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**The Freedom of Expression and Its Reflections in Turkey in the Frame of the Decisions
of ECtHR**

Joint Master's Programme European Studies Master Thesis

Antalya / Hamburg, 2012

Akdeniz Üniversitesi
Sosyal Bilimler Enstitüsü Müdürlüğüne,

Sena Elif KÜTÜK'ün bu çalışması, jürimiz tarafından Uluslararası İlişkiler Ana Bilim Dalı Avrupa Çalışmaları Ortak Yüksek Lisans Programı tezi olarak kabul edilmiştir.

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Tez Başlığı:

İFADE ÖZGÜRLÜĞÜ VE İFADE ÖZGÜRLÜĞÜNÜN AVRUPA İNSAN HAKLARI
MAHKEMESİ KARARLARI IŞIĞINDA TÜRKİYE'YE YANSIMALARI.

THE FREEDOM OF EXPRESSION AND ITS REFLECTIONS IN TURKEY IN THE FRAME
OF THE DECISIONS OF ECtHR.

Onay : Yukarıdaki imzaların, adı geçen öğretim üyelerine ait olduğunu onaylarım.

Tez Savunma Tarihi 24/05/2012

Mezuniyet Tarihi :27/08./2012

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LIST OF ABBREVIATIONS

ATL	Anti Terror Law
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
Ltd.	Limited Şirket (Limited Liability Company)
OSCE	Organization for Security and Co-operation in Europe
PKK	Komünist Kürt Partisi (Kurdish Nationalist Party)
RTÜK	Radyo Televizyon Üst Kurumu (Radio and Television Supreme Council in Turkey)
TCK	Türk Ceza Kanunu (Turkish Penal Code)
T.C.	Türkiye Cumhuriyeti (Republic of Turkey)
TL	Turkish Lira
TMK	Terörle Mücadele Kanunu (Anti Terror Law)
TÜSİAD	Türk Sanayicileri Ve İş Adamları Derneği (Turkish Industrialists' and Businessmen's Association)
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
USA	United States of America
vs.	versus

ABSTRACT

The freedom of expression is the most significant piece of basic rights and freedoms, and is necessary for democratic societies. It is the key point of every constitutional state. Furthermore, it is protected by democratic societies as the freedom of expression, because it has a great importance in Europe and in the whole world and when the provided freedoms are widen, the democracy of the states increase. This concept is criticised very much in Turkey and there are many cases of European Court of Human Rights against Turkey by regarding it. The political side of freedom of expression, one of the must-be protected freedoms, should be analyzed as much as the legal side of it. With the recent regulations, the freedom of speech in Turkey is being narrowed. Yet, it is debatable if these measures are enough.

Keywords: Freedom of expression, European Court of Human Rights, Article 10 of ECtHR, Article 301 of Turkish Crime Code, European Convention on Human Rights

ÖZET

İfade özgürlüğü temel hak ve özgürlüklerin en önemli parçasıdır ve demokratik toplumların olmazsa olmaz parçasıdır. İfade özgürlüğü her demokratik hukuk devletinde kilit noktadır. Bütün dünyada ve Avrupa’da ifade özgürlüğü büyük öneme sahip olduğu için bu özgürlük, demokratik toplumlarca koruma altına alınmaya çalışılmaktadır ve sağlanan özgürlüklerin boyutu genişledikçe doğru orantılı olarak ülkelerin demokratikliği o kadar artmaktadır. Türkiye’de bu kavram çok eleştirilmektedir ve ifade özgürlüğü konusunda Avrupa İnsan Hakları Mahkemesi’nin Türkiye aleyhine verdiği birçok karar vardır. Korunması gereken özgürlükler arasında yer alan ifade özgürlüğünün Türkiye’de hukuki boyutunun yanı sıra siyasi boyutu da incelenmelidir. Son zamanlarda yapılan değişikliklerle Türkiye’de ifade özgürlüğünün sınırları daha da azaltılmaya çalışılmaktadır. Ancak bu önlemlerin yeterli olup olmadığı tartışmaya açık bir konudur.

Anahtar Kelimeler: İfade özgürlüğü, Avrupa İnsan Hakları Mahkemesi, AİHS 10.Madde, TCK 301. Madde, Avrupa İnsan Hakları Sözleşmesi

INTRODUCTION

Basic rights and freedoms are the conditions in which man is to live in accordance with the others. And the freedom of expression is the base of the liberal and democratic states. The freedom of expression is a necessary condition for man to develop individually and the state to develop itself.¹

Freedom of expression is one of the most important basic rights and freedoms. And this is why European Court of Human Rights had its first case about this freedom when it was reconstructed in 1998. It is because thoughts are voiced through expression and rights exist this way. According to European Court of Human Rights, the freedom of expression is; ‘Freedom of expression which constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment is subject to certain restrictions as set forth in paragraph 2 of Article 10 of the European Convention on Human Rights’.²

Turkey’s view over the basic rights and freedoms has had both positive and negative criticisms. How free is Turkey about freedom of expression? With the recent regulations, it’s been tried to change. The answer analyzed in this study is to find out why Turkey is criticised regarding this issue and point out the criteria when European Court of Human Rights sued Turkey regarding freedom of expression, and how the situation is in Turkey on legal terms.

The limitation of freedom of expression has a great importance in the concept of freedom of expression. And this is still one of the issues discussed in whole world. Another answer I analysed in this study is found out on what conditions the freedom of expression can be limited and legal bases of such limitations. How the situation is in Turkey and what Turkey does about this situation, are what I am going to evaluate in this study. Limitations regarding to the freedoms affect the quality of democratic regime of the states. Even though the freedoms in liberal democracies are broad, they can be exceptionally limited. It is still

¹ TEZCAN, Durmuş, ERDEM, R., Mustafa, SANCAKDAR, Oğuz, ÖNOK, Rıfat, M., ‘İnsan Hakları El Kitabı’, Seçkin Yayınevi, Ankara, 2006, p.189.

² European Court of Human Rights, Case of Sürek vs. Turkey (No:1), 8 July 1999, Application Number: 26682/95, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.09.2011.

discussed in Turkey and all around the world where freedom of expression is taken seriously too.

CHAPTER 1: WHAT IS THE MEANING OF THE FREEDOM OF EXPRESSION?

1.1 Freedom of Expression as a Human Right

‘Behind every right, there is a history of oppression. Every human right plays a role in the construction of our common humanity and what it means to be human, but it is the indivisibility of these rights and their synergy that makes up human dignity. The importance of non-discrimination of human rights is well known and understood: human history is replete with instances of racism and intolerance that have given rise to genocide and crimes against humanity.’³ Human right is absolute, yet as long as it is not legalized, it is also moral. Besides, human rights, based on its character, are different from any other moral right. This difference points itself out as being superior to all the other moral rights. In other words, human rights mean the most supreme moral requests. The practical meaning of human right supremacy is that it is prior to the claims and requests that are based on all the other rights.⁴

The international community has described racism and discrimination which are an abuse of human dignity and equality and a major cause of other massive violations, including genocide. However, national and international bodies and courts worldwide have emphasized and proved that freedom of expression is the centre of international human rights rule and human dignity.⁵

The situation of freedom of expression exists when one person explains themselves and passes on their thoughts to others. The most distinctive elements in human beings are the ability to speak and think. In that case, thinking and articulating the thoughts can be seen as the structural pillars of human being.⁶ It is significant because, the greatest man-made calamities in history involved full control over expressions, opinions and, at times, conscience: the slave trade and slavery, the Inquisition, the Holocaust, the genocide in Cambodia or Rwanda, the Stalin regime and the gulag.⁷

³ CALLAMARD, Agnes, ‘Freedom of Expression as a Cornerstone Human Rights’, Human Rights and History: A Challenge for Education, Stiftung Öffentliche Recht, EVZ, Berlin, 2010, p.99.

⁴ ERDOĞAN, Mustafa, ‘Anayasal Demokrasi’, Siyasal Kitabevi, 4.Edition, Ankara, 2011, p.119.

⁵ CALLAMARD, Agnes, ‘Freedom of Expression as a Cornerstone Human Rights’, Human Rights and History: A Challenge for Education, Stiftung Öffentliche Recht, EVZ, Berlin, 2010, p.99.

⁶ DÜLGER, M., Volkan, ‘Avrupa İnsan Hakları Sözleşmesi'nde Düşünce Özgürlüğü’, İstanbul Barosu Çetin Özek Armağanı Özel Sayısı, İstanbul, 2004, p.282.

⁷ CALLAMARD, Agnes, ‘Freedom of Expression As A Cornerstone Human Rights’, Human Rights and History: A Challenge for Education, Stiftung Öffentliche Recht, EVZ, Berlin, 2010, p.99.

1.2 What Is the Meaning of ‘Expression’ and Definition of Freedom of Expression?

‘Whenever people agree with me I always feel I must be wrong.’

Oscar Wilde

Freedom of expression is to be able to express one’s opinions, idea free from any suppression.⁸ According to the other explanations, freedom of speech is to be able to share your feelings, ideas without feeling any reservations.⁹ The terms of freedom of speech are considerable terms in the concept of freedom of expression. Freedom of speech is one of the most important components of being a free person and having a free society.

‘In democratic societies, there is more freedom of expression than under repressive governments. But even in free countries, not all speech is free. In countries with free speech judges, lawmakers, individual citizens, attorneys and traditions often face decision about what expression should be protected, what speech may be punished or proscribed, what justifies more or less expansive freedom of expression, and how free speech is to be balanced against other rights.’¹⁰

Freedom of expression is a fundamental cornerstone of constitutional democracy. The freedom of expressing and the concept of democracy are similar to one another. According to Burbaker¹¹, ‘the freedom of expression requires democracy, and the democracy requires the freedom of expression’. In the same sense, pluralism and the asset of tolerance centre the democracy and the freedom of expression.¹² Freedom of expression in a broad sense means to bare an idea, belief, opinion, behaviour and a feeling in a peaceful way freely¹³. But it has a various structure in all issues. “Because the answers implicate religious, political, and cultural considerations, speech protection varies from country to country, differing even among democratic societies. Freedom of expression’s importance in human interactions, self-

⁸ BİRTEK, Fatih, ‘İfade Özgürlüğü ve Türk Ceza Kanunu’nun 301. Maddesinin Bu Kavram Işığında Değerlendirilmesi’, İstanbul Bar Association, No: 2, Volume: 81, İstanbul, 2007, p.611.

⁹ ARTUK, M., Emin, GÖKCEN, Ahmet, YENİDÜNYA, A., Caner, ‘Ceza Hukuku Özel Hükümler’, Turhan Kitabevi Yayınları, 6.Edition, Ankara, 2005, p.30.

¹⁰ TRAGER, Robert, DICKERSON Donna L., ‘Freedom of Expression In The 21.Century’, Pine Forge Press, 1999, p.13.

¹¹ BRUKER, Stanley, C., ‘The Encyclopaedia of Democracy’, Edt: Seymour Martin Lipset, Press: 2, Routledge, London, 1995, p. 504.

¹² KÜZECİ, Elif, ‘AİHS’nin 10.Maddesi Işığında Nefret İçerikli ve Irkçı Nitelikli Düşünce Açıklamaları’, TBB Journal 71, (2007), p.180.

¹³ ERDOĞAN, Mustafa, ‘İfade Özgürlüğü ve Sınırları’, İfade Özgürlüğü İlkeler ve Türkiye, İletişim Yayınları, 1st Edition, 2007, İstanbul, 2007, p.19.

development and in relationships between governments and their citizens makes free speech not just an interesting topic, but one that is crucial to people's lives.”¹⁴

So what is 'Expression'? Expression is to word of people oneself and it happens in various ways. In day-to-day language we mean a musical, oral, written or pictorial explanation of an idea, feeling, emotion or an aspiration. Additionally, physical behaviours, approaches and positions can also be seemed as ways to express. In wide meaning, choices of clothing and carried symbols are included in the scope of expression.¹⁵ Thinking and producing ideas are activities that are the basis of human being, constitute the core of it¹⁶ and that happens with expression. Because of that it is important to word the expression and in this way expression should be seemed as a communication or message transmitting instrument.¹⁷

As it mentioned before, freedom of expression is not consisted of verbal statements, there are several ways¹⁸ for expressing the opinion such as TV, radio or mails where there are every kind of written cultural, political, economical, commercial opinions.¹⁹ However, everything one says is not in the scope freedom of expression. At this point, the statements that will benefit from the freedom of expression must be the product of an intellectual activity. The explanations that will not be covered by freedom of expression are those that include statements regarded as insult swear words and any offences at honour words, writings or pictures.²⁰ In a clear explanation, expression is the way of people for communicate with others or society. Expression provides the opportunity to make us known and to know others. In this way it composes the focus point of mutual learning process in society life.²¹

¹⁴ TRAGER, Robert, DICKERSON Donna L., 'Freedom Of Expression In The 21.Century', Pine Forge Press, 1999, p.13.

¹⁵ ERDOĞAN, Mustafa, 'İfade Özgürlüğü ve Sınırları', İfade Özgürlüğü İlkeler ve Türkiye, İletişim Yayınları, 1.Press, İstanbul, 2007, p.20.

¹⁶ SUNAY, Reyhan, 'İfade Hürriyetinin Muhtevası ve Sınırları', Liberal Düşünce Topluluğu, 1.Press, Ankara, 2001, p.12.

¹⁷ ERDOĞAN, Mustafa, 'İfade Özgürlüğü ve Sınırları', İfade Özgürlüğü İlkeler ve Türkiye, İletişim Yayınları, 1.Press, İstanbul, 2007, p.20.

¹⁸ BİRTEK, Fatih, 'İfade Özgürlüğü ve Türk Ceza Kanunu'nun 301. Maddesinin Bu Kavram Işığında Değerlendirilmesi', İstanbul Barosu Dergisi, No:2, Volume: 81, İstanbul, 2007, p.612.

¹⁹ BIÇAK, Vahit, 'Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü', Liberal Düşünce Topluluğu, Ankara, 2002, p.20.

²⁰ TANILİ, Server, 'Devlet ve Demokrasi', Cem Yayınevi, 7. Press, İstanbul, 1990, p.194.

²¹ ERDOĞAN, Mustafa, 'İfade Özgürlüğü ve Sınırları', İfade Özgürlüğü İlkeler ve Türkiye, İletişim Yayınları, 1.Baskı, İstanbul, 2007, p.21

1.3 Freedom of Thought: As a Reflection of Freedom of Expression

There must be some conditions for freedom of expression to exist. If these conditions are not formed, it is not possible to talk about freedom of expression. These conditions are firstly, receive information and the freedom to learn.²² Those are the core of freedom of expression. Secondly, it is freedom of opinion. Choosing what is believed to be right is freedom of opinion. It is to state not to be condemned because of the opinions and ideas in an environment where freedom of intelligence and learning is secured.²³ This freedom requires the protection not only against the things that endangers the freedom of expression, but also against the factors that bother the persons because they have different ideas or that stop them from accepting different ideas. Freedom of conscience is the right not to be condemned because of an opinion, such as a religious one. Third one is the freedom to express the opinion. Abstract opinion only gains functionality when expressed. The concept of statement contains defending the opinion, explaining to the others, publishing, that is freedom of press, and making others accept the opinion.²⁴ Propaganda, which is delivering an opinion to more than one person in a systematic and convincing way, is included in the action of an opinion.²⁵ Actions such as lecturing, making a speech, reading a poem, singing a song, publishing newspapers, magazines, brochures are included in this concept.²⁶ Democratic civil disobedience actions such as hunger or strike, protest or homage marching, applauding are included in the integrity intellectual freedom.²⁷

The fount of expression is thinking, and therefore any consideration of freedom of speech begins with freedom of thought. Thinking, at least abstract thinking, distinguishes people from other forms of life. Thoughts are fundamental for human being. To a great extent, a person is what he or she thinks. One can not stop thinking – people dream when asleep. But can what one thinks be limited? Is a person's thought process so private no government should be permitted to interfere with it?²⁸

²² KÜTÜK, İbrahim, 'Anayasa Hukukunda Düşünce Özgürlüğü ve Sınırları', Unpublished Master's Thesis, Diyarbakır, 2001, p.4.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ TRAGER, Robert, DICKERSON Donna L., 'Freedom Of Expression In The 21.Century', Pine Forge Press, 1999, p.14.

Freedom of thought implies the people's right to have ideas or the right to not be under pressure because of these ideas. This right includes having no difficulty while expressing the ideas or feelings, the right to not be accused or not be criticized due to expressing the ideas. With a clear explanation, the right of freedom of thought is the right that protects the person (the subject) who has an idea or opinion rather than the idea or opinion itself.²⁹

According to the aforementioned explanations, the right of freedom of expression protects various forms expressing freely as the various aspects of expressing the ideas.³⁰ Freedom of thought protects the owner of ideas and opinions but freedom of expression protects the ideas and expressions. First one acts from the immunity of personality and private life; the second one is predicated on the additional value of ideas' diffusion. That's why freedom of expression is in the core of democracy discussions rather than freedom of thought.³¹

1.4 The Scope of Freedom of Expression in International Frame and Doctrines of Freedom of Expression

a) "The freedom of expression is a fundamental human right, important in its own right and also because of its function in underpinning the protection of all other rights. It is a complex right."³² Especially in the international area the consequence of freedom of expression is liberty. First, freedom of expression is not absolute, but may be restricted to protect other overriding private and public interests, for example national privacy and security. Second, it defends both the right of the listener and the right of the speaker, in the latter case to receive a diversity of ideas and information. Sometimes these rights appear to come into competition and allocating priority between them can entail a difficult balancing endeavour.³³

How did the importance of freedom of thought appear in international area? Freedom of expression is generally accepted by almost all international instruments as a multi-faceted right that embraces much more than merely the right to express, or disseminate, information and ideas. It is described as including at least three distinct conditions:

- the right to seek information and ideas;

²⁹ ERDOĞAN, Mustafa, 'İfade Özgürlüğü ve Sınırları', İfade Özgürlüğü İlkeler ve Türkiye, İletişim Yayınları, 1. Press, İstanbul, 2007, p.21.

³⁰ Ibid.

³¹ Ibid.

³² MENDEL, Toby, 'Freedom of Expression and Broadcasting Regulation', Communication and Information, UNESCO, Brasilia Office, 2011, p.9.

³³ Ibid.

- the right to receive information and ideas;
- the right to impart information and ideas

Furthermore, most standards recognise the right to hold an opinion as a right directly associated with freedom of expression.³⁴

b) For making a doctrinal analyse; ‘the doctrine of freedom of expression is generally thought to single out a class of ‘protected acts’ which it holds to be immune from restrictions to which other acts are subject. In particular, on any very strong version of the doctrine there will be cases where protected acts are held to be immune from restriction despite the fact that they have as consequences that harms which would normally be sufficient to justify the imposition of legal sanctions.’³⁵ It is the entity of such cases which makes freedom of expression an important doctrine and which makes it clear, from a certain point of view, an unreasonable one.³⁶

1.5 The Concept of Objective Border and Objective Borders of Freedom of Expression

1.5.1 Generally

The freedom of expression has a big importance for human and society and its concessive position is incontestable. It could be possible being up against while using the freedom like others for different values and benefits. The solution for this is providing to live together for benefits rather than one benefit eliminates the other one.³⁷

Traditionally, conciliatory expressions need to be protected by law and the expressions, which encourage and drive the violence, should to be punished. Additionally the expressions, which includes aspersion and aggrieve the people, are under limitation.³⁸ Generally pornographic expression is limited by the conservatives. With development in recent times, opinion or feelings explanations that drive and humiliate the people because being a part of various ethnic and religious groups or because the sex or sex choices are in the way of forbid.

³⁴ Assembly and Association of the Commonwealth Secretariat (Ed.), Best Practice, Freedom of Expression, Human Rights Unit, London, 2002, p.9-10.

³⁵ SCALON, Thomas, ‘Philosophy and Public Affairs’, Princeton University Press, Princeton, 1977, p.204.

³⁶ Ibid.

³⁷ SUNAY, Reyhan, ‘İfade Hürriyetinin Muhtevası ve Sınırları’, Liberal Düşünce Topluluğu, 1.Press , Ankara, 2001, p.73.

³⁸ ERDOĞAN, Mustafa, ‘İfade Özgürlüğü ve Sınırları’, İfade Özgürlüğü İlkeler ve Türkiye, İletişim Yayınları, 1st Edition, İstanbul, 2007, p.27.

At the same time, the expressions that deny and aggravate the historical events are going to be forbidden.³⁹

The matter of borderline of freedom of expression is still debated in every part of the world as well as in Turkey. Especially in contemporary democracies this borderline concept is still a matter. In the Constitutional Order is ‘a constitutional regime operates in terms of the rule of law and ensures effective restraints on the power holders, as defined within the constitution.’⁴⁰ Basic right and freedoms form the key stone of a constitution.

Especially in liberal democracies, freedom of expression has wide liberty; in addition to that, the limits of freedoms such as freedom of opinion are even wider. That is why, freedoms are considered to be absolute. However, when looking at standard areas, every freedom has a limit. Those are regarded as objective borderlines of freedoms.⁴¹

The limits put for freedom of expression came along with a need for fine balance. Freedom of expression can develop only in an environment where the order is protected, crimes are prevented and general security is provided. Compromising these freedoms with freedom of expression does not cause serious problems.⁴²

In terms of freedom of expression, national judiciary principally takes the words spoken, announcement written, expressions used in those texts, and speeches into consideration. In these conditions, it is accepted that expression itself is convenient for law sanction without even checking if the expression has made any concrete impact.⁴³ In my opinion, the borderline of freedom of expression is the most critical point in the concept of freedom of expression. Freedom of expression has a protection area and the concepts outside that area are not covered or protected. For instance, the expressions that include insults or swear words are excluded from that area. This is going to be explained in a more explicit way below.

The limitation of freedom of expression has three criteria. In following part these three criteria will be analysed. At the same time these criteria take place in 10 Article of ECHR clearly.

³⁹ Ibid.

⁴⁰ DANZIGER, James, ‘Understanding The Political World A Coperation Introduction to Political Science’, 8.Edition, Pearson Logman, 2007, p.184.

⁴¹ HAKYEMEZ, Yusuf, Şevki, ‘Temel Hak ve Özgürlüklerde Objektif Sınır Sorunu ve Düşünce Özgürlüğünün Objektif Sınırları’, Ankara Üniversitesi SBF’s Journal, Press:57, Volume: 2, 2002, p.18.

⁴² KABOĞLU, İbrahim,Ö., ‘Düşünce Özgürlüğü Avrupa Ölçütleri ve Türkiye’, İnsan Hakları Yıllığı, TODAİE, 1993, p.45.

⁴³ European Court of Human Rights, Case of İbrahim İncal vs. Turkey, 9.06.1998, Application Number: 41/1997/825/1031, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 14.09.2011.

1.5.2 Limitation Criteria of Freedom of Expression

1.5.2.1 Interference Should be Needed in Democratic Society

The needs of society and limitation should be in harmony as limitation ethic rules. The needs of democratic society are important criteria by acceptance of limitation.⁴⁴ The concept to be required is interpreted as compulsive social need in convention system. While researching the compulsive social need in the supervision of necessity, various factors are considered and an abstract assessment is made. These factors are the concept of balance between limitations instruments and aims, circumstances of limitation to be made and the right is made the issue of limitation.⁴⁵

The case Zana vs. Turkey can be shown as an example in this part. The issues of this case are the speeches made by a governor for straining the environment when the terrorist organization activities were raised.⁴⁶ Because of that the limitation was made by the Court for protecting the public security and territorial integrity⁴⁷ and making this limitation was a need for democratic society.⁴⁸

1.5.2.2 Limitation Should be Determined by Law

Being determined by law is related to the predictability and attainability of the law. Having enough information for citizens about implemented legal rules is important through the attainability. Predictability is to provide formulizing the rules clearly so, citizens can behave through these rules without having difficulty. Citizens should envisage the consequences of their behaviours.⁴⁹

Law means here law in general meaning. More clearly, there is no statement about a physical or formal structure. However the Commission of European Human Rights mentions

⁴⁴ BIÇAK, Vahit, 'Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü', Liberal Düşünce Topluluğu, Ankara, 2002, p.21.

⁴⁵ SUNAY, Reyhan, 'İfade Hürriyetinin Muhtevası ve Sınırları', Liberal Düşünce Topluluğu, 1.Press, Ankara, 2001 p.114-115.

⁴⁶ European Court of Human Rights, Case of Zana v. Turkey , 10.04.1996, Application Number: 69/1996/688/880, 18954/91, Paragraph: 9-10, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 14.09.2011.

⁴⁷ European Court of Human Rights, Case of Zana v. Turkey , 10.04.1996, Application Number: 69/1996/688/880, 18954/91, Paragraph: 48-49, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 14.09.2011.

⁴⁸ SUNAY, Reyhan, 'İfade Hürriyetinin Muhtevası ve Sınırları', Liberal Düşünce Topluluğu, 1.Press, Ankara, 2001, p.115.

⁴⁹ BIÇAK, Vahit, 'Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü', Liberal Düşünce Topluluğu, Ankara, 2002, p.21.

that freedom could be limited by using physical meaning of law concept with the rules which are not general, physical, objective and personal. Through this determination, the Commission decided with the authority of legislative power, that the limitations made through the regulatory procedures of implementation are in accordance with the Convention.⁵⁰

According to the ECtHR, the concept of law includes not only the written rules. For instance, the European Council has cleared its detailed law statement in Sunday Times/UK case.⁵¹ According to the claims which said that implemented and unwritten ‘Common Law’ rule in United Kingdom is not harmonize the legality. The European Council mentioned that the law concept includes not only written rules but also the unwritten rules of customary.⁵²

1.5.2.3 Interference Should Have a Legitimate Purpose

The Legitimate Purpose concept took place in Article 10/2 of the Convention.⁵³ According to this Article the aims like protecting the others’ right and prestige are considered as legal aims. The responsibility to show the right of legitimate purpose by limiting freedom of expression belongs to government. Legitimate purpose should be introduced as persuasive and there should be an ‘emergence social need’ in legal aim. Furthermore, beneficial, wanted and ordinarily circumstances do not mean that the limitation is needed.⁵⁴ The reasons for limitation have a wearing structure because; their meaning and concept have limited existence in Convention Law. Consequently, freedom of expression could not be limited according to another reason of limitation.⁵⁵

According to the Convention and Constitutional Law for having the legality while limiting the freedom of expression, the limitation should not be used for other purposes which

⁵⁰ SUNAY, Reyhan, ‘İfade Hürriyetinin Muhtevası ve Sınırları’, Liberal Düşünce Topluluğu, 1.Press, Ankara, 2001, p.123.

⁵¹ European Court of Human Rights, Case of Sunday Times v. The United Kingdom (Article 50), 26.9.1979. Application Number: 6538/74, 26.04.1979, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 18.09.2011.

⁵² SUNAY, Reyhan, ‘İfade Hürriyetinin Muhtevası ve Sınırları’, Liberal Düşünce Topluluğu, 1.Press, Ankara, 2001, p.79.

⁵³ Article 10/2 of the European Convention on Human Rights- 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.

⁵⁴ BIÇAK, Vahit, ‘Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü’, Liberal Düşünce Topluluğu, Ankara, 2002, p.21.

⁵⁵ SUNAY, Reyhan, ‘İfade Hürriyetinin Muhtevası ve Sınırları’, Liberal Düşünce Topluluğu, 1.Press, Ankara, 2001, p.99.

are not considered.⁵⁶ More clearly, the principle of proportionality should be implemented for the aim and need of limitation. The limitation of freedom of expression has to be in a parallel line with the legal aim to be reached.⁵⁷

1.5.3 Clear and Present Danger Criteria Dimension of Limiting the Freedom of Expression

Clear and Present Danger Criteria is a significant issue and should be analysed while explaining the limitation of freedom of expression. Especially we encounter the criteria in ECHR- Turkey cases usually. In following examples it is possible to see this situation clearly.

The doctrine of Clear and present danger placed on First Amendment to the United States Constitution. It was established in the case of *Schenck vs. United States*⁵⁸. This case stressed that the Supreme Court held that ‘advocacy of the use of force or of law violation’ is defended unless ‘such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action’. In the same way, the Court held that a statute prohibiting threats against the life of the President could be administrated only against speech that constitutes a ‘true threat’ and not against mere ‘political hyperbole’.⁵⁹ In cases of content-based restrictions of speech other than advocacy or threats, the Supreme Court generally applies ‘strict scrutiny’, which means that it will uphold a content-based restriction only if it is necessary ‘to promote a compelling interest,’ and is ‘the least restrictive means to further the articulated interest’.⁶⁰

Clear and present danger concept has an important place in limits of freedom expression. What is important at this point is if the words stated create clear and present danger or not. In this subject, it is proper to explain it with a decision Turkey has sided with. The European Court of Human Rights used this concept in its decision⁶¹ about a very little party in Turkey, which is called Democracy and Change Party. Their views are as follows; the using of

⁵⁶ SUNAY, Reyhan, ‘İfade Hürriyetinin Muhtevası ve Sınırları’, Liberal Düşünce Topluluğu, 1.Press, Ankara, 2001, p.99.

⁵⁷ BIÇAK, Vahit, ‘Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü’, Liberal Düşünce Topluluğu, Ankara, 2002, p.21.

⁵⁸ U.S. Supreme Court, Case of *Schenck v. U.S.*, Application No: 249 U.S. 47, 1919, <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=249&invol=47>, accessed on 21.09.2011.

⁵⁹ COHEN, Henry, Freedom of Speech and Press, Exceptions to the First Amendment, Congressional Research Service, 2009, p.3.

⁶⁰ Ibid.

⁶¹ European Court of Human Rights, Case of *Democracy and Change Party and others v. Turkey*, 26.04.2005, Applications Numbers: 39219/98 and 19974/98, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 19.09.2011.

Kurdish language freely in every area and official procedures, guaranteeing Kurdish identity with constitution and law with all its outcomes. The most important criterion here is that the danger has not yet shifted into action from idea, but it was enough in this case that the idea was regarded as a ‘danger’. However it was not explained why it was regarded as a danger in decisions of the national constitutional court.⁶²

In my opinion, Turkey has always been criticized for these situations, this kind of decisions regarding freedom of expression throughout the Europe and world. Turkey has obviously put forward its fears bearing inside its decisions. Regarding those statements as clear and present danger, which are placed in a manifesto of a party that is not even known by the majority of people in Turkey is still a question about the extent of democracy in Turkey.

1.5.3.1 Slander, Swear Words and Insulting Words

It is highly important separate criticism from slander; swear words and insulting words, which are the other thin line in freedom of expression. Slander, swear words and insulting words are analysed inside the concept of freedom of expression and freedom of press as an important part of freedom of expression because; at present these statements are used through the mass communication means. The important thing here is to protect individual rights and pride rather than their fame and reputation. Another important case here is to protect individual rights through freedom of opinion. Even though individual rights are protected, it is not possible to state that these expressions mentioned in freedom of opinion must be prohibited because they are not covered in the limits of objective freedom. That is why freedom of expression is regarded as superior to individual rights especially when it is about the public.⁶³

Nonetheless, the expressions, writings or pictures that directly aim at others’ honours are outside the protection limit of freedom of expression.⁶⁴ This case is kept in wider concept for the critics about the politicians and especially about governors. It is explained as follows in

⁶² ARSLAN Zühtü, ‘İfade Özgürlüğünün Sınırlarını Yeniden Düşünmek: Açık ve Mevcut Tehlike’nin Tehlikeleri’, Teorik ve Pratik Boyutlarıyla İfade Özgürlüğü, Liberal Düşünce Topluluğu, Avrupa Komisyonu, Ankara, 2003, p.64.

⁶³ HAKYEMEZ, Yusuf, Ş., ‘Temel Hak ve Özgürlüklerde Objektif Sınır Sorunu ve Düşünce Özgürlüğünün Objektif Sınırları’, Ankara Üniversitesi SBF Dergisi, Press:57, Volume: 2, 2002, p.28.

⁶⁴ HAKYEMEZ, Yusuf, Ş., Temel Hak ve Özgürlüklerde Objektif Sınır Sorunu ve Düşünce Özgürlüğünün Objektif Sınırları, Ankara Üniversitesi SBF’s Journal, Press:57, Volume: 2, 2002, p.29.

Castells⁶⁵ case of European Court of Human Rights; the limit of tolerable criticism should be widened more for governor and politicians when compared private identities. The actions and mistakes of a government should not only be exposed to the authorities of legislation and justice but also to the inspections of the press and public.⁶⁶

1.5.3.2 Hate and Racist Speeches

There are many definitions for hatred speeches but the best definition is by the Committee of Ministers of Council of Europe Recommendation; ‘for the purposes of the application of these principles, the term ‘hate speech’ shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism And ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.’⁶⁷

According to the Committee of Ministers, hate speech includes all forms of expression which promote spread and incite, or justify racial hatred, xenophobia, anti- Semitism or other shapes of hatred based on sternness.⁶⁸

‘The concept of “hate speech” encompasses a multiplicity of situations:

- Firstly, incitement of racial hatred or in other words, hatred directed against persons or groups of persons on the grounds of belonging to a race;
- Secondly, incitement of hatred on religious grounds, to which may be equated incitement to hatred on the basis of a distinction between believers and non-believers.
- Lastly, to use the wording of the Recommendation on “hate speech” of the Committee of Ministers of the Council of Europe, incitement to other forms of hatred based on intolerance “expressed by aggressive nationalism and ethnocentrism”.’⁶⁹

⁶⁵ European Court of Human Rights, Case of Castells vs. Spain, Application Number 11798/85, 24.04.1992, Paragraph: 46, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 18.09.2011.

⁶⁶ European Court of Human Rights, Case of Castells vs. Spain, Application Number 11798/85, 24.04.1992, Paragraph: 46, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 18.09.2011.

⁶⁷ Council of Europe Committee of Ministers Recommendation No. R (97) 20, of The Committee of Ministers to Member States on "Hate Speech" (Adopted by the Committee of Ministers on 30 October 1997, at the 607th Meeting of the Minister's Deputies), [http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(1997\)020&expmem_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(1997)020&expmem_EN.asp), accessed on 17.12.2011.

⁶⁸ WEBER, Anne, ‘Manuel on Hate Speech’, Council Of Europe Publishing, Strasbourg, 2009,p.3.

The important distinctive factor in hate speech is the speech that has hate along with the expressions of opinions carried out in an unlawful way. While the feature of how to explain an opinion is pointed out, in hatred speeches, the content is important.⁷⁰ In this sense, hateful expressions form an area that include the intolerance and hate between religions and sexes.⁷¹ From the second part of 19th, racism is described as anti-social beliefs and behaviours, which is based on the fallacy that the relations between apartheid groups can be confirmed through biological bases. Hate speech covers all forms of expression which spread, incites, promote or justify racial hatred, intolerance.⁷²

Racist speeches in hatred speeches are the ones that cause more problems. Prohibiting these statements that provoke war is not dealt with in the concept of freedom of opinion⁷³, but here there is a thin line. It is the difference that racist speeches may have a message.

There are countries that have strict laws about racist speeches. Moreover Europe has even much stricter laws when compared to the USA. As an example, in the Federal Republic of Germany, although the freedom of expression has been seriously protected, the denial of Jewish genocide in Hitler's period was prohibited in 1994 as it was regarded as a potential danger to violate the public peace (The Auschwitz Lies).⁷⁴

Eventually, the concept of objective limits is the key point when restricting hate and racist speeches. But it would be wrong to say that everything in categories that is not inside the scope of objective limit of freedom of expression will not always be utilized by legal protection, because the speeches may have a message to give. We need to be cautious because it would be to bring extreme limits to the expressions of thoughts.⁷⁵

⁶⁹ Ibid, p.3-4.

⁷⁰ HAKYEMEZ, Yusuf, Ş., 'Temel Hak ve Özgürlüklerde Objektif Sınır Sorunu ve Düşünce Özgürlüğünün Objektif Sınırları', Ankara Üniversitesi SBF Dergisi, Press:57, Volume: 2, 2002, p.30.

⁷¹ KÜZECİ, Elif, AİHS'nin 10.Maddesi Işığında Nefret İçerikli ve Irkçı Nitelikli Düşünce Açıklamaları, TBB Journal, Nr. 71, 2007, p.179.

⁷² Ibid, p.178-179.

⁷³ HAKYEMEZ, Yusuf, Ş., 'Temel Hak ve Özgürlüklerde Objektif Sınır Sorunu ve Düşünce Özgürlüğünün Objektif Sınırları', Ankara Üniversitesi SBF Dergisi, Press:57, Volume: 2, 2002, p.31.

⁷⁴ HAKYEMEZ, Yusuf, Ş., 'Temel Hak ve Özgürlüklerde Objektif Sınır Sorunu ve Düşünce Özgürlüğünün Objektif Sınırları', Ankara Üniversitesi SBF Dergisi, Press:57, Volume: 2, 2002, p.32.

⁷⁵ Ibid, p.33.

1.5.3.3 Expressions Encompassing Obscenity

Generally, the things that encompass obscenity are not just abstract expression, but the images, videos and other similar means.⁷⁶ The freedom of press and distribution is both the means and form of freedom of expression. The most common excuses for government auditing are obscenity and political ‘sensitivities’. Along with the fact that what is an obscene change according to time and case, obscenity itself has a negative image. This is why 70 percent of Turkish people approve the censorship by RTÜK⁷⁷, over obscene publication on radio and television.⁷⁸ It can be easily concluded that it is not possible to talk about the existence of freedom of expression regarding obscenity. But in my opinion, this is also because of the cultural background of Turkey.

⁷⁶ Ibid, p.29.

⁷⁷ RTÜK, The Turkish Radio and Television Supreme Council, According to the Law No: 3984, RTUK was founded in 1994, RTUK is an autonomous and impartial public law corporation, RTUK reviews radios and televisions of Private Companies and Communication Faculty of Universities. (AVŞAN, Zakir, ÖNGÖREN, Gürsel, ‘Bilişim Hukuku’, Türkiye Bankalar Birliği, Publication No:270, İstanbul, 2010, p.99.)

⁷⁸ DAĞI, İhsan, TOPRAK, Metin, ‘Türkiye’de İnsan Hakları ve Düşünce Özgürlüğü’, Association for Liberal Thinking, Support to European Commission ‘Yasal ve Sosyal Yönleriyle Türkiye’de İfade Özgürlüğü’ Project, Ankara, 2003, p.32.

CHAPTER 2: CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

2.1 General Concept

European Convention on Human Rights has established a strong union among the Members of Council of Europe. It also provided for respect to human rights and basic freedoms on the base of democracy, peace and justice therefore it is seen to be their concrete expression by deciding to guarantee these rights while providing their development. The Convention for the protecting of human rights and basic freedoms was prepared within the Council of Europe.⁷⁹ ‘The Convention was signed on 4th November 1950, entered into force on 3rd September 1953 and has been ratified by all 46 Member States of the Council of Europe.’⁸⁰

Nearly all signatory countries of European Convention on Human Rights have integrated the Convention to their national legislation. In this way, the European Convention on Human Rights has become an integral part of domestic law system and it has been binding for all public authorities.⁸¹ Another result of this is that; there are rights and tasks of individual’s, which are reproduced by European Convention on Human Rights in related countries.⁸² In consequence, through domestic law, it is possible to address the text and case law of the Convention and also national courts have to apply this.⁸³ Additionally, when there is a conflict between national legislation and the Convention and its case law, including national courts, national authorities are obliged to give priority to the Convention.⁸⁴

⁷⁹ Introduction of European Convention on Human Rights, As amended by Protocols Nos. 11 and 14, Collected Texts, 2010. p.2.

⁸⁰ The Convention text is presented with its changed version on 1st June 2010 after 14. Protocol entered into force (Council of Europe Treaty Series [CETS] Nr. 194). The convention text was changed before with the arrangements of 21st September 1970 dated and 3. Protocol (CETS Nr. 45) from 20th December 1971 5. Protocol (CETS Nr. 55) from 1st January 1990 and 8. Protocol (CETS Nr. 118). It was involving the text of 2. Protocol (CETS Nr. 44). In accordance with its 3rd paragraph of 5th Article, this protocol is considered as an integral part of the Convention since it came into force on 21st September 1970. The aforementioned changed protocols and added regulations were replaced with the 11. Protocol (CETS Nr. 155) since it came into force on 1st November 1998. Since that date, the 9. Protocol from 1st October 1994 (CETS Nr. 140) ceased to have force and the 10. Protocol (CETS Nr. 146) became moot.

(http://www.yargitay.gov.tr/abproje/belge/temelbelge/AIHS_tr.pdf), accessed on 21.01.2012.

⁸¹ MACOVEI, Monica, ‘İfade Özgürlüğü, Avrupa İnsan Hakları Sözleşmesi’nin 10.maddesinin Uygulanmasına Yönelik Klavuz’, İnsan Hakları El Kitabı, No:2, 2001, p.5.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

Together with some additional protocols⁸⁵, which enlarge the scope of the European Convention on Human Rights, the Council of Europe has accepted many recommendations, these develop behaviour standards for member countries, and when they not confirm the obligations of the Convention, the Council has applied many sanctions to the countries.⁸⁶

The European Human Rights Supervisory Units have been doing theoretical applications through the judgments of Convention in its first years. But in following years the taken decisions have enlarged and cleared the application area. Therefore it was not necessary to make theoretical discussions on Convention judgments as before. The case law has to be considered through the growing principles of the cases.⁸⁷ Therefore the European Convention of Human Rights (ECHR) cannot be read excluding the case law. The ECHR system processes through the common law system. The decisions of European Court of Human Rights clear and interpret the Convention text. These decisions are legally binding prejudications and their legal statuses are in mandatory legal norms category. In consequence, when the ECHR is approved, national public authorities of all signatory countries are obliged to consider the Court's decisions as legally binding judgments.⁸⁸

The general logic of the European Convention on Human Rights was established through these directions: the contracting state has the main responsibility for the protection of the determined human rights. The reason for the existence of the European Court of Human Rights is to observe the states' applications and use the judicial review power. So the discretionary power in domestic law works in a parallel line with supervision within the Europe.⁸⁹

Freedom of expression has an accurate situation. Because of this, the right is not only important on national base but also on international base.⁹⁰ The Article 10 of European

⁸⁵ See above at footnote 79.

⁸⁶ MACOVEI, Monica, 'İfade Özgürlüğü, 'Avrupa İnsan Hakları Sözleşmesi'nin 10.maddesinin Uygulanmasına Yönelik Klavuz', İnsan Hakları El Kitabı, No:2, 2001, p.4.

⁸⁷ BOZKURT, Enver, DOST, Süleyman, 'Avrupa İnsan Hakları Mahkemesi Kararlarında İfade Özgürlüğü ve Türkiye', Süleyman Demirel Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi, 7.Cilt, 1.Sayı, Isparta, 2002, p.50.

⁸⁸ MACOVEI, Monica, 'İfade Özgürlüğü, Avrupa İnsan Hakları Sözleşmesi'nin 10.maddesinin Uygulanmasına Yönelik Klavuz', İnsan Hakları El Kitabı, No:2, 2001, p.5.

⁸⁹ MACOVEI, Monica, 'İfade Özgürlüğü, Avrupa İnsan Hakları Sözleşmesi'nin 10.maddesinin Uygulanmasına Yönelik Klavuz', İnsan Hakları El Kitabı, No:2, 2001, p.6.

⁹⁰ SUNAY,Reyhan, 'İfade Hürriyetinin Muhtevası ve Sınırları' , Liberal Düşünce Topluluğu, 1.Press, Ankara, 2001, p.3.

Convention on Human Rights is the one that puts the absolute borders of the freedom of expression in Europe. Article 10 ECHR originates from Article 19 International Human Rights Declaration adopted in 16 December 1948. The International Human Rights Declaration, dated 10 December 1948, has a similar provision in its Article 19. Article 10 ECHR is as follows:

Article 10

- 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Article 10 ECHR is one of most important and fundamental article of this Convention. The first part of the article reflects the importance of the freedom of expression, (which is not debated any more). The second part is about the inevitability of the borders and again only few people deny the borders are inevitable.⁹¹

After the 11. Protocol came into force; the European Court of Human Rights was restructured in 1998. Thanks to the reconstruction, the first case⁹² was about freedom of expression so that it would draw attention to their importance of freedom of expression.⁹³

⁹¹ LAWSON, Rick, 'İfade Hürriyetini Güvenceye Almak: Avrupa İnsan Hakları Mahkemesi İçtihatlarında Üç Eğilim', Teorik Ve Pratik Boyutuyla İfade Özgürlüğü, (Editör: Bekir Berat Özipek), Liberal Düşünce Topluluğu, Avrupa Komisyonu, Ankara, 2003, p.249.

⁹² European Court of Human Rights, Case of Fressoz and Roire vs France, 21 January 1999, Application Number: 29183/95, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 18.09.2011.

2.2 Article 10(1) ECHR- Protection of Freedom of Expression

The determined freedoms in Article 10 (1) ECHR are enforced freely without intervention of public authorities (except the legal grounds of 2nd paragraph) and independence from national borders.⁹⁴

The 1st paragraph guarantees three elements of freedom of expression:

- Freedom to hold opinion
- Freedom to receive information and idea
- Freedom to impart information and idea

2.2.1 Freedom To Hold Opinion

Freedom of belief means to choose and prefer information or knowledge in any area like the philosophic, religious, politic, economic, etc..⁹⁵ Additionally freedom of belief is to reach the information resources for individuals in a free environment to form opinion, to make choices and to conclude from these as they want.⁹⁶

States should not back up individuals that have opinions against others and expose their citizens to indoctrination. Additionally when the states disseminate unilateral opinions, these cause a definite and unacceptable obstacle for the freedom to hold opinion.⁹⁷

The individuals are under protection for negative consequences when they are attributed of their previous public expressions. That is another feature of freedom to hold opinion. The freedom to hold opinion also includes the negative freedom “to not be obliged for expressing opinions”.⁹⁸

⁹³ BIÇAK, Vahit, ‘Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü’, Teorik Ve Pratik Boyutuyla İfade Özgürlüğü, (Edt: Bekir Berat Özipek), Liberal Düşünce Topluluğu, Avrupa Komisyonu, Ankara, 2003, p.270.

⁹⁴ MACOVEI, Monica, ‘İfade Özgürlüğü, Avrupa İnsan Hakları Sözleşmesi’nin 10.maddesinin Uygulanmasına Yönelik Klavuz’, İnsan Hakları El Kitabı, No:2, 2001, p.11.

⁹⁵ SUNAY, Reyhan, ‘İfade Hürriyetinin Muhtevası ve Sınırları, Liberal Düşünce Topluluğu’, 1.Press, Ankara, 20001, p.57.

⁹⁶ KILDAN, Turgut, İsmail, ‘Türk Anayasa Yargısında İfade Özgürlüğü ve Avrupa İnsan Hakları Mahkemesi Kararlarıyla Karşılaştırılması’, Gazi Üniversitesi, Sosyal Bilimler Enstitüsü, Master Thesis, Ankara, 2008, p.62. (Accessed at <http://tez2.yok.gov.tr/> on 17.08.2011).

⁹⁷ MACOVEI, Monica, İfade Özgürlüğü, Avrupa İnsan Hakları Sözleşmesi’nin 10.maddesinin Uygulanmasına Yönelik Klavuz, İnsan Hakları El Kitabı, No:2, 2001, p.11.

⁹⁸ Ibid, p.11-12.

2.2.2 Freedom to Impart Information and Idea

Freedom to impart information and idea is the application of a decision outside of the mind. With a clearer explanation, it is the activity for reaching the targets which are determined by choosing.⁹⁹ Additionally, the freedom to impart information and idea completes the freedom to reach ideas and the freedom to reach information.¹⁰⁰

This freedom includes the explanation of all kind of ideas such as social, political or legal.¹⁰¹ All kind of expressions are in the scope Article 10 ECHR and therefore the concept of freedom to impart information and idea is considered wider. For instance, to inform on issues regarding critics of the government¹⁰², states secrets¹⁰³, criticizing the buying of war planes¹⁰⁴, military information¹⁰⁵, and miscarriage¹⁰⁶ is inside of freedom of expression. In another case¹⁰⁷ the Court stated that the freedom to impart information and idea is one of the fundamental bases of democratic society.¹⁰⁸ Freedom of expression is not only valid for information and idea which are accepted as favourably and seen innocent but at the same time

⁹⁹ SUNAY, Reyhan, 'İfade Hürriyetinin Muhtevası ve Sınırları', Liberal Düşünce Topluluğu, 1.Press, Ankara, 2001, p.63.

¹⁰⁰ MACOVEI, Monica, İfade Özgürlüğü, Avrupa İnsan Hakları Sözleşmesi'nin 10.maddesinin Uygulanmasına Yönelik Klavuz, İnsan Hakları El Kitabı, No:2, 2001, p.13.

¹⁰¹ SUNAY, Reyhan, 'İfade Hürriyetinin Muhtevası ve Sınırları', Liberal Düşünce Topluluğu, 1.Press, Ankara, 2001, p.32.

¹⁰² European Court of Human Rights , Case of Castells vs. Spain, 23 April 1992, Application No. 11798/85, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.09.2011.

¹⁰³ European Court of Human Rights, Case of Vereniging Weekblad Bluf vs. The Netherlands, 09 February 1995, Application No: 16616/90, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.09.2011.

¹⁰⁴ European Court of Human Rights, Case of Chorherr v. Austria, 25 August 1993, Application No. 13308/87, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 02.10.2011.

¹⁰⁵ European Court of Human Rights, Case of Hadjianastassiou vs. Greece, 16 December 1992, Application No:12945/87, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 02.10.2011.

¹⁰⁶ European Court of Human Rights, Case of Open Door and Dublin Well Woman vs. Ireland, 29 October 1992, Application No: 14234/88; 14235/88, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 17.11.2011.

¹⁰⁷ European Court of Human Rights, Case of Handyside vs. The United Kingdom, 7 December 1976, Application No: 5493/72, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 21.11.2011.

¹⁰⁸ KILDAN,Turgut, İsmail, Türk Anayasa Yargısında İfade Özgürlüğü ve Avrupa İnsan Hakları Mahkemesi Kararlarıyla Karşılaştırılması, Gazi Üniversitesi, Sosyol Bilimler Enstitüsü, Master Thesis, Ankara, 2008, p.56. (Accessed at <http://tez2.yok.gov.tr/> on 17.08.2011).

it is also valid for expressing the ideas or information which are inconsistent and disturbing for the state or society and which are confusing and anxious.¹⁰⁹

The point to be *nota bene* regarding freedom to impart information and idea is that; this freedom gives the opportunity to individuals for criticizing the applications which they don't like, to behave through their opinions and beliefs and to impose the ideas on which they believe that they are true. Therefore, criticism and informational activity cross their borders. Propaganda activities which aim to gain idolaters for an idea and to create the control on individuals have place in the freedom of expressing and imposing the ideas. The only limitation for propagandas that is developed to affect people is when an environment is prepared to use violence and force. Otherwise to impart information and idea will be not in the area of freedom it will be in crime area and therefore the state will have the right to punishment.¹¹⁰

2.2.3 Freedom to Receive Information and Idea

Freedom to receive information and idea means to reach the idea and opinions freely.¹¹¹ Freedom to receive information and idea is related to media; it gives the opportunity to media for transferring the information and ideas. There is the right to be informed regarding issues of public interest in the freedom to receive information and idea.¹¹² The media has a big importance while reaching the information for this reason it is significant to touch upon this issue.

¹⁰⁹ Ibid, p.57.

¹¹⁰ SUNAY, Reyhan, 'İfade Hürriyetinin Muhtevası ve Sınırları', Liberal Düşünce Topluluğu, 1.Press, Ankara, 2001, p.32.

¹¹¹ KILDAN, Turgut, İsmail, 'Türk Anayasa Yargısında İfade Özgürlüğü ve Avrupa İnsan Hakları Mahkemesi Kararlarıyla Karşılaştırılması', Gazi Üniversitesi, Sosyal Bilimler Enstitüsü, Master Thesis, 2008, Ankara, p.59. (Accessed at <http://tez2.yok.gov.tr/> on 17.08.2011).

¹¹² MACOVEI, Monica, 'İfade Özgürlüğü, Avrupa İnsan Hakları Sözleşmesi'nin 10.maddesinin Uygulanmasına Yönelik Klavuz', İnsan Hakları El Kitabı, No:2, 2001, p.16.

2.2.3.1 Freedom of the Press

Media has a big importance regarding the ordinary functioning of democracy. The media should not exceed the limits of the freedom which are: prevention of crime or disorder, protection of national security and state integrity with the use of threat to use violence.¹¹³

Additionally, media is the most significant instrument for providing the creating of public conviction about the leaders' opinion and ideas and the reach of the ideas to the public.¹¹⁴ According to the European Court of Human Rights, although the media should not exceed the limits such as preventing the crime or disorder, protecting national security and state integrity which are against violence threat for protecting the vital benefits of the state, it is an obligation to give and provide information regarding political issues including disjunctives.¹¹⁵ The tasks of media are not limited only with transmitting the information. Society has the right to reach the information. Therefore the Court does not accept the opinions such as "media's task is only to provide information, media should leave the interpretation to the reader".¹¹⁶ Because the society has the right to understand the information together with the media's obligation regarding announcing the information and opinions.¹¹⁷

The freedom of media provides for society one of the best instruments for exploring behaviour and ideas of leaders and for creating the regarding opinions.¹¹⁸ According to the Court, the media has to care for the publication of opinions of organizations' representatives who violate against the government. That means the media has the responsibility to prevent

¹¹³ BOZKURT, Enver, DOST, Süleyman, 'Avrupa İnsan Hakları Mahkemesi Kararlarında İfade Özgürlüğü ve Türkiye', Süleyman Demirel Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi, 7.Cilt, 1.Sayı, Isparta, 2002, p.58.

¹¹⁴ European Court of Human Rights, Case of Lingens vs. Austria , 8 July 1986, Application No:9815/82, Paragraph:43, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 21.12.2011.

¹¹⁵ European Court of Human Rights, Case of Sürek vs. Turkey (No. 3), 8 July 1999, Application No: 24735/94, Paragraph:80, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 21.12.2011.

¹¹⁶ European Court of Human Rights, Case of Lingens vs. Austria , 8 July 1986, Application No:9815/82, Paragraph:42, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 22.09.2011.

¹¹⁷ European Court of Human Rights, Case of Sürek vs. Turkey (No. 3), 8 July 1999, Application No: 24735/94, Paragraph:80, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 22.09.2011.

¹¹⁸ European Court of Human Rights, Case of Sürek vs. Turkey (No. 3), 8 July 1999, Application No: 24735/94, Paragraph: 80, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 22.09.2011.

provocations against governments. This should be made for preventing the use of speeches' as an instrument which includes antagonism for encouraging violence.¹¹⁹

2.3 Article 10 (2) ECHR the System of Restrictions Carried On With Freedom of Expression

The general issues regarding the limitations for freedom of expression were analysed superficially in the first part. In this part the limitations will be explained in the frame of the European Convention on Human Rights and Article 10. Preferably, it will be analysed in which conditions the limitation cannot be done. Also the way to prevent the bad use of this limitation will be explained with the related articles.

2.3.1 The Limitation of Fundamental Rights and Freedoms in State of Emergency

Article 15 ECHR explains the need for suspending the rights in state of emergency conditions.

Article 1:

1. *'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'*
2. *No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*
3. *Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.'*

¹¹⁹ European Court of Human Rights, Case of Sürek vs. Turkey (No. 4), 8 July 1999, Application No: 24762/94, Paragraph:60, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 22.09.2011.

According to this arrangement, in dangerous circumstances, which threat the existence of the country, signatory countries may take preventive measures in conflict with the arranged regulations in the Convention. These limitations include also freedom of expression. In other words, the Convention gives the authority for limiting or suspending the fundamental rights and freedoms under the determined circumstances in this Article. But the state needs to fulfil all obligations regarding the basis and form, for evaluating the limitations in the frame of freedom of expression. A requirement is that there is a state of emergency. Additionally the state authority is not unlimited.¹²⁰ Because, it is controlled by the European Court of Human Rights if there is a ‘real need’ or not, which is a requirement for crisis period. The Court also indicates that the concept of ‘general danger that threatens the existence of the nation’ has to mean such a threat that should affect all public, should be a threat for ordinary life of the public and it should be a very close crisis.¹²¹ It is very clear that the heavy, close and serious nature of danger and threat make the normal circumstances’ limitations and arrangements ineffective in normal times and therefore the Article 15 ECHR regulation was arranged.¹²²

2.3.2 The Destroy, Limitation and Misuse of Fundamental Rights and Freedoms

Article 17 ECHR was arranged such as:

‘Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’

In this article the activities of individuals and states are considered on the limitation for freedom of expression issue. But there is an important point to pay attention; the state cannot limit more rights and freedoms which are determined in the European Convention on Human

¹²⁰ KILDAN, Turgut, İsmail, ‘Türk Anayasa Yargısında İfade Özgürlüğü ve Avrupa İnsan Hakları Mahkemesi Kararlarıyla Karşılaştırılması’, Gazi Üniversitesi, Sosyol Bilimler Enstitüsü, Master Thesis, Ankara, 2008, p.68. (Accessed at <http://tez2.yok.gov.tr/> on 17.08.2011).

¹²¹ European Court of Human Rights, Case of Lawless vs. Ireland (No. 3), 1 July 1961, Application No: 332/57, Part of ‘The Law’, Paragraph: 28, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.09.2011.

¹²² European Court of Human Rights, Case of Lawless vs. Ireland (No. 3), 1 July 1961, Application No: 332/57, Part of ‘The Law’, Paragraph: 28, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.09.2011.

Rights. Therefore the misuse of the rights and freedoms, which are determined and protected with the Convention, is forbidden. It is decreed that the Convention should not exceed the allowed limits. The aim of the rule regarding misuse forbid is to protect the rights and freedoms with the function of free democratic society.¹²³

2.3.3 The Limitation of Rights and Freedoms in Usual Terms

The possible legal grounds for limiting the freedom of expression are laid down in Article 10 (2) ECHR. Not only the freedom of expression, but also national security, territorial integrity and public security are also in this paragraph. Limitations by state authorities, which are based on reasons except the determined grounds in the second paragraph, are not legal. Therefore national courts are obliged to control when there are applications of any regulation that can be seen as intervention for freedom of expression. They should control the benefit or value that is protected by this regulation and if this value or benefit is included by the second paragraph or not.¹²⁴

The limiting of the freedom of Expression is dealt in the Article 10 (2) ECHR. The scope of the limiting is to be analysed elaborately. While it is stated in the Article 10 (2) ECHR, it is aimed to point out the limiting through law.¹²⁵ That means the limitations can only be made in the frame of the law. According to the 10th Article the borders of the freedom of expression have three conditions and are interpreted very strictly.¹²⁶

2.3.3.1 The Necessity of the Explicit Limiting

Intervention should be explicit in the scope of democratic society criteria. ‘The limiting complies with the needs of democratic society, which is a political ethic. The needs of democratic society are important criteria in the acceptability of the limiting. The democratic society criteria are considered to be most original criteria of the Convention. It is placed in the

¹²³ KILDAN, Turgut, İsmail, ‘Türk Anayasa Yargısında İfade Özgürlüğü ve Avrupa İnsan Hakları Mahkemesi Kararlarıyla Karşılaştırılması’, Gazi Üniversitesi, Sosyol Bilimler Enstitüsü, Master Thesis, Ankara, 2008, p.69. (Accessed at <http://tez2.yok.gov.tr/> on 17.08.2011).

¹²⁴ MACOVEI, Monica, İfade Özgürlüğü, Avrupa İnsan Hakları Sözleşmesi’nin 10.maddesinin Uygulanmasına Yönelik Klavuz, İnsan Hakları El Kitabı, No:2, 2001, p.63.

¹²⁵ KOCASAKAL, Ümit, AKSOY, Eylem, Emine, MEMİŞ, Pınar, ‘Avrupa İnsan Hakları Kararlarında İfade Özgürlüğü’, p.5, <http://www.tchd.org.tr/MenuContent.aspx?id=127>, accessed on 08.08.2011.

¹²⁶ BIÇAK, Vahit, ‘Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü’, Teorik Ve Pratik Boyutuyla İfade Özgürlüğü (Edt: Bekir Berat Özipek), Liberal Düşünce Topluluğu, Avrupa Komisyonu, Ankara, 2003, p.271.

preface and forms the important part of the general structure of the Convention.’¹²⁷ This shows the respect for the democratic society while limiting the freedoms and can be seen as a development for human rights.

2.3.3.2 The Necessity of the Limiting Through Law

It is a necessity that all limiting should be through law. And in my opinion, it is unquestionable that the protection of the freedom of speech with law constitutes assurance regarding basic rights and freedoms.

This is stated clearly in the Article 10 ECHR. If the explicitly is not through law, it causes ambiguity. It is the best way to eliminate the ambiguity to keep the present situation. However, according to the European Court on Human Rights, it was not enough being explicit through the law. “Additionally, the law should be accessible to individuals”¹²⁸, and should be clear and obvious enough to show the results of a particular behaviour as reasonable. In terms of law, it is crucial that the citizens have the sufficient information regarding accessibility. Predictability is on the other hand important as individuals control their behaviours and formulate, which means people should be able to foresee the result of the behaviour.¹²⁹

2.3.3.3 The Authority of Judicial Power, Impartiality and the Necessity of Legitimacy

The important elements regarding determine the legal objective are listed as; in the court inspection, the term legitimate goal forms the legitimacy of the inspection. This is the first step and the second step is the existence of legal ground. The next matter to analyse is to check if the intervention is in accordance with the legitimate goal or not. In other words, if it is required in a democratic way the sanction needs to be stated clearly in the case of the court. What is important here is that it can be seen in the national court case clearly. In more clear words, it is an obligation that the result has to be visible in the national court reason. It is very important getting the national law in accordance with the Convention and the need of the

¹²⁷ Ibid, p.271-272.

¹²⁸ KOCASAKAL, Ümit, AKSOY, Eylem, Emine, MEMİŞ, Pınar, ‘Avrupa İnsan Hakları Kararlarında İfade Özgürlüğü’, p.5, <http://www.tchd.org.tr/MenuContent.aspx?id=127>, accessed on 10.09.2011.

¹²⁹ BIÇAK, Vahit, ‘Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü’, Teorik Ve Pratik Boyutuyla İfade Özgürlüğü (Edt: Bekir Berat Özipek), Liberal Düşünce Topluluğu, Avrupa Komisyonu, Ankara, 2003, p.271.

national court. At this point, we understand that local courts should do the same what European Court of Human Rights does. It is the states' responsibilities to realize the rights stated in the Convention. The Article 10 (2) ECHR gives the states authority regarding those limiting. According to the article, this authority is open to the inspection of the Strasbourg Court, as well as it may show difference, which shouldn't be underestimated.¹³⁰

Thirdly, limiting should be based on a legitimate goal. Again in the Article 10 (2) ECHR Judgement power is a very important concept.¹³¹ Judgement power is not unlimited, untouchable, uncriticizable power; but is credibility power, which must be protected for the justice to be easily done, courts and judges to be impartial.¹³² This protection is not related with the divinity attribution to the justice corporation and organ but with the function of corporation and what the people gain from its existence. Justice is a mechanism which aims to protect the individual rights and gains its value from the very same goal. Securing justice power authority and equilibrium, one of the legitimate goals mentioned in the Article 10 (2) ECHR, it does not mean the protection of one particular person as an abstract value.¹³³

The way for protecting the legal objectives is; in the freedom of expression cases in national courts, local government is obliged to implement the case law of European Court of Human Rights from the first trial. Because the case law of the Court provide protection regarding freedom of expression with a higher level than national law and national case law. Therefore the jurisdiction needs to apply the standards of the European Court of Human Rights. While answering the questions like 'was the limitation a need in democratic society?' or 'was the objective parallel with the instruments?' the reasoning will be through detailed analyse of legal 'objectives' that determined in second paragraph. Because the 'instrument' is the same in all conditions: intervention to freedom of expression.

¹³⁰ ANDREOTTİ, Onur, 'İfade Özgürlüğünü Sınırlayan Meşru Amaçlardan Yargının Otoritesi ve Tarafsızlığının Güvence Altına Alınması', Ankara, 2010, p.1. (www.yargitay.gov.tr/abproje/belge/sunum/rt5/Androetti_notlar.pdf) , accessed on 01.09.201.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

CHAPTER 3: ASSESMENT OF FREEDOM OF EXPRESSION IN TERMS OF ARTICLE 301 TURKISH PENAL CODE

3.1 General Concept

Since the first day the Turkish Penal Code was regulated, and despite some changes made in 2008, it has always been discussed in the scope of Freedom of Expression. Turkey has always been exposed to cruel criticism regarding freedom of expression even though other party states that support European Convention on Human Rights have similar articles in their domestic laws. What is it that makes it cruel? In the last part, I will analyse both first version of Article 301 when Turkish Penal Code came into force and its amended version. And I also will share the evaluations regarding Article 301 in terms of both Turkey and the party states supporting the Convention, aiming to deal with the issue impartially.

3.2 Criticisms When Article 301 of Turkish Penal Code First Came Into Force

The Turkish Penal Code was amended on 26th September 2004 by Act No. 5237¹³⁴. The amendment came into force on 1st June 2005. The amendment to the Act was made, then passed by parliament on 31.03.2005, and published in the Official Gazette on 31 March 2005, entering into force on 1 June 2005¹³⁵. The amendment brought a change of Article 301 of the Penal Code with it. In 2008 a new amendment to the Act was made. Before that amendment was made on 30th April 2008, Article 301 stated the following:

Turkish Penal Code¹³⁶

Article 301

1. A person who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey, shall be punishable by imprisonment of between six months and three years.

¹³⁴ Turkish Penal Code, Law Nr. 5237 passed on 26.09.2004 (Official Gazette No. 25611 dated 12.10.2004), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

¹³⁵ Law Nr. 5328, passed on 31.03.2005, (Official Gazette No. 25772 dated 31.03.2005), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

¹³⁶ See translation of this document, BIÇAK, Vahit, GRIEVES, Edward, Türk Ceza Kanunu (Turkish Penal Code), Seçkin Yayınevi, 1.Press, 2007.

2. A person who publicly denigrates the Government of the Republic of Turkey, the judicial institutions of the State, the military or security organizations shall be punishable by imprisonment of between six months and two years.

3. In cases where denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third.

*4. Expressions of thought intended to criticize shall not constitute a crime.*¹³⁷

When this first form of the Article is analysed, the term ‘Turkishness’ in the first paragraph stands out. What is Turkishness for those preparing the article, and why is it criticised that much when dealt in terms of freedom of expression?

The explanations by the officials of Turkish National Grand Assembly¹³⁸ about freedom of expressions are as follows:¹³⁹

“It is stated in cases by European Court of Human Rights, which is acknowledged as its judicial authority in this study, that freedom of expression is the base of a democratic society, that it also includes adverse, annoying, striking news and thoughts, yet that it is not an unlimited freedom, and that it can be limited by national law-makers in terms of the needs of

¹³⁷ According to the OSCE (Organization for Security and Co-operation in Europe) another translation of this document is as following:

Article 301 on *Insulting being a Turk, the Republic, the organs and institutions of the State* reads:

- 1. A person who explicitly insults being a Turk, the Republic or Turkish Grand National Assembly, shall be imposed a penalty of imprisonment for a term of six months to three years.*
- 2. A person who explicitly insults the Government of the Republic of Turkey, the judicial bodies of the State, the military or security organisation shall be imposed a penalty of imprisonment for a term of six months to two years.*
- 3. Where insulting being a Turk is committed by a Turkish citizen in a foreign country, the penalty to be imposed shall be increased by one third.*
- 4. Expression of opinions with the purpose of criticism does not require penalties.*

See HARASZTI, Miklos, ‘Review of the Draft Turkish Penal Code: Freedom of Media Concerns’, Organization for Security and Co-operation in Europe 2005, Vienna, p.10, <http://www.osce.org/fom/14672>, accessed on 10.09.2011

¹³⁸ The report of Commission of Justice of the Turkish National Grand Assembly was consist in the 16/04/2008 dated 13th meeting with the participation of Kahramanmaraş member of parliament (proposal owner) Veysi Kaynak and the representatives of Acts and Decisions Directory, General Directory of European Union, Ministry of Foreign Affairs and General Secretariat of European Union. See Turkish Grand National Assembly, Act on the European Union Harmonization Committee, Decision Nr. 4, 17.4.2008, <http://www.tbmm.gov.tr/komisyon/abuyum/belge/faaliyet/donem23/2-210.pdf>, accessed on 10.09.2011.

¹³⁹ Turkish Grand National Assembly, Act on the European Union Harmonization Committee, Decision Nr. 4, 17.4.2008, <http://www.tbmm.gov.tr/komisyon/abuyum/belge/faaliyet/donem23/2-210.pdf>, accessed on 10.09.2011.

democratic community in accordance with the Article 10 of European Convention on Human Rights. And the issue about the Article 301 is explained by the government officials as follows; the term of Turkishness in the Article 301 is not considered to be a description focused on ethical basis in practice and cases of Court of Cassation, on the contrary, it refers to ‘Turkish Public’.¹⁴⁰ Since the foundation of Turkish Republic, the term ‘Turkishness’ has appeared in many articles, and on law grounds, the term Turkishness is a reference to the Turkish Public.’¹⁴¹

Besides, those who object to the Article interpret the issue as follows: Turkey consists of people of many different races as well as Turkish race, such as Arabian, Kurdish, Laz, Circassian, Georgian, the language, the culture, the literature, the art, the folklore, the traditions of whom differ from one another.¹⁴² As the term Turkishness specifically represents the Turkish race, they strongly defend the idea that it should be removed especially from the laws.

Article 301 is basically formulated for protecting the ‘constitutional institutions. The mentioned institutions are not only the public institutions because there are institutions these are not public bodies and these are authorised with a second level rendition. Additionally the values are also protected such as “Turkishness” and “Republic” which are related to the existence of state and could not be considered as bodies or institutions of the state.¹⁴³ State is a ‘right subject’ which has public law figure. These rights public rights and belongs to the state. Although there are understanding differences in historical development regarding the concept of the state, the protection of state is always discussed. For this reason, the state is always protected for providing the existence and sustainability of the state.¹⁴⁴

301st Article is interpreted such as: the relation between the political system and penal code plays a determining role regarding the stabilization of the legal benefit which is protected by the norm while narrowing or enlarging the protection. The efforts for sanctifying the values, which attributed to institutions or bodies which are located in 301st Article cause correspondence with impatience regarding critics and expressions. All expressions are seen

¹⁴⁰ Ibid.

¹⁴¹ YILDIRIM, Nesip, EZGİN,Ercan, ANALAY, Cengiz, SÖNMEZ,Şerife, ‘Vatandaşlık, Türklük Ve 301.Maddenin Değerlendirilmesi Raporu’, İnsan Hakları ve Mazlumlara İçin Dayanışma Derneği Diyarbakır Şubesi, Diyarbakır, 2007, p.5.

¹⁴² Ibid.

¹⁴³ SANCAR, Türkan, Yalçın, Yine Düşünce Özgürlüğü, ‘Yine 301.Madde, İfade Özgürlüğü İlkeler ve Türkiye’, İletişim Yayınları, 1.Baskı, İstanbul, 2007, p.122.

¹⁴⁴ Ibid.

sacral by the government because they are considered illegal and they may weaken the structures. Giving definite values to sanctity and immunity creates all kind of ignorance and criticism. It is very clear that it constitutes a big danger for freedom of expression.¹⁴⁵ The exceptions within the protection scope of the expression of freedom are: though the person could be correct while criticising, he/she goes beyond the limitation of criticism if he/she uses derogatory, injurious, despicable words when it is unnecessary because, these kinds of expressions are out of the scope of expression. Protection issue in Article 301 requires impulse and derogative, injurious expressions which have not criticism character. The ‘right’ is not considered here because in this situation there is not a concept of the thought. Thought involves exactly the opinions which create thesis and have systematic context. Consequently, the expressions, which are not acceptable in the concept of thought, are exceptional from the right of criticism.¹⁴⁶

The concept of “Turkishness” in 301st Article caused the limitation of freedom of expression because, it was not clear what it mean with “Turkishness” and that caused the false interpretation of this Article. Because of the unclear structure this concept had to be formulized. Additionally, when the punishment through this Article was considered it has evaluated as a very high penalty. The best way to decrease these punishments is determined as to carry out the investigation of this kind of crimes only with permission of the Ministry of Justice.¹⁴⁷

3.3 New Version of Article 301 of Turkish Penal Code

With its first version, Article 301 caused trouble among the Human Rights defenders. It has been amended by the Law No. 5759¹⁴⁸

¹⁴⁵ Ibid, p.123.

¹⁴⁶ Ibid, p.140-141.

¹⁴⁷ DİRDİMAN, Cengiz, ‘TCK’nunun 301. Maddesindeki Değişikliğin Hukukî ve Siyasî Sonuçları’, Paradoks Ekonomi, Sosyoloji ve Politika Dergisi, (e-dergi), <http://www.paradoks.org>, Yıl:5 Sayı:1, 2009, p.5-6.

¹⁴⁸ Amending Law on Turkish Penal Code, Law Nr. 5759 (Official Gazette No.26870, dated 08.May.2008), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

The new version of Article 301 after the year 2008:

Turkish Penal Code

Article 301

- 1. The person who publicly insults Turkish People, the Republic of Turkey or the Turkish Grand National Assembly, the Government of Republic of Turkey and the judicial bodies of state is inflicted imprisonment between six months and two years.*
- 2. The person who publicly insults military organizations or the police organizations of state is punished according to the first sub-clause.*
- 3. The declarations which aim to criticize are not evaluated as crime.*
- 4. Examination related to this article depends on the permission of Minister of Justice.*

‘As stated in the reasoning of the law, the Article 301 was amended taking these principles into consideration:¹⁴⁹

- *Obviousness*; meaning an obvious and concrete action of the crime.
- *Openness*; seeking obvious performance of the crime.
- *Integrity*; if the action of crime performed in an expression of an opinion, the whole speech or the article must be evaluated as a whole to see if it is committing a crime.
- *Exceeding the limit of criticism*; the action of the crime must involve an insult outside the limit of criticism.

The action regarding the crime cannot be performed against real persons, only corporations or joint identities’.¹⁵⁰

After the amendments made in 2008 on Article 301 of Turkish Penal Code, the article now considers insults to the Turkish People instead of Turkishness as a crime. Amendments also reduce the time in prison for those sentenced for the violation of this article. The law makes examinations related to this article depend on the permission of Minister of Justice. In the present situation, most of the applications for examination related to the Article 301 were

¹⁴⁹ Heinrich Böll Stiftung Derneği, Meeting held on June 6, 2008, (<http://old.boell-tr.org/faaliyet.aspx?id=6>), accessed on 21.01.2012.

¹⁵⁰ Ibid.

not approved by the Minister of Justice and that is a significant development for Turkey.¹⁵¹ Government is now more cautious and wary.

The issue is closely followed by the public and the world. After the last situation, international institutions reduced criticism and made statements as follows: how the term Turkish People replaced Turkishness in the amendments impact will depend on the meaning given to the term. If the term Turkish People is accepted as a term integrating all ethnic, lingual, religious differences, it can conclude that all elements must be protected against insult. With such an implementation, it is possible to protect not only those who have Turkish ethnic identity but also the other ethnic identities such as Kurdish, Armenian, Circassian, who are the components of Turkish People.¹⁵²

In my opinion, with the last amended version of the Article of 301 in terms of practice, it has widened limits regarding the Freedom of Expression. Because the change of the terms from “Turkishness” and “Republic” to “Turkish Nationality” and “Republic of Turkey” has changed the unclear and misunderstanding features of the term in this Article. Additionally “the permission clause”, which was added in Article 301 with this change and the necessity for the permission of the Ministry of Justice for investigations carried out under Article 301. Although this situation is important for enlarging the limits of freedom, it is in conflict with the principle of equality in Constitution because there is no this kind of condition for other crimes.¹⁵³

3.4 Interim Result

Article 159 (Article 159 is an article which has been revised many times. It was amended seven times after coming into effect in 1926¹⁵⁴ in 1936¹⁵⁵, 1938¹⁵⁶, 1946¹⁵⁷, 1961

¹⁵¹ Amnesty International, Turkey Submission to the UN Universal Periodic Review Eighth session of the UPR Working Group of the Human Rights Council May 2010 p.3, (<http://www.amnesty.org/en/library>) accessed on 22.01.2012.

¹⁵² Heinrich Böll Stiftung Derneği, Meeting held on June 6, 2008, (<http://old.boell-tr.org/faaliyet.aspx?id=6>), accessed on 21.01.2012.

¹⁵³ DERDİMAN, ‘Cengiz, TCK’nunun 301. Maddesindeki Değişikliğin Hukukî ve Siyasî Sonuçları’, Paradoxs Ekonomi, Sosyoloji ve Politika Dergisi, (e-dergi), <http://www.paradoxs.org>, Yıl:5 Sayı:1, 2009, p.10-11-12.

¹⁵⁴ Law Nr. 765 (Official Gazette Nr. 321 dated 1 March 1926), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

¹⁵⁵ Law Nr: 3038 (Official Gazette Nr. 3337 dated 11.06.1936), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

¹⁵⁶ Law Nr: 3531 (Official Gazette Nr. 3961 dated 16 July 1938), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

twice in 2002¹⁵⁸ and 2003¹⁵⁹)¹⁶⁰ of Turkish Penal Code dates from 1926; it was taken from the Italian Penal code which dated from 1889, not necessarily translated literally into Turkish, yet it has been changed seven times up to this point¹⁶¹. Party states to the European Convention on Human Rights have similar provisions. e.g.: Article 90 German Penal Code, Article 110 Danish Penal Code, 4th French Penal Code, Articles 290 and 291, Article 543 Spanish Penal Code, Article 122 Polish Penal Code, Article 332 of Portuguese Penal Code, Article 112 Dutch Penal Code.¹⁶² There are similar regulations among other EU Member-States. The values such as constitutional order, republic, the flag and national anthem are protected by articles similar to Article 301 of Turkish Penal Code in states like Germany, Italy and Austria.¹⁶³ But why are the limitations of freedom of expression criticised so much in Turkey?

It may be because there are many ethnical groups in Turkey, and limitation of their rights and freedoms by laws. Even though there are limitations regarding freedom of expression in laws of other European states, there are not as many big problems as there exist in Turkey¹⁶⁴. This has two major reasons:

- In the practice of European states, they have decisions to secure the freedom of expression, not against it. The implementation and the practice of the judicial system of European States have made it possible to create an environment where freedom of expression is appreciated and protected. The aim is to protect Freedom of expression, and what is exceptional is to limit it.¹⁶⁵

¹⁵⁷ Law Nr: 4956 (Official Gazette Nr. 6416 dated 14 September 1946), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

¹⁵⁸ Law Nr. 4744 (Official Gazette Nr. 24676 dated 19 February 2002) and Law No: 4771 (Official Gazette Nr. 24841 dated 09 August 2002). These laws were adopted as a result of the efforts for EU membership aimed at harmonizing Turkish laws with EU standards. The first one is known as the 1st Adjustment Law/Package, while the latter as the 2nd Adjustment Law/Package, http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

¹⁵⁹ Law Nr. 4963 (Official Gazette No: 25192 dated 07. August 2003), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

¹⁶⁰ ALGAN, Bülent, 'The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey', 9 German Law Journal 2237-2252, 2008.

¹⁶¹ YUCA, Nezahat, 'Türk Ceza Kanunu 301.madde ve AB Uygulamaları', Türkiye Cumhuriyeti Araştırma Merkezi, Fact Sheet, 2008, p.2.

¹⁶² YUCA, Nezahat, 'Türk Ceza Kanunu 301.madde ve AB Uygulamaları', Türkiye Cumhuriyeti Araştırma Merkezi, Fact Sheet, 2008, p.2-11.

¹⁶³ Ibid.

¹⁶⁴ Heinrich Böll Stiftung Derneği, Meeting held on June 6, 2008, (<http://old.boell-tr.org/faaliyet.aspx?id=6>), accessed on 21.01.2012.

¹⁶⁵ Ibid.

- In European Law, in the comparison of freedom of expression to rights and freedoms, has broader freedom. And this makes it easier to have a decision in favour of freedom of expression in critical cases and trials.¹⁶⁶

In my opinion, even if the term “Turkishness” is said to refer “Turkish Nation” by officials of governments. It has been clarified with the last regulation, and by preventing the penal laws, giving authority to Minister of Justice, freeing the freedom of expression.

¹⁶⁶ Ibid

CHAPTER 4: CASE STUDIES OF FREEDOM OF EXPRESSION RELATED TO TURKEY

4.1 General Concept

The implementation of international treaties into domestic law is made through Article 90 of Turkish Republic Constitution¹⁶⁷;

Turkish Constitution

Article 90: 'Ratification of International Treaties'

'International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional.'

This article states that international treaties regarding basic rights and freedoms are between the constitution and other laws.¹⁶⁸ 'Article 90 Turkish Constitution has been amended in 2004¹⁶⁹. With the amendment a new sentence to Article 90 Turkish Constitution had been added which ensures that, in the case of contradiction between the provisions of the duly ratified international agreements on fundamental rights and freedoms and the provisions of domestic laws, the former shall prevail, and that the judiciary will consequently refer to the provisions of such international agreements directly by ignoring the provisions of domestic laws.'¹⁷⁰

The European Court of Human Rights can have cases only regarding compensation and that shows European Court of Human Rights is not the last resort to undo the cases by the domestic courts.

European Court of Human Rights decisions have no direct effect in domestic law and do not also replace the national courts decisions by annulling or changing them. The concept of final judgment (*res judicaa*) has its place in domestic laws of states supporting the convention; this is why the decisions by European Court of Human Rights do not have any

¹⁶⁷ Law Nr. 5170 (Official Gazette No. 25469 dated 22 May 2004), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

¹⁶⁸ ÖZBUDUN, Ergun, Türk Anayasa Hukuku, 8. Press, Ankara, Yetkin Yayınları, 2004, p.213.

¹⁶⁹ As amended on May 22, 2004.

¹⁷⁰ ÖZTÜRK, Mehtap, Yıldırım, ERGÜN, Çağdaş, Evrim, Redevelopment Of The Turkish Constitution (www.cakmak.av.tr/pdf/28254_1.pdf), accessed on 23.08.2011.

effect on this qualification. Thus, in the case of detecting any opposition to the Convention, the compensation, though it seems to be only way, is not enough in some situations. At such a case, judgment may be redone.¹⁷¹ For instance, if any opposition is detected and execution of the compliant plaintiff in domestic law still goes on, new trial is possible. According to those who defend the new trial, it enables the domestic court decisions to be better and there may be no need for compensation. It is also important to announce the injustice by detecting it by the court decision, as most people want, whenever the case is in question.¹⁷² It is as follows in Turkey, by laws no 4771¹⁷³, 4793¹⁷⁴ and 4926¹⁷⁵, if a case of a Turkish court is detected as opposed to European Convention of Human Rights, the relevant person can request the new trial from the court deciding opposed to European Court of Human Rights, in one year after the absolution of case European Court of Human Rights.¹⁷⁶

In the section below, some important decisions regarding Turkey in European Court of Human Rights cases will be discussed. These cases will be analysed in the scope of Article 10 of European Convention on Human Rights. The cases by the court about Turkey regarding the freedom of expression could be listed as: prescribed by law, the person making the declaration, the environment where expression was made, the content of expression and the way of the expression made. Some important examples of these are Zana vs. Turkey, case No: 1, Sürek vs. Turkey No:1 and No: 2, Okçuoğlu vs. Turkey case and Karataş vs. Turkey case will be analysed in titles.

4.2 Prescribed By Law

4.2.1 Karataş vs. Turkey Case

The applicant, Hüseyin Karataş, was a Turkish citizen of Kurdish origin. He published a poetry book, named ‘Dersim- The Song of a Rebellion’. The National Security Court, with the

¹⁷¹ ÜNAL,Şeref, ‘Avrupa İnsan Hakları Mahkemesi Kararlarının Türk İç Hukukuna Etkileri’, Anayasa Yargı Journal, Volume: 15, 2000, p.64.

¹⁷² Ibid.

¹⁷³ Law Nr. 4771 (Official Gazette No. 24841 dated 09. August 2002), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 22.01.2012.

¹⁷⁴ Law Nr. 4793 (Official Gazette No. 25014 dated 04. February.2003), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 23.01.2012.

¹⁷⁵ Law Nr. 4926 (Official Gazette No. 25173 dated 10July 2003), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

¹⁷⁶ GÖZLER,Kemal, Avrupa İnsan Hakları Mahkemesi Kararları, (<http://www.anayasa.gen.tr/aihm.htm>), accessed on 01.09.2011.

implementation of the Article 8 of Anti Terror Law, sued the applicant and the publisher of the book on grounds for propaganda of divisiveness against the indivisible integrity of the state and requested for confiscating the published copies.¹⁷⁷

The applicant is found guilty and imprisoned for 20 months and fined for 41.666.666 Turkish Liras. The copies are confiscated, because, according to the National Security Court, the term Kurdistan (in the book of Dersim) refers to a part of Turkey, the struggle of PKK in the East is sanctified by being described as the Kurdish independence struggle. Besides, according to the higher instance, the Supreme Court of Appeals, the praises of the struggle in the whole book threaten the indivisible integrity of the state and damages the unity and indivisibility of the Turkish nation. Even though the applicant did deny the accusations and requested an appeal, the case is confirmed by the National Security Court. With this confirmation, due to the change of law No: 4126 under Section 8 of Law No. 3713 which reduces the jail time but rises the fine, the case is re-evaluated and the prison time is reduced to 13 months and ten days but the amount of fine raised to 111.111.110 TL. The appeal is objected again the conviction is confirmed.¹⁷⁸

About the necessity of an intervention on freedom of expression for a democratic society, the applicant states that the only reason for his conviction is his reference to Kurds and Kurdistan, not adopting any official ideology. Besides, according to the applicant, the book is a literary work, in which he voices his thoughts, anger, joy, emotions in a coloured and at times exaggerated way. He claims that he does not have an intention for divisiveness, and his book should be accepted in same sense.¹⁷⁹

As a reply to the claims of the applicant, Turkish Republic Government states that he is causing divisiveness with his poems and in cases of the integrity of the states is under the threat of terrorism, the Article 10 leaves the appreciation of limiting the right to the states supporting the Convention. The government also stated that it was officials' duty to prevent any kind of divisive actions in such an environment where women, children and teachers were

¹⁷⁷ European Court of Human Rights, Case of Karataş vs. Turkey, 8 July 1999, Application Number: 23168/94, Paragraph: 9-10, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.09.2011.

¹⁷⁸ European Court of Human Rights, Case of Karataş vs. Turkey, 8 July 1999, Application Number: 23168/94, Paragraph:14-15, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.10.2011.

¹⁷⁹ European Court of Human Rights, Case of Karataş vs. Turkey, 8 July 1999, Application Number: 23168/94, Paragraph: 45, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.10.2011.

killed systematically, consequently, divisive actions triggered the hate and violence among the different groups of the community and that would threaten the human rights and democracy.¹⁸⁰

As a result of the jurisdiction, the court concludes that there is no ration between the intervention to freedom of expression and the aim out of the punishment to the applicants, and that the intervention to freedom of speech is not necessary for a democratic community. Additionally the court emphasized that the opinion explanations of artworks, which have artistic values, are significant for democratic societies. By the reasons above, it is concluded there has been violation of the freedom of speech which is protected by the Convention.¹⁸¹

The importance in the case is the Delegate of Commissioner (ECtHR) stated the suitability to the criteria 'openness' and 'predictability' which must be present in Law no. 3713 was debatable and out of under section 8 of Law no. 3713 the limitation brought is an intervention 'prescribed by law'.

The court has considered that the person explained his own opinions by poetry rather than mass media, which could restrict the potential effects on 'public security', 'public order' and 'territorial integrity'. In fact, the court also considered that some parts of poetries include afflictions rather than an invitation for a rebellion. According to the court, although these parts were very aggressive and could be seen as invitation to violence against the unity and integrity of the state, they had limited effect and artistic values naturally.¹⁸²

¹⁸⁰ European Court of Human Rights, Case of Karataş vs. Turkey, 8 July 1999, Application Number: 23168/94, Paragraph: 46, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.10.2011.

¹⁸¹ European Court of Human Rights, Case of Karataş vs. Turkey, 8 July 1999, Application Number: 23168/94, Paragraph: 47, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.10.2011.

¹⁸² European Court of Human Rights, Case of Karataş vs. Turkey, 8 July 1999, Application Number: 23168/94, Paragraph: 59, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.10.2011.

4.3 The Person Making the Declaration

4.3.1 Zana vs. Turkey Case

Mr. Mehdi Zana, a Turkish citizen was born in 1940, was a former mayor of Diyarbakır, where he currently lived.¹⁸³ Mr. Zana made such a declaration when he was convicted in Diyarbakır Military Jail; ‘I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake’,¹⁸⁴

Diyarbakır the National Security Court convicted Zana, according to the Article 312 of Turkish Penal Code No. 765 concluding these statements are reference to the support for PKK, which was founded to split Turkey, in scope of Article 168 of Turkish Penal Code No.765. The case by Diyarbakır the National Security Court was appealed and approved by the Court of Cassation.

According to European Court of Human Rights, the conviction of the applicant due to his statements can be seen as interference to freedom of expression. However, the limitation of the freedom is an important issue.¹⁸⁵

During the case, Zana, who had applied to European Court of Human Rights, claimed his conviction was unfair. Being a member of Kurdish movement since 1960, he had always been against violence, and the government had misunderstood what he had stated. Actually, while he stated he always had decried the slaughter of women and children, he said he supported the national independence movement. He also declared he was not a PKK member; the only reason for his conviction was his membership to an association called ‘Path of Freedom’ which is against the violence.¹⁸⁶

¹⁸³ European Court of Human Rights, Case of Zana vs. Turkey, 25 November 1997, Application Number: 69/1996/688/880, Paragraph: 9, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.10.2011.

¹⁸⁴ European Court of Human Rights, Case of Zana vs. Turkey, 25 November 1997, Application Number: 69/1996/688/880, Paragraph: 12, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.10.2011.

¹⁸⁵ European Court of Human Rights, Case of Zana vs. Turkey, 25 November 1997, Application Number: 69/1996/688/880, Paragraph 47, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 15.11.2011.

¹⁸⁶ European Court of Human Rights, Case of Zana vs. Turkey, 25 November 1997, Application Number: 69/1996/688/880, Paragraph 52, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 15.11.2011.

As a reply to the claims of the applicant, Turkish Government claimed the conviction was justified according to the second paragraph of the Article 10 of Convention, PKK is a terrorist organisation and pointed out the importance of the time he expressed his opinions, when PKK increased its attacks. According the government, they should have wide appreciation authority when the indivisible integrity of the state is under threat of terrorists' movements.¹⁸⁷

As is was stated above, the addressing of the person making the declaration is important and the Court approved the decision of the Turkish legal organs as the expressions of ex-major of Diyarbakır might aggravate the situations even more.¹⁸⁸

4.4 The Environment Was Expression Made

4.4.1 Sürek vs. Turkey Case No:1

The weekly magazine, The Truth of News and Comments is the largest shareholder of the company called Deniz Press and Publication Industry and Commercial Organisation. In one issue, two letters, 'Weapons cannot win against freedom' and 'It is our Fault' were published.¹⁸⁹

Istanbul National Security Court sued the owner of the magazine and the editor of that issue according to Article 8 Anti Terror Law and Article 312 of the Penal Code claiming that they had made propaganda against the integrity of state, and provoking hate and hostility among the community.¹⁹⁰ According to Istanbul National Security Court, the letters are propaganda against the integrity of Turkish State, describing the 8 provinces in South-Eastern part as Kurdistan and PKK as an organization that fight for independence against Turkish State. The applicant was fined by the Article 8 of the Penal Code while he was acquitted by

¹⁸⁷ European Court of Human Rights, Case of Zana vs. Turkey, 25 November 1997, Application Number: 69/1996/688/880, Paragraph 53-54, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 15.11.2011.

¹⁸⁸ KOCASAKAL, Ümit, AKSOY, Eylem, Emine, MEMİŞ, Pınar, 'Avrupa İnsan Hakları Kararlarında İfade Özgürlüğü', (<http://www.tchd.org.tr/MenuContent.aspx?id=127>), accessed on 07.09.2011.

¹⁸⁹ European Court of Human Rights, Case of Sürek vs. Turkey (No:1), 8 July 1999, Application Number: 26682/95, Paragraph 11, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 17.11.2011.

¹⁹⁰ European Court of Human Rights, Case of Sürek vs. Turkey (No:1), 8 July 1999, Application Number: 26682/95, Paragraph 12, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 17.11.2011.

the Article 312 of the Penal Code and this was also approved by the Supreme Court of Appeals.¹⁹¹

The punishment to the applicant by the Article 8 of the Penal Code has been regarded as interference to the freedom of expression. The interference has been prescribed by law and based on one of the reasons stated in the second paragraph. However unless the necessity of the interference for a democratic community is proven, it was regarded as a violation of the freedom protected in the first paragraph.¹⁹²

According to the court, the Turkish Army has been described as an oppressive, killing organization. Additionally, in the letters written by Mr. Sürek the Turkish army was defined as an army which scuppers, violates and keeps down and characterized as ‘the fascist Turkish army’, ‘the T.C. murder gang’, ‘the hired killers of imperialism’. The court, thus, concluded the punishment was a result of a social need, the reasons put forward by the State were enough and there was relevance between the interference and the aim to justify the punishment. With the reasons above, it is concluded there has been no violence of the freedom of expressions.¹⁹³

The atmosphere where the explanation made is important regarding the limitation of the freedom of expression. In the case above the expression was made when terrorist attacks increased and where terrorist incidents were frequent. Thus, according to the court, threatening the legal aims was highly possible. Consequently, it was decided that announcing state of emergency when attacks increased and limiting the freedom of expression complied with the Article 10.¹⁹⁴

¹⁹¹ European Court of Human Rights, Case of Sürek vs. Turkey (No:1), 8 July 1999, Application Number: 26682/95, Paragraph 14-15, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 17.11.2011.

¹⁹² European Court of Human Rights, Case of Sürek vs. Turkey (No:1), 8 July 1999, Application Number: 26682/95, Paragraph 44, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 17.11.2011.

¹⁹³ European Court of Human Rights, Case of Sürek vs. Turkey (No:1), 8 July 1999, Application Number: 26682/95, Paragraph 62, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.09.2011.

¹⁹⁴ KOCASAKAL, Ümit, AKSOY, Eylem, Emine, MEMİŞ, Pınar, ‘Avrupa İnsan Hakları Kararlarında İfade Özgürlüğü’, (<http://www.tchd.org.tr/MenuContent.aspx?id=127>), accessed on 07.09.2011.

4.5 The Content of the Expression

4.5.1 Sürek vs. Turkey No: 2

The journal called 'The Truth of News and Comments', owner Kamil Tekin one of the applicants and the editor Yücel Özdemir, published an interview with the leader of the illegal Kurdish Organization PKK.¹⁹⁵ In addition to that, in one issue, joint declarations of four socialist organizations were published.¹⁹⁶

The İstanbul National Security Court decided the confiscation of the published issue of the journal and sued the publisher by the Articles 6 and 8 of Anti Terror Law claiming that they had made propaganda against the integrity of state and publishing the interview of a PKK leader and declarations of four terrorist organizations.¹⁹⁷ The defendants stated that the declarations were published in the freedom of press to inform the public, and added that defending, even the most shocking, assaulting opinions included, different opinions are usual. However, they were convicted on the provisions of Articles 6 and 8 of Anti Terror Law^{198 199}.

The punishment given to anyone having his right of freedom of expression in the name of limitation is one of the important elements when we evaluate the balance of the limitation on freedom of expression. In other words, freedom is limited with the punishment. In cases of war and commotion, the media has a particular duty. It has to be more cautious not to be the means through which the opinions of hate and hostility are declared while intended to pass the thoughts of representatives of the terrorist organization. Yet if there is not such a case, the

¹⁹⁵ European Court of Human Rights, Case of Sürek and Özdemir vs. Turkey, 08.07.1999, Applications Number: 23927/94 and 24277/94, Paragraph 8, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.09.2011.

¹⁹⁶ European Court of Human Rights, Case of Sürek and Özdemir vs. Turkey, 08.07.1999, Applications Number: 23927/94 and 24277/94, Paragraph 9, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 30.09.2011.

¹⁹⁷ European Court of Human Rights, Case of Sürek and Özdemir vs. Turkey, 08.07.1999, Applications Number: 23927/94 and 24277/94, Paragraph 12-13, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 18.11.2011.

¹⁹⁸ Anti Terror Law, Law Nr. 3713 (Official Gazette No.20843, dated 12.April. 1991), http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.sorgu_baslangic, accessed on 21.01.2012.

¹⁹⁹ European Court of Human Rights, Case of Sürek and Özdemir vs. Turkey, 08.07.1999, Applications Number: 23927/94 and 24277/94, Paragraph 16, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 18.11.2011.

states do not stop media from informing the community through punitive measures with the claims of the integrity of the state, national security, to prevent the crime.²⁰⁰

Taking the evaluations above into consideration, the court concluded that there was violation of the Article 10 of the Convention, stating it was not acceptable to limit the freedom of expression with punitive measures in a democratic community and there was no balance between the intended aim and conviction of the applicants.²⁰¹

The point to pay attention was the content of the explanation in the case. The court agrees that the states have broader authority regarding the interference on freedom of expression if these expressions imply violence against to a particular person, a representative or some of the community. The court have the opinion that Turkish authorities do not pay attention to the right to know different point of views about the incidents taking place in the South-East part of Turkey, no matter how bad those views are for itself.²⁰²

It can be concluded that the court do not have any objection to announcements and declarations as long as they do not include elements of hate and violence.

4.6 The Way of the Expression Made

4.6.1 Okçuoğlu vs. Turkey Case

In the 12th issue of the journal called Democrat, the opinions of a round table conference which Kurdish originated legal practitioner Zeki Okçuoğlu attended to took place in an article under the title of ‘past and present of the Kurdish problem’ Upon that, Okçuoğlu was sued by İstanbul National Security Court by the Article 8 of Anti Terror Law regarding the propaganda against ‘indivisibility of the State’ and was fined and sentenced for 18-month imprisonment along with the verdict to confiscate the related issue.²⁰³

²⁰⁰ European Court of Human Rights, Case of Sürek and Özdemir vs. Turkey, 08.07.1999, Applications Number: 23927/94 and 24277/94, Paragraph: 63, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 18.11.2011.

²⁰¹ European Court of Human Rights, Case of Sürek and Özdemir vs. Turkey, 08.07.1999, Applications Number: 23927/94 and 24277/94, Paragraph: 64, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 18.11.2011.

²⁰² KOCASAKAL, Ümit, AKSOY, Eylem, Emine, MEMİŞ, Pınar, ‘Avrupa İnsan Hakları Kararlarında İfade Özgürlüğü’, (<http://www.tchd.org.tr/MenuContent.aspx?id=127>), accessed on 07.09.2011.

²⁰³ European Court of Human Rights, Case of Okçuoğlu vs. Turkey, 08 July 1999, Application Number: 24246/94, Paragraph 9, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 21.09.2011.

Istanbul National Security Court regarded the following statement as a propaganda against the indivisible integrity of Turkish State with its nation and land. ‘Some Turkish nationals had been deprived of their ‘national rights’ as a result of their Kurdish origin and that their territory had been divided up between the States in the region concerned. According to the applicant, the Kurdish population – dominated by these States – was fighting to acquire its national rights.’²⁰⁴

However, despite Court’s consideration about Turkey’s sensitivity to reduce the terrorist actions which it has faced for 15 years, they have the opinion that it does not bear a significant threat for national security, public order and territorial integrity as the applicant expressed his opinions in an open forum and those expressions published in a magazine not sold in great numbers.²⁰⁵

What the court pointed out was that the expressions by Okçuoğlu about Turkish people do not imply violence, armed struggle or rebellion even if they have negative and hostile contents.²⁰⁶ In these conditions, the court regarded the 18-month imprisonment and the persistence of the public prosecutor on punishment about the applicant as significant and the amount of the sentence as an important factor when evaluating the balance of the interference to the freedom of speech protected by the Article 10 of the Convention.²⁰⁷

The court regarded it as a violation on freedom of expression by the Article 10 of the Convention, stating it was not acceptable for a democratic community as there was imbalance between the intended aim and the punishment for the applicant Okçuoğlu.²⁰⁸ The Court contemplates that the way the freedom of expression is used plays an important role in the impact it will make. And according to the Court, the number of the people reached through

²⁰⁴ European Court of Human Rights, Case of Okçuoğlu vs. Turkey, 08 July 1999, Application Number: 24246/94, Paragraph 11, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 21.09.2011.

²⁰⁵ European Court of Human Rights, Case of Okçuoğlu vs. Turkey, 08 July 1999, Application Number: 24246/94, Paragraph 48, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 08.09.2011.

²⁰⁶ European Court of Human Rights, Case of Okçuoğlu vs. Turkey, 08 July 1999, Application Number: 24246/94, Paragraph 48, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 08.09.2011.

²⁰⁷ European Court of Human Rights, Case of Okçuoğlu vs. Turkey, 08 July 1999, Application Number: 24246/94, Paragraph 49, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 09.09.2011.

²⁰⁸ European Court of Human Rights, Case of Okçuoğlu vs. Turkey, 08 July 1999, Application Number: 24246/94, Paragraph 50, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 09.09.2011.

the publication in which the expression included is also important regarding the impression of territorial integrity, public order and national security.²⁰⁹ In fact that the publication reached to a small number of people limited the impact. For instance, in the case stated above, making the statement in a daily newspaper that has a great number of readers had a significant importance.²¹⁰

As a result, in the European Court of Human Rights decisions, it is pointed out that the freedom of expression constitutes the basis of democratic societies. The criteria of European Court of Human Rights paid attention in the cases opposed to Turkey regarding freedom of expression have been stated above. And I can conclude from those cases, any idea, thought, expression can be freely voiced as long as they do not provoke violence or hate. Additionally, the expressions which are against the general opinion, shocking and disturbing, are in the protection scope of freedom of expression. As it understood from this, freedom of expression includes not only favourable, harmless news and expressions not worth mentioning but also those disturbing news and opinions. Consequently, in my opinion, even though the decisions of European Court of Human Rights are criticised, the criteria stated above had great influence in these decision and the court also reflect its own opinions. And as the court has its own concrete inspection mechanism for every decision it has, the implementation of these decisions will play an important role in determining the limits of Turkey on freedom of expression.

According to aforementioned cases, when the issue is the expressions which include violence, these expressions should be evaluated widely while considering the issue, place, impact area and proportion. For this reason, it is possible to say that ‘including violence’ fact interpreted broader than national laws in favour of the freedom of expression.

While determining the ‘objectives’, the nature and fact of the right and freedom in Article 10(1) were considered in the aforementioned cases. The meaning of the provision ‘prescribed by law’ or ‘in accordance with the law’ is that the activities or implementations, which make intervention to rights or freedoms, should have a legal base in national law. If there is an appreciation authorisation of public bodies, the concept of this authorisation should be

²⁰⁹ KOCASAKAL, Ümit, AKSOY, Eylem, Emine, MEMİŞ, Pınar, ‘Avrupa İnsan Hakları Kararlarında İfade Özgürlüğü’, (<http://www.tchd.org.tr/MenuContent.aspx?id=127>), accessed on 07.09.2011.

²¹⁰ See also in terms of press freedom, European Court of Human Rights, Case of Lingens vs. Austria, 08 July 1986, Application Number: 9815/82, online searchable database: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>, accessed on 09.09.2011.

determined with the law from which this authorisation was based. It is possible to see in case studies that the difficulty appears when the provision 'requirement in democratic societies' is examined while assessing the 'proportionality' and 'margin of appreciation'. However the criterion of 'requirement in democratic societies' has here a general and discrete character. For this reason, the Court looks for the existence of pressing social need for eliminating the possible difficulties. That means the important reasons for intervention should be proved. At the same time with the proving the needs for intervention, the proportion of intervention, the criterion of balance and choice between individual and general benefits should be considered during the cases. Turkey generally defends itself with basing this pressing social need in ECtHR cases. When the need of intervention is evaluated if there is 'pressing social need' the states should have the margin of appreciation which is a requirement of Strasbourg supervision bodies. In the cases related to Turkey, it is possible to make an assessment such as; the states, which face a terror condition that affects the territorial integrity, have more extensive margin of appreciation than the states which face a terror condition that affects only individuals.

CONCLUSION

Freedom of expression is marginal in democratic states and it is a basic right for the citizens. However, in some states this right is very limited. Which category does Turkey belong to?

First reason of this limitation is that it is ‘prescribed by law’, the predictability and availability of laws. It is necessary for availability that citizens have enough information about rules applied in the case analyzed. Predictability is to formulate the rules clear enough for the citizens to adapt themselves to it. Being able to foresee the results of the action is important for the citizens. Limitation prescribed by law is not a serious problem regarding freedom of expression. Secondly, an intervention on freedom of expression must be necessary in democratic society. The necessities of a democratic society, which are the political ethic rules, must be in accordance with the limitation. The necessity of the democratic society is an important criterion for the admissibility of the limitation and regarded the most original criterion of the Convention. This principle is in the preface of the Convention and constitutes an important part of the general structure of the Convention. Thirdly, the limitation has to aim legal targets. Those targets have been mentioned in the second paragraph of the Article 10 of ECHR. The limitation of the freedom of speech must be based one of those legal targets in the Article 10, not on some other reason. Attributing broad meaning on those is not possible, the court states that the reasons to limit are exceptional and must be interpreted in a narrow sense.²¹¹

The legal dimensions of the freedom of expression and the reasons to limit according to the Convention have been explained above. And how is the situation in Turkey? The effects of the legal part of the freedom of expression are still being discussed every day as much as the political part of it. Legal part itself is not considered to be the only way to solution; the issue must be secured politically after it is fixed on legal base. It is obvious that the decisions by European Court of Human Rights regarding freedom of expression have started to change Turkey’s legal structure and it should keep changing. Article 301st of Turkish Penal Court is a good example for that. Despite the lackings in the practise, it is those steps to open up the way for freedoms.

²¹¹ KARAGÖZ, Kasım, ‘İfade Özgürlüğü ve İnsan Hakları Avrupa Mahkemesi Kararlarında Sınırlandırılması Sorunu’, Department of Public Law at Ankara University Institute of Social Sciences PhD Thesis, Unpublished PhD’s Thesis Ankara, 2004, p.331-332.

The world changes rapidly and importance of freedom of expression grows more and more. It is of great importance for Turkey to broaden the dimensions of freedoms regarding democracy and modernization. I hope that the limits of freedom of expression, the key stone of basic rights and freedoms, widen each and every day and we become a society that is able to think and express. We must remember that the people exist as long as they think.

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<http://tez2.yok.gov.tr/>

APPENDIX I: THE CASES ABOUT FREEDOM OF EXPRESSION TO PARTICULAR CASES

Since its foundation, European Human Rights has had many cases about the freedom of expression. In many of these cases, it was concluded that the freedom of expression was violated. You can find the cases about Turkey in the last part.

Here in this section, subjects and the cases are given in headings (KOCASAKAL, Ümit, AKSOY, Eylem, Emine, MEMİŞ, Pınar, ‘Avrupa İnsan Hakları Kararlarında İfade Özgürlüğü’, p.10-11, <http://www.tchd.org.tr/MenuContent.aspx?id=127>, accessed on 11.09.2011):

- Judiciary members can be criticized. (24 February 1997 De Haes ve Gijssels vs. Belgium; 25 July 2001 Perna vs. Italy.)
- The press can share the incidents dealt by judiciary, that one case is in the court does not mean it is not discussed or distributed. (26 April 1979 Sunday Times vs. U.K)
- The secrecy of the investigation can be violated by the press. (Regarding the action for compensation). (22 May 1990 Weber vs. Swiss.)
- The distribution of the image of the accused can not be banned.

(11 January 2001, News Werlags Gmbh and CoKG vs. Austria Case.)
- The activities of intelligence can be published (9 February 1995 Vereniging Weekblad Bluf vs. Holland Case.)
- Governmental documents gained unpermittedly (tax refund docs) can be published. (21 January 1999 Fressoz ve Roire vs. France Case.)
- Secret official reports can be published. (20 May 1999 Bladet Troms ve Stensaas vs. Norway Case.)
- Journalist can not be forced to state his/her news sources. (27 March 1996 Goodwin vs. U.K Case.)

- The names of the public officials can be announced who misuse their authorities. (8 July 1999, Sürek vs. Turkey Case No:2). (TMK(ATL) 6.)
- Members of Professions can make declarations to the public. (25 March 1985 Barthold vs. Germany Case.)
- A public official can enroll in a communist party. (26 September 1995 Vogt vs. Germany Case) (A Dismissal of a teacher because of a membership.)
- A public official can respond to critics (25 November 1999 Nilsen and Johnsen vs. Norway Case.)
- Politicians can be criticized even more. (8 July 1986 Lingens vs. Austria Case; 23rd May 1991 Oberschlick (No.1) vs. Austria Case.)
- Congressmen have more freedom of expression / Government can be criticized even more / the present order of the State can be questioned. (23 April 1992 Castells vs. Spain Case; 10 October 2000 Aksoy vs. Turkey Case.)
- Freedom of Expression is wider when about political issues. (8 July 1999 Sürek and Özdemir vs. Turkey Case.)
- A book already reachable cannot be prevented from distribution. (26 November 1991 the Observer and Guardian Newspapers Ltd vs. U.K Case.)
- The right of debriefing cannot be limited. (24 September 1992 Harczegfalvy vs. Austria Case) the prevention of communication and debriefing during detention and psychiatric treatment.
- The right of debriefing cannot be limited. (29 October 1992 Open Door Counselling Limited Company and Dublin Well Woman vs. Ireland Case) (a prohibition by case on sharing the information with pregnant women about the abortion outside Ireland.)

- The campaign to free abortion cannot be prevented. (19 February 1998 Bowman vs. U.K Case) Conviction due to distributing brochures about abortion after general election.
- The distribution of a newspaper in a military post can not be prevented. (19 December 1994 Vereinigung Demokratischer Soldaten Österreichs and Gubi vs. Austria Case.)
- Joining in the demonstration walk can not be linked to a penalty. (27 April 1995 Piermont vs. France Case; 23 September 1998 Steel and Others vs. U.K Case.)
- A call for Boycott (Resistance) that does not include violence can be made. (9 June 1998 Incal vs. Turkey Case.)
- Repeating of opinions cannot be prohibited. (25 August 1998 Hertel vs. Swiss Case.)
- Historical truths can be partially voiced. (8 July 1999 Arslan vs. Turkey Case.)
- Partial opinions can be explained. (8 July 1999 Okçuoğlu vs. Turkey Case; 15th June 2000 Erdoğan vs. Turkey Case.)
- Academical study that does not involve violence cannot be prevented. (The Kurdistan reference and the term of ‘the colony under Turkish invasion’ in an academical study of an economy professor, confiscation-conviction-dismissal) (8th July 1999 Başkaya and Okçuoğlu vs. Turkey Case.)
- Opinions can be explained in a strong tone (8 July 1999 Ceylan vs. Turkey Case.)
- Offensive expressions can be used. (18 July 2000 Şener vs. Turkey Case.)
- Opinions can be written in a hostile manner. (8 July 1999 Polat vs. Turkey Case.)
- News can be provoking and be exaggerated. (29th March 2001 Thoma vs. Luxemburg Case.)
- Sociological analysis and explanations can be made providing that they do not go with the speech of a terrorist organization. (8 July 1999, Erdoğan ve İnce vs. Turkey Case.)

- It is important how the expression has been explained. (8 July 1999 Karataş vs. Turkey Case.)
- There is right to know or learn from different perspectives. (8 July 1999 Sürek (No.4) vs. Turkey Case.)
- There can be broadcasting about the famous public figures. (28 September 1999 Dalban vs. Romania Case; 12th July 2001 Feldek vs. Slovakia Case.) (Corruption-having a fascist background.)
- Institutions can be criticized too. (27 February 2001 Jerusalem vs. Austria Case.) (The declarations of two legal institutions about having fascist tendencies and totalitarian character.)
- The State has positive liability to secure the freedom of expression. (16 March 2000 Özgür Gündem vs. Turkey Case.)
- The freedom of speech is beyond limits. (17 July 2001 Akin Association vs. France Case) (Due to the describing of ‘foreign source’ the preventing of sale, distribution and circulation of the book about the Bask issue by an institution founded to protect Bask culture.)
- Military discipline cannot be weakened. (8 June 1976 Engel and Others vs. Holland Case.) (Distributing a magazine that weakens the military discipline during conscription.)
- Assault on sacred and moral values cannot be permitted. (7 December 1976 Handyside vs. U.K Case; 24 May 1988 Muller and Others vs. Swiss Case; 20 September 1994 Otto-Preminger Institut vs. Austria Case; 25th November 1996 Wingrove vs. U.K Case.)
- Vow for Loyalty to Constitution may be required (28 August 1986 Glasenapp and Kosiek vs. Germany Case.)

- The access to records of secret service may be prevented. (26 March 1987 Leander vs. Sweden Case.)
- Secret information cannot be revealed even if they are unimportant. (16 December 1992 Hadjianastassiou vs. Greece Case.)
- No Poster opened, no brochure distributed during military assembly. (25 August 1993 Chorherr vs. Austria Case.)
- There may be prohibition on advertisement for lawyers. (24 February 1994 Casade Coca vs. Spain Case.)
- Judges cannot be insulted. (26 April 1995 Prager and Oberschlick vs. Austria Case.)
- Penal Court cannot be misled. (29 August 1997 Worm vs. Austria Case) (Conviction of a journalist who affected the decision of the case.)
- No declaration supporting terrorist organization can be made. (25 November 1997 Zana vs. Turkey Case.)
- There can be prohibition of politics for members of a Police force (20 May 1999 Rekvenyi vs. Hungary Case.)
- Expressions to provoke hate and spite can be prohibited. (8 July 1999 Sürek (No:1) vs. Turkey Case.)
- The writer cannot identify himself with a terrorist organization (8 July 1999 Sürek (No:3) vs. Turkey.)
- The words chosen when asking questions are important. (6 February 2001 Tommer vs. Estonia Case.)

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DECLARATION OF AUTHORSHIP

I declare that this thesis and the work presented in it are my own and have been generated by me as the result of my own original research.

None of the parts of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution.

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