaseti ve Stratejisi [The Politics and Strategy of National Security]*, p. 21

The efforts to classify reasons for lawfulness usually entail determining high interests and weighing contradictory interests against each other[66]. Protection of the higher interest means the restriction of the other. The interest restricted in favour of the higher interest will be denied legal protection, and the holder of the interest cannot make an argument of unlawfulness. With respect to the right to impart information as a reason for lawfulness, national security and freedom of press clash with each other.

The crime defined in art. 329 of the Turkish Penal Code is intended to protect information that concerns the primary interests of the State, which are, in essence, state secrets. The legal interests protected by this crime are "State security", "internal and foreign political interests of the State" and "national defence".

When a journalist or publisher discloses information pertaining to the security or internal and foreign political interests of the State, he/she is considered to have violated state security, and as a result, national security. This puts freedom of press against national security and the State, which provides for the safety, peace, welfare and survival of the society, therefore of the individuals. When weighed against each other, national security and the interests of the State, which provides for the safety, peace, welfare and survival of the society, therefore of the individuals, must be held in higher regard as these are defined as legitimate reasons for restricting freedom of press in art. 10, par. 2 of the Convention, art. 26, par. 2 of the Constitution, and art. 3, par. 2 of the Code of Press.

Consequently, freedom of press and the right to impart information does not make the act of disclosing information pertaining to the security or political interests of the State lawful, based on the reason of "exercising a right".

D. BEING AT FAULT

The general rules with respect to a person being at fault apply to crimes that deprive individuals of their freedom. In addition to objective and subjective elements and the element of unlawfulness, the offender must also be shown to be at fault. Art. 38 of the Constitution prohibits punishment

[66] Legal doctrine and court judgments emphasise the principle of weighing interests when deciding which of two conflicting interests will be held higher and taken under legal protection, and which will be restricted. KILIÇOĞLU, Ahmet, *Şeref, Haysiyet ve Özel Yaşama Basın Yoluyla Saldırılardan Hukuksal Sorumluluk [Legal Liability of Attacks on Honour, Dignity and Privacy via the Press].* 2nd Edition. Ankara, 1993, p. 109

without an offence[67]. With respect to the crime in question, the determination of faultiness may be affected by the circumstance of carrying out an unlawful but binding order (art. 24/2-4). If a provision of law grants a power to a person in any area, carrying out this order as envisaged cannot give rise to unlawfulness. An unlawful disclosure will constitute the crime of disclosing state secrets. If the disclosing party is authorised or obligated to make the disclosure by law, a reason for lawfulness will apply. The disclosure by this person of the secret will be lawful or unlawful depending on the recipient of the secret. In order for a person to be authorised to disclose secrets, a clear and explicit authorisation must be present in the form of a law or other instrument. Authorisation by proxy, such as claiming the fundamental principles of the constitutional regime as the basis for being authorised to disclose secrets, is impermissible.

Being under threat or coercion (art. 28/1) may, in theory, be brought up. Under these circumstances, the disclosing party will not be at fault.

E. AGGRAVATED ELEMENTS OF THE CRIME

The second paragraph of the article states that the crime will be aggravated if the act is committed during war or jeopardises the war preparations, war activities or military moves of the State. In this case, the offender shall be sentenced to imprisonment between ten to fifteen years.

There are two circumstances for aggravation. One is the commission of the act during war. War is considered by the legislature to be the zenith of activities against the security or internal and external political interests of the State, and a crime committed during time of war becomes aggravated regardless of whether it causes any threat or loss. Since war can only occur with a declaration of war, if the crime is committed after the declaration of war, the first condition of aggravation will have materialised.

The second circumstance is jeopardy of war preparations, war activities or military moves of the State. In this case, the legislature increases the severity of the punishment based on the consequences of the crime. In order for this cause to be applicable, it is determined whether the act jeopardises war preparations, war activities or military moves of the State. If there is no consequence of jeopardy, the crime will not be aggravated and be subject to the first paragraph.

---

[67] KOCA, Mahmut- ÜZÜLMEZ, İlhan, *Türk Ceza Hukuku Genel Hükümler [General Provisions in Turkish Criminal Law]*, 7th Edition, Seçkin Yayınevi, Ankara, 2014, p. 288

"Jeopardise" includes not only actual harm to security or the interests protected by the law, but also subjecting them to danger. Acts that jeopardise the war preparations, war activities or military moves of the State cannot be causes for aggravation on their own. For instance, causing damage to a navy vessel is harmful to war preparations. However, in order for the crime to become aggravated, the damage must be extensive and must occur during war or at a time when the probability of war is almost certain, thereby weakening the military power of the State[68].

The law regards the mere presence of a threat as adequate and does not specify the severity of the threat. The judge or the court is expected to exercise discretion depending on the specific facts of the case. Causes for aggravation are only applicable if the threat actually occurs. For technical matters, experts may be appointed or opinions may be sought from relevant authorities. However ultimately, the judge or the court must decide whether the act jeopardises the war preparations, war activities or military moves of the State.

F. SPECIAL MANIFESTATIONS OF THE CRIME

1. Attempt

The negligent version of the crime cannot include an attempt. Attempt may come into consideration in the deliberate commission of the crime. Since the crime will have been completed at the time and place of disclosure, the act of disclosing or publishing secrets to unauthorised persons regardless of the means constitutes the crime. The disclosure alone is enough for the commission of the crime[69].

Whether the State came to harm as a result of the disclosure is immaterial to the commission of the crime. If the offender starts the deliberate act of disclosure but fails to complete it due to reasons beyond his/her control (for example, if the means of communication used to disclose the secret is blocked), the offender will be liable for the attempt. An example may be the seizure of a sealed envelope containing a secret before it reaches the recipient[70].

The judgment of the First Chamber of the Military Court of Cassation dated 18.6.2008 no. 2008/1890-1886 E.K. discusses attempt as follows[71]: *"The first paragraph of art. 329 titled 'Disclosure of information relating to public security and political interests of the State' contains the provision: '(1)*

68 ÖGEL, p. 1030
69 EVİK-EVİK, p. 135
70 ÖGEL, p. 1042.
71 Library of the Military Court of Cassation, First Chamber 2008 Judgments Binder

Persons who disclose information that needs to be kept in confidence for the security of the State or its internal and foreign interests shall be sentenced to imprisonment between five to ten years.' The reasoning of the article emphasises that the provision punishes the disclosure of information that needs to be kept in confidence for the security of the State or its internal and foreign interests, thus protecting public security and interests, and continues 'the objective element of the crime, i.e. "disclosure" means the conveyance or transmission of state secrets as defined above to one or more persons by any method". Therefore, the transmission of the confidential information is adequate for the commission of the crime. In the impugned case, the defendant, who was a SEMAC Operator in the ... News Centre, acquired some information that needed to be kept in confidence for the security of the State or its internal and foreign interests, obtained print-outs of this information, placed them in an envelope which he gave to his friend to put in the mail, thereby beginning to commit the act. When the intermediary of the envelope realised that it contained confidential information, he turned the envelope in to military authorities, which prevented the offender from completing the crime due to reasons beyond his control and left the crime in the State of an attempt."

2. Complicity

It is possible to complicit in the crime of disclosing state secrets defined in par. 1 of the article. Persons who commit the act together or use others as a proxy for the commission of the crime will be punished as offenders pursuant to art. 37 of the Penal Code. Similarly, those who complicit in the crime by soliciting it will be punished as the offenders of the crime pursuant to art. 38. Meanwhile, forms of complicity such as providing the means for disclosure may exist. Complicity is not possible for the negligent commission of the act as defined in par. 3. Pursuant to art. 22, par. 5 of the Penal Code, if a negligent crime is committed by more than one offender, each will be held liable for his/her own fault and punished according to his/her level of fault.

3. Joinder

"A crime for each act, a punishment for each crime" (quot crimina, tot poenae) is one of the fundamental principles of criminal law. Accordingly, the joinder of punishments is the rule in criminal law, and each crime is sentenced to a separate punishment, which remains independent of others[72]. Since a punishment must be given for each crime committed, the issue of joinder requires special regulation in law[73].

---

[72] İÇEL, Kayıhan, *Suçların İçtimaı [Joinder of Offences]*, İstanbul Üniversitesi Yayınları no. 1762, Sermet Matbaası, İstanbul, 1972, p. 12-13; ÖZGENÇ, p. 493

[73] İÇEL, p. 10

The "Joinder of Offences" chapter in the Turkish Penal Code no. 5237 regulates joint offences (art. 42), successive offences (art. 43) and Joinder of Ideas (art. 44); however, the joinder of offences is limited to successive offences and joinder of ideas[74].

In consideration of the above, provisions on joinder of ideas and joint offence may apply to the crime in question.

If the offender causes more than one crime to occur, joinder of ideas may come into consideration. In this case, the offender is liable only for the crime that imposes the heaviest punishment.

Joinder of ideas may be illustrated with an example. As stated above, anyone can be an offender of the crime defined in art. 329 (regardless of whether they are public officials). If the offender is a public official who discloses information pertaining to the security or internal and foreign political interests of the State that he/she has acquired as a result of his/her duty, the offence of "disclosure of secrets pertaining to an office held" will also have occurred. In this case and in accordance with the rules of joinder of ideas, the offender will only be liable for the offence in art. 329 as it entails the heaviest punishment.

If the confidential information pertaining to the security or internal and foreign political interests of the State is contained in a document and the information is disclosed as a result of the destruction, falsification, misuse, deceitful acquisition or theft of the document, the provisions of true joinder must apply to the offences defined in articles 326 and 329 of the Penal Code.

CONCLUSION

A study of European Court of Human Rights judgments reveals two key principles regarding freedom of press and the crime of disclosing state secrets.

The first principle is that information relating to national security cannot be prohibited or seized once the information becomes public, and that persons who act as intermediaries in its transmission cannot be punished.

The second principle is that states must be barred from blanket classification of all information relating to national security as confidential and imposing prior restrictions to accessing such information.

[74] Compound offence is a type of apparent joinder in the form of the exhausted and exhausting norm relationship. In apparent joinder where the structural relationship between the violated norms becomes important, the multiplicity of norms is only apparent; in actuality, only one norm is being violated. Therefore, article 42 states that a joint offence is considered to "have been committed by a single act". Consequently, it is not possible to regard joint offence as a form of joinder of offences. İÇEL, p. 204 et seq.

Therefore, legislation that absolutely and unconditionally prohibits all information pertaining to national security and prevents public scrutiny of the activities of intelligence services is "unnecessary in a democratic society" and a violation of art. 10 of the European Convention on Human Rights.

From the Turkish perspective, freedom of press is one of the fundamental values of the Republic of Turkey as explicitly stated in art. 28 of the Constitution. Freedom of press has also been a part of international treaties since the Age of Enlightenment. The press is free, and shall not be censored. Everyone has the fundamental right to receive true news, be informed, reach conclusions and share his/her opinions with others. However, guarantees on freedom of press afforded by the Constitution, universal legal principles and national laws cannot grant lawfulness to the act of disclosing state secrets defined in art. 329 of the Penal Code. If state secrets are disclosed on media such as newspapers, magazines or televisions, the crime of "Disclosure of Information Relating to Public Security and Political Interests of the State" in art. 329 will have been committed.

♦♦♦♦

BIBLIOGRAPHY

ACAR, Ünal – URHAL, Ömer, *Devlet-Güvenlik İstihbarat-Terörizm [State-Security Intelligence-Terrorism]*, Adalet Yayınevi, Ankara, 2007.

AKBULUT, İlhan, "Türk Ceza Hukukunda Yeni Gelişmeler Işığında Devletin Şahsiyetine Karşı İşlenen Suçlar ve Ülke Bölücülüğü Suçu" [Crimes against the Entity of the State and the Crime of Separating the Country in the Light of New Developments in Turkish Criminal Law"], *Bilgi Toplumunda Hukuk*, *Ünal TEKİNALP'e Armağan [Law in the Information Society, Homage to Ünal TEKİNALP]*, Vol. 3, 1st Edition, Beta, İstanbul, 2003, p. 696-720.

AKGÜÇ, Atıf, "Casusluk Suçu" ["The Crime of Espionage], *Siyasi İlimler Mecmuası [Journal of Political Sciences]*, 10th Year, Issue 118, 1941, p. 477-484.

AKIN, İlhan F., *Devlet Doktrinleri [State Doctrines]*, Samim Güniz ve Sadık Özaygen Basımevi, İstanbul, 1962.

ALACAKAPTAN, Uğur, "Devletin Güvenliğini İlgilendiren Suçlar" ["Crimes Concerning the Security of the State"], *Ceza Hukuku Reformu [Criminal Law Reform]*, 1st Edition, Umut Vakfı Yayınları, İstanbul, 2001, p. 652-654.

ARTUK, Mehmet Emin – GÖKÇEN, Ahmet – YENİDÜNYA, A.Caner, *Ceza Hukuku Genel Hükümler [Criminal Law General Provisions]*, 4th Edition, Turhan Kitabevi, Ankara, 2009.

AYDIN, Murat, *TCK'nın Genel Hükümleri Açısından Basın Suçlarında Sorumluluk [Liability in Press Offences with Regard to the General Provisions of the Turkish Penal Code]*, Adalet Yayınevi, Ankara, November 2009.

BELLİ, Doğan Bülent, *Basın Yolu ile Kişilik Haklarına Saldırılardan Doğan Hukuki Sorumluluk [Legal Liabilities of Infringement of Personal Rights via the Press]*, Ankara, 2008.

BİLGEN, Pertev, *1961 Anayasasına Göre Sıkıyönetim [Martial Law According to the 1961 Constitution]*, İstanbul, 1976.

CENTEL, Nur – ZAFER, Hamide – ÇAKMUT, Özlem, *Türk Ceza Hukukuna Giriş [Introduction to Turkish Criminal Law]*, 3rd Edition, Beta Yayınevi, İstanbul, October 2005.

ÇETİN, Erol, *Son Değişikliklerle Basın Hukuku [Latest Amendments in the Code of Press]*, 4th Edition, Seçkin Yayınevi, 2008.

ÇINAR, Bekir, *Devlet Güvenliği İstihbarat ve Terör [Security of State, Intelligence and Terrorism]*, Sam Yayınları, Ankara, 1997.

DAVER, Bülent, *Siyasal Bilime Giriş [Introduction to Political Science]*, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları no: 251, Ankara.

DEMİRBAŞ, Timur, *Ceza Hukuku Genel Hükümler [Criminal Law General Provisions]*, 7th Edition, Seçkin Yayınevi, Ankara, 2011.

DEVELLİOĞLU, Ferit, *Osmanlıca-Türkçe Ansiklopedik Lûgat [A Lexicon of Ottoman and Turkish]*, 24th Edition, Aydın Kitabevi, Ankara, 2007.

Devletin Kavram ve Kapsamı [The Concept and Scope of the State], MGK Genel Sekreterliği Yayını no: 1, Ankara, 1990.

DOĞRU, Osman – NALBANT, Atilla, *Ty√âl·y√ I l·ʔ[fl·NJP !ØNJdzLJl· Sözleşmesi Açıklama ve Önemli Kararlar [European Convention on Human Rights Annotations and Important Judgments]*, Vol. 2, 1st Edition, Pozitif Matbaa, Ankara, 2013.

DURAN, Lütfi, "Sosyal Hareketler ve Milli Güvenlik" ["Social Movements and National Security"], *İktisat ve Maliye [Economics and Finance]*, Vol. 17, Issue: 4, July 1970.

DÖNMEZER, Sulhi, *Basın ve Hukuku [The Press and Its Law]*, 4th Edition, İstanbul, 1976.

EREM, Faruk, *Ceza Hukuku Hususi Hükümler [Special Provisions in Criminal Law]*, Vol. 1, Ajans-Türk Matbaası, Ankara, 1968.

EVİK, V. Sonay-EVİK, A.Hakan, "Devlet Sırrını ve Yayılması Yasaklanan Bilgileri Açıklama ve Elde Etme Suçları" ["The Crimes of Disclosing and Obtaining State Secrets and Information Prohibited from Dissemination"], *Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi [Atatürk University Erzincan Law School Journal]* , Vol. VIII, Issue 3-4, Erzincan 2004, p. 111-147.

GÖZÜBÜYÜK, *Alman, Fransız, İsviçre ve İtalyan Ceza Kanunlariyle Mukayeseli Türk Ceza Kanunu Açıklaması [Annotations on the Turkish Penal Code in Comparison to German, French, Swiss and Italian Penal Codes]*, Vol. 1, 3rd Edition, Kazancı Yayınevi, Ankara, 1982.

HAFIZOĞULLARI, Zeki, "Liberal Demokratik Bir Hukuk Düzeninde İfade Hürriyetinin Sınırı" ["The Limits of Freedom of Expression in a Liberal Democratic Rule of Law"], *Türkiye Barolar Birliği Dergisi [Journal of the Union of Bar Associations of Turkey]*, Issue 55, 2004, p. 85-101.

HAZAR, Zeynep, "Basın Özgürlüğü ve Ulusal Güvenlik" ["Freedom of Press and National Security"], *Gazi Üniversitesi Hukuk Fakültesi Dergisi [Gazi University Law School Journal]*, Vol. XVII, Y. 2013, Issue 1-2, p. 1525-1548.

İÇEL, Kayıhan, *Suçların İçtimaı [Joinder of Offences]*, İstanbul Üniversitesi Yayınları no. 1762, Sermet Matbaası, İstanbul, 1972.

KAPANİ, Münci, *Politika Bilimine Giriş [Introduction to Political Science]*, 2nd Edition, Ankara Üniversitesi Hukuk Fakültesi Yayınları no: 31, Ankara.

KARACA, Nuray Gökçek, *Gazetecinin Basın İş Kanunu'ndan Doğan Hakları ve Sorumlulukları: 5953 Sayılı Basın İş Kanunu ve Uygulaması [The Rights and Responsibilities of Journalists Arising out of the Code of Press: The Letter and Practice of the Code of Press no. 5953]*, İstanbul, 2010.

KARCILIOĞLU, N.Kaan, "Demokratik Sistemin Unsuru Olarak İfade Özgürlüğü ve Ceza Hukukunun Etkisi" ["Freedom of Expression as an Element of a Democratic System and the Influence of Criminal Law"], *Uğur ALACAKAPTAN'a Armağan [Dedicated to Uğur ALACAKAPTAN]*, İstanbul Bilgi Üniversitesi Yayınları, Vol. 1, 1st Edition, June 2008, p. 451-466.

KAYA, Cemil, "State Secret as an Instrument to Maintain State Security", *Selçuk Üniversitesi Hukuk Fakültesi Dergisi [Selçuk University Law School Journal]*, Vol. 14, Issue 1, 2006, p. 33-55.

KILIÇOĞLU, Ahmet, *Şeref, Haysiyet ve Özel Yaşama Basın Yoluyla Saldırılardan Hukuksal Sorumluluk [Legal Liability of Attacks on Honour, Dignity and Privacy via the Press].* 2nd Edition. Ankara, 1993.

KOCA, Mahmut- ÜZÜLMEZ, İlhan, *Türk Ceza Hukuku Genel Hükümler [General Provisions in Turkish Criminal Law]*, 7th Edition, Seçkin Yayınevi, Ankara, 2014.

KORKMAZ, Ömer, "Düşünce Özgürlüğü ve Sınırları" [Freedom of Thought and Its Limits"], *Prof. Dr. Seyfullah EDİZ'e Armağan [Homage to Professor Seyfullah EDİZ]*, Dokuz Eylül Üniversitesi Yayını, İzmir, 2000, p. 117-150.

MACOVEİ, Monica, "İfade Özgürlüğü, Avrupa İnsan Hakları Sözleşmesinin 10'uncu maddesinin Uygulanmasına İlişkin Klavuz" ["Freedom of Expression, a Guide to the Implementation of Art. 10 of the European Convention on Human Rights"], *İnsan Hakları El Kitabı [Human Rights Handbook] İnsan Hakları El Kitabı*, Issue 2. http://www.anayasa.gov.tr/files/insan_haklari_mahkemesi/el_kitapla-ri/AIHSmad10Ifade.pdf, accessed on 11.4.2015.

MARSH, Norman S., Access to Government-Held Information: An Introduction, in Ed. Norman S. Marsh, *Public Access to Government-Held Information: A Comparative Symposium*, Stevens&Son Ltd., London, 1987.

Milli Güvenlik Siyaseti ve Stratejisi [National Security Policies and Strategy], Harp Akademileri Yayınları, Harp Akademileri Basımevi, İstanbul, 1996.

ÖGEL, Ragıp, "Casusluk Suçları" ["Crimes of Espionage"], *Adliye Ceridesi [Journal of the Judiciary]*, 31st Year, 1940, p. 1023-1043.

ÖZBEK, Özer – KANBUR, Mehmet Nihat – DOĞAN, Koray - BACAKSIZ, Pınar – TEPE, İlker, *Türk Ceza Hukuku Genel Hükümler [Turkish Penal Code General Provisions]*, 5th Edition, Seçkin Yayınevi, Ankara, 2014.

ÖZEK, Çetin, "Devletin Şahsiyeti Aleyhine Cürümlerin Genel Prensipleri" ["General Principles of Crimes against the Personality of the State"], *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası [İstanbul University Law School Journal]*, Vol. 32, Issue 2-4, p. 597-683.

ÖZGENÇ, İzzet; *Türk Ceza Kanunu Gazi Şerhi (Genel Hükümler) [Gazi Annotations to the Turkish Penal Code (General Provisions)]*, 2nd Edition, Seçkin Yayınevi, Ankara, 2005.

ÖZKORKUT, Nevin Ünal, "Basın Özgürlüğü ve Osmanlı Devletindeki Görünümü" ["Freedom of Press and Its Appearance in the Ottoman State"], *AÜHFD*, Vol. LI, Issue 3, 2002, p. 65-84.

ÖZÜTÜRK, Nejat, *Türk Ceza Kanunu Şerhi ve Tatbikatı [Annotations and Implementation of the Turkish Penal Code]*, Vol. 1, Balkanoğlu Matbaa, Ankara, 1966.

PARLAR, Ali - HATİPOĞLU, Muzaffer, *Açıklamalı – Yeni İçtihatlarla 5237 sayılı Türk Ceza Kanunu [Turkish Penal Code no. 5237 with Annotations and New Jurisprudence]*, Vol. 1, 3rd Edition, Seçkin Yayınevi, Ankara, 2010.

SALİHPAŞAOĞLU, Yaşar, *Türkiye'de Basın Özgürlüğü [Freedom of Press in Turkey]*, Seçkin Yayınları, Ankara, 2007.

SAVAŞÇI, Bilgehan, "Haberleşme Özgürlüğünün Kovuşturma Evresinde Sınırlandırılması" ["Restrictions on Freedom of Communication during the Prosecution Phase"], *Türkiye Barolar Birliği Dergisi [Journal of the Union of Bar Associations of Turkey]*, Issue 96, 2011, p. 269-292.

SUNAY, Reyhan, *Avrupa Sözleşmesinde ve Türk Anayasasında İfade Hürriyetinin Muhtevası ve Sınırları [Content and Limits of Freedom of Expression in the European Convention and Turkish Constitution]*, LDT Yayınevi, Ankara, 2001.

TANÖR, Bülent, *Siyasal Düşünce Hürriyeti ve 1961 Türk Anayasası [Freedom of Political Thought and the 1961 Turkish Constitution]*, İstanbul, 1969.

Türk Dil Kurumu Türkçe Sözlük [Dictionary of Turkish], 10th Edition, 4. Akşam Sanat Okulu Matbaası, Ankara, 2005.

Türkiye'de Düşünce Özgürlüğü [Freedom of Thought in Turkey], (Ed.: İbrahim Ö. KABOĞLU) Türkiye Genç İşadamları Yüksek Kurulu-1994, İstanbul, 1997.

Türkçe Sözlük [Dictionary of Turkish], Atatürk Kültür, Dil ve Tarih Yüksek Kurulu Yayınları, Ankara, 2010.

ÜZÜLMEZ, İlhan, "Suçsuzluk Karinesi ve Basın Özgürlüğü" ["Presumption of Innocence and Freedom of Press], *Fahiman Tekil'in Anısı'na Armağan [Homage to the Memory of Fahiman Tekil]*, İstanbul, 2003, p. 929-952.

(YAYLA, Yıldızhan, *İdare Hukuku-2 Ders Notları [Administrative Law-2 Course Notes]*, 1978-1979, İstanbul, March 1979.

AİHS'YE GÖRE İFADE ÖZGÜRLÜĞÜ HAKKI KAPSAMINDA KAMU GÖREVLİLERİ AÇISINDAN GÖREV VE SORUMLULUK KAVRAMI

The Notion of Duty and Responsibility in Respect of Civil Servants According to the ECHR, within the Scope of the Right to Freedom of Expression

Abdi SAĞLAM*

ÖZET

Temel bir insan hakkı olarak Avrupa İnsan Hakları Sözleşmesi'nde düzenlenen ifade özgürlüğü hakkı, birey ve toplumun gelişimi açısından önemli bir yere sahiptir. Bununla beraber, bütün haklar gibi ifade özgürlüğü hakkının kullanımı da, sınırsız ve mutlak değildir. Bu hakkın kötüye kullanımı nedeniyle bazen bir bütün olarak kamu, bazense spesifik olarak bireyler zarar görebilmektedir. Bu nedenle, toplumun ve başkalarının haklarını koruyabilmek amacıyla ifade özgürlüğü hakkı belli tedbirler uygulanmak suretiyle sınırlandırılabilmektedir. Öte yandan; sınırlama toplumun tüm kesimlerine aynı mahiyette uygulanmamaktadır. Bazı özellikli görevlerde bulunan kişiler açısından sınırlamanın ve tedbirin ağırlığı değişkenlik göstermektedir. Bu bağlamda; kamu görevlilerinin ifade özgürlüğü hakkı söz konusu olduğunda, Avrupa İnsan Hakları Mahkemesince değerlendirme yapılırken, konumu itibarıyla bazı kişilerin, diğer kişilere nazaran ayrıca görev ve sorumluluklarının farkında olması gerektiği hususu vurgulanmaktadır.

Anahtar Kelimeler: Avrupa İnsan Hakları Sözleşmesi, Avrupa İnsan Hakları Mahkemesi, İfade Özgürlüğü, Görev ve Sorumluluk, Kamu Görevlisi.

ABSTRACT

The right to freedom of expression, which has been regulated as a fundamental human right in the European Convention on Human Rights, has great value for the progress of the individual and the society. Nevertheless, as it is the case for all rights, the exercise of the right to freedom of expression is not absolute and unlimited. Sometimes the society as a whole or specifically individuals can be harmed on account of the abuse of this right. Therefore, the right to freedom of expression can be restricted by applying certain measures with a view to protecting the rights of the society and others. On the other hand, the restriction in question is not applied to all segments of the society in the same manner. The seriousness of the restriction and

* Judge rapporteur at the Human Rights Department of the General Directorate for International Law and Foreign Relations at the Ministry of Justice, Ph.D. student at the Public Law Department of the Social Sciences Institute at Kocaeli University, abdi.saglam@gmail.com

the measure varies for individuals who perform duties with certain properties. In this connection, where the civil servants' right to freedom of expression is at stake, the European Court of Human Rights reiterates in its assessment that some individuals must also be aware of their duties and responsibilities by virtue of their positions compared to other persons.

Keywords: European Convention on Human Rights, European Court of Human Rights, Freedom of Expression, Duty and Responsibility, Civil Servant.

♦♦♦♦

INTRODUCTION

Interpersonal interaction and communication among people with different ideas and opinions are clearly key for progress in a society. The progress of people and of society as a whole is in direct proportion to communication which entails the exchange of information and sharing of values. As Ziya Pasha said, unless any opinion or method followed soundly is subjected to a serious and meticulous study and discussion, in other words, unless the opinion closest to reality is accepted after the statement of opposing views on its good and bad sides, one usually reaches wrong conclusions.[1] Therefore, the perspective that can be summarized as "*barikayı hakikat müsademe-i efkârdan doğar*" ("the sun of reality rises from the clash of ideas") emphasises how effective and necessary communication is.

Freedom of communication is important to reach truth/reality[2], both for the individual and for society. Freedom of expression is the lifeblood of democracy and plays a key role in exercising and using this right as well as other human rights.[3] This right also enables the participation of the public in decision-making and is considered the cornerstone of all other democratic rights and freedoms.[4]

---

1 Ziya Paşa; **İnsanların Düşünce Farklılıkları Göstermesi Rahmettir**, Teorik ve Pratik Boyutlarıyla İfade Hürriyeti [**That people have different thoughts is a blessing**, Freedom of Expression with its Theoretical and Practical Dimensions] ed. Berat Özipek, Liberal Düşünce, 2003, p. 100.

2 For MILL's opinions on the importance of freedom of expression in reaching the truth, see Mill, John Stuart; *On Liberty and Other Essays*, Digireads.com Publishing, 2010, p. 31 and 37.

3 *Article 10: Freedom of Expression*, Human Rights Review, 2012, Equality and Human Rights Commission, p. 334.

4 Lécuyer, Yannick; *Le droit à des élections libres*, Council of Europe, March 2014, p. 44.

Freedom of expression (*liberté d'expression*) comprises two components; access to information or ideas and the freedom to express them.[5] The Court adopts a wide scope for *expression* and offers the protection of art. 10 to all kinds of political[6], commercial[7] and artistic[8] expressions; it includes not only oral or written speech[9] but also behaviours, pictures and images[10] used to express ideas or information.[11] Likewise, art. 10 protects not only the contents of ideas and information but also the means and tools with which they are expressed.[12]

The notion of freedom of expression was first regulated in art. 19 of the Universal Declaration of Human Rights in 1948; it is also in art. 19 of the International Covenant on Civil and Political Rights. It is regulated by art. 10 of the European Convention on Human Rights (ECHR or Convention).[13]

Although the Convention does not protect the freedom of communication on its own, articles 9, 10 and 11 of the Convention[14] include principles on various safeguards and limitations for different versions of interpersonal communication in daily life.[15]

Art. 10 entitled *freedom of expression* is 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

---

5 Velu, Jacques; *Propos sur les normes applicables aux relations entre la justice et la presse*, Journal des Tribunaux, 1995, p. 580.

6 *Lingens v. Austria*, no. 9815/82, 08.07.1986,§42 (To access the European Court of Human Rights judgments cited in this article, see http://hudoc.echr.coe.int/)

7 *Casado Coca v. Spain*, no. 15450/89, 24.02.1994,§35; *Hertel v. Switzerland*, no. 53440/99, 17.01.2002.

8 *Müller et al v. Switzerland*, no. 10737/84, 24.05.1988, §27.

9 Schauer, Frederick; İfade Özgürlüğü Felsefi Bir İnceleme [Freedom of Speech: A Philosophical Enquiry], Trans. M. Bahattin Seçilmişoğlu, Ankara, 2002, p. 38.

10 *Von Hannover v. Germany*, no. 59320/00, 24.06.2004, §59; *Verlagsgruppe News GmbH v. Austria* (no. 2), no. 10520/02, 14.12.2006, § 29 and § 40.

11 Stratford, Jemima; *Striking the Balance: Privacy v. Freedom of Expression under the European Convention on Human Rights*, Developing Key Privacy Rights, ed. Madeleine Colvin, Hart Publishing, 2002, p. 25; *Stell et al v. United Kingdom*, no. 67/1997/851/1058, 23.09.1998, §110; *Chorherr v. Austria*, no. 13308/87, 25.08.1993.

12 *Jersild v. Denmark*, no. 15890/89, 23.09.1994, § 31.

13 Verpeaux, Michel; *Freedom of Expression*, Council of Europe, 2010, p. 14.

14 Freedom of thought, conscience and religion (9), Freedom of Expression (10), Freedom of assembly and association (11).

15 Marauhn, Thilo; *Freedom of Expression, Freedom of Assembly and Association*, European Fundamental Rights and Freedoms, edited by Dirk Ehlers, De Gruyter, Germany, 2007, p. 97.

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.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, 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."

Art. 10 of the Convention states the scope and limits of freedom of expression. Taking into consideration the text of the article, one can say that the jurisprudence of the European Court of Human Rights (ECtHR or Court) determined the criteria for exercising and limiting freedom of expression. The Court's jurisprudence made the abstract content of the article more concrete.[16]

According to the classical definition of freedom of expression in all of the Court's relevant judgments, freedom of expression is one of the essential foundations of a democratic society which is one of the basic conditions for the progress of individuals and society.[17] Thanks to freedom of expression, new ideas and demands are expressed, thus revealing the faults within the current system and eliminating incorrect practices, therefore contributing to social development. The presence of different ideas and their free discussion give individuals the opportunity to choose among different ideas.[18]

---

16 Geranne, Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford University Press, 2013, p. 13; *The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the states of the engagements undertaken by them as Contracting Parties* (***Ireland** v. United Kingdom*, no. 5310/71, 18.01.1978, §154).

17 *Oberschlick v. Austria* (no. 1), no. 11662/85, 23.05.1991, § 57; *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43; *Handyside v. United Kingdom*, no. 5493/72, 07.12.1976, § 49; *Lingens v. Austria*, no. 9815/82, 08.07.1986, §41; *Observer and Guardian v. United Kingdom*, no. 13585/88, 26.11.1991, §59; http://aihm.anadolu.edu.tr/aihmgoster.asp?id=25.

18 Ünal, Şeref; *Avrupa İnsan Hakları Sözleşmesi* [European Convention on Human Rights], TBMM Basımevi, Ankara, 1995, p. 220.

1. Limiting Freedom of Expression

The principles on limiting the rights regulated in articles 8, 9, 10 and 11 of the Convention and in art. 2 of Protocol no. 4[19] are very similar. The paragraphs on limitations aim at drawing the limits of exercising the rights safeguarded in the first paragraphs of the said articles.[20]

The right to exercise freedom of expression may be subject to certain limitations even in the most democratic regimes. Similar to all freedoms, freedom of expression is not unlimited or absolute; the rights of others (individuals and society) determine the limits of this freedom. On the other hand, as a basic human right, freedom of expression is the rule and its limitation is allowed in exceptional circumstances. The compliance of such limitations with the Convention is determined by the jurisprudence of the Court.

In the *Handyside v. United Kingdom* case which the Court often makes references to, the Court stated that 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 news and ideas that offend, shock or disturb the State or any sector of the population; it emphasised that such are the demands of pluralism, tolerance and broadmindedness without which there is no"democratic society". Amongst other things, every "formality", "condition", restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.[21]

Art. 10(2) of the Convention states that freedom of expression may be subject to formalities, conditions, restrictions and penalties. There are three conditions to limiting this right in line with the Convention. The first condition is that the limitation must be prescribed by law. Second, it must serve a legitimate aim. Finally, such limitations must be necessary in a democratic society. There is a wide range of acts and actions which may constitute an interference with the freedom of expression.[22] Sentences to pay criminal or material compensation for exercising the freedom of expression, media

---

19 http://www.inhak.adalet.gov.tr/temel/aihs.pdf

20 Zwaak, Leo - Karagöz, Kasım - Şahin, Kemal - Tümay, Murat; *Matra; Yargıda İfade Özgürlüğüne Yönelik Farkındalığın Arttırılması Projesi* [Matra; Project to Raise Awareness about Freedom of Expression in the Judicary], Türkiye Adalet Akademisi Yayınları, Ankara, 2013, p. 77.

21 *Handyside v. United Kingdom*, § 49; *Observer and Guardian v. United Kingdom*, § 59; *Castells v. Spain*, no. 11798/85, 23.04.1992, § 42.

22 Doğru, Osman - Nalbant, Atilla; İnsan Hakları Sözleşmesi Açıklama ve Önemli Kararlar [Convention on Human Rights Annotations and Important Judgments], C.2, Pozitif Matbaa, Ankara, 2013, p. 226.

blackouts, dismissals, taking into custody or arresting demonstrators due to a demonstration, apprehensions and detentions while distributing leaflets are tools that constitute interferences with the freedom of expression.[23]

a. Prescribed by law

Interferences with the freedom of expression which are safeguarded by art. 10 of the Convention are subject to certain conditions. One requirement is that the interference must be prescribed by law (prévues par la loi). In fact, being prescribed by law is the common criterion to limit the rights regulated by articles 8, 9, 10 and 11 of the Convention and by art. 1 of Protocol 1[24] and art. 2 of Protocol 4.[25]

While meeting this condition does not necessarily mean that the interference is in line with the Convention, the Court examines being prescribed by law as the first requirement in its assessment.

An interference does not necessarily have to be regulated by statutes only in order to conclude that it is prescribed by law. Common law[26], rules and regulations[27] adopted by professional organisations, decrees[28] and international provisions[29] also fall within this scope.

According to the Court's interpretation, "prescribed by law" entails two requirements: First, the [applicable] law should be adequately accessible[30]; in other words, citizens should have adequate access to information about the presence of applicable laws. Second, in order for a norm to be recognized as a legal rule, it must be precise and foreseeable[31] in a manner that enables citizens to regulate their behaviour accordingly.[32]

---

23 Macovei, Monica; İfade Özgürlüğü, Avrupa Konseyi İnsan Hakları El Kitapları [Freedom of Expression, Council of Europe Human Rights Handbooks] no. 2, p. 67.

24 http://www.inhak.adalet.gov.tr/temel/aihs.pdf

25 *The Sunday Times v. United Kingdom* (no. 1), no. 6538/74, 26.04.1979, §48.

26 Ibid, §47.

27 *Barthold- Germany*, no. 8734/79, 25.03.1985, §46.

28 *De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium*, no. 2832/66 2835/66 2899/66, 18.06.1971, §93.

29 *Autronic AG v. Switzerland*, no. 12726/87, 22.05.1990, §57.

30 *Kopp v. Switzerland*, no. 23224/94, 25.03.1998, §55; *Amann v. Switzerland*, no. 27798/95, 16.02.2000, §50.

31 *Piroğlu and Karakaya v. Turkey*, no. 36370/02 and 37581/02, 18.03.2008, §54; *Karademirci et al v. Turkey*, no. 37096/97 and 37101/97, 25.01.2005, §42.

32 *The Sunday Times v. United Kingdom* (no. 1), §49; *Barthold v. Germany*, §45; *Müller et al v. Switzerland*, §29, *Vereinigung Demokratischer Soldaten* ***Österreichs*** *and Gubi v. Austria*, no. 15153/89, 30.06.1993, §31; *Olsson v.* ***Sweden*** (no. 1), no. 10465/83, 24.03.1988, §61/a.

When the Court concludes that an interference does not meet the criterion of being prescribed by law, it ends its examination without assessing whether the interference serves a legitimate purpose or whether it is proportionate to the end to be achieved.[33]

b. Legitimate Aim

Art. 10(2) of the Convention enumerates nine legitimate aims which may justify limiting freedom of expression:[34] interests of national security[35], preserving territorial integrity or public safety[36], the prevention of disorder[37], prevention of crime[38], protection of health[39], protection of morals[40], protection of the reputation or rights of others[41], preventing the disclosure of information received in confidence[42] and maintaining the authority and impartiality of the judiciary.[43]

The established jurisprudence of the Court indicates that the justifications for limitation in art. (10)2 of the Convention are of an exceptional nature and should be interpreted narrowly.[44] However, it also emphasises that national authorities have certain discretionary powers concerning legitimate aims.[45] Such discretion is granted to national lawmakers and the judiciary responsible

---

33 *Piroğlu and Karakaya v. Turkey*, §55.

34 D.J. Harris-M. O'Boyle-E.P. Bates-C.M. Buckley; Avrupa İnsan Hakları Sözleşmesi Hukuku, Yüksek Yargı Kurumlarının Avrupa Standartları Bakımından Rollerinin Güçlendirilmesi Ortak Projesi [Law of the European Convention on Human Rights: Joint Project on Enhancing the Role of the Supreme Judicial Authorities in respect of European Standards], [Oxford University Press, 2009, Council of Europe], Türkçe Birinci Baskı [First edition in Turkish], Şen Matbaa, Ankara, 2013, p. 487.

35 *Observer and Guardian v. United Kingdom*, no. 13585/88, 26.11.1991;*Vereniging Weekblad Bluf! v. the Netherlands*, no. 16616/90, 09.02.1995.

36 *Erdoğdu v. Turkey*, no. 25723/94, 15.06.2000.

37 *Öztürk v. Turkey*, no. 22479/93, 28.09.1999; *Rekvényi v. Hungary [GC],* no. 25390/94, 20.05.1999.

38 *Raëlien Suisse v. Switzerland*, no. 16354/06, 13.07.2012.

39 *Open Door and Dublin Well Woman v. Ireland*, no. 14234/88 14235/88, 29.10.1992.

40 *Vereinigung Bildender Künstler v. Austira*, no. 68354/01, 25.01.2007; *Akdaş v. Turkey*, no. 41056/04, 16.02.2010.

41 *Le Pen v. France*, no. 18788/09, 20.04.2010; *Standard Verlags GmbH v. Austria*, no. 34702/07, 10.01.2012; *Axel Springer AG v. Germany*, no. 39954/08, *Chauvy et al v. France*, no. 64915/01, 29.06.2004.

42 *Matúz v. Hungary*, no. 73571/10, 21.10.2014.

43 *Worm v. Austria*, no. 22714/93, 29.08.1997; *The Sunday Times v. United Kingdom* (no. 1), no. 6538/74, 26.04.1979.

44 *Sunday Times v. United Kingdom* (no. 1), §65.

45 *Leander v. Sweden*, no. 9248/81, 26.03.1987, §59; *Tammer v. Estonia*, no. 41205/98, 06.02.2001, § 60; *Murphy v. Ireland*, no. 44179/98, 10.07.2003, § 97.

for implementing the current legislation.[46] However, the margin of appreciation is not identical for all limiting aims. Discretionary power depends on a number of factors including the nature of the Convention right, the significance of the said right for the individual, the nature of the interference, and the aim the interference serves.[47]

On the other hand, freedom of expression cannot be limited based on justifications other than those enumerated in the article.[48] Therefore, the justifications for limiting this right must be handled in a manner that is exhaustive in meaning and scope.[49]

In cases where the Court deems that the limitation serves a legitimate aim, the next step is to examine whether the interference is necessary in a democratic society.

c. Necessary in a democratic society

When the Court determines that an interference with the freedom of expression is prescribed by law and based on the legitimate justifications in par. 2 of art. 10 of the Convention, the third criterion used in assessing the interference is to see whether it is *necessary in a democratic society*.

The Court's judgments about using the criterion of necessity in a democratic society for freedom of expression started with the *Handyside*[50] judgment; the Court then established its jurisprudence on this issue with the *Oberschlick*[51], *The Sunday Times* (no. 1)[52] and *Lingens*[53] judgments; these judgments established the basic principles that need to be taken into consideration in examining the criterion of necessity in a democratic society.[54]

The Court is authorised to make the final judgment about whether a "ban" or "penalty" is reconcilable with the freedom of expression safeguarded by

---

46 *Golder v. United Kingdom*, no. 4451/70, 21.02.1975, §45; *Engel et al v. the Netherlands*, no. 5100/71, 5101/71, 5102/71..., 08.06.1976, §100

47 *Gillow v. United Kingdom*, no. 9063/80, 24.11.1986, §55.

48 *mutatis mutandis, Klass et al v. Germany*, no. 5029/71, 06.09.1978, §42.

49 Doğru, Osman - Nalbant, Atilla; ibid, C.2, p. 228.

50 *Handyside v. United Kingdom*, no. 5493/72, 07.12.1976.

51 *Oberschlick v. Austria*, no. 11662/85, 23.05.1991.

52 *The Sunday Times v. United Kingdom* (no. 1), no. 6538/74, 26.04.1979.

53 *Lingens v. Austria*, no. 9815/82, 08.07.1986.

54 Some of the Court's judgments lay out the basic principles on this issue in bullet form. (*The Sunday Times v. United Kingdom* (no. 2), no. 13166/87, 26.11.1991, §50; see also *Fressoz and Roire v. France*, no. 29183/95, 21.01.1999, §45).

art. 10 of the Convention. The national margin of appreciation goes hand in hand with the oversight of Europe. This oversight includes both the aim of the interference about which a complaint was filed and the "necessity" of the interference; it covers not only the basic national legislation but also the judgments of local courts that implement such legislation - even if they may be independent courts. Consequently, the duty of the Court is not to replace authorised national courts in any way but to oversee that the judgments passed by national courts by exercising their margin of appreciation are in compliance with art. 10 of the Convention.[55]

Within the context of art. 10 of the Convention, "necessary" indicates a "pressing social need".[56] This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.[57]

The Court emphasised that "necessary" in art. 10 of the Convention is not synonymous with "indispensable", neither does it have the flexibility of words such as "admissible", "ordinary", "useful", "reasonable" or "desirable". National courts have the authority to carry out the initial assessment on the presence of a pressing social need as implied by "necessity".[58]

An interference is necessary in a democratic society if it is carried out in response to a pressing social need, it is proportionate to the legitimate aim and, finally, the justification for interference that the national authorities present is relevant and sufficient.[59]

The Court underlined the fact that, in order for a measure to be deemed proportionate and necessary in a democratic society, there must have been no other measure that would have harmed the basic right less while serving the same aim.[60] In other words, if the measure is not the last resort, then it cannot be deemed in line with the requirements of a democratic society.

The court assesses whether the interference was necessary when analysing interferences with the freedom of expression. If the interference is necessary,

---

55 *Engel et al v. the Netherlands*, §100; *Handyside v. United Kingdom*, §49; *Lingens v. Austria*, §39; *Goodwin v. United Kingdom*, no. 17488/90, 27.03.1996, §40; http://aihm.anadolu.edu.tr/aihmgoster.asp?id=25.

56 *Barthold v. Germany*, §55.

57 *Handyside v. United Kingdom*, §49.

58 *The Sunday Times v. United Kingdom* (no. 1), §59; *Handyside v. United Kingdom*, §48.

59 *Coster v. United Kingdom*, no. 24876/94, 18.01.2001, §104; *S. and Marper v. United Kingdom*, no. 30562/04 and 30566/04, 04.12.2008, §101.

60 *Glor v. Switzerland*, no. 13444/04, 30.04.2009, §94.

another criterion to take into consideration is whether the interference is proportionate. Although the interference may be deemed necessary in a democratic society, the Court may conclude that the interference was extreme and disproportionate to the aim the interference was trying to reach.

When assessing whether a measure is proportionate to the necessity in a democratic society, the Court also takes into consideration how the expression was stated and its impact on society. Audi-visual media such as television and radio are undeniably important in this aspect. The power of sharing a message through sound and images is stronger and faster than the written word.[61] In addition, television and radio broadcasts can reach the homes of the listeners or spectators without any limitation, thus making their impact even stronger.[62]

It is important to determine the target audience the expression reaches and its potential effects on the public.[63] While opinions expressed in writing in artistic forms such as poems, articles and novels[64] may not have a significant impact, the same opinion expressed through television, radio or social media, the new public communication centre of our age, may have a significant impact on the public.

Although an expression in written media may have less impact in comparison with the audiovisual media, another important point for consideration is the target audience of the expression. The Court took into consideration the target audience which the expression reached in an application involving a letter written by a solider to his commander where he insulted the army[65] and in another application where a detainee was subject to disciplinary measures due to a hand-written text which included insulting comments about the judiciary and prison managers and which was not published.[66]

---

61 *Jersild v. Denmark*, § 31; *Murphy v. Ireland*, §69; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, 17.12.2004, §79.

62 *Centro Europa 7 S.R.L. and Di Stefano v. Italy* [GC], no. 38433/09, 07.06.2012, §132; *Murphy v.Ireland*, §74.

63 *Lindon, Otchakovsky-Laurens and July v. France* [GC], no. 21279/02 36448/02, 22.10.2007, §66; *Nikula v. Finland*, no. 31611/96, 21.03.2002, §52.

64 *Okçuoğlu v. Turkey* [GC], no. 24246/94, 08.07.1999, §48; *Polat v. Turkey* [GC], no. 23500/94, 08.07.1999, §47; *Aksu v. Turkey* [GC], no. 4149/04 41029/04, 15.03.2012, §86; *Karataş v. Turkey* [GC], no. 23168/94, 08.07.1999, §52; *Arslan v. Turkey* [GC], no. 23462/94, 08.07.1999, §48.

65 *Grigoriades v. Greece*, no. 24348/94, 25.11.1997, § 15 and 47.

66 *Yankov. v. Bulgaria*, no. 39084/97, 11.12.2003, § 139.

2. The notion of duty and responsibility in respect of civil servants

The rights the European Convention on Human Rights safeguards also apply to public servants.[67] Articles 1 and 14 of the Convention state that all individuals within the authority of the Contracting States shall enjoy the rights and freedoms set forth in the Section 1 "without discrimination on any ground". In addition, the final sentence of par. 2 of art. 11 which allows for imposing restrictions on the freedom of assembly and association for members of the armed forces, the police force or the administration of the State confirms that, as a general rule, the safeguards in the Convention also apply to civil servants.[68]

An individual who has been working as a civil servant can enjoy the safeguards provided by the Convention if he is dismissed [69].

Nonetheless, employment in public service has been left outside the scope of the Convention on purpose.[70] The failure to be accepted into public service is not a right safeguarded by the Convention.[71]

The preamble of the Convention does not mention duties and responsibilities in the general sense. The Convention mentions this concept only once as "*duties and responsibilities*" in art. 10(2), thus underlining the use of freedom of expression and the legal basis for its restriction. This concept does not have an important place in the Court's jurisprudence on art. 10. According to the Court, an individual's duties and responsibilities while exercising the freedom of expression depend on the said individual's situation and how an expression is made. Accordingly, some people's freedom of expression may be limited based on their duties and position.[72]

While freedom of expression as regulated in art. 10 of the Convention is a right that is also granted to civil servants, the exercise of this right by civil servants requires more sensitivity than its exercise by others. The notion of "*duty and responsibility*" expresses this matter in the Convention. The Court

---

67 *Vogt v.* Germany [GC], § 43, *Wille v. Liechtenstein [GC],* no. 28396/95, 28.10.1999, § 41; *Fuentes Bobo v. Spain*, no. 39293/98, 29.02.2000, § 38; *Kayasu v. Turkey* [no. 1], no. 64119/00 and 76292/01, 13.11.2008, § 77.

68 *Kosiek v. Germany*, § 35; *Glasenapp v. Germany*, § 49; Vogt, § 43.

69 *Wille v. Liechtenstein [GC],* § 41

70 *Kosiek v. Germany*, § 35; *Glasenapp v. Germany*, § 49.

71 *Vogt v. Germany [GC],* § 43; *Otto v. Germany*; *mutatis mutandis, Abdülaziz, Cabales and Balkandalı v. United Kingdom*, no. 9214/80 9473/81 9474/81, 28.05.1985, §60.

72 Brems, Eva; *Human Rights: Universality and Diversity*, Kluwer Law International, 2001, p. 429.

states that the notion of "duty and responsibility" is of key importance for the freedom of expression of public servants and that national authorities have a certain margin of appreciation when determining whether the interference is proportionate to the legitimate aims regulated by art. 10(2) of the Convention.[73]

The Court used the notion of *duty and responsibility* in examining freedom of expression and interferences with it from the perspective of civil servants[74], soldiers[75], police officers[76], individuals in judicial positions[77], politicians, journalists (members of the press)[78] and writers, publishers[79], artists[80], civil society organisations and their representatives.[81]

Civil servants are in a unique situation in exercising their freedom of expression. Taking into consideration the requirement to treat all citizens equally while rendering public services, employees who offer public services must be seen as impartial and must not discriminate against any individual. Due to their positions, civil servants must act more carefully and, therefore, be aware of the *duties and responsibilities* in art. 10(2) of the Convention.

Taking into consideration the notion of *duty and responsibility* for civil servants, a margin of appreciation is granted to national authorities in limiting their freedom of expression. However, the position of an individual, the nature of the expression and whether the limitation is proportionate to the legitimate aims are taken into consideration while exercising this discretionary

---

73 *Vogt v. Germany [GC],* § 53; *Rekvényi v. Hungary*, § 43.

74 *Ahmed et al v. United Kingdom*, no. 22954/93, 02.09.1998; *Vogt v. Germany [GC*], no. 17851/91, 26.09.1995.

75 *Hadjianastassiou v. Greece*, no. 12945/87, 16.12.1992; *Engel et al v. the Netherlands*, no. 5100/71, 5101/71, 5102/71..., 08.06.1976; *Grigoriades v. Greece*, no. 24348/94, 25.11.1997.

76 *Rekvényi v. Hungary*, no. 25390/94, 20.05.1999; *Otto v. Germany*, no. 27574/02, 24.11.2005.

77 *Poyraz v. Turkey*, no. 15966/06, 07.12.2010; *Kudeshkina v. Russia*, no. 29492/05, 26.02.2009; *Guja v. Moldova [GC*], no. 14277/04.12.02.2008; *Albayrak v. Turkey*, no. 38406/97, 31.01.2008; *Giovanni v. Italy*, no. 51160/06, 09.07.2013; *Jhangiryan v. Armenia*, no. 8696/09, 05.02.2013; *Buscemi v. Italy*, no. 29569/95, 16.09.1999; *Harabin v. Slovakia*, no. 62584/00, 29.06.2004.

78 *Wojtas-Kaleta v. Poland*, no. 20436/02, 16.07.2009; *Matúz v. Hungary*, no. 73571/10, 21.10.2014; *Fuentes Bobo v. Spain*, no. 39293/98, 29.02.2000.

79 *İ.A. v. Turkey*, no. 42571/98, 13.09.2005.

80 *Müller et al v. Switzerland*, no. 10737/84, 24.05.1988.

81 *Otto-Preminger-Institut v. Austria*, no. 13470/87, 14.01.1993; *Ceylan v. Turkey*, no. 23556/94, 08.07.1999; *mutatis mutandis, Steel and Morris v. United Kingdom*, no. 68416/01, 15.02.2005.

power. In addition, the nature and qualities of the interference are also taken into consideration in assessing whether it is proportionate.[82]

The nature of the interference is key in determining whether a measure is proportionate. For example, when a civil servant is dismissed due to his activities in a political party, this does not qualify as a proportionate interference.[83]

The Court always repeats the basic principles concerning art. 10 as established in its *Vogt v. Germany* [GC] judgment. The three key criteria are:[84]

(i) 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's self-fulfilment. *Subject to par. 2 of art. 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; such are the demands of that pluralism, tolerance and broadmindedness without which there is no'democratic society'. Freedom of expression, as enshrined in art. 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any exceptions must be convincingly established (see Handyside v. United Kingdom, 7 December 1976, Series A no. 24, p. 23, § 49; Lingens v. Austria, 8 July 1986, Seri A no. 103, p. 26, § 41; and Jersild v. Denmark, 23 September 1994, Series A no. 298, p. 26, § 37).*

(ii) The adjective 'necessary', within the meaning of art. 10 – 2 implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by art. 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under art. 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good

---

82 *Tammer v. Estonia*, no. 41205/98, 06.02.2001, §69, *Perna v. Italy [GC],* no. 48898/99, 06.05.2003, § 39; *Lesnik v. Slovakia*, no. 35640/97, 11.03.2003, § 63/64; *Skalka v. Poland*, no. 43425/98, 27.05.2003, § 41/42; *Ceylan v. Turkey*, §37.

83 *Vogt v. Germany [GC],* §61.

84 *Ibid*, § 52.

faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it is 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in art. 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see Jersild judgment, p. 26, § 31).

In its *Vogt v. Germany* [GC] judgment where the Court determined the main criteria concerning the freedom of expression of civil servants, the Court ruled that there was a violation due to the State's inability to explain that the interference was necessary in a democratic society although there were valid reasons to justify the interference.

This case involved Mrs. Vogt who was a French teacher in a middle school in Germany. Vogt became a member of the *German Communist Party* (Deutsche Kommunistische Partei – "DKP") in 1972. The relevant authorities knew of this fact before her probationary period was over and when she was appointed in 1979 as a full-time civil servant. However, following an investigation about her political activities, she was subject to disciplinary measures in 1982. Finally, she was fired on 15 October 1987 due to the failure to fulfil her duty of political loyalty. The criticism against the applicant focused on the applicant's activities within DKP, her position in the party and her candidacy in the State parliamentary elections.

The Court stated that a democratic society has the right to expect its civil servants to uphold the constitutional principles that form the basis of the State. However, the Court underlined that a measure such as dismissal would impact the said person's reputation and that, taking into consideration the fact that there are very few teaching positions in Germany besides civil service, teachers who are thus dismissed would usually lose their source of income and someone in such a situation would find it almost impossible to teach elsewhere.

The judgment also emphasised that Vogt teaches German and French in middle school, a position that does not carry any security risks. There is the risk that Vogt may use her profession to indoctrinate her students with her ideas or have other undue influence on her students during class in violation of the special *duties and responsibilities* teachers have. However, there was no such criticism against the applicant; quite to the contrary, the applicant's superiors

found her work at school totally satisfactory and she was appreciated by her students, their parents and her colleagues. Therefore, the Court stated that there was uncertainty as to the necessity of the measure of laying her off four years after the investigation started on the grounds of a pressing need.

Teachers' duties and responsibilities extend to their activities outside school to a certain extent since they are authority figures in the eyes of their students. However, there was no proof that Vogt's activities outside the school entailed any unconstitutional statements or that she exhibited behaviour in violation of the constitution; the only criticisms against her were that she was an active member of the DKP, her position within the party, and her candidacy in the State parliamentary elections. On the other hand, the Court stated that all of the applicant's activities within the DKP were legal since the DKP was not closed by the Federal Constitutional Court.

In light of the above information, the Court ruled that the grounds provided by the State to justify the interference in Vogt's freedom of expression were *valid* but insufficient in that the State was not able establish in a convincing manner that this interference was *necessary* in a democratic society. The Court stated that although the State does have certain discretionary powers, dismissing Mrs. Vogt from her position as a middle school teacher through disciplinary measures was disproportionate to the legitimate aim it served and that there was a violation of art. 10 of the Convention.

The Court established that regulations which prevent certain civil servants such as soldiers or police officers from becoming members of political parties or engaging in political activities are not excessive limitations; they are proportionate measures that do not violate art. 10 of the Convention. [85] The Court concluded that the failure to promote a security officer due to his political activities does not constitute a violation of the freedom of expression according to art. 10(2) of the Convention and that the measure was proportionate since the applicant was not deprived of his means to make a living due to his failure to be promoted.[86] The Court referred to *duties and responsibilities* in par. 2 of art. 10 of the Convention.

Commenting on limiting the political activities of civil servants in local administrations, the Court underlined the importance of the principle of impartiality for civil servants and determined that the State had not exceeded

85 *Rekvényi v. Hungary [GC*], § 49.
86 *Otto v. Germany*.

the discretionary powers granted in par. 2 of art. 10 of the Convention and that therefore, there was no violation of the freedom of expression.[87]

In *Ahmed et al v. United Kingdom*, the Court underlined that civil servants in a democratic society have a duty to help the government while fulfilling their duties and that the public can justifiably expect civil servants to help them and to not be an obstacle against a democratically elected government; the duty of loyalty and prudence carry a special significance.[88]

Like other rights in the Convention, freedom of expression as regulated by art. 10 of the Convention does not stop at the gates of barracks and applies to military staff as it does to all individuals under the jurisdiction of Contracting States. However, given the fact that the rules adopted to ensure that soldiers do not weaken military discipline are indispensable in establishing military order and structure, states must have recourse to limiting freedom of expression in cases that pose a real danger to military discipline.[89] Therefore, states do have certain discretionary powers in matters concerning military discipline.[90] On the other hand, even if freedom of expression may directly target the military as an institution, national authorities may not depend on rules of this kind to prevent the exercise of this right.[91]

In *Grigoriades v. Greece* [GC], the applicant who was a second lieutenant witnessed many abuses by his superiors against conscripts; he came into conflict with his superiors many times since he opposed such behaviour. He was finally acquitted of all accusations against him at the end of the administrative and criminal proceedings against him. However, a disciplinary penalty was imposed on him, as a result of which he had to serve additional time in the army. He left his barracks on a one-day leave but he did not return, fled and sent a letter to his superiors. He wrote that the treatment of the conscripts was inhuman and unconstitutional; the applicant opposed such treatment during his two years of service as a reserve officer cadet and said that exposure to such behaviour harms the conscripts' spiritual welfare, resulting in negative social outcomes; the situations people are exposed to during their military service is responsible for crimes and aggressiveness in

87 *Ahmed et al v. United Kingdom*, §§ 61-65

88 *mutatis mutandis, Ahmed et al v. United Kingdom*, §53.

89 *Vereinigung Demokratischer Soldaten **Österreichs** and Gubi v. Austria*, § 36.

90 *Engel et al v. the Netherlands*, § 59; *Smith and Grady v. United Kingdom*, no. 33985/96 and 33986/96, 27.09.1999, § 89.

91 *Grigoriades v. Greece [GC],* no. 24348/94, 25.11.1997, § 49; *Vereinigung Demokratischer Soldaten **Österreichs** and Gubi v. Austria*, § 36.

society; the army is against people and society by nature and damages peace. In addition, the applicant commented on the human and social impact of the conditions faced during military service and was highly critical of the military as an institution and of the management style of high-ranking officers.[92]

An investigation was started about the applicant due to this letter which resulted in a sentence of one year and eight months for desertion and of three months for insulting the army. The desertion judgment was reversed but the insult judgment was approved at the end of an appeal process. The applicant's application to the Greek High Court (*Arios Pagos*) was dismissed on the grounds that freedom of expression is subject to limitations based on art. 14 of the Greek Constitution.[93]

The applicant claimed that this case violated art. 10 of the Convention. The Court's assessment first mentioned the principles laid out in *Vogt v. Germany* [GC]. It then stated that the provisions of the Convention also apply to the military and that military personnel can benefit from the protection of the Convention; however, it also drew attention to the fact that the functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline.[94] On the other hand, national authorities may rely on regulations for the purpose of frustrating the expression of opinion, even if these are directed against the army as an institution.

In this specific case, although the letter sent by the applicant contains some very severe statements against the Greek army, these remarks were general and included criticism of the rules of army life and the army was assessed as an institution. The Court underlined that the aim of establishing military discipline is not significant in this case, taking into consideration that the letter was not published and a limited audience was aware of its contents, the statements were not directed against the recipient or any other person; the Court concluded that the measure was not necessary in a democratic society and that art. 10 of the Convention was violated.[95]

ECtHR stated that civil servants in the judiciary need to be more sensitive so as not to harm the impartiality and authority of the judiciary. Members of the judiciary do not have the right to use their position in favour of or

92 *Grigoriades v. Greece [GC],* §§ 10-15.
93 Ibid, §§ 16-24.
94 *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, § 36.
95 *Grigoriades v. Greece [GC*], §§ 45-48.

against any political party and are under obligation to act in an impartial and restrained manner.[96]

Since the courts are and are accepted by the public at large as the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge, the "authority of the judiciary" entails notions that must be protected.[97] In order to protect the authority of the judiciary, it is important that the courts in criminal proceedings inspire confidence in the public in general and among the defendants in a democratic society.[98] Therefore, in cases where the freedom of expression is exercised, members of the judiciary are expected to keep a certain distance with the press even though there may be provocation, to refrain from using words or statements that may cause one to question the impartiality and authority of the judiciary, and express themselves in a diligent, prudent and responsible manner.[99]

Taking into consideration the importance of the judiciary as a public institution in a democratic society, the freedom of expression of judges is limited due to the qualities of their position and the unique nature of judicial activities in comparison with other routine public services.[100]

In *Wille v. Liechtenstein*, the president of the High Administrative Court expressed the academic opinion that when there is a dispute between the Prince and the *Diet*, the dispute may be settled by the Constitutional Court. The ECtHR emphasised the notion of *duty and responsibility* in art. 10(2) of the Convention from the perspective of the president of the court and stated that members of the judiciary must be sensitive about maintaining the authority and impartiality of the judiciary by acting responsibly when exercising their freedom of expression.[101]

---

96 *Baka v. Hungary*, no. 20261/12, 27.05.2014.

97 *Worm v. Austria*, § 40.

98 *Fey v. Austria*, no. 14396/88, 24.02.1993, § 51; *Thorgeir Thorgeirson v. Iceland*, no. 13778/88, 25.06.1992, § 51.

99 *Worm v. Austria*, § 40; *Fey v. Austria*, no. 14396/88, 24.02.1993, §30; *Kayasu v. Turkey* [no. 1], § § 92, 100; *Kudeshkina v. Russia*, § 86; *Kyprianou v. Cyprus*, no. 73797/01, 15.12.2005, §172; *Wille v. Liechtenstein [GC],* § 64; *Buscemi v. Italy*, no. 29569/95, 16.09.1999, § 67; *Poyraz v. Turkey*, § 69.

100 *Pitkevich v. Russia*, no. 47936/99, 08.02.2001; *Albayrak v. Turkey*, no. 38406/97, 31.01.2008, §42.

101 *Wille v. Liechtenstein [GC],* § 64.

On the other hand, the Court ruled that art. 10 of the Convention was violated since the Prince stated in an open letter that he would not reappoint the president of the court and he did not reappoint the president at the end of his term of duty; although the national authorities do have a margin of appreciation, these steps were not necessary in a democratic society.[102]

The *Baka v. Hungary*[103] case also mentioned the notion of *duty and responsibility* and included similar statements concerning judges' freedom of expression.

In 2009 the Hungarian parliament elected Mr. András Baka, former ECtHR judge, President of the Supreme Court of Justice of Hungary for a six-year term until July 2015. In 2011, Mr. Baka was critical of certain judicial reforms, especially the lowering of the mandatory retirement age of judges from 70 to 60. New constitutional provisions entered into force on 1 January 2012 in Hungary; one of these provisions stated that the term of office of the President of the Supreme Court would end upon the entry into force of the new law. In addition, a new criterion of at least five years of experience as a judge in Hungary was introduced for the presidency of the Supreme Court.

The Court ruled that the applicant's right to access a tribunal was denied since he was unable to have recourse to any judicial remedy due to the fact that the rule that ended his term of office earlier than envisaged was stated in a provision of the new Hungarian constitution and not in a legislative regulation.

The Court also ruled that art. 10 of the Convention was violated. The Court emphasised that Mr. Baka was dismissed due to his public criticism of the government's judicial reform and that the sanction of termination (dismissal) would have a chilling effect on other judges who would be discouraged from exercising their freedom of expression and refrain from making critical statements about public institutions and policies.

The notion of duty and responsibility is also an issue in situations where civil servants need to act loyally and confidentially.

The Court stated that employees have a duty of loyalty, discretion and confidentiality towards their employers or superiors. This statement is also valid for public servants who are bound by the duty of loyalty and confidentiality.[104]

---

102 *Ibid*, § 70.

103 *Baka v. Hungary*, no. 20261/12, 27.05.2014.

104 *De Diego Nafria v. Spain*, no. 46833/99, 14.03.2002, §37; *Vogt v. Germany [GC]*, §53; *Ahmed et al v. United Kingdom*, §55.

The disclosure of information civil servants have access to as a result of their work must be assessed in the light of the duty of loyalty and confidentiality, even if such information is of public interest.[105] In addition, due to the nature of the work of civil servants, they may usually have access to information that the State may have an interest in keeping confidential for legitimate reasons. Therefore, generally speaking, civil servants' duty of confidentiality is of a serious nature.[106]

While examining the restriction of freedom of expression of civil servants who have access to important information concerning national security,[107] ECtHR spoke of such civil servants' *duties and responsibilities* in line with art. 10(2) of the Constitution.[108]

In *Kayasu v. Turkey* [no.1], the Court stated that individuals with judicial authority need to act prudently and therefore, they should not use the press even to respond to provocation.[109]

Commenting on informing the press in one's capacity as public prosecutor, the Court ruled that the applicant had taken into account his duty of loyalty towards the State as his employer. On the other hand, the case involved more than merely stating one's personal opinion which may be in conflict with the legitimate interests envisaged in art. 10(2) of the Convention; the statement in question aimed at exhibiting the problems in a democratic regime; the Court concluded that dismissing the applicant from his position as public prosecutor was not proportionate to any of the legitimate aims of interfering with his freedom of expression.[110]

In *Poyraz v. Turkey*, the Court stated that vigilance was to be observed by officials in the exercise of their freedom of expression in the context of

---

105 *Guja v. Moldova [GC],* §§ 72-78.

106 *Ibid*, § 71.

107 The Court established an individual's freedom of expression rights based on professional confidentiality in the *Guja v. Moldova [GC]* judgment (§§74-78). The below criteria are used in assessing cases: (a) public interest in the disclosed information; (b) the authenticity of the disclosed information; (c) the detriment, if any, to the relevant authority due to the disclosure of the information; (d) the aim of reporting the employee; (e) in light of the duty of confidentiality the employee owes his employer, whether the said information was disclosed publicly as last resort after it was shared with a superior or competent authority; and (f) the severity of the sanction.

108 *Engel et al v. the Netherlands*, § 100; *B v. United Kingdom*, no. 10293/83, 12.12.1985; *Hadjianastassiou v. Greece*, § 46; *Rekvényi v. Hungary [GC],* § 43.

109 *Kayasu v. Turkey* [no. 1], § 100.

110 *Ibid*, § 107.

ongoing inquiries, in particular when the official himself was in charge of the inquiry which included information under the protection of the confidentiality provision in order to dispense justice correctly; it mentioned the notion of *duty and responsibility* in art. 10(2) of the Convention and ruled that, unlike journalists, individuals with public responsibilities such as judges and public prosecutors are under obligation to act vigilantly.[111]

In this case, the applicant who was a chief inspector of the Ministry of Justice, prepared an investigation report about a judge; this report was then leaked to the press and he commented to the media about some parts of the report. He claimed that art. 10 of the Convention was violated since the Civil Court of First Instance subsequently sentenced him to pay compensation.

When examining the interference in the freedom of expression, the ECtHR took into consideration the fact that the applicant served as a judge, underlined that great discretion was required of judicial authorities, as it had in *Kayasu v. Turkey* [no.1][112], and stated that judicial authorities should not use the press, even to respond to provocations. It ruled that it is the higher demands of justice and the elevated nature of judicial office which impose this duty.[113]

Statements civil servants make on social media also need to be examined. At a time when social media is as effective as audiovisual media, statements civil servants make on social media must be assessed from the perspective of loyalty to the employer (the State) and duty and responsibility in light of the Court's above-mentioned criteria.

Taking into consideration the above issues, civil servants who have access to certain information due to their positions cannot publicly disclose such information in an indiscriminate manner, some of such statements may not enjoy the protection of art. 10 of the Convention, and the ECtHR judgments on this issue examine the obligations of loyalty and prudence hand in hand with the notion of *duty and responsibility* in art. 10(2) of the Convention.

111 *Poyraz v. Turkey*, §§ 76-78.
112 *Kayasu v. Turkey* [no. 1], § 100.
113 *Poyraz v. Turkey*, § 69; *mutatis mutandis, Buscemi v. Italy*, §67.

Conclusion

One of the unique qualities of human beings is their ability to think. Progress is possible thanks to thought. However, *thinking* in itself does not ensure social progress. Undisclosed ideas concern only the individual who is thinking and consequently has no meaning for humanity. Therefore, expressing thoughts is important in that it ensures that the best conclusion or, in other words, reality is reached through comparison with other ideas.

In addition to speech and writing, it is possible to express ideas by using behaviour or actions, symbols, artistic expressions, film or music and other means such as clothing. One of the indicators of a democratic society is the presence of an environment where individuals can express their ideas without any limitations. According to John Stuart MILL, the truth can only emerge through the discussion of ideas in the marketplace of ideas without any limitation. The progress of a society is directly proportional to this freedom.

However, free thought cannot be used without limits and in an absolute manner, as agreed on by modern societies. This freedom is subject to certain restrictions based on legitimate reasons.

Generally speaking, Articles 9, 10 and 11 of the European Convention on Human Rights regulate the freedom to express ideas. The possibility of restricting this freedom is the common point of these articles; they enumerate the issues concerning such restrictions in detail. However, art. 10 is unique. The exercise of the freedom of expression also brings certain duties and responsibilities to those who exercise it. The rulings of the European Court of Human Rights assess this notion in concrete cases.

The jurisprudence of the Court shows that the restriction of freedom of expression many not be identical for everyone. Freedom of expression may be interpreted more narrowly for some people in specific positions. According to the Court, national authorities have a wider margin of appreciation in certain cases depending on the relevant individual's position and duty. This interpretation is based on art. 10(2) which states that the *exercise of these freedoms carries with it duties and responsibilities*.

The notion of duty and responsibility also applies to the freedom of expression of civil servants and manifests its impact when civil servants are subject to a sanction or restriction when they exercise this right. Indeed, a civil servant must act more prudently and in a manner that does not damage his/her position's reputation in order to protect the presupposition that civil servants maintain certain standards and treat all citizens equally.

The notion of duty and responsibility is taken into consideration in assessing the situation of civil servants who are subject to sanctions due to their expressions; the same notion is also important in determining whether a limitation is proportionate. The determination and assessment of whether a limitation is proportionate are subject to the oversight of the European Court of Human Rights and the severity of the limitation is considered in determining whether there is a violation of art. 10 of the Convention. Consequently, while the Court may state that a limitation is justified, it may rule that there is violation since the limitation is not proportionate.

Therefore, although the rights regulated by the Convention apply to civil servants, the ECtHR takes into consideration the notion of *duty and responsibility* in art. 10(2) of the Convention in assessing the situation of civil servants whose freedom of expression is limited.

♦♦♦♦

BIBLIOGRAPHY

Brems, Eva; *Human Rights: Universality and Diversity*, Kluwer Law International, 2001

D.J. Harris-M. O'Boyle-E.P. Bates-C.M. Buckley; *Avrupa İnsan Hakları Sözleşmesi Hukuku, Yüksek Yargı Kurumlarının Avrupa Standartları Bakımından Rollerinin Güçlendirilmesi Ortak Projesi* [Law of the European Convention on Human Rights: Joint Project on Enhancing the Role of Supreme Judicial Authorities in respect of European Standards] [Oxford University Press, 2009, Council of Europe], Türkçe Birinci Baskı [First Edition in Turkish], Şen Matbaa, Ankara, 2013

Doğru, Osman – Nalbant, Atilla; İnsan Hakları Sözleşmesi Açıklama ve Önemli Kararlar [Human Rights Convention Annotations and Important Judgments], C.2, Pozitif Matbaa, Ankara, 2013

Geranne, Lautenbach *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford University Press, 2013

Lécuyer, Yannick; *Le droit à des élections libres,* Council of Europe, Mart 2014

Macovei, Monica; İfade Özgürlüğü, Avrupa Konseyi İnsan Hakları El Kitapları [Freedom of Expression, Council of Europe Human Rights Handbooks] no: 2

Marauhn, Thilo; *Freedom of Expression, Freedom of Assembly and Association*, European Fundamental Rights and Freedoms, edited by Dirk Ehlers, De Gruyter, Germany, 2007

Mill, John Stuart; *On Liberty and Other Essays*, Digireads.com Publishing, 2010

Schauer, Frederick; İfade Özgürlüğü Felsefi Bir İnceleme [Freedom of Speech: A Philosophical Enquiry], Çev. M. Bahattin Seçilmişoğlu, Ankara, 2002

Stratford, Jemima; *Striking the Balance: Privacy v. Freedom of Expression under the European Convention* on *Human Rights*, Developing Key Privacy Rights, ed. Madeleine Colvin, Hart Publishing, 2002

Ünal, Şeref; *Avrupa İnsan Hakları Sözleşmesi* [European Convention on Human Rights], TBMM Basımevi, Ankara, 1995

Velu, Jacques; *Propos sur les normes applicables aux relations entre la justice et la presse*, Journal des Tribunaux, 1995

Verpeaux, Michel; *Freedom of Expression*, Council of Europe, 2010

Ziya Paşa; *İnsanların Düşünce Farklılıkları Göstermesi Rahmettir* [That people have different thoughts is a blessing], Teorik ve Pratik Boyutlarıyla İfade Hürriyeti [Freedom of Expression with its Theoretical and Practical Dimensions], ed. Berat Özipek, Liberal Düşünce, 2003

Zwaak, Leo – Karagöz, Kasım – Şahin, Kemal – Tümay, Murat; *Matra; Yargıda İfade Özgürlüğüne Yönelik Farkındalığın Arttırılması* Projesi [Matra; Project to Raise Awareness about Freedom of Expression in the Judiciary], Türkiye Adalet Akademisi Yayınları, Ankara, 2013

AVRUPA İNSAN HAKLARI SÖZLEŞMESİNDE İFADE ÖZGÜRLÜĞÜNÜN SINIRLARI

Freedom of Expression within the Boundaries of European Convention on Human Rights

Mehmet YÜKSEK*

ÖZET

Düşünme ve düşündüklerini ifade edebilme yeteneği insanları diğer canlılardan ayıran en temel özelliklerdendir. Günlük hayatta düşüncelerimizi çeşitli şekillerde ifade ederek başkaları ile paylaşırız. Bu düşünce açıklamalarına müdahale edilmediği sürece çoğu kez ifade özgürlüğümüzü kullandığımızın farkına bile varmayız. En temel insan haklarından biri olmasına rağmen, toplumsal yaşamın bir gereği olarak ifade özgürlüğü mutlak bir hak olarak düzenlenmemiş ve belli şartlar altında bu özgürlüğün de sınırlanabileceği kabul edilmiştir. Bu makalede çok geniş bir kullanım alanı olan ifade özgürlüğünün hangi hallerde sınırlanabileceğini Avrupa İnsan Hakları Sözleşmesindeki düzenlemeler ışığında Avrupa İnsan Hakları Mahkemesi içtihatları ve yeri geldiğinde Anayasa Mahkemesi ve Yargıtay uygulamaları ile açıklamaya çalışacağız.

Anahtar Kelime: İfade, İfade Özgürlüğü, Anayasa, Sözleşme, Temel Hak.

ABSTRACT

The ability to think and express these thoughts is one of the basic characteristics of human beings that differs them from other creatures. In our daily lives, we share our thoughts by expressing them in many different ways. As long as there is no interference, we even do not realise that we are using our right to freedom of expression. Although freedom of expression is one of the basic human rights and is regulated as a perfect right of man, it is still accepted that it can be restricted under certain conditions as a necessity of communal living. We will try to explain in this article under which circumstances and conditions can freedom of expression be restricted in the light of European Convention on Human Rights and decisions of European Court of Human Rights, Constitutional and Court of Cassation.

Keyword: Expression, Freedom of Expression, Constitution, Convention, Fundamental Right.

INTRODUCTION

Freedom of expression is defined in art. 10 of the European Convention on Human Rights (ECHR) and art. 26 of the Constitution of the Republic of Turkey ("Constitution") and its boundaries are explained in art. 10 of ECHR as follows:

* Judge of the Şanlıurfa Courts; yüksekmehmet-70@hotmail.com

"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.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, 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."

According to the European Court of Human Rights ("Court"), freedom of expression is one of the fundamentals of a democratic society which is essential for the advancement of the society and the development of the individual. According to art. 10, par. 2 of ECHR, 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 which offend, shock or disturb part of the government or the people. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no democratic society[1].

Freedom of expression in art. 26 of the Constitution titled "Freedom of expression and dissemination of thought" states the following:

"Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision does not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing.

The exercise of these freedoms may be restricted for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing offences, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

[1] European Court of Human Rights, Arslan v. Turkey, 08.06.1999. Application 23462/94 www.yargıtay gov.tr

Provisions regulating the use of means of disseminating information and ideas cannot be interpreted as a restriction of the freedom of expression and dissemination unless they prevent the dissemination of information and thoughts.

The formalities, conditions and procedures to be applied in the exercise of the freedom of expression and dissemination of thought are prescribed by law."

Art. 25, "Freedom of thought and opinion" of the Constitution states:

"Everyone has freedom of thought and opinion.

Noone may be forced to reveal his thoughts or opinions under any circumstance or for any purpose, and noone may be condemned or accused for his thoughts and opinions."

Art. 13, "Restriction of fundamental rights and freedoms" of the Constitution states:

"Fundamental rights and freedoms may only be restricted provided that their essence remains intact, the restriction is based on the reasons set forth in the related articles of the Constitution, and by way of laws. Such restrictions may not be in violation of the letter and spirit of the Constitution, the requirements of a democratic social order and secular Republic, and the principle of proportionality."

Furthermore, the last paragraph of art. 90 of the Constitution on "Applicability of International Treaties" states:

"Duly executed international treaties have the force of law. No appeal can be made to the Constitutional Court on charges of Constitution violations regarding these. In the case of conflict between duly executed international treaties and laws on fundamental rights and freedoms, the provisions of international treaties shall prevail."

The provisions in the Constitution are obviously harmonized with ECHR. A comparison of Court decisions and Constitutional Court decisions shows that the Constitutional Court often refers to Strasbourg Court decisions and uses very similar criteria[2].

ECHR and its protocols defining fundamental rights and freedoms have been ratified by the Turkish Parliament in 1954 with Law no. 6366; they are therefore incorporated into national law pursuant to the last paragraph of art.

[2] Judgment of the Constitutional Court dated 04.06.2015 on Bekir Coşkun, Application 2014/12151, www.anayasa.gov.tr

90 of the Constitution. Provisions on fundamental rights and freedoms that are not compliant with ECHR may not be enforced.

Freedom of expression protects all stages of thought from its inception in an individual's mind to its expression to the outside world. Thoughts and opinions are absolute as long as they stay in the mind of the individual. Noone may be condemned or punished for his thoughts. Thought begins to gain its true significance when it is expressed to others. Therefore, freedom of expression ultimately protects the statement of a thought. This protection guarantees the individual's right to impart not only his own opinion but also information, knowledge and opinions acquired from others, and the way in which such thoughts are imparted.

Freedom of expression protects the expression of thoughts in speech, writing, images, sculptures or other means, as well as the media for expressing opinions such as newspapers, radio, TV, internet, films and brochures[3].

Everyone without exception is protected under freedom of expression as defined in Art. 10 of ECHR. Freedom of expression is not limited to designated individuals and groups, but applies to all real persons and entities, public officials, remanded or convicted persons, and non-citizens.

Freedom of expression includes not only the freedom to have opinions or to acquire information and thoughts, but also to express and disseminate one's thoughts and opinions.

Individuals that comprise the society can only have their own thoughts and express their opinions on important matters in public debate if they have the ability to discover opinions that are different from their own.

Restriction of freedom of expression occurs when the State (public authority) or third persons interfere in an individual's exercise of his/her freedom of expression. Interference in freedom of expression may be in the form of sanctions by the State, imposing the payment of compensation, confiscation of a printed book, banning of TV or radio broadcasts, and denying detainees or convicts the publications they want, as well as in the form of physical intervention by third parties[4].

---

3 Korkmaz Ömer, *Düşünceyi Açıklama Özgürlüğü ve Sınırları* (The Freedom of Expression of Ideas and Its Limitations), Yetkin Yayınları, Ankara, 2014, p. 110

4 Doğru Osman- Nalbant Atilla, *Ɏyãl·ƴ I I·ƪfl·ǋƤ !ǾǋdzǇI· Sözleşmesi* [European Convention on Human Rights], Pozitif Matbaası, Ankara, 2013, p. 226

Par. 2 of art. 10 of ECHR specifies the legitimate reasons that may be invoked to place restrictions on freedom of expression as defined in par. 1 thereof. Accordingly, it is understood that freedom of expression is not absolute, and public authorities may interfere in freedom of expression if the interference is prescribed by law, based on legitimate purposes, and is necessary in a democratic society as explained in par. 2 of the said article. Interference in freedom of expression by the State may not be based on reasons other than the legitimate purposes specified in art. 10, par. 2, nor can it be based on other reasons for restriction set forth in other articles of ECHR. Additionally, interference in freedom of expression must be required for achieving the legitimate purposes specified in ECHR. Interference that is based on ordinary reasons, is not related to the legitimate purpose sought, or is not proportionate will cause a violation of ECHR[5].

With respect to the protection of freedom of expression, the State has a negative obligation of not interfering with the execution of this freedom, as well as a positive obligation to protect individuals from the physical attacks and threats of third parties and prevent the obstruction of print or broadcast media[6].

ECtHR expresses the State's positive obligation as follows in the Dink v. Turkey judgment: "On the other hand, the Court observes that the complaints of the applicants and the circumstances specific to the case invoke the State's positive obligation according to art. 10 of ECHR. The true and effective use of freedom of expression is not limited to the State's duty to refrain from any interference. The use of this right may necessitate taking positive protective measures in interpersonal relations as well. In fact, the State may be required to defend freedom of expression against violations perpetrated by real persons as well[7]."

When deciding whether an opinion is eligible for protection under freedom of expression, the expression must not be taken out of context; rather, the context and expression must be regarded as a whole. Factors to consider include the identity of the person making the expression, whether the person is a politician or ordinary citizen, the forum and medium of expression, and

---

5 European Court of Human Rights judgment dated 29.03.2005 on Ağın v. Turkey, Application 46069/99 www.yargıtay.gov.tr

6 Doğru Osman- Nalbant Atilla, *Tyãl·y ı l· }tı·NP !ØNdzLJ· Sözleşmesi* [European Convention on Human Rights], Pozitif Matbaası, Ankara, 2013, p. 356

7 European Court of Human Rights, Dink v. Turkey, judgment of 14.09.2010. Application 2668/07, 6102/07, 3079/09, 7124/09 hudoc.echr.coe.int/eng

the means used to express the thought in question. It must be observed that the expression of an opinion in a newspaper will not bear the same threat to national security, territorial integrity or the perpetration of a crime as opposed to its expression in a meeting with very limited attendance[8].

LIMITS OF FREEDOM OF EXPRESSION

A- GENERAL

As a pillar of democratic society, freedom of expression is not an absolute right, but may be restricted for legitimate reasons that must be interpreted narrowly; therefore, it is subject to restriction for the specific reasons explained in art. 10, par. 2 of ECHR, which are listed below:

Protection of national security, territorial integrity or public safety,

Ensuring public order and preventing criminal acts,

Protection of health or morals,

Protection of the reputation or rights of others,

Protection of classified information,

Maintaining the authority and impartiality of the judiciary.

Restrictions on freedom of expression must be based on one or more of the legitimate purposes set forth in art. 10, par. 2 of ECHR and listed above. Since a limited number of reasons have been explicitly stated, freedom of expression may not be restricted for reasons other than these. Furthermore, the restriction must be prescribed by law and necessary in a democratic society.

Art. 13 of the Constitution on fundamental rights and freedoms states "only for purposes specified in the relevant articles" in par. 1, which clarifies that freedom of expression may only be restricted for the legitimate purposes stated in par. 2 of art. 26, and that it may not be restricted for reasons other than these[9].

The Constitution refers to the purposes for restriction in art. 10, par. 2 of ECHR as well as the legitimate purposes of conformity with the letter and

[8] European Court of Human Rights judgment dated 08.07.1999 on Karataş v. Turkey, Application 23168/99 www.yargıtay.gov.tr

[9] İnceoğlu Sibel, *Avrupa İnsan Hakları Sözleşmesi ve Anayasa* [European Convention on Human Rights and the Constitution] Beta Yayınları, İstanbul, 2013, p. 28

spirit of the Constitution, maintaining the essence of the right and freedom, and observing the requirements of a secular Republic.

The Constitutional Court stated that considering the importance of freedom of expression, a public authority interfering in freedom of expression is burdened with the responsibility of proving a benefit that prevails over the protection of freedom of expression and necessitates interference[10].

With respect to the "democratic society" and "integrity of essence" in art. 13 of the Constitution, the Constitutional Court states: "Democracy is a regime where fundamental rights and freedoms are provided and protected in the widest scope possible. Restrictions that alter the essence of fundamental rights and freedoms and render them entirely unusable cannot be accommodated in a democratic state of law. Art. 13 of the Constitution on the restriction of fundamental rights and freedoms states that fundamental rights and freedoms may only be restricted provided that their essence remains intact, and the restriction is prescribed by law. The essence that must remain intact may vary for specific fundamental rights and freedoms. Nevertheless, a restriction prescribed by law must not severely impair the use of fundamental rights, prevent them from achieving their purpose or negate their effects if it is to be accepted that the restriction does not harm the integrity of the essence of the right[11]."

B- LEGITIMATE PURPOSES FOR RESTRICTION

What follows is an analysis of the legitimate purposes for restricting freedom of expression specified in par. 2 of art. 10 in ECHR based on the jurisprudence of ECtHR.

1- PROTECTION OF NATIONAL SECURITY, TERRITORIAL INTEGRITY OR PUBLIC SAFETY

National security and territorial integrity constitute one of the most important and legitimate purposes for which freedom of expression may be restricted. National security may be defined as the protection of the independence of the State as an entity, the unity of the nation, territorial integrity and national sovereignty by bodies authorised by the Constitution

[10] Judgment of the Constitutional Court dated 04.06.2015 on Bekir Coşkun, Application 2014/12151, www.anayasa.gov.tr

[11] Decision of the Constitutional Court dated 04.06.2015 on Bekir Coşkun, Application 2014/12151, www.anayasa.gov.tr

when these face a clear and present threat on a national or international level[12].

An analysis of interference in freedom of expression for the legitimate purpose of defending the independence of the State, territorial integrity or public safety shows that expressions which incite violence or terrorism, are racist or separatist in nature, or seek to overturn the democratic regime cannot be granted protection. Moreover, in countries like Turkey where national unity is under greater hazard, it is accepted that the State has a wider margin of appreciation when interfering in an act that targets national unity as opposed to acts of an individual nature[13]. The means and medium of expression are under protection as well; therefore, expressions in the form of poetry or art, which appeal to a narrow audience, have limited impact on national security, territorial integrity or public safety compared to expressions that reach a wider population, and enjoy greater protection than the latter[14].

A criminal investigation was launched against Mehdi Zana, former Mayor of Diyarbakır, when an interview with Zana was printed in a national newspaper in 1987. The interview contained the following statements: "I support the PKK's fight for national liberation. We do not condone massacres; mistakes are made everywhere. Women and children are killed by mistake." When the Court of Cassation confirmed the judgment of a State Security Court sentencing the applicant to imprisonment for 12 months, the applicant appealed to ECtHR on grounds that his freedom of expression was violated.

ECtHR found that the applicant, the former Mayor of Diyarbakır, made the expression in question at a time of intense terrorist activity, and that the interference in freedom of expression had the legitimate purpose of protecting territorial integrity and national security. Also in this specific case, considering the State's margin of appreciation, ECtHR argued that a fair balance had to be achieved between the freedom of expression of individuals and the legitimate right of a democratic society to protect itself from terrorist acts.

ECtHR noted that the interview with the applicant coincided with murderous attacks carried out by the PKK on civilians at the material time

---

12 Yıldırım Zeki, *Terörizmin Propagandası Suçu* [The Crime of Terrorist Propaganda] Adalet Yayınları, Ankara, 2014, p. 144

13 European Court of Human Rights judgment dated 08.06.1999 on Arslan v. Turkey, Application 23462/94 www.yargıtay.gov.tr

14 European Court of Human Rights judgment dated 08.07.1999 on Karataş v. Turkey, Application 23168/94 www.yargıtay.gov.tr

and that the statement of the applicant that he viewed the PKK as a national liberation organisation had to be regarded as likely to exacerbate an already explosive situation in the region considering the position and political identity of the applicant. The Court argued that the penalty imposed on the applicant answered a "pressing social need", that the reason for interference was appropriate and adequate, the interference in freedom of expression was within the State's margin of appreciation and was proportionate, and found no breach of the applicant's freedom of expression[15].

In the Polat v. Turkey case, ECtHR reviewed the criminal conviction of the applicant on charges of disseminating separatist opinions in a published book. ECtHR considered that, having regard to the sensitivity of the security situation in south-east Turkey and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicant's freedom of expression can be said to have been in furtherance of some of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of crime, that the right of restricting the statement of opinions on matters of general public interest is very narrow and that events and government activity in a democratic system must come under scrutiny of not just legislative and judicial authorities, but also the public at large. ECtHR held that, where such remarks incite violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression[16].

In the Düzgören v. Turkey case, ECtHR studied whether the conviction of the applicant, who was a conscientious objector and distributed leaflets calling for the abolishment of compulsory military service, to imprisonment for two months by a military court was "proportionate to the legitimate aim pursued" and whether the reasons put forward by national authorities were "relevant and adequate", finding that the words in the leaflet, while being hostile towards military service, did not incite violence, armed resistance or revolt, and did not constitute hate speech. With regard to the circumstances and possible impact of the statement, ECtHR noted that the leaflets were distributed in a public area in İstanbul and did not aim to incite people to desert immediately either by form or content, which were important factors

15 European Court of Human Rights judgment dated 25.11.1997 on Zana v. Turkey, Application 69,688,880/96 www.yargıtay.gov.tr

16 European Court of Human Rights judgment dated 08.06.1999 on Polat v. Turkey, Application 23500/94 www.yargıtay.gov.tr

in determining the necessity of the interference. ECtHR further noted the two-month imprisonment sentence was harsh and while the reasons put forward by the Military Court were relevant, they were not adequate to justify the interference in the applicant's freedom of expression, and decided that the conviction and punishment of the applicant were disproportionate to the legitimate aims pursued and were not "necessary in a democratic society"[17].

In countries like Turkey, where territorial integrity is under greater threat due to terrorist activity, interference in freedom of expression due to the legitimate aims of national security and territorial integrity mostly target expressions of opinion or publications that praise, legitimize and conduct propaganda of acts of violence and threat committed by terrorist organisations. There is no doubt that a multifaceted approach is required for combating international terrorist organisations. Terrorist organisations appeal to their audiences through propaganda that seeks to recruit members to the organisation. In the case of statements that incite terrorism or violence or disrupt national unity, the public authority may interfere with the right to freedom of expression with regard for the severity of threat posed by such expressions and the conditions provided in art. 10 of ECHR. However, interference in such expressions fail to achieve the aim pursued most of the time. In these cases, alternatives such as informing citizens and adopting objective measures may yield better results.

2- ENSURING PUBLIC ORDER AND PREVENTING CRIMINAL ACTS

One legitimate purpose for restricting freedom of expression is ensuring public order and preventing criminal acts. Maintaining order in public institutions, including armed forces and correctional facilities, and public enterprises may be a legitimate aim for which freedom of expression may be restricted. In institutions such as armed forces or correctional facilities where discipline and order are paramount, heavier restrictions and disciplinary action may be applicable compared to other institutions. However, such restrictions must not be extensive enough to cause members of professional organisations and the press to avoid expressing their opinions on matters of social importance, and the different interests pertaining to the pursued legitimate aim of maintaining public order and preventing crime must be carefully balanced against the interference in freedom of expression[18].

---

17 European Court of Human Rights judgment dated 09.11.2006 on Düzgören v. Turkey, Application 56827/03 www.yargıtay.gov.tr

18 European Court of Human Rights judgment dated 13.01.2009 on Açık et al v. Turkey, Application 31451/03 www.yargıtay.gov.tr

ECtHR holds that verbal or written statements that incite violence, armed resistance or revolt, invoke feelings of hatred or constitute hate speech cannot be protected under freedom of expression; however, statements that do not contain these elements are indeed under protected speech[19].

In the Alınak v. Turkey judgment, ECtHR held that the decision to seize the published book due to its potential to incite violence, even if partly, was based on the legitimate aim of maintaining public order as specified in art. 10, par. 2 of ECHR, but argued that the interference was not necessary in a democratic society[20].

In the Açık et al v. Turkey case, ECtHR noted that the applicants' protests at the academic year opening ceremony of İstanbul University on October 3, 2002 during the Chancellor's speech, took the form of shouting slogans and raising banners, leading them to be forcibly removed by the police while sustaining various injuries. They subsequently remained in detention for eleven and a half hours, however, no criminal proceedings were launched against them. The actions of the applicants no doubt amounted to an interference with the Chancellor's freedom of expression and caused disturbance and exasperation among some members of the audience, who had the right to receive the information being conveyed to them. Against this background, ECtHR considered that the decision to remove the applicants from the university hall, even though it interfered with their freedom of expression, may be deemed to have been proportionate to the aim of protecting the rights of others. However, ECtHR observed that the applicants did not resort to violence and no criminal proceedings were brought against them. ECtHR considered that the applicants' protest could have been countered by less draconian measures, such as temporary removal from the conference hall, rather than resorting to the extreme measures of arrest and detention. In these circumstances, ECtHR found that the authorities' response was disproportionate to the legitimate aims of preventing public disorder or protecting the rights of others. It was not therefore "necessary in a democratic society" and constituted a violation of Article 10[21].

---

19 European Court of Human Rights judgment dated 11.02.2011 on Faruk Temel v. Turkey, Application 16853/05 www.yargıtay.gov.tr

20 European Court of Human Rights judgment dated 29.03.2005 on Alınak v. Turkey, Application 42287/98 www.yargıtay.gov.tr

21 European Court of Human Rights judgment dated 13.01.2009 on Açık et al v. Turkey, Application 31451/03 hudoc.echr.coe.int/eng

During an assembly of the Hungarian Parliament, four applicants who were members of the opposition were fined 170 Euros for having gravely disrupted parliamentary proceedings after they displayed billboards accusing the government of corruption. The fines were imposed by the Parliament in plenary session without a debate.

ECtHR observed that the interference was prescribed by law and pursued the legitimate aims of protecting the rights of others and preventing disorder. ECtHR ruled that the interference was not necessary in a democratic society due to the applicants being members of parliament and stating their criticism of the government on a matter of high social relevance by displaying banners, thereby voicing the opinion of the minority in the Parliament, to the fact that the assembly was not disrupted in any major way and its reputation was not damaged, and finally to the chilling effect the fine would have on other members of the parliament to speak up on issues of importance to the public[22].

During Nevruz celebrations in Tarsus, Mersin on March 21, 2012, banners were displayed with statements such as "we will rise together for an honourable life; democratic solution or mighty resistance; we will trample AKP fascism on the way to freedom". Some demonstrators were seen to display pictures of Abdullah Öcalan, leader of the PKK terrorist organisation, and the banners of the PKK, chanting slogans such as "biji serok Apo" and "Tarsus is home to Apo". The defendant, who was a demonstrator in the event, was charged with terrorist propaganda for allegedly leaning from the window of a car to chant "biji Apo, biji Apo". The defendant was sentenced to ten months imprisonment for violation of art. 7/2 of Law no. 3713 by committing terrorist propaganda. Upon the defendant's appeal, the case was submitted to the 16th Chamber of the Court of Cassation ("Chamber").

The Chamber observed that the prison sentence was an interference in the applicant's freedom of expression but was justified by the legitimate aim of maintaining public order and preventing crime as specified in art. 10, par. 2 of ECHR, and proceeded to test whether the interference was necessary in a democratic society.

The Chamber noted that freedom of expression was one of the fundamental rights to be most frequently subject to interference in the context of anti-

[22] European Court of Human Rights judgment dated 14.01.2014 on Karácsony et al v. Turkey, Application 42461/13 hudoc.echr.coe.int/eng

terrorism and that the subsequent amendments to art. 7/2 of the anti-terrorism Law no. 3713 on terrorist propaganda were attempts in expanding freedom of expression; however, the Chamber also pointed out that in sub-paragraph b of the same amendment, the assumption that "displaying or carrying emblems, signs and pictures related to the organisation, chanting slogans, broadcasting over loudspeakers, wearing uniforms that bear the signs and marks of the terrorist organisation" constitutes terrorist propaganda regardless of other factors, would be a description of an act that excludes the parameters of freedom of expression.

The Chamber observed that ECHR and its protocols defining fundamental rights and freedoms have been ratified by the Turkish Parliament, and are therefore incorporated into national law pursuant to art. 90 of the Constitution.

The Chamber noted that although combating terrorism granted a wider margin of appreciation to states due to its unique difficulties, it was nevertheless still subject to rule of law and it is not permissible for states to violate their obligations arising out of international law while combating terrorism; called for an assessment of whether displaying banners, wearing uniforms or chanting slogans constitute hate speech that incites hatred, violence, armed resistance or revolt, stating that if a direct or indirect incitement of violence is present, the act must not be taken out of context but must be treated as a whole to determine whether freedom of expression had been violated.

After studying the case in question following the above statements, the Chamber concluded that the applicant's act of leaning from the window of a vehicle to chant slogans in support of a terrorist organisation during Nevruz celebrations did not lead to the use of violence or force among the demonstrators who proceeded to disperse of their own accord. The Chamber did not find the slogans to legitimize or condone the violent, forceful or threatening methods of terrorist organisations, considered this to be within freedom of expression, and unanimously overturned the sentence[23].

3- PROTECTION OF HEALTH AND MORALS

Protection of health and morals is one legitimate aim for which public authorities may interfere with freedom of expression. Interferences to protect the young, elderly and disabled, and to ensure healthy sexual development among the youth in particular are found justified. Due to the vast geographical

[23] Court of Cassation [16th Criminal Chamber] ruling dated 17.07.2015, case number 2015/2742, judgment number 2015/2316 www.yargıtay.gov.tr

area where ECtHR has jurisdiction and the varying understanding of morality in the societies inhabiting this area, ECtHR avoids imposing specific criteria with regard to morality and grants a wider margin of appreciation to local authorities. Local judges are better positioned to decide whether the restriction of freedom of expression regarding publications of an obscene or pornographic nature constitute violations of ECHR since they live in the very society concerned[24].

In the case of artistic expression, the freedom of expression applies also to those statements that "challenge, shock or aggrieve" the populace[25].

In 1999, the publisher Rahmi Akdaş published the Turkish translation of the erotic novel *Les onze mille verges* by the French writer Guillaume Apollinaire ("The Eleven Thousand Rods" – On Bir Bin Kırbaç in Turkish) originally published in 1907, and was convicted by a court for publishing obscene or immoral material. The court also ordered seizure of the books and imposed a fine on the publisher, upon which Rahmi Akdaş applied to ECtHR.

ECtHR observed that the decision of seizure had pursued a legitimate aim, namely the protection of morals, reiterated that those who promoted artistic works also had duties and responsibilities, that freedom of expression had its limits and the requirements of morals varied from society to society, and that the national authorities were therefore in a better position than the international judge to give an opinion on the necessity of a restriction intended to protect morals.

ECtHR stressed the fact that more than a century had elapsed since the book had first been published in France, its publication in various languages in a large number of countries and the recognition it had gained through publication in the "La Pléiade" series ten years before being published in Turkey. Acknowledgment of the margin of appreciation for restrictions on freedom of expression could not go so far as to prevent public access in a particular language to a work belonging to the European literary heritage. Accordingly, ECtHR ruled that the seizure of copies of the book had not been necessary in a democratic society, and had constituted a violation of freedom of expression[26].

---

[24] European Court of Human Rights judgment dated 07.12.1976 on Handyside v. UK, Application 5493/72 hudoc.echr.coe.int/eng

[25] Korkmaz Ömer, *Düşünceyi Açıklama Özgürlüğü ve Sınırları* (The Freedom of Expression of Ideas and Its Limitations), Yetkin Yayınları, Ankara, 2014, p. 173

[26] European Court of Human Rights judgment dated 16.02.2010 on Akdaş v. Turkey, Application 41056/04 hudoc.echr.coe.int/eng

4- PROTECTION OF THE REPUTATION OR RIGHTS OF OTHERS

With regard to expressions that may harm the rights of others, a fair balance must be struck between enabling freedom of expression and protecting the rights of others.

ECtHR ruled that the rights to freedom of expression in art. 10 and to privacy in art. 8 of ECHR deserved equal protection. When an expression is in violation of privacy, family life and the right to residential and communication privacy protected under art. 8 of ECHR, it must be determined whether a fair balance has been struck between freedom of expression and the right to privacy in a way that ensures the integrity of the essences of both rights. In the case of two separate applications for a single case where parties claim the violation of art. 10 and art. 8 respectively, the same decision must be given for both parties and the margin of appreciation must be identical in both cases[27].

Figures that are well-known in the society attract attention with their conduct, including their private lives. Restrictions may apply to expressions that are considered attacks on the reputation and privacy of such individuals. While limits of critical comment are wider if a public figure is involved, as he or she is inevitably and knowingly exposed to public scrutiny and must therefore display a particularly high degree of tolerance, the reputation of a politician, even a controversial one, must benefit from the protection afforded by ECHR[28].

Considering the duty of the press to report news and opinions on matters of public debate and the right of the society to acquire such news and opinions, the limits of criticism must be wider when targeting a politician as opposed to an ordinary citizen. Restrictions on expressions related to the official capacities of politicians and members of the government must be more thorough and tolerant of excesses to a certain degree. The statement of an expression must not harm the rights of others. When a claim is made in this regard, the specific circumstances of both parties must be reviewed and the interests of the parties must be balanced. The opinions of public figures on issues that are currently under debate in the society attract particular attention. Discovering these opinions is in the interest of the public. Information that has been made public before and statements that do not constitute defamation are protected under freedom of expression[29].

---

27 European Court of Human Rights judgment dated 16.06.2015 on Delfi AS v. Estonia, Application 64569/09 www.inhak.adalet.gov.tr

28 European Court of Human Rights judgment dated 13.09.2009 on Erdoğan v. Turkey, Application 39656/03 www.yargıtay.gov.tr

29 Korkmaz Ömer, *Düşünceyi Açıklama Özgürlüğü ve Sınırları* [The Freedom of Expression of Ideas and Its Limitations], Yetkin Yayınları, Ankara, 2014, p. 189

In an ongoing criminal case, the applicant, who was the attorney of the petitioner, said *"Mothers were heard as witnesses on October 13, 2006. Since then, they have been subjected to insults and slander on the website for allegedly supporting Darwin's theory of evolution. I wish they had actually descended from apes"* upon which a public lawsuit was initiated against the applicant on charges of insult, and the applicant was fined 2,180.00 TL on the grounds that the applicant's words of *"I wish they had actually descended from apes"* was damaging to the public reputation and prestige of the defendants and constituted disparaging comments against their honour and dignity. On reviewing the applicant's plea that his freedom of expression had been violated, the Constitutional Court observed that:

The imposition of a fine on the applicant, who is an attorney, for his words spoken in a courtroom against the counterparties of the case constitutes an interference in freedom of expression having a legitimate aim of protecting the reputation and rights of others. With regard to whether the interference was necessary in a democratic society, ECtHR stated that a reasonable balance had to be achieved between freedom of expression and the protection of the rights and reputation of others, where as a principle reputation will be held in higher regard if the person whose reputation is at stake is an ordinary citizen, and freedom of expression if the person is a politician. States have a negative obligation to refrain from interference when protecting the reputation and dignity of others as well as a positive obligation to prevent interference by others. Moreover, in order for a person to benefit from the protection afforded to his moral entity, the attack against the person's reputation must be of enough severity to prevent the person from exercising his right to protect and further his moral being.

After establishing the above general principles, the Constitutional Court reviewed the case in question, observing that the applicant's allegedly insulting words of *"I wish they had actually descended from apes"* spoken during a criminal hearing was irrelevant to the case and made no contribution to the prosecution and the defence; the applicant was considered able to present his defence and objections without uttering these offensive words, therefore, the statement was outside freedom of expression and immunity of defence described in art. 128 of the Turkish Penal Code, and it was ruled that the applicant's freedom of expression had not been violated[30].

[30] Judgment of the Constitutional Court dated 11.03.2013 on Emine Rezzan Aydınoğlu, Application 2013/8396, kararı www.anayasa.gov.tr

5- PREVENTING THE DISCLOSURE OF INFORMATION RECEIVED IN CONFIDENCE

In the context of freedom of expression, the right to receive information only protects access to public information and sources. Private information of individuals and information designated as state secrets are outside the scope of this protection. Here, the State's duty is to refrain "from restricting a person from receiving information that others wish or may be willing to impart to him/her[31]."

In this regard, the State has no positive obligation to disclose confidential information and documents pertaining to law enforcement and intelligence agencies[32]. If the information disclosed while exercising freedom of expression has already become public knowledge by other means, no interference in freedom of expression may be justified on grounds of the legitimate aim of preventing the disclosure of information received in confidence. The right of the society to receive information must be weighed against the necessity of protecting confidential information, with priority given to the right of the society to receive information.

ECtHR reviewed a case where the entire print run of a newspaper in the Netherlands was seized after printing an old report by the Dutch internal security service. As the offset plates were not taken away during the seizure, the newspaper was reprinted and sold, upon which the prosecutor's office ordered another seizure.

ECtHR ruled that a violation of art. 10 of ECHR had occurred since the seizure and withdrawal of the newspaper were not necessary for the legitimate aim of preventing disclosure of confidential information, as the report had become public once the newspaper was reprinted with the remaining offset plates and made available to limited circulation and could no longer be considered state secrets after being covered and commented on by the press[33].

---

31 European Court of Human Rights judgment dated 26.03.1987 on Leander v. Sweden, Application 9248/81, *Avrupa İnsan Hakları Mahkemesi Kararlarından Örnekler* [Samples from the Judgments of the European Court of Human Rights] Council of Europe Publications, 309

32 İnceoğlu Sibel, *Avrupa İnsan Hakları Sözleşmesi ve Anayasa* [European Convention on Human Rights and the Constitution], Beta Yayınları, İstanbul, 2013, p. 357

33 European Court of Human Rights judgment dated 09.02.1995 on Vereniging Weekblad v. The Netherlands, *Avrupa İnsan Hakları Mahkemesi Kararlarından Örnekler* [Samples from the Judgments of the European Court of Human Rights], Council of Europe Publications, p. 372

6- MAINTAINING THE AUTHORITY AND IMPARTIALITY OF THE JUDICIARY

Maintaining the authority and impartiality of the judiciary is among the legitimate purposes set forth in art. 10, par. 2 of ECHR for which freedom of expression may be restricted. The function of the judiciary requires high levels of public confidence in the justice system. The freedom to express opinions may be restricted on matters of the judiciary to maintain trust in the system. However, like all interferences, this must be prescribed by law and considered necessary in a democratic society. Persons who report judicial news, criticize judicial decisions, and judges and attorneys engaged in judiciary duty must ensure that the authority and impartiality of the judiciary is protected when using their freedom of expression[34].

According to art. 6 of ECHR and provisions in local law, closed hearings may be ordered in order to pursue the legitimate aims to maintain the authority and impartiality of the judiciary, protect the privacy of the young, prevent crime, and protect the rights of others. In these cases, the right of the press to report on judicial matters and the society's right to receive information compete with the legitimate aims enumerated above, and closed trials may be held in the case of minors and issues found to be in violation of general morals as the legitimate aim is considered to have gained more weight[35].

In the Skalka v. Poland case, ECtHR observed that as a guarantor of justice, a fundamental value in a State in which the rule of law is observed, the courts have to enjoy public confidence if they are to be successful in carrying out their duties, and it might therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded. The courts, as with all other public institutions, are not immune from criticism and scrutiny. ECtHR ruled that persons with restricted freedom of expression enjoy the same rights as all other members of society in this area. A clear distinction must, however, be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate punishment would not, in principle, constitute a violation of art. 10 § 2 of ECHR[36].

---

34 Doğru Osman-Nalbant Atilla, *[illegible] Sözleşmesi* [European Convention on Human Rights], Pozitif Matbaası, Ankara, 2013, p. 241

35 D.J. Harris, M.O'Boyle, E.P Bates, C.M Buckley, *Avrupa İnsan Hakları Sözleşmesi Hukuku* [Law of the European Convention on Human Rights], A Council of Europe Publication, Şen Matbaası, Ankara, 2013, p. 501

36 European Court of Human Rights judgment dated 27.05.2003 on Skalka v. Poland, Application 43425/98 hudoc.echr.coe.int/eng

One measure designed to protect the authority and impartiality of the judiciary in Turkey is a provision in art. 183 of the Law of Criminal Proceedings, which states: *"no audiovisual recording or transmission equipment may be used inside a court building or inside the courtroom after the hearing starts. This provision is applicable to the performance of other judicial duties inside and outside court buildings."* This measure, while intended to protect the authority and impartiality of the judiciary, is at the same time restrictive of the rights of members of the press to report, and citizens to receive, information. The legitimate aim of this restriction must be weighed against the interference in a fundamental right to achieve a proportionate and balanced outcome. This balance may be achieved, as in the case of art. 183, by prohibiting the use of audiovisual recording and transmission equipment only, allowing people to take notes, make sketches or otherwise report on the proceedings, or by authorising members of the judiciary to prohibit audiovisual recording and transmission in some important cases.

Journalists and publishers of the *Evrensel* daily were fined by a local court to pay approximately 2500 Euros for two stories appearing in the daily on September 8 and 10, 2001 under the headings "Public Prosecutor admits detainee goes missing" and "Prosecutor falsifies report", which contained allegations against the Public Prosecutor in charge of the investigation into the alleged disappearance of Kemal Bilgin while under police custody. The applicants appealed to the Court of Cassation, arguing that they had no intention to attack the personal rights of the Public Prosecutor but sought to uncover how investigations into people losing their lives under custody were led; however, the Court of Cassation rejected the appeal and confirmed the judgment of the local court. The applicants then applied to ECtHR, claiming that they only printed the witness statements and documents in the İrfan Bilgin v. Turkey case previously handled by ECtHR with regard to the disappearance of Kemal Bilgin while under custody and that the prosecutor in charge of the investigation did not consider new information available to him, arguing that the fine imposed on them violated their freedom of expression.

ECtHR noted that the press played a critical note in a democratic society and needed to report on every issue of public concern provided that it protects the reputation and rights of others and adheres to its duties and responsibilities. ECtHR further stated that the freedom of press included exaggeration and provocation to a certain degree, imposing an obligation on members of the press to act in good faith and with due respect for the journalism profession.

ECtHR observed that since the present case was previously brought before ECtHR and concerned missing persons in Turkey, it was relevant to a current issue of public interest. While members of the judiciary must be protected against severe and unfounded attacks, it is natural that the press is interested in issues related to the functioning of the judiciary, and the full performance of the prosecutor involved in investigating and concluding the matter was essential to the confidence of the public in the judiciary.

ECtHR ruled that the critique of the prosecutor's attitude in the investigation and the allegations that the information in the published report was misleading were based on witness statements and facts previously determined by ECtHR in the preceding case. Therefore, the journalist had based their story on a published official report and had not been under an obligation to engage in further research. ECtHR concluded that the applicants had acted in good faith and the reasons presented by the local authorities for interfering in their freedom of expression were not relevant and adequate, leading to a violation of the applicants' freedom of expression[37].

C- RESTRICTION MUST BE PRESCRIBED BY LAW

Interference in freedom of expression guaranteed by art. 10, par. 1 of ECHR in order to pursue the legitimate aims specified in par. 2 must be prescribed by law and foreseeable from a legal perspective.

Accordingly, State Parties may only impose restrictions on freedom of expression by way of laws. Prescription by law will not only prevent arbitrary action by public authorities, but also allow citizens easy access to the regulations on restriction, and will help the consequences of the implementation of the law be more foreseeable[38].

When testing whether an interference in freedom of expression is prescribed by law and predictable from a legal perspective, the law allowing restrictions on freedom of expression must be accessible, foreseeable and understandable by everyone. The acts that will be restricted should be explained in as specific terms as possible; the law must clearly state the rights and obligations of citizens and include safeguards against arbitrary action by the authorities. Interference in freedom of expression based on a law that

[37] European Court of Human Rights judgment dated 08.01.2008 on Saygılı et al v. Turkey, Application 19353/03 www.yargıtay.gov.tr

[38] Yıldırım Zeki, *Terörizmin Propagandası Suçu* [The Crime of Terrorist Propaganda], Adalet Yayınları, Ankara, 2014, 140

does not contain these elements will be in violation of ECHR even if such law is adopted by a competent public authority. The Constitutional Court states the following on this matter:

"One of the pillars of the rule of law is '*certainty*'. Accordingly, legal arrangements must be clear, precise, comprehensible and implementable without any doubt or hesitation on the part of either the State or individuals, and must include safeguards against arbitrary exercise by public authorities. Certainty is tied to legal security, and each individual must know which legal sanction or consequence is associated with which specific acts or events, and what rights of interference are granted to public authorities. One will only then comprehend one's obligations and adjust one's conduct appropriately. Legal security means that norms are foreseeable, individuals can have confidence in the State in all their actions and behaviour, and that while imposing legal requirements, the State avoids methods that may disrupt this confidence[39]."

ECtHR concedes that many laws are inevitably couched in terms which are vague and require legal advice in practice, as shown by many years of experience. However, laws such as art. 301 of the Turkish Penal Code, which include excessively ambiguous terms and provisions that are too unforeseeable and ineffective at preventing arbitrary action, or legal provisions that grant too wide a margin of appreciation to the State constitute violations of art. 10 of ECHR[40].

Reviewing the request by the applicant, who was being held in the F-type prison in Bolu, the prison's education board decided not to deliver the Kurdish-language *Azadiya Welat* daily newspaper to the applicant. They based their decision on section 62 § 3 of Law no. 5275 on the Enforcement of Sentences and Preventive Measures, which provides that no publication containing information, articles, photographs and comments which are obscene or liable to jeopardise prison security should be delivered to convicted prisoners. The board denied the request, arguing that the newspaper was in the Kurdish language, that the prison had no staff who were able to read Kurdish, and that it had therefore been impossible to have the publication in question translated and tested in terms of its compliance with section 62 § 3 of Law no. 5275. The applicant's appeal was dismissed by the judicial authorities. The applicant applied to ECtHR and submitted that the newspaper in question was

---

39 Judgment of the Constitutional Court dated 10.12.2014 on Ali Karatay, Application 2012/990, www.anayasa.gov.tr

40 European Court of Human Rights, Altuğ Taner Akçam v. Turkey, judgment of 25.10.2011. Application 27520/07, hudoc.echr.coe.int/eng

freely available throughout Turkey and that it was not the subject of any ban or seizure order, and that the education board's decision to refuse delivery of the newspaper without knowing its content and establishing why it was liable to jeopardise prison security was a violation of his freedom of expression.

ECtHR noted that prisoners in general continue to benefit from all the fundamental rights and freedoms secured under ECHR apart from the right to freedom, and that the refusal amounted to an interference in the applicants' freedom of expression, which includes the right to receive information and ideas. After establishing that an interference had taken place, ECtHR tested whether the interference was prescribed by law.

Prescription by law also means that the law prescribing interference is accessible by citizens and its consequences can be foreseen. A law must also include safeguards against arbitrary exercise by public authorities and partial interpretations against the interest of individuals. ECtHR observed that art. 62 of Law no. 5275 recognized the possibility of convicted prisoners receiving periodical and non-periodical publications. The circumstances under which prisoners will be denied publications are enumerated in the law. These are publications containing information, articles, photographs and comments which are obscene or liable to jeopardise prison security.

According to ECtHR, the education board did not base its decision to deny the applicant's request on possible threats on prison security or obscene writings and comments. Laws must be able to adapt to changing situations, and ECtHR accepted that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. In the instant case, however, ECtHR noted that there was no legislative provision in art. 62 of Law no. 5275 mentioning a restriction or prohibition of access to publications on the ground of the language in which they were published. It further noted that the power of review granted to the prison authorities regarding prisoner access to publications only concern whether prison security is jeopardised or obscene content is found in the publication. Notwithstanding, the education board reached an arbitrary decision without due assessment of the content of the publication. The education board did not base its decision on any of the reasons provided by law. Therefore, ECtHR ruled that there had been a violation of the applicant's freedom of expression as the decision to deny the prisoner the right to access news and information by refusing to deliver a Kurdish newspaper was an interference that was not prescribed by law[41].

[41] European Court of Human Rights, Mesut Yurtsever et al v. Turkey, judgment of 20.01.2015. Application 14946/08, hudoc.echr.coe.int/eng

D- NECESSITY IN A DEMOCRATIC SOCIETY

The restriction of freedom of expression must be "necessary in a democratic society" as set forth in art. 10, par. 2 of ECHR. It can be inferred that the only necessity that justifies an interference in freedom of expression is the necessity originating from a democratic society. ECHR considers only one political model, which is democracy. Therefore, restrictions must be harmonious with a democratic social order[42].

The determination of whether an interference in freedom of expression is prescribed by law and based on the legitimate aims stated in art. 10, par. 2 of ECHR is generally easy; the determination of whether it was "necessary in a democratic society" proves to be much more challenging.

ECtHR conducts a meticulous analysis of whether any interferences in freedom of expression in order to achieve the legitimate aims stated in art. 10, par. 2 of ECHR are also necessary in a democratic society, and evaluates the necessities in a democratic society submitted by the public authority making the interference. A study of the ECtHR jurisprudence shows that necessity in a democratic society includes the elements of "rule of law, pluralism, tolerance and open-mindedness". The interference must respond to a "pressing social need", achieve a fair and proportionate balance between general public interest and the interests of the individual whose freedom of expression is subject to interference, and display an appropriate use of the margin of appreciation. Interference in freedom of expression that is not based on a pressing social need cannot be considered necessary to achieve a legitimate aim. Especially in the case of the press, necessity in a democratic society points to a "pressing social need." States are given some margin of appreciation when determining pressing social needs. ECtHR conducts a careful analysis of whether national authorities made reasonable and considerate use of their margin of appreciation in good faith, and tests whether the interference was "proportionate to legitimate aims" and whether the reasons put forward by national authorities were "relevant and adequate"[43].

---

42 Özbey Özcan, "Avrupa İnsan Hakları Sözleşmesi ışığında ifade özgürlüğü kısıtlamaları" [Restrictions on freedom of expression in the light of the European Convention on Human Rights], *TNOD Journal* p. 53, Barobirlik.org.tr

43 European Court of Human Rights judgment dated 29.03.2005 on Alınak v. Turkey, Application 42287/98 www.yargıtay.gov.tr

With regard to whether the interference was necessary in a democratic society, a determination is made as to whether there was a pressing social need that made each and every interference necessary. The national authorities making the interference in freedom of expression are in the best position to determine whether a pressing social need exists. While the national authorities enjoy a certain margin of appreciation when determining a pressing social need, this margin is not limitless. ECtHR makes a meticulous evaluation of whether the margin of appreciation is used appropriately and requires that freedom of expression standards applicable to all countries are protected.

In the Cox v. Turkey case, the applicant, who was a lecturer in a university in Turkey, was expelled and banned from entering Turkey because she had said to her students and colleagues at the university that "the Turks had expelled the Armenians and had massacred them. Moreover, the Turks had assimilated the Kurds and exploited their culture". ECtHR held that the applicant's statements did not constitute an offence, which was proven by the fact that she had never been prosecuted for having expressed those opinions, that the expressed opinions concerned issues that were being debated not only in Turkey but all around the world and even if the statements were disturbing for some people, tolerance of different opinions and open-mindedness were required in a democratic society, and since the State could not show any act by the applicant that presented danger for the society, being permanently banned from entering Turkey violated the applicant's freedom of expression in a way that was not necessary in a democratic society, thus infringing art. 10 of ECHR[44].

When evaluating an alleged interference in freedom of expression, even if the interference is prescribed by law and done for a legitimate aim, ECtHR studies whether the interference was **proportionate** to the legitimate aim pursued when testing for necessity in a democratic society, and if another form of interference which causes less infringement of freedom of expression could be made to achieve the same legitimate aim, the interference is deemed to be disproportionate and unnecessary in a democratic society, ruling a violation of ECHR[45].

---

[44] European Court of Human Rights judgment dated 20.05.2010 on Cox v. Turkey, Application 29933/03 hudoc.echr.coe.int/eng

[45] European Court of Human Rights judgment dated 11.10.2005 on Ceylan v. Turkey, Application 46454/99 www.yargıtay.gov.tr

Freedom of expression may be restricted with regard to statements that constitute a criminal offence or insult. This restriction may be in the form of criminal sanctions or monetary compensation. Considering the importance of freedom of expression for the society, the criminal sanction or compensation must not be so severe as to cause a chilling effect on people who use their freedom of expression or on others, preventing them from expressing their opinions on other matters of public importance in the future. Otherwise, the restriction on freedom of expression will not be proportionate to the legitimate aims stated in art. 10, par. 2 of ECHR, and will constitute a violation of art. 10 of ECHR.

In the Arslan v. Turkey judgment, ECtHR held that the applicant's opinions were conveyed in a work of literature (a book) that had far less impact on "national security", "public order" and "territorial integrity" than means of mass communication, and even though the offensive sections of the book painted people of Turkish origin in a negative light and had a hostile tone, they did not incite violence, armed resistance or revolt, and ruled that the punishment of one year and six months imprisonment was disproportionate and in violation of the applicant's freedom of expression[46].

According to the jurisprudence of ECtHR, the "necessity" in art. 10, par. 2 of ECHR corresponds to a "pressing social need." State Parties of ECHR enjoy a certain margin of appreciation when determining whether a "pressing social need" exists to cause "necessity." When evaluating a case, ECtHR decides whether the interference is within a state's margin of appreciation. When interfering in freedom of expression, states must make a narrow interpretation of the limited number of legitimate aims, choose the form of interference that restricts freedom of expression the least, and build a credible case of the legitimate aims for interference and reasons that prove its necessity[47].

When there is a conflict between two values guaranteed by ECHR, ECtHR holds that national courts must strike a fair balance, and when this balance is achieved in accordance with ECtHR's jurisprudence, ECtHR will need compelling reasons to overturn the ruling of a national court. ECtHR also points out that national courts will be granted a greater margin of appreciation when balancing between two conflicting rights in ECHR[48].

---

46 European Court of Human Rights judgment dated 08.06.1999 on Arslan v. Turkey, Application 23462/94 www.yargıtay.gov.tr

47 European Court of Human Rights, Dink v. Turkey, judgment of 14.09.2010. Application 2668/07, 6102/07, 3079/09, 7124/09 www.yargıtay.gov.tr

48 European Court of Human Rights judgment dated 16.06.2015 on Delfi AS v. Estonia, Application 64569/09 www.inhak.adalet.gov.tr

In the Mehmet Ali Aydın judgment of 04.06.2015, the Constitutional Court resolved that public authorities were to have a very narrow margin of appreciation when restricting the speech and statements of the applicant, who was a politician, and that opinions which are disturbing to the authorities or a section of the populace could not be restricted unless they contained an incitement to violence, justification of terrorist activities, or an incitement of hatred.

According to the Constitutional Court, freedom of expression is not restricted regarding content; however, in cases of racism, hate speech, war propaganda, inciting and provoking violence, inciting revolt or justifying terrorist activities where the freedom approaches its boundaries, the State has a greater margin of appreciation in their interference[49].

National authorities have a wider margin of appreciation in cases concerning religion or morals, which vary to a greater degree between societies, because they possess a better understanding of the situation; the margin of appreciation is narrower when it comes to expressions of opinion on political matters. Having regard to the addressee of the expression, judicial authorities enjoy the greatest margin of appreciation, followed by criticisms of ordinary citizens, public officials, politicians and administrators, and finally public institutions and the government[50].

When ascertaining whether a restriction of freedom of expression is necessary in a democratic society, ECtHR looks for a "pressing social need", "relevant and appropriate reasons" that prove such necessity, "proportionality" of the interference, and "balance and preference between individual and public interest" to apply to the present case and reach a decision.

An applicant who was a convict in the Elbistan E-Type Prison on charges of disrupting the unity of the State was the subject of a criminal investigation following a letter sent to the Ministry of Justice containing the phrases "Poisoning Mr. Abdullah Öcalan, the leader of the Kurdish people, is a severe violation of the law and is wounding to the conscience". The investigation led to public prosecution on charges of praising criminals and criminal activities pursuant to art. 215 of Law no. 5237. The local court agreed with the prosecution and sentenced the applicant to five months of imprisonment. Upon the applicant's appeal, the case was submitted to the 8th Criminal Chamber of the Court of Cassation ("Chamber").

---

[49] Judgment of the Constitutional Court dated 16.04.2015 on Bejder Ro Amed, Application 2013/7363, www.anayasa.gov.tr

[50] İnceoğlu Sibel, *Avrupa İnsan Hakları Sözleşmesi ve Anayasa* [European Convention on Human Rights and the Constitution], Beta Yayınları, İstanbul, 2013, p. 371

The Chamber referred to ECtHR's Handyside v. United Kingdom judgment, pointing out that matters of public interest must be discussed in complete freedom, that the State had a duty to promote an environment of debate with the only exclusion being acts that incite violence, and that opinions which are of disturbing or shocking nature to the public are also protected under freedom of expression.

The Chamber that dealt with the case in the form of an appeal held that referring to a convict as "Mr." did not incite violence or armed resistance, praise a criminal person or some criminal activity, and that referring to a convict as "Mr." was protected under freedom of expression as guaranteed by art. 10 of ECHR, the application of which is mandated by the last paragraph of art. 90 of the Constitution, and overturned the sentence in unanimity[51].

E- HATE SPEECH

Hate speech is prohibited by art. 4 of the UN International Convention on the Elimination of All Forms of Racial Discrimination and art. 19 of the UN International Covenant on Civil and Political Rights, which impose an obligation on states to prevent hate speech.

As one of the pillars of a democratic society, freedom of expression may be restricted to prevent forms of disparaging, offensive or alienating speech based on factors such as language, religion, race, gender or other differentiating factors among individuals in a society by classifying these as hate speech and denying them protection.

Hate speech is usually directed at a specific section of the society whose members share similar attributes. It challenges and rejects the civil and political rights and freedoms of its target populace. Speech that does not attack the civil and political rights and freedoms of its target populace cannot be considered hate speech even if it contains offensive remarks. Speech against legal entities, the State, political system, political institutions and symbols cannot form hate speech. Restrictions against such expressions may be imposed based on the legitimate aims discussed above, but they cannot be dealt with as hate speech. With regard to the importance of freedom of expression, restrictions based on hate speech must not hinder debates of general public benefit or deter people from expressing their opinions[52].

---

51 Court of Cassation (8th Criminal Chamber) ruling dated 23.05.2012, case number 2009/7316, judgment number 2012/17738 www.yargıtay.gov.tr

52 Yılmaz Halit, *Nefret Söylemi* [Hate Speech], Adalet Yayınevi, Ankara, 2015, p. 10

In the case of statements involving a criticism of a particular ethnicity or religion, the negative effects of the criticism on the members of the criticized ethnicity or religion must be considered and a balance must be struck between the freedom of expression of the critics and the sensitivities of the members of the criticized ethnicity or religion.

Expressions seeking to instill hatred against individuals belonging to a specific ethnicity, faith or similar common qualities damage social peace. They offend and harm the targeted group while inciting others to violence against them. Therefore, the restriction of hate speech serves the purpose of protecting human dignity and public order.

The "duties and responsibilities" imposed upon freedom of expression in art. 10, par. 2 of ECHR, and the prohibition of the abuse of rights in art. 17 are considered as obligations on freedom of expression to avoid abusing democratic values and offending or violating the rights of others by ECtHR, which holds that hate speech cannot be granted protection under art. 10.

With respect to the sanction imposed on Müslüm Gündüz by a local court and confirmed by the Court of Cassation on charges of inciting people to hatred and violence due to his words about introducing the rule of *sharia* on a television programme, ECtHR observed that Gündüz had expressed his opinions on a matter of public debate, that although his words contained the intent of overthrowing the democratic system and installing a *sharia* order, the mere fact of defending *sharia*, without calling for violence to establish it, cannot be regarded as hate speech, and that since the applicant's extremist views had already been known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the program on live television, the need for the restriction in issue had not been established convincingly[53].

In the Karatepe v. Turkey case, ECtHR, with respect to the sanctions imposed on the Mayor of Kayseri, Ş. Karatepe, for his words calling out to Muslims to "(...) maintain the idea, vengeance and faith in them", continuing "I was forced to attend this ceremony in this attire [a secular attire]. But you are under no obligation whatsoever. This system needs to change. We have been waiting; we will wait a little longer. Let's see what the future holds in store for us. Muslims; never let go of your determination and vengeance", which were deemed to be "inciting to violence" by national courts, pointed out that tolerance and respect towards the dignity of humans is among the

[53] European Court of Human Rights judgment dated 04.12.2003 on Müslüm Gündüz v. Turkey, Application 35071/97 www.yargıtay.gov.tr

pillars of a democratic and pluralistic society and that it may be necessary in a democratic society to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred. ECtHR also observed that the opinions stated by a known politician in a public meeting revealed a social perspective shaped by religious values, which was not compatible with the notion of pluralism that defines today's societies where multiple groups of opposing views live together. In particular, ECtHR held that the applicant could not be afforded protection under freedom of expression for calling a section of the populace to nurture the "determination, vengeance and hatred" against another section of the populace, that the applicant promoted defiance of the secular laws of the Turkish State and the words used were incompatible with the notion of tolerance and in violation of the fundamental values of peace and justice discussed in the preamble to ECHR. ECtHR noted that the applicant had been the mayor of a large province who played an even more significant public role in times of tension and conflict. Finally, ECtHR concluded that information or ideas being merely of shocking or disturbing nature would not be a sufficient reason to justify the interference, but having regard to the fact that the applicant's speech was based on hatred and promotion of violence, the restriction of the applicant's freedom of expression was based on legitimate reasons and no violation of ECHR had occurred[54].

A minor became the subject of a public lawsuit on charges of terrorist organisation propaganda with the allegation that he chanted the slogan of "no life without leader" during a demonstration for International Women's Day. He was acquitted of these charges by the local court. The Public Prosecutor appealed the decision before the 16th Criminal Chamber of the Court of Cassation.

As a result of the appeal process, the 16th Criminal Chamber of the Court of Cassation held that the slogan "no life without leader" chanted by the minor during a demonstration for International Women's Day did not incite people to armed resistance or revolt and could not be considered hate speech, rejecting the appeal of the Public Prosecutor and confirming the local court's judgment of acquittal[55].

[54] European Court of Human Rights, Şükrü Karatepe v. Turkey, judgment of 31.07.2007. Application 41551/98, hudoc.echr.coe.int/eng

[55] Court of Cassation (16th Criminal Chamber) ruling dated 11.05.2015, case number 2015/3015, judgment number 2015/2273 www.yargıtay.gov.tr

F- PROHIBITION OF ABUSE

It has been explained above that freedom of expression, one of the fundamental rights and freedoms enshrined in ECHR, can be restricted as it is not an absolute right. One of the limitations that the interfering public authority must abide by is the prohibition of abuse of rights explained in art. 17 of ECHR and art. 14 of the Constitution.

The prohibition of abuse intends to prevent the use of fundamental rights and freedoms guaranteed by ECHR to destroy the very fundamental rights and freedoms specified in ECHR[56].

Abuse of a right or freedom can occur when the right or freedom is used in a way contrary to its intention, or solely for the purpose of inflicting harm on another individual.

Art. 17 of ECHR states that *"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"*, explaining that restrictions on rights and freedoms enshrined in ECHR cannot be used towards the destruction of such rights and freedoms. With respect to freedom of expression, it is obvious that no interference may be made in thought, which precedes the expression stage. A restriction otherwise will completely destroy freedom of thought[57].

Art. 17 of ECHR emphasises that restrictions of fundamental rights and freedoms are an exception and their maintenance and proliferation the rule. This clarifies that interference by public authorities to restrict freedoms must be proportionate to the public aims pursued and not exceed what is necessary for achieving those aims[58].

In the case of expressions that incite terrorist activities or violence or constitute hate speech, if the individuals making the statement apply to ECtHR against the interference in their expressions, ECtHR considers such

---

56 Gülfidan O. Serkan, *Avrupa İnsan Hakları Sözleşmesinde Kötüye Kullanma Yasağı* [The Prohibition of Abuse in European Convention on Human Rights], Oniki Levha Yayınevi, İstanbul, 2013 p. 12

57 Özbey Özcan, "Avrupa İnsan Hakları Sözleşmesi ışığında ifade özgürlüğü kısıtlamaları" [Restrictions on freedom of expression in the light of the European Convention on Human Rights], *TNOD Journal*, Barobirlik.org.tr

58 Yıldırım Zeki, *Terörizmin Propagandası Suçu* [The Crime of Terrorist Propaganda], Adalet Yayınları, Ankara, 2014, p. 138

applications inadmissible due to their violation of the letter and spirit of ECHR as specified in art. 17[59].

In an application following the dissolution of Refah Partisi (Welfare Party) by the Constitutional Court on 16.01.1998 on the ground that it was the focal point for activities in violation of the principles of secularism, ECtHR observed that secularism was one of the fundamental principles of a state compatible with the rule of law, human rights and respect for democracy, and that an expression which does not observe this principle cannot be granted protection under freedom of expression on grounds that the statement in question is an expression of religious beliefs. ECtHR also noted that when acts committed under the freedoms enshrined in articles 9, 10 and 11 of ECHR endanger the institutions of the State, the State cannot be deprived of the right to protect such institutions, and that a certain reconciliation by the national courts between necessities in a democratic society and protection of personal freedoms was not in violation of the ECHR system. The court further observed that a political party may pursue its aim of changing the political regime in a State only if the means used are legal and democratic, and the proposed change is compatible with fundamental democratic principles, stating that noone may use the provisions of ECHR to undermine the ideals and values of a democratic society[60].

ECtHR's ruling states that fundamental rights and freedoms cannot be used as a means to introduce a political system that is incompatible with a democratic society, and the interference in such situations will not be a violation of ECHR; in other words, the abuse of rights is not protected by ECHR.

Even if interference in fundamental rights and freedoms complies with the limitations in ECHR including the abuse of rights, art. 18 of ECHR states "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" in order to prevent public authorities from abusing the right to interfere granted to them under exceptional circumstances.

---

59 Commission of Europe, decision of Glimmerveen and Hagenbeek v. The Netherlands, 11.10.1979, Application 8348/78, 8406/78

60 European Court of Human Rights judgment dated 13.02.2003 on Refah Partisi (Welfare Party) v. Turkey, Application 41340/98 www.yargıtay.gov.tr

G- CLEAR AND PRESENT DANGER

Clear and present danger has long been one of the criteria applied by the US Supreme Court when testing whether an interference in freedom of expression is necessary. For each interference in freedom of expression, the Supreme Court examines whether there is "clear and present danger." "Clear" means that the danger exists without any doubt, and "present" means that the statements used when exercising freedom of expression has an almost certainty of causing imminent harm[61]. When clear and present danger is used as a criterion, freedom of expression is not unlimited, but neither may it be restricted unless a clear and present danger of severe and concrete harm beyond public disturbance, offence and anger can be proven. When this criterion is employed, a statement of opinion, even if subversive in nature, cannot be considered dangerous in itself if made in an abstract manner, and it follows that freedom of expression may not be restricted.

Art. 215 of the Turkish Penal Code no. 5237 states that *"A person who publicly praises an offence or an offender shall be sentenced to up to two years in prison if such act results in a* ***clear and present danger*** *to public order"* making clear and present danger an essential element of the offence. A similar provision may also be found in art. 216 of the Turkish Penal Code no. 5237.

The ECtHR and Constitutional Court do not employ the "clear and present danger" criterion; this is replaced by "necessity in a democratic society" and "proportionality" as provided by art. 10, par. 2 of ECHR. When considered in the light of the practice of the US Supreme Court, "clear and present danger" provides full protection to abstract expressions of opinion and is more liberal in nature compared to the "necessity in a democratic society" and "proportionality" criteria used by the ECHR and Constitutional Court.

H- STATUS OF PUBLIC OFFICIALS

The use of freedom of expression by public officials and practitioners of certain professions may be different from that of private citizens "since it carries with it duties and responsibilities" according to art. 10, par. 2 of ECHR. An examination of ECHR reveals that the mere fact of being a public official or a member of an independent professional organisation is not a reason for limitation in itself. This is because the enumerated legitimate aims in par. 2 do not include "being a public official".

---

61 Korkmaz Ömer, *Düşünceyi Açıklama Özgürlüğü ve Sınırları* [The Freedom of Expression of Ideas and Its Limitations], Yetkin Yayınları, Ankara, 2014, p. 305

If persons using their freedom of expression are also public officials, ECtHR makes an extensive assessment of the situation, and, considering the importance of freedom of expression, points out that the interference in freedom of expression as a result of the person's public duty may not abrogate freedom of expression altogether, but may grant the State a greater margin of appreciation. The Constitutional Court also states in many rulings that an interference cannot change the essence of the freedom being used. The limits of criticism against public officials based on their public duties are wider than those for a private citizen. Public officials are expected to be more tolerant in this regard.

1- ATTORNEYS

Attorneys have a special position since they act as a liaison between the parties and the court in legal proceedings. They are bound by their duty to act in honesty and keep secrets. Prohibition of advertising and the disciplining of attorneys who violated this prohibition were interpreted more narrowly by ECtHR compared to other professions, and no violation of the freedom of expression was found. With respect to the statements of attorneys on the judiciary and legal proceedings, they must achieve a balance between the society's right to receiving information and the protection of the authority and impartiality of the judiciary and the professional honour of attorneys, which are stated as legitimate aims in art. 10, par. 2 of ECHR.

ECtHR has assessed a case where an attorney used the terms "cruel" (zalim), "bigot" (yobaz) and "[a person] with no regard for the rule of law" against the applicant, who was a Mayor, in an action presented before an administrative court for the dismissal of municipality employees. Although no criminal action was pursued against the attorney, he was ordered to pay approximately 8500 Euros in compensation as a result of a damages lawsuit. ECtHR observed that the interference in freedom of expression had to be considered as a whole with all statements concerned, the medium in which these statements were made, and the special circumstances of the parties involved. With respect to the facts in the case, ECtHR examined whether a fair balance had been struck between the necessity to protect the reputation and rights of the applicant, a Mayor, and the protection of the attorney's freedom of expression. The special nature of the profession practiced by members of the Bar must be considered. In their capacity as officers of the court, they are subject to restrictions on their conduct. They must be discreet, honest and dignified. But they also benefit from privileges regarding arguments used in

court. The statements were used in a petition submitted to an administrative court. There was no indication that there was a real risk that the statements would have appeared in the media. ECtHR carefully weighed the applicant's professional interest in freedom of expression against the interests of the victim, a politician, in being protected against personal insult, attached greater importance to freedom of expression, and ruled that the applicant's freedom of expression had been violated[62].

2- JUDGES

Judges are also in a partly different position due to their special duties and authority in proceedings. Like all public officials, the freedom of expression of judges is protected as they are individuals. Judges are expected to conduct themselves in a way to protect the honour and dignity of their profession and the respect for the judicial profession. Public authorities are expected to strike a fair balance between the freedom of expression of an individual and the legitimate aims of the State, and use its margin of appreciation in a reasonable and proportionate manner.

As a result of their duties, judges have to instill high levels of confidence in both the parties of the proceeding and the public at large; they therefore enjoy the greatest protection compared to other public officials. In other words, the limits of criticism against judges are narrower than those of other public officials[63].

In the Albayrak v. Turkey judgment, ECtHR ruled that the transfer of a judge of Kurdish origin, who had no personal work or performance issues and faced no allegations of acting in a partial manner towards his cases, due to watching a PKK-controlled television station and the comments he made were unnecessary in a democratic society and in violation of art. 10 of ECHR[64].

On August 5, 1999, the applicant, who was at the time a public prosecutor and acting as a private citizen, wrote a criminal complaint to the State Security Court against generals who were members of the National Unity Committee, which carried out the military coup of 12 September 1980 against the Turkish

---

62 European Court of Human Rights judgment dated 13.01.2009 on Erdoğan v. Turkey, Application 39656/03 hudoc.echr.coe.int/eng

63 D.J. Harris, M.O'Boyle, E.P Bates, C.M Buckley, *Avrupa İnsan Hakları Sözleşmesi Hukuku* [Law of the European Convention on Human Rights] A Council of Europe Publication, Şen Matbaası, Ankara, 2013, p. 503

64 European Court of Human Rights judgment dated 31.01.2008 on Albayrak v. Turkey, Application 38406/97 www.yargıtay.gov.tr

Parliament. He was subjected to disciplinary investigation, and the High Council of Judges and Prosecutors imposed a disciplinary sanction on the applicant in the form of a reprimand. On March 28, 2000, the applicant, in his capacity as a public prosecutor issued an indictment against the instigators of the military coup of 12 September 1980. Another criminal investigation was brought against the applicant, this time for abuse of position and for causing offence to the armed forces. The applicant was sentenced to suspended criminal fines with the Court of Cassation judgment dated 04.04.2001. Previously suspended from his position, the applicant was removed from office by the HCJP on 27.02.2003. The former prosecutor applied to the European Court of Human Rights against the disciplinary sanction and his subsequent dismissal because of the indictment he wrote.

ECtHR held that freedom of expression applied to public officials and their professional duties, and the reprimand and fines imposed on the applicant constituted interferences in his freedom of expression. The applicant was a public prosecutor and articles 240 and 159 of the Turkish Penal Code and articles 69 and 70 of the Law on Judges and Prosecutors, which were the basis of the fine imposed on the applicant, contained an adequate degree of certainty; therefore, no violation of the requirement of prescription by law was found. The applicant, in his position as public prosecutor, had the authority to apply laws directly in order to ensure justice and prevent crime; this brings on the applicant a duty to contribute to the efficiency of justice and the confidence of the public in the judiciary, and to act as a protector of personal rights and the State.

At the same time, ECtHR pointed out that members of the judiciary should show restraint in exercising their right to freedom of expression in all cases where the authority and impartiality of the judiciary were likely to be called into question, while great caution was required in all interferences in the freedom of expression of a prosecutor. The applicant had contributed to the debates on the possibility of prosecuting the instigators of the military coup despite the provisions of the transitional art. 15 in the Constitution. Therefore, freedom of expression must be protected to a high degree. The applicant has to be aware of the necessity for discretion in his duty and avoid responding via the press even when challenged. However, in the present case the applicant had a legitimate aim that had greater priority. The applicant had exposed a shortcoming in the democratic system. This required careful balancing of conflicting interests.

Considering the duty of loyalty to the State for public officials and the State's margin of appreciation for interfering in the freedom of expression of public officials, ECtHR held that the sanctions imposed on the applicant, namely a reprimand and a fine for abuse of position pursuant to art. 240 of the Turkish Penal Code, could be accepted as answering a pressing social need and found no violation of the applicant's freedom of expression in that regard.

On the other hand, ECtHR found that the applicant's conviction for offence of the military generals according to art. 159 of the Turkish Penal Code had not met a pressing social need, and that the armed forces had an increased protection against personal insult compared to other individuals. Finally, the ECHR examined the proportionality of the applicant's punishment, highlighting that the imposition of fines, dismissal from the post of public prosecutor and prohibition from the legal profession would inevitably have a chilling effect, not only on the official concerned but on the profession as a whole. As a result, ECtHR concluded that the sanctions were not proportionate to the legitimate aim pursued and there was a violation of the applicant's freedom of expression[65].

3- MILITARY PERSONNEL

No doubt, military personnel are also protected by freedom of expression. In the case of statements by military personnel regarding their institutions, the necessity for order and discipline in the army must be weighed against people's freedom of expression and tolerance for criticism required of the armed forces on the virtue of their being a public institution, and any violation of freedom of expression must be decided accordingly.

ECtHR has ruled that freedom of expression applies "inside the barracks" as well, meaning that all military personnel also enjoy freedom of expression. ECtHR holds that statements which are critical of military issues but do not incite violence or instigate disobedience in the armed forces must be tolerated[66].

---

[65] European Court of Human Rights judgment dated 13.11.2008 on Kayasu v. Turkey, Application 64119/00 hudoc.echr.coe.int/eng

[66] European Court of Human Rights judgment dated 08.06.1976 on Engel et al v. The Netherlands, trans. Osman Doğru, *Avrupa İnsan Hakları Mahkemesi İçtihatları* [Jurisprudence of the European Court of Human Rights], İstanbul, 2002, p. 134-155; European Court of Human Rights judgment dated 25.11.1997 on Gregoriades v. Greece, trans. Osman Doğru, *İnsan Hakları Kararlar Derlemesi* [Selected Judgments on Human Rights] vol. 2 İstanbul 1998 p. 327-339

4- POLITICIANS

Due to the nature of the work of politicians and their contribution to public benefit by stating their opinions on matters of public debate, freedom of expression becomes even more significant for elected politicians. According to ECtHR, the freedom of political debate "is the foundation of all democratic systems." Governments are subject to scrutiny not only by the legislative and judicial bodies, but by the public and media as well. Governments must be both extremely tolerant of criticism and prevent the restrictive interferences they impose on freedom of expression to cause a chilling effect on the use of that right. The private lives of politicians are more visible compared to ordinary citizens and matters that are considered within the private lives of citizens may be of public interest when they are associated with politicians. The boundaries of criticism against politicians are wider than those which apply to private citizens[67].

The nature of the statements made by politicians must also be taken into consideration when determining whether an interference was fair. The statements of a politician against another politician, the government or public bodies must be afforded extensive protection, while the statements of the same person that contain hate speech or endorse terrorism or violence must be granted less protection.

In the Castells v. Spain judgment[68], ECtHR sought to strike a balance between maintaining public order and preventing crimes, and the political criticisms directed to governments by their opponents, building a strong argument for freedom of expression for political opponents. The applicant, Castells, was at the time a senator in the Spanish Parliament and was part a political organisation supporting independence for the Basque Country. In 1979, he published an article titled "Outrageous Impunity" in a nationwide newspaper wherein he accused the government of not investigating murders committed in Basque Country. The parliamentary immunity of the applicant was withdrawn and he was sentenced to one year and one day in prison for "insults against the government." Upon the application, ECtHR tested whether the restriction was "necessary in a democratic society" and ruled:

67 İnceoğlu Sibel, *Avrupa İnsan Hakları Sözleşmesi ve Anayasa* [European Convention on Human Rights and the Constitution], Beta Yayınları, İstanbul, 2013, p. 359

68 European Court of Human Rights judgment dated 23.04.1992 on Castells v. Spain; for full Turkish text, see Osman Doğru, *[illegible] İçtihatları* [European Jurisprudence on Human Rights] Beta Yayınevi, İstanbul 1997, p. 217-238

"While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of ECtHR. The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for responding to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith." Based on the above, ECtHR ruled that Spain had violated art. 10 of ECHR, emphasising that criminal sanction was an excessive reaction against a criticism of which it should have been more tolerant[69].

I- JOURNALISTS AND FREEDOM OF PRESS

Journalists and freedom of press play crucial roles in a democratic society. Freedom of expression protects the conveyance of opinions and information by journalists as well as the means with which they are conveyed. There should be no interference on journalists about which opinions and information are imparted in what manner. Considering the role of the press in ensuring pluralism as one of the pillars of a democratic society, a much greater level of tolerance must be applied and journalists must not be restricted from using their right to freedom of expression due to the contribution of the press on matters of public interest. States have a positive obligation to prevent interference by third parties in journalists' use of the right to freedom of expression. No interference must be made in statements appearing in the press unless they incite violence, resistance or revolt[70]. However, journalists are not unlimited in terms of freedom of press. Statements of opinions must

[69] Özbey Özcan, "Avrupa İnsan Hakları Sözleşmesi ışığında ifade özgürlüğü kısıtlamaları" [Restrictions on freedom of expression in the light of the European Convention on Human Rights], *TNOD Journal* p. 29, Barobirlik.org.tr

[70] European Court of Human Rights judgment dated 23.09.2008 on Aktan v. Turkey, Application 20863/02 www.yargıtay.gov.tr

be within press ethics and in good faith. Otherwise, they will not be protected against interference under art. 10.

Art. 10 of ECHR does not prohibit prior restraint on publication. However, the dangers inherent in prior restraint call for the most careful scrutiny. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and appeal[71].

ECtHR states that, in a democratic system the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion and mass media. Moreover, the dominant position which a government occupies makes it necessary for it to display restraint in replying to the most severe attacks and criticisms, and ensure that interferences in freedom of expression due to criticisms of the government do not have a chilling effect on the expression of political opinions[72].

In the Ali Erol v. Turkey judgment, ECtHR held that since the press is subject to general criminal provisions in addition to the duties and responsibilities imposed on them by the nature of their profession, they must willingly adhere to the limitations to which they are subject. ECtHR stated that the article in question did not incite violence, armed resistance or revolt, thus imposing an obligation on the State, owing to the dominant position which it occupies, to display restraint in resorting to criminal proceedings, namely the conviction of the applicant and the closure of the newspaper for 20 days, particularly where other means are available for responding to the unjustified attacks and criticisms of its adversaries, and ruled that there had been a violation of art. 10 of ECHR[73].

ECtHR states the significance of the press and permissible interferences as follows in the Dink v. Turkey judgment: “The press plays a critical role in a democratic society. Although some boundaries must be respected, a journalist has a duty to report on every matter of public importance while adhering to his duties and responsibilities and ensuring that the reputations of others are protected. Freedom of press included exaggeration and provocation to a certain degree. Generally, any restriction on the use of freedom of expression

---

71 European Court of Human Rights judgment dated 29.03.2005 on Alınak v. Turkey, Application 42287/98 www.yargıtay.gov.tr

72 European Court of Human Rights judgment dated 18.07.2000 on Şener v. Turkey, Application 26680/95 www.yargıtay.gov.tr

73 European Court of Human Rights judgment dated 27.10.2005 on Ali Erol v. Turkey, Application 47796/99 www.yargıtay.gov.tr

needs to be established convincingly. While national authorities have a certain margin of appreciation, first it must be established whether there is a pressing social need that makes the imposition of such restrictions legitimate. As in the present case, when this restriction is imposed on the press, the national margin of appreciation intersects with the interest of maintaining and protecting freedom of press in a democratic society. This interest becomes even more significant when determining whether the interference is proportionate to the legitimate aims pursuant to art. 10, par. 2 of ECHR. The duty of ECtHR when testing for this rule is not to substitute national judiciary authorities, but to confirm whether their decisions are in line with their margin of appreciation pursuant to art. 10. Therefore, ECtHR must consider the interference as a whole, determining whether the reasons put forward by national authorities for the legitimacy of the interference were relevant and adequate. When doing so, ECtHR must be convinced that the national authorities applied rules which are compliant with the requirements of art. 10, and implemented them based on an acceptable assessment of the facts[74]."

An Internet news portal owned by Delfi As limited company in Estonia published up to 300 news articles a day at the time of the lodging of the application. On 24 January 2006 the applicant company published an article on the Delfi portal under the heading "SLK Destroyed Planned Ice Road" about a public ferry transport service. Following publication, the article attracted 185 comments, about twenty of which contained threats and offensive language directed against SLK. On 9 March 2006, SLK's lawyers requested Delfi AS to remove the offensive comments and claimed approximately 32,000 Euros in compensation for non-pecuniary damage. The offensive comments were removed on the same day; however, Delfi AS refused the claim for damages.

In the conclusion of the civil lawsuit initiated by SLK, it was noted that the activity of Delfi AS was not of a merely technical, automatic and passive nature; instead, it invited users to add comments, thus becoming a provider of content services rather than of technical services. The local court found that the precautionary measures to prevent offensive comments and the protection offered to personal rights were not adequate, and that it was contrary to the principle of good faith to place the burden of monitoring the comments on their potential victims, ruling on a compensation of 320 Euros to be paid to SLK.

[74] European Court of Human Rights, Dink v. Turkey, judgment of 14.09.2010. 2668/07, 6102/07, 30079/09, 7124/09 hudoc.echr.coe.int/eng

Following the conviction, Delfi AS applied to ECtHR with the claim that the compensation was a violation of freedom of expression. ECtHR noted that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds. ECtHR stated that the majority of the impugned comments amounted to hate speech or incitements to violence and as such did not enjoy the protection of art. 10 of ECHR.

ECtHR noted that in the impugned case, the contested matter was not the freedom of expression of the users posting the comments, but whether the judgment of national courts to the effect that Delfi AS was liable for comments posted by third parties was in violation of the freedom to impart information guaranteed by art. 10 of ECHR, observing that the number of visits to the applicant company's portal depended on the number of comments; the revenue earned from advertisements published on the portal, in turn, depended on the number of visits, and that the actual authors of the comments could not modify or delete their comments once they were posted on the applicant company's news portal – only the applicant company had the technical means to do this.

ECtHR found that the absolute duty of immediate take-down on publication (as applied to the applicant company) of comments that contained hate speech or incitement to violence and were therefore clearly unlawful did not constitute a disproportionate interference in the applicant's freedom of expression. It was also noted that the applicant was not in complete negligence of its duty as it had taken down the offensive comments immediately upon the application and used a filtering program, albeit inactively. Nevertheless, the automatic word-based filter used by the applicant company failed to filter out odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments.

Having regard to the fact that there are ample possibilities for anyone to make his or her voice heard on the Internet, ECtHR considered that a large news portal's obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence – the issue in the present case – can by no means be equated to "censorship on private media companies", and that the sanction of 320 Euros was not disproportionate to the aim pursued.

Based on the concrete assessment of the violent and hateful nature of the comments in question, the insufficiency of the measures taken by the applicant company even though the offensive comments were removed without delay after publication, and margin of appreciation afforded to the respondent State, ECtHR ruled that the measure did not constitute a disproportionate restriction on the applicant company's right to freedom of expression and no violation of art. 10 had occurred[75].

In the case against the *Ülkede Özgür Gündem* (The Free Agenda in the Country) newspaper published in Turkey, the national court considered that the content of certain reports and articles contained elements of propaganda, the approval of terrorist crimes and had identified officials who risked terrorist attack. Moreover, the offences had been continuous. Consequently, the publication and distribution of the periodical was suspended for a period of fifteen days. The applicant, who was the owner of the newspaper, applied to ECtHR with the claim that his freedom of expression had been violated.

ECtHR stated that freedom of expression constitutes one of the essential foundations of a democratic society. Although freedom of expression may be subject to exceptions, these must be narrowly interpreted and the necessity for any restriction must be convincingly established. Nevertheless, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases concerning the printed media, the national margin of appreciation is circumscribed by the interests of a democratic society in ensuring and maintaining a free press.

Art. 10 of ECHR does not, in terms, prohibit the imposition of restraints on publication. More importantly, it must be considered that the national courts did not order the confiscation of particular issues, but banned the publication of the newspaper as a whole for a period of 15 days. News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest. Therefore, when freedom of the press is at stake, national authorities have only a limited margin of appreciation to decide whether there is a "pressing social need" to interfere in the freedom of expression. Based on the above, ECtHR concluded that by suspending the publication and distribution of the newspaper for a period of 15 days based on the contents of previously published articles and news, the domestic courts

[75] European Court of Human Rights judgment dated 16.06.2015 on Delfi AS v. Estonia, Application 64569/09 www.inhak.adalet.gov.tr hudoc.echr.coe.int/eng

unjustifiably restricted the essential role of the press as a public watchdog in a democratic society and prevented the publication of similar articles and news in the future, which amounted to censorship and a violation of freedom of expression[76].

The Constitutional Court makes the following statements about freedom of the press and its significance: *Press is the principal means of disseminating thought by way of newspapers, journals or books, and is a way in which freedom of expression is exercised. Freedom of expression includes freedom of the press, and extends over the rights of expressing and interpreting opinions and thoughts as well as disseminating information, news and criticisms by means such as newspapers, magazines and books. Freedom of expression enables the dissemination and circulation of ideas to inform the individual and the society. A democratic society requires that thoughts, including those in opposition to the majority opinion, are expressed via all means available, stakeholders are won for the expressed thought, the thought is put into practice, and others are persuaded to practice the thought. Therefore, the freedom to express and disseminate opinions and the freedom of press are vital for the functioning of democracy*[77].

The Constitutional Court also states that when considered alongside the society's right to receive information and the duty of the press to impart information, freedom of expression as a fundamental human right depends on the ability of the press to undertake its duty as a public watchdog without being restrained, and that the margin of appreciation for interferences in the freedom of expression of journalists is very narrow[78].

The Constitutional Court reached the following conclusions regarding freedom of expression in an application made by the users of the twitter. com website for the blocking of the said website. *"The checks and balances provided by public and press scrutiny are as important to democratic systems as administrative and judicial oversight in order to ensure that those who hold public power use their authorities within legal limits. Since the functionality of the press as the overseer of public administration on behalf of the people depends on its freedom, freedom of press is a vital freedom that applies to*

---

76 European Court of Human Rights judgment dated 20.10.2009 on Ülper et al v. Turkey, Application 14526/07 hudoc.echr.coe.int/eng

77 Judgment of the Constitutional Court dated 25.06.2015 on Ali Gürbüz, Application 2013/724, www.anayasa.gov.tr

78 Judgment of the Constitutional Court dated 12.11.2014 on Fatih Taş, Application 2013/1461, www.anayasa.gov.tr

everyone. The internet is of instrumental value in modern democracies with regard to the use of fundamental rights and freedoms, chief among which is the freedom of expression. The social media platform provided by the internet is indispensable for sharing, expressing and disseminating information and opinions by people. This has made the internet and social media one of the most influential and widespread means of expressing opinions, which requires that states and authorities must be very careful with respect to regulations and measures in this area.

The freedom to express and disseminate thought is not absolute and unlimited. When using the freedom to express and disseminate thought, one must avoid attitudes and conduct that violate the rights and freedoms of others. The freedom to express and disseminate thought, as guaranteed by articles 26 and 28 of the Constitution, may be restricted subject to the provisions in art. 13 of the Constitution and for the reasons specified therein. Art. 13 of the Constitution states that fundamental rights and freedoms may only be restricted provided that their essence remains intact, the restriction is prescribed by law, and may not be in violation of the requirements of a democratic social order and the principle of proportionality[79]*."*

States are afforded a greater margin of appreciation when restricting the freedom of expression of the press with respect to news about violent and terrorist events, therefore balancing the society's right to receive information and the prevention of terrorist activities.

CONCLUSION

Freedom of expression is a fundamental right that all citizens enjoy equally, and is a pillar of a democratic society. Considering its close relationship to other fundamental rights and freedoms, an interference in freedom of expression will mean interference in other rights and freedoms as well. It must be kept in mind that freedom of expression as defined in art. 10, par. 1 of ECHR is the rule, and any interference in it must be an exception. More tolerance should be afforded to matters of public discussion and interest, enabling multiple perspectives to be voiced and allowing the citizens to reach a conclusion by evaluating all of the different opinions available.

Considering the importance of the duty of journalists and their effectiveness in disseminating ideas as well as the society's right to receive a varying range of opinions, interference in journalists' right to freedom of expression must

[79] Judgment of the Constitutional Court dated 02.04.2014 on Yaman Akdeniz, Application 2014/3986, www.anayasa.gov.tr

be avoided at all times. Politicians set out on their political career knowing that their conduct, including that in their private lives, will be under close scrutiny of the public, and there is public benefit in having their opinions on various matters known; therefore, much greater tolerance must be shown to politicians' freedom of expression and criticisms against political figures. Although public officials have a duty of loyalty to the State, the mere fact of being a public official is not a legitimate reason for restricting freedom of expression; therefore, freedom of expression must be protected even when criticisms directed to public institutions are severe.

In countries like Turkey where the threat against territorial integrity is greater, states have a greater margin of appreciation with respect to interferences in types of speech that incite terrorist activities, violence or revolt based on legitimate aims of public order, territorial integrity and prevention of crime.

In cases where it is mandatory to interfere in the fundamental right of freedom of expression, the interference must be prescribed by law, based on legitimate purposes enumerated in ECHR, and necessary in a democratic society. Even when these conditions are met and it is established that there is a necessity for the State to make an interference, the restriction must be proportionate to the legitimate aim pursued.

Although considerable improvements have been achieved in all fundamental rights and freedoms, including freedom of expression, after the ratification of the jurisdiction of ECtHR in Turkey, the lack of consensus even on basic issues such as national integrity and state regime prevent achieving universal levels in fundamental rights and freedoms. ECtHR is the foremost advocate of fundamental rights and freedoms thanks to the universal criteria imposed and applied in the recent years, and an awareness of ECtHR's judgments among the society and in the executive branch will yield positive results.

Considering that the Constitutional Court, Court of Cassation and Council of State are the supreme courts envisaged in the Constitution, the selection of their members and the fact that most members are senior judges and prosecutors, and the effectiveness of these courts in ensuring uniform execution nationwide, it can be argued that the attitude of the Constitutional Court, which employs criteria very similar to that of the ECHR, the Court of Cassation and the Council of State will be greatly influential in the protection of fundamental rights and freedoms.

♦♦♦♦

BIBLIOGRAPHY

Constitutional Court website. www.anayasa.gov.tr

Artun Avcı- *Türkiye'de İnternet ve İfade Özgürlüğü* [Freedom of Internet and Expression in Turkey]. Legal Yayıncılık İstanbul 2015

Avrupa İnsan Hakları Mahkemesi Kararları Işığında Ceza Yargılaması Kurum ve Kavramları [Institutions and Concepts in Criminal Procedure in the Light of the Judgments of the European Court of Human Rights]. A Union of Bar Associations of Turkey publication, Şen Matbaası Ankara 2008

Council of Europe - *Avrupa İnsan Hakları Mahkemesi Kararlarından Örnekler* [Samples from the Judgments of the European Court of Human Rights]. Ankara 2007

D.J. Harris, M.O'Boyle, E.P Bates, C.M Buckley. *Avrupa İnsan Hakları Sözleşmesi Hukuku* [Law of the European Convention on Human Rights]. A Council of Europe publication, Şen Matbaası Ankara 2013

Erhan Tanju- *İfade ve Basın Özgürlüğü* [Freedom of Expression and Press]. Seçkin Yayınları Ankara 2012

Halit Yılmaz- *İfade Özgürlüğü Sorunu Olarak Nefret Söylemi* [Hate Speech as a Freedom of Expression Problem]. Adalet Yayınları Ankara 2015

Mehmet Ali Zengin, *Türk Hukukunda Bilgi Edinme Hakkının Sınırları* [The Limits of the Right to Receiving Information in Turkish Law] Adalet Yayınları Ankara 2012

O. Serkan Gülfidan- *Avrupa İnsan Hakları Sözleşmesinde Kötüye Kullanma Yasağı* [The Prohibition of Abuse in European Convention on Human Rights]. Oniki Levha Yayınları, İstanbul 2013

Osman Doğru and Atilla Nalbant- *Tyâl·y˝ I l· ʔfl·ℕℙ !ØℕdzLJl· Sözleşmesi Açıklama ve Önemli Kararlar* [European Convention on Human Rights Annotations and Important Judgments] Pozitif Matbaası 2013

Ömer Korkmaz - *Düşünceyi Açıklama Özgürlüğü ve Sınırları* [The Freedom of Expression of Ideas and Its Limitations]. Yetkin Yayınları Ankara 2014

Özcan Özbey - *Avrupa İnsan Hakları Sözleşmesi Işığında İfade Özgürlüğü* [Freedom of Expression in the light of the European Convention on Human Rights]

Serkan Kızılyel- *Temel Hak ve Özgürlüklerin Kısıtlanmasında Kamu Güvenliği Ölçütü* [The Criterion of Public Security in the Restriction of Fundamental Rights and Freedoms] Beta Yayınları İstanbul 2013

Sibel İnceoğlu- *Avrupa İnsan Hakları Sözleşmesi ve Anayasa* [European Convention on Human Rights and the Constitution]. Beta Yayınları İstanbul 2013

Şeref Gözübüyük and Feyyaz Gölcüklü- *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması* [European Convention on Human Rights and Its Application]. Turhan Kitabevi Ankara 2013

Presidency of the Court of Cassation website, ECHR judgments. www.yargıtay.gov.tr

Zeki Yıldırım- *Terörizmin Propagandası Suçu* [The Crime of Terrorist Propaganda]. Adalet Yayınevi. Ankara 2014

Zühtü Arslan- *ABD Yüksek Mahkemesi Kararlarında İfade Özgürlüğü* [Freedom of Expression in US Supreme Court Judgments] Liberal Düşünce Topluluğu (Liberal Thought Society) Ankara 2003

BİLİMSEL, SANATSAL VE EDEBİ DEĞER TAŞIYAN ESERLERDE MÜSTEHCENLİĞİN İFADE ÖZGÜRLÜĞÜ BAKIMINDAN DEĞERLENDİRİLMESİ

A Review of Obscenity with Respect to Freedom of Expression in Scientific, Artistic and Literary Works

Tahir Hami TOPAÇ* – Caner GÜRÜHAN – Aydın AYGÜN*****

ÖZET

Devletin genel sağlık ve ahlakın korunması amacıyla ifade özgürlüğünün kullanılması aleyhindeki müdahaleleri özellikle müstehcen yayın ve eserler bakımından kendisini göstermektedir. Sınırlama gerekçesi olarak gösterilen genel sağlık ve genel ahlakın korunması gibi geniş yorumlanabilen kavramlar nedeniyle bu müdahaleler ulusal ve uluslar arası yargı kararlarında büyük ölçüde kabul görmektedir. İfade özgürlüğü aleyhindeki uygulamaların önemli bir sebebini de somut ve bilimsel kriterlere dayanmamakla eleştirilebilen bilirkişi incelemeleri oluşturmaktadır. Mevcut sorunların çözülmesi anlamında, müstehcenliğe konu yayın veya eserin bilimsel, sanatsal veya edebi değer taşıyıp taşımadığının bilimsel yöntemler ve daha özgürlükçü bir bakış açısıyla değerlendirilmesi, resmi bilirkişi sıfatını haiz Küçükleri Muzır Neşriyattan Koruma Kurulu'nda önemli bir takım yapısal değişikliler yapılması ve çocukların müstehcen yayın ve eserlerden korunması amacıyla internet ve televizyon yayınlarına erişimin doğrudan engellenmesi yerine filtreleme sisteminin benimsenmesi etkili olacaktır.

Anahtar Kelimeler: Müstehcenlik, İfade Özgürlüğü, Eser, Bilirkişi İncelemesi, Erişimin Engellenmesi

ABSTRACT

Interventions of the state are against to the use of freedom of speech so as to protect public morality and health show itself especially for the obscene publications and works. These interferences reason consept construing liberal like as public moral and health showing justification of restraint have been approved in national and international judicial decisions a vast scale. Expert examinations not based upon concrete and scientific criterion have also formed one of important reason of practices against freedom of speech.

* Judge Reporter in Court of Cassation Criminal Grand Chamber, Selçuk University Public Law Post Graduate Student- tahirhami@gmail.com

** Judge Reporter in Court of Cassation 5th Criminal Chamber, Kocaeli University Public Law Post Graduate Student canerguruhan@gmail.com

*** Judge Reporter in Court of Cassation 14th Criminal Chamber, İstanbul University Public Law Post Graduate Student. Special credit and appreciation to Ezgi Turaç, Post Graduate Student in Contemporary Turkish Literature, Hacettepe University and Serhat Ergin Kanat, Inspector in the High Council of Judges and Prosecutors for their critical comments and valuable contibutions in the drafting of this Article. aydinaygun@gmail.com

In meaning of solving of existing problems, subject to obscene publications or works must be evaluated whether they cary value scientific, artistic or literal with methods of scientific and more libertarion perspective. So, constuction of council official expert of preventing obscene publication must be changed. In addition, internet and television broadcasting must be filtered instead of blocked on purpose of save from obscene publications and works the children

Keywords: Obscenity, Freedom of Speech, Work, Expert Examination, Blocked of Access.

♦♦♦♦

INTRODUCTION

Throughout history obscenity has maintained its position as the subject of many legal as well as moral and religious discussions, and it remains to be a complex and ambiguous concept, which is perceived differently by different communities and even by different individuals.

Currently, the regulation of obscenity in criminal law as an offence is based on reasons such as protection of public morality and minors and prevention of crime, which can potentially contradict with the freedom of expression- an inalienable right of the individual in a free and pluralistic society. This situation becomes even more complicated in the case of scientific, literary and artistic work. For this purpose, the provision in the last paragraph of art. 226 of the Turkish Penal Code number 5237 date 26 September 2004 appears to be significant with regard to the rulings by national and international courts.

This study starts with a review of the conceptual relation between the freedom of expression and obscenity, and continues to discuss the frequency of restrictions that particularly target publications and works of an obscene nature, and moves on to an assessment of relevant national and international legislation and court rulings. The following section describes the difference between scientific, literary and artistic works as defined in the Turkish Penal Code art. 226/7, and discusses the protection of children against such works as provided by the relevant provision. The final section attempts to suggest the most appropriate solutions to the identified problems.

I. A CONFLICT OF RIGHTS AND OBLIGATIONS: FREEDOM OF EXPRESSION VERSUS OBSCENITY

In a democratic society, freedom of expression constitutes one of the essential fundamentals for social progress and the self-development of any

individual[1]. This freedom does not only apply 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 section of the population[2]. The Turkish Constitution and international documents impose restrictions to the freedom of expression, which often causes conflicts between the individual and the State. According to the jurisprudence of the European Court of Human Rights, restrictions to the freedom of expression must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society[3]. In this respect, one can easily argue that restrictions to the freedom of expression are found acceptable only in very exceptional cases, and the reasons for restriction contained in art. 10 of the European Convention on Human Rights are interpreted rather narrowly[4]. Yet, it would be of interest to analyse one particular reason for restriction, which is the protection of morality. This is because morality is a concept that may vary from one region to another even in a single country. Moreover, it is virtually impossible to find a single definition of European morality in neither the legal nor the social systems of the State Parties to the Convention[5]. In terms of the restrictions imposed on obscenity for the purpose of protecting public morality, the situation becomes problematic specifically in cases, which require a decision regarding whether priority should be given to the freedom of expression or the obligation of the State to protect public morality. Mostly observed in cases regarding obscene publications and works, these problems lead to significant infringement of rights due to the fact that the European Court of Human Rights recognizes a broad margin of appreciation to the local courts, which are in a better position to interpret the reasons for the protection of morals according to the Court[6].

---

1 For relevant comments and *Handyside v. UK* see, Monica Macovei, İfade Özgürlüğü-Avrupa İnsan Hakları Sözleşmesi'nin 10. Ƴaddesinin Uygulanmasına İlişkin Kılavuz [Freedom of Expression – A Guide to the Implementation of Article 10 of the European Convention on Human Rights] İnsan Hakları El Kitapları [Human Rights Handbooks] no. 2, p 8, footnote 4; Harris, Davis/O'Boyle, Michael/Bates, Ed/Buckley, Carla, (Translated by Mehveş Bingöllü Kilci, Ulaş Karan) Avrupa İnsan Hakları Sözleşmesi Hukuku, [Law of the European Convention on Human Rights], Turkish Edition 1, Council of Europe 2013, p. 455- 470; Doğru, Osman/Nalbant, Atilla, Ɏy̆ãl·ƴ I l·ʅſl·ǋ !ǾǊǳǇl· Sözleşmesi - Açıklama ve Őnemli Kararlar [European Convention on Human Rights- Annotations and Important Judgments], Volume 2, Turkish Court of Cassation, Edition 1, Ankara 2013, p. 181.

2 See *Handyside v. UK par.* 49, Harris/O'Boyle/Bates/Buckley, p. 470-471; Doğru/Nalbant, p. 245 et sq.; Macovei, p. 26-27.

3 For criteria regarding conditions for legitimate interventions to freedom of see *Nada v. Sweden* date 12 Sept. 2012 number 10593/08, par. 181, http://hudoc.echr.coe.int/eng?i=001-113118 (Accessed on 15.Nov.2015).

4 Doğru/Nalbant, p. 181.

5 *Müller et al. v. Switzerland*, par. 36; for ruling and comments see Doğru/Nalbant, p. 231; Harris/O'Boyle/Bates/Buckley, p. 491.

6 Harris/O'Boyle/Bates/Buckley, p. 491; Doğru/Nalbant, p. 245 et seq.; Macovei, p. 108-109.

Art. 10/2 of the European Convention on Human Rights names the protection of health and morals as conjoint reasons for the restriction of freedom of expression. Yet, protection of public health is a more tangible term, which can be defined more concretely than the concept of public morality, and therefore there have been much less controversies and quite a small number of cases brought before the Court with this argument. On the other hand, due to its characteristics, which are specified above, public morality is likely to constitute an issue in interventions that result in infringement of rights[7].

Regarding the book that was seized and destroyed for obscenity in the *Handyside v. United Kingdom Case*, the Court decided on non-violation based on the argument that states have a large margin of appreciation in the field of morals since, potentially, there may be harmful impacts on the development of young people. Moreover, in *Müller et al. v. Switzerland Case,* the Court made a similar interpretation and decided that the statement 'mostly to offend the sense of sexual propriety of persons of ordinary sensitivity' is reasonable in the case of these works, which were exhibited in a freely accessible public space without admission charges[8]. Although these judgments of the Court are criticized for lacking in diligence and awareness about the logical fundamentals of artistic expression in a pluralistic democracy[9], and they may be based on a notion as vague as public morals, they can still be considered acceptable since this notion exists in the Convention, and states enjoy a large margin of appreciation. Besides, there is also the judgment of the Court in *Vereinigung Bildender Künstler v. Austria* case, in which the Court made a ruling in favour of the freedom of expression, and emphasised the fact that paintings with obscene content are regarded as a form of artistic expression and social commentary, and concluded that the injunction imposed on the exhibition is in breach of art. 10 [10].

---

7 On the right to be prudent yet careful about authorising governments with the power of prohibiting publications for obscenity since most governments have a tendency for extreme or incorrect implementations, therefore abusive practices should not be allowed to replace accurate analysis regarding obscenity related issues- banning of works including An American Tragedy by Theodore Dreiser, The Well of Loneliness by Radclyffe Hall and Ulysses by James Joyce for obscenity. See Frederick Schauer, İfade Özgürlüğü Felsefi Bir İnceleme [Free Speech: A Philosophical Inquiry] (translated by M. Bahattin Seçilmişoğlu) Cambridge University Press, Edition 1, USA 1982, Section 3 Chapter 12

8 For judgments see Doğru/Nalbant, p. 245-256, 294-303.

9 For criticism see Harris/O'Boyle/Bates/Buckley, p. 473.

10 See *Vereinigung Bildender Künstler v. Austria,* 25.Jan.2007 n. 68354/01 http://hudoc.echr.coe.int/fre?i=001-79213 (Accessed on 15.Nov.2015).

The 1982 Constitution art. 26 on the freedom of expressing and disseminating thought does not name the protection of public morals as a reason for restriction. Since reasons for restriction are already foreseen in the Constitution for rights and freedoms such as privacy, freedom of the press, the right of public corporate persons to use non-press mass commutation instruments at their disposal, freedom of association, the right to assembly and demonstrations, and the right to form trade unions, it can, thus, be concluded that it was not specifically considered for restrictions to the freedom of expression. Hence, it can be argued that art. 26 of the Turkish Constitution is more liberal than art. 10 of the European Convention on Human Rights in terms of restrictions to the freedom of expression. In view of the aforementioned reason, Turkish judiciary would have been expected to be more favourable to the freedom of expression in their rulings, yet they have been rather disappointing in their performance so far. In this respect, there are some Court of Cassation rulings, in which the Court of Cassation does not argue the reasoning behind basing its judgment on one expert opinion report that qualifies the work as non-literary in value over the other that qualifies it of literary value[11] as per art. 226/7 of the TPC, and refers to the protection of public morals as a reason for restriction in art. 10/2 of the European Convention on Human Rights, and assesses the absence of scientific, artistic or literary value for the work by itself [12]. Although, these judgments may be defended

[11] Court of Cassation 14th Criminal Chamber judgment number 2012/13054 CF- 2013/388 J. on 22.Jan.2013 quashing the local court's decision to acquit the book by Guillaume Apollinaire translated into Turkish with the title *"Görgülü ve Bilgili Bir Burjuva Kadınının Mektupları"* on merits of literary value in accordance with TPC Article 226/7 as specified by the expert opinion report; on the grounds that *"… Prime Ministry Council for the Protection of Children Against Harmful Publications report dated 23. Aug.2010 qualifying the publication as '…of an obscene nature, sexually exploitative and provocative and hurtful for public morals and modesty'; and further opinion by a delegation of two expert opinions- one of whom is a criminal lawyer- dated 23.08. 2010 arguing '…completely lacking any aesthetic value, written merely for stimulating sexual impulses, activates bestial feelings in the reader, hurtful for public morals and modesty'* and *'moreover, the wording in the work in question is simple, ordinary and vulgar, and has no artistic or literary significance'*, *and thus the contents of the book and the entire case file as examined were found to constitute an offence*." Likewise 14th Criminal Chamber judgment dated 26.Feb.2013 number 2012/13055 CF - 2013/1873J.

[12] Court of Cassation 14th Criminal Chamber judgment dated 19.Feb.2013 judgment dated number 2012/13056 CF - 2013/1527J states: "... *Although Freedom of Expression as defined by European Convention on Human Rights art. 10 foresees that persons should be able to impart opinions and works free of any inference by public authority, in its par. 2, it expresses the need to act responsibly when exercising freedoms and adds that prohibitions or sanctions prescribed by law may be applied for the prevention of crime or disorder and protection of public health and morals ... The book in question does not contain any story*

based on the argument that the ECHR may be applicable as per art. 90/5 of the Constitution, thus there is no need to specifically indicate the reasons for restricting for the sake of public morals; however, this argument is completely unacceptable in accordance with art. 53 of the Convention. Because, this Article clearly states that nothing in the Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms, which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party. Due to the fact that the restriction for reasons of public health in art. 26 of the Constitution is not cited here, it would not be valid to argue that the interference was for the purpose of preventing harm to the mental wellbeing of children.

II. A SPECIFIC MATTER IN THE CRIME OF OBSCENITY: THE SUBJECT OF "WORKS OF SCIENTIFIC, ARTISTIC AND LITERARY VALUE"

A. In General

Art. 226 of the Turkish Penal Code names the conditions for and forms of punishment foreseen for the crime of obscenity in its initial paragraphs, yet in its final paragraph it provides an exception for scientific works, and states that except for par. 3[13] these provisions cannot be applicable to works of artistic and literary value as long as access by minors is prevented. This means that criminal provisions are not applicable at all in case of scientific works, and in case of works of artistic and literary value, they can only be applied in specific exceptional cases. Yet, as mentioned above it is difficult to argue that the judgments have been diligent in terms of making this distinction. Although it may not be clearly expressed in art. 10 of the Convention, potentially there may be more infringement of rights in case of freedom of expression since it covers a broad range varying from the freedom of artistic expression[14] to conducting, disclosing and disseminating scientific studies[15].

line, and employs vulgar and simple language aimed at only activating sexual impulses by describing unnatural, anal, lesbian sex involving animals and using children, and thus these expressions are depicted in a way that is hurtful for the public modesty and decency, sexually seductive and abusive, as well as repulsive in its descriptions of human defecation, and completely lacking any artistic or literary value."

13 Turkish Penal Code Article 226/3 says: *"Anyone who exploits children in the production of products including obscene images, printed or audio material shall be sentenced to imprisonment for a term of from five to ten years and a judicial fine of up to 5000 days. Anyone who imports such material, who duplicates, offers for sale, sells, transfers, stores, exports, holds in possession or submits it to the use of others shall be sentenced to imprisonment for a term of from two to five years and a judicial fine of up to 5000 days."*

14 Müller et al. v. Switzerland, par. 27.

15 For comments and judgments see Doğru/Nalbant, p. 183.

Considering the severity of the punishments foreseen for the crime of obscenity in law on one hand, and the possibility of certain non-punishment for the defendant in case of scientific works, and conditional non-punishment in case of works of artistic or literary value on the other, it becomes ever so important to determine whether the work is obscene as alleged, and to make the distinction between obscene publications and works of scientific, artistic and literary value. Although determining whether works of artistic or literary value should be included in the scope of art. 3 appears to be a straightforward process, it is worth considering how children can be prevented from reaching such works, and how this can be supervised.

B. Distinguishing Between Scientific Works and Works of Artistic and Literary Value

Art. 226/7 of the Turkish Penal Code contains three different definitions for work: scientific works, and works of artistic and literary value. These types of works are identical and closely related since they are all composed of statements by their author. In fact, The 1982 Constitution art. 27 specifies that everyone has the right to study and teach freely, explain, and disseminate science and arts, and to carry out research in these fields, and art. 1/B of Law 5846 on Intellectual and Artistic Works defines what is meant by work: "*any intellectual or artistic product bearing the characteristic of its author, which is deemed a scientific and literary or musical work or work of fine arts or cinematographic work*", and the following articles of this Law list scientific and literary works, musical works, works of fine arts, cinematographic works, adaptations and collections as types of intellectual and artistic works. Likewise, Berne Convention for the Protection of Literary and Artistic Works[16], to which Turkey is a party, specifies that the expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.

Evidently, due to the close relationship and points of intersection between these concepts, it may seem challenging to make a distinction, yet it is possible to define their basic characteristics in general terms.

The definition of science includes physical sciences or natural sciences for the observation and study of natural events and life, social sciences for the study of human behaviour, social events and their relevance, and applied

[16] Published in Official Gazette on 02.June.1951 number 7824

sciences for the practical application of scientifically acquired knowledge[17]; and it is described as the method, which employs controlled observation and based on its results, finds and verifies generalisations that are capable of explaining phenomena by way of logical thinking[18]; thus, scientific work may be defined as all kinds of work that are created within this scope.

However, there is not a commonly agreed definition for art[19]. The word art is sanat in Turkish, and it originates from *"sunu"* in Arabic, which means doing, making, work, influence and power[20]; and it is defined as all of the methods employed in the expression of emotions, design, beauty and similar notions, and outstanding creativity emerging from such activity[21], as well as the effort to produce pleasant forms with an aesthetic purpose[22]. Artistic work means all kinds of products created by the artist through these activities. The common elements of artistic works are thoughts, expressions, tangible or intangible materials, which lead to excitement or admiration[23]. All works of art commonly pursue the objective of stimulating aesthetic senses in their audience, but may be diversified in terms of the material they employ, which may include sound, drawing, color, and architecture among others. Thus, literary work is a work of art, which aims to stimulate the sense of aesthetics through language[24]. If the definition of the work of art is accepted as the product created through the use of diverse methods applied in the expression of emotion or thought, then one can easily see that this definition has a vast coverage, which includes paintings, sculptures, photography, and decorative arts, crafts, and also plastic arts[25].

---

17 Doğan, Mehmet, Bilim ve Teknoloji Tarihi [History of Science and Technology], Anı Yayıncılık, Ankara 2010, p. 3.

18 Cemal Yıldırım Bilim Felsefesi [Philosophy of Science], Edition 7, Remzi Kitapevi, İstanbul 2000, p. 19; Aytuğ Kutlu Dünden Bugüne Bilim ve Teknoloji [Science and Technology Past and Present], Biltav Yayınları, Ankara 1996, p. 8-9.

19 Orhan Okay, Sanat ve Edebiyat Yazıları [Essays on Art and Literature], Edition 3, Dergah Yayınları, İstanbul 2011, p. 19.

20 Mehmet Önal, Edebiyat Sanatı, [The Art of Literature], Kurgan Edebiyat Yayınları, Ankara 2012, p. 30.

21 http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.564cf4fdc3f940.72496465 (Access on 18.Nov.2015).

22 Ahmet Şişman, Sanata ve Sanat Kavramlarına Giriş [An Introduction to Art and Artistic Concepts], Yaz Yayınları, İstanbul 2006, p. 9.

23 Okay, s. 20.

24 Kamil Yeşil, Türk Edebiyatı Öğretmen El Kitabı [Turkish Literature Teacher's Handbook], Elips Kitap, Ankara 2007, p. 202.

25 Dilek Karakuzu Baytan, Fikri Mülkiyet Hukuku- Kavramlar [Intellectual Property Law-Concepts], Beta, İstanbul 2005, p. 26.

Literary work[26] is also a work of art by definition, and like all other intellectual and artistic works, it is inspired by the culture and society where it originates, and it is created with an artistic purpose in order to stimulate aesthetic sense in the mind and soul of its reader[27]. Literary works are different from other works of art in terms of the material they use, which are words[28]. Since literary work has coherence by nature, all the parts and details that comprise that literary work have a meaning in their specific entirety[29]. Therefore, if a work has one obscene part, it cannot be labeled as completely obscene.

Literary works are differentiated from scientific works by the fact that they are not specifically drafted by experts in a scientific field[30], and they do not pursue objectives such as teaching a science, defending an argument or establishing some rules[31]. Besides, in terms of general definitions, artistic and literary works are different from scientific works since they pursue an aesthetic purpose, they are subjective, and do not attempt to establish any facts.

There is another concept, which needs to be evaluated, and it is the concept of "*European Literary Heritage*" established by the European Court of Human Rights in *Akdaş v. Turkey Case*. The applicant is a publisher and in 1999 he published the Turkish translation of the erotic novel Les Onze Mille Verges by the French writer Guillaume Apollinaire (The Eleven Thousand Rods – On Bir Bin Kırbaç in Turkish), which contains graphic descriptions of scenes of sexual intercourse, with various practices such as sadomasochism or vampirism. After he was convicted for the crime of obscenity for this act, he applied to the European Court of Human Rights arguing that the book was a work of fiction, it contains literary techniques such as exaggeration and metaphor, and that the afterword of the edition in question was written by specialists in literary analysis, and that his freedom of expression was violated[32]. The Court, in the

---

26 Agah Sırrı Levend, Türk Edebiyatı Tarihi (History of Turkish Literature), Volume I, Edition 4, Türk Tarih Kurumu Basımevi [Turkish History Institute Press], Ankara 1998, p. 3-4; Önal, p. 136.

27 Cahit Kavcar, II. Meşrutiyet Devrinde Edebiyat ve Eğitim [Literature and Education in Parliamentary Monarchy Period II], İnönü Üniversitesi Eğitim Fakültesi Yayınları no. 3, Malatya 1988, p 13; Levend, p. 3.

28 Önal, p. 38.

29 Önal, p. 136.

30 Yusuf Şerif Kılıçel, Muhtasar Avrupa Edebiyatı [Contemporary European Literature], Maarif Vekaleti, [Ministry of Education], 1935, p. 6-7.

31 Sadık Tural, Zamanın Elinden Tutmak [Grasping Time], Yüce Erek Yayınevi, Ankara 2006, p. 15; Önal, p. 137.

32 Buyse, Antoine, Literary Heritage Judgment - A Novel by Apollinaire, 16.02.2010, http://echrblog. blogspot. com.tr/2010/02/literary-heritage-judgment-novel-by.html (Erişim

present case, took into consideration the fact that more than a century had elapsed since the book had first been published in France (in 1907), and that its has been published in various languages in a large number of countries, and that it had gained recognition through publication in the prestigious La Pléiade series; and after emphasising that acknowledgment of the cultural, historical and religious particularities of the Council of Europe's Member States could not go so far as to prevent public access in a particular language, in this instance Turkish, to a work belonging to the European literary heritage, it concluded that the interference was not proportional in a democratic society, and it was not intended to satisfy a pressing social need, and therefore there had been a violation of the freedom of expression[33].

Apparently, the Court considered the work in question as a part of European Literary Heritage, but just like in the case of obscenity, it did not offer any conceptual definition to clarify what was meant by this vague concept. Besides, the factors that lead to the Court's consideration of this work as an element of European Literary Heritage are not universal. Although the Court states that there has been a century since the first publication of the book, it overlooks the fact that the book was banned in France until 1970[34]. Moreover, taking into account the fact that it was not the book, which changed during the course of that century, but the society's value judgment about obscenity, it could be argued that this criterion would not be applicable in the case of a work with identical content, but had been published only a few years ago. Additionally, even though "*La Pléiade*" also includes classics of world literature[35], it has strong emphasis on works that were originally written

Tarihi: 19.11.2015); Burbergs, Maris, What is the European Literary Heritage?, 13.04.2010, http://strasbourgobservers.com/2010/04/13/what-is-the-european-literary-heritage-2/#more-54 (Accessed on 19.Nov.2015); http://cyberlaw .org. uk/ 2010/02/16/echr-decision-in-akdas-v-turkey-no-4105604/ (Accessed on 19.Nov.2015).

33 Buyse, Antoine, Literary Heritage Judgment - A Novel by Apollinaire, 16.02.2010, http:// echrblog. blogspot. com .tr/2010/02/literary-heritage-judgment-novel-by.html (Accessed on 19.Nov.2015); Burbergs, Maris, What is the European Literary Heritage?, 13.04.2010, http://strasbourgobservers.com/2010/04/13/what-is-the-european-literary-heritage-2/#more-54 (Accessed on 19.Nov.2015); http://cyberlaw .org. uk/ 2010/02/16/echr-decision-in- akdas-v-turkey-no-4105604/ (Accessed on 19.Nov.2015).akdas-v-turkey-no-4105604/ (Accessed on 19.Nov.2015).

34 Antoine Buyse, Literary Heritage Judgment - A Novel by Apollinaire, 16.02.2010; http:// echrblog. blogspot.com.tr/2010/02/literary-heritage-judgment-novel-by.html (Accessed on 19.Nov.2015).

35 For full list See: https://en.wikipedia.org/wiki/Album_de_la_Pléiade42627727 (Accessed on 19.Nov.2015).

in French[36]. In this case, there is still a certain degree of uncertainty regarding works that have been published in France or elsewhere, but not included in this list. In this respect, the definition of the concept is expected to develop with the jurisprudence of the Court.

C. Preventing Minors From Access to Obscene Publications

1. Council For the Protection of Children From Harmful Publications

Currently, all countries face challenges in providing protection for children with a view to ensure that they grow up to become emotionally and physically healthy individuals. The preamble of the United Nations Convention on the Rights of the Child, which is the most comprehensive and widely accepted international instrument in this subject, refers to the importance of the traditions and cultural values of each people for the protection and harmonious development of the child.

The international legal notion, which defines the development of the child as a socially harmonious individual is transcribed in our domestic legislation in The 1982 Constitution art. 41, and names the State responsible for protecting children against abuse and all forms of violence.

Although there are not any provisions regarding the rights of the child in either the 1921 or the 1924 Constitutions, Law 1117 enacted on 21.June.1927 pursues the objective of protecting children against publications that are not necessarily obscene yet harmful- meaning pedagogically harmful publications[37], and art. 2 of this Law foresees that the authorised council shall be responsible for identifying harmful publications and imposing restrictions. Subsequent to a comprehensive amendment to this Law introduced by Law 3266 dated 6. March.1986, the Council was appointed as the official expert opinion for identifying obscene publications, too.

The Council For the Protection of Children From Harmful Publications decides whether printed works are harmful for minors by taking into account the fundamental objectives and principles prescribed in Basic National Education Law 1739 dated 14. June. 1973, which include the development of a physically, mentally, morally, spiritually and emotionally balanced and healthy personality and character.

---

36 https://en.wikipedia.org/wiki/Bibliothèque_de_la_Pléiade (Accessed on 19.Nov.2015).

37 http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.5644e2a57d5322.42627727 (Accessed on 18.Nov.2015).

Art. 6 of Law 1117 limits the mandate of the Council by excluding works of art that have philosophical, social, scientific and aesthetic value from the scope of this law, yet it does not offer any definition regarding the nature of works of philosophical, social, scientific or aesthetic value. Since the works are not pre-examined by an expert, who is capable of classifying their real nature, and instead, the examination is basically performed by this Council, which is mainly composed of bureaucrats, works that should have been classified as works of philosophical, social or artistic value are often misclassified as harmful publications, and this practice undermines the freedom of expression and freedom to publish. These concerns also apply to cases, in which the Council is commissioned for identifying obscenity in its capacity as the official expert opinion. Formed in accordance with Law 1117 art. 2, the Council consists of eleven members, who are mostly bureaucrats[38], but it does not include any expert members such as pedagogues or sexologists; although, their presence is of utmost importance for ensuring criminal justice due to the provision contained in the Turkish Penal Code art. 226/7. On the other hand, the freedom to publish constitutes a method of disseminating expression and opinions within the scope of freedom of expression as prescribed in international and national law. Therefore, it is important give it priority with respect to the rule of law, and certainty and predictability of the law, and to prevent the Council from imposing restrictions to the freedoms of individuals, who are involved in artistic activities.

2. Blocking Access

Turkish Penal Code art. 226/7 starts with the rule that crime of obscenity is not applicable to scientific works, but mentions in the same sentence that children should be protected from works of artistic and literary value, which have an obscene content. The alternative to the Council For the Protection of

[38] The Council is composed of total eleven members: Bureaucrats- one each- selected from the Prime Ministry, Ministry of Justice, Ministry of Interior Affairs, Ministry of National Education, Presidency of Religious Affairs and Ministry of Family and Social Security, and one medical professional from the Ministry of Health, one member with a reputition in fine arts selected by the Ministry of Culture, one academic faculty member with at least a phD selected by the Higher Education Council, and one member selected by the General Directorate of Press Broadcasting and Information by drawing lot from amongst three members of press nominated by Ankara, İstanbul and İzmir journalists associations- one each- (For three years, Turkish Journalists Association has been refusing to respond to the letters by General Directorate of Press, Broadcasting and Information requesting appointment of members for this board, which it rejects and describes as one of the major obstacles before the freedom of expression see http://www. haberaktuel.com/turkiye-gazeteciler-cemiyetinden-muzir-kararina-tepki-haberi-433444.html, Accessed on 13.Nov.2015)

Children From Harmful Publications may be to impose blockages in order to protect children from publications and works of an obscene nature.

The content and the medium of communication are irrelevant in determining whether an expression benefits from free speech, therefore all the instruments employed in the development, communication, and distribution of printed works, radio and television broadcasts, the Internet, paintings, sculptures, cinematography and similar information and comments benefit from safeguards foreseen for this freedom[39]. In this respect, blockage is regulated in various laws depending on the content of the specific expression in question. The most prominent are: Law no. 5651 on Regulation of Publications on the Internet and Combating Crimes Committed by Means of Such Publications date 4.May.2007, and Law 6112 on the Establishment of Radio and Television Enterprises and their Media Services date 15.Feb.2011 as well as jurisprudence on injunction orders for blocking access.

Law 5651 art. 5651 regulates that the Court may decide on blocking access in case there is substantial suspicion that certain crimes including that of obscenity are being committed[40]. Par. 4 of the same Article states that the Information and Communications

Authority of Turkey may block access upon its own initiative, in case the website content or page provider is located in another jurisdiction, or in case there is substantial suspicion regarding the committal of the crimes of sexual abuse of children, prostitution or obscenity even if it is located within the country. However, this procedure takes place in the absence of a judicial decision, and hence contradicts with the principle of the rule of law, since it means a direct interference by the administration to fundamental rights and freedoms.

---

39 Doğru/Nalbant, p. 183.

40 From a comperative law perspective, many countries implement blockages specifically in case of child pornography. For example Denmark, Sweden, Finland, Holland, Italy, UK, Switzerland, New Zeland, South Korea, Canada and Taiwan block websites with child pornography content. Italy and Finland regulate their blockages with legislation, whereas others mainly block access through their contracts with Internet service providers. For further information see Tekin Memiş "Erişimin Engellenmesi, Hukuki Sorunlar ve Çözüm Yolları" ("Blockages, Legal Issues and Solutions"), *Erzincan Üniversitesi Hukuk Fakültesi Dergisi (Erzincan University Law Faculty Periodical), V. XIII,* p. 3-4 y. 2009, p. 162; For international practices regarding blockages see Doğan Kılınç, "Türk Hukukunda ve Mukayeseli Hukukta İnternet Sitelerine Erişimin Engellenmesi ve İfade Özgürlüğü" ("Blockages to Websites and Freedom of Expression in Turkish and Comparative Law"), *Gazi Üniversitesi Hukuk Fakültesi Dergisi (Gazi University Law Faculty Periodical), V. XIV*, p. 2, y. 2010, p. 418 seq.

On the other hand, art. 8/1 of Law 6112 on the Establishment of Radio and Television Enterprises and their Media Services primarily states that media service providers shall comply with the principles in the Law, and act in a socially responsible manner when offering their broadcasting services; and continues by stating that broadcast services cannot be obscene in its subpar. n. In its art. 8/3, the same Law foresees that on-demand broadcast service providers have the obligation to make sure that the broadcast services, which may be of a nature that can potentially create a negative impact on the physical, mental or moral development of children and young people, are offered in a such a way that it is not possible for such minors to hear or watch this broadcast under normal conditions. Additionally, Law 9/6 subpar. ç expresses that commercial communication shall not be harmful for the physical, mental or moral development of children. Following its articles regarding how broadcasts of an obscene nature should be prevented from the reach of children, in its art. 32 the Law regulates the sanctions for media service providers who act in violation, and offers a range of sanctions including varying degrees of administrative fines depending on the severity of the breach, and the medium and coverage of the broadcast; and also administrative injunctions including stoppage of the broadcast of the program in question or its complete removal from the catalog in the case of on-demand broadcast services[41].

Beside the already mentioned legislation, investigations by the press prosecution services, and injunction orders by courts may also be considered part and parcel of the measures foreseen for protecting children from obscene content.

Not only do the existing practices regarding blockage of access obviously fail to comply with the principle of proportionality, but also the distinction foreseen in the Turkish Penal Code art. 226/7 is completely disregarded in all of these regulations. Since publications and works of such scope are processed regardless of their scientific, artistic or literary value, this means that any content, which is considered obscene can be easily blocked at the expense of violating freedom of expression.

[41] Article 32/4 of the Law states that if a program is stopped from being broadcast due to an administrative injunction, the network has to broadcast in its slot non-commercial programs of public benefit provided by the Supreme Council such as programs on education, culture, rights of women and children, physical and moral development of youth, fight against drugs and addictions, better use of the Turkish language, environmental protection, problems of disabled people, health etc.

Moreover, one can hardly argue that filtering systems are sufficiently utilized in Turkey, although they should be preferred over direct blockage since they help to protect children from such content, and they are more compatible with the exercise of the freedom of expression.

CONCLUSION

Arguably, State interventions aiming to protect public health and morals constitute one of the most major obstacles before the exercise of the freedom of expression. These interventions are specifically more common with regard to obscene publications and works, and the European Court of Human Rights consider them justifiable in many instances since it is so difficult to define these concepts. Although there is not any provision in the Constitution that allows for restriction of freedom of expression due to public morals, this is a practice that is found acceptable in many court rulings in Turkey as well. An improvement to the level of awareness in the judiciary regarding freedom of expression may as well be of benefit for relieving the already excessive caseload.

Moreover, rulings by all judiciary bodies, including most prominently the Court of Cassation, can be more liberal if they adopt criteria of a tangible and scientific nature instead of assessing the obscenity of the work in question by themselves or basing their rulings on inadequate expert opinion reports.

Analysis of the rulings suggests that breaches of the freedom of expression are mainly caused by the deficiencies of experts who are commissioned for identifying whether there is obscenity. Although the Council for the Protection of Children Against Harmful Publications is often criticized for its lack of expert members, it is considered to be the “official expert opinion”, and this means a notable workload for the Council. Thus, the Council has unjustifiably broad interpretations for the concept of obscenity, which lead to unfavourable results in terms of the freedom of expression. Also, they are not able to respond to the applications for their expert opinion reports in due time, and this constitutes violation of the right to a fair trial in terms of concluding the proceedings within a “reasonable time”. Therefore, it is almost inevitable that there should be substantial structural changes to the Council for the Protection of Children Against Harmful Publications. It would be useful to increase the number of seats in the Council to enable a higher level of responsiveness, and to form new departments, which report to the Council, and which are composed of experts who are capable of identifying whether the work referred for assessment of obscenity has any scientific, artistic or literary value.

Interventions by the State can be more justifiable in view of the conflict between the obligations of the State and freedoms if according to art. 226/7 of the Turkish Penal Code, the protection of children against obscene publications and works can be rearranged to include more internationally acceptable elements such as filtering systems, and less direct blockages of access through legal provisions in the case of the Internet and television, and through public prosecutors of press or courts in the case of printed or visual material.

♦♦♦♦

BIBLIOGRAPHY

Monica Macovei, İfade Özgürlüğü-Avrupa İnsan Hakları Sözleşmesi'nin 10. Maddesinin Uygulanmasına İlişkin Kılavuz [Freedom of Expression – A Guide to the Implementation of art. 10 of the European Convention on Human Rights], no. 2

Davis Harris/ Michael O'Boyle, / Ed Bates, / Carla Buckley, (Translated by Mehveş Bingöllü Kilci, Ulaş Karan) Avrupa İnsan Hakları Sözleşmesi Hukuku, [Law of the European Convention on Human Rights], Turkish Edition 1, Council of Europe 2013

Osman Doğru/ Atilla Nalbant, Ɏyãl·ƴ I l·ʅƭl·NJP !ØNJdzLJl· Sözleşmesi- Açıklama ve Önemli Kararlar [European Convention on Human Rights- Annotations and Important Judgments], Volume 2, Turkish Court of Cassation, Edition 1, Ankara 2013

Frederick Schauer, İfade Özgürlüğü Felsefi Bir İnceleme [Free Speech: A Philosophical Inquiry] (translated by M. Bahattin Seçilmişoğlu) Cambridge University Press, Edition 1, USA 1982

Mehmet Doğan, Bilim ve Teknoloji Tarihi [History of Science and Technology], Anı Yayıncılık, Ankara 2010

Cemal Yıldırım, Bilim Felsefesi [Philosophy of Science], Edition 7, Remzi Kitapevi, İstanbul 2000

Aytuğ Kutlu, Dünden Bugüne Bilim ve Teknoloji [Science and Technology Past and Present], Biltav Yayınları, Ankara 1996

Orhan Okay, Sanat ve Edebiyat Yazıları, [Essays on Art and Literature], Edition 3, Dergah Publishers, İstanbul

Mehmet Önal, Edebiyat Sanatı [The Art of Literature], Kurgan Edebiyat Yayınları, Ankara 2012

Ahmet Şişman, Sanata ve Sanat Kavramlarına Giriş [An Introduction to Art and Artistic Concepts], Yaz Yayınları, İstanbul 2006

Kamil Yeşil, Türk Edebiyatı Öğretmen Elkitabı, [Turkish Literature Teacher's Handbook], Elips Kitap, Ankara 2007

Dilek Karakuzu Baytan, Fikri Mülkiyet Hukuku- Kavramlar Intellectual [Intellectual Property Law-Concepts], Beta, İstanbul 2005

Agah Sırrı Levend, Türk Edebiyatı Tarihi [History of Turkish Literature], Volume I, Edition 4, Türk Tarih Kurumu Basımevi, [Turkish History Institute Press] Ankara 1998

Cahit Kavcar, II. Meşrutiyet Devrinde Edebiyat ve Eğitim [Literature and Education in Parliamentary Monarchy Period II], İnönü Üniversitesi Eğitim Fakültesi Yayınları [Inönü University Education Faculty Press] no. 3, Malatya 1988

Yusuf Şerif Kılıçel, Muhtasar Avrupa Edebiyatı, [Contemporary European Literature], Maarif Vekaleti, (Ministry of Education), 1935

Sadık Tural, Zamanın Elinden Tutmak (Grasping Time), Yüce Erek Yayınevi, Ankara 2006

Antoine Buyse, Literary Heritage Judgment - A Novel by Apollinaire, 16.02.2010, http:// echrblog. blogspot. com .tr/2010/02/literary-heritage-judgment-novel-by. html (Accessed on 19.Nov.2015)

Maris Burbergs, What is the European Literary Heritage?, 13.04.2010, http:// strasbourgobservers.com/2010/04/13/what-is-the-european-literary-herita-ge-2/#more-54 [Accessed on 19.Nov.2015]

Tekin Memiş "Erişimin Engellenmesi Hukuki Sorunlar ve Çözüm Yolları" ["Blockages, Legal Issues and Solutions"], *Erzincan Üniversitesi Hukuk Fakültesi Dergisi [Erzincan University Law Faculty Periodical], V. XIII,* y. 2009

Doğan Kılınç, "Türk Hukukunda ve Mukayeseli Hukukta İnternet Sitelerine Erişimin Engellenmesi" ["Blockages to Websites and Freedom of Expression in Turkish and Comparative Law"], Gazi Üniversitesi Hukuk Fakültesi Dergisi (Gazi University Law Faculty Periodical), V. XI, p. 2, y. 2010

INTERNET SOURCES

http://www.haberaktuel.com

http://www.tdk.gov.tr https://en.wikipedia.org

http://echrblog. blogspot.com

http://hudoc.echr.coe.int

AVRUPA İNSAN HAKLARI MAHKEMESİ KARARLARI IŞIĞINDA NEFRET SÖYLEMİ VE DİNE HAKARET

Hate Speech and Blasphemy in the Light of the Decision of European Court of Human Rights

Hüseyin GÖKTEPE*

ÖZET

İfade özgürlüğü hem birey açısından hem de toplum açısından hayati öneme sahip olan bir temel haktır. Bireyin ve toplumun gelişimi ve dönüşümü bu hakkın özgürce kullanımına bağlıdır. Bunun yanında devletlerin demokratik yönden ilerlemesi, hukuk devleti ilkelerinin tam anlamıyla hayata geçirilmesi, hukuki standartların yükseltilmesi ile bu hakkın kullanımı arasında doğrudan bağlantı vardır.

Ancak bu hakkın kullanımı aynı zamanda hukuken korunan bazı haklarla karşı karşıya gelmesine ve çatışmasına sebebiyet verebilmektedir. Bu duruma örnek olarak son yıllarda ifade özgürlüğünün sınırlandırma sebeplerinden biri olan nefret söylemi içerikli ifadeler gösterilebilir. Nefret söylemi bireylerin dini, dili, cinsiyeti, cinsel tercihleri, tabi olduğu etnik grup, kültürel kimliği ve kültürel değerleri gibi birtakım farklılıklar hedef alınarak kullanılan olumsuz söylemlerdir. Bu kapsamda dine hakaret içerikli ifadeler, nefret söyleminin en hararetli tartışmalarının olduğu örneklerinden biridir. Bu ifade bilgi teknolojileri ve iletişim araçları vasıtası ile yapıldığında daha büyük etki yaratmaktadır. Nefret söyleminin hedefi olan birey ya da gruplar incindiği gibi bireyin yaşadığı toplumun da uzun vadede toplumsal barışına ve huzuruna zarar gelebilmektedir. Böylesi bir durumda hukuken bir müdahalede bulunulup bulunulmaması noktasında tercih yapılması gerekmektedir.

Bu makalede dine hakaret ve ifade özgürlüğü olgusu arasındaki ilişki teorik olarak ele alınacak ve konuya ilişkin Avrupa İnsan Hakları Mahkemesi kararları analiz edilmeye çalışılacaktır.

Anahtar Kelimeler: İfade Özgürlüğü, Nefret Söylemi, Dine Hakaret, Avrupa İnsan Hakları Mahkemesi Kararları.

ABSTRACT

Freedom of speech is fundamental right both for individuals and society. Development and transformation of individuals and the society depend on the unrestricted use of this fundamental right. Moreover there also exist direct links among its unrestricted use and democratic transformation and progress of states and alleviation of rule of law.

* Judge rapporteur of the Constitutional Court, huseyin.goktepe@anayasa.gov.tr

However its use may cause possible conflict and confrontation with some other protected rights. One recent example to that could be hate speech that is considered as a ground for restriction of free speech. Hate speech can be defined as the negative expressions target individuals' religion, language, gender, ethnical belonging, cultural identity and values. In this context the blasphemy is one of the most discussed examples of hate speech. It creates even stronger negative impact when committed through the means of information and communication technologies. Not only the individuals or groups targeted by hate speech suffers but hate speech also pose serious threat to the peace and comfort in the society. In such cases there is the necessity to make decision whether there should be intervened or not.

In this article we theoretically analyze the interrelation between free speech and blasphemy in the light of the decisions of European Court of Human Rights.

Keywords: Freedom of Expression, Hate Speech, Blasphemy, Decision of the European Court of Human Rights.

♦♦♦♦

INTRODUCTION

Humans are social beings and the ability to think is unique to humans. This ability allows ideas to form and flourish before they reach the world. Human emotions, thoughts, demands and aspirations are conveyed to the outside world as ideas thanks to freedom of expression. Therefore, freedom of expression plays a crucial role. Recent technological advances have accelerated the circulation of knowledge and ideas, and people have started using their right to freedom of expression in an unprecedented manner. Increasing demands for this right have turned freedom of expression into a *sine qua non* of democracies and democratic societies.

These developments have also stirred up discussions on the limits of freedom of speech, turning this gray area into a significant debate. While some would like to see an unrestricted use of this right, others ask for its limitation, claiming that they are offended and disturbed by what is expressed. Blasphemy is one area of hate speech which has been increasingly on the agenda in recent years. What is the proper mode of action if the use of freedom of speech involves expressions that insult values considered sacred? Should hate speech be afforded protection? The general answer is that it should not be protected. However, the more controversial issue is determining what constitutes hate speech or insult, especially when it concerns blasphemy.

Without doubt, it is a challenge for public authorities to remain fair and balanced in fulfilling their positive obligation to ensure freedom of expression while also affording protection to expressions that might be in contravention

of other rights[1]. This article will attempt to seek answers to these challenges and, based on the elements and limits of freedom of expression, will primarily argue that hate speech is a problem of freedom of speech. It will then go on to define blasphemy and present an analysis of the approach adopted by the European Court of Human Rights. Finally, it will analyse art. 216 (3) of the Turkish positive law which brings sanctions to such expressions with all its relevant aspects.

THE CONCEPT OF EXPRESSION, FREEDOM OF EXPRESSION AND ITS MAIN ELEMENTS

As thinking beings, humans have the capacity to express themselves through speech, which renders the concept of 'expression' crucial for mankind[2]. Humans communicate with each other in social life using a variety of means, such as writing, sculpture, paintings, to express themselves. This creates a broad base for freedom of expression and its means of deployment[3]. It is therefore not easy to determine the precise content of freedom of expression[4]. There is no consensus on the exact meaning of 'expression' in legal doctrine. It is a difficult concept to delimit, both because of its dynamic nature as well as its pertinence for the courts[5].

When reflecting on the concept of expression, it is important to understand what kinds of expression can be afforded protection under freedom of expression. Here, we see references to oral and written forms of expression, as well as artistic expression and symbolic expression[6]. Thoughts are not considered to be expressions unless imparted. Expressions create or aim to create an impact in the outside world[7]. Herein lies the strict separation

---

1 Önder Bakırcıoğlu, **Freedom of Expression and Hate Speech**, Tulsa Journal of Comparative-International Law, Vol. 16, 2008, p. 2.

2 Kemal Şahin, **İnsan Hakları ve Özgürlük Boyutuyla İfade Özgürlüğü Gerekçeleri ve Sınırları [Freedom of Expression in Relation to Human Rights and Freedoms: Justifications and Limits**], İstanbul, XII Levha Yayınevi, 1st edition, 2009, p. 1.

3 Kemal Şahin. ibid, p. 1.

4 Leo Zwaak, Kasım Karagöz, Kemal Şahin, Murat Tümay, **Matra Yargıda İfade Özgürlüğüne Yönelik Farkındalığın Arttırılması Projesi İfade Özgürlüğü Ders Kitabı [Matra 'Strengthening the Capacity of the Judiciary on Freedom of Expression Project: Freedom of Expression Course Book**], Ankara, Adalet Akademisi Yayınları, 2013, p. 35.

5 T. Ayhan Beydoğan, **Avrupa İnsan Hakları Sözleşmesi Işığında Türk Hukukunda Siyasî İfade Hürriyeti [Freedom of Political Expression in Turkish Law in Light of the European Convention on Human Rights**], Ankara, Liberal Düşünce Topluluğu, Cantekin Matbaası, 2003, p. 9.

6 Kasım Karagöz, **İfade Özgürlüğü ve Avrupa İnsan Hakları Sözleşmesinde Sınırlandırılması [Freedom of Expression and its Limitation in the European Convention on Human Rights**], Ankara, 2004 (Unpublished Doctoral dissertation), p. 20.

7 Osman Can**, Düşünceyi Açıklama Özgürlüğü: Anayasal Sınırlar Açısından Neler Değişti?**

between thought and expression. There are, however, also close connections between the two concepts and the prevention of one will have an impact on the other.

Today, even in the most democratic and free societies, not all forms of expression are allowed[8]. Freedom of expression is a fundamental concept and one of the main freedoms in western-style liberal democracies. However, in liberal democracies, freedom of expression can be limited because of the way an idea is expressed[9].

Freedom of expression is a larger entity than the concept of expression and follows from the identification of what constitutes an expression. Freedom of expression is the basis of a democratic system governed by the rule of law. This is not a freedom limited to one's inner world. On the contrary, it gains meaning when ideas are made public. Freedom of expression is about freely accessing different ideas and news, holding an opinion, not being condemned for having an opinion or conviction, and being able to freely convey and defend these ideas using different means. In other words, freedom of expression can have functions with multiple meanings[10]. Democracy is inconceivable without the existence of this freedom. Free debate is based on the possibility of expressing and freely debating all kinds of beliefs, opinions and ideas[11]. While freedom of expression generally evokes the presence of an action, word or behaviour, this freedom also covers the freedom to remain silent, i.e., non-self-expression[12]. This right allows individuals to seek the truth, self-autonomy, self-fulfillment and functions as a pre-requisite of democratic cultures and tolerant societies[13].

[The Right to Express a Thought: What has Changed in Terms of Constitutional Limits?], Liberal Düşünce Topluluğu, (Editor Bekir Berat Özipek), 2003, p. 358-411.

8 Robert Trager - Donna L. Dickerson**, 21. Yüzyılda İfade Özgürlüğü [Freedom of Expression in the 21st Century**], translated by A. Nuri Yurdusev, Ankara, Liberal Düşünce Topluluğu, Cantekin Matbaası, 2003, p. 140.

9 Ali Okumuş, **Avrupa İnsan Hakları Mahkemesi Kararları Işığında Türkiye'de İfade Hürriyeti [Freedom of Expression in Turkey in Light of the Judgments of the European Court of Human Rights**], Ankara, Adalet Yayınevi, 2007, p. 33.

10 This definition has been taken up in the jurisprudence of the European Court of Human Rights and is also used extensively in legal doctrine by a number of authors. The judgment of the ECtHR on Handyside v. UK is a real milestone in this field. See Handyside v. United Kingdom-5493/ 72, 7 December 1976, (Access) http://www.hudoc.echr.coe.int/site.

11 Durmuş Tezcan, Mustafa Ruhan Erdem, Oğuz Sancakdar, **Avrupa İnsan Hakları Sözleşmesi Işığında Türkiye'nin İnsan Hakları Sorunu [The Problem of Human Rights in Turkey in Light of the European Convention on Human Rights**], Ankara, Seçkin Yayınları, 2004 p. 425-426.

12 Arjen Van Rijn**, İfade Özgürlüğü (10.madde) [Freedom of Expression: Article 10],** Vol. 1, Ankara, Başkent Klişe Matbaacılık, (Editor; Birsen Erdoğan, Compiled by Birsel Erdoğan, Ulaş Karan), p. 162.

13 Durmuş Tezcan, Mustafa Ruhan Erdem, Oğuz Sancakdar, Rifat Murat Önok, **İnsan Hakları El Kitabı [Handbook on Human Rights**], 5th edition, Ankara, Seçkin Yayınları, 2014, p. 326.

Freedom of expression consists of many aspects which come together to make this freedom meaningful[14]. These aspects include the right to receive information, think, hold an opinion and express and impart an idea[15]. When taken separately, these aspects do not yield the desired result. However, when taken together to constitute a whole in the form of freedom of expression, they attain their true meaning. In other words, it would not be wrong to say that freedom of expression is a collection of freedoms which is formed by the unity of various freedoms interacting with each other[16].

a. Freedom to Receive Information

The conception of humans as the ultimate value of the society has led to a shift from an understanding that individuals exist for the State to one where the State exists for the individual. This new understanding has fostered individualism and coincided with the spread of human rights[17]. The foregrounding of the individual has brought with it certain freedoms. One such freedom, with growing significance, is the right to receive information. This right entails an unhindered access to information, ideas, convictions and resources needed to form an opinion on a topic and the possibility to make the choice one wishes[18].

b. Freedom of thought

The law regulates social actions. Inner worlds of individuals are not a remit of the law. It is generally assumed that ideas which pertain to the inner world of individuals cannot be restricted[19]. However, inner worlds are shaped by external factors. It is possible to argue that ideas are formed in relation to external factors[20]. In order for freedom of thought to prevail fully, external

---

14 İbrahim Şahbaz, **Karşılaştırmalı Düşünceyi Açıklama Özgürlüğü ([Freedom of Expression of Thought: A Comparative Analysis],** Ankara, Yetkin Yayınevi, 2007, p. 27.

15 Adnan Küçük, **İfade Hürriyetinin Unsurları [Elements of Freedom of Expression**], 1st Edition, Ankara, Liberal Düşünce Topluluğu, September 2003, p. 13.

16 Adnan Küçük, **Fikir Özgürlügünün Unsurlarıyla Birlikte Arzettigi Ayrılmaz Bütünlük [Freedom of Expression and Its Constituents: An Indivisible Whole],** (Access) http://www.akader.info/KHUKA_2003_mart/fikir_hurriyeti.htm.13.12.2014.

17 Anıl Çeçen**, İnsan Hakları [Human Rights**], İstanbul, Gündoğan Yayınları, 2000, p. 40.

18 Ahmet Gökçen, **Halkı Kin ve Düşmanlığa Açıkça Tahrik Cürümü (TCK madde 312/2) [The Criminal Offence of Publicly Inciting the Society to Hatred and Hostility: TPC art. 312/2],** Ankara, Liberal Düşünce Topluluğu Yayınları, 2001, p. 223.

19 Erdoğan Teziç, **Türkiye'de Siyasal Düşünce ve Örgütlenme Özgürlüğü [Freedom of Political Thought and Organisation in Turkey],** v. 7, p. 32. Ankara, Anayasa Yargısı, (Access) http://www.anayasa.gov.tr/eskisite/anyarg7/tezic.pdf., 15.10.2014.

20 Reyhan Sunay, **Avrupa Sözleşmesinde ve Türk Anayasasında İfade Hürriyetinin Muhtevası ve Sınırları [The Content and Limits of Freedom of Expression in the European Convention and the Turkish Constitution]**, 3rd edition, Ankara, Pano Ofset, 2000, p. 6.

factors should not impose any pressure on this ability. There should be no imposition of social presuppositions or official ideologies, and intolerance against ideas must be avoided. Access to information channels, pluralism, non-criminalisation of thought, free debate, equal respect for opinions are all crucial to ensure this freedom[21].

In pluralistic and libertarian democracies, the freedom to think and to receive information afford protection to the formation and presence of convictions and opinions[22].

c. Freedom to hold opinions

Freedom to hold an opinion can be defined as the right of the individual to choose, adopt and opt for an idea they deem right[23]. If the opinion concerns religion, one can talk about freedom of conscience. This freedom also includes not being condemned or excluded for one's opinion and conviction[24]. In that sense, the freedom to hold an opinion is an essential aspect of democratic systems. Democratic systems also allow individuals to refrain from expressing their opinions and from speaking. In democratic societies, people are not forced to disclose their convictions. Thus, there are both positive and negative elements of this freedom which entail the right to express one's opinions and convictions, as well as the right to refrain from saying what one does not believe in[25]. The right not to disclose one's opinion further augments the State's obligation to remain impartial. Any act to the contrary, harms the principle of the impartiality of the State[26].

d. Freedom to express and impart thought

The freedom to impart thought entails the dissemination of a thought to the outside world. This is the last stage of freedom of expression. Ideas acquire meaning as they are imparted[27]. The freedom to express and impart ideas is as important for the society as it is for the individual. This process enables new ideas to emerge in societies. Societies find the chance to evaluate these

21 Adnan Küçük, p. 6-10.

22 Suat Kamber**, İfade Özgürlüğü [Freedom of Expression]**, Ankara, Specialisation Thesis at the Prime Ministry, 2012, p. 16.

23 Erdoğan Teziç, p. 33.

24 İbrahim Şahbaz, p. 27.

25 Çağdaş Zarplı**, İnsan Hakları: İçeriği ve Sınırları [Human Rights: Content and Limitations**], Master Thesis, 2008, p. 51.

26 Sami Selçuk, **Düşün Özgürlüğü [Freedom of Thought],** Yeni Türkiye, Vol 17., Year 3., Ankara, 1997, p. 238.

27 Ahmet Gökçen, p. 226.

ideas. Societies which do not enjoy this freedom are bound to become static and regress. The freedom to express ideas is a fundamental right and freedom that ensures the progression of societies and the resolution of problems[28]. One cannot talk about freedom of expression if individuals are not able to convey their inner thoughts to the outside world and share these with others[29].

In democratic systems, the co-existence and interaction of contradictory ideas is considered desirable. Free circulation of ideas and opinions is seen as means of fostering democracy[30]. Restrictions on freedom of expression must remain an exception. This exceptional restriction should never be linked to a political stance, but should follow an interpretation of the circumstances in line with the understanding of a democratic regime[31]. On the other hand, while unlimited freedom might seem possible in our imagination, it is generally considered unattainable in social contexts[32]. Accordingly, all human rights documents, including those by the ECHR, see freedom of expression as a qualified right[33]. In other words, freedom of expression is not exempt from limitations[34].

DEFINITION OF HATE SPEECH, DIFFERENCE BETWEEN HATE SPEECH AND HATE CRIME

While the State is expected to guarantee freedom of expression, in instances where expressions need to be limited, the same State is expected to take restrictive measures. Hate speech figures centrally in this discussion[35].

---

28 Sami Selçuk, **Bağımsız Yargı Özgür Düşünce [Independent Judiciary, Free Thought**], İmge Yayınları, Ankara 2007, p. 186.

29 Safa Reisoğlu, **Uluslararası Boyutlarıyla İnsan Hakları (Human Rights with its International Dimensions),** İstanbul, Beta Yayınları, 2001, p. 66.

30 Çağdaş Zarplı, p. 53-54.

31 Reyhan Sunay, p. 73.

32 Münci Kapani, **Kamu Özgürlükleri [Public Freedoms]**, 7th edition, Ankara, Yetkin Yayınları, 1993, p. 223.

33 Zühtü Arslan**, İfade Özgürlüğünün Sınırlarını Yeniden Düşünmek: Açık ve Mevcut Tehlikenin Tehlikeleri, Teorik ve Pratik Boyutlarıyla İfade Özgürlüğü [Revisiting the Limits of Freedom of Expression: Dangers of Clear and Present Danger, Theoretical and Practical Aspects of Freedom of Expression**], Liberal Düşünce Topluluğu, (Editor: Bekir Berat Özipek), Ankara, 2003, p. 57.

34 Vahit Bıçak, **AİHM Kararları Işığında İfade Özgürlüğü, Teorik ve Pratik Boyutlarıyla İfade Özgürlüğü [Freedom of Expression in the Light of ECtHR Judgments, Theoretical and Practical Aspects of Freedom of Expression]**, Liberal Düşünce Topluluğu, (Editor: Bekir Berat Özipek), Ankara 2003, p. 271.

35 Ulaş Karan **Nefret İçerikli İfadeler, İfade Özgürlüğü ve Uluslararası Hukuk [Expressions of Hate, Freedom of Expression and International Law]**, 1st Edition, İstanbul, Ayrıntı Yayınları, (Editor Yasemin İnceoğlu) 2012, p. 81-82.

In order to determine the restriction to be imposed, it is first necessary to define what will be restricted. Hate speech does not have a universally accepted definition[36]. Expressions of hate are inherently negative emotions and have the potential to disrupt mutual understanding and peace and cause psychological, symbolic or physical violence[37]. At the core of hate speech lie prejudices, racism, xenophobia, nepotism, discrimination, sexism and homophobia. Hate speech operates over cultural and group identities, and where nationalism and intolerance are on the rise, there is a dramatic increase in the frequency and impact of hate speech[38].

The Committee of Ministers of the Council of Europe defines hate speech as follows: "*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*"[39]. In that sense, expressions of hate also cover gender and religious-based hate and intolerance[40].

This definition has also been used by the European Court of Human rights (ECtHR). However, the ECtHR has sufficed by citing the definition without going into a detailed analysis of the concept. In some of its decisions, the ECtHR only refers to hate speech as "all forms of expression which spread, incite, promote or justify hatred based on intolerance"[41].

The ECtHR sees hate speech as a directly harmful form of expression[42]. On the basis of international texts, particularly the decisions of the Council of

---

36 Anna Weber, **Nefret Söylemi El Kitabı [Manual on Hate Speech],** Trans. by Metin Çuhaloğlu, Council of Europe Publications, September 2009, p. 3.

37 Nefret Söylemi [Hate Speech], (Access) http://www.nefretsoylemi.org, 14.09.2014.

38 Nefret Söylemi [Hate Speech], (Access) http://www.nefretsoylemi.org, 14.09.2014.

39 Anna Weber, p. 3.

40 Elif Küzeci**, AİHS'nin 10. maddesi Işığında Nefret İçerikli ve Irkçı Nitelikli Düşünce Açıklamaları [Expressions of Hate and Racism in Light of art. 10 of the ECHR]**, Türkiye Barolar Birliği Dergisi [Journal of the Union of Bar Associations of Turkey], p. 71, 2007 p. 178

41 Nefret Söylemi [Hate Speech], (Access) http://www.nefretsoylemi.org, 15.09.2014, Yasemin İnceoğlu, p. 85.

42 Kerem Altıparmak, **Kutsal Değerler Üzerine Tezler ve İfade Özgürlüğü: Toplu Bir Cevap [Theses on Sacred Values and Freedom of Expression: A Collective Answer] bkz. İfade Özgürlüğü İlkeler ve Türkiye [in Freedom of Expression: Principles and Turkey],** 1st edition, İstanbul, İletişim Yayınları, Sena Ofset, 2007, p. 92.

Europe's Committee of Ministers[43], the ECtHR obliges positive obligations on the State for hate speech and demands a system of protection for the victims of such acts[44].

The concept of hate speech encompasses multiple types of expression. One major type is incitement to racial hatred, i.e., hatred directed against persons or groups of persons on the grounds of belonging to a race. The other is incitement to religious hatred, which entails incitement to hatred on the basis of a distinction between believers and non-believers[45].

The first category of national and international legal instruments in this area bans insults and incitement to hate against certain groups of people; the second category bans insults against the dignity of a person or nation; and the third category bans the denial of a historical event. Religion and ideas play an important role in identity formation, not only by acting as systems of belief, but also by creating a sense of belonging and ensuring social cohesion[46].

Hate speech has various consequences one of which is social harm. This harm can be psychological or physical in nature. In addition to short-term harms, hate speech can also cause long-term harm if frequently used in the media or continuously propagated by hatemongers. It can incite people to commit hate crimes[47].

Being affiliated concepts, hate speech and hate crime are sometimes used interchangeably or indistinctively. As mentioned before, the Committee of Ministers of the Council of Europe has defined hate speech. For hate crime, one such definition in the international arena is by the Organisation for Security and Cooperation in Europe (OSCE). In the annual report of 2006, the OSCE defines hate crime as any criminal offence, including offences against persons or property, committed on the basis of the person's worldview, language,

---

43 The Committee of Ministers follows up the execution of the judgments of the ECtHR by the State Parties. In some of its judgments, the ECtHR can specify the types of measures that need to be taken.

44 Dink v. Turkey-64915/01, 14 September 2010, par. 69, (Access) http://www.hudoc.echr.coe.int/site, 18.06.2014.

45 Tarlach McGonagle**, Protection of Human Dignity, Distribution of Racist Content (Hate Speech**), Institute for Information Law, Faculty of Law, University of Amsterdam (Access) http://www.ivir.nl/publications/mcgonagle/humandignity.html. 16.08.2014.

46 Bahia Tahzeb-Lie, **Freedom of Religion or Belief Is an Asset, Fundamental Rights and Principles**, Liber Amicorum, Pieter van Dijk, Marjolein van Roosmalen, Ben Vermeulen, Fried van Hoof, Marten Oosting, Camdridge-Antwerp-Portland, Intersantia Publishers, 2013, p. 396.

47 Nefret Söylemi [Hate Speech], (Access) http://www.nefretsoylemi.org, 17.09.2014.

religion, mental or physical disability, gender, age and sexual orientation[48]. In other words, any difference, group affiliation or belief of the person can be a reason for being selected as the target of this offence. For instance, killing a person for being homosexual or arson attacks against members of a certain race all constitute acts of hate crime.

What sets hate crimes apart from others is the kind of prejudice involved in committing these crimes. Crimes based on such prejudices (sexual, racial, religious, etc.) are hate crimes, although not all crimes committed against members of a group are necessarily hate crimes. There must be corroborating evidence for such a motive[49]. In other words, in addition to the act which is the objective element of the crime, there must be proof that the act has been committed with these prejudices, which constitute the subjective element (mens rea) of the crime.

THE CONCEPT OF BLASPHEMY

Although freedom of expression is an important concept in countries governed by the rule of law, it is not limitless. Some expressions are subject to a higher level of protection than others[50]. For instance, racism, severe insults, obscenities have a highly negative impact on people. These are considered low-value expressions. The social value of an expression determines whether an expression will be considered as low or high-value. Expressions which carry a social value are viewed as high-value expressions[51].

How then can one determine the social value of an expression? Will there be no limitations for expressions that have a social value? From the viewpoint of the discipline of law, are attacks against sacred values to be afforded protection? Let us start by pointing out that this is one of the most challenging areas concerning freedom of expression. The difficulty stems from the thin line that separates sacred from non-sacred and the discussions around who can make that decision[52].

Firstly, in order to rationally accept freedom of expression and religion as a richness, it is imperative to know what they entail. This requires an

48 **Hate Crimes in the OSCE Region: Incidents and Responses, Annual Report for 2006**, OSCE Office for Democratic Institutions and Human Rights, Warsaw, 2007, p. 9, (Access) http://www.osce.org/odihr/26759 12.06.2014.

49 Ulaş Karan, p. 86.

50 Leo Zwaak, Kasım Karagöz, Kemal Şahin, Murat Tümay, p. 48.

51 Çağdaş Zarplı, p. 9.

52 Kerem Altıparmak, p. 73.

understanding of two aspects that define the concepts of freedom of expression and religion: internal freedom and external freedom. Although clearly distinct, these aspects are not completely independent of each other[53].

The internal aspect of freedom of religion or expression indicates that an individual's religion and thoughts are free and open to change[54]. External freedom, on the other hand, refers to the freedom of an individual to express his religion or thought in the public or private sphere, collectively or alone. This freedom has personal/social as well as public/private dimensions[55].

As the French historian Alain Cabantous once pointed out, when Jesus Christ claimed that he was born holy, this was considered blasphemy and he was convicted. Blasphemy led to his death and death brought resurrection. In that sense, Cabantous claimed 'blasphemy founded Christianity'[56].

"Despite all the ambiguity and risk the concept of blasphemy carries, it is an important area of regulation in domestic and international law and constitutes a 'natural' boundary for freedom of expression"[57].

In all legal systems of the past where religion reigned over social life, blasphemy was regulated as an offence punishable with the severest penalty, which usually meant death[58]. With the secularisation of social life, some countries removed this offence from their penal codes, while others maintained it for historical reasons as well as public order concerns[59]. In fact, in the scholastic world where social and intellectual life were dominated by religion, blasphemy was not only subject to the severest forms of penalty, it was also considered a crime against the public. As an "impious act that requires worldly punishment"[60], blasphemy played an important role in

53 Tahzeb-Lie, p. 397.
54 Tahzeb-Lie, p. 398.
55 Tahzeb-Lie, p. 406.
56 Talal Asad, **Reflections on Blasphemy and Secular Criticism**, In Religion: Beyond a Concept, Hent de Vries, Fordham University Press, 2008, p. 30.
57 Hülya Dinçer, **İnsan Hakları Söylem Ve Pratiğinde Dine Hakaret, İfade Özgürlüğü Ve Dini Hislere Tanınan Koruma [Blasphemy, Freedom of Expression and Protection of Religious Feelings in the Discourse and Practice of Human Rights**], Marmara University official website, (Access) http://marmara. academia.edu hulyadincer, p. 1-2. 16.08.2014.
58 Akif Emre Öktem, **Uluslararası Hukukta İnanç Özgürlüğü [Freedom of Belief in International Law**], Ankara, Liberte Yayınları, December 2002, p. 407.
59 Akif Emre Öktem, p. 407.
60 Talal Asad, **Free Speech, Blasphemy, and Secular Criticism, in Is Critique Secular?:** Blasphemy, Injury and Free Speech, The Townsend Papers in Humanities no. 2, University of California Press, Los Angeles, 2009, p. 34.

Christianity. For instance, in England, assaults against religion were tried in church courts according to the canonical law up until the 17th century after which they became criminalised under the *common law.* In Scotland, blasphemy continued to be punished with death until the 18th century[61].

Islam's general approach, on the other hand, has been towards protecting a moral tradition although the presence of different interpretations in the Islamic law have led to divergent conceptualisations of blasphemy. In contrast to the way it has been regulated in the Bible, blasphemy is covered under heresy and Islamic sources do not explicitly prescribe whether it should be regarded as worldly punishable[62].

Today, many countries consider blasphemy as an offence and impose sanctions. However, in modern penal systems, the legally protected interest is not the sacredness of person considered to be holy from a religious point of view, but rather the respect for the religious beliefs of individuals and communities and more generally the prevention of hate crimes[63].

The fundamental human rights norms regulated in the European Convention on Human Rights (ECHR) grant individuals certain rights and freedoms, but the very same norms can also lead to obligations for others. These might include negative obligations against third parties such as abstaining, not forcing and not intervening. The obligations between individuals concerning fundamental rights and freedoms (including the freedom of expression and religion) are described as the horizontal effect. Refraining from condemning another person for his religious beliefs can imply the restriction of that person's freedom of expression[64]. On the other hand, in case there is an assault against the beliefs of a person, the State might be required to take precautions against it, implying certain positive obligations. With the ECHR, the Contracting States have committed themselves to 'recognising the rights' which has subsequently been conceptualised as "*the positive and negative obligations of the Contracting States"* in the jurisprudence of the ECtHR'[65].

---

61 **Blasphemy** in Brittanica encyclopedia of world religions, ed. Wendy Doniger, 2006, Chicago, p. 133.

62 Ş. Özen**, İslam Hukukunda Zındıklık Suçu Ve Molla Lürfî'nin İdamının Fıkhîliği [The Offence of Heresy in Islamic Law and the Execution of Molla Lürfi],** İslam Araştırmaları Dergisi (Journal of Islamic Studies), Vol. 6, 2001, p. 26. (Access) http://www.isam.org.tr/documents%5 Cdosyalar%5Cpdfler %5Cislamarastirmalaridergisi%5Csayi06%5C017062.pdf., 12.09.2014.

63 Hülya Dinçer, p. 5-6.

64 Hasan Saim Vural**, Türkiye'de Din Özgürlüğüne İlişkin Anayasal Güvence [Constitutional Guarantee for Freedom of Religion in Turkey],** Ankara, Seçkin Yayıncılık, 2013, p. 74-75.

65 Hasan Saim Vural, p. 76.

In fact, the ECtHR has issued its first ruling on the positive obligation of the State to protect the members of a religious group in Choudhury v. the United Kingdom. The applicant was a member of the Islam faith and claimed that his religious values were insulted in Salman Rushdie's book "Satanic Verses". The local court found "no doubt that as the law now stands it does not extend to religions other than Christianity". In other words, it ruled that the law against blasphemy was there to protect Christianity only. The Commission which assessed the application deliberated on the scope of the guarantee provided by art. 9 of the ECHR, initially stated that art. 9 protection could not be afforded to authors and publishers who offend the religious sensitivities of people, but then changed its jurisprudence in subsequent rulings and took decisions to protect the members of a religion or belief against such attacks[66].

RESTRICTIONS TO FREEDOM OF EXPRESSION UNDER ARTICLE 10 OF THE ECHR

Art. 10 of the ECHR which regulates freedom of expression states:

"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.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, 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".

Paragraph 2 of art. 10 lays down the restrictions on freedom of expression. While the State must provide the context for the effective exercise of this freedom in line with its positive obligations, it must simultaneously refrain from intervening to the exercise of this freedom within legally justified limits in line with its negative obligations. The conditions for restricting freedom of expression are contained in the negative obligations of the State. When

[66] Hande Seher Demir, **AİHS sisteminde Din ve Vicdan Özgürlüğü [Freedom of Religion and Conscience in the ECHR system],** Ankara, Adalet Yayınevi, 2011, p. 84.

adjudicating cases on the necessity of an intervention to the freedom of expression, the ECtHR uses a triple test. The criteria are whether the intervention is prescribed by law, pursues a legitimate aim and is necessary in a democratic society.

Prescribed by law: According to the ECHR, any restriction on fundamental rights must first and foremost be prescribed by law or be in accordance with the law. In other words, there must be a legal basis in the domestic laws of a country to be able to impose restrictions on fundamental rights. This principle aims to prevent arbitrariness. The ECtHR interprets the ECHR's reference to 'law' in substance and not in form. According to this interpretation, the regulation of the restriction concerned does not have to be an act of the Parliament (law), but can be any act that has the power to impose abstract norms (law, statute, regulation, jurisprudence, etc.). Furthermore, such regulations must be "*accessible*" and "*comprehensible*"[67]. These norms can be domestic or international legal norms[68]. Today, restrictions on a democratic society can only be done by law. The laws that regulate restrictions must be easily accessible[69].

Pursuing a legitimate aim; Generally speaking, there are two major legitimate aims for imposing a restriction. These include the protection of the State and public interest and protection of the reputation and rights of others[70]. The condition of pursuing a legitimate aim in restricting freedom of expression is narrower than other rights. Freedom of expression must be protected more broadly than other freedoms which means any restriction on this freedom must remain an exception. That is to say, legitimate aim in question pertains to the legally protected interest.

The ECtHR has held that, freedom of expression can be restricted under certain circumstances if there is a legitimate aim. Fundamental rights and freedoms can only be limited in accordance with the restriction criteria. One such criteria is being prescribed by law[71] which bans restrictions that lack a

---

67 A. Feyyaz Gölcüklü, A. Şeref Gözübüyük**, Avrupa İnsan Hakları Sözleşmesi ve Uygulaması [The European Convention on Human Rights and its Implementation**], Ankara, Turhan Kitabevi, 2012, p. 375-376.

68 Esra Demir Gürsel, **Avrupa İnsan Hakları Sözleşmesinin 8-11 maddesinde korunan Haklar ve Demokratik Toplumun Sınırları [The Rights Protected Under Articles 8-11 in the European Convention on Human Rights and Limits of a Democratic Society]**, Ph.D. Thesis, İstanbul, 2014, p. 11.

69 Sami Selçuk**, İnsan Hakları [Human Rights],** Ankara, 2007, p. 189.

70 Reyhan Sunay, p. 65.

71 D.J.Harris, M.O.Boyle, E.P. Bates, C.M.Buckley, **Avrupa İnsan Hakları Sözleşmesi Hukuku**

reason or legitimacy.

Necessary in a democratic society; In Handyside v. United Kingdom[72], the ECtHR has meticulously defined the fundamental features of a "democratic society". In the same case, it has also established an organic link between "freedom of expression" and a "democratic society"[73]. The ECtHR has cited the features of a democratic society as pluralism, tolerance and openness, placing particular emphasis on pluralism. It has underlined that the principle of pluralism allows for the expression of different and divergent ideas, even if they have the potential to shock the society or parts of it[74].

On the other hand, in its jurisprudence, the ECtHR has defined "democratic social order" with anti-discrimination, rule of law and principles of pluralism. The ECtHR's definition of a "democratic society" is as follows; "Democratic society" is a society where pluralism, tolerance, broad-mindedness and respect for difference are realised. The principle of pluralism, which refers to the co-existence of different views, is a founding pillar of a "democratic society"[75].

In conclusion, legal doctrine clearly states that in a democratic society, restrictions on freedom of expression must be based on more sound justifications than restrictions on other rights or freedoms, and that the specific weight of freedom of expression is not the same as other rights and freedoms[76]. In other words, even if it is generally accepted that freedom of expression can be restricted, this must remain an exception only[77].

Yüksek Yargı Kurumlarının Avrupa Standartları Bakımından Rollerinin Güçlendirilmesi Ortak Projesi [Law of the European Convention on Human Rights, Joint Project on Enhancing the Role of the Supreme Judicial Authorities in Respect of European Standards], Ankara, Şen Matbaa, 2013.p. 485. Also see Osman Doğru**, İnsan Hakları Avrupa Mahkemesi İçtihatları [Jurisprudence of the European Court of Human Rights**)], İstanbul, Legal Yayıncılık, 2004.

72 Handyside v. United Kingdom-5493/72, 7 December 1976, (Access) http://www.hudoc.echr.coe.int/ site, 06.09.2014.

73 Kasım Karagöz, p. 11.

74 Kasım Karagöz, p. 11.

75 Bakır Çağlar/Naz Çavuşoğlu, **Parti Kapatma Davalarında Mermer – Mozaik İkilemi: Demokratik Toplum Düzeni Hukuku Tartışması Üzerine Notlar [The Marble-Mosaic Dilemma in Party Closure Cases: Notes on the Debate regarding the Law of a Democratic Social Order],** Ankara, Anayasa Yargısı 16, 1999, p. 160-161.

76 Öykü Didem Aydın**, Üç Demokraside Düşünce Özgürlüğü ve Ceza Hukuku-ABD [Freedom of Thought and Criminal Law in Three Democracies - The USA]**, Ankara, Seçkin Yayıncılık, 2004, p. 54.

77 İbrahim Ö. Kaboğlu, **Özgürlükler Hukuku 1 [The Law of Freedoms 1],** Ankara, İmge Kitabevi Yayınları, 2013 p. 77.

ECtHR'S APPROACH TO BLASPHEMY

Overview

In cases involving blasphemy, the ECtHR adopts a two-pronged approach. Firstly, and as a requirement of a pluralistic society, the ECtHR holds that individuals who exercise the freedom to express their religion must also tolerate and accept the denial of their religious beliefs and even the propagations by others of doctrines hostile to their faith.

On the other hand, the ECtHR adopts a very diligent approach to gratuitous attacks, i.e., expressions that do not contribute to public debate. The ECtHR holds that, in accordance with art. 19 of the ECHR, the State can have a responsibility to protect the believers against such expressions[78].

This protection can sometimes take place in the meaning of the restrictions in par. 2 of article 10 of the ECHR. In the meaning of the rights and obligations in par. 2, any individual who enjoys this right also carries certain duties and responsibilities. One such duty and responsibility is "*to avoid expressions that are gratuitously offensive to the beliefs of others*". These are expressions that assault other people's beliefs without contributing to public debate[79].

Among the three types of restrictions mentioned in par. 2 of art. 10, "*respect for the rights of others*" constitutes the legal justification for granting protection to religious values. In cases involving an insult on religious values or a prohibition, restriction or sanction on such expressions, the ECtHR adjudicates on the basis of the aforementioned 'respect for the rights of others'.

Freedom of thought, conscience and religion are to a large extent related to one's inner world and difficult to distinguish. Public authorities can only become aware of their existence and content once a person expresses his religion or beliefs. The expression of a person's religion or belief falls under the protection not only of art. 9, but possibly also of articles 10 or 8[80].

---

78 Osman Doğru, Atilla Nalbant, **İnsan Hakları Avrupa Sözleşmesi: Açıklama ve Önemli Kararlar [European Convention on Human Rights: Annotations and Important Judgments**], Vol. 2, Ankara: Avrupa Konseyi, 2013, p. 191-192.

79 Otto-Preminger-Institute v. Austria-13470/87, par. 49, 20 September 1984, Murphy v. Ireland-44179, 10 July 2003, par. 67, (Access) http://www.hudoc.echr.coe.int/ site, 07.09.2014.

80 Sabahattin Nal, **Avrupa İnsan Hakları Sözleşmesi Çerçevesinde Düşünce, Vicdan ve Din Özgürlüğü [Freedom of Thought, Conscience and Religion Within the Framework of the European Convention on Human Rights],** Mustafa Kemal University Faculty of Economics

In the relationship between the protection of religion and conscience and freedom of expression, the justifications for imposing restrictions tend to be "*general morals*" and the "*protection of the dignity and rights of others*". Art. 10 of the ECHR clearly indicates that religious values and beliefs alone do not constitute a reason for restriction. On the other hand, a connection, albeit indirect, can be established between "*protection of the rights and freedoms of others*" and "*general morals*" which are the two main reasons for restricting freedom of expression in many applications brought to the ECtHR concerning blasphemy[81].

In interpreting the concepts of blasphemy and conscience, the ECtHR refrains from a narrow and shallow approach and adopts an evolutionary interpretation of the ECHR, taking into account the prevailing circumstances and the emerging *consensus* between Member States. The ECtHR holds that, as is the case for morals, there is no uniform understanding in Europe on the role of religion in society and points to the difficulty of making an all-encompassing definition of religion[82].

In the Handyside judgment, the ECtHR underlines that the protection afforded to freedom of expression in art. 10 also applies to ideas that "*offend, shock or disturb*". For the continuation of pluralistic societies, believers must accept criticism and propagation of ideas that are openly hostile to their faith. On the other hand, offensive ideas which are biased against a group, which do not carry a message and incite ill intentions, i.e., hate speech, cannot be afforded protection in light of art. 17 of the ECHR which bans the exploitation of rights[83].

An overview of ECtHR's jurisprudence regarding the protection of religious beliefs and values points to a content-based restriction on freedom of speech. The famous Handyside judgment of the ECtHR seems to be a deviant case in point with a ruling that states that even "*offensive, shocking and disturbing*" expressions must be protected[84].

---

and Management, Ankara University SBF Journal, 57-4, (Access) http://dergiler.ankara.edu.tr/dergiler/42/469/5371.pdf, p. 88 ,11 September 2014.

81 Hülya Dinçer, p. 8.

82 Hülya Dinçer, p. 8.

83 Jim Murdoch, **Düşünce vicdan ve din özgürlüğü, Avrupa İnsan Hakları Sözleşmesi'nin 9.maddesinin uygulanmasına dair klavuz kitap, İnsan hakları el kitapları [Freedom of Thought, Conscience and Religion, A Guide to the Implementation of Article 9 of the European convention on Human Rights, Human Rights Handbook],** Trans. by Serkan Cengiz, 1st edition, Ankara, Şen Matbaa, 2013, p. 50.

84 N. Nathwani, **Human Rights Law Review**, 2008/4, p. 490.

ECtHR Judgments in this area

The first judgment where the Court held that freedom of expression can be restricted was the Otto Preminger Institute v. Austria judgment of 1994[85]. In this judgment, the ECtHR made certain points as to how to draw the line between freedom of expression and blasphemy[86]. In other words, this judgment explored the relationship between the two based on the notion of "*the rights of others*" and assessed where to draw the line[87]. This judgment can be taken to form the methodology of the ECtHR's jurisprudence on the protection of religious sentiments.

The applicant Otto Preminger Institute had planned six screenings of the film 'Council in Heaven'. The film aimed to criticise the extremes of the Christian religion and its trivial imagery. Upon an application by the Innsbruck Diocese of the Roman Catholic Church, a criminal investigation was launched against the Director of the Institute three days before the event on charges of 'disparaging religious values' and the film was seized[88]. The Regional Court held that the freedom of artistic creativity guaranteed by the Austrian Constitution had been exceeded and ruled for the seizure of the film. Instead of showing the film, the Institute had to suffice by reading its script[89].

When making its legal assessment, the ECtHR first held that the interference concerned was prescribed by law[90]. According to the ECtHR, freedom of religion is a vital element that makes up the identity of believers and their conception of life. Referring to the Kokkinakis v. Greece judgment[91], the ECtHR underlined that freedom of thought, religion and conscience in the meaning of art. 9 of

---

85 Otto Preminger Institute v. Austria-13470/87, 20 September 1994 (Access) http://www.hudoc. echr.coe.int/site, 06.11.2014.

86 Osman Doğru, Atilla Nalbant, p. 192.

87 Monica Macovei, **İfade Özgürlüğü, Avrupa Konseyi İnsan Hakları El Kitapları [Freedom of Expression, Council of Europe Human Rights Handbooks]** no: 2, Strasbourg, p. 106.

88 Otto Preminger Institute v. Austria, par. 9,10,11.

89 In the film, God is depicted as an infirm old man who bows to and kisses with the Devil, Jesus Christ is depicted as Mummy's boy of low intelligence and Mary as a voluptuous woman. Together they decide to punish humanity for its indecency. Instead of opting for total annihilation, they decide to impose a punishment which will require mankind to be 'capable of redemption' and 'in need of salvation'. For this, they ask the assistance of the Devil. The Devil proposes inflicting mankind with a disease that is sexually transmitted between men and women. In the end, he decides to inflict syphilis. The film shows Christ, Mary and God applauding the Devil.

90 Otto Preminger Institute v. Austria, par. 45.

91 For the judgment, see Kokkinakis v. Greece-14307/88, 25 May 1993 (Access) http://www.hudoc.echr.coe.int/site, 06.11.2014.

the ECHR is an indissociable element of a democratic society[92]. Holders of a belief, must tolerate criticisms and comments against their beliefs no matter how shocking these may be. However, if these expressions are hostile, the State will have to undertake a positive obligation to protect the believers. According to the ECtHR, such a measure will then serve the legitimate aim of "*protecting the rights and freedoms of others*"[93].

In this case, the problem which the ECtHR debated at length was whether the interference was "*necessary in a democratic society*". Here, the ECtHR first referred to its jurisprudence where it held that even ideas which shock or disturb sections of a society must benefit from the protection afforded to freedom of expression[94]. It then noted that the exercise of this right came with certain duties and responsibilities which included avoiding expressions that are gratuitously offensive to others, profane and that do not contribute to public debate. Following the reasoning in the Müller judgment[95], the ECtHR held that there was no consensus in Europe on what constitutes general morals and that the Contracting States enjoy a broader margin of appreciation on expressions that insult religion. In cases where respect towards religious sensitivities are counterposed with the protection of morals, protection of religious sensitivities will prevail. However, the ECtHR also noted that the domestic margin of appreciation is not unlimited and goes hand in hand with European supervision[96].

In conclusion, in this judgment, the ECtHR held that the national authorities had acted to ensure religious peace and to prevent people from feeling the object of the attacks on their religious beliefs in an unwarranted manner. Thus the ECtHR found no violation of art. 10 of the ECHR.

The more recent rulings of the ECtHR on blasphemy seem more moderate compared to its initial judgments. In the Giniewski v. France judgment of 2006[97], the ECtHR sought to define the kind of legal interpretation that would apply to cases where there was a conflict between freedom of expression and the protection of religious beliefs and sacred values. Despite a novel

92 Otto Preminger Institute v. Austria, par. 47.
93 Otto Preminger Institute v. Austria par. 48.
94 Otto Preminger Institute v. Austria, par. 49.
95 For the judgment, see Müller et al v. Switzerland-10737/84, 24 May 1988 par. 36 (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014.
96 Otto Preminger Institute v. Austria, par. 50.
97 Giniewski v. France -64016/00, 31 January 2006, (Access) http://www.hudoc.echr.coe.int/site, 08.11.2014.

reasoning in the judgment, it does not constitute a deviation from the existing jurisprudence of the ECtHR[98].

The applicant Mr. Giniewski was a journalist who wrote in a newspaper published in Paris. In his article, he claimed that the Catholic Church propagated a doctrine that belittled the Jews. The author claimed that *"many Christians have acknowledged that anti-Judaism and the doctrine of the "fulfilment" of the Old Covenant in the New lead to anti-Semitism and prepared the ground in which the idea and implementation of Auschwitz took seed*"[99]. The General Alliance against Racism and for Respect for the French and Christian Identity brought proceedings against the applicant. The national courts held that the expressions used could be interpreted as suggesting that Christians were responsible from the massacres in Auschwitz and concluded that the author had made defamatory statements against the Christian community. The applicant and the publisher of the newspaper were convicted and ordered to pay a fine of 6.000 French Francs.

The applicant petitioned to the ECtHR claiming that *"as a historian and journalist, he had contributed to the intellectual works on the emergence of anti-semitism and the extermination of Jews and his expressions did not have any other aim than to further public debate"*[100].

The ECtHR referred to its judgment on Garaudy v. France[101] and held that the article written by the applicant developed ideas that would contribute to the doctrine on the reasons behind the Holocaust. Furthermore, the Court held that the article did not incite intolerance or hatred or cast doubt on clearly established historical facts[102]. The article in question had, moreover, not been "gratuitously offensive" or insulting and had not incited to hostility or hatred. The Court held that the article pertained to Pope's views and the expressions used could not be extended to Christianity as a whole[103].

In its ruling, the Court first acknowledged that the conviction had pursued a legitimate aim in light of par. 2 of art. 10 of the ECHR. The legitimate aim was the 'protection of the reputation and dignity of others". In addition to the emphasis on the "rights of others", the Court referred to the freedom of

98 Hülya Dinçer, p. 24.
99 Giniewski v. France, par. 13,14, Hülya Dinçer, p. 24.
100 Hülya Dinçer, p. 23.
101 For the judgment, see Garaudy v. France-65831/01, 24 June 2003, (Access) http://www.hudoc.echr.coe.int/site, 06.11.2014.
102 Giniewski v. France, par. 50, 52.
103 Giniewski v. France, par. 49.

religion in the meaning of art. 9[104].

The Court also assessed whether the conviction was necessary in a democratic society. It emphasised that some expressions by the applicant were indeed shocking and disturbing, but freedom of expression still had to be protected, also in reference to the judgment on De Haas and Gijsel v. Belgium[105].

The ECtHR makes a distinction between expressions that are gratuitously offensive to religious feelings and those that contribute to a debate of public interest. This distinction is not used to demarcate the limits of the protection afforded to religious sentiments, but to determine the limits of public debate[106]. The Court thus held that there was no violation of art. 10 the ECHR.

Another case in point is Murphy v. Ireland regarding the ban on the advertisement of a religious event. In this judgment, the Court looked at the extent to which restrictions on freedom of expression concerning religion, conscience and belief were compatible with the ECHR. Following a ban imposed by the Irish Radio and Television Commission on the broadcast of a religious advertisement, the applicant applied to the ECtHR for the violation of articles 9 and 10[107]. Referring to the Handyside judgment, the applicant claimed that being prevented from advertising a religious matter was a clear violation of his freedom of expression[108]. Referring to Otto Preminger and Wingrove judgments[109], the applicant acknowledged that the Contracting States enjoy a broad margin of appreciation in this field, but argued that, by reviewing the cases, the ECtHR subjected this margin of appreciation to supervision. He argued that the margin of appreciation of the Contracting States was not unlimited and the supervision by the ECtHR was the determining factor[110]. Finding the application admissible, the ECtHR held that the application did not concern the expression of religious beliefs, but rather the regulation of the applicant's means of expression and should therefore be assessed in light of art. 10 of the ECHR[111]. Evaluating whether the interference to the

104 Giniewski v. France, par. 39, 40.

105 For the judgment, see De Haas and Gijsel v. Belgium-19983/92, 24 February 1997, par. 46 (Access) http://www.hudoc.echr.coe.int/site, 21.11.2014.

106 Hülya Dinçer, p. 24.

107 Murphy v. Ireland-44179,(Access) http://www.hudoc.echr.coe.int/site, 07.09.2014.

108 Murphy v. Ireland, par. 46.

109 Wingrove v. United Kingdom-17419/90, 25 November 1996, (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014.

110 Murphy v. Ireland, par. 49.

111 Murphy v. Ireland, par. 61.

applicant's freedom of expression was necessary in a democratic society, the Court found it necessary to understand whether sufficient and relevant justification had been presented by the local authorities in making such an interference. Referring to the Jensild v. Denmark judgment[112] in assessing the proportionality of the interference, the ECtHR held that the medium of the message was important and that audiovisual media was faster and more effective than written media[113].

Referring to Lingens v. Austria[114], Thorgeir Thorgeirson v. Iceland[115] and Castells v. Spain[116], the ECtHR underlined that restrictions in the meaning of par. 2 of art. 10 of the ECHR were more limited in matters of political and public interest and held that Contracting States were in a better position than an international court to exercise the margin of appreciation in matters related to intimate personal convictions, moral sensitivities and beliefs of individuals[117]. The margin of appreciation is better exercised in restricting freedom of speech when it concerns religion because, in an era of ever-expanding range of convictions and denominations, matters that can seriously offend holders of a belief are very diverse, time and context-bound. In light of these considerations, the ECtHR held that the State was justified in asserting that certain religious sensitivities of the Irish society could be offended by a religious advertisement[118].

Wingrove v. United Kingdom which concerned the banning of a film for containing expressions and scenes that offended religious values was in many ways similar to Otto-Preminger v. Austria. Here again, the ECtHR found no violation of art. 10 of the ECHR[119]. The applicant in this case was a film director who had directed an 18-minute film on the life of Jesus Christ. He submitted the film to the British Board of Film Classification but the Board refused to certify it[120]. The Board argued that +18 images focusing on the body

112 Jersild v. Denmark -15890/89, 23 September 1994, (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014.
113 Murphy v. Ireland, par. 69.
114 Lingens v. Austria-9815/82,8 July 1986, par. 42, (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014.
115 Throgeir Thorgeirson v. Iceland-13778/88, 25 June 1992, par. 63 (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014.
116 Castells v. Spain-11798/85, 23 April 1992, par. 43, (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014
117 Murphy v. Ireland, par. 43.
118 Murdoch, p. 50.
119 Leo Zwaak, Kasım Karagöz, Kemal Şahin, Murat Tümay, p. 139.
120 Wingrove v. United Kingdom, par. 9, 11.

of Christ were not appropriate[121]. Claiming that his freedom of expression had been violated, the claimant brought the case to the ECtHR. The Court first assessed for admissibility and looked at whether the interference was prescribed by law, legitimate and necessary in a democratic society. It held that the interference was indeed prescribed by law and accepted the Board's justification of protecting the religious sensitivities of others as a legitimate purpose[122]. Furthermore, the Court held that the interference carried out in the meaning of art. 10 (2) of the ECHR to protect the right of others was also congruent with the protection of religion in art. 9. Assessing whether the interference was necessary in a democratic society, the ECtHR held that the Contracting States had a margin of appreciation in intervening to freedom to expression concerning cases of blasphemy, but underlined that this margin was not limitless. The legitimacy of the margin of appreciation used by a State will be supervised by the ECtHR based on the presence of a pressing social need or proportionality with a legitimate aim[123]. The applicant argued that the interference was disproportionate claiming that the brevity of the film made it unlikely for a Christian to watch it and that its distribution could have been restricted[124]. However, the Court held that once the film was broadcast, it could be copied, controlling this proliferation was not possible and that it could be shown in various forms. It hence ruled that the interference by the British national authorities was proportionate and within their margin of appreciation[125].

Judgments concerning Turkey

There are not many judgments of the ECtHR in this area which directly focus on Turkey. In the two judgments where Turkey was involved, the ECtHR found violation in one and no violation in the other. The first judgment of the ECtHR is I.A. v. Turkey of 13 September 2005 where it held that insulting religious feelings in publications would not enjoy the protection afforded to freedom of expression[126].

This case was brought to the Court after the publisher of Abdullah Rıza Ergüven's book "Yasak Tümceler" (Forbidden Phrases) was fined for blasphemy.

121 Wingrove v. United Kingdom, par. 13.
122 Wingrove v. United Kingdom, par. 48.
123 Wingrove v. United Kingdom, par. 53.
124 Wingrove v. United Kingdom, par. 62.
125 Wingrove v. United Kingdom, par. 63, 64.
126 I.A v. Turkey-42571/98, 13 September 2005, (Access) http://www.hudoc.echr.coe.int/site, 08.11.2014.

[**]Referring to the Handyside judgment, the ECtHR held that freedom of expression is an essential pillar of a democratic society, a basic condition for its progress and for the development of every person. In the meaning of 10 (2), 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. In par. 24 of its judgment, the ECtHR underlined that enjoying freedom of expression came with certain duties and responsibilities. Referring to the Otto Preminger judgment, the ECtHR emphasised that, in cases concerning freedom of religion and belief, this duty entailed 'avoiding as far as possible expressions and behaviours that are gratuitously offensive to others'. In this context, the Court held it necessary to sanction defamatory criticisms against values of religious veneration. The Court held that the novel contained both shocking expressions as well as abusive attacks against the prophet of Islam. In par. 29 of the judgment, the ECtHR emphasised that it had been convinced to rule as such due to expressions such as *"God's messenger broke his fast through sexual intercourse…Muhammad did not forbid sex with a dead person or live animal"*. The Court also held that the rights of others had to be protected against attacks on religious beliefs and moral convictions. It emphasised that the exercise of freedom of expression had to be courteous and included an obligation to avoid expressions that disrespected religious beliefs and infringed the rights of third parties. In this case, the ECtHR held that the measure taken intended to provide protection against offensive attacks on matters regarded as sacred by Muslims and Islam. It also underlined that the reasons given by the national authorities were sufficient, the measures taken against the applicant were relevant and the margin of appreciation had not been overstepped[128].

In conclusion, in the I.A. v. Turkey judgment, the ECtHR acknowledged that the publication concerned had not only been offensive, shocking and provocative, but also constituted an abusive attack against the personality of the prophet of Islam. The ECtHR was convinced so due expressions in the

[**] Published by Berfin Publishing House in 1993, The Forbidden Phrases was printed 2000 copies in its first edition. The Prosecutor pressed for criminal proceedings on charges of 'insulting God, religion, prophet and the Holy Book'. Expert reports were first written by a lecturer at the Theological Faculty of Marmara University, and then, upon the applicant's objection, by a group of criminal law experts from the Faculty of Law, İstanbul University. I.A. was convicted by the Criminal Court of First Instance based on this report and the decision was upheld by the Court of Cassation on October 6, 1997.

[128] I.A. v. Turkey-42571/98,13 September 2005, par. 32 (Access) http://www.hudoc.echr.coe.int/site, 08.11.2014.

book which said "God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal". In deciding that the measure undertaken had addressed a social need and was proportionate to the aims pursued, the ECtHR also took into account that the domestic courts had not seized the book and imposed a rather insignificant fine. Based on these reasons, the ECtHR held that there was no violation of art. 10 of the ECHR.

On the other hand, the ECtHR unanimously found a violation in Aydın Tatlav v. Turkey[129]. In contrast to the previous judgment, the ECtHR held that the applicant's right of freedom of expression had been violated.

In this case, the applicant who is a journalist, had authored a 5-volume book on "Islamiyet Gerçeği" (The Reality of Islam). Following the publication of the fifth edition of the book which included an academic interpretation and criticism of the Koran, proceedings were instituted against the applicant for making a publication "*designed to defile one of the religions*" under art. 175 (3) of the previous Penal Code of Turkey. During the proceedings, the applicant argued that the book concerned was scientific in nature, clearly separated personal convictions from a State governed by religion, and criticised religion-based political systems only[130]. The domestic court first sentenced the applicant to 12-months prison for blasphemy, which was then converted into a fine. The judgment by the domestic court was upheld by the Court of Cassation. The domestic court argued that the book by the applicant contained expressions that *"God does not exist, it was created to control societies, Islam is a primitive religion, it fools people with stories about heaven and hell and consecrates exploitation and slavery*"[131]. The domestic court held that these expressions contained the elements of the offence of insulting religion. The applicant claimed an interference to his freedom of expression in the meaning of art. 10. The government referred to the Otto-Preminger v. Austria judgment and argued that the interference concerned had aimed to protect morals and the rights and freedoms of others in the meaning of art. 10 (2) of the ECHR. It argued that the interference concerned should be evaluated by the Court as falling within the scope of the margin of appreciation granted to the State.

---

129 Aydın Tatlav v. Turkey-50692/99, 2 May 2006, (Access) http://www.hudoc.echr.coe.int/site, 16.11.2014.

130 Aydın Tatlav v. Turkey, par. 9-12.

131 Aydın Tatlav v. Turkey, par. 14.

In its judgment, the ECtHR underlined the importance of striking a balance between two fundamental freedoms: the freedom to impart information and ideas and respect for others' freedom of belief, conviction and religion. The ECtHR acknowledged that the book contained harsh criticism against religion. It also held, however, that the expressions in the book did not directly attack the believers or their religious symbols, but criticised the wrongness of legitimizing social injustice by portraying it as "God's will". It underlined that certain criticisms could offend believers[132]. The Court unanimously held that there was a violation of art. 10 of the ECHR.

An Evaluation of ECtHR's Judgments

As the overview above suggests, in applications concerning blasphemy, the ECtHR strives to strike a balance between freedom of expression and freedom of religion and conscience. In restricting freedom of expression, it rests on the protection of the rights and freedoms of others. Although it is possible to argue that the ECtHR has an established jurisprudence in this field, one tends to think that the ratio of the votes in violation judgments point to a lack of stability. It is indeed challenging to draw a line between freedom of expression and freedom of religion and conscience, which are both considered fundamental rights. Cognizant of this challenge, the ECtHR underlines that states enjoy a wider margin of appreciation when these two freedoms clash with each other. The Court holds that in cases of blasphemy, two rights protected by the ECHR come to compete with each other: freedom of expression and freedom of religion and conscience. Therefore, the primary discussion should not be whether there has been an insult against religion, but whether there has been an attack on the feelings of the believers. For instance, in the Otto Preminger case, ECtHR focuses on those whose religious feelings were attacked rather than whether religion was attacked. Secondly, it looks at the medium used to disseminate the allegedly blasphemous expressions. The ECtHR underlines that audio and visual media are more pervasive compared to printed media. Furthermore, as in the case of Wingrove v. United Kingdom, the ECtHR also takes into account that even a single showing of a film can lead to its proliferation and uncontrolled dissemination. The reasoning in the judgments of national courts, though not binding, are also used by the ECtHR to strike a balance between the two rights.

[132] Aydın Tatlav v. Turkey, par. 28.

The judgments of the ECtHR and the general evolution of its jurisprudence in this area can be summarised as follows: Otto-Preminger Institute and Wingrove judgments pre-date other judgments and can be considered as initial judgments. These judgments were taken by the Commission under the previous version of the ECHR. Both Otto-Preminger and Wingrove judgments were taken with the votes of the dissenting judges and the I.A. case was taken by 4 votes to 3. These judgments indicate that public authorities can restrict expressions that insult religion and underline the margin of appreciation by the State. The ECtHR has justified its position with the argument that "there is no uniform European conception regarding which types of interference can be seen as appropriate when one's freedom of expression is used to attack the religious convictions of others". On the other hand, in its more recent rulings such as in Aydin Tatlav v. Turkey, the ECtHR has found a violation of art. 10 based on the fact that even an insignificant fine could deter others.

The ECtHR has also tackled the issue of the duties and responsibilities involved in exercising one's freedom of expression and, in matters concerning religious thoughts and convictions, held that "*this responsibility included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs"*[133]. The 'duty' imposed by the ECtHR can be viewed as an attempt to restrict expressions that do not contribute to public debate, gratuitously offend or insult believers, and which have the potential to harm social peace. In other words, according to the ECtHR, expressions that do not contribute to public debate while being 'gratuitously offensive' to others may fall outside the scope of protection afforded by the ECHR[134].

In conclusion, although the issues raised above are always assessed according to the circumstances of each case, the most recent judgments of the ECtHR seem to be in favour freedom of expression over freedom of religion, conscience and convictions.

The Offence of 'Insulting the Religious Values of a Section of the Society' in the Turkish Penal Code (TPC) no. 5237

[133] Kerem Altıparmak. p. 106.
[134] Osman Doğru, Atilla Nalbant, p. 19.

A. Overview

Although freedom of expression is a human right that can be enjoyed freely, it comes with certain inherent restrictions. International and national documents that refer to freedom of expression also mention certain restrictions and sanctions[135]. Other laws might have corresponding restrictions to the restrictions mentioned in the Constitution. Indeed, while freedom of thought and opinion is unlimited, restrictions may apply at the stage when they are shared with the outside world. The offence of 'insulting religious values' taken up in light of the ECtHR's judgments in this article is found in Section 5 of Chapter 3 on 'Offences Against Community' in the second volume of the Turkish Penal Code no. 5237 entitled *"Special Provisions".* The legislator has sought to protect public peace with this offence in art. 216 (3). The last paragraph of art. 216 criminalizes "*publicly insulting the religious values of a section of the society*". Expressions that insult religious values are a reason for restricting freedom of expression.

art. 216 (3) of the TPC states:

"Any person who publicly insults the religious belief of a section of the society shall be punished with imprisonment from six months to one year if such an act has the potential to disrupt public peace". In other words, Law no. 5237 criminalizes acts that publicly insult the religious values adopted by a section of the society.

Art. 218 allows for an increase in the sentence, saying "*if the offences defined in the articles above are committed through the media and press, the penalty shall be increased by one half. However, expressions of thought made with the intention of criticism, and which do not exceed the limits of providing information shall not constitute an offence*". The provision in the TPC for restricting freedom of expression can thus be invoked if there is a potential to disrupt social peace.

B. A Comparison of the Old and the New Law

Law no. 765 does not have an offence that corresponds to the Offence of Insulting Religious Values contained in art. 216 (3) of Law no. 5237[136]. The old TPC no. 765 contained a provision on "Offences Against Freedom of

---

135 The European Convention on Human Right asserts that freedom of expression also brings certain duties and responsibilities. In case of non-compliance with these duties and responsibilities, expressions may be subject to certain limitations.

136 Ahmet Gökçen, **Kamu Barışına Karşı Suçlar (m. 213-222) [Offences Against Public Peace: Articles 213-222]**, (Access) http://www.ceza-bb.adalet.gov.tr/makale/118.doc, p. 1., 18.11.2014.

Religion" in the section on "Offences Committed Against Freedom" (articles 175-178). However, these articles covered offences against religion in general, including the offence of insulting religious values. Par. 3 of art. 175 in TPC no. 765 included a provision against insults on religious values as a ground for restricting freedom of expression in the way it has been explored within the scope of this article. This provision stated: *"Any person who insults God or a religion or a prophet or a holy book or a denomination or who condemns, derides or insults another person for the other's religious belief or for obeying the rules of their religion or for avoiding its prohibitions shall be punished with imprisonment from six months to one year and a heavy fine from five thousand to twenty-five thousand liras".* In TPC no. 5237, the relevant provision refers to "*religious values*" and is shorter.

C. Insulting Religious Values

a. Legally Protected Interest

Each offence has a legal subject. The person or the thing to which an offence is directed constitutes the legal subject. The legal object or interest which the offence violates constitutes the subject of the offence[137]. Legal subject or legally protected interest then are not tangible or visible interests, but intangible values of the society such as public safety, peace and human dignity[138]. In the offence of blasphemy, the legally protected interest is "public peace". Insulting religious values is considered an 'endangerment offence' and it is enough for the danger to arise against the legally protected interest. In other words, the legally protected interest is violated when the danger of damage arises and it is not necessary for actual damage to occur[139].

b. Public Peace

The concept of public peace in 216 (3) also appears in "Offences Against Public Peace" under section 3 on "Crimes Against Society" in the second volume of the Turkish Penal Code no. 5237 entitled Special Provisions. Public peace pertains to an order where relations between individuals are governed by the rule of law. The concept of public peace is broader than public security and narrower than the concept of public security[140]. The offence of insulting

---

137 Mehmet Emin Artuk, Ahmet Gökçen, Caner Yenidünya, **5237 sayılı Yeni TCK'ya göre Hazırlanmış Ceza Hukuku Genel Hükümler I [General Criminal Law Provisions in the New Turkish Penal Code no. 5237**], 7th Edition, Ankara, Adalet Yayınevi, 2013, p. 280.

138 Mahmut Koca, İlhan Üzülmez, **Türk Ceza Hukuku Genel Hükümler [General Provisions of the Turkish Criminal Law],** 5th Edition, Ankara, Seçkin Yayıncılık, 2013, p. 107.

139 Pervin Aksoy İpekçioğlu, **Türk Ceza Hukukunda Suça Teşebbüs [The Attempt to Commit an Offence in the Turkish Criminal Law],** Ankara, Seçkin Yayıncılık, 2009, p. 183.

140 Ahmet Gökçen, **Kamu Barışına Karşı Suçlar [Offences Against Public Peace]**, p. 1.

religious values has an element of "*having the potential to disrupt public peace*" which narrows down the scope of implementation of this article. If the act concerns the person himself, this article cannot be invoked because there will be no damage to public peace[141].

c. Perpetrator of the Offence

The offence of insulting religious values does not contain any special provisions regarding the perpetrator. Any person can be the perpetrator of this offence. The law refers to "*a person who incites a group of persons from a different social class, race, religion, denomination or region to hatred and hostility against another group*" and thus ascertains that any person can be the perpetrator of this offence[142].

d. Victim of the Offence

Each offence aims to protect a value and must thus violate a legally protected interest which means an offence must harm someone[143]. Accordingly, the victim of an offence is the person who suffers in relation to an offence and only real persons can be victims of an offence[144]. Insulting religious values, which is regulated as an offence, is considered harmful to public peace. The victim of the offence is the society and the religious values adopted by the society. In fact, the law clearly refers to "*religious values adopted by a section of the society*" thereby pointing to the society as the protected value. The legislator's reference to 'society'[145] should be understood as any unspecified human grouping[146].

---

141 İsmail Malkoç**, Açıklamalı-İçtihatlı 5237 Sayılı Yeni Türk Ceza Kanunu (Madde150-241) [The New Turkish Penal Code no. 5237 with Annotations and Jurisprudence (Articles 150-241)]**, Ankara, Sözkesen Matbaacılık, p. 3610.

142 Mehmet Emin Artuk, Ahmet Gökçen, Caner Yenidünya, **Ceza Hukuku Özel Hükümler [Criminal Law: Special Provisions],** 13th Edition, Ankara, Adalet Yayınevi, 2013, p. 23.

143 Zeki Hafızoğulları, Muharrem Özen, **Türk Ceza Hukuku Genel Hükümler [Turkish Criminal Law: General Provisions]**, Ankara, US-A Yayıncılık, 2014, p. 373.

144 Mehmet Emin Artuk, Ahmet Gökçen, Caner Yenidünya**, Ceza Hukuku Özel Hükümler [Special Provisions of the Turkish Criminal Law**], p. 2425.

145 For the characterisation of the offence, the number of people targeted and impact on social life are to be deemed important. For instance, workers, employers, civil servants, farmers, foreigners, natives, political groups, masons, people of the same region are considered society. General Assembly of Criminal Chambers of the Court of Cassation, 15.03.2005, 2004/8-201-2005/30.

146 Osman Yaşar, Hasan Tahsin Gökcan, Mustafa Artuç, **Türk Ceza Kanunu Cilt V Madde 197-251 [Turkish Penal Code Volume 5 Articles 197-251],** Ankara, Adalet Yayınevi, 2014, p. 6544.

ELEMENTS OF THE OFFENCE

a. Objective Elements (Actus Reus)

The objective element of the offence of "*insulting religious values*" is publicly insulting the religious values adopted by a section of the society in a way that might harm public peace. The main act mentioned in the law is the insult against religious values. For the offence to occur, the act of insulting must be committed publicly. If the act is committed through the means of the media and press, the penalty foreseen within the scope of art. 218 may be increased by half.

aa. The Act of Insulting

According to the dictionary of the Turkish Language Society, 'insult' is defined as "depreciating the value, belittling, acting in a scornful manner"[147]. According to another definition, it is "not placing any value, shaking the trust of people in someone or something by referring to its uselessness and meaninglessness"[148]. Since the law does not place any restrictions to its form or means, the insult can be committed in oral expressions, artistic expressions, pictures as well as in cartoons. The critical factor here is the intention to insult the religious values protected by law.

Endangerment offences are offences that have the potential to harm. In such offences, the risk of danger is taken as danger[149]. Therefore, it is enough for the act to occur, that is to say, for the expression of an insult to take place. It is not necessary for the society to take this expression as offensive to their religious values. It is sufficient for the act to be objectively insulting. The law clearly stipulates a concrete endangerment offence[150].

bb. Being Public

One of the objective elements of this offence is being committed 'publicly'. Publicly is taken to mean "*explicitly, in front of everyone's eyes, in front of everyone, without hiding*"[151]. In legal jargon, publicly is used in a more technical

---

147 **Aşağılamak Nedir [What is to Insult],** (Access) http://www.tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.547dd86935e750.16548548, 20.11.2014.

148 İsmail Malkoç, p. 3611.

149 Pervin Aksoy İpekçioğlu, p. 183.

150 Osman Yaşar, Hasan Tahsin Gökcan, Mustafa Artuç, p. 6558.

151 **Aleniyet Nedir (What is publicly)** (Access), http://www.tdk.gov.tr/index.php?option=com_bts&arama=kelime&g uid =TDK.GTS.547de43d 3cb.588388, 12.08.2014.

sense. It is used to mean "*in a way that everyone can be aware of*", "*open to public*"[152]. If the offence is committed by means of the press, internet or social media, this element is considered to exist automatically.

Subjective Elements (Mens Rea)

A voluntary act alone does not suffice for an offence to occur: the subjective element (mens rea) of the crime must also be present. The subjective elements of a crime are intent and neglicence[153]. Art. 22 of the Turkish Penal Code states that acts conducted with neglicence shall be subject to a penalty only where explicitly prescribed by law. Since art. 216 (3) of the TPC does not contain any provisions that define crimes of neglicence for blasphemy, this offence can only be committed with (direct or probable) intent[154].

The Element of Unlawfulness

In addition to the objective and subjective elements, in order for an atypical behaviour like an offence to occur, it must not befit any lawful excuse[155].

In the second section of the Turkish Penal Code no. 5237 on excusatory or mitigating causes, all lawful excuses as well as excusatory and mitigating causes are regulated together. Lawfulness under TPC no. 5237 pertains to complying with a legal provision (art. 24/1), legitimate self-defence (art. 25/1), use of a right (art. 26/1), and consent of the concerned (art. 26/1).

Art. 218 of the Turkish Penal Code states that the penalty for insulting religious values will be increased if the offence is committed through the use of the press and media. According to the same article, however, expressions of one's ideas made with the intention of criticising, and which do not exceed the limits of imparting information will not constitute an offence. Freedom of expression as guaranteed by the Constitution and expressions that aim to impart information and subject to the restrictions of the Code of Press, do not constitute an offence. When all of these facts are taken together, it becomes clear that during an investigation or proceeding on blasphemy, perpetrators can invoke art. 26 (1) of the Turkish Penal Code to claim lawfulness.

---

152 Fehmi Şener Gülseren, **Ceza Hukukunda Aleniyet Kavramı [The Concept of Publicity in the Criminal Law**)], June 2014, p. 33, (Access) http://en.lau.edu.tr/euljss/si513.pdf, 12.07.2014

153 Hakan Hakeri, **Ceza Hukuku Genel Hükümler [Criminal Law General Provisions**], Ankara, Adalet Yayınevi, 2012, p. 181.

154 Ali Parlar, Muzaffer Hatipoğlu, **Türk Ceza Kanunu Yorumu [An Interpretation of the Turkish Penal Code)],** Vol.3, 3rd edition, Ankara, 2010.

155 Hakan Hakeri, p. 240.

Special Appearance Forms of the Offence

aa. Attempt

A completed offence is an offence where all the executive movements and all elements towards committing the crime are finalized. If one of these elements remain incomplete, the offence remains incomplete. An act towards an offence which is started but not completed shows a missing aspect as far as the objective element is concerned[156]. Defined as an attempt to commit a crime, this act is still punishable even though one of the elements is missing. However, the punishment of an attempt can only take place if the conditions mentioned in art. 35 of the TPC are present. This article states that "a person who acts with the intention of committing a crime but fails to perform the acts necessary to commit the crime due to a cause beyond his control, is considered to have attempted to commit crime". In this provision, the person starts the acts towards committing a crime but cannot finalise them due to reasons beyond his control.

In legal doctrine, the offence of insulting religious values is a conduct crime and, by definition, it is not amenable to 'attempt'. In other words, in offences where the result and act are intertwined, it is very unlikely not to have a result once the act is complete[157]. Attempt is only possible when movements towards a crime can be separated into parts[158]. Considering that one of the objective elements of blasphemy is 'being committed publicly', the offender might prevent an expression from becoming 'public'. Since blasphemy can also be committed through the use of the media and press, this could be the case when a person sends a text to a publisher or broadcaster but then demands that it not be published[159].

bb. Complicity and Joinder

In order to talk about complicity, there has to be more than one offender. Participation in a crime may be objective or subjective. The type of participation does not change the existence of an offence but it might change its classification. However, there has to be causation between the offence committed and the conduct of the accomplices[160]. This type of offence is open

---

156 İzzet Özgenç, **Türk Ceza Hukuku Genel Hükümler** [**Turkish Criminal Law: General Provisions**], Ankara, 9th Edition, Seçkin Yayıncılık, 2013, p. 206.

157 Nur Centel, Hamide Zafer, Özlem Çakmut, **Türk Ceza Hukukuna Giriş [Introduction to Turkish Criminal Law**], İstanbul, 7th Edition, Beta yayıncılık, 2011, p. 458.

158 Osman Yaşar, Hasan Tahsin Gökcan, Mustafa Artuç, p. 6567.

159 Osman Yaşar, Hasan Tahsin Gökcan, Mustafa Artuç, p. 6567-6568.

160 Veli Özer Özbek, Mehmet Nihat Kanbur, Koray Aydın, Pınar Bacaksız, İlker Tepe**, Türk Ceza**

to all kinds of participation. The legislator has not sought a specific offender status for this crime. Therefore, the relevant provisions on complicity in the Turkish Penal Code will be used to determine complicity in this offence[161].

Before discussing whether joinder provisions apply to the offence regulated by art. 216 (3), it is important to define what joinder means. In criminal law, each act is subject to a separate sanction. Joinder of offences is the only exception to this rule. In joinder, more than one act is covered in a single offence.

In joinder of offences, while the legally protected interest remains protected, there is a joinder of more than one offence for the same offender. That is to say, although more than one offence has been committed, one single legally protected interest is considered violated or the same legally protected interest is considered violated by different acts[162]. This can be in the form of actual or opinion-based joinder. There is an actual joinder of offences if more than one act has violated more than one legally protected interest[163]. If one legally protected interest is violated with more than one action, as is the case under joinder of offences on the basis of opinions, the offender is not given a separate sentence for each individual offence.

The legislator has not foreseen any special provisions or exceptions with regard to the joinder of offences on insulting religious values. Therefore, the general joinder provisions in the Turkish Penal Code will apply.

cc. Sanction

Punishment or sanction, is a penalty applied to a person in return for and commensurate with an offence committed, as a result of which the person is deprived of certain rights [164]. Sanctions are specific deprivations aimed to be deterrent, imposed on a person as a result a judicial decision for an offence committed and damage inflicted on the society, particularly in the form of containing the person so as to rehabilitate and demonstrate that the committed acts are not approved by the society[165].

Hukuku Genel Hükümler [Turkish Criminal Law: General Provisions], Ankara, Seçkin Yayıncılık, 3rd edition, 2012, p. 518.

161 Osman Yaşar, Hasan Tahsin Gökcan, Mustafa Artuç, p. 6567-6568.

162 Veli Özer Özbek, Mehmet Nihat Kanbur, Koray Aydın, Pınar Bacaksız, İlker Tepe, p. 535.

163 Veli Özer Özbek, Mehmet Nihat Kanbur, Koray Aydın, Pınar Bacaksız, İlker Tepe, s.535-536.

164 Ali Şafak, **Ceza Hukuku (Genel ve Özel Hükümler) [Criminal Law: General and Special Provisions**], Ankara, Selim Kitapevi, 1st edition, 2005, p. 60.

165 Timur Demirbaş**, Ceza Hukuku Genel Hükümler [Criminal Law: General Provisions**], Ankara, Seçkin Yayıncılık, 8th edition, 2012, p. 531.

Art. 216 (3) of the TPC sanctions the offence of insulting religious values with imprisonment from six months up to one year. If art. 218[166] applies, the punishment can be increased by one half.

Since the punishment is less than two years, if the accused consents, the court can decide to postpone the announcement of the judgment according to art. 231 (5) of the Law of Criminal Proceedings.

dd. Method of Prosecution and Court of Competent Jurisdiction

The offence of insulting religious values is prosecuted ex officio, that is to say, without the need for a complaint. According to art. 10 of Law no. 5235 on the Establishment, Duties and Capacities of First Instance Courts and Regional Courts of Appeal in Civil Jurisdiction, Courts of the Peace in Criminal Matters are responsible from trying these offences. If the offence is committed by means of the press and media, the competent court is the Criminal Court of First Instance in line with art. 7 of the Code of Press no. 5187. The court of competent jurisdiction will be where the act of insulting took place.

CONCLUSION

Freedom of expression is the basis of many rights. It is one of the main pillars of democracies. Furthermore, from a historical viewpoint, it is one of the most important gains of humanity. However, as with all other rights, limitation of this right is also a current topic of discussion.

Hate speech constitutes one of the most salient reasons for restricting freedom of expression. All rights may be exploited and recent discussions in this field have mainly centred around the exploitation of freedom of expression for hate speech and how to best contain it. Unfortunately, these discussions have generally remained limited to the field of law, particularly to domestic law and the jurisprudence of the international court. In reality, the sociological and political aspects of this issue are very important and certainly warrant more attention. Hate speech related to religion, ethnicity, sexual orientation, among others, is never devoid of social conditions and contexts.

In discussions on freedom of expression and its limitation in democratic societies, expressions of hate based on race, religion or other identities remain an unresolved issue with no clear consensus emerging in the horizon.

[166] The law foresees an increase in the penalty if the offence is committed through the means of the press and media.

If hate speech, as an assault on human dignity and honour, is not limited, the people who are attacked can be offended and the positive obligation of the State will remain unfulfilled. If freedom of expression, with its specific weight in the realm of human rights, is part and parcel of human dignity and honour, then it will have to be limited in cases where it is used as an attack on other people's rights and freedoms.

Two questions arise for the discipline of law: What kinds of expressions need to be interfered with and what kind of interference is appropriate. Determining which expressions of hate speech to limit is rather controversial. One of the most challenging issues here is the protection to be granted to religious feelings and values. The definition of 'religious values' is vague, and so are the conditions that will need to come together to warrant protection. In dealing with the way national authorities have handled moral or religious issues, the ECtHR has tended to respect religious values given the lack of a Europe-wide consensus in the field. In the Otto Preminger judgment, the ECtHR underlined that each society can have its unique dynamics and states enjoy a margin of appreciation in balancing the various dynamics to secure religious peace. While the margin of appreciation is a licence granted to states, it is up to the states to fill in its content. We believe that using criminal proceedings is not the way states should go about their margin of appreciation.

If hate speech incites and provokes to violence, the right to freedom of expression is considered abused and such expressions do not benefit from the protection afforded to freedom of expression. The risk of damage, as an element of offence, is considered present when there is incitement to violence. In cases where an expression does not contain violence and is merely an expression of an idea, we believe it is better to seek mutual understanding between the parties by keeping the social communication channels open, and where this fails, by resorting to legal compensation rather than invoking criminal sanctions. In fact, rather than bringing social peace and order, criminal sanctions by the State can sometimes harm social peace. In its jurisprudence, the ECtHR is more cautious with applications where the applicant has received a prison sentence and, depending on the severity of the sanction, can decide for a violation.

♦♦♦♦

BIBLIOGRAPHY

ALTIPARMAK, Kerem, **Kutsal Değerler Üzerine Tezler ve Ifade Özgürlüğü: Toplu Bir Cevap [Theses on Sacred Values and Freedom of Expression: A Collective Answer] bkz. İfade Özgürlüğü İlkeler ve Türkiye, (in: Freedom of Expression: Principles and Turkey),** 1st edition, İstanbul, İletişim Yayınları, Sena Ofset, 2007.

ARSLAN, Zühtü**, İfade Özgürlüğünün Sınırlarını Yeniden Düşünmek: Açık ve Mevcut Tehlikenin Tehlikeleri, Teorik ve Pratik Boyutlarıyla İfade Özgürlüğü [Revisiting the Limits of Freedom of Expression: Dangers of Clear and Present Danger, Theoretical and Practical Aspects of Freedom of Expression**], Liberal Düşünce Topluluğu, (Editor: Bekir Berat Özipek), Ankara, 2003.

ARTUK, Mehmet Emin, GÖKÇEN, Ahmet, YENİDÜNYA, Caner, **5237 sayılı Yeni TCK'ya göre Hazırlanmış Ceza Hukuku Genel Hükümler I [General Criminal Law Provisions in the New Turkish Penal Code no. 5237**], 7th Edition, Ankara, Adalet Yayınevi, 2013.

ARTUK, Mehmet Emin, GÖKÇEN, Ahmet, YENİDÜNYA, Caner, **Ceza Hukuku Özel Hükümler [Criminal Law Special Provisions],** 13th Edition, Ankara, Adalet Yayınevi, 2013.

ASAD, Talal, **Reflections on Blasphemy and Secular Criticism**, "In Religion: Beyond a Concept", Hent de Vries, Fordham University Press, 2008.

ASAD, Talal, **Free Speech, Blasphemy, and Secular Criticism, in Is Critique Secular?:** Blasphemy, Injury and Free Speech, The Townsend Papers in Humanities no. 2, University of California Press, Los Angeles, 2009.

AYDIN, Öykü Didem, **Üç Demokraside Düşünce Özgürlüğü ve Ceza Hukuku-ABD [Freedom of Thought and Criminal Law in Three Democracies - The USA]**, Ankara, Seçkin Yayıncılık, 2004.

BAKIRCIOĞLU, Önder, **Freedom of Expresion and Hate Speech**, Tulsa Journal of Comparative-International Law, Vol.16, 2008.

BEYDOĞAN, T.Ayhan, **Avrupa İnsan Hakları Sözleşmesi Işığında Türk Hukukunda Siyasî İfade Hürriyeti [Freedom of Political Expression in the Turkish Law in Light of the European Convention on Human Rights**], Ankara, Liberal Düşünce Topluluğu, Cantekin Matbaası, 2003.

BIÇAK, Vahit, **AİHM Kararları Işığında İfade Özgürlüğü, Teorik ve Pratik Boyutlarıyla İfade Özgürlüğü [Freedom of Expression in the Light of ECtHR Judgments, Theoretical and Practical Aspects of Freedom of Expression]**, Liberal Düşünce Topluluğu, (Editor: Bekir Berat Özipek), Ankara 2003.

CAN, Osman, **Düşünceyi Açıklama Özgürlüğü: Anayasal Sınırlar Açısından Neler Değişti? [The Right to Express a Thought: What has changed in terms of Constitutional Limits?**], Liberal Düşünce Topluluğu, (Editor: Bekir Berat Özipek), 2003.

CENTEL, Nur, ZAFER, Hamide, ÇAKMUT, Özlem, **Türk Ceza Hukukuna Giriş [Introduction to Turkish Criminal Law**], İstanbul, 7th edition, Beta Yayıncılık, 2011.

ÇAĞLAR Bakır, ÇAVUŞOĞLU Naz, **Parti Kapatma Davalarında Mermer – Mozaik İkilemi: Demokratik Toplum Düzeni Hukuku Tartışması Üzerine Notlar [The Marble-Mosaic Dilemma in Party Closure Cases: Notes on the Debate regarding the Law of a Democratic Social Order],** Ankara, Anayasa Yargısı 16, 1999.

ÇEÇEN, Anıl, **İnsan Hakları [Human Rights],** İstanbul, Gündoğan Yayınları, 2000.

DEMİR, Hande Seher, **AİHS sisteminde Din ve Vicdan Özgürlüğü [Freedom of Religion and Conscience in the ECHR system],** Ankara, Adalet Yayınevi, 2011.

DEMİRBAŞ, Timur, **Ceza Hukuku Genel Hükümler [Criminal Law: General Provisions**], Ankara, Seçkin Yayıncılık, 8th edition, 2012.

DOĞRU, Osman; NALBANT, Atilla, **İnsan Hakları Avrupa Sözleşmesi: Açıklama ve Önemli Kararlar [The European Convention on Human Rights: Annotations and Important Judgments**], Vol. 2, Ankara: Avrupa Konseyi, 2013.

GÖLCÜKLÜ, A. Feyyaz; GÖZÜBÜYÜK A. Şeref, **Avrupa İnsan Hakları Sözleşmesi ve Uygulaması [European Convention on Human Rights and its Implementation**], Ankara, Turhan Kitabevi, 2012.

GÖKÇEN, Ahmet, **Halkı Kin ve Düşmanlığa Açıkça Tahrik Cürümü (TCK madde 312/2) [The Criminal Offence of Openly Inciting the Society to Hatred and Hostility (art. 312/2)],** Ankara, Liberal Düşünce Topluluğu Yayınları, 2001.

GÜRSEL, Esra Demir, **Avrupa İnsan Hakları Sözleşmesinin 8-11 maddesinde korunan Haklar ve Demokratik Toplumun Sınırları [The Rights Protected Under Articles 8-11 in the European Convention on Human Rights and the Limits of a Democratic Society]**, Ph.D. Thesis, İstanbul, 2014.

HAFIZOĞULLARI, Zeki, ÖZEN, Muharrem, **Türk Ceza Hukuku Genel Hükümler [Turkish Criminal Law: General Provisions]**, Ankara, US-A Yayıncılık, 2014.

HAKERİ, Hakan, C**eza Hukuku Genel Hükümler** (**General Provisions of the Criminal Law**), Ankara, Adalet Yayınevi, 2012.

İPEKÇİOĞLU, Pervin Aksoy, **Türk Ceza Hukukunda Suça Teşebbüs [The Attempt to Commit an Offence in the Turkish Criminal Law],** Ankara, Seçkin Yayıncılık, 2009.

KABOĞLU, İbrahim Ö, **Özgürlükler Hukuku 1 [The Law of Freedoms 1],** Ankara, İmge Kitabevi Yayınları, 2013.

KAMBER, Suat, **İfade Özgürlüğü [Freedom of Expression]**, Ankara, Specialisation Thesis at the Prime Ministry, 2012.

KAPANİ, Münci, **Kamu Özgürlükleri [Public Freedoms]**, 7th edition, Ankara, Yetkin Yayınları, 1993

KARAGÖZ, Kasım, **İfade Özgürlüğü ve Avrupa İnsan Hakları Sözleşmesinde Sınırlandırılması [Freedom of Expression and its Limitation in the European Convention on Human Rights**], Ankara, 2004 (Unpublished Doctoral dissertation).

KARAN, Ulaş, **Nefret İçerikli İfadeler, İfade Özgürlüğü ve Uluslararası Hukuk [Expressions of Hate, Freedom of Expression and International Law]**, 1st Edition, İstanbul, Ayrıntı Yayınları, (Editor: Yasemin İnceoğlu) 2012.

KOCA, Mahmut, ÜZÜLMEZ, İlhan, **Türk Ceza Hukuku Genel Hükümler [General Provisions of the Turkish Criminal Law],** 5th Edition, Ankara, Seçkin Yayıncılık, 2013.

KÜÇÜK, Adnan, **İfade Hürriyetinin Unsurları [Elements of Freedom of Expression**], 1st Edition, Ankara, Liberal Düşünce Topluluğu, September 2003.

KÜZECİ, Elif, **AİHS'nin 10.maddesi Işığında Nefret İçerikli ve Irkçı Nitelikli Düşünce Açıklamaları [Expressions of Hate and Racism in Light of art. 10 of the ECHR]**, Türkiye Barolar Birliği Dergisi [Journal of the Union of Bar Associations of Turkey], p. 71, 2007 p. 178

MACOEVİ, Monica, , **İfade Özgürlüğü, Avrupa Konseyi İnsan Hakları El Kitapları [Freedom of Expression, Council of Europe Human Rights Handbooks]** no:2, Strasbourg, 2001.

MALKOÇ, İsmail, **Açıklamalı-İçtihatlı 5237 Sayılı Yeni Türk Ceza Kanunu (Madde150-241) [The New Turkish Penal Code no. 5237 with Annotations and Jurisprudence (articles 150-241)]**, Ankara, Sözkesen Matbaacılık.

MURDOCH, Jim, **Düşünce vicdan ve din özgürlüğü, Avrupa İnsan Hakları Sözleşmesi'nin 9.maddesinin uygulanmasına dair klavuz kitap, İnsan hakları el kitapları [Freedom of Thought, Conscience and Religion, A Guide to the Implementation of art. 9 of the European convention on Human Rights,**

Human Rights Handbook], Trans. by Serkan Cengiz, 1st edition, Ankara, Şen Matbaa, 2013.

NATHWANİ, N, **Human Rights Law Review**, 2008/4.

OKUMUŞ, Ali, **Avrupa İnsan Hakları Mahkemesi Kararları Işığında Türkiye'de İfade Hürriyeti [Freedom of Expression in Turkey in Light of the Judgments of the European Court of Human Rights**], Ankara, Adalet Yayınevi, 2007.

ÖKTEM, Akif Emre, **Uluslararası Hukukta İnanç Özgürlüğü [Freedom of Belief in International Law**], Ankara, Liberte Yayınları, December 2002.

ÖZGENÇ, İzzet, **Türk Ceza Hukuku Genel Hükümler** [**Turkish Criminal Law: General Provisions**], Ankara, 9th Edition, Seçkin Yayıncılık, 2013.

ÖZBEK, Veli Özer, KANBUR, Mehmet Nihat, AYDIN, Koray, BACAKSIZ, Pınar, TEPE, İlker, **Türk Ceza Hukuku Genel Hükümler [Turkish Criminal Law: General Provisions**], Ankara, Seçkin Yayıncılık, 3rd edition, 2012.

PARLAR, Ali, HATİPOĞLU, Muzaffer, , **Türk Ceza Kanunu Yorumu [An Interpretation of the Turkish Penal Code)],** Vol.3, 3rd edition, Ankara, 2010.

REİSOĞLU, Safa, **Uluslararası Boyutlarıyla İnsan Hakları (Human Rights with its International Dimensions),** İstanbul, Beta Yayınları, 2001.

RIJN, Arjen Van, **İfade Özgürlüğü (10.madde) [Freedom of Expression: art. 10],** Vol. 1, Ankara, Başkent Klişe Matbaacılık, (Editor: Birsen Erdoğan, Compiled by Birsen Erdoğan, Ulaş Karan).

SELÇUK, Sami, **Düşün Özgürlüğü [Freedom of Thought],** Yeni Türkiye, Vol 17, Year 3, Ankara, 1997.

SELÇUK, Sami, **Bağımsız Yargı Özgür Düşünce [Independent Judiciary, Free Thought**], İmge Yayınları, Ankara 2007.

SUNAY, Reyhan, **Avrupa Sözleşmesinde ve Türk Anayasasında İfade Hürriyetinin Muhtevası ve Sınırları [The Content and Limits of Freedom of Expression in the European Convention and the Turkish Constitution]**, 3rd edition, Ankara, Pano Ofset, 2001.

ŞAHBAZ, İbrahim, **Karşılaştırmalı Düşünceyi Açıklama Özgürlüğü ([Freedom of Expression of Thought: A Comparative Analysis],** Ankara, Yetkin Yayınevi, 2007.

ŞAHİN, Kemal, **İnsan Hakları ve Özgürlük Boyutuyla İfade Özgürlüğü Gerekçeleri ve Sınırları [Freedom of Expression in relation to Human Rights and Freedoms: Justifications and Limits**], İstanbul, XII Levha Yayınevi, 1st edition, 2009.

ŞAFAK, Ali, **Ceza Hukuku (Genel ve Özel Hükümler) [Criminal Law: General and Special Provisions**], Ankara, Selim Kitapevi, 1st edition, 2005.

TAHZEB-LIE, Bahia, **Freedom of Religion or Belief is an Asset**, "Fundamental Rights and Principles", Liber Amicorum, Pieter van Dijk, Marjolein van Roosmalen, Ben Vermeulen, Fried van Hoof, Marten Oosting, Camdridge-Antwerp-Portland, Intersantia Publishers, 2013.

TEZCAN, Durmuş: ERDEM, Mustafa Ruhan; SANCAKDAR, Oğuz, **Avrupa İnsan Hakları Sözleşmesi Işığında Türkiye'nin İnsan Hakları Sorunu [The Problem of Human Rights in Turkey in Light of the European Convention on Human Rights**], Ankara, Seçkin Yayınları, 2004.

TEZCAN, Durmuş; ERDEM, Mustafa Ruhan; SANCAKDAR, Oğuz; ÖNOK, Rifat Murat, **İnsan Hakları El Kitabı [Handbook on Human Rights**], 5th edition, Ankara, Seçkin Yayınları, 2014.

TRAGER, Robert - DICKERSON Dona L. **21. Yüzyıl da İfade Özgürlüğü [Freedom of Expression in the 21st Century**], translated by A. Nuri Yurdusev, Ankara, Liberal Düşünce Topluluğu, Cantekin Matbaası, 2003.

VURAL, Hasan Saim, **Türkiye'de Din Özgürlüğüne İlişkin Anayasal Güvence [Constitutional Guarantee for Freedom of Religion in Turkey],** Ankara, Seçkin Yayıncılık, 2013.

YAŞAR, Osman; GÖKCAN, Hasan Tahsin, ARTUÇ Mustafa, **Türk Ceza Kanunu Cilt V Madde 197-251 [Turkish Penal Code Volume 5 Articles 197-251],** Ankara, Adalet Yayınevi, 2014.

WEBER, Anna, **Nefret Söylemi El Kitabı [Manual on Hate Speech],** Trans. by Metin Çuhaloğlu, Council of Europe Publications, September 2009.

ZARPLI, Çağdaş, **İnsan Hakları: İçeriği ve Sınırları [Human Rights: Content and Limitations**], Master Thesis, 2008.

ZWAAK, Leo, Kasım Karagöz, Kemal Şahin, Murat Tümay; **Matra Yargıda İfade Özgürlüğüne Yönelik Farkındalığın Arttırılması Projesi İfade Özgürlüğü Ders Kitabı [Matra 'Strengthening the Capacity of the Judiciary on Freedom of Expression Project: Freedom of Expression Course Book**], Ankara, Adalet Akademisi Yayınları, 2013.

INTERNET RESOURCES

Adnan Küçük, **Fikir Özgürlügünün Unsurlarıyla Birlikte Arzettigi Ayrılmaz Bütünlük [Freedom of Expression and Its Constituents: An Indivisible Whole],** (Access) http://www.akader.info/ KHUKA_2003_mart/fikir_hurriyeti.htm. 13.12.2014.

Aleniyet Nedir (What is publicly) (Access), http://www.tdk.gov.tr/index.php?option=com_bts& arama=kelime&guid=TDK.GTS.547de43d 3cb.588388, 12.08.2014.

Fehmi Şener Gülseren, **Ceza Hukukunda Aleniyet Kavramı [The Concept of Publicity in the Criminal Law**)], June 2014, p. 33, (Access) http://en.lau.edu.tr/euljss/si513.pdf, 12.07.2014

Aşağılamak Nedir [What is to Insult], (Access) http://www.tdk.gov.tr/index.php?option=com_gts& arama=gts&guid=TDK.GTS.547dd86935e750.16548548, 20.11.2014.

Erdoğan Teziç, **Türkiye'de Siyasal Düşünce ve Örgütlenme Özgürlüğü [Freedom of Political Thought and Organisation in Turkey],** v. 7, p. 32. Ankara, Anayasa Yargısı, (Access) http://www.anayasa. gov.tr/eskisite/anyarg7/tezic.pdf., 15.10.2014.

Ahmet Gökçen, **Kamu Barışına Karşı Suçlar (m. 213-222) [Offences Against Public Peace: Articles 213-222]**, (Access) http://www.ceza-bb.adalet.gov.tr/makale/118.doc, p. 1., 18.11.2014.

Hate Crimes in the OSCE Region: Incidents and Responses, Annual Report for 2006, OSCE Office for Democratic Institutions and Human Rights, Warsaw, 2007, p. 9, (Access) http://www.osce.org/odihr/ 26759, 12.06.2014.

Hülya Dinçer, **İnsan Hakları Söylem Ve Pratiğinde Dine Hakaret, İfade Özgürlüğü Ve Dini Hislere Tanınan Koruma [Blasphemy, Freedom of Expression and Protection of Religious Feelings in the Discourse and Practice of Human Rights**], Marmara University official website, (Access) http://marmara. academia.edu hulyadincer, p. 1-2. 16.08.2014.

Nefret Söylemi [Hate Speech], (Access) http://www.nefretsoylemi.org, 14.09.2014.

Ş. Özen, **İslam Hukukunda Zındıklık Suçu Ve Molla Lürfî'nin İdamının Fıkhîliği [The Offence of Heresy in Islamic Law and the Execution of Molla Lürfi],** İslam Araştırmaları Dergisi (Journal of Islamic Studies), Vol. 6, 2001, p. 26. (Access) http://www.isam.org.tr/documents%5Cdosyalar%5Cpdfler%5Cislamarastirmalaridergisi%5Csayi06%5C017062.pdf., 12.09.2014.

Tarlach McGonagle, **"Protection of Human Dignity, Distribution of Racist Content (Hate Speech)",** Institute for Information Law, Faculty of Law, University of Amsterdam (Access) http://www.ivir.nl/publications/mcgonagle/humandignity.html., 16.08.2014.

Sabahattin Nal, **Avrupa İnsan Hakları Sözleşmesi Çerçevesinde Düşünce, Vicdan ve Din Özgürlüğü [Freedom of Thought, Conscience and Religion Within the Framework of the European Convention on Human Rights],** Mustafa Kemal University Faculty of Economics and Management, Ankara University SBF Journal, 57-4, (Access) http://dergiler.ankara.edu.tr/dergiler/42/469/5371.pdf, p. 88 ,11 September 2014.

ECtHR JUDGMENTS

Aydın Tatlav v. Turkey (no. 50692/99), (Access) http://www.hudoc.echr.coe.int/site, 16.11.2014.

Castells v. Spain (no. 11798/85), (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014

De Haas and Gijsel v. Belgium (no. 19983/92), (Access) http://www.hudoc.echr.coe.int/site, 21.11.2014.

Dink v. Turkey (no. 64915/01), p. 69, (Access) http://www.hudoc.echr.coe.int/site, 18.06.2014.

Handyside v. United Kingdom (no: 5493/7), (Access) http://www.hudoc.echr.coe.int/site, 06.09.2014.

Garaudy v. France (no. 65831/01), (Access) http://www.hudoc.echr.coe.int/site, 06.11.2014.

Giniewski v. France (no. 6401/2006), (Access)http://www.hudoc.echr.coe.int/site, 08.11.2014.

Jersild v. Denmark (no. 15890/89), (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014.

I.A. v. Turkey (no: 4571/98), (Access) http://www.hudoc.echr.coe.int/site 07.08.2014.

Kokkinakis v. Greece (no. 14307/88), (Access)http://www.hudoc.echr.coe.int/site, 06.11.2014.

Lingens v. Austria (no. 9815/82), (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014

Murphy v. Ireland (no. 44179), (Access) http://www.hudoc.echr.coe.int/site, 07.09.2014.

Müller et al v. Switzerland (no. 10737/84), (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014.

Otto Preminger Institute v. Austria (no. 13470/87), (Access) http://www.hudoc.echr.coe.int/site, 06.11.2014.

Throgeir Thorgeirson v. Iceland (no. 13778/88), (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014.

Wingrove v. United Kingdom (no. 17419/90), (Access) http://www.hudoc.echr.coe.int/site, 06.10.2014.

TERÖR PROPAGANDASI YAPAN VEYA TERÖRÜ ÖVEN İNTERNET SİTELERİNİN İDARİ YOLDAN ENGELLENMESİNE DAİR 13 KASIM 2014 TARİHLİ FRANSIZ YASAL REFORMU

La Réforme Française Du 13 Novembre 2014 Sur Le Blocage Administratif Des Sites Internet Provoquant Au Terrorisme Ou En Faisant L'apologie

Mustafa AKGÜN[1*]

RESUME

Le 21ème siècle a commencé avec de fortes attaques de groupes terroristes mondiaux. Ces attaques ont conduit la plupart des pays à faire des réglementations spécifiques antiterroristes y compris des réglementations très répressives. Mais ces réglementations n'étaient pas assez pour finir la dissémination du terrorisme mondial. En fait, certaines mesures exagérées a eu même des effets renforçant pour les groupes terroristes.

Actuellement, les organisations terroristes profitent bien les possibilités de l'ère de communication dans la rémunération des terroristes, l'élargissement de leur champ de violence et pour enseigner leurs membres et sympathisants. La situation actuelle du terrorisme mondiale et l'utilisation fréquent des sites internet pour ce but a amené certaines pays faire des règlementations spécifiques sur ce domaine.

Dans ces circonstances, la France a adopté, le 13 novembre 2014, des lois relatives au blocage administratif des sites internet provoquant au terrorisme ou en faisant l'apologie, qui a lancé un vif débat autour de la liberté d'expression et de communication.

Mots Clés : Terrorisme mondial, Internet, Blocage administratif, Liberté d'expression, Liberté de communication

ÖZET

21. yüzyıl, küresel terör örgütlerinin ses getiren eylemleriyle başlamış, buna cevaben birçok devlet, fazla baskıcı hükümler de içeren terörle mücadele düzenlemeleri yapmıştır. Ancak, bu düzenlemeler terörün yayılmasını önlemeye yetmediği gibi, bazı aşırı baskıcı düzenleme ve uygulamalar terör örgütlerinin daha fazla güç kazanmasına sebep olmuştur.

Günümüzde terör örgütleri, insan kaynağı bulmak, daha geniş bir eylem alanı edinmek, üyelerine ve sempatizanlarına görüşlerini empoze etmek için iletişim

* Stagiaire Juriste à l'Ambassade de Turquie à Paris

çağının imkanlarını aktif olarak kullanmaktadır. Küresel terörün durumu ve bu amaçla internet sitelerinin yoğun olarak kullanılıyor olması gerçeği, birçok ülkeyi bu alanda özel düzenlemeler yapmaya yönlendirmiştir.

Bu şartlar altında, Fransa, 13 Kasım 2014'te, terör propagandası yapan veya terörü öven internet sitelerinin idari kararla engellenmesini öngören bir düzenlemeyi kabul etmiştir. Bu düzenleme, Fransa'da ifade özgürlüğü ve haberleşme özgürlüğü çerçevesinde bir tartışmanın da doğmasına sebep olmuştur.

Anahtar Sözcükler: Küresel Terör, İnternet, İdari engelleme, İfade özgürlüğü, İletişim özgürlüğü

♦♦♦♦

INTRODUCTION

1. Les raisons socio-politique de la réforme

La situation globale

Le terrorisme est un concept juridique qui peut être défini comme « exercer contre un Etat et/ou une société de la part d'un acteur que l'on peut considérer comme non-étatique, même s'il peut disposer par ailleurs d'un soutien étatique externe au pays considéré »[2]. Il y a trois typologies de terrorisme: terrorisme national, internationale et globale[3]. Le terrorisme global est défini selon son caractère qui utilise les moyens de la globalisation technologique[4].

L'évolution dans les technologies de communication et de transport ont lancées la mondialisation du terrorisme. Actuellement, internet et plus précisément les réseaux sociaux sont des outils indispensables des acteurs du terrorisme global. Ils utilisent les outils de communication pour faire leur propagande, pour le recrutement et pour l'enseignement des terroristes. Le difficile contrôle d'internet leur offre une place libre pour leurs buts susvisés.

Ce phénomène de mondialisation du terrorisme a causé deux importants changements: Les organisations terroristes ont une composition

2 H. LAURENS, M. DELMAS-MARTY, « Le terrorisme comme concept juridique de transition », in. *Terrorismes. Histoire et droit,* H. LAURENS, M. DELMAS-MARTY *,* Biblis, CNRS éditions, Paris, 2010, p.323.

3 E. DECAUX, « Terrorisme et droit international des droits de l'homme" in. Terrorismes. Histoire et droit, H. LAURENS, M. DELMAS-MARTY , Biblis, CNRS editions, Paris, 2010, p.307

4 Ibid.p.309.

géographiquement diverse[5] et leur champ de violence est facilement plus large qu'avant. Étant actuellement un des acteurs terroristes le plus dangereux, Etat Islamique (EI), est né au moyen orient après la guerre intérieure en Syrie et a non seulement une composition de terroristes de divers pays du monde mais aussi un champ d'effet plus large que le Moyen Orient. Ils ont des ressources humaines et financières globales à la fois ont un champ de violence globale. De l'autre côté un autre acteur important et plus ancien du terrorisme mondiale, Al-Qaïda, a lancé un appel au djihad-individuel qui invite ses sympathisants à faire des attaques terroristes individuelles sans formation ou instruction de la part de l'organisation terroriste[6]. Al-Qaïda souhaite que ses sympathisants apprennent les notions nécessaires pour la perpétration d'attaques terroristes et les réalisent eux-mêmes. On a vu les effets premiers du terrorisme individuel avec l'attentat d'Anders Behring Breivik qui a causé la mort de 77 personnes en Norvège et l'attentat de Mohammed Merah qui a tué sept personnes en France. Les possibilités d'internet a des effets très important sur le terrorisme individuel aussi. On peut voir des sites internet et des pages dans les réseaux sociaux faisant la propagande des organisations terroristes, enseignant les méthodes de préparation individuelle des bombes et la dissimulation des traces de crimes.

Il semble pertinent de continuer avec examination de la situation en France. La France est entre les premiers pays qui souffert de terrorisme mondiale alors qu'elle est assez loin aux centres des groupes terroristes actuellement connus, du point de vue géographique. Selon le rapport parlementaire[7], en date du 17 juillet 2014, les services français recensaient 899 personnes françaises – ou résidentes en France – concernées par des filières terroristes, soit une progression de 58 % en six mois. On a vu, ces dernières années, des attaques terroristes, comme l'attaque au siège du journal Charlie Hebdo, commises par des citoyens français sur le territoire français au nom des groupes terroristes augmenter. Les combattants européens dans les groupes terroristes est un sujet également important au niveau européen. Ainsi, la dissémination du terrorisme en Europe nous a montré la nécessité de mener une politique antiterroriste plus adaptée aux nécessités actuelles. Un des plus

5 G. CHAILAND, "Guérillas et terrorismes", in. Politique étrangère, (revue trimestrielle publiée par l'institut français des relations internationales), No 2, 2011, p.291.

6 G. STEINBERG, Al- Al-Qaida 2011, in. Politique étrangère, (revue trimestrielle publiée par l'institut français des relations internationales), No 2, 2011, p.267.

7 « Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Texte de la commission n° 2173, déposé le 22 juillet 2014, Assemblée Nationale, Disponible sur; http://www.assemblee-nationale.fr/14/ta-commission/r2173-a0.asp

importants objectifs de cette politique est d'empêcher la propagande des organisations terroristes sur internet. Ainsi, la propagande de terrorisme, le recrutement et l'enseignement des terroristes sur internet a amené la plupart des pays européens à faire des régulations spécifiques dans ce domaine.

Dans ces circonstances, la France a adopté, le 13 novembre 2014, des lois relatives au blocage administratif des sites internet provoquant au terrorisme ou en faisant l'apologie.

2. Les méthodes de blocage sur les sites internet

Selon l'art. 1 de la loi du 29 juillet 1982, « la communication audiovisuelle est libre. ». Cette liberté trouve sa base constitutionnelle dans l'art. 11 de la Déclaration des droits de l'homme et du citoyen (DDHC), qui affirme que « La libre communication des pensées et des opinions est un des droits les plus précieux de l'Homme ; tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi. ». De plus, cette liberté est protégée par la Convention européen de droit de l'homme (CEDH)[8]. Normalement, cette liberté a des limites. L'art. 10-2 de la CEDH a une grande importance en ce qui concerne les limites de cette liberté. Cet article a influence assez profondément sur le droit français[9]. Cet article prévoit que la liberté d'expression peut être limitée par la loi en vertu de « mesures nécessaires, dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale ou à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire ».

---

8 L'art. 10 de la Convention dispose que: « Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques et sans considération de frontière. Le présent article n'empêche pas les Etats de soumettre les entreprises de radiodiffusion, de cinéma ou de télévision à un régime d'autorisations. L'exercice de ces libertés comportant des devoirs et des responsabilités peut être soumis à certaines formalités, conditions, restrictions ou sanctions prévues par la loi, qui constituent des 12 13 mesures nécessaires, dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale ou à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire.»
Disponible sur : http://www.echr.coe.int/Documents/Convention_FRA.pdf

9 A. LEPAGE, Libertés et droits fondamentaux à l'épreuve de l'internet, Litec, Editions Jurisclaseur, Paris, 2002, p.89

En considérant le rôle important d'internet dans le domaine des crimes, faire des réglementations particulières aux nouvelles technologies est devenu indispensable. La propagande du terrorisme, la pédopornographie et les autres crimes sont interdites et punis y compris sur internet. Internet n'est pas une zone de non droit mais pour garantir le droit dans ce domaine on a besoin de réglementations particulières appropriées à ses spécificités.

Il s'agit deux types de blocage de sites internet : le blocage judiciaire et le blocage administratif. Le premier qui vient après une décision de justice est la méthode essentielle du blocage, en droit européen. Le blocage administratif n'est possible que dans des situations exceptionnelles. En droit français, le blocage administratif n'est possible que pour les sites qui héberge des contenus pédopornographiques[10] et, dans une certaine mesure, pour les sites qui serve aux jeux d'hasard illicite[11]. Pour le reste une décision de justice est nécessaire. Comme un autre exemple, en droit turc, le blocage administratif n'est possible que pour une catégorie de crimes dans les cas où l'hébergeur et l'éditeur du contenu ne sont pas en Turquie, et pour une autre catégorie plus restreinte de crimes même si les hébergeurs et les éditeurs sont dans le pays[12].

---

10 L'article 4 de la loi n° 2011-267 du 14 mars 2011 d'orientation et de programmation pour la performance de la sécurité intérieure (LOPPSI 2) a modifié l'article 6 de la LCEN pour prévoir le blocage administratif des sites à caractère pédopornographique

11 « En outre, un blocage « hybride » (c'est-à-dire judiciaire à l'initiative d'une autorité administrative) a été mis en place en application de l'article 61 de la loi n° 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne et du décret n° 2011-2122 du 30 décembre 2011 relatif aux modalités d'arrêt de l'accès à une activité d'offre de paris ou de jeux d'argent et de hasard en ligne non autorisée définit les modalités de blocage des sites de jeux illégaux. Après constat puis mise en demeure des opérateurs de jeux d'argent ou de hasard contrevenant aux dispositions du titre II du livre III du code de la sécurité intérieure, le Président de l'ARJEL peut saisir le Président du TGI de Paris aux fins d'ordonner l'arrêt du service aux hébergeurs, et le cas échéant, le blocage des sites incriminés aux FAI. »
« Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Texte de la commission n° 2173, déposé le 22 juillet 2014, Assemblée Nationale, Disponible sur : http://www.assemblee-nationale.fr/14/ta-commission/r2173-a0.asp

12 Selon l'article 8 de la loi n° 5651 du 04/05/2007, il peut être décidé au blocage des sites internet qui commettent certains crimes définis dans le code pénal tels que:
- L'incitation au suicide
- L'abus sexuel des mineurs
- La facilitation de l'utilisation des substances narcotiques
- La fourniture de substances dangereuses pour la santé
- L'obscénité
- La prostitution
- La mise à disposition de lieux pour les jeux d'hasard.

Pour le blocage judiciaire, il existe deux méthodes : la décision du juge des référés et la décision de la cour. Selon l'art. 6.I.8 et l'art. 50-1 de la loi du 29 juillet 1881 sur la liberté de la presse modifiée par la loi du 5 mars 2007 : « l'arrêt [du] service peut être prononcé par le juge des référés, à la demande du ministère public et de toute personne physique ou morale ayant intérêt à agir ». Comme un autre exemple, en Turquie, pour les crimes qui sont listés à l'alinéa 1 de l'art 6 de la loi 5651 du 4/5/2007, la décision judiciaire de blocage doit être rendue par le juge des référés pendant l'enquête juridique et par la cour pénale pendant le procès. Pendant l'enquête, si nécessaire, le procureur public peut décider aussi au blocage. Dans ce cas, sa décision sera présentée au juge référé dans les 24 heures. Celui-ci doit communiquer sa décision au maximum dans 24 heures. Pour les autres crimes, c'est la cour qui peut la décider.

En principe, une intervention qui prive les individus de leur liberté d'expression et de communication nécessite la décision d'une autorité indépendante des politiques. Mais certaines nécessités comme la protection des internautes, la protection des mineurs et la lutte contre le terrorisme ont mené à faire des exceptions à ce principe.

Pour le blocage administratif il y a essentiellement deux méthodes[13]. La première est la méthode exclusivement administrative selon laquelle le blocage est valide jusqu'à la décision contraire du pouvoir judiciaire. La

Cet article prévoit aussi que les sites internet commettant des crimes définis dans la loi sur les crimes contre Atatürk peuvent être bloqués.
La décision de blocage est rendue par le juge des référés pendant l'enquête judiciaire et par la cour pénale pendant le procès. Pendant l'enquête, si nécessaire, le procureur public peut décider aussi au blocage. Dans ce cas, sa décision sera présentée au juge des référés dans un délai de 24 heures. Le juge des référés communique sa décision au maximum dans un nouveau délai de 24 heures.
Si l'éditeur ou l'hébergeur des contenus qui commettent les crimes susvisés sont dans un autre pays, la BTK peut décider à un blocage administratif. Quand la BTK trouve les responsables de ces contenus, il doit saisir le juge. Jusqu'à la décision contraire d'un juge, le blocage administratif reste toujours valide.
La BTK peut décider au blocage administratif sur les crimes d'abus sexuel sur des enfants et d'obscénité même si l'éditeur et l'hébergeur résident dans le pays. Mais dans ce cas, la BTK doit saisir le juge des référés dans les 24 heures. Le juge doit communiquer sa décision au maximum dans 24 heures. Sinon le blocage administratif sera invalide sans délai.

13 En France, pour le blocage concernant des jeux de hasard illicite, le Président de l'Autorité de régulation des jeux en ligne (l'ARJEL) peut saisir le Président du TGI de Paris aux fins d'ordonner l'arrêt du service aux hébergeurs, et le cas échéant, le blocage des sites incriminés aux fournisseurs d'accès à internet(FAI). Donc, il s'agit d'un blocage judiciaire à l'initiative de l'autorité administrative. Certains auteurs l'acceptent comme une autre façon de blocage administrative.

deuxième est un blocage hybride qui nécessite le recours au pouvoir judiciaire par l'administration pour que la mesure puisse commencer ou continuer. Dans ce-cas, le blocage de l'administration est temporaire et n'est valide qu'une durée limitée sans une décision judiciaire. En France, le blocage administratif des sites internet qui diffuse des images ou des représentations de mineurs relevant de l'article 227-23 du code pénal est soumis à la méthode de blocage exclusivement administrative. Par contre, pour le blocage concernant des jeux d'hasard illicite, le Président de L'Autorité de régulation des jeux en ligne (ARJEL) peut saisir le Président du Tribunal de grande instance (TGI) de Paris aux fins d'ordonner l'arrêt du service aux hébergeurs, et le cas échéant, le blocage des sites incriminés aux fournisseurs d'accès à internet. Donc c'est un blocage quasi-judiciaire à l'initiative de l'autorité administrative. Comme un autre exemple, en Turquie, pour les décisions de blocages administratif relatives à des crimes particulièrement déterminés et si les hébergeurs et les éditeurs sont à l'extérieur, on privilégie le blocage exclusivement administratif. Dans ces cas, le blocage administratif est valide jusqu'à la décision contraire de l'autorité judiciaire. De plus, la BTK peut décider au blocage administratif sur les crimes d'abus sexuel des enfants et d'obscénité même si l'éditeur ou l'hébergeur sont à l'intérieur du pays. Mais dans ce cas, la BTK doit saisir le juge des référés sur le blocage dans les 24 heures et le juge doit communiquer sa décision au maximum dans un délai de 24 heures. Dans le cas contraire, le blocage administratif sera invalide sans délai.

Avant les reformes, en France, c'était le juge des référés qui décide au blocage des sites internet faisant l'apologie du terrorisme. Face au renforcement du terrorisme international, particulièrement avec la naissance d'EI, on a bien vu que même le recours au juge des référés a des faiblesses importantes. Cette situation a causé le renforcement du blocage administratif.

A- LA PRESENTATION DE LA REFORME

1-Le contenu de la réforme

En France, la propagande de terrorisme, y compris sur internet, est interdite et punie par l'article 421-2-5 du code pénal, même avant cette réforme. On décide au blocage des sites internet faisant la propagande de terrorisme par une décision de justice[14]. Avant la réforme, l'article 50-1 de la loi du 29 juillet 1881 prévoyait que lorsque certains contenus illicites sur Internet –

[14] S. PIETRASANTA, « Rapport parlementaire sur le projet de loi (n° 2110), renforçant les dispositions relatives à la lutte contre le terrorisme », Assemblée Nationale, Au nom de la commission des lois constitutionnelles, de la législation et de l'administration générale de la république, n°2173, 22 juillet 2014, p.125.

provocation à la commission d'infractions, apologie de crimes de guerre ou contre l'humanité, contestation de crimes contre l'humanité, provocation au terrorisme et apologie des faits de terrorisme, provocation à la discrimination ou à la haine – constituent un trouble manifestement illicite, selon cet article : « l'arrêt [du] service peut être prononcé par le juge des référés, à la demande du ministère public et de toute personne physique ou morale ayant intérêt à agir ». Donc le blocage des sites internet nécessitait une décision judiciaire. Le blocage administratif des sites internet n'était possible que pour empêcher les jeux de hasard illégaux et la pédopornographie**.**

Suivant l'art. 12 de la loi n° 2014-1353 du 13 novembre 2014, le blocage administratif des sites internet provoquant au terrorisme ou en faisant l'apologie a été acceptée. L'apport de la révision est :

- l'extension du champ de l'obligation spéciale à la charge des prestataires techniques aux faits de provocation au terrorisme et d'apologie du terrorisme (article 9)

- et la possibilité de blocage administratif dans ce cas.

A la fin de cette révision législative, l'art 6-1 de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique est ainsi rédigé :

« Lorsque les nécessités de la lutte contre la provocation à des actes terroristes ou l'apologie de tels actes relevant de l'article 421-2-5 du code pénal ou contre la diffusion des images ou des représentations de mineurs relevant de l'article 227-23 du même code le justifient, l'autorité administrative peut demander à toute personne mentionnée au III de l'article 6 de la présente loi ou aux personnes mentionnées au 2 du I du même article 6[15] *de retirer les contenus qui contreviennent à ces mêmes articles 421-2-5 et 227-23. Elle en informe simultanément les personnes mentionnées au 1 du I de l'article 6*[16] *de*

[15] « 2. Les personnes physiques ou morales qui assurent, même à titre gratuit, pour mise à disposition du public par des services de communication au public en ligne, le stockage de signaux, d'écrits, d'images, de sons ou de messages de toute nature fournis par des destinataires de ces services ne peuvent pas voir leur responsabilité civile engagée du fait des activités ou des informations stockées à la demande d'un destinataire de ces services si elles n'avaient pas effectivement connaissance de leur caractère illicite ou de faits et circonstances faisant apparaître ce caractère ou si, dès le moment où elles en ont eu cette connaissance, elles ont agi promptement pour retirer ces données ou en rendre l'accès impossible. L'alinéa précédent ne s'applique pas lorsque le destinataire du service agit sous l'autorité ou le contrôle de la personne visée audit alinéa. »

[16] I.-1. Les personnes dont l'activité est d'offrir un accès à des services de communication au public en ligne informent leurs abonnés de l'existence de moyens techniques permettant de restreindre l'accès à certains services ou de les sélectionner et leur proposent au moins un de ces moyens. Les personnes visées à l'alinéa précédent les informent également de l'existence de moyens de sécurisation permettant de prévenir les manquements

la présente loi. »

Selon l'article 421-2-5 du code pénal[17], « le fait de provoquer directement à des actes de terrorisme ou de faire publiquement l'apologie de ces actes » est interdit et puni. Cela justifie l'intervention de l'autorité administrative sur internet. Selon l'art. 1 du décret n° 2015-125 du 5 février 2015 relatif au blocage des sites provoquant à des actes de terrorisme ou en faisant l'apologie et des sites diffusant des images et représentations de mineurs à caractère pornographique, l'autorité administrative qui est chargé du blocage administratif est , l'office central de lutte contre la criminalité liée aux technologies de l'information et de la communication qui est une division de la direction générale de la police nationale.

Cette dernière peut demander aux éditeurs du contenu (c'est-à-dire des personnes dont l'activité est d'éditer un service de communication au public en ligne qui sont mentionné au III de l'article 6[18] de la loi) ou aux hébergeurs du contenu (c'est-à-dire des personnes physiques ou morales qui assurent, même à titre gratuit, , le stockage de signaux, d'écrits, d'images, de sons ou de messages de toute nature fournis par des destinataires de ces services qui sont mentionnées au 2 du I du même article 6) de retirer le contenu illicite. L'administration en informe les fournisseurs d'accès aussi. Ces derniers sont des personnes dont l'activité est d'offrir un accès à des services de communication au public en ligne.

à l'obligation définie à l'article L. 336-3 du code de la propriété intellectuelle et leur proposent au moins un des moyens figurant sur la liste prévue au deuxième alinéa de l'article L. 331-26 du même code.

17 Article 421-2-5 du code pénal dispose que : « Le fait de provoquer directement à des actes de terrorisme ou de faire publiquement l'apologie de ces actes est puni de cinq ans d'emprisonnement et de 75 000 € d'amende.
Les peines sont portées à sept ans d'emprisonnement et à 100 000 € d'amende lorsque les faits ont été commis en utilisant un service de communication au public en ligne. »

18 « III.-1. Les personnes dont l'activité est d'éditer un service de communication au public en ligne mettent à disposition du public, dans un standard ouvert :a) S'il s'agit de personnes physiques, leurs nom, prénoms, domicile et numéro de téléphone et, si elles sont assujetties aux formalités d'inscription au registre du commerce et des sociétés ou au répertoire des métiers, le numéro de leur inscription ; b) S'il s'agit de personnes morales, leur dénomination ou leur raison sociale et leur siège social, leur numéro de téléphone et, s'il s'agit d'entreprises assujetties aux formalités d'inscription au registre du commerce et des sociétés ou au répertoire des métiers, le numéro de leur inscription, leur capital social, l'adresse de leur siège social ;
c) Le nom du directeur ou du codirecteur de la publication et, le cas échéant, celui du responsable de la rédaction au sens de l'article 93-2 de la loi n° 82-652 du 29 juillet 1982 précitée ;
d) Le nom, la dénomination ou la raison sociale et l'adresse et le numéro de téléphone du prestataire mentionné au 2 du I. »

Selon l'art. 6-1 de la loi n° 2004-575 du 21 juin 2004 ;

« En l'absence de retrait de ces contenus dans un délai de vingt-quatre heures, l'autorité administrative peut notifier aux personnes mentionnées au même 1 la liste des adresses électroniques des services de communication au public en ligne contrevenant auxdits articles 421-2-5 et 227-23. Ces personnes doivent alors empêcher sans délai l'accès à ces adresses. Toutefois, en l'absence de mise à disposition par la personne mentionnée au III du même article 6 des informations mentionnées à ce même III, l'autorité administrative peut procéder à la notification prévue à la première phrase du présent alinéa sans avoir préalablement demandé le retrait des contenus dans les conditions prévues à la première phrase du premier alinéa du présent article. »

Si les éditeurs et hébergeurs qui ont fait l'objet d'une demande de retirer les contenus ne les retirent pas dans un délai de 24 heures, l'autorité administrative a une autre possibilité. Dans ce cas, elle en peut s'adresser aux fournisseurs d'accès qui doivent empêcher sans délai ces adresses.

De plus, selon l'art. 6, les éditeurs des contenus doivent mettre à disposition du public certaines données sur leurs identités[19]. S'ils n'ont pas respecté cette obligation, l'autorité administrative n'est pas obligée de demander préalablement de retirer le contenu aux éditeurs.

---

[19] « Les personnes dont l'activité est d'éditer un service de communication au public en ligne mettent à disposition du public, dans un standard ouvert :
a) S'il s'agit de personnes physiques, leurs nom, prénoms, domicile et numéro de téléphone et, si elles sont assujetties aux formalités d'inscription au registre du commerce et des sociétés ou au répertoire des métiers, le numéro de leur inscription;
b) S'il s'agit de personnes morales, leur dénomination ou leur raison sociale et leur siège social, leur numéro de téléphone et, s'il s'agit d'entreprises assujetties aux formalités d'inscription au registre du commerce et des sociétés ou au répertoire des métiers, le numéro de leur inscription, leur capital social, l'adresse de leur siège social ;
c) Le nom du directeur ou du codirecteur de la publication et, le cas échéant, celui du responsable de la rédaction au sens de l'article 93-2 de la loi n° 82-652 du 29 juillet 1982 précitée ;
d) Le nom, la dénomination ou la raison sociale et l'adresse et le numéro de téléphone du prestataire mentionné au 2 du I.

2. Les personnes éditant à titre non professionnel un service de communication au public en ligne peuvent ne tenir à la disposition du public, pour préserver leur anonymat, que le nom, la dénomination ou la raison sociale et l'adresse du prestataire mentionné au 2 du I, sous réserve de lui avoir communiqué les éléments d'identification personnelle prévus au 1.
Les personnes mentionnées au 2 du I sont assujetties au secret professionnel dans les conditions prévues aux articles 226-13 et 226-14 du code pénal, pour tout ce qui concerne la divulgation de ces éléments d'identification personnelle ou de toute information permettant d'identifier la personne concernée. Ce secret professionnel n'est pas opposable à l'autorité judiciaire. »

Selon l'art. 6-1 de la loi n° 2004-575 du 21 juin 2004 ;

« L'autorité administrative transmet les demandes de retrait et la liste mentionnées, respectivement, aux premier et deuxième alinéas à une personnalité qualifiée, désignée en son sein par la Commission nationale de l'informatique et des libertés pour la durée de son mandat dans cette commission. Elle ne peut être désignée parmi les personnes mentionnées au 1° du I de l'article 13 *de la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés. »*

Selon l'art. 2 du décret n° 2015-253 du 4 mars 2015, l'autorité administrative transmet les listes de blocage sans délai à la personnalité qualifiée qui est choisi parmi les membres de la Commission nationale de l'informatique et des libertés (CNIL). Afin de garantir l'impartialité de la personnalité qualifiée, les deux députés et les deux sénateurs, désignés respectivement par l'Assemblée nationale et par le Sénat ne peuvent pas être désignés comme personnalité qualifiée. Selon l'art. 5[20] du décret n° 2015-125 du 5 février 2015, la personnalité qualifiée dispose pour l'exercice de ses fonctions des services de la Commission nationale de l'informatique et des libertés.

Selon l'art. 6-1 de la loi n° 2004-575 du 21 juin 2004 ;

« La personnalité qualifiée s'assure de la régularité des demandes de retrait et des conditions d'établissement, de mise à jour[21]*, de communication et d'utilisation de la liste. Si elle constate une irrégularité, elle peut à tout*

---

[20] « La désignation de la personnalité qualifiée est publiée au Journal officiel de la République française. La personnalité qualifiée dispose pour l'exercice de ses fonctions des services de la Commission nationale de l'informatique et des libertés. Lorsqu'il est nécessaire de traduire en langue française les contenus des services de communication au public en ligne contrevenant aux articles 227-23 et 421-2-5 du code pénal, elle est assistée d'un interprète. L'office central de lutte contre la criminalité liée aux technologies de l'information et de la communication met à la disposition de la personnalité qualifiée les demandes de retrait adressées aux hébergeurs et aux éditeurs ainsi que les éléments établissant la méconnaissance par les contenus des services de communication au public en ligne des articles 227-23 et 421-2-5 du code pénal. »

[21] L'office central de lutte contre la criminalité liée aux technologies de l'information et de la communication vérifie au moins chaque trimestre que le contenu du service de communication contrevenant présente toujours un caractère illicite.
Lorsque ce service a disparu ou que son contenu ne présente plus de caractère illicite, l'office retire de la liste les adresses électroniques correspondantes et notifie sans délai ce retrait à la personnalité qualifiée et aux personnes mentionnées au 1 du I de l'article 6 de la loi du 21 juin 2004 susvisée. Dans un délai de vingt-quatre heures suivant cette notification, celles-ci rétablissent par tout moyen approprié l'accès aux services fournis par les adresses électroniques retirées de la liste et le transfert vers ces services.

moment recommander à l'autorité administrative d'y mettre fin. Si l'autorité administrative ne suit pas cette recommandation, la personnalité qualifiée peut saisir la juridiction administrative compétente, en référé ou sur requête. »

Cette personnalité qualifiée contrôle la régularité des décisions de blocage et la liste de celles-ci. Cela concerne leur établissement, communication, utilisation et mise à jour. La personnalité qualifiée a un droit de recommandation à l'autorité administrative qui décide du blocage. Si cette dernière ne suit pas la recommandation, la personnalité qualifiée peut saisir le juge.

Selon l'art. 5 du Décret n° 2015-125 du 5 février 2015, l'office central de lutte contre la criminalité liée aux technologies de l'information et de la communication met à la disposition de la personnalité qualifiée les demandes de retrait adressées aux hébergeurs et aux éditeurs ainsi que les éléments établissant la méconnaissance des articles 227-23 et 421-2-5 du code pénal, précédemment évoqués, par les contenus de site internet. De plus selon l'art. 4 du Décret n° 2015-253 du 4 mars 2015, l'office central de lutte contre la criminalité liée aux technologies de l'information et de la communication vérifie au moins chaque trimestre que les adresses électroniques notifiées ont toujours un contenu présentant un caractère illicite.

Selon l'art. 6-1 de la loi n° 2004-575 du 21 juin 2004 ;

« L'autorité administrative peut également notifier les adresses électroniques dont les contenus contreviennent aux articles 421-2-5 et 227-23 du code pénal aux moteurs de recherche ou aux annuaires, lesquels prennent toute mesure utile destinée à faire cesser le référencement du service de communication au public en ligne. La procédure prévue au troisième alinéa du présent article est applicable. »

C'est encore la même procédure après épuisement des voies prévues dans le premier et deuxième alinéas. Selon l'art. 3[22] du Décret n° 2015-253 du 4 mars 2015, dans un délai de quarante-huit heures suivant la notification, les exploitants de moteurs de recherche ou d'annuaires prennent toute mesure utile destinée à faire cesser le référencement de ces adresses.

Selon l'art. 6-1 de la loi n° 2004-575 du 21 juin 2004 ;

« La personnalité qualifiée mentionnée au même troisième alinéa rend

[22] « Dans un délai de quarante-huit heures suivant la notification, les exploitants de moteurs de recherche ou d'annuaires prennent toute mesure utile destinée à faire cesser le référencement de ces adresses. Ils ne modifient pas les adresses électroniques, que ce soit par ajout, suppression ou altération. »

public chaque année un rapport d'activité sur les conditions d'exercice et les résultats de son activité, qui précise notamment le nombre de demandes de retrait, le nombre de contenus qui ont été retirés, les motifs de retrait et le nombre de recommandations faites à l'autorité administrative. Ce rapport est remis au Gouvernement et au Parlement.

Les modalités d'application du présent article sont précisées par décret, notamment la compensation, le cas échéant, des surcoûts justifiés résultant des obligations mises à la charge des opérateurs.

Tout manquement aux obligations définies au présent article est puni des peines prévues au 1 du VI de l'article 6[23] *de la présente loi. »*

2- La procédure de la réforme

En France, cette réforme est faite dans le cadre d'une réglementation renforçant la lutte contre le terrorisme. L'art. 9 du projet de loi n° 2110, renforçant les dispositions relatives à la lutte contre le terrorisme prévoyait le blocage administratif des sites internet provoquant au terrorisme ou en faisant l'apologie. Le projet de loi a été accepté par l'Assemblée Nationale le 29 octobre 2014 et par Sénat le 4 novembre 2014.

Quand on compare la proposition de loi et la loi, on constate deux différences matérielles importantes qui sont toutes deux issues de l'Assemblée Nationale. La première est l'obligation préalable de l'autorité administrative de demander le retrait du contenu à l'éditeur ou à l'hébergeur[24]. Selon la proposition de loi, la procédure de demande aux éditeurs et aux hébergeurs

[23] « Est puni d'un an d'emprisonnement et de 75 000 Euros d'amende le fait, pour une personne physique ou le dirigeant de droit ou de fait d'une personne morale exerçant l'une des activités définies aux 1 et 2 du I, de ne pas satisfaire aux obligations définies aux quatrième et cinquième alinéas du 7 du I du présent article ni à celles prévues à l'article 6-1 de la présente loi, de ne pas avoir conservé les éléments d'information visés au II du présent article ou de ne pas déférer à la demande d'une autorité judiciaire d'obtenir communication desdits éléments. Les personnes morales peuvent être déclarées pénalement responsables de ces infractions dans les conditions prévues à l'article 121-2 du code pénal. Elles encourent une peine d'amende, suivant les modalités prévues par l'article 131-38 du même code, ainsi que les peines mentionnées aux 2° et 9° de l'article 131-39 de ce code. L'interdiction mentionnée au 2° de cet article est prononcée pour une durée de cinq ans au plus et porte sur l'activité professionnelle dans l'exercice ou à l'occasion de laquelle l'infraction a été commise. »

[24] « Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Texte n° 406 adopté par l'Assemblée nationale, le 18 septembre 2014. Disponible sur : http://www.assemblee-nationale.fr/14/ta/ta0406.asp

n'était pas prévue[25]. On a fait un amendement qui fait du blocage une mesure « subsidiaire »[26] par rapport au retrait du contenu par l'éditeur ou l'hébergeur afin de donner davantage d'efficacité à la lutte des pouvoirs publics contre la propagande terroriste sur internet[27].

Selon le projet de loi, l'autorité administrative pouvait notifier directement aux fournisseurs d'accès et ils devaient empêcher l'accès sans délai. Par contre, selon la loi actuelle, l'administration doit demander premièrement aux personnes plus proches (c'est-à-dire les éditeurs et les hébergeurs) de retirer le contenu illicite. En cas d'absence du retrait dans un délai de vingt-quatre heures, elle l'ordonne aux fournisseurs d'accès à Internet (FAI) d'empêcher ces contenus sans délai. Selon moi, cette révision a deux avantages. Premièrement, les éditeurs ou hébergeurs retirent le contenu, il y aura donc moins d'intervention des autorités publiques ce qui peut empêcher un « sur-blocage »[28]. Deuxièmement, le contenu sera bloqué plus effectivement au niveau national ainsi qu'au niveau international grâce à la coopération qui va être créé avec les éditeurs et hébergeurs.

La deuxième différence est sur le contrôle des blocages administratifs. Le texte initial du projet de loi avait prévu qu'un magistrat de l'ordre judiciaire, désigné par le Ministre de la Justice, serait chargé de cette mission, mais ne lui avait confié aucune prérogative vis-à-vis de l'autorité administrative, car le principe de la séparation des pouvoirs s'y serait opposé[29]. La Commission a proposé qu'une personnalité qualifiée soit désignée par la CNIL pour une durée de trois ans non renouvelable[30]. Elle se verra confier la mission de vérifier que les contenus dont l'autorité administrative demande le retrait ou que les sites dont elle ordonne le blocage sont bien contraires aux dispositions du code pénal sanctionnant la provocation au terrorisme, l'apologie du terrorisme ou la diffusion d'images pédopornographiques. Cette personnalité aura un pouvoir de recommandation vis-à-vis de l'autorité administrative. Si l'autorité administrative ne suit pas sa recommandation, elle aura la compétence pour

---

25 « Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Texte de la commission n° 2173, déposé le 22 juillet 2014, Assemblée Nationale, p.91. Disponible sur : http://www.assemblee-nationale.fr/14/ta-commission/r2173-a0.asp

26 « Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Rapport n° 2173 de M. Sébastien PIETRASANTA, fait au nom de la commission des lois, Assemblée Nationale, 22 juillet 2014. Disponible sur : http://www.assemblee-nationale.fr/14/rapports/r2173.asp

27 Ibid.

28 Ibid.

29 S. PIETRASANTA, op.cit.

30 « Texte de la commission n° 2173, » .

saisir la juridiction administrative. Au Senat, il n'y a pas eu de changement important[31] sur le projet de loi que la chambre a finalement adopté le 4 novembre 2014.

La reforme a lancé un vif débat autour de la liberté d'expression et de communication. Commission de réflexion sur le droit et les libertés à l'âge du numérique de l'Assemblée Nationale a communiqué un rapport séparé sur l'article 9 du projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme qui prévoit le blocage administratif des sites internet. Mais, le Conseil Constitutionnel n'as pas été saisi sur la réforme. Donc, le Conseil ne l'a pas examiné. En fait, dans la même époque, il y a eu aussi un reforme en Turquie, élargissant le blocage administratif des sites internet. En Turquie, suivant la loi mixte[32] n°6552 du 10/09/2014 destinée essentiellement à réviser le droit du travail, le contenu du blocage administratif a été élargi. Selon le nouveau paragraphe ajouté à l'article sur le blocage administrative des sites internet : « Si la sécurité nationale, la protection de l'ordre public ou la lutte contre la criminalité le rende nécessaire, le président du l'Autorité de la technologie de l'information et de la communication (BTK) peut ordonner le blocage des sites internet. Les fournisseurs d'accès doivent appliquer cette décision dans un délai de quatre heures. Cette décision doit être présentée au juge des référés judiciaire dans les 24 heures. Ce dernier communique sa décision au maximum dans 24 heures. » Après la légifération de cette loi, le principal parti politique d'opposition a saisi la Cour Constitutionnelle qui l'a censuré le 2 octobre 2014[33]. Selon la Cour Constitutionnelle turque, cette révision était contraire à la liberté d'expression et à la liberté de communication qui sont protégées par la constitution turque. Selon la Cour, l'attribution de la compétence d'interpréter les termes de la nécessité de sécurité nationale, de la protection de l'ordre public et de lutte contre la criminalité, au président du BTK pour accélérer la procédure de blocage des sites internet n'était pas une mesure proportionnelle.

---

31 « Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Amendements déposés en vue de l'élaboration du texte de la commission, Senat. Disponible sur: http://www.senat.fr/amendements/commissions/2013-2014/807/accueil.html

32 La loi mixte est un type de projet de loi que les gouvernements souvent utilisent en Turquie. Même si la loi a un sujet essentiel, elle peut concerner des différents sujets aussi. Par exemple, la loi qu'on examine était, initialement, sur le droit du travail mais elle concerne aussi des révisions antiterroristes. Cette pratique est beaucoup critiquée dans la doctrine.

33 AYM, E.S.2014/149, K.S.2014/151 du 2.10.2014, publié le 1.1.2015, Disponible sur : http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/8a9c9ba2-b43e-48b7-9283-40dade21b8a4?excludeGerekce=False& wordsOnly=False

B-L'ANALYSE DE LA REFORME

Le 21ème siècle a commencé avec de fortes attaques de groupes terroristes mondiaux. Ces attaques ont conduit la plupart des pays à faire des réglementations spécifiques antiterroristes y compris des réglementations très répressives. Mais ces réglementations n'étaient pas assez pour finir la dissémination du terrorisme mondial. En fait, certaines mesures exagérées a eu même des effets renforçant pour les groupes terroristes. Par exemple, selon le Prof. Andreani, « dans leur guerre contre le terrorisme, les Etats unis ont involontairement magnifié l'ennemi. »[34].

La liberté d'expression et la liberté de communication en tant que libertés fondamentales doivent être limitées par des autorités indépendantes politiquement et s'appuyant les textes du pouvoir législatif. Cette décision de limitation doit, en principe, être prise par une décision de justice[35]. Mais, comme le blocage judiciaire ne suffit pas pour une politique anti-terroriste efficace, le blocage administratif a été privilégié dans ce domaine.

Suite à la réforme, on attribue à l'autorité administrative la compétence du blocage des sites internet pour renforcer les moyens de la lutte contre le terrorisme. Cette attribution entraîne un risque de politisation du blocage d'internet et ainsi le risque de « sur-blocage ». Il convient d'examiner le blocage administratif selon son caractère nécessaire, adéquat et proportionnel.

1. Est-ce que le blocage administratif est nécessaire et adéquate ?

Tout d'abord, nous étudierons les défiances du blocage judiciaire. Puis, nous analyserons les solutions que le blocage administratif produit pour ces défiances.

« Pour pouvoir empêcher la propagande de terrorisme sur internet, il faut intervenir utilement dans des délais restreint »[36]. Mais le blocage judiciaire n'est pas un moyen qui peut intervenir utilement dans des courts délais à cause, d'une part du nombre croissant de sites mis en cause et des méthodes d'internet qui sont produit pour augmenter cette quantité, d'autre part de la durée des procédures judiciaires.

Avec la mondialisation du terrorisme, on voit bien que la quantité des

---

34 G. ANDREANI, « La guerre contre le terrorisme: un succès incertain et cou teux », in. politique étrangère, (revue trimestrielle publiée par l'institut français des relations internationales), No 2, 2011, p.253.

35 Ö. ÖZBEY, Restrictions on freedom of expression concerning the european convention on human rigths, TBB Dergisi, 106, 2013, p.57.

36 J. CATTAN, « Le droit et les communications électroniques », These de doctorat, H. ISAR(s. dir), Ecole Doctorale Sciences Juridiques et Politiques (Aix-en-Provence), 2012, p.467.

sites internet faisant la propagande de terrorisme augmente. De plus, il y a des méthodes d'internet comme « miroir » et « duplica » qui favorise cette augmentation[37]. Ce sont des techniques permettant de copier les URL's et de créer des différents comptes pour le même contenu. L'exigence de nouvelles décisions de justice pour les comptes copiés est un facteur important augmentant la charge de travail des juges. À cause du manque de juge pour traiter ces affaires rapidement, le blocage judiciaire devient une méthode inadaptée pour intervenir dans un délai approprié. De l'autre côté, le travail du pouvoir judiciaire exige une procédure détaillée et donc nécessite un temps nécessairement plus long[38].

Pour accélérer la procédure, le blocage administratif a recours à différentes solutions. Le blocage administratif offre la possibilité de réagir plus rapidement. En effet, l'autorité administrative possède plus de personnel et elle prend ses décisions en suivant une procédure moins formelle.

En France l'autorité administrative qui est chargé du blocage administratif est l'Office central de lutte contre la criminalité liée aux technologies de l'information et de la communication faisant partie de la direction générale de la police nationale. En considérant son champ de spécialité et son nombre de personnel, on peut dire qu'il s'agit d'une autorité administrative qui peut intervenir dans des délais restreints.

Contre les méthodes d'internet comme le miroir et duplica qui augmentent le nombre de sites, le blocage administratif crée une solution simple et rapide. L'utilisation d'une procédure moins formelle, après le constat du recours à ces techniques, permet à l'autorité administrative de décider du blocage dans un délai restreint. Dans le cadre du système français de blocage, l'absence de contrôle juridictionnel obligatoire sur les décisions de blocage empêche une augmentation de la charge de travail de la justice, qui pourrait découler de l'utilisation des méthodes évoquées précédemment.

De plus, une des plus importantes défiances du blocage sur internet concerne son effectivité. Internet n'est pas une zone de non-droit mais l'efficacité de l'application du droit dans cette zone nécessite une coopération avec les acteurs d'internet. Par exemple, « [L'article 6 de la LCEN] ne permet de faire fermer un site (ou supprimer un contenu) que si le site contenant des images ou représentations de mineur à caractère pornographique est hébergé en France. La plupart des sites de cette nature sont cependant

---

37 « Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme »,Etude d'impact, Assemblée Nationale,8 juillet 2014. Partie 2.6.2

38 D. ROUSSEAU, La place du juge : le rôle du juge dans les sociétés contemporaines, Droit européen des libertés fondamentales, La course de droit à l'Université Paris I, 2015.

hébergés à l'étranger. L'étude d'impact de la LOPPSI souligne que ' jusqu'à fin 2007, un hébergeur russe diffusait près de 50% de la pédopornographie mondiale'. En conséquence, le Forum des droits sur l'internet a émis le 29 octobre 2008 une recommandation préconisant la mise en place d'un filtrage des sites pédophiles par les FAI.»[39] A côté du déficit de blocage sur internet à l'extérieur du pays, différents logiciels et méthodes comme les 'proxy' empêchent un blocage effective même dans le pays. Par exemple, en Turquie, le jour où le site Twitter a été bloqué par l'administration a été le jour où le plus de twits ont été écrits en un jour dans cette année, sur ce réseau social. Parmi les utilisateurs de Twitter le jour où il était bloqué, il y avait aussi le Président de la République turc qui a écrit qu'il était contre a tous les types de censure sur internet[40]. Donc, même s'il y a un blocage national, sans une coopération avec l'hébergeur, l'éditeur et les fournisseurs d'accès, l'effectivité de ce blocage va rester toujours faible. Ainsi internet, en pratique, sera une zone de non-droit. Par contre, avec un retrait de la part de l'éditeur ou de l'hébergeur, l'accès à ce contenu sera impossible dans le pays concerné ainsi qu'à l'étranger. Dans la décision du blocage contre Twitter, en Turquie, on a vu que le blocage sans une coopération avec les acteurs d'internet ne sert à rien. Suite à ce blocage, BTK et les représentants du site Twitter se sont rencontrés. La direction de Twitter a effacé les contenus illicites et le blocage administratif a pris fin. Les autorités administratives ont plus de capacités de créer des liens avec les acteurs d'internet que les autorités judiciaires. En fait, création d'une organisation internationale qui compose des autorités administratives indépendantes nationales chargée de cette fonction peut être une solution assez utile.

D'un autre côté, la plupart des contenus faisant la propagande du terrorisme sont hébergés par les réseaux sociaux comme Twitter, Facebook et Youtube. Sans une coopération avec les éditeurs et les hébergeurs du contenu, le blocage total du site est non-proportionnel pour la liberté d'expression. Comme a évoquée, la Cour Constitutionnelle turque, dans divers décisions sur Twitter et Youtube[41], le blocage total de ces sites ayant des millions d'utilisateurs pour empêcher des contenus spécifiques n'est pas proportionnel et porte atteinte à la liberté d'expression.

---

39 J. CATTAN, « Le droit et les communications électroniques », Thèse de doctorat, H. ISAR(s. dir), Ecole Doctorale Sciences Juridiques et Politiques (Aix-en-Provence), 2012, p.513.

40 Le journal turc, Disponible sur : http://www.hurriyet.com.tr/cumurbaskani-abdullah-gulden-yasaga-ragmen-tweet-26053467

41 AYM, Yaman Akdeniz ve diğerleri başvurusu, , B.N. 2014/3986, 2/4/2014 et
AYM, Youtube LLC corporation service company ve diğerleri başvurusu, B.N. 2014/4705, 29/05/2014

Pour la question relative à la nécessité de la coopération avec les acteurs d'internet, on a créé une nouvelle procédure en France. Selon cette procédure, l'autorité administrative doit demander aux éditeurs et hébergeurs de retirer le contenu illicite. Si les éditeurs et hébergeurs qui font l'objet de la demande ne les retirent pas dans un délai de 24 heures, l'autorité administrative a une autre possibilité. Dans ce cas, elle peut le demander aux fournisseurs d'accès et ils doivent empêcher sans délai l'accès à ces adresses. Cette procédure permet d'accentuer la coopération avec les acteurs d'internet ce qui contribue à augmenter le caractère efficace et démocratique du blocage.

L'efficacité du blocage des sites incitant à des actes de terrorisme ou en faisant l'apologie nécessite aussi une coopération internationale. Soit entre les juges soit entre les autorités administratives, il faut augmenter la coopération internationale Le Secrétaire Générale des Nations-unies, Ban Ki-moon, exprime que « L'Internet est un excellent exemple du fait que les terroristes peuvent se comporter d'une façon transnationale; en réponse, les États doivent penser et fonctionner dans une manière aussi transnationale. »[42].

2. Est-ce que le blocage administratif est proportionnel ?

En France, le fait que le créateur de blocage est une autorité liée hiérarchiquement au pouvoir politique est un risque important pour la liberté d'expression et la liberté de communication des individus. Pour éviter les dérives, il existe un contrôle administratif réalisé par une personnalité qualifiée choisie parmi les membres d'une autorité administrative indépendante spécialisée dans ce domaine. Ce contrôle n'empêche pas le blocage dans des délais restreints, parce qu'il intervient après la décision de blocage. Donc on a créé un blocage administratif qui a deux niveaux : niveau de blocage et niveau de contrôle. L'autorité de blocage est une autorité liée au pouvoir politique, en revanche le contrôle administratif du blocage est réalisé par une autorité indépendante du pouvoir politique. La personnalité qualifiée se compose des membres de la CNIL qui est une autorité administrative indépendante. La CNIL est la première autorité administrative indépendante créée en France. Elle a une composition diverse qui permet de représenter le pouvoir législatif, le pouvoir judiciaire et les forces sociaux. Elle possède une indépendance bien encadrée et protégée[43]. De plus, afin de garantir l'impartialité de la personnalité qualifiée, les deux députés et les deux sénateurs désignés

[42] United Nations Office on Drugs and Crime, The Use Of The Internet For Terrorist Purposes, United Nations, New York, 2012, p.III.

[43] M. AKGÜN, « L'indépendance des autorités nationales chargées de la protection des données personnelles en droit comparé : La France et la Turquie », Mémoire de Master, G. Marcou(s. dir.), Paris 1, 2015,p.89.

respectivement par l'Assemblée nationale et par le Sénat comme membres de la CNIL ne peuvent pas être désignés comme personnalités qualifiées. Donc la personnalité qualifiée possède une forte indépendance. Deuxièmement, la personnalité qualifiée dispose pour l'exercice de ses fonctions des services de la CNIL. La CNIL est chargée de veiller à ce que l'informatique soit au service du citoyen et qu'elle ne porte atteinte ni à l'identité humaine, ni aux droits de l'homme, ni à la vie privée, ni aux libertés individuelles ou publiques. La forte indépendance de l'autorité qualifiée et la compétence spécifique de la CNIL dans ce domaine est une garantie importante d'un contrôle efficient et d'une protection efficace des individus.

En revanche, les pouvoirs de la personnalité qualifiée ne sont pas assez larges pour la protection des droits fondamentaux des individus. La personnalité qualifiée aura un pouvoir de recommandation vis-à-vis de l'autorité administrative et aura, si l'autorité administrative ne suit pas sa recommandation, compétence pour saisir la juridiction administrative. Donc les décisions de la personnalité qualifiée ne sont pas obligatoires pour l'administration et sa seule pression contre l'administration est le pouvoir de saisir le juge administratif. Pour mieux prévenir la politisation du blocage et offrir une meilleure protection des droits des individus, il faudrait attribuer à l'autorité qualifiée des pouvoirs plus forts.

Comme une solution plus protectrice pour la liberté d'expression, l'autorité administrative chargée du blocage administrative des sites internet peut être une autorité administrative indépendante. Par exemple, en Turquie, dans la révision du 10/09/2014 sur le blocage administratif, c'était le président d'une autorité administrative indépendante spécialisée dans le domaine d'internet, l'autorité de la technologie de l'information et de la communication (BTK) qui décide au blocage administratif. Premièrement, attribuer ce pouvoir à une autorité administrative ou son président nous permet d'échapper à la procédure judiciaire qui est plus complexe que les procédures administratives. En considérant son champ de spécialité, une autorité administrative indépendante spécialisée dans le secteur de l'informatique peut être une autorité administrative qui peut intervenir dans des délais restreints. En plus, une autorité indépendante de tous les politiques sera plus protectrice pour la liberté d'expression et communication des individus. Donc, l'attribution de ce pouvoir à une autorité administrative indépendante sera un point positif pour la proportionnalité de la mesure.

Une autre inquiétude à propos du « sur-blocage » est liée aux conditions du blocage. La qualification juridique des contenus litigieux sur internet sera faite par les autorités administratives déjà examinées. Mais il convient aussi d'analyser le champ d'interprétation de ces dernières.

En France, suite à la réforme de 2014, le blocage administratif est possible sur les sites internet provoquant à des actes de terrorisme ou en faisant l'apologie. La propagande de terrorisme est le fait de provoquer directement à des actes de terrorisme. Apologie du terrorisme est le fait de présenter le terrorisme sous un jour favorable, de façon positive. C'est un discours qui met en valeur le terrorisme et y incite. L'interprétation de l'apologie de terrorisme connaît à l'administration un grand champ d'interprétation. En considérant aussi que le créateur du blocage est la police administrative qui n'est pas une autorité indépendante, un champ d'interprétation si large pour cette dernière comme l'apologie de terrorisme cause un problème important contre la liberté d'expression et la liberté de communication.

Conclusion

La mondialisation du terrorisme dans le 21eme siècle conduit les Etats à la recherche systématique concernant la lutte contre le terrorisme. Car, une démarche exclusivement axée sur les méthodes classique n'est pas suffisant pour parvenir à la prévention du terrorisme sur l'Internet. D'ailleurs, la diffusion des moyens de terrorisme particulièrement active sur l'internet exige une dimension d'urgence afin d'empêcher les terroristes d'avoir accès à des sources humaines et financières.

A cet égard, l'apparition des attaques terroristes en France par des citoyens françaises a conduit aux dispositions spécifiques en matière de terrorisme et revêt une importance pour cette étude. Le renforcement de mesures administratives contre le terrorisme s'est inscrit dans le cadre d'une réforme du blocage administratif dans divers pays. A ce titre, la compétence de l'autorité administrative française pour la notification directe aux fournisseurs d'accès apparait une révision essentielle. Ensuite, la proposition d'internet civilisé mérite d'être examinée compte tenu de rôle majeur d'internet dans la diffusion du terrorisme.

Néanmoins, l'intervention à la liberté d'expression et la vie privée est l'une des questions les plus importantes dans ce domaine. Car, toute restriction à ces libertés doit être nécessaire et proportionnelle à l'objectif poursuivi ainsi que prévue par la loi, comme l'a bien souligné la Cour Constitutionnel turque dans sa décision portant la loi relative à l'élargissement du blocage administratif. L'efficacité du blocage administratif semble également une autre question importante en ce qui concerne la lutte contre le terrorisme. De ce fait, il convient de noter que la création d'une organisation internationale qui compose des autorités administratives indépendantes et une coopération plus étroite entre les Etats pourrait être une solution assez utile.

♦♦♦♦

BIBLIOGRAPHIE

Livre

A. LEPAGE, Libertés et droits fondamentaux à l'épreuve de l'internet, Litec, Editions Jurisclaseur, Paris, 2002, 328p.

A.Ş. GÖZÜBÜYÜK, T. TAN, *İdare hukuku,* Seçkin, 10ème édition, 2014, 1037p.

E. DECAUX, « Terrorisme et droit international des droits de l'homme" in. Terrorismes. Histoire et droit, H. LAURENS, M. DELMAS-MARTY , Biblis, CNRS éditions, Paris, 2010, pp.291-323

G. ANDREANI, « La guerre contre le terrorisme: un succès incertain et couteux », in. Politique étrangère, (revue trimestrielle publiée par l'institut français des relations internationales), No 2, 2011, pp.253-267

G. CHAILAND, « Guerillas et terrorismes », in. Politique étrangère, (revue trimestrielle publiée par l'institut français des relations internationales), No 2, 2011, pp.281-293.

G. STEINBERG, « Al-Qaida 2011 », in. Politique étrangère, (revue trimestrielle publiée par l'institut français des relations internationales), No 2, 2011, pp.267-281

H. LAURENS, M. DELMAS-MARTY, « Le terrorisme comme concept juridique de transition », in. Terrorismes. Histoire et droit, H. LAURENS, M. DELMAS-MARTY , Biblis, CNRS éditions, Paris, 2010, pp.323-335.

Ö. ÖZBEY, Restrictions on freedom of expression concerning the european convention on human rights, TBB Dergisi, 106, 2013, pp.41-92.

The use of the Internet for terrorist purposes, United Nations Office on Drugs and Crime, New York, 2012. Disponible sur: https://www.unodc.org/documents/frontpage/Use_of_Internet_for_ Terrorist_Purposes.pdf

Thèses

J. CATTAN, « Le droit et les communications électroniques », These de doctorat, H. ISAR(s. dir), Ecole Doctorale Sciences Juridiques et Politiques (Aix-en-Provence), 2012.

M. AKGÜN, « L'indépendance des autorités nationales chargées de la protection des données personnelles en droit comparé : La France et la Turquie », Mémoire de Master, G. Marcou(s. dir.), Paris 1, 2015.

Séminaire

D. ROUSSEAU, La place du juge : le rôle du juge dans les sociétés contemporaines, Droit européen des libertés fondamentales, La course de droit à l'Université Paris I, 2015.

Les Rapports

« Loi renforçant les dispositions relatives à la lutte contre le terrorisme », Dossier législatif, Senat, Disponible sur : http://www.senat.fr/dossier-legislatif/pjl13-807.html

S. PIETRASANTA, « Rapport parlementaire sur le projet de loi (n° 2110), renforçant les dispositions relatives à la lutte contre le terrorisme », Assemblée Nationale, Au nom de la commission des lois constitutionnelles, de la législation et de l'administration générale de la république, n°2173, 22 juillet 2014. Disponible sur : http://www.assemblee-nationale.fr/14/rapports/r2173.asp

« Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Texte n° 406 adopté par l'Assemblée nationale, le 18 septembre 2014, p.91. Disponible sur : http://www.assemblee-nationale.fr/14/ta/ta0406.asp

« Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Amendements déposés en vue de l'élaboration du texte de la commission, Senat. Disponible sur : http://www.senat.fr/amendements/commissions/2013-2014/807/accueil.html

« Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Comptes rendus des réunions de la commission des lois, Examen des amendements au texte de la commission, Senat, 15 octobre 2014, Disponible sur : http://www.senat.fr/compte-rendu-commissions/20141013/lois.html#toc6

« Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Rapport n° 9 (2014-2015) de MM. Jean-Jacques HYEST et Alain RICHARD, fait au nom de la commission des lois, Senat, déposé le 9 octobre 2014, Disponible sur : http://www.senat.fr/rap/l14-009/l14-009.html

« Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Texte de la commission n° 10 (2014-2015) déposé le 9 octobre 2014, Senat, Disponible sur : http://www.senat.fr /leg/pjl14-010.html

« Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Rapport n° 37 (2014-2015) de MM. Jean-Jacques HYEST et Alain RICHARD, fait au nom de la commission mixte paritaire, déposé le 21 octobre 2014. Disponible sur : http://www.senat.fr/rap/l14-037/l14-037.html

« Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme »,Etude d'impact, Assemblée Nationale,8 juillet 2014, Partie 2.6.2

« Recommandation sur l'article 9 du projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme », Commission de réflexion sur le droit et les libertés à l'âge du numérique. Disponible sur : http://www2.assemblee-nationale.fr/14/commissions-permanentes/numerique/a-la-une/recommandation-sur-l-article-9-du-projet-de-loi-contre-le-terrorisme

Sites internet

« Combattants européens de l'EI: débat sur les menaces à la sécurité intérieure de l'UE », 03.10.2014, Disponible sur : http://www.europarl.europa.eu/news/fr/news-room/content/20141017IPR74303/html/Combattants-europ%C3%A9ens-de-l'EI-d%C3%A9bat-sur-les-menaces-%C3%A0-la-s%C3%A9curit%C3%A9-de-l'UE

« Cumurbaşkanı Abdullah Gül'den yasağa rağmen tweet », 21.03.14, Hürriyet, Disponible sur: http://www.hurriyet.com.tr/cumurbaskani-abdullah-gulden-yasaga-ragmen-tweet-26053467

« France on its way to total Internet censorship? », 27 June 2011, Disponible sur:https://www.indexoncensorship.org/2011/06/france-on-its-way-to-total-internet-censorship/

« Les ratés de la première vague de blocages administratifs de sites djihadistes », 18.03.2015, Le Monde, Disponible sur : http://www.lemonde.fr/pixels/article/2015/03/18/les-rates-de-la-premiere-vague-de-blocages-administratifs-de-sites-djihadistes_4596149_4408996.html

« Quel contrôle du blocage administratif des sites Internet ? », 13 Fevrier 2015, Disponible sur : http://www.cnil.fr/linstitution/actualite/article/article/quel-controle-du-blocage-administratif-des-sites-internet/

SOMMAIRE

Ahlatlıbel Mah.
İncek Şehit Savcı Mehmet Selim Kiraz Bulvarı
06095 Çankaya Ankara - TÜRKİYE
T. +90.312 489 81 80 F. +90.312 489 81 01
www.taa.gov.tr

ISSN:1309-6826